

HSBC Bank USA, N.A. v Pacifico

2018 NY Slip Op 32106(U)

August 27, 2018

Supreme Court, Suffolk County

Docket Number: 1625/2012

Judge: Howard H. Heckman

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SUPREME COURT - STATE OF NEW YORK
IAS PART 18 - SUFFOLK COUNTY

COPY

PRESENT:
HON. HOWARD H. HECKMAN JR., J.S.C.

INDEX NO.: 1625/2012
MOTION DATE: 8/6/2018
MOTION SEQ. NO.: #003 MG

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HSBC BANK USA, N.A.,

Plaintiff,

-against-

JOSEPH H. PACIFICO, JR., et al.,

Defendants.
-----X

PLAINTIFF'S ATTORNEY:
LEOPOLD & ASSOCIATES, PLLC
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DEFENDANT PRO SE:
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DEFENDANT'S ATTORNEY:
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Upon the following papers numbered 1 to 17 read on this motion 1-17 ; Notice of Motion/ Order to Show Cause and supporting papers___; Notice of Cross Motion and supporting papers___; Answering Affidavits and supporting papers___; Replying Affidavits and supporting papers ___; Other___; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this unopposed motion by plaintiff HSBC Bank USA, N.A. seeking an order: 1) granting summary judgment striking the answer of defendants Joseph H. Pacifico, Jr. and Susan Oliva Pacifico; 2) discontinuing the action against defendants designated as "John Doe #1" through "John Doe #12"; 3) deeming all appearing and non-appearing defendants in default; 4) amending the caption; and 5) appointing a referee to compute the sums due and owing to the plaintiff in this mortgage foreclosure action is granted; and it is further

ORDERED that plaintiff is directed to serve a copy of this order amending the caption upon the Calendar Clerk of the Court; and it is further

ORDERED that plaintiff is directed to serve a copy of this order with notice of entry upon all parties who have appeared and not waived further notice pursuant to CPLR 2103(b)(1),(2) or (3) within thirty days of the date of this order and to promptly file the affidavits of service with the Clerk of the Court.

Plaintiff's action seeks to foreclose a mortgage in the original sum of \$645,000.00 executed by defendant Joseph Pacifico on September 20, 2006 in favor of Fidelity Mortgage. On the same date defendant Pacifico executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. The mortgage loan was assigned to plaintiff by assignment dated March 2, 2009. Plaintiff claims that the mortgagor/defendant defaulted under the terms of the mortgage and note by failing to make timely monthly mortgage payments beginning June 1, 2008 and continuing to date. Plaintiff originally commenced a foreclosure action against the defendants under index number 10271-2009 which was discontinued without prejudice by Order (Pitts, J.) dated April 12, 2013. Plaintiff commenced this action by filing a summons, complaint and notice of

pendency in the Suffolk County Clerk's Office on January 10, 2012. Defendants served an answer dated February 14, 2012 setting forth four (4) affirmative defenses.

Plaintiff's motion seeks an order granting summary judgment striking defendants Pacificos' answer and for the appointment of a referee. In opposition, defendant Pacifico claims that plaintiff has failed to submit admissible evidence sufficient to prove that the bank has standing to maintain this action.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material question of fact from the case. The grant of summary judgment is appropriate only when it is clear that no material and triable issues of fact have been presented (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957)). The moving party bears the initial burden of proving entitlement to summary judgment (*Winegrad v. NYU Medical Center*, 64 NY2d 851 (1985)). Once such proof has been proffered, the burden shifts to the opposing party who, to defeat the motion, must offer evidence in admissible form, and must set forth facts sufficient to require a trial of any issue of fact (CPLR 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557 (1980)). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v. Associated Fur Manufacturers*, 46 NY2d 1065 (1979)).

Entitlement to summary judgment in favor of the foreclosing plaintiff is established, prima facie by the plaintiff's production of the mortgage and the unpaid note, and evidence of default in payment (see *Wells Fargo Bank N.A. v. Erobobo*, 127 AD3d 1176, 9 NYS3d 312 (2nd Dept., 2015); *Wells Fargo Bank, N.A. v. Ali*, 122 AD3d 726, 995 NYS2d 735 (2nd Dept., 2014)). Where the plaintiff's standing is placed in issue by the defendant's answer, the plaintiff must also establish its standing as part of its prima facie showing (*Aurora Loan Services v. Taylor*, 25 NY3d 355, 12 NYS3d 612 (2015); *Loancare v. Firshing*, 130 AD3d 787, 14 NYS3d 410 (2nd Dept., 2015); *HSBC Bank USA, N.A. v. Baptiste*, 128 AD3d 77, 10 NYS3d 255 (2nd Dept., 2015)). In a foreclosure action, a plaintiff has standing if it is either the holder of, or the assignee of, the underlying note at the time that the action is commenced (*Aurora Loan Services v. Taylor, supra.*; *Emigrant Bank v. Larizza*, 129 AD3d 94, 13 NYS3d 129 (2nd Dept., 2015)). Either a written assignment of the note or the physical transfer of the note to the plaintiff prior to commencement of the action is sufficient to transfer the obligation and to provide standing (*Wells Fargo Bank, N.A. v. Parker*, 125 AD3d 848, 5 NYS3d 130 (2nd Dept., 2015); *U.S. Bank v. Guy*, 125 AD3d 845, 5 NYS3d 116 (2nd Dept., 2015)). A plaintiff's attachment of a duly indorsed note to its complaint or to the certificate of merit required pursuant to CPLR 3012(b), coupled with an affidavit in which it alleges that it had possession of the note prior to the commencement of the action, has been held to constitute due proof of the plaintiff's standing to prosecute its claims for foreclosure and sale (*JPMorgan Chase Bank, N.A. v. Weinberger*, 142 AD3d 643, 37 NYS3d 286 (2nd Dept., 2016); *FNMA v. Yakaputz II, Inc.*, 141 AD3d 506, 35 NYS3d 236 (2nd Dept., 2016); *Deutsche Bank National Trust Co. v. Leigh*, 137 AD3d 841, 28 NYS3d 86 (2nd Dept., 2016); *Nationstar Mortgage LLC v. Catizone*, 127 AD3d 1151, 9 NYS3d 315 (2nd Dept., 2015)).

The plaintiff's proof in support of its motion consists of: 1) a copy of the fixed rate promissory note dated September 20, 2006 signed by defendant Joseph H. Pacifico, together with two attached allonges; the first allonge signed by an authorized signatory of the original mortgage,

Fidelity Mortgage and endorsed to Delta Funding Corporation; and the second allonge signed by a vice-president of Delta Funding Corporation and endorsed to plaintiff HSBC Bank USA, N.A.; 2) a copy of the mortgage dated September 20, 2006 signed by defendant Joseph H. Pacifico; 3) an “affidavit of possession” dated April 3, 2017 from a vice president of the mortgage servicer (Ocwen) testifying about the contents of the loan (business) records maintained by the mortgage servicer with respect to this loan; and 4) an “affidavit of indebtedness” dated October 15, 2013 from a vice president of the mortgage servicer (Ocwen) testifying about the contents of the loan (business) records maintained by the mortgage servicer with respect to this loan.

At issue is whether defendants undisputedly late service of opposition papers mandates the court’s rejection of such opposition so that plaintiff’s motion is considered unopposed and, if so, whether the evidence submitted by the plaintiff is sufficient to establish its right to foreclose. Or, if the court considers such opposition, whether issues of fact exist sufficient to defeat plaintiff’s summary judgment motion .

With respect to the issue of plaintiff’s rejection of untimely filed opposition papers, the record is clear that defendants’ opposition papers were undisputedly not served within the time frame mandated pursuant to CPLR 2214(b) and the papers must therefore be disregarded. Plaintiff’s motion was served on April 20, 2017, made returnable on May 31, 2017 and required that (pursuant to CPLR 2214(b)) answering papers be served no later than seven (7) days prior to the return date (May 31, 2017) of the motion . Defendants attempted service of opposition papers on or about June 14, 2017 was clearly well beyond the statutorily required service date of May 24, 2017. Based upon these circumstances the opposing papers are jurisdictionally defective as “the failure to provide proper service of motion papers deprives the court of jurisdiction to entertain the contents of such papers” (*Lee v. I-Sheng Li*, 129 AD3d 923, 10 NYS3d 451 (2nd Dept., 2015); *Crown Waterproofing, Inc. v. Tadco Construction Corp.* 99 AD3d 964, 953 NYS2d 254 (2nd Dept., 2012)). Under the circumstances the opposition papers are deemed untimely and a nullity (CPLR 2103(b)(2)). However plaintiff still has the burden of proving the necessary elements required to establish its entitlement to foreclose based upon the evidence submitted by the mortgage lender.

CPLR 4518 provides:

Business records.

(a) Generally. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter.

The three foundational requirements of CPLR 4518(a) are: 1) the record must be made in the regular course of business— reflecting a routine, regularly conducted business activity, needed and relied upon in the performance of business functions; 2) it must be the regular course of business to make the records (i.e. the record is made in accordance with established procedures for the routine, systemic making of the record); and 3) the record must have been made at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter, assuring that the recollection

is fairly accurate and the entries routinely made (*see People v. Kennedy*, 68 NY2d 569, 579-580, 510 NYS2d 853 (1986)). The statute clearly does not require a person to have personal knowledge of each and every entry contained in the business record (*Citibank, N.A. v. Abrams*, 144 AD3d 1212, 40 NYS3d 653 (2nd Dept., 2016); *HSBC Bank USA, N.A. v. Sage*, 112 AD3d 1126, 977 NYS2d 446 (3rd Dept., 2013); *Landmark Capital Inv. Inc. v. Li-Shan Wang*, 94 AD3d 418, 941 NYS2d 144 (1st Dept., 2012)). “There is no requirement that a plaintiff in a foreclosure action rely on a particular set of business records to establish a prima facie case, so long as the plaintiff satisfies the admissibility requirements of CPLR 4518(a) and the records themselves actually evince the facts for which they are relied upon” (*Citigroup v. Kopelowitz*, 147 AD3d 1014, 48 NYS3d 223 (2nd Dept., 2017)). Decisions interpreting CPLR 4518 are consistent to the extent that the three foundational requirements, if demonstrated, make the records admissible since such records are considered trustworthy and reliable. Moreover the language contained in the statute specifically authorizes the court discretion to determine admissibility by stating “*if the judge finds*” that the three foundational requirements are satisfied the evidence shall be admissible.

The affidavits submitted from the mortgage servicer/attorney-in-fact’s (Ocwen’s) vice presidents provide the evidentiary foundation for establishing the mortgage lender’s right to foreclose. The affidavits set forth the employees’ review of business records maintained by the loan servicer; the fact that the books and records are made in the regular course of Ocwen’s business; that it was Ocwen’s regular course of business to maintain such records; that the records were made at or near the time the underlying transactions took place; and that the records were created by an individual with personal knowledge of the underlying transactions. Based upon the submission of these two affidavits, the plaintiff has provided an admissible evidentiary foundation which satisfies the business records exception to the hearsay rule with respect to the issues raised in this summary judgment motion.

With respect to plaintiff’s unopposed motion for summary judgment, the “affidavit of indebtedness” submitted by the mortgage lender’s vice president, together with the attorney’s affirmation and submission of copies of the original promissory note with attached allonges- the second of which is indorsed to the plaintiff- and the mortgage, provide the evidentiary foundation for establishing the mortgage lender’s right to foreclose. This evidence shows prima facie that the mortgagor failed to comply with the terms of the promissory note and mortgage by his default in making timely monthly mortgage payments since June 1, 2008. The bank, having proven entitlement to summary judgment, it is incumbent upon the defendant to submit relevant, evidentiary proof sufficiently substantive to raise genuine issues of fact concerning why the lender is not entitled to foreclose the mortgage. Defendant has wholly failed to do so by failing to submit any timely opposition to the plaintiff’s motion. Accordingly the plaintiff’s motion must be granted in its entirety.

Even were the Court to consider defense counsel’s opposition papers, the relevant, admissible evidence in this record proves the plaintiff’s entitlement to foreclose the mortgage. With respect to the issue of standing, plaintiff has submitted sufficient evidence in the form of the “affidavit of possession” from the mortgage lender’s vice president and plaintiff’s counsel’s affirmation to prove the plaintiff has standing, as the holder of the endorsed original promissory note signed by the defendant which has been in its physical possession beginning October 26, 2011 and continuing on the date the action was commenced on January 10, 2012 (*Aurora Loan Services v. Taylor; supra.; Wells Fargo Bank, N.A. v. Parker, supra.; U.S. Bank, N.A. v. Ehrenfeld*, 144 AD3d 893, 41 NYS3d

269 (2nd Dept., 2016); *GMAC Mortgage, LLC v. Sidberry*, 144 AD3d 863, 40 NYS3d 783 (2nd Dept., 2016)).

Finally, and in view of defendants' failure to submit timely opposition, defendants have failed to raise any evidence to address any of their remaining affirmative defenses in opposition to plaintiff's motion, those affirmative defenses must be deemed abandoned and are hereby dismissed (see *Kronick v. L.P. Therault Co., Inc.*, 70 AD3d 648, 892 NYS2d 85 (2nd Dept., 2010); *Citibank, N.A. v. Van Brunt Properties, LLC*, 95 AD3d 1158, 945 NYS2d 330 (2nd Dept., 2012); *Flagstar Bank v. Bellafore*, 94 AD3d 1044, 943 NYS2d 551 (2nd Dept., 2012); *Wells Fargo Bank Minnesota, N.A. v. Perez*, 41 AD3d 590, 837 NYS2d 877 (2nd Dept., 2007)).

Accordingly the plaintiff's motion seeking an order granting summary judgment and for the appointment of a referee is granted. The proposed order for the appointment of a referee has been signed simultaneously with the execution of this order.

Dated: August 27, 2018

HON. HOWARD H. HECKMAN, JR.

J.S.C.