Bank of Am. N.A. v Felice
2019 NY Slip Op 30423(U)
February 21, 2019
Supreme Court, Suffolk County
Docket Number: 3112/2014
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.: 3112/2014
MOTION DATE: 1/18/2019
MOTION SEQ. NO.: #003 MG
#004 MD

---X
BANK OF AMERICA N.A.,

Plaintiff,

-against-

PHIL FELICE, et al.,

Defendants.
---X

PLAINTIFF'S ATTORNEY:
BERKMAN HENOCH PETERSON PEDDY
100 GARDEN CITY PLAZA
GARDEN CITY, NY 11530

DEFENDANT PRO SE:
PHIL FELICE
333 SUNRISE HWY
WEST ISLIP, NY 11795

Upon the following papers numbered 1 to 24 read on this motion : Notice of Motion/ Order to Show Cause and supporting papers 1-9 (#003) ; Notice of Cross Motion and supporting papers 10-18 (#004) ; Answering Affidavits and supporting papers___; Replying Affidavits and supporting papers 19-24 ; Other___ ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff Bank of America, N.A., seeking an order pursuant to CPLR 2221(e) granting leave to renew plaintiff's prior motion and the Order (Murphy, J.) thereon dated September 30, 2015 denying plaintiff's motion for summary judgment and for an order of reference, is granted; and it is further

ORDERED that upon renewal, plaintiff's motion seeking an order: 1) granting summary judgment striking the answer of defendants Phil Felice and Dawn Felice ; 2) substituting Yeny Zavala and Jose Zavala as named party defendants in place and stead of defendants designated as "John Doe #1" and "John Doe #2" and discontinuing the action against remaining defendants designated as "John Doe #3" 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 the cross motion by defendant Phil Felice seeking an order pursuant to CPLR 3126 & 3212 denying plaintiff's motion and dismissing plaintiff's complaint or, in the alternative, precluding plaintiff for an award of interest due as part of the damages accumulated as a result of the mortgagors' continuing default, is denied; 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 $259,000.00 executed

by defendants Dawn Felice and Phil Felice on April 30, 2007 in favor of Alliance Mortgage Banking Corporation. On the same date mortgagor/borrower Dawn Felice 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 January 18, 2012. Plaintiff claims that the mortgagors defaulted by failing to make timely monthly mortgage payments beginning July 1, 2010 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 February 13, 2014. Defendants Felice and Felice served an answer dated March 12, 2014 asserting nine (9) affirmative defenses.

By short form Order (Murphy, J.) dated September 30, 2015, plaintiff's motion and defendants' cross motion each seeking an order granting summary judgment were denied. Plaintiff's current motion seeks an order granting leave to renew its prior motion and the September 30, 2015 Order and, upon renewal seeking an order granting summary judgment and for the appointment of a referee. Defendant's cross motion seeks an order denying plaintiff's motion and granting defendant Phil Felice's application to dismiss the complaint based upon plaintiff's alleged intentional failure to comply with prior discovery orders and seeks an order tolling any interest plaintiff might seek to recover based upon plaintiff's "wrongful conduct".

Plaintiff's motion for renewal was originally served on December 8, 2016 and made returnable on December 30, 2016; defendant's cross motion was served on March 13, 2017 and made returnable on April 7, 2017. Both motions remained sub judice in IAS Part 25 until this action and the underlying motions were transferred to this Part 18 by Administrative Order 114-18 (Hinrichs, J.) dated December 7, 2018. Upon transfer of the file and assemblage of all motion papers these motions were marked submitted on Part 18's motion calendar on January 18, 2019.

CPLR 2221(e) provides:

(e) A motion for leave to renew:

1. shall be identified as such;

2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination;

3. shall contain reasonable justification for the failure to present such facts on the prior motion.

This Court has reviewed the evidence presented by the parties in the original motion papers and plaintiff's submission of an additional affidavit which provides new facts which were not offered on the prior motion and contains a reasonable justification for plaintiff's failure to present the new facts on its prior motion. Based upon plaintiff's showing of the three factors required to permit renewal of a prior motion, plaintiff's application seeking leave to renew its prior summary judgment motion is hereby granted.

Upon renewal, 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. Mandrin,* 160 AD3d 1014 (2nd Dept., 2018) *Tribeca Lending Corp. v. Lawson,* 159 AD3d 936 (2nd Dept., 2018); *Deutsche Bank National Trust Co. v. Iarrobino,* 159 AD3d 670 (2nd Dept., 2018); *Central Mortgage Company v. Davis,* 149 AD3d 898 (2nd Dept., 2017); *U.S. Bank, N.A. v. Ehrenfeld,* 144 AD3d 893, 41 NYS3d 269 (2nd Dept., 2016); *JPMorgan Chase Bank v. Weinberger,* 142 AD3d 643, 37 NYS3d 286 (2nd Dept., 2016); *CitiMortgage, Inc. v. Klein,* 140 AD3d 913, 33 NYS3d 432 (2nd Dept., 2016); *U.S. Bank, N.A. v. Godwin,* 137 AD3d 1260, 28 NYS3d 450 (2nd Dept., 2016); *Wells Fargo Bank, N.A. v. Joseph,* 137 AD3d 896, 26 NYS3d 583 (2nd Dept., 2016); *Emigrant Bank v. Larizza, supra.*; *Deutsche Bank National Trust Co. v. Whalen,* 107 AD3d 931, 969 NYS2d 82 (2nd Dept., 2013); *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), has been held to constitute due proof of the plaintiff's standing to prosecute its claims for foreclosure and sale (*Nationstar Mortgage, LLC v. LaPorte,* 162 AD3d 784, 75 NYS3d 432 (2nd Dept., 2018); *Bank of New York Mellon v. Theobalds,* 161 AD3d 1137 (2nd Dept., 2018); *HSBC Bank USA, N.A. v. Oscar,* 161 AD3d 1055, 78 NYS3d 428 (2nd Dept., 2018); *CitiMortgage, Inc. v. McKenzie,* 161 AD3d 1040, 78 NYS3d 200 (2nd Dept., 2018); *U.S. Bank, N.A. v. Duthie,* 161 AD3d 809, 76 NYS3d 226 (2nd Dept., 2018); *Bank of New York Mellon v. Genova,* 159 AD3d 1009, 74 NYS3d 64 (2nd Dept., 2018); *Mariners Atl. Portfolio, LLC v. Hector,* 159 AD3d 686, 69 NYS3d 502 (2nd Dept., 2018); *Bank of New York Mellon v. Burke,* 155 AD3d 932, 64 NYS3d 114 (2nd Dept., 2017); *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)).

At issue is whether the evidence submitted by the plaintiff is sufficient to establish its right to foreclose. The mortgagors do not contest their failure to make timely payments due under the terms of the promissory note and mortgage agreement since July 1, 2010. Rather, the issues raised by defendant Phil Felice concerns whether the proof submitted by the mortgage lender provides sufficient admissible evidence to prove its entitlement to summary judgment based upon the mortgagors' continuing default, plaintiff's lack of standing, plaintiff's failure to comply with court ordered discovery, and plaintiff's failure to negotiate a settlement in good faith.

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 affidavits submitted from the plaintiff lender/mortgage servicer's (Bank of America, N.A.'s) two assistant vice presidents dated August 5, 2014 and December 6, 2016, 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 mortgage lender/servicer; the fact that the books and records are made in the regular course of BOA's business; that it was BOA'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 both affidavits, 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 standing, plaintiff has proven standing by submission of the two affidavits from BOA's assistant vice presidents attesting to plaintiff's continuous physical possession of the original promissory note since May 22, 2007, with the second affidavit dated December 6, 2016 further attesting to plaintiff's physical possession of the original promissory note with an attached allonge containing three specific indorsements: 1) the first indorsement signed by John Murphy, as president of the original mortgage lender Alliance Mortgage Banking Corp. and endorsed to Countrywide Bank, FSB; 2) the second indorsement signed by Laurie Meder as senior vice president of Countrywide Bank, FSB and endorsed to Countrywide Home Loans, Inc.; and 3) the third indorsement signed by Michele Sjolander as executive vice president of Countrywide Home Loans, Inc. and endorsed in blank. Both affidavits confirm that plaintiff, directly or through its agent, physically possessed the original note on the date this action was commenced and the second affidavit dated December 6, 2016 attests to plaintiff directly or through its agent's physical possession of the promissory note with the attached allonge, containing the three indorsements on the date this action was commenced on February 13, 2014. Such evidence proves plaintiff's standing to maintain this foreclosure action (*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 v. Sidberry,* 144 AD3d 863, 40 NYS3d 783 (2nd Dept., 2016); *U.S. Bank, N.A. v. Carnivale,* 138 AD3d 1220 (3rd Dept., 2016)). Any alleged issues concerning the mortgage assignments are therefore irrelevant to the issue of standing since plaintiff has established possession of the promissory note prior to commencing this action (*FNMA v. Yakaputz II, Inc.,* 141 AD3d 506, 35 NYS3d 236 (2nd Dept., 2016); *Deutsche Bank National Trust Company v. Leigh,* 137 AD3d 841, 28 NYS3d 86 (2nd Dept., 2016)).

With respect to the defendant's claim that the promissory note originally provided to defendants in response to their discovery request (and which was annexed to the complaint) contained only one indorsement, plaintiff has provided a reasonable explanation for the discrepancy by submission of the second affidavit from BOA's assistant vice president who attests that the prior note was served in error; that plaintiff never intended to submit or use the prior version of the note; and that the erroneously produced note was merely an earlier version of the same note when it contained only the first of the three indorsements on the allonge. Plaintiff's affidavit provides a sufficient and rational explanation of its prior error and sets forth the necessary elements to grant renewal and to prove plaintiff's standing. Moreover, this court would note that even if the original earlier version of the note served in error was submitted as evidence of standing, that note together with the supporting affidavits was sufficient to establish plaintiff's standing since plaintiff submitted additional proof that BOA was the successor by merger to Countrywide Bank, FSB and therefore the endorsement to Countrywide Bank, FSB effectively and legally was an endorsement to Bank of America, N.A.

With respect to the issue of the mortgagors' 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 et al.,* 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 mortgagors undisputed default in making timely mortgage payments sufficient to sustain its burden to prove the defendants have defaulted under the terms of the parties agreement by failing to make timely payments since July 1, 2010 (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 mortgagors' continuing default, plaintiff's application for summary judgment based upon defendants' breach of the mortgage agreement and promissory note must be granted.

With respect to defendant's claim that the action must be dismissed based upon plaintiff's failure to produce a deposition witness in violation of CPLR 3126, court records fail to show that Acting Justice Murphy issued any orders directing the deposition of plaintiff's witnesses. Defendant's artful use of the phrase: "the Court advised"-- provides no justification or legal grounds to dismiss plaintiff's action. The law is clear that all disclosure is stayed upon the submission of a summary judgment motion (CPLR 3214), and in this case there is no reason to compel any additional disclosure since the relevant, admissible evidence submitted proves that plaintiff is entitled to foreclose this mortgage loan.

[* 7]

With respect to defendant's claim of plaintiff's failure to negotiate in good faith, the law is clear that a foreclosing party has no obligation to modify the terms of its loan freely entered into by the borrower and a failure to modify the loan obligation does not provide any defense to a mortgage foreclosure action (*see Citibank, N.A. v. Van Brunt Properties, LLC,* 95 AD3d 1158, 945 NYS2d 330 (2nd Dept., 2010)). Court records indicate that this action was scheduled for a total of fifteen court conferences beginning with the mortgagors failure to appear at the CPLR 3408 foreclosure settlement conference on July 14, 2014. Fourteen additional conferences were thereafter scheduled in IAS Part 25 beginning on September 2, 2015 and ending May 15, 2017. There is no indication in the records maintained by the court that plaintiff's representatives ever failed to negotiate in good faith. No legal or equitable grounds therefore exist to further delay prosecution of this action.

With respect to defendant's claim that plaintiff must be denied an award of interest based upon its "bad faith", there is no evidence submitted to support this final claim. While the court retains authority to deny a party interest based upon its "wrongful conduct", there is no proof in this record that plaintiff is guilty of any "wrongful conduct". The only inequitable conduct that the court can glean from this record is the defendants' acceptance of the sum of $259,000.00 from the mortgage lender on the promise that the borrowers would re-pay that amount with interest with monthly payments for the ensuing thirty (30) years; the defendants default in making any payments for the past eight (8) years and eight (8) months; and the plaintiff's resultant obligation to subsidize its investment by paying property taxes and hazard insurance for the benefit of the defendants. In addition, it is inevitable that these premises are the source of additional income to the defaulting mortgagors as it appears that they are renting the premises and retaining those monies while the delay has continued in this foreclosure process. Based upon these circumstances these defendants are clearly not the "wronged" in this proceeding and there is absolutely no justification to further reward them.

Finally, defendant has failed to submit any admissible evidence to support his remaining affirmative defenses in opposition to plaintiff's motion. Accordingly, those 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. 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 and plaintiff's motion seeking renewal and upon renewal, an order granting summary judgment is granted. The proposed order of reference has been signed simultaneously with execution of this order.

HON. HOWARD H. HECKMAN, JR.

Dated: February 21, 2019

J.S.C.