

Wells Fargo Bank, N.A. v Rodriguez
2018 NY Slip Op 32793(U)
October 26, 2018
Supreme Court, Suffolk County
Docket Number: 600433/2017
Judge: Linda Kevins
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SHORT FORM ORDER

INDEX NO. 600433/2017

**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY**

P R E S E N T :

Hon. LINDA J. KEVINS
Justice of the Supreme Court

**MOTION DATE: 6/20/17 (001)
7/11/17 (002)**

**ADJ. DATE: 8/31/17
Mot. Seq. # 001 - MG
Mot. Seq. # 002 - MD**

-----X
**WELLS FARGO BANK, NATIONAL
ASSOCIATION, NOT IN ITS INDIVIDUAL OR
BANKING CAPACITY BUT SOLELY AS TRUSTEE
FOR SRMOF II 2011-1 TRUST,**

Plaintiff,

- against -

**ELVIS A. RODRIGUEZ A/K/A ELVIS
RODRIGUEZ; CLERK OF THE SUFFOLK
COUNTY DISTRICT COURT; CLERK OF THE
SUFFOLK COUNTY TRAFFIC & PARKING
VIOLATIONS AGENCY; PEOPLE OF THE STATE
OF NEW YORK O/B/O CLERK OF THE SUFFOLK
COUNTY DISTRICT COURT; PETRO, INC.; FIA
CARD SERVICES, N.A.; CAPITAL ONE BANK
USA, N.A.; RIVERWALK HOLDING, LTD; "JOHN
DOE" AND "MARY DOE", said names being
fictitious, it being the intention of Plaintiff to
designate any and all occupants, tenants, persons or
corporations, if any, having or claiming an interest in
or lien upon the premises being foreclosed herein,**

Defendants.
-----X

**FRIEDMAN VARTOLO LLP
Attorney for Plaintiff
85 Broad Street, Suite 501
New York, NY 10004**

**CHARLES WALLSHEIN, ESQ.
Attorney for Defendant
Elvis Rodriguez
35 Pinelawn Road, Ste 106
Melville, NY 11747**

Upon the following papers: Notice of Motion by Plaintiff, dated May 23, 2017, and supporting papers; Notice of Cross-Motion by Defendants, dated June 26, 2017, and supporting papers; Reply Affirmation in Further Support of Motion and in Opposition to Cross Motion by Plaintiff, dated August 24, 2017, and supporting papers; and upon due consideration; it is

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ORDERED that this motion (001) by the plaintiff for, *inter alia*, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the answering defendant Elvis A. Rodriguez a/k/a Elvis Rodriguez, striking his answer and dismissing the affirmative defenses and counterclaim set forth therein; (2) pursuant to CPLR 3215 fixing the defaults of the non-answering defendants; and (3) pursuant to RPAPL § 1321 appointing a referee to (a) compute amounts due under the subject mortgage; and (b) examine and report whether the subject premises should be sold in one parcel or multiple parcels, is granted; and it is further

ORDERED that the answering defendant's cross-motion (002) to dismiss the complaint is denied; and it is further

ORDERED that the plaintiff is directed to serve a copy of this order with notice of entry upon all parties who have appeared herein and not waived further notice pursuant to CPLR 2103(b)(1), (2) or (3) within thirty (30) days of the date herein, and to promptly file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on real property situate in Suffolk County, New York. On December 20, 2006, defendant-mortgagor Elvis A. Rodriguez executed a note in favor of plaintiff's predecessor in the principal amount of \$622,000. To secure said note, on the same date, defendant-mortgagor gave the lender a mortgage on the property. By way of a series of endorsements, including most recently a blank endorsement via allonge, with physical delivery, the note was transferred to plaintiff prior to commencement of this action. Transfer of the note to plaintiff was memorialized by an assignment of the mortgage, duly recorded in the Office of the Suffolk County Clerk. Defendant-mortgagor allegedly defaulted on the note and mortgage by failing to make monthly payments of principal and interest which had come due on December 1, 2007. Subsequently, plaintiff elected to advance the default date to January 1, 2010, and on that basis commenced the instant action by the filing of a lis pendens, summons and complaint on January 10, 2017. Issue was joined by the interposition of defendant-mortgagor's answer dated January 25, 2017. By his answer, the defendant-mortgagor generally denies the material allegations set forth in the complaint and asserts twelve (erroneously denominated as fourteen) affirmative defenses and one counterclaim. The remaining defendants have not answered. Plaintiff now moves for, *inter alia*, summary judgment and an order of reference.

Defendant-mortgagor opposes plaintiff's motion and cross moves for dismissal of the complaint. The grounds for defendant's opposition and cross motion are primarily based upon plaintiff's alleged failure to satisfy conditions precedent to this action. Defendant argues that plaintiff failed to demonstrate strict compliance with RPAPL 1304 in that plaintiff failed to submit sufficient proof of mailing, and failed to meet content requirements because the mailing contained an "additional notice" prohibited by the statute. Defendant further argues that discrepancies in amounts due between a demand notice sent pursuant to the terms of the mortgage and a pre-foreclosure notice sent pursuant to RPAPL 1304, renders the 1304 notice non-compliant with statute. As set forth below, those and other related arguments are rejected. Additionally, defendant contends that plaintiff's claims for a certain portion of the delinquent amounts owed by defendant are time barred. Defendant's opposition and cross motion do not address the remaining affirmative defenses and counterclaim set forth in the answer.

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A plaintiff seeking summary judgment in a foreclosure action is required to produce the mortgage, the unpaid note, and evidence of default (*see DLJ Mtg. Capital, Inc. v Sosa*, 153 AD3d 666, 60 NYS3d 278 [2d Dept 2017]; *Pennymac Holdings, LLC v Tomanelli*, 139 AD3d 688, 32 NYS3d 181 [2d Dept 2016]; *Wachovia Bank, N.A. v Carcano*, 106 AD3d 724, 965 NYS2d 516 [2d Dept 2013]. Further, when a defendant serves an answer which includes the affirmative defense of standing, the plaintiff must prove its standing so as to be entitled to relief (*see Bank of N.Y. Mellon v Visconti*, 136 AD3d 950, 25 NYS3d 630 [2d Dept 2016]; *Bank of N.Y. v Silverberg*, 86 AD3d 274, 926 NYS2d 532 [2d Dept 2011]).

Plaintiff produced, *inter alia*, the note, mortgage, and evidence of nonpayment. Plaintiff established its standing as the holder of the note by attaching it to the summons and complaint, demonstrating that the note was in its possession prior to the commencement of the action (*see Wells Fargo Bank v Thomas*, 150 AD3d 1312, 52 NYS3d 894 [2d Dept 2017]; *Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 362, 12 NYS3d 612, 614 [2015]; *U.S. Bank, N.A. v Saravanan*, 146 AD3d 1010, 45 NYS3d 547 [2d Dept 2017]; *Nationstar Mtge., LLC v Catizone*, 127 AD3d 1151, 1152, 9 NYS3d 315 [2d Dept 2015]). With regard to defendant-mortgagor's default in payment, plaintiff provided an affidavit in support of motion, dated May 3, 2017, from Cedric Small, a manager of Selene Finance, LP ("Selene"), plaintiff's loan servicing agent. The Small affidavit attests to the default in payment based upon personal knowledge acquired by a review of Selene's business records kept in the ordinary course of business (*see Wells Fargo Bank, NA v. Thomas*, 150 AD3d 1312, 1313, 52 NYS3d 894, 895 [2d Dept 2017]; *U.S. Bank v. Ehrenfeld*, 144 AD3d 893, 41 NYS3d 269 [2d Dept 2016]; *U.S. Bank v. Godwin*, 137 AD3d 1260, 28 NYS3d 450 [2d Dept 2016]; *Deutshce Bank Nat. Trust Co. v. Abdan*, 131 AD3d 1001, 16 NYS2d 459 [2d Dept 2015], lv to appeal den, 26 NY3d 917 [2016]). Mr. Small averred that the business records of Selene include records of the prior loan servicers, which were incorporated and relied upon by Selene in the routine course of business, and therefore the averments concerning payment default comport with CPLR 4518(a) (*see Carothers v GEICO Indemnity Co.*, 79 AD3d 864, 914 NYS2d 199 [2d Dept 2010]; *People of the State of New York v DiSalvo*, 284 AD2d 547, 727 NYS2d 146 [2d Dept 2001]; *Plymouth Rock Fuel Corp. v Leucadia*, 117 AD2d 727, 498 NYS2d 453 [2d Dept 1986]; *Johnson v Lutz*, 253 NY 124, 128 [1930]; *see also U.S. Bank N.A. v Noble*, 144 AD3d 788, 41 NYS3d 79 [2d Dept 2016]).

Plaintiff must also demonstrate strict compliance with the pre-foreclosure notice provisions of RPAPL 1304 in order to obtain the relief requested here (*see Aurora Loan Servs. LLC v Weisblum*, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]). Plaintiff claims that it mailed a pre-foreclosure notice, dated March 5, 2015, to defendant-mortgagor by certified and first class mail as required by RPAPL 1304. Defendant-mortgagor acknowledges receipt of the notice by first class mail but denies receipt by certified mail. As correctly argued by defendant in his cross motion, the Small affidavit, referenced above, does not constitute sufficient proof of mailing of the pre-foreclosure notices pursuant to RPAPL 1304. The Small affidavit avers, in conclusory fashion, that the notices were sent by certified and first class mail. Such conclusory statements are insufficient (*see Citimortgage v Espinal*, 134 AD3d 876, 23 NYS3d 251 [2d Dept 2015]). Mr. Small did not aver that he was familiar with the mailing practices and procedures for mailing the notices, "and therefore did not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed (citations omitted)" (*see Citimortgage v Papas*, 147 AD3d 900, 901, 47 NYS3d 415, 416 [2d Dept 2017]; *Bank of America N.A. v Wheatley*, 158 AD3d 736 [2d Dept 2018]; *Wells Fargo Bank, N.A. v Trupia*, 150 AD3d 1049, 55 NYS3d 134 [2d Dept 2017]; *Wells Fargo Bank, N.A. v Lewczuk*, 153 AD3d 890, 61 NYS3d 244 [2d Dept 2017]). However, in response to

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defendant's opposition and cross motion, plaintiff submitted an affidavit, dated August 9, 2017, from Michael Zervlik, a litigation specialist of Selene, the entity which performed the mailings. Defendant, as movant on the cross motion, did not reply to plaintiff's submissions, although he had the opportunity to do so (*see Central Mtge. Co. v Jahnsen*, 150 AD3d 661, 56 NYS3d 107 [2d Dept 2017]; *Bank of N.Y. Mellon v Hoshmand*, 158 AD3d 600, 71 NYS3d 527 [2d Dept 2018]; *Pietrafesa v Canestro*, 130 AD3d 602, 13 NYS3d 204 [2d Dept 2015]). Accordingly, the Court will consider plaintiff's submissions in reply to defendant's opposition and cross motion (*see Citimortgage, Inc. v Espinal, supra*).

The Zervlik affidavit satisfactorily attests to the standard business practices and procedures for mailing the notices, and to plaintiff having mailed the requisite pre-foreclosure notices in this case. Additionally, plaintiff's supporting documentation includes copies of the notices with tracking numbers, a certification from the U.S. Post Office reflecting that the certified mailing was "unclaimed" and a computerized letter log kept by Selene in the ordinary course of business (*see Citimortgage v Banks*, 155 AD3d 936, 64 NYS3d 121 [2d Dept 2017]; *Flagstar Bank, FSB v Mendoza*, 139 AD3d 898, 32 NYS3d 278 [2d Dept 2016]; *Citimortgage, Inc. v Espinal, supra*; *CitiMortgage, Inc. v Pappas, supra*; *HSBC v Ozcan*, 154 AD3d 822, 64 NYS3d 38 [2d Dept 2017]). Additionally, plaintiff documented that pursuant to RPAPL 1306, proof of said mailing was electronically filed with the New York State Superintendent of Financial Services.

Defendant-mortgagor further argues that the 1304 notice he received included additional language prohibited by RPAPL 1304(2). RPAPL(1) requires that a plaintiff give a borrower pre-foreclosure notice which shall include certain prescribed language explicitly set forth in the statute. RPAPL 1304(2) provides that the requisite notice be sent "in a separate envelope from any other mailing or notice." Here the 1304 notice, in addition to the prescribed language, included general advisories that Selene was a debt collector and intended to comply with applicable bankruptcy laws, and that service members and dependents were entitled to certain additional protections. Neither of those advisories are applicable to defendant-mortgagor. According to defendant, the inclusion of this language constituted a further notice which was not permitted to be in the same envelope as the pre-foreclosure notice, and therefore a failure on plaintiff's part to demonstrate strict compliance with RPAPL 1304. Defendant's characterization of the additional language as a prohibited notice, is unfounded. The mandatory language of 1304(1) provides that the pre-foreclosure notice "shall include" (emphasis added) certain prescribed language. The statute does not provide that such language be exclusive of any other particular language. To the contrary, it is evident that "the notices may include more language than that which is set forth in the statute" (*Citimortgage, Inc. Sbm ABN Amro Mortgage Group, Inc. v Bunger*, 58 Misc.3d 333,341, 66 NYS3d 788 [Sup Ct, Suffolk County 2017]; *Citibank, N.A. v Feustel*, 2018 NY Slip Op 50673(U) [Sup Ct, Suffolk County]). The above-referenced advisories included in the notice here simply provided important qualifying information to the borrower in conjunction with the prescribed portion of the notice. It does not constitute a separate notice under 1304(2), nor grounds to conclude that plaintiff was non-compliant with the strict mandates of the statute.

Proof of compliance with the pre-foreclosure notice provision of RPAPL 1304 also satisfied the notice provision of the subject mortgage (*see Wachovia Bank Nat. Ass'n. v Carcano*, 106 Ad3d 724, 965 NYS2d 516 [2d Dept 2013]). In any event, pursuant to the terms of the mortgage, plaintiff mailed and defendant acknowledged receipt of demand letters, dated March 23, 2011 and December 13, 2016. Plaintiff's reply papers include proof of a third such demand letter, dated March 17, 2014. Given the

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numerous timely pre-foreclosure notifications provided, defendant's argument that this action was commenced less than 30 days after the date of the final demand letter in violation of the terms of the mortgage, is rejected as unmeritorious.

In view of the original default date of December 2, 2007, and commencement of the action on January 10, 2017, defendant argues that under the six-year statute of limitation applicable to foreclosure actions under CPLR 213(4), plaintiff's claims for installment payments owed more than six years prior to commencement are time barred. Plaintiff concedes that point. Defendant does not argue that the action itself is time barred. It is well settled that "the existence of a dispute as to the exact amount owed . . . to the plaintiff does not preclude the award of summary judgment to the plaintiff on the issue of foreclosure" (*Mishal v Fiduciary Holdings, LLC*, 109 AD3d 885, 886 [2d Dept 2013]; see, *Shufelt v Bulfamante*, 92 AD3d 936, 937 [2d Dept 2012]; *Long Is. Sav. Bank of Centereach, F.S.B. v Denkensohn*, 222 AD2d 659, 660 [2d Dept 1995]). Rather, a dispute as to the precise amount owed by the defendant may be resolved after a reference pursuant to RPAPL § 1321 (see *Crest/Good Mfg. Co., Inc. v Baumann*, 160 AD2d 831 [2d Dept 1990]). In connection with this issue, the Zervlik affidavit, referenced above, avers that plaintiff, as a business decision, elected to advance the default date from December 2, 2007 to January 1, 2010, despite defendant having made no payments on the loan. That explanation, among other things, is sufficient for the Court to reject defendant's argument that the letter of December 16, 2016 stated an amount to cure different from the 1304 notice dated March 5, 2015 (see *Citimortgage, Inc. v Espinal*, *supra*). Additionally, contrary to defendant's argument, the 1304 notice did not expire and was in effect when the present action was commenced almost two years later (see *Deutsche Bank Nat'l Trust Co. v Webster*, 142 AD3d 636, 37 NYS3d 283 [2d Dept 2016]).

Plaintiff submitted sufficient proof to establish, *prima facie*, that the remaining affirmative defenses and counterclaim are subject to dismissal due to their unmeritorious nature (see *Becher v Feller*, 64 AD3d 672, 884 NYS2d 83 [2d Dept 2009]). Where a defendant fails to oppose some or all matters advanced on a motion for summary judgment, the facts as alleged in the movant's papers may be deemed admitted as there is, in effect, a concession that no question of fact exists (see *Kuehne & Nagel, Inc. v Baiden*, 36 N.Y.2d 539, 369 N.Y.S.2d 667 [1975]; see also *Argent Mtge. Co., LLC v. Montesana*, 79 A.D.3d 1079, 915 N.Y.S.2d 59 [2d Dept 2010]).

Accordingly, plaintiff's motion is granted, defendant's cross motion is denied, and the proposed order of reference is being signed concurrently herewith.

Dated: 10/26/18


HON. LINDA J. KEVINS, J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION