U.S. Bank N.A. v Hoffman
2018 NY Slip Op 32267(U)
September 18, 2018
Supreme Court, Suffolk County
Docket Number: 25955/2011
Judge: Howard H. Heckman
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[* 1]

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.: 25955/2011
MOTION DATE: 8/6/2018
MOTION SEQ. NO.: #001 MG
#002 MD

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U.S. BANK N.A.,

Plaintiff,

-against-

ROBERT HOFFMAN, et al.,

Defendants.

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PLAINTIFF'S ATTORNEY:
LOCKE LORD LLP
THREE WORLD FINANCIAL CENTER
200 VESEY STREET
NEW YORK, NY 10281

DEFENDANT'S ATTORNEY:
IVAN E. YOUNG, ESQ.
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BOHEMIA, NY 11716

Upon the following papers numbered 1 to 32 read on this motion ; Notice of Motion/ Order to Show Cause and supporting papers 1-17 (#001) ; Notice of Cross Motion and supporting papers 18-24 (#002) ; Answering Affidavits and supporting papers 25-30, 31-32 ; Replying Affidavits and supporting papers ____; 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 and counterclaims asserted by defendant Robert Hoffman; 2) striking the named party defendants designated as "John Doe" and "Jane Doe"; 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 the cross motion by defendant seeking an order pursuant to CPLR 3212 & RPAPL 1304 & AO 431/11 & RPL 282 denying plaintiff's motion, dismissing plaintiff's complaint, and awarding defendant attorneys' fees is denied.

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 $344,000.00 executed by defendant Robert Hoffman on August 30, 2006 in favor of Argent Mortgage Company LLC. On the same date Hoffman 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 September 5, 2006. Defendant Hoffman subsequently executed a loan modification mortgage agreement (HAMP) in favor of plaintiff dated July 3, 2010 creating a single lien in the sum of $480,949.30. Plaintiff claims that defendant defaulted after making only five

payments due under the terms of the modified mortgage and note, by failing to make timely monthly mortgage payments beginning January 1, 2011 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 August 16, 2011. Defendant Hoffman served an answer dated October 7, 2011 asserting thirteen (13) affirmative defenses and eight (8) counterclaims.

Plaintiff's motion seeks an order granting summary judgment striking defendant's answer and for the appointment of a referee. Defendant's cross motion seeks an order denying plaintiff's motion and dismissing plaintiff's complaint for failure to prove service of pre-foreclosure notices required pursuant to RPAPL 1304 and for failure to comply with attorney certification requirements . Defendant also seeks an award for attorneys' fees upon dismissal of this foreclosure 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)).

Proper service of RPAPL 1304 notices on borrower(s) are conditions precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing compliance with this condition (*Aurora Loan Services, LLC v. Weisblum*, 85 AD3d 95, 923 NYS2d 609 (2nd Dept., 2011); *First National Bank of Chicago v. Silver*, 73 AD3d 162, 899 NYS2d 256 (2nd Dept., 2010)). RPAPL 1304(2) provides that notice be sent by registered or certified mail and by first-class mail to the last known address of the borrower(s), and if different, to the residence that is the subject of the mortgage. The notice is considered given as of the date it is mailed and must be sent in a separate envelope from any other mailing or notice and the notice must be in 14-point type.

At issue is whether the evidence submitted by the plaintiff is sufficient to establish its right to foreclose. The defendant does not contest his default in making required payments within less than five months of signing a modification agreement and his failure to make timely payments due under the terms of the promissory note and mortgage agreement for the past seven (7) years and nine (9) months. Rather, the issues raised by the defendant concerns 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, plaintiff's compliance with statutory pre-foreclosure notice requirements, and plaintiff's compliance with attorney certification 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)).

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 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 two affidavits submitted from the mortgage servicer's/attorney-in-fact's (Specialized Portfolio Servicing LLC's) document control officer provide the evidentiary foundation for establishing the mortgage lender's right to foreclose. The affidavits set forth the employee's review of the business records maintained by the loan servicer; the fact that the books and records are made in the regular course of Specialized Portfolio Servicing's business; that it was Specialized Portfolio Servicing'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 affidavits, together with a copy of the limited power of attorney authorizing Specialized Portfolio Servicing LLC as agent to act on behalf of the mortgagee, 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 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 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 mortgages, and an "affidavit of regularity" 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 February 1, 2011 (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 the defendant's continuing default, plaintiff's application for summary judgment based upon defendant's breach of the mortgage agreements and promissory note must be granted.

With respect to service of the pre-foreclosure RPAPL 1304 90-day notices, the proof required to prove strict compliance with the statute (RPAPL 1304) can be satisfied: 1) by plaintiff's submission of an affidavit of service of the notices (*see CitiMortgage, Inc. v. Pappas,* 147 AD3d 900, 47 NYS3d 415 (2nd Dept., 2017); *Bank of New York Mellon v. Aquino,* 131 AD3d 1186, 16 NYS3d 770 (2nd Dept., 2015); *Deutsche Bank National Trust Co. v. Spanos,* 102 AD3d 909, 961 NYS2d 200 (2nd Dept., 2013)); or 2) by plaintiff's submission of sufficient proof to establish proof of mailing by the post office (*see HSBC Bank USA, N.A. v. Ozcan,* 154 AD3d 822. 64 NYS3d 38 (2nd

Dept., 2017); *CitiMortgage, Inc. v. Pappas, supra pg. 901; see Wells Fargo Bank, N.A. v. Trupia,* 150 AD3d 1049, 55 NYS3d 134 (2nd Dept., 2017)). Once either method is established a presumption of receipt arises (*see Viviane Etienne Medical Care, P.C. v. Country-Wide Insurance Co., supra.; Flagstar Bank v. Mendoza,* 139 AD3d 898, 32 NYS3d 278 (2nd Dept., 2016); *Residential Holding Corp. v. Scottsdale Insurance Co.,* 286 AD2d 679, 729 NYS2d 766 (2nd Dept., 2001)).

In this case, the record shows that there is sufficient evidence to prove that mailing by certified and first class mail was done by the post office proving strict compliance with RPAPL 1304 mailing requirements. Plaintiff has submitted proof in the form of two "affidavits of regularity" from the mortgage service representative confirming her familiarity with the servicer's standard internal office procedure regarding the mailing of notices with regards to a defaulted mortgage loan; that the mailings were done on February 17, 2011 more than 90 days prior to commencing this action on August 16, 2011; together with a copy of the 90 day notice containing a ten digit tracking number. Both 90-day notices were addressed to the defaulting mortgagor Hoffman at the mortgaged premises. Plaintiff also submits a copy of the RPAPL 1306 filing statement with the New York State Banking Department confirming mailing of the notice to the defendant/mortgagor. Such proof provides sufficient evidence of compliance with RPAPL 1304 requirements (*see HSBC Bank USA v. Ozcan, supra; Bank of America, N.A. v. Brannon,* 156 AD3d 1, 63 NYS3d 352 (1st Dept., 2017)). Defendant and defense counsel's conclusory denial of service, is not supported by any relevant, admissible evidence sufficient to raise a genuine issue of fact which would defeat plaintiff's summary judgment motion (*see PHH Mortgage Corp., v. Muricy,* 135 AD3d 725, 24 NYS3d 137 (2nd Dept., 2016); *HSBC Bank v. Espinal,* 137 AD3d 1079, 28 NYS3d 107 (2nd Dept., 2016)).

As to the sufficiency of the 90-day notice itself, a review of the notice reveals that it complies with statutory requirements by providing the names and addresses of five (Long Island) regional housing counseling agencies which is consistent with the requirements in effect when the 90-day notice was mailed on February 17, 2011. Moreover, with respect to the issue of service of the 90-day notices, the requirements set forth in RPAPL 1304(3) at the time plaintiff served the pre-foreclosure notices in this action stated that the notice requirement "shall not apply, or shall cease to apply, if the borrower has filed an application for the adjustment of debts...". The record in this case shows that defendants obtained an "adjustment of debts" in the form of a HAMP modification mortgage agreement dated July 3, 2010 thereby obviating the requirement for service of the 90 day notices.

With respect to defendant's remaining claims, plaintiff has submitted evidence that an attorney certification was submitted in support of the foreclosure action and no grounds therefore exist to either dismiss plaintiff's complaint on those grounds or to award attorneys' fees pursuant to RPL 282.

Finally, defendant has failed to raise any admissible evidence to support any of his remaining affirmative defenses and counterclaims in opposition to plaintiff's motion. Accordingly, those defenses and counterclaims 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. Bellafiore,* 94 AD3d 0144, 943 NYS2d 551 (2nd Dept., 2012); *Wells Fargo Bank Minnesota, N.A. v. Perez,* 41 AD3d 590, 837 NYS2d 877 (2nd Dept., 2007)).

Accordingly, defendant's cross motion is denied in its entirety and plaintiff's motion seeking summary judgment is granted. The proposed order of reference has been signed simultaneously with execution of this order.

Dated: September 18, 2018

HON. HOWARD H. HECKMAN, JR.

J.S.C.