Bank of N.Y. Mellon v Ozen
2019 NY Slip Op 33788(U)
December 18, 2019
Supreme Court, Suffolk County
Docket Number: 17376/12
Judge: Thomas F. Whelan

[* 1]

MEMO DECISION & ORDER

INDEX No. 17376/12

SUPREME COURT - STATE OF NEW YORK
IAS PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 9/14/18
SUBMIT DATE 11/27/19
Mot. Seq. # 002 - MG
Mot. Seq. # 003 - XMD
CDISP Y____ N X

THE BANK OF NEW YORK MELLON f/k/a The Bank of New York, as Trustee for the Certificateholders of the CWALT, Inc., Alternative Loan Trust 2007-16CB Mortgage Pass-through Certificates Series 2007-16CB,

Plaintiff,

-against-

HANIFE OZEN
"JOHN DOE #1 through JOHN DOE #10", the last 10 names being fictitious and unknown to Plaintiff, the person or parties intended being the person or parties , if any, having or claiming an interest in or lien upon the mortgaged premises described in the Verified Complaint,

Defendants.

GREENSPOON MARDER, P.C.
Attys. For Plaintiff
590 Madison Ave., Ste. 1800
New York, NY 10022

PIKE, TUCH & COHEN, LLP
Attys. For Defendant
1921 Bellmore Avenue
Bellmore, NY 11710

Upon the following papers numbered 1 to 9 read on this motion to appoint a referee, among other things and cross motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers: 5-7; Opposing papers: 8-9; Reply papers ____; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#002) by the plaintiff for, among other things, summary judgment, amendment of the caption and the appointment of a referee to compute, is granted in its entirety; and it is further

ORDERED that the cross motion (#003) by defendant, Hanife Ozen, for an order to dismiss for failure to demonstrate strict compliance with RPAPL §1306 is denied; and it is further

ORDERED that the proposed Order submitted by plaintiff, as modified by the court, is signed simultaneously herewith; 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 §202.5-b(h)(2).

This is an action to foreclose a mortgage on residential real property situated in West Babylon. In essence, on March 19, 2007, defendant Hanife Ozen borrowed $388,000.00 from plaintiff's predecessor in interest and executed a note and a mortgage. The defendant ceased making monthly payments as of August 1, 2008. This action was thereafter commenced by filing on June 7, 2012. Defendant interposed an answer containing five affirmative defenses. On May 24, 2018, plaintiff filed the instant motion (#002) seeking an order granting it summary judgment as against the answering defendant, default judgments against all non-appearing defendants, amendment of the caption, and the appointment of a referee to compute. The defendant cross moves to dismiss for failure to demonstrate strict compliance with RPAPL §1306, as set forth in the cross motion.

Although fully briefed as of October 17, 2018, the matter languished within the Court's system until being reassigned to this Part pursuant to Administrative Order No. 86-19, dated November 6, 2019.

Remarkably, this case has been pending on the trial calendar since the filing of the note of issue on November 2, 2016. While the matter appeared on the CCP calendar on May 31, 2017, it was remanded back to the IAS Part for trial. No trial has been held. Plaintiff timely made this motion before the IAS Part, pursuant to the Order of June 19, 2018, however, in this pre-E-filing case, the motion was inadvertently mailed to the defendant and not counsel. Thereafter, the parties entered into a stipulation, dated September 6, 2018, prior to the return date of the motion, to extend defendant's time to submit opposition for an additional month, until October 10, 2018. The Court finds that the non-jurisdictional defect of improper initial service has been mitigated by the stipulation and the adjournment and the motions of the parties in addressing the summary judgment motion on the merits.

The plaintiff addresses its burden of proof in the moving papers on this summary judgment motion, and refutes the ten affirmative defenses of the answer. On its initial motion, the plaintiff

here submitted the affidavit of Wilma Colon, a Litigation FC Specialist of Shellpoint Mortgage Servicing ("Shellpoint"), plaintiff's loan servicer, sworn to on August 13, 2018. Ms. Colon notes that she has personal knowledge of Shellpoint's record making practices, avers that the records are made at or near the time of the event by persons with knowledge, and are kept in the course of its ordinarily conducted business. Importantly, she states:

> 5. To the extent that the business records of the Loan in this matter was created by a prior servicer, the prior servicer's records concerning the Loan are now part Shellpoint's business records. Shellpoint maintains quality control and verification procedures as part of the boarding process to ensure the accuracy of the boarded records. It is the regular practice of Shellpoint to integrate prior servicer's records in Shellpoint's business records, and to rely upon the accuracy of those boarded records in providing its loan service functions.

As such, Ms. Colon notes that, to the extent any records were created by a previous servicer, those records have been verified for accuracy and incorporated into that of Shellpoint. Finally, she avers that it is the business practice of plaintiff to maintain such records and to rely on such in the ordinary course of its business. Such satisfies the dictates of ***Bank of New York Mellon v Gordon***, 171 AD3d 197, 205, 97 NYS3d 283 (2d Dept 2019) (incorporate and rely upon prior servicer's records; *see also* ***JPMorgan Chase Bank, Nat. Assn. v Escobar***, __ AD3d __, 2019 WL 5950745 [2d Dept 2019]).

Here, the plaintiff's moving papers demonstrate, by due proof in admissible form, the plaintiff's entitlement to summary judgment. In opposition, defendant only submits an affirmation of counsel. The Court notes that the attorney's affirmation is not based upon personal knowledge of the facts and, as such, the submission is without evidentiary value and is insufficient to raise a triable issue of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; *see also* ***Bank of New York Mellon v Aiello***, 164 AD3d 632, 83 NYS3d 135 [2d Dept 2018]). As such, the affirmation lacks evidentiary value and is rejected.

In any event, of the five affirmative defenses, defendant only raises two in opposition - plaintiff's compliance with RPAPL §§1304 and 1306. Therefore, the three other affirmative defenses, which were abandoned, are dismissed (*see* ***JPMorgan Chase Bank, Natl. Assn. v Cao***, 160 AD3d 821, 76 NYS3d 82 [2d Dept 2018]; ***New York Commercial Bank v J. Realty F Rockaway, Ltd.***, 108 AD3d 756, 969 NYS2d 796 [2d Dept 2013]; ***Starkman v City of Long Beach***, 106 AD3d 1076, 965 NYS2d 609 [2d Dept 2013]).

As to RPAPL §1306, the only claim raised in the notice of cross motion, the Proof of Filing Statement with the New York State Department of Financial Services satisfies the statute.

The defendant's contentions regarding plaintiff's mailing of the notice pursuant to RPAPL §1304 are also unavailing. Initially, the Court notes that the defendant does not submit an affidavit denying receipt of the notice and counsel merely alleges plaintiff's "non compliance" in a conclusory manner (*see* ***Citibank, N.A. v Conti–Scheurer***, 172 AD3d 17, 98 NYS3d 273 [2d Dept 2019]). In fact, the business records demonstrates that the defendant actually *received and signed for* the §1304 notice, on January 23, 2012, as set forth on the postal return receipt certificate.

The Court noted that the legislative intent behind the Home Equity Theft Prevention Act (Real Property Law §265–a, or "HETPA"), through which RPAPL §1304 was enacted, was to provide greater protections to borrowers facing foreclosure (*see* ***First Natl. Bank of Chicago v Silver***, 73 AD3d 162, 165 [2d Dept 2010], *citing* Senate Introducer Mem. in Support, Bill Jacket, L. 2006, ch. 308, at 7–9). RPAPL §1304 was thereafter enacted "to aid the homeowner in an attempt to avoid litigation, and to facilitate communication between distressed homeowners and lenders and/or servicers" (***HSBC Bank USA, Nat. Assn. v Ozcan,*** 154 AD3d 822, 825, 64 NYS3d 38 [2d Dept 2017], *citing* Senate Introducer Mem. in Support, Bill Jacket L. 2008, ch. 472, § 2; ***Aurora Loan Services, LLC v Weisblum***, 85 AD3d 95, *supra*). Specifically, "[t]he bill sponsored sought 'to bridge that communication gap in order to facilitate a resolution that avoids foreclosure' by providing a pre-foreclosure notice advising the borrower of 'housing counseling services available in the borrower's area' and an 'additional period of time ... to work on a resolution'" (***Aurora Loan Services, LLC v Weisblum***, 85 AD3d at 107–08, *supra, citing* Senate Introducer Mem. in Support, Bill Jacket, L. 2008, ch. 472, at 10).

To achieve this end, the statute requires that the lender/servicer mail a notice containing specific, mandatory language to the borrower at least 90 days prior to commencement of an anticipated foreclosure filing (*see* RPAPL §1304[1]). The content requirements of the notice support the "underlying purpose of HETPA to afford greater protections to homeowners confronted with foreclosure" (***Aurora Loan Services, LLC v Weisblum***, 85 AD3d 95, 103, *supra*, *citing* ***First Natl. Bank of Chicago v Silver***, 73 AD3d 162, 165, 899 NYS2d 256 [2d Dept 2010]). The statute further provides that the mailing should take place "in a separate envelope from any other mailing or notice" (RPAPL §1304[2]). If the lender/servicer knows that the borrower has limited English proficiency, the notice "shall be in the borrower's native language (or a language in which the borrower is proficient), provided that the language is one of the six most common non-English languages spoken by individuals with limited English proficiency in the state of New York" (RPAPL §1304[5]).

Here, the business records demonstrate that the defendant actually *received* the §1304 notice, that is, proof of actual mailing. With the proof of actual mailing, the legislative purpose of RPAPL §1304 has been satisfied. The statutory opportunity to "bridge the communication gap" between the lender and the borrower has been fulfilled. To argue to the contrary is to read an absurdity into the statute.

Nevertheless, the plaintiff here has demonstrated proper mailing of the notice. While an affidavit of service is the preferred demonstration of mailing, "[t]here is no requirement that a plaintiff in a foreclosure action rely on any 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" (***Aurora Loan Services, LLC v Vrionedes***, 167 AD3d 829, 832, 91 NYS3d 150 [2d Dept 2018], *citing* ***Citigroup v Kopelowitz***, 147 AD3d 1014, 1015, 48 NYS3d 223; *see also* ***HSBC Bank USA, N.A. v Ozcan***, (154 AD2d 822, 826, 64 NYS3d 38 [2d Dept 2017]). A foreclosure plaintiff or its servicer can demonstrate mailing by providing proof of actual mailing or a description of the sender's office practice and procedure for mailing (*see* ***Citibank, N.A. v Wood***, 150 AD3d 813, 55 NYS3d 109 [2d Dept 2017]). Thus, due proof of the mailing of the notice can be established by submission of an affidavit of service (*see* ***Investors Sav. Bank v Salas***, 152 AD3d 752, 58 NYS3d 600 [2d Dept 2017]; ***Bank of NY Mellon v Aquino***, 131 AD3d 1186, 16 NYS3d 770 [2d Dept 2015]; ***Emigrant Mtge. Co., Inc. v Persad***, 117 AD3d 676, 985 NYS2d 608 [2d Dept 2014]); an affidavit of mailing (*see* ***JPMorgan Chase Bank, NA v Schott***, 130 AD3d 875, 15 NYS3d 359 [2d Dept 2015]; ***Wells Fargo v Moza***, 129 AD3d 946, 13 NYS3d 127 [2d Dept 2015]) or through "proof of standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure" (***Citibank, N.A. v Conti-Scheurer***, 172 AD3d 17, 21, 98 NYS3d 273 [2d Dept 2019] [citations omitted]).

Here, Ms. Colon annexed copies of the notice that shows the appropriate postal markings as well as the date. Likewise, Ms. Colon previously avers as to the reliability of the mailing of the RPAPL §1304 notices to the defendant in this case was completed in accordance with such regular practices, by certified and regular mail, on January 17, 2012, and attaches the same business records to demonstrate the mailing. Finally, plaintiff submits the Proof of Filing Statement to the New York State Banking Department pursuant to RPAPL §1306, which is offered as proof to the state agency that the mailing occurred on January 17, 2012, pursuant to the Step One Filing requirement.

In accordance with the above, Ms. Colon's affidavit adequately sets forth the basis of her knowledge and establishes the admissibility of the documents appended to the affidavit as business records and satisfies the admissibility requirements of CPLR §4518(a) (see ***Bank of N.Y. Mellon v Gordon,*** 171 AD3d at 197, *supra*, ***Nationstar Mtge., LLC v LaPorte***, 162 AD3d at 784, *supra*; ***HSBC Bank USA v Ozcan*** 154 AD2d at 822). In opposition, defendant fails to raise a triable issue of fact.

The plaintiff's moving papers have established all of the elements necessary for the fixation of the remaining defendants' defaults in answering and the appointment of a referee to compute amounts due under the subject note and mortgage as contemplated by RPAPL §1321 (*see* CPLR §3215; RPAPL §1321; ***Todd v Green***, 122 AD3d 831, 832, 997 NYS2d 155 [2d Dept 2014]; ***US Bank v Razon***, 115 AD3d 739, 740, 981 NYS2d 583 [2d Dept 2014]). The moving papers further established the plaintiff's entitlement to an order amending the caption (*see* CPLR §1024; ***Deutsche***

Bank Natl. Trust Co. v Islar, 122 AD3d 566, 996 NYS2d 130 [2d Dept 2014]; ***Flagstar Bank v Bellafiore***, 94 AD3d at 1044, 1046, 943 NYS2d 551, [2d Dept 2012]; ***Neighborhood Hous. Servs. of NY City, Inc. v Meltzer***, 67 AD3d 872, 873-874 [2009]).

Accordingly, plaintiff's motion (#002) is granted and defendant's cross motion (#003) is denied. The proposed order of reference, as modified by the court, has been signed simultaneously with this memorandum decision and order.

DATED: 12/18/19

THOMAS F. WHELAN, J.S.C.