Bank United v Connor
2019 NY Slip Op 30424(U)
February 22, 2019
Supreme Court, Suffolk County
Docket Number: 10767/2011
Judge: Howard H. Heckman

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.: 10767/2011
MOTION DATE: 1/18/2019
MOTION SEQ. NO.: #001 MG

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BANK UNITED,

Plaintiff,

-against-

FRANK E. CONNOR JR., et al.,

Defendants.

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PLAINTIFF'S ATTORNEY:
BERKMAN, HENOCH, PETERSON,
PEDDY & FENCHEL, P.C.
100 GARDEN CITY PLAZA
GARDEN CITY, NY 11530

DEFENDANT'S ATTORNEY:
ERNEST E. RANALLI, ESQ.
742 VETS MEM HIGHWAY
HAUPPAUGE, NY 11788

Upon the following papers numbered 1 to 41 read on this motion 1-20 ; Notice of Motion/ Order to Show Cause and supporting papers__; Notice of Cross Motion and supporting papers___ ; Answering Affidavits and supporting papers 21-25 ; Replying Affidavits and supporting papers 26-41 ; Other___ ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff BankUnited seeking an order: 1) granting summary judgment striking the answer of defendant Frank E. Connor, Jr.; 2) substituting Castle Peak 2012-1 Loan Trust Mortgage Backed Notes, Series 2012-1 as the named party plaintiff in place and stead of BankUnited; 3) substituting Unique Palmer as a named party defendant in place and stead of a defendant designated as "John Doe #1" and discontinuing the action against defendants designated as "John Doe #2" 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; 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 $264,000.00 executed by defendant Frank E. Connor, Jr. on June 20, 2006 in favor of BankUnited, FSB. On the same date defendant/mortgagor Connor executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. By assignment dated January 14, 2013 the mortgage and note were assigned to plaintiff. By assignment dated January 22, 2013 the mortgage and note were assigned to Castle Peak 2012-1 Loan Trust Mortgage Backed Notes, Series 2012-1. Plaintiff claims that the defendant/mortgagor defaulted under the terms of the mortgage and note by failing to make timely monthly mortgage payments beginning March 1, 2008 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 March 31, 2011. Defendant/mortgagor Connor served an answer dated

April 13, 2011 asserting eight (8) affirmative defenses and two (2) counterclaims.

Plaintiff's motion seeks an order granting summary judgment striking defendant's answer and for the appointment of a referee. Defendant/mortgagor Connor submits an attorney's affirmation claiming that plaintiff has failed to submit sufficient admissible evidence to establish its standing to prosecute this action and to prove compliance with mortgage and RPAPL 1303 & 1304 pre-foreclosure notice requirements. Defendant also claims that plaintiff has failed act in good faith.

This motion was originally served on September 10, 2014 and made returnable on October 7, 2014. The motion remained sub judice in IAS Part 25 (and was twice stayed as a result of defendant Connor's bankruptcy filings) until this action and the motion were reassigned to IAS Part 18 by Administrative Order 114-18 (Hinrichs, J.) dated December 11, 2018. Upon the transfer of the file and assemblage of all motion papers, this motion was submitted on this IAS Part's motion calendar on January 18, 2019.

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. 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), coupled with an affidavit in which it alleges that it had possession of the note prior to the commencement of the action, has been held to constitute due proof of the plaintiff's standing to prosecute its claims for foreclosure and sale (*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)).

Proper service of RPAPL 1303 & 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 1303 requires that a notice in proper form be delivered with the summons and complaint to commence the foreclosure action. 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/mortgagor does not contest his failure to make timely payments due under the terms of the promissory note and mortgage agreement for the past eleven (11) years. 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/mortgagor's continuing default, plaintiff's compliance with statutory pre-foreclosure notice requirements, plaintiff's standing to maintain this action, and plaintiff's failure to offer the defaulting mortgagor a loan modification.

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 mortgage servicer/attorney-in-fact's (Selene Finance, LP's) foreclosure manager 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 Selene Finance; the fact that the books and records are made in the regular course of Selene's business; that it was Selene'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, 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 standing, plaintiff's mortgage servicer/attorney-in-fact's

representative's affidavit, together with documentary evidence in the form of a copy of the original promissory note with three attached indorsed allonges which plaintiff has attached to the complaint, together with the certificate of merit, provides sufficient evidence of possession of the underlying note to establish the plaintiff's standing to prosecute this foreclosure action (*see JPMorgan Chase Bank, N.A. v. Weinberger, supra.; Nationstar Mortgage LLC v. Catizone, supra.*; *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)). In addition, plaintiff has proven standing by submission of the documentary evidence and the affidavit for the mortgage servicer/attorney-in-fact's foreclosure manager, attesting to plaintiff's physical possession of the promissory note prior to commence of this action on March 31, 2011 (*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)). Any alleged issues concerning 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 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 mortgagors' undisputed default in making timely mortgage payments sufficient to sustain its burden to prove the mortgagors have defaulted under the terms of the parties agreement by failing to make timely payments since March 1, 2008 (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 agreement and promissory note must be granted.

With respect to service of the RPAPL 1303 notice, plaintiff's proof consists of a copy of the affidavit of service from the process server confirming that the summons, complaint and RPAPL 1303 notice in proper form was served upon defendant Frank E. Connor, Jr. by personal delivery pursuant to CPLR 308(1), by delivery on April 2, 2011 at 10:15 a.m. at 64 Offaly Street, Amityville, New York to: "defendant personally; deponent knew said person so served to be the person described as said defendant therein; He identified himself as such." The affidavit of service together with the documentary proof constitute prima facie evidence of proper service of the RPAPL 1303 notice and it is therefore incumbent upon the defendant/mortgagor Connor to submit relevant, admissible evidence in the form of an affidavit containing specific and detailed contradictions of the claims set forth in the process server's affidavit (CPLR 306; *U.S. Bank, N.A. v. Tauber,* 140 AD3d 1154, 36 NYS3d 144 (2nd Dept., 2016); *NYCTL v. Tsafinos,* 101 AD3d 1092, 956 NYS2d 571 (2nd Dept., 2012)). Defendant Connor's submission of an attorney's affirmation claiming generally that plaintiff did not serve a proper 1303 notice provides no admissible evidentiary proof to contradict plaintiff's prima facie showing and therefore defendant's RPAPL 1303 defense must be stricken.

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)). The statute only applies to "home loans" which is defined as premises "which is or will be occupied by the borrower as the borrower's principal dwelling." (RPAPL 1304(5)(b)iv); *see Wells Fargo Bank, N.A. v. Berkovits,* 143 AD3d 696, 38 NYS3d 579 (2nd Dept., 2016); *Mendel Group, Inc. v. Prince,* 114 AD3d 732, 980 NYS2d 519 (2nd Dept., 2014)). Court records indicate that the CPLR 3408 court mandated conference (which is triggered by service of a 90-day notice and the filing of an RJI) that was scheduled for this action was marked with the notation that this defendant was "not eligible" for the conference. That notation confirms that defendant/mortgagor Connor did not reside in the premises and therefore RPAPL 1304 requirements were not applicable since such requirements apply only to "home loans" as defined by the statute.. Defendant does not dispute the fact that he did not reside in the premises and therefore plaintiff was not statutorily obligated to serve the 90-day notice. To require that this notice be served under these undisputed facts would defeat the very intention of the statute which was to afford homeowners of "home loans" to engage in preliminary settlement discussions with the mortgage lender— not to afford landlords the right to further delay prosecution of a foreclosure action.

Moreover, even were this court to determine that RPAPL 1304 requirements applied 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 (*see HSBC Bank USA, N.A. v. Ozcan supra.; Nationstar Mortgage, LLC. v. LaPorte,* 162 AD3d 784, 79 NYS3d 70 (2nd Dept., 6/13/2018); *Bank of America, N.A. v. Brannon,* 156 AD3d 1, 63 NYS3d 352 (1st Dept., 2017)). 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)).

With respect to defendant's claim of the mortgage lender's failure to act in good faith and its alleged predatory lending practice, there is no admissible, credible proof submitted to support such conclusory claims. The record clearly shows that this defendant has defaulted in making payments for the past eleven years; has filed at least two bankruptcy petitions; has been subsidized for the past eleven years by the mortgage lenders which have been forced to make payments for property taxes and hazard insurance; and has likely continued to profit by collecting rent payments from tenant(s) without any offer to reimburse the mortgage lender. Based upon these circumstances there is no evidence of bad faith on the part of the mortgage lender and the equities weigh solely in favor of the plaintiff.

Finally with respect to the answering defendant's remaining affirmative defenses and counterclaims set forth in his answer, defendant Connor has failed to submit 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, plaintiff's motion seeking an order granting summary judgment and for the appointment of a referee is granted. The proposed order of reference has been signed simultaneously with execution of this order.

Dated: February 22, 2019

HON. HOWARD H. HECKMAN, JR.

J.S.C.