Short Form Order

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

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

INDEX NO.: 49464/2009
MOTION DATE: 8/6/2018
MOTION SEQ. NO.: #003 MG

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U.S. BANK, N.A.,

Plaintiff,

-against-

THEODORE J. BOURIE, et al.,

Defendants.

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PLAINTIFF'S ATTORNEY:
BUCKLEY MADOLE, P.C.
420 LEXINGTON AVE, STE 840
NEW YORK, NY 10170

DEFENDANTS' ATTORNEY:
ALAN C. STEIN, PC
7600 JERICHO TPKE, STE 308
WOODBURY, NY 11797

Upon the following papers numbered 1 to 8 read on this motion 1-14 ; Notice of Motion/ Order to Show Cause and supporting papers__; Notice of Cross Motion and supporting papers___ ; Answering Affidavits and supporting papers 15-16 ; Replying Affidavits and supporting papers 17-18 ; Other___ ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff U.S. Bank, N.A., seeking an order: 1) granting summary judgment striking the answer of defendant Theodore J. Bourie; 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 $3,480,000.00 executed by defendant Theodore J. Bourie on February 2, 2007 in favor of Resource Mortgage Banking, Ltd. On the same date defendant/mortgagor Bourie executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. The mortgage and note were assigned to the plaintiff by assignment dated November 25, 2009 and by corrective assignment dated September 30, 2015. Defendant/mortgagor Bourie also executed a loan modification mortgage agreement dated February 2, 2007. Plaintiff claims that defendant Bourie defaulted under the terms of the mortgage and note by failing to make timely monthly mortgage payments beginning March 1, 2009 and continuing to date. Plaintiff commenced this action by filing a summons, complaint and notice of pendency in the Suffolk County Clerk's Office on December 18, 2009. Defendant/mortgagor served an answer dated January 7, 2010 with no affirmative defenses.

Plaintiff's motion seeks an order granting summary judgment striking defendant's answer and for the appointment of a referee. In opposition, defendant claims that plaintiff has failed to prove that it complied with the service requirements set forth pursuant to the mortgage and the Fair Debt Collection Practices Act.

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)).

At issue is whether the evidence submitted by the plaintiff is sufficient to establish its right to foreclose. The defendant does not contest his failure to make timely payments due under the terms of the promissory note and mortgage agreement in more than nine (9) years. Rather, the issues raised by the defendant concern whether the proof submitted by the mortgage lender provides sufficient admissible evidence to prove its entitlement to summary judgment based upon defendant's continuing default and plaintiff's compliance with mortgage and federal statutory pre-foreclosure notice requirements.

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 Court of Appeals in *People v. Guidice*, 83 NY2d 630, 635, 612 NYS2d 350 (1994) explained that "the essence of the business records exception to the hearsay rule is that records systematically made for the conduct of business... are inherently highly trustworthy because they are routine reflections of day-to-day operations and because the entrant's obligation is to have them

truthful and accurate for purposes of the conduct of the enterprise." (quoting *People v. Kennedy,* 68 NY2d 569, 579, 510 NYS2d 853 (1986)). It is a unique hearsay exception since it represents hearsay deliberately created and differs from all other hearsay exceptions which assume that declarations which come within them were not made deliberately with litigation in mind. Since a business record keeping system may be designed to meet the hearsay exception, it is important to provide predictability in this area and discretion should not normally be exercised to exclude such evidence on grounds not foreseeable at the time the record was made (*see Trotti v. Estate of Buchanan,* 272 AD2d 660, 706 NYS2d 534 (3rd Dept., 2000)).

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, systematic 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, supra* @ pp. 579-580)). The "mere filing of papers received from other entities, even if such papers are retained in the regular course of business, is insufficient to qualify the documents as business records." (*People v. Cratsley,* 86 NY2d 81, 90, 629 NYS2d 992 (1995)). The records will be admissible "if the recipient can establish personal knowledge of the maker's business practices and procedures, or that the records provided by the maker were incorporated into the recipient's own records or routinely relied upon by the recipient in its business." (*State of New York v. 158th Street & Riverside Drive Housing Company, Inc.,* 100AD3d 1293, 1296, 956 NYS2d 196 (2012); *leave denied,* 20 NY3d 858 (2013); *see also Viviane Etienne Medical Care, P.C. v. Country-Wide Insurance Company,* 25 NY3d 498, 14 NYS3d 283 (2015); *Deutsche Bank National Trust Co. v. Monica,* 131 AD3d 737, 15 NYS3d (3rd Dept., 2015); *People v. DiSalvo,* 284 AD2d 547, 727 NYS2d 146 (2nd Dept., 2001); *Matter of Carothers v. GEICO,* 79 AD3d 864, 914 NYS2d 199 (2nd Dept., 2010)). In this regard, with respect to mortgage foreclosures, a loan servicer's employee may testify on behalf of the mortgage lender and a representative of an assignee of the original lender can rely upon business records of the original lender to establish its claims for recovery of amounts due from the borrowers provided the assignee/plaintiff establishes that it incorporated the original records into its own records and relied upon those records in the regular course of business (*Landmark Capital Inv. Inc. v. Li-Shan Wang,* 94 AD3d 418, 941 NYS2d 144 (1st Dept., 2012); *Portfolio Recovery Associates, LLC. v. Lall,* 127 AD3d 576, 8 NYS3d 101 (1st Dept., 2015); *Merrill Lynch Business Financial Services, Inc. v. Trataros Construction, Inc.,* 30 AD3d 336, 819 NYS2d 223 (1st Dept., 2006)).

The statute (CPLR 4518) clearly does not require a person to have personal knowledge of each and every entry contained in a business record (*see Citibank N.A. v. Abrams,* 144 AD3d 1212, 40 NYS3d 653 (3rd 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, supra.*)). As the Appellate Division, Second Department recently stated in *Citigroup v. Kopelowitz,* 147 AD3d 1014, 48 NYS3d 223 (2nd Dept., 2017): "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." Decisions interpreting CPLR 4518 are consistent to the extent that the three foundational requirements: 1) that the record be made in the regular course of business; 2) that it is in the regular course of business to make the record; and 3) that the record must be made at or near the

time the transaction occurred. – 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 affidavit submitted from the mortgage service provider/attorney-in-fact's (Specialized Loan Servicing, LLC's)(SLS's) second assistant vice president provides the evidentiary foundation for establishing the mortgage lender's right to foreclose. The affidavit sets forth the employee's review of the business records maintained by SLS; the fact that the books and records are made in the regular course of SLS's business; that it was SLS'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 this affidavit, 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 application.

With respect to the issue of the defendant's default in making payments, in order to establish prima facie entitlement to judgment as a matter of law in a foreclosure action, the plaintiff must submit the mortgage, the unpaid note and admissible evidence to show default (*see Property Asset Management, Inc. v. Souffrant,* 162 AD3d 919, 75 NYS3d 432 (2nd Dept., 2018); *PennyMac Holdings, Inc. V. Tomanelli,* 139 AD3d 688, 32 NYS3d 181 (2nd Dept., 2016)*; North American Savings Bank v. Esposito-Como,* 141 AD3d 706, 35 NYS3d 491 (2nd Dept., 2016); *Washington Mutual Bank v. Schenk,* 112 AD3d 615, 975 NYS2d 902 (2nd Dept., 2013)). Plaintiff has provided admissible evidence in the form of a copy of the note and mortgage, and an affidavit attesting to the defendant's undisputed default in making timely mortgage payments sufficient to sustain its burden to prove defendant has defaulted under the terms of the parties agreement by failing to make timely payments since March 1, 2009 (CPLR 4518; *see Wells Fargo Bank, N.A. v. Thomas, supra.; Citigroup v. Kopelowitz, supra.*)). Accordingly, and in the absence of any proof to raise an issue of fact concerning Bourie's continuing default, plaintiff's application for summary judgment based upon defendant's breach of the mortgage agreement and promissory note must be granted.

With respect to defendant's claim that plaintiff failed to proof service of the mortgage default notice required under the terms of the mortgage, a review of defendant's answer reveals that defendant never asserted plaintiff's alleged failure to serve a mortgage default notice, as required pursuant to the terms of the mortgage, as an affirmative defense. Based upon defendant's failure to assert this affirmative defense in his answer, the defendant has waived his right to assert this lack of compliance in opposition to plaintiff's motion for summary judgment (*see* CPLR 3018; *Emigrant Bank v. Marando,* 143 AD3d 856, 39 NYS3d 83 (2nd Dept., 2016); *Signature Bank v. Epstein,* 95 AD3d 1199, 1200-1201, 945 NYS2d 347 (2nd Dept., 2012); *First N. Mortgage Corp. v. Yatrakis,* 154 AD2d 433, 546 NYS2d 9 (2nd Dept., 1989); *see also Wilmington Trust v. Sukhu,* 155 AD3d 591, 63 NYS3d 853 (1st Dept., 2017); *Karel v. Clark,* 129 AD2d 773, 514 NYS2d 766 (2nd Dept., 1987)). Defendant/mortgagor's failure to assert the defense transforms the defense into an admission of plaintiff's satisfaction of the condition thereby resulting in a waiver of the defense by the defendant (CPLR 3015[a]). Under these circumstances such claim was waived and abandoned. Moreover, even were the court to consider the merits of defendant's defense, plaintiff has submitted sufficient proof to show that the default notice was mailed to the mortgagor in compliance with mortgage requirements.

Finally with respect to defendant's remaining claim that plaintiff failed to serve a demand letter as required pursuant to the Fair Debt Collections Practice Act, defendant has similarly waived asserting such defense by not asserting it as an affirmative defense in his answer (CPLR 3018). Moreover, such regulations may not be employed as a defense to any facet of a New York mortgage foreclosure action based upon longstanding principles of law for in rem actions requiring that such actions are governed by the law of the situs of the property in issue (*see Mallory Associates, Inc. v. Barving Realty Co.*, 300 NY 297, 90 NE2d 468 (1949)). Such regulations may provide a federal monetary remedy in favor of a borrower against a bank subject to federal regulations upon proof of a violation of any such regulations, but have no effect upon this court or the application of New York law to the matters in issue in this foreclosure action.

Accordingly, plaintiff's motion seeking summary judgment is granted. The proposed order of reference has been signed simultaneously with execution of this order.

Dated: September 6, 2018

HON. HOWARD H. HECKMAN, JR.

J.S.C.