

<b>Wells Fargo Bank, N.A. v Montalvo</b>
2019 NY Slip Op 33466(U)
November 22, 2019
Supreme Court, Suffolk County
Docket Number: 15577/2013
Judge: Howard H. Heckman
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SUPREME COURT - STATE OF NEW YORK  
IAS PART 18 - SUFFOLK COUNTY

**PRESENT:**

**HON. HOWARD H. HECKMAN JR., J.S.C.**

INDEX NO.: 15577/2013  
MOTION DATE: 11-22-2019  
MOTION SEQ. NO.: #004 MG  
#005 MD

-----X  
WELLS FARGO BANK, N.A.,

Plaintiff,

-against-

EDWIN A. MONTALVO, et al.,

Defendants.  
-----X

**PLAINTIFF'S ATTORNEY:**  
SHAPIRO DICARO & BARAK, LLC  
175 MILE CROSSING BLVD.  
ROCHESTER, NY 14624

**DEFENDANT'S ATTORNEY:**  
GRAUSSO & FOY, LLP  
EIGHT WEST MAIN STREET, STE 5  
PATCHOGUE, NY 11772

Upon the following papers numbered 1 to 36 read on this motion; Notice of Motion/ Order to Show Cause and supporting papers 1-14 (#004); Notice of Cross Motion and supporting papers 15-32 (#005); Answering Affidavits and supporting papers     ; Replying Affidavits and supporting papers 33-36; Other     ; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion by plaintiff Wells Fargo Bank, N.A. seeking an order: 1) granting summary judgment striking the answer of defendant Edwin A. Montalvo; 2) deeming all appearing and non-appearing defendants in default; and 3) 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 Edwin A. Montalvo seeking an order pursuant to CPLR 3212 & RPAPL 1304 denying plaintiff's motion and dismissing the complaint is denied; 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 \$318,250.00 executed by defendant Edwin A. Montalvo on May 30, 2007 in favor of Wells Fargo Bank, N.A. On the same date mortgagor Montalvo executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. Plaintiff claims that defendant defaulted under the terms of the mortgage and note by failing to make timely monthly mortgage payments beginning January 1, 2013 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 June 14, 2013. Defendant Montalvo served an answer dated July 16, 2013 asserting twenty two affirmative defenses and five counterclaims. By short form Order (Pastorella, J.) dated September 1, 2016, plaintiff's initial motion for an order granting summary judgment was denied without prejudice based upon court records indicating that this action had been settled. The action had not been settled. Plaintiff submitted a second motion seeking summary judgment which was opposed by the defendant Montalvo, who submitted a cross motion seeking dismissal of plaintiff's complaint. By short form Order (Pastorella, J.) dated April

3, 2018 defendant's cross motion was denied and plaintiff's motion was granted to the extent that all of the numbered affirmative defenses set forth in defendant's answer were stricken. The only issue remaining to be resolved as a result of Justice Pastorella's Order were the defenses identified in the defendant's answer as "First Defense" and "Second Defense" which claim that plaintiff failed to comply with RPAPL 1304 requirements.

Plaintiff's third motion seeks an order granting summary judgment against the defendant and for the appointment of a referee. In opposition, defendant submits a second cross motion seeking judgment dismissing plaintiff's complaint for failure to prove compliance with RPAPL 1304. Defendant claims that plaintiff's successive summary judgment motion should not be permitted since it is a motion seeking renewal and argues that the complaint must be dismissed based upon the identical grounds the defendant asserted in his prior cross motion.

Procedurally, plaintiff served this third motion seeking summary judgment on September 12, 2018 and made it originally returnable on September 28, 2018 assigned to IAS Part 34. Defendant served his cross motion on October 19, 2018 and failed to designate any return date. The cross motion was assigned to IAS Part 34. Both motions remained sub judice without decision until this foreclosure action and the underlying motions were reassigned to this IAS Part 18 on November 12, 2019 by Administrative Order 85-19 (Hinrichs, J.) dated November 6, 2019. Upon assemblage of all motion papers both motions were marked submitted on the IAS Part 18 motion calendar on November 22, 2019.

With respect to defendant's claim that an additional summary judgment motion is not permitted absent some designation by its proponent that the moving party is seeking renewal, a court has discretion to consider a successive summary judgment motion when it is substantively valid and the granting of the motion will further the ends of justice and eliminate an unnecessary burden on the resources of the courts" (*see Kolel Damsek Eliezer, Inc. v. Schlesinger*, 139 AD3d 810, 33 NYS3d 284 (2<sup>nd</sup> Dept., 2016) quoting *Graham v. City of New York*, 136 AD3d 747, 748, 24 NYS3d 754 (2<sup>nd</sup> Dept., 2016); *Landmark Capital Investments, Inc. v. Li-Shan Wang*, 94 AD3d 418, 941 NYS2d 144 (2<sup>nd</sup> Dept., 2012); *Town of Angelica v. Smith*, 89 AD3d 1547, 933 NYS2d 480 (4<sup>th</sup> Dept., 2011)). This court deems consideration of this successive motion as "substantively valid" and in the interests of judicial economy and furthering the ends of justice.

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. Erobo*, 127 AD3d 1176, 9 NYS3d 312 (2<sup>nd</sup> Dept., 2015); *Wells Fargo Bank, N.A. v. Ali*, 122 AD3d 726, 995 NYS2d 735 (2<sup>nd</sup> Dept., 2014)).

By short form Order (Pastorella, J.) dated April 3, 2018 plaintiff's motion for an order granting summary judgment was granted as to all issues except with respect to the issue of service of the pre-foreclosure 90-day notices required pursuant to RPAPL 1304. Justice Pastorella's Order granted judgment striking all affirmative defenses and counterclaims and made a specific finding that plaintiff's submissions "establish its prima facie entitlement to summary judgment on its mortgage foreclosure action by producing the indorsed note, the mortgage and evidence of nonpayment" which as recited in the short form Order was proven by the "affidavit of merit" which established the default date as January 1, 2013. Based upon Justice Pastorella's Order, which is the law of this case, all issues have been decided with the sole exception of plaintiff's compliance with RPAPL 1304.

Proper service of such 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 (2<sup>nd</sup> Dept., 2011); *First National Bank of Chicago v. Silver*, 73 AD3d 162, 899 NYS2d 256 (2<sup>nd</sup> 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 plaintiff's compliance with statutory pre-foreclosure notice 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 (3<sup>rd</sup> 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. 158<sup>th</sup> 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 (3<sup>rd</sup> Dept., 2015); *People v. DiSalvo*, 284 AD2d 547, 727 NYS2d 146 (2<sup>nd</sup> Dept., 2001); *Matter of Carothers v. GEICO*, 79 AD3d 864, 914 NYS2d 199 (2<sup>nd</sup> 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 (3<sup>rd</sup> Dept., 2016); *HSBC Bank USA, N.A. v. Sage*, 112 AD3d 1126, 977 NYS2d 446 (3<sup>rd</sup> 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 (2<sup>nd</sup> 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 two Wells Fargo vice presidents of loan documentation provide the evidentiary foundation for establishing the mortgage lender’s right to foreclose. The affidavits sets forth both employees review of the business records maintained by the mortgagee/loan servicer; the fact that the books and records are made in the regular course of Wells Fargo’s business; that it was Wells Fargo’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, the plaintiff has provided an admissible evidentiary foundation which satisfies the business records exception to the hearsay rule with respect to the remaining issue

raised in this summary judgment application.

As 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 (2<sup>nd</sup> Dept., 2017); *Bank of New York Mellon v. Aquino*, 131 AD3d 1186, 16 NYS3d 770 (2<sup>nd</sup> Dept., 2015); *Deutsche Bank National Trust Co. v. Spanos*, 102 AD3d 909, 961 NYS2d 200 (2<sup>nd</sup> Dept., 2013)); or 2) by plaintiff's submission of sufficient proof to establish proof of mailing by the post office (*see Nationstar Mortgage LLC v. LaPorte*, 162 AD3d 784, 79 NYS3d 70 (2<sup>nd</sup> Dept., 2018); *HSBC Bank USA, N.A. v. Ozcan*, 154 AD3d 822, 64 NYS3d 38 (2<sup>nd</sup> Dept., 2017); *CitiMortgage, Inc. v. Pappas*, *supra* pg. 901; *see Wells Fargo Bank, N.A. v. Trupia*, 150 AD3d 1049, 55 NYS3d 134 (2<sup>nd</sup> 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 (2<sup>nd</sup> Dept., 2016); *Residential Holding Corp. v. Scottsdale Insurance Co.*, 286 AD2d 679, 729 NYS2d 766 (2<sup>nd</sup> 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 an "affidavit of mailing" from the plaintiff/mortgage lender's (Wells Fargo's) vice president loan documentation dated July 13, 2018 attesting to the facts underlying the mortgage lender's compliance with RPAPL 1304 statutory requirements. Specifically the Wells Fargo vice president testifies to the following:

5. In the regular performance of my job functions I have received training and have personal knowledge of Wells Fargo's standard office practice to prepare, address, mail and store letters used in its mortgage servicing business, and how to retrieve such information.

6. Based on this training and knowledge, I am familiar with Wells Fargo's standard practices and procedures used to create, mail and store data regarding the 90 day pre-foreclosure notice ("90 Day Notice") required by New York law that are designed to ensure that these letters are properly addressed, mailed and that data reflecting those events is stored in Wells Fargo's business records.

The plaintiff's representative next testifies about Wells Fargo's standard business practice and procedure for establishing an electronic file for each serviced loan, the inputting of the borrower's mailing address and property address (if different), the creation of the notice containing a list of five housing agencies serving the county where the premises are located, the creation and addressing, of the envelopes used to mail the notices, and the enclosing and sealing of those envelopes. The Wells Fargo vice president then testifies to the following:

9. I hereby certify and affirm that, in accordance with Wells Fargo's standard business practice and procedure and in compliance with RPAPL 1304, a 90 Day Notice and a current list of at least five (5) housing counseling agencies serving the county where the property is located from the most recent listing available from the Department of Financial Services were mailed to Edwin A. Montalvo by certified and first class mail, in envelopes separate from any other notice to the last known address of the borrower

at 6 Gregory Drive, Lake Ronkonkoma, NY 11779-4324, which is the residence that is the subject of the Mortgage. The 90 Day Notices were mailed on or about December 17, 2012.

10. It is Wells Fargo regular practice to enter and retain on file a copy of all 90 Day Notices, created and stored at or near the time of processing and generation by authorized persons, in the normal course of business. In this matter, copies of the aforementioned 90 Day Notices sent to Edwin A. Maldonado were entered into and retained by the system used by Wells Fargo on or about December 17, 2012. Copies of said 90 Day Notices are annexed hereto as Exhibit "A".

11. In the normal course of business, it is Wells Fargo's regular practice to process, send, and track certain notices via the TrackRight system, and for such notices Wells Fargo relies on the tracking data and other records from the TrackRight system as proof of (and to establish) compliance with the requirements of such notices, in its day-to-day operations.

12. Wells Fargo processed, sent, and tracked the 90 Day Notices annexed hereto within Exhibit "A" via the TrackRight system, in accordance with its regular practice and in its normal course of business, and Wells Fargo relies on the tracking data and other records from the TrackRight system in its day-to-day operations to confirm its compliance with the notices' requirements for this loan. Copies of the TrackRight tracking results for the mailings of the 90 Day Notices are annexed hereto as Exhibit "B".

13. Moreover, it is Wells Fargo's regular practice to retain on file a copy of all delivery receipts and envelopes returned to Wells Fargo for notices it sent.

14. In that manner, a signed certified mail receipt for the mailing of the 90 Day Notice was returned to Wells Fargo upon delivery to the Mortgaged Premises. A copy of the signed receipt is annexed hereto as Exhibit "C".

15. I hereby certify and affirm that within three business days of mailing the 90 Day Notice, Wells Fargo electronically filed notice with the Superintendent of Financial Services as required by RPAPL 1306(2) and confirmation number NYS3131621 was issued. A copy of Proof of Filing Statement issued by the New York State Department of Financial Services 90-Day Pre-Foreclosure Filings website is attached to this application as Exhibit "D".

Based upon this testimony, together with the documentary evidence submitted by the plaintiff referred to above as Exhibits "A", "B", "C" & "D" which includes copies of: 1) the 90 Day Notice served upon the defaulting mortgagor (Exhibit "A"); 2) the Trackright results confirming the first class and the certified mailing, delivery, and receipt of the signed mailing (Exhibit "B"); 3) the signed certified receipt indicating delivery by a USPS stamp dated December 21, 2012 (Exhibit "C") (confirming delivery as reflected in the Exhibit "B" TrackRight notation); and 4) the RPAPL 1306 filing statement (Exhibit "D"). Such proof provides sufficient evidence of strict compliance with RPAPL 1304 requirements (*see also Bank of America, N.A. v. Brannon*, 156 AD3d 1, 63 NYS3d 352

(1<sup>st</sup> Dept., 2017)). Defendant Montalvo's self-serving and incredible denial of service in the face of the evidence presented in the form of a signed receipt of the certified mailing containing the 90 day notice fails to provide any credible 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 (2<sup>nd</sup> Dept., 2016); *HSBC Bank v. Espinal*, 137 AD3d 1079, 28 NYS3d 107 (2<sup>nd</sup> Dept., 2016)).

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

Dated: November 22, 2019

HON. HOWARD H. HECKMAN, JR.

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J.S.C.