

**Federal Mtge. Assn. v Roth**

2021 NY Slip Op 32414(U)

November 15, 2021

Supreme Court, New York County

Docket Number: 510301/14

Judge: Karen B. Rothenberg

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on November 3, 2014 by plaintiff which had possession of the note prior to the time of commencement; and (4) the Roths made one payment on the loan which was subsequently reversed due to insufficient funds, and no other payments have been made.

The issues presented for determination at trial were ultimately limited to those regarding the mailings required by RPAPL 1304 and the sufficiency of the content of the notices. The plaintiff called Jamar Harris and Marilyn Scibetta as witnesses. The defendant did not call any witnesses to testify.

*Jamar Harris*

Jamar Harris testified that he is a Default Servicing Officer employed by Caliber Home Loans which is a loan originator and servicer. Through Mr. Harris' testimony the CEMA, which indicates the original loan of \$384,900 [plaintiff's 1], the consolidated note and mortgage [plaintiff's 2], a power of attorney authorizing Caliber to service the loan [plaintiff's 3], and an assignment of this loan [plaintiff's 4] were admitted into evidence. Mr. Harris testified that he has been trained in the boarding process, which is the process by which Caliber obtains and uploads the prior servicer's records. It is a process generally relied upon by the industry and is a formal documented process. Mr. Harris then qualified plaintiff's 8 through 12. These exhibits included: the mortgage foreclosure compliance documents, the payment history, the account summary, the default notice issued September 26, 2008, the 90-day notices dated July 19, 2014, the green card tracking receipts for their mailing, the proof of filing with NYS Dept of Financial Services, and the Seterus letter log. All of these documents were incorporated into Caliber's records when the loan was transferred in 2019 in the regular course of their business.

On cross-examination, Mr. Harris conceded that the 90-day notice does not include an affidavit of the actual posting of the mail nor were there signatures on the green cards which did contain the certified mail numbers. Proof of Fannie Mae's possession of the note was established as a copy of the note which was attached to the complaint at the time the action was commenced.

*Marilyn Sciabetta*

Marilyn Sciabetta testified that she is employed by JP Morgan Chase, NA as a mediation representative. Her duties include attending mediations, reviewing records and testifying at trials and hearings. She qualified plaintiff's 13, the Purchase and Assumption agreement between FDIC and JP Morgan Chase at the time JP Morgan Chase assumed the assets of WaMu on September 25, 2008. She also qualified plaintiff's 15, which is the payment history of the loan, and which documents that this loan defaulted on May 1, 2008.

After the witness' testimony, plaintiff rested, and defendant moved for a directed verdict on the issue of lack of proof of mailing pursuant to RPAPL 1304, and the

insufficiency of the content of the 90-day notice as it appears to only apply to the county of Manhattan and not to the region where the property is located, to wit, Brooklyn.

### *Discussion*

In order to establish its prima facie showing to foreclose the mortgage in this matter, the plaintiff was required to demonstrate, by a fair preponderance of the evidence, the existence of the mortgage, the note, and the Roths' default on their payment obligations (*see One West Bank, FSB v Rosenberg*, 189 AD3d 1600 [2d Dept 2020]). Here, the testimony and evidence admitted at trial established that plaintiff was in possession of the CEMA, note, and mortgage at the time the action was commenced, and that the Roths were in default of paying the mortgage loan as of May 2008.

Plaintiff was also required to demonstrate, by a fair preponderance of the evidence, its compliance with RPAPL 1304 (*see Bank of America, N.A. v Bittle*, 168 AD3d 656 [2d Dept 2019]). RPAPL 1304(1), which applies to residential foreclosure actions, "requires that at least 90 days before a lender, an assignee, or a mortgage loan servicer commences an action to foreclose the mortgage on a home loan as defined in the statute, such lender, assignee, or mortgage loan servicer must give notice to the borrower" (*Bank of N.Y. Mellon v Porfert* 187 AD3d 1110, 1111-1112 [2d Dept. 2020]). The statute sets forth the required content of the notice and provides that the notice must be sent by registered or certified mail and also by first-class mail to the last known address of the borrower (*see RPAPL 1304[2]; 21<sup>st</sup> Mortgage Corp., v Broderick*, 191 Ad3D 744 [2D Dept. 2021]). "Strict compliance with RPAPL 1304 notice to the borrower or borrowers is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition" (*Caliber Home Loans, Inc. v Squaw*, 190 AD3d 926, 927 [2d Dept. 2021]).

Here, Mr. Harris's testimony as to the procedures Caliber followed in the regular course of business when acquiring loans from the prior servicer, together with the exhibits admitted into evidence as business records, including the incorporated records of the prior servicer containing copies of the 90-day notices addressed to the Roths, the time and date stamped letter log reflecting when the 90-day notices were mailed, the green card tracking receipts, and the proof of filing with the NYS Department of Financial Services, established by a fair preponderance of the evidence that the notices were sent by regular first-class mail and by certified mail to defendants at the subject premises pursuant to RPAPL 1304 (*see JPMorgan Chase Bank, NA v Skluth*, 177 AD3d 592, 594 [2d Dept 2019]).

Moreover, the plaintiff's evidence demonstrated that the contents of the 90-day notices complied with the version of RPAPL 1304(2) that was in effect at the relevant time as it listed five agencies in the region where the Roths resided (*see L 2009, ch 507, § 1-a* [eff Jan 14, 2010; *Federal National Mortgage Assoc. v Bailey*, 179 AD3d 774 [2d Dept 2020])). It is of no moment that three of the five agencies in the notices were located in

Manhattan instead of Brooklyn. In *Federal National Mortgage Assoc. v Bailey, supra*, the Appellate Division, Second Department, in overturning the lower court's dismissal of a foreclosure action against a Brooklyn resident, determined that the list of five agencies included in that plaintiff's 90-day notice, which is the same list of agencies provided in this matter, complied with RPAPL 1304 as the agencies were located in the New York City area, which was the region where the plaintiff resided. Thus, the Roths failed to raise any legitimate challenge to the adequacy of the content of the RPAPL 1304 notices.

Finally, the testimony and evidence admitted at trial also establish that the RPAPL 1304 notices were timely filed with the Superintendent of Banks (*see HSBC Bank USA, NA v Bermudez*, 175 AD3d 667 [2d Dept 2019]).

Therefore, plaintiff established, by a fair preponderance of the credible evidence, its entitlement to a judgment herein. The Roths failed to rebut the plaintiff's showing.

Accordingly, it is

ORDERED that the plaintiff is granted judgment on its complaint and the Roths' answer including all the affirmative defenses raised therein is stricken; and it is further

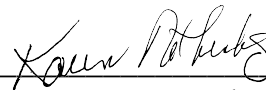
ORDERED that plaintiff's application to amend the caption to substitute U.S. Bank Trust as Trustee for LSF11 Master Participation Trust for Federal National Mortgage Association as plaintiff is also granted; and it is further

ORDERED that the matter shall be referred to a referee to compute the amount due plaintiff pursuant to RPAPL 1321. Plaintiff is directed to submit to the court a proposed order of reference for the court's review and signature.

This constitutes the judgment, decision and order of the Court after trial.

Dated: November 15, 2021

ENTER,



Hon. Karen B. Rothenberg  
J.S.C