

<b>Citibank, N.A. v Wood</b>
2014 NY Slip Op 31729(U)
June 30, 2014
Sup Ct, Suffolk County
Docket Number: 10-15428
Judge: Daniel Martin
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

**COPY**  
FOR COURT ORDER

INDEX No. 10-15428

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 9 - SUFFOLK COUNTY

**P R E S E N T :**

Hon. DANIEL MARTIN  
Justice of the Supreme Court

MOTION DATE 10-29-13  
ADJ. DATE #001 11-19-13  
ADJ. DATE #002 12-17-13  
Mot. Seq. # 001 - MG  
                  # 002 - MD

-----X

CITIBANK, N.A., AS TRUSTEE FOR GSA  
HOME EQUITY TRUST 2007-10  
3476 Stateview Boulevard  
Ft. Mill, SC 29715,

Plaintiff,

- against -

JOSEPH WOOD, COVE DELI, MORTGAGE  
ELECTRONIC REGISTRATION SYSTEMS,  
INC., AS NOMINEE FOR CITIBANK, N.A.,  
NEW YORK STATE DEPARTMENT OF  
TAXATION AND FINANCE, PEOPLE OF THE  
STATE OF NEW YORK, SOUTH FORK DELI,  
SUFFOLK COUNTY CHILD SUPPORT  
ENFORCEMENT BUREAU OBO JEAN A.  
WOODS, THERESA BRAND,

JOHN DOE (Said name being fictitious, it being  
the intention of Plaintiff to designate any and all  
occupants of premises being foreclosed herein, and  
any parties, corporations or entities, if any, having  
or claiming an interest or lien upon the mortgaged  
premises.)

Defendants.

-----X

HOGAN LOVELLS US LLP  
Attorney for Plaintiff  
875 Third Avenue  
New York, New York 10022

KOZENY, MCCUBBIN & KATZ, LLP  
Attorney for Plaintiff (Co-counsel)  
395 N. Service Road, Suite 401  
Melville, New York 11747

THE RANALLI LAW GROUP PLLC  
Attorney for Defendant Joseph Wood  
742 Veterans Memorial Highway  
Hauppauge, New York 11788

Upon the following papers numbered 1 to 71 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 22; 38 - 53 ; Notice of Cross Motion and supporting papers       ; Answering Affidavits and supporting papers 23 - 30; 54 - 60; 61 - 68 ; Replying Affidavits and supporting papers 31 - 37; 69 - 71 ; Other       ; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion by the plaintiff for summary judgment and the motion by defendant Joseph Wood for summary judgment are consolidated for the purposes of this determination; and it is further

**ORDERED** that the motion by the plaintiff for an order pursuant to CPLR 3212 granting summary judgment in its favor against the defendant Joseph Wood, for an order dismissing the answer of defendant Joseph Wood, for an order fixing the defaults of the remaining non-appearing defendants, for an order granting permission to treat defendant Joseph Wood’s answer as a limited notice of appearance entitling his attorney to receive, without prior notice, a copy of the notice of sale, notice of discontinuance, and notice of surplus monies, for leave to amend the caption of this action pursuant to CPLR 3025 (b) to substitute Catherine Wood, Brian Danuccio and Kristy Taylor in place of defendant “John Doe,” and for an order of reference appointing a referee to compute the sum due and owing plaintiff pursuant to Real Property Actions and Proceedings Law § 1321, is granted; and it is further

**ORDERED** that the motion by defendant Joseph Wood for summary judgment dismissing the complaint is denied; and it is further

**ORDERED** that the caption is hereby amended by substituting defendants Catherine Wood, Brian Danuccio and Kristy Taylor as “John Doe”; and it is further

**ORDERED** that plaintiff is directed to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court; and it is further

**ORDERED** that the caption of this action hereinafter appear as follows:

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SUFFOLK**

-----X  
CITIBANK, N.A., AS TRUSTEE FOR GSAA  
HOME EQUITY TRUST 2007-10  
3476 Stateview Boulevard  
Ft. Mill, SC 29715,

Plaintiff,

- against -

JOSEPH WOOD, COVE DELI, MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC., AS NOMINEE FOR  
CITIBANK, N.A., NEW YORK STATE DEPARTMENT OF  
TAXATION AND FINANCE, PEOPLE OF THE STATE OF  
NEW YORK, SOUTH FORK DELI, SUFFOLK COUNTY CHILD  
SUPPORT ENFORCEMENT BUREAU OBO JEAN A. WOODS,  
THERESA BRAND, CATHERINE WOOD, BRIAN DANUCCIO,  
and KRISTY TAYLOR,

Defendants.

-----X

In this residential foreclosure action, the plaintiff seeks to foreclose a mortgage on the premises known as 93 James Hawkins Road, Moriches, New York. On April 27, 2007, Joseph Wood executed a promissory note agreeing to pay the principal sum of \$535,600.00 in return for a loan received from Wells Fargo Bank, N.A. To secure said note, Wood executed a mortgage on the same date on the subject property. The mortgage was recorded on June 1, 2007 in the Suffolk County Clerk's Office. Wood defaulted on his monthly payment of principal and interest on October 1, 2009 and each month thereafter. Thereafter, Wells Fargo Bank, N.A. sent Wood a letter of default. Wood failed to cure his default. By assignment dated February 1, 2010 and recorded in the Suffolk County Clerk's office on March 2, 2010, the mortgage and note were assigned by Wells Fargo Bank, N.A. to the plaintiff.

The plaintiff commenced the instant action on April 29, 2010. Thereafter, Wood served an answer. The plaintiff now moves for, *inter alia*, summary judgment and Wood moves for summary judgment dismissing the complaint.

In support of the plaintiff's motion, the plaintiff submits, among other things, the note and mortgage, the notice of default letter, the summons and complaint, a notice pursuant to RPAPL § 1304, affidavits of service for the summons and complaint, an affidavit of service for the instant summary judgment motion upon defendant's counsel, an affidavit of merit, and a proposed order appointing a referee to compute. The Court notes that a copy of the notice pursuant to RPAPL § 1303 is annexed to defendant Wood's opposition papers.

“[I]n an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default” (*Republic Natl. Bank of N.Y. v O’Kane*, 308 AD2d 482, 482, 764 NYS2d 635 [2d Dept 2003]; *see Argent Mtge. Co., LLC v Mentasana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Here, the plaintiff produced the note and mortgage executed by the mortgagor, as well as evidence of nonpayment thereby establishing its prima facie entitlement to judgment as a matter of law (*see Argent Mtge. Co., LLC v Mentasana, supra; Republic Natl. Bank of N.Y. v O’Kane, supra*).

Since the plaintiff made a prima facie showing of entitlement to judgment as a matter of law, it was incumbent on the defendant “to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff” (*see Cochran Inv. Co., Inc. v Jackson*, 38 AD3d 704, 834 NYS2d 198, 199 [2d Dept 2007] *quoting Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 467, 664 NYS2d 345 [2d Dept 1997]).

In opposition and in support of Wood's motion for summary judgment, Wood asserts that the plaintiff has failed to establish standing since it has not submitted sufficient evidence that it has physical custody of the note. In addition, Wood asserts that the plaintiff failed to properly comply with the requirements of Real Property Actions and Proceedings Law §§ 1303 and 1304. In support of his motion, Wood submits, *inter alia*, copies of the purported notices pursuant to RPAPL 1303 and 1304 which were allegedly served on him, his own affidavit as well as an affidavit from Celeste Martinez, the president of 742 Vets Hwy Tax Grievance & Audit Co., LLC.

In his affidavit, Wood asserts that he did not receive the notices pursuant to RPAPL 1303 and 1304 and that the purported notices which the plaintiff allegedly served on him were not in compliance with the statutes. In addition, he asserts that the plaintiff lacks standing since it failed to establish that it is in physical possession of the note.

Ms. Martinez states in her affidavit that she conducted a “forensic review” of the foreclosure file in the instant case, including the RPAPL 1303 and RPAPL 1304 notices. Ms. Martinez asserts that the title of the notice (“HELP FOR HOMEOWNERS”) is halfway down the page and is not in the required 20-point type. The Court notes that the annexed notice begins halfway down the page and is two pages long. While the title appears to be in bold, the Court is unable to discern whether it is in 20-point type. Ms. Martinez further states that she reviewed other files for other clients who had retained the plaintiff’s former attorney and found that the plaintiff’s former attorney filed other RPAPL 1303 notices with the clerk of the court which were similar to this one, but submitted different RPAPL 1303 notices, which were in compliance with the type size and one-page requirements set forth in RPAPL 1303, when moving for summary judgment. Ms. Martinez states that the RPAPL 1304 notice also does not comply with the statute since it is not in the required 14-point type and does not state how it was mailed.

Pursuant to RPAPL 1303 (1), in a residential foreclosure action, the foreclosing party must serve, together with the summons and complaint, a specific notice to the homeowner. RPAPL 1303 (2) specifically provides that

[s]uch notice shall be in bold, fourteen-point type and shall be printed on colored paper that is other than the color of the summons and complaint, and the title of the notice shall be in bold, twenty-point type. The notice shall be on its own page.

Pursuant to RPAPL 1304, in a residential foreclosure action, at least 90 days before the lender commences an action against the borrower, the lender must send a notice to the borrower including certain language and the notice must be in 14-point type. The notice must be sent by registered or certified mail and also by first-class mail to the last known address of the borrower, and if different, to the residence that is the subject of the mortgage (*see* RPAPL 1304). The statute further provides that the notice shall contain a list of at least five housing counseling agencies that serve the region where the borrower resides (*id.*).

It is well settled that proper service of the notices required by RPAPL 1303 and 1304 is a condition precedent to the commencement of a residential foreclosure action, and is the plaintiff’s burden to establish (*see Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909, 961 NYS2d 200 [2d Dept 2013]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]; *First Natl. Bank of Chicago v Silver*, 73 AD3d 162, 899 NYS2d 256 [2d Dept 2010]). Here, the plaintiff satisfied its burden that service of the RPAPL 1303 notice was properly made with the summons and complaint by submitting a copy of the affidavit of service establishing proper service on Joseph Wood of the RPAPL 1303 notice with the statutorily-required content, printed in the required type size on colored paper (*see Aurora Loan Servs., LLC v Weisblum, supra*). Wood’s bare and unsubstantiated denial of receipt of the RPAPL 1303 notice was insufficient to rebut the presumption of proper service created by the affidavits of service (*see id.*; *Deutsche Bank Natl. Trust Co. v Hussain*, 78 AD3d 989, 912 NYS2d 595 [2d Dept 2010]). In addition, annexed to the plaintiff’s motion is a copy of the RPAPL 1304 notice containing the tracking number for first class mail as well as the reference number for certified mail. The plaintiff also submits an affidavit from Angela Frye, the vice president of loan documentation for Wells Fargo Bank, N.A., the servicer for the plaintiff, in which she states that the RPAPL 1304 notice was mailed to Wood by certified mail and first-class mail and that the copies of the notice annexed to the motion contain the tracking number for first class mail and the reference number for certified mail. Thus, Wood’s mere denial of receipt was insufficient to rebut Ms. Frye’s affidavit that a proper mailing was made (*see Kihl v Pfeffer*, 94 NY2d 118, 700 NYS2d 87 [1999]). Moreover, any alleged failure by the plaintiff to satisfy a condition precedent in the form of the foreclosure notice requirements of RPAPL 1304, even if true, merely constitutes a defense to a

foreclosure action and did not deprive the Court of subject matter jurisdiction to render an order of reference (*see Deutsche Bank Trust Co. Americas v Shields*, \_\_\_ AD3d \_\_\_, 2014 NY Slip Op 02254 [2d Dept 2014]; *Pritchard v Curtis*, 101 AD3d 1502, 957 NYS2d 440 [3d Dept 2012]; *Signature Bank v Epstein*, 95 AD3d 1199, 945 NYS2d 347 [2d Dept 2012]).

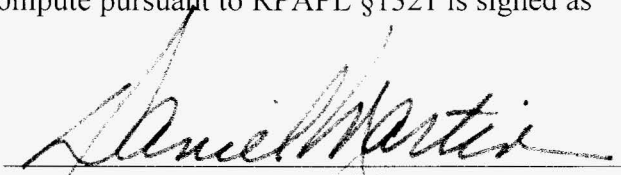
Turning to defendant Wood’s contention that the complaint should be dismissed because the RPAPL 1303 and 1304 notices did not comply with the requirements set forth in each statute, while it has been held that the failure to properly serve the RPAPL 1303 and 1304 notices will result in the dismissal of the complaint (*see Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909, *supra*; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, *supra*), the Court has found no appellate authority affirming the dismissal of a complaint where, as alleged here, the title of the RPAPL 1303 notice did not comply with the type size required by RPAPL 1303 and did not satisfy the one-page requirement of RPAPL 1303, and the RPAPL 1304 notice did not comply with the type size required by RPAPL 1304. Further, with respect to the plaintiff’s contention that the RPAPL 1304 notice was defective since it did not state how it was mailed, while the statute requires that the notice be mailed by registered or certified mail and by first-class mail, it does not state that the notice must state therein how it was mailed (*see* RPAPL 1304 [2]). In any event, Ms. Frye states in her affidavit that the RPAPL 1304 notice was mailed to Wood by both certified and first-class mail. Thus, the Court finds that since the alleged defects in the RPAPL 1303 and 1304 notices do not prejudice any substantial right of Wood, they should be disregarded (*see* CPLR 2001; *cf. Aurora Loan Servs., LLC v Weisblum*, *supra*).

With respect to Wood’s contention that the plaintiff lacks standing since it did not submit evidence establishing that it was in physical possession of the note, the Court notes that annexed to the plaintiff’s motion is copy of the assignment from Wells Fargo Bank, N.A. to the plaintiff establishing that the plaintiff was in physical possession of the note prior to the commencement of this action. In addition, Ms. Frye states in her affidavit that the plaintiff currently holds the note and mortgage and was the holder of the note and mortgage on the date that this action was commenced.

In light of the foregoing, the plaintiff’s motion is granted and the defendant’s motion is denied.

The proposed order appointing a referee to compute pursuant to RPAPL §1321 is signed as modified by the court.

Dated: JUNE 30, 2014.

  
A.J.S.C.

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION