

<b>HSBC Bank USA, N.A. v Davis</b>
2016 NY Slip Op 32205(U)
September 12, 2016
Supreme Court, Suffolk County
Docket Number: 24505-2012
Judge: Howard H. Heckman, Jr.
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SUPREME COURT - STATE OF NEW YORK  
CALENDAR CONTROL PART 18 - SUFFOLK COUNTY

**COPY**

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

INDEX NO.: 24505-2012  
MOTION DATE: 02/20/2015  
MOTION SEQ. NO.: 001 MG  
002 MD

-----X  
HSBC BANK USA, N.A.,

Plaintiffs,

-against-

**PLAINTIFFS' ATTORNEY:**  
STERN & EISENBERG, PC  
4976 TRANSIT RD., STE. 2  
DEPEW, NY 14043

MICHAEL P. DAVIS, ROSALIND DAVIS,

Defendants.

-----X

**DEFENDANTS' PRO SE:**  
MICHAEL & ROSALIND DAVIS  
10 HIGHWOOD CT.  
ST. JAMES, NY 11780

Upon the following papers numbered 1 to 20 read on this motion; Notice of Motion/ Order to Show Cause and supporting papers 1-12; Notice of Cross Motion and supporting papers 13-17; Answering Affidavits and supporting papers\_\_\_; Replying Affidavits and supporting papers 18-20; Other\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion by plaintiff HSBC Bank USA, N.A., seeking an order: 1) granting summary judgment striking the answer of the defendants Michael P. Davis and Rosalind Davis; 2) discontinuing the action against defendants identified as "John Doe"; 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 defendants Michael P. Davis and Rosalind Davis seeking an order denying plaintiff's motion and compelling additional discovery 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 consolidated mortgage in the sum of \$300,000.00 executed by the defendants Michael P. Davis and Rosalind Davis on February 7, 2002 in favor of HSBC Mortgage Corporation (USA). On the same date the defendants executed a promissory note

promising to re-pay the entire amount of the indebtedness to the mortgage lender. By assignment dated January 5, 2012, HSBC Mortgage Corporation (USA) assigned the mortgage to plaintiff HSBC Bank USA, N.A. Plaintiff claims that the defendants have defaulted in making timely monthly mortgage payments since August 1, 2011. Plaintiff's motion seeks an order granting summary judgment striking defendants' answer and for the appointment of a referee.

In opposition to the motion, the defendants submit an affidavit from defendant Michael P. Davis and an affirmation of counsel, and claim that they are entitled to conduct discovery to obtain original documents and that plaintiff's failure to provide adequate responses to their discovery demands mandates that plaintiff's summary judgment motion be denied. Defendants claim that plaintiff does not have standing to maintain this action since there is no relevant, admissible evidence submitted to establish when, where, how or why the plaintiff came into physical possession of the note and since the assignment of the mortgage by MERS was invalid. Defendants also claim that the mortgage lender failed to negotiate a modification of the loan in good faith and that HSBC is guilty of predatory lending practices. Finally defendants argue that the plaintiff has failed to provide sufficient evidence of compliance with the 90 day notice provision and that plaintiff is responsible for defendants' default by arbitrarily terminating Davis's separate line of credit thereby causing significant harm to the defendant Davis's business operations.

In reply, the plaintiff submits an attorney's affirmation and argues that no further discovery is required since the evidentiary proof submitted in support of the motion proves the bank's entitlement to foreclose the mortgage. Plaintiff claims that, in addition to the undisputed evidence showing that the defendants have defaulted in making required payments under the terms of the note and mortgage, sufficient proof is submitted to prove that: 1) the original note was lost; 2) plaintiff was the actual owner of the lost note (including facts surrounding its loss, and describing the terms of the note); and 3) the note, indorsed in blank, was in plaintiff's possession prior to commencement of the action thereby establishing plaintiff's standing. Plaintiff claims that the two affidavits submitted from the Vice President of the mortgage loan servicer and from an HSBC assistant vice president ("Lost Note Affidavit") supply the proof required to establish these three elements. Plaintiff claims that records maintained in the ordinary course of business can be relied upon by the mortgage servicing and bank employees as adequate evidentiary proof in support of the bank's claims. Plaintiff asserts that the admissible evidence submitted proves that HSBC had standing to maintain this action as the holder of the note and mortgage by demonstrating that the note was in the bank's possession prior to April 12, 2012, which was three months prior to commencement of the action. Plaintiff argues that no further details are required once proof has been submitted that the lender was in physical possession of the note and therefore plaintiff is entitled to an award of summary judgment based upon the defendant's continuing default in making timely monthly mortgage payments. Plaintiff claims that there is no credible evidence submitted to support defendants' claims of predatory lending practices and the bank's alleged failure to negotiate in good faith. Plaintiff also claims that sufficient proof is submitted to prove that the 90 day notices were served in compliance with RPAPL 1304 and contends that no viable defense is asserted based upon claims that the plaintiff caused defendants' default by terminating Davis's separate line of credit.

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. Eraboba*, 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)). 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 (2<sup>nd</sup> Dept., 2015); *HSBC Bank USA, N.A. v. Baptiste*, 128 AD3d 77, 10 NYS3d 255 (2<sup>nd</sup> 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 (2<sup>nd</sup> 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 (2<sup>nd</sup> Dept., 2015); *U.S. Bank v. Guy*, 125 AD3d 845, 5 NYS3d 116 (2<sup>nd</sup> Dept., 2015)).

Proof that the plaintiff was in possession of the note on a day certain or an "on or before" date (*Wells Fargo Bank, N.A. v. Joseph*, 137 AD3d 896, 2016 NY Slip Op 01661 (2<sup>nd</sup> Dept., 2016)) prior to the commencement of the action is sufficient to establish, prima facie, the plaintiff's possession of the requisite standing to prosecute its claims for foreclosure and sale (*Aurora Loan Servs., LLC v. Taylor, supra.*; *Loancare v. Firshing, supra.*; *Emigrant Bank v. Larizza, supra.*). Delivery of the note to a custodial agent of the plaintiff on a date prior to the commencement of the action will suffice to establish the standing of a foreclosing plaintiff under the foregoing rule (*Deutsche Bank National Trust Co. v. Whalen*, 107 AD3d 91, 969 NYS2d 82 (2<sup>nd</sup> Dept., 2013); *HSBC Bank USA, N.A. v. Sage*, 112 AD3d 1126, 977 NYS2d 446 (3<sup>rd</sup> Dept., 2013)). A plaintiff's attachment of a duly indorsed mortgage 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 commencement of the action, constitutes due proof of the plaintiff's standing (*Deutsche Bank National Trust Company v. Leigh*, 137 AD3d 841, 28 NYS3d 86 (2<sup>nd</sup> Dept., 2016); *FNMA v. Yakaputz II, Inc.*, 141 AD3d 506, 2016 NY Slip Op 05358 (2<sup>nd</sup> Dept., 2016); *Nationstar Mortgage, LLC v. Catizone*, 127 AD3d 1151, 9 NYS3d 315 (2<sup>nd</sup> Dept., 2015)).

The record shows that the original promissory signed by the Davis defendants was lost by the mortgage lender. An affidavit from an HSBC assistant vice president states that the loss was discovered on or about April 12, 2012 after a physical search was conducted in the bank's files and storage facilities. In his affidavit the bank employee goes on to state that an imaged copy of the note was saved in the bank's imaging system and the plaintiff has submitted a copy of the five page "Fixed/Adjustable Rate Note" which has an indorsement in blank signed by a vice president of the original mortgagee, HSBC Mortgage Corporation (USA).

Section 3-804 of the Uniform Commercial Code entitled “Lost, Destroyed or Stolen Instruments” provides that “the owner of an instrument which is lost, whether by destruction, theft or otherwise, may maintain an action in his own name and recover from any party liable thereon upon due proof of his ownership, the facts which prevent his production of the instrument and its terms.” Based upon the proof submitted, the plaintiff has demonstrated the required elements of loss, ownership, the facts preventing production of the original note and the note’s terms sufficient to establish the plaintiff’s statutory UCC 3-804 standing. Moreover, a review of the additional evidence submitted by the plaintiff, in the form of the affidavit from the mortgage servicing representative (satisfying the business records exception to the hearsay rule) together with the documentary proof, provides sufficient proof to confirm that the bank had standing, as the holder of the promissory note prior to commencement of the action. Plaintiff’s proof confirms that the original promissory note, indorsed in blank, was in the bank’s possession prior to April 12, 2012– which is the date that the bank discovered its loss. Since this action was commenced on August 10, 2012 (the date of filing of the summons and complaint with the County Clerk) HSBC has established proof of standing to maintain this foreclosure action through possession and ownership of the note (indorsed in blank) (*see Aurora Loan Services av. Taylor, supra.; CitiMortgage v. Klein*, NY Slip Op 04687 (2<sup>nd</sup> Dept., 2016)).

Proper service of an RPAPL 1304 notice on the borrower(s) is a condition 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.

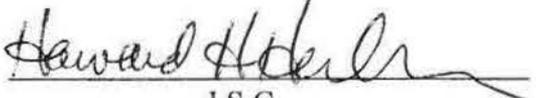
Plaintiff has submitted sufficient proof to establish that notice was given to the defendants in compliance with the requirements of RPAPL 1304. The plaintiff’s proof consists of the affidavit submitted by the bank’s mortgage service representative stating that service was made in compliance with statutory requirements on August 10, 2011, which was more than 90 days prior to commencing this action, together with copies of the 90 day notice and a copy the “Proof of Filing Statement” filed with New York State Banking Department pursuant to RPAPL 1306 to confirm within three days of mailing that the 90 pre-foreclosure notice was served upon these defendants.

The defendant’s remaining series of contentions concerning the defendants’ right to conduct additional discovery, plaintiff’s failure to negotiate in good faith, defendants’ claims of predatory lending practices, defendants’ need for an accounting, an invalid MERS assignment, and plaintiff’s alleged responsibility for causing defendants’ default by terminating a separate line of credit maintained by the defaulting borrower are equally without merit and fail to raise issues of fact sufficient to defeat plaintiff’s summary judgment motion (*Seaway Capital Corp. v. 500 Sterling Realty Corp.*, 94 AD3d 856, 941 NYS2d 871 (2<sup>nd</sup> Dept., 2012); *Sasson v. Setina Mfg. Co., Inc.*, 26 AD3d 487, 810 NYS2d 500 (2<sup>nd</sup> Dept., 2006); *Wells Fargo Bank v. Eroboho*, 127 AD3d 1176, 9 NYS3d 312 (2<sup>nd</sup> Dept., 2015))

Finally, the bank has shown that the defendants have defaulted under the terms of the February 7, 2002 consolidated mortgage agreement by failing to make timely monthly mortgage

payments since August 1, 2011. The bank, having proven entitlement to summary judgment, it is incumbent upon the defendants to submit relevant, evidentiary proof sufficiently substantive to raise genuine issues of fact concerning why the lender is not entitled to foreclose the mortgage. Defendants have wholly failed to do so. Accordingly, the defendants' cross motion is denied and the plaintiff's motion seeking an order granting summary judgment and for the appointment of a referee must be granted. The proposed order for the appointment of a referee has been signed simultaneously with the execution of this order.

Dated: September 12, 2016

  
J.S.C.

**Hon. Howard H. Heckman Jr.**