U.S. Bank N.A. v Handwerker
2018 NY Slip Op 33065(U)
November 21, 2018
Supreme Court, Suffolk County
Docket Number: 36348/2012
Judge: Howard H. Heckman
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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.: 36348/2012
MOTION DATE: 8/7/2018
MOTION SEQ. NO.: #001 Mot. D

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U.S. BANK N.A.,

Plaintiffs,

-against-

MICHAEL HANDWERKER,

Defendants.

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PLAINTIFF'S ATTORNEY:
FRIEDMAN VARTOLO LLP
85 BROAD STREET, STE 501
NEW YORK, NY 10004

DEFENDANTS' ATTORNEY:
THE RANALLI LAW GROUP, PLLC
742 VETERANS MEMORIAL HWY.
HAUPPAUGE, NY 11788

Upon the following papers numbered 1 to 17 read on this motion 1-12 ; Notice of Motion/ Order to Show Cause and supporting papers__; Notice of Cross Motion and supporting papers___ ; Answering Affidavits and supporting papers 13-15 ; Replying Affidavits and supporting papers 16-17 ; 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 defendants Michael Handwerker and Jennifer Handwerker; 2) substituting Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust, as trustee for Normandy Mortgage Loan Trust, Series 2015-l as the named party plaintiff in place and stead of U.S. Bank National Association, as Trustee for Stanwich Mortgage Loan Trust, Series 2011-4; 3) discontinuing the action against defendants designated as "John Doe #1" through "John Doe #12"; 4) deeming all appearing and non-appearing defendants in default; 5) amending the caption; and 6) appointing a referee to compute the sums due and owing to the plaintiff in this mortgage foreclosure action is granted to the following extent:

ORDERED that plaintiff is awarded partial summary judgment dismissing all affirmative defenses and counterclaims set forth in defendants' answer except the defense asserted in the third affirmative defense related solely to plaintiff's compliance with RPAPL 1304; and it is further

ORDERED that plaintiff's application to substitute Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust, as trustee for Normandy Mortgage Loan Trust, Series 2015-l as the named party plaintiff in place and stead of U.S. Bank National Association, as Trustee for Stanwich Mortgage Loan Trust, Series 2011-4 and striking defendants designated as "John Doe #1" through "John Doe #12" is granted and the caption is hereby amended; and it is further

ORDERED that plaintiff's application for an order appointing a referee to compute amounts due is denied without prejudice, as such request is premature; and it is further

ORDERED that pursuant to CPLR 3212(g) in aid for disposition of the action, the sole remaining issue to be determined in this foreclosure action shall concern whether the plaintiff complied with pre-foreclosure RPAPL 1304 90-day notice requirements; and it is further

ORDERED that all parties shall appear for a court conference to ready this matter for trial or to provide a briefing schedule for an additional summary judgment motion (*see Kolel Damsek Eliezer, Inc. v. Schlesinger,* 139 AD3d 810, 33 NYS3d 284 (2nd Dept., 2016)) at 9:30 a.m. on December 12, 2018 in Part 18 at the Supreme Court Courthouse, 1 Court Street, Courtroom A- 301, Riverhead, NY; 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 file a notice of entry within five days of receipt of this Order pursuant to 22 NYCRR Section 202.5-b(h)(3).

Plaintiff's action seeks to foreclose a mortgage in the original sum of $187,500.00 executed by defendants Michael Handwerker and Jennifer Handwerker on June 16, 2003 in favor of CitiMortgage, Inc. On the same date both mortgagors also executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. By assignment dated December 15, 2011, the mortgage and note were assigned to the plaintiff. By assignment dated September 13, 2016 the mortgage and note were assigned to Wilmington Savings Fund Society, FSB. Plaintiff claims that defendants defaulted under the terms of the mortgage and note by failing to make timely monthly mortgage payments beginning March 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 December 4, 2012. Defendants Handwerkers served and filed an answer dated February 5, 2013 asserting thirteen (13) affirmative defenses and four (4) counterclaims.

Plaintiff's motion seeks an order granting summary judgment striking defendants' answer and for the appointment of a referee. In opposition to plaintiff's motion, defendants claim that plaintiff failed to comply with service and filing requirements set forth pursuant to RPAPL 1304 & 1306. .

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)).

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 defendants do not contest their failure to make payments due under the terms of the promissory note and mortgage agreement for more than seven years. Rather, the issues raised by the defendants concern whether the proof submitted by the mortgage lender provides sufficient admissible evidence to prove its entitlement to summary judgment based upon defendants' continuing default and plaintiff's compliance with statutory pre-foreclosure notice and filing 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.

Although defendants have not raised the issue of standing in their opposition to plaintiff's motion, the first affirmative defense set forth in their answer asserts that plaintiff lacks standing. With respect to this issue, plaintiff has proven standing by submission of an affidavit from the mortgage servicer's representative attesting to plaintiff's possession of the promissory note, together

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with documentary evidence in the form of a copy of the original promissory note with indorsed allonges which plaintiff has attached to the complaint, together with a certificate of merit (CPLR 3012-b). Such proof provides sufficient evidence of plaintiff's possession of the promissory note with attached allonges to establish standing (*Bank of New York Mellon v. Theobalds,* 161 AD3d 1137, 79 NYS3d 50 (2nd Dept., 2018); *Bank of New York Mellon v. Burke,* 155 AD3d 932, 64 NYS3d 114 (2nd Dept., 2017); *Wells Fargo Bank, N.A. v. Thomas,* 150 AD3d 1312, 52 NYS3d 894 (2nd Dept., 2017)).

With respect to the issue of the Handwerker defendants 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 mortgage, and an affidavit attesting to the defendants' undisputed default in making timely mortgage payments sufficient to sustain its burden to prove defendants have defaulted under the terms of the parties agreement by failing to make timely payments since March 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 defendants' continuing default, plaintiff's application for partial summary judgment against the defendants based upon their breach of the mortgage agreement and promissory note must be granted.

With respect to service of the pre-foreclosure mortgage RPAPL 1304 90-day notices, the proof required to prove strict compliance with the statute 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" (*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)).

While the business records exception to the hearsay rule provides a mechanism to establish the foundation for the proof necessary to prove compliance, in this case there is insufficient evidence to prove that mailing by certified and first class mail was done by the post office, since plaintiff has failed to submit either an affidavit of service by mailing or to submit an affidavit from a representative personally familiar with the mailing practices used by the mortgage lender at the time the notices were mailed, or to submit sufficient documentary evidence of proof of mailing by the post office. The evidence submitted by the plaintiff reveals that a prior servicer (Carrington Mortgage Services, LLC) was the entity which mailed the RPAPL 1304 90-day notices to the mortgagors and there is no representation from the current mortgage servicer's assistant vice president that the prior servicer's records were incorporated into the current servicer's business records in the regular course of its business, and that those incorporated records were relied upon by

the current servicer in the ordinary course of its business record keeping. Based upon these circumstances, plaintiff has failed to demonstrate its entitlement to summary judgment on the issue of compliance with the requirements of RPAPL 1304 and a significant issue of fact remains concerning the notice requirement (*Citibank, N.A. v. Wood,* 150 AD3d 813, 55 NYS3d 109 (2nd Dept., 2017); *M & T Bank v. Joseph,* 152 AD3d 579, 58 NYS3d 150 (2nd Dept., 2017)).

With respect to the defendants' remaining arguments, none of the remaining defenses asserted by defense counsel in his opposing papers raise sufficient evidence to establish genuine issues of fact to defeat plaintiff's summary judgment motion. Plaintiff has submitted documentary evidence to establish compliance with RPAPL 1306 filing requirements, and as the defendants have failed to submit admissible, credible evidence to address any of their remaining affirmative defenses and counterclaims, those remaining affirmative 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 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, plaintiff's motion seeking summary judgment is granted solely to the extent indicated hereinabove. A conference shall be held for the purpose of either scheduling a limited issue trial pursuant to CPLR 3212(g), or a briefing schedule for submission of another summary judgment motion.

Dated: November 21, 2018

HON. HOWARD H. HECKMAN, JR.

J.S.C.