

<b>US Bank Natl. Assoc. v Hunte</b>
2016 NY Slip Op 30739(U)
April 7, 2016
Supreme Court, Queens County
Docket Number: 18220/09
Judge: Darrell L. Gavrin
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## MEMORANDUM

SUPREME COURT: QUEENS COUNTY  
IA PART 27

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US BANK NATIONAL ASSOCIATION, AS  
TRUSTEE FOR THE STRUCTURED ASSET  
SECURITIES CORPORATION MORTGAGE  
LOAN TRUST, 2006-NC1  
3476 Stateview Boulevard  
Ft. Mill, SC 29715

Plaintiff,

- against -

MARCIA E. HUNTE, NEW CENTURY MORTGAGE  
CORPORATION, NEW YORK CITY  
ENVIRONMENTAL CONTROL BOARD, NEW  
YORK CITY TRANSIT ADJUDICATION BUREAU,  
ALFRED HUNTE,

Defendants.

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INDEX NO. 18220/09

MOTION DATE Nov. 2, 2015

MOTION CAL. NO. 160

MOTION SEQUENCE NO. 2

Plaintiff commenced this action on July 9, 2009, seeking foreclosure of a mortgage allegedly executed and delivered by defendant, Marcia E. Hunte, with respect to the real property known as 1470 Egmont Place, Far Rockaway, New York, to secure payment of a promissory note made by her, evidencing a loan in the principal sum of \$466,400.00, plus interest. Defendant, Marcia E. Hunte, served an answer with various affirmative defenses, including ones based upon lack of standing, and interposed a counterclaim seeking a judgment declaring that plaintiff has no interest in the subject mortgage or note, and enjoining plaintiff “from maintaining this or any other foreclosure action or suit against [her] as to the property subject to the note and mortgage.” The remaining defendants have not appeared or answered and are in default. Plaintiff served a reply to the counterclaim asserted by defendant, Marcia E. Hunte.

A settlement conference was scheduled for March 10, 2010, and by order of that date, the Court Attorney Referee found the case met the criteria for the Residential Foreclosure Part, but that it had not been settled. He noted defendant borrower was over three years in arrears, and that the subject property was encumbered by a second mortgage. The Court Attorney Referee directed that the case proceed by application for an order of reference or motion.

Plaintiff previously moved to strike the answer, including affirmative defenses and counterclaim of defendant, Marcia E. Hunte, with prejudice, for summary judgment against defendant, Marcia E. Hunte, for leave to amend the caption, for leave to appoint a referee to determine the amount due and owing plaintiff and whether the mortgage premises can be sold

in parcels, and to deem all non-appearing and non-answering defendants to be in default in the action. Defendant, Marcia E. Hunte, cross-moved pursuant to CPLR 3211(a)(1) to dismiss the complaint insofar as asserted against her, and to cancel the notice of pendency. By order dated March 2, 2015, the branches of plaintiff's motion for summary judgment against defendant, Marcia E. Hunte, to dismiss the affirmative defenses of defendant, Marcia E. Hunte, for leave to fix the defaults of defendants, New Century Mortgage Corporation, New York City Environmental Control Board, New York City Transit Adjudication Bureau and Alfred Hunte, and for leave to appoint a referee were denied. The branches of the motion to substitute Alfred Hunte in place and stead of defendant, "John Doe," and for leave to amend the caption to reflect that substitution and to dismiss the counterclaim were granted. In addition, the cross motion by defendant, Marcia E. Hunte, to dismiss the complaint insofar as asserted against her was denied. The court determined that plaintiff had failed to submit a copy of the RPAPL 1303 notice purportedly delivered by the licensed process server to defendant, Marcia E. Hunte, by delivery to Alfred Hunte, and mailing to defendant, Marcia E. Hunte. The court ruled that under such circumstances, it could not determine whether plaintiff had strictly complied with (former) RPAPL 1303. The court determined that the documentary evidence presented by defendant, Marcia E. Hunte, did not conclusively establish that plaintiff did not comply with RPAPL 1303. The court denied that branch of the motion by plaintiff to dismiss the affirmative defenses of defendant, Marcia E. Hunte, because of the open factual question of whether plaintiff had complied with RPAPL 1303. The court also determined that plaintiff had failed to present proof of service of process with respect to defendants, New Century Mortgage Corporation, New York City Environmental Control Board, New York City Transit Adjudication Bureau and Alfred Hunte.

Plaintiff moves pursuant to CPLR 2221(a)(d) and (e) for leave to renew and reargue its prior motion for summary judgment and upon renewal and reargument, for summary judgment against defendant, Marcia E. Hunte, to dismiss the answer of defendant, Marcia E. Hunte, including all affirmative defenses, for leave to appoint a referee to determine the amount due and owing plaintiff and whether the mortgaged premises can be sold in parcels, and to deem all non-appearing and non-answering defendants to be in default in the action. Plaintiff asserts that the court overlooked evidence in denying those branches of its prior motion for summary judgment against defendant, Marcia E. Hunte, to dismiss the affirmative defenses of defendant, Marcia E. Hunte, for leave to fix the defaults of defendants, New Century Mortgage Corporation, New York City Environmental Control Board, New York City Transit Adjudication Bureau and Alfred Hunte, and for leave to appoint a referee. It also asserts that the affirmation of its counsel and the affidavit of Alan Feldman dated July 16, 2009 constituted proper proof of compliance with RPAPL 1303 in relation to defendant, Marcia E. Hunte. Plaintiff also offers affidavits of service of process upon defendants, New Century Mortgage Corporation, New York City Environmental Control Board, New York City Transit Adjudication Bureau and Alfred Hunte.

Defendants, Marcia E. Hunte and Alfred Hunte, oppose the motion and cross move to dismiss the complaint insofar as asserted against them pursuant to CPLR 3211(a)(1) based upon documentary evidence, to cancel the notice of pendency. The remaining defendants have not appeared in relation to the motion or cross motion.

With respect to that branch of the cross motion by defendant, Marcia E. Hunte, to dismiss the complaint insofar as asserted against her pursuant to CPLR 3211(a)(1), she waived her right to move pursuant to CPLR 3211(a)(1) to dismiss the complaint based upon documentary evidence (*see Margolin v IM Kapco, Inc.*, 89 AD3d 690 [2d Dept 2011]). This defense was not raised in her answer and the motion was not made before her answer was due (*see* CPLR 3211[e]; *Margolin v I M Kapco, Inc.*, 89 AD3d 690; *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 241 [2d Dept 2007]). That branch of the cross motion by defendant, Marcia E. Hunte, to dismiss the complaint insofar as asserted against her pursuant to CPLR 3211(a)(1) is denied.

With respect to that branch of the cross motion by defendant, Alfred Hunte, to dismiss the complaint insofar as asserted against him based upon CPLR 3211(a)(1), plaintiff offers an affidavit of service dated July 16, 2009 of a licensed process server, indicating that service of process was made upon Alfred Hunte, originally sued herein as “John Doe,” on July 14, 2009 at 6:37 A.M. by in-hand delivery of a copy of the summons and complaint to Alfred at 1470 Egmont Place, Far Rockaway, New York. Defendant, Alfred Hunte, does not dispute he was served with a copy of the summons and complaint on July 14, 2009. To the extent defendant, Alfred Hunte, cross-moves to dismiss the complaint insofar as asserted against him pursuant to CPLR 3211(a)(1), his cross motion is untimely since it was made after his time to serve an answer had expired (*see* CPLR 3211[e]; *Archer v Motor Vehicle Acc. Indemnification Corp.*, 118 AD3d 5, 11 [2d Dept 2014]; *Lema v New York Cent. Mut. Fire Ins. Co.*, 112 AD3d 891 [2d Dept 2013]), and he makes no request to extend his time to serve an answer (*see Archer v Motor Vehicle Acc. Indemnification Corp.*, 118 AD3d 5, 11; *Clinkscale v Sampson*, 74 AD3d 721, 722 [2d Dept 2010]).

Furthermore, because defendant, Alfred Hunte, did not answer in a timely manner, he is in default. He has not moved for leave to serve a late answer, or to vacate his default in answering, and offers no reasonable excuse for his default. Under such circumstances, it is not necessary to determine whether he has demonstrated a potentially meritorious defense to this action, including one based upon documentary evidence (*see HSBC Bank USA, N.A. v Lafazan*, 115 AD3d 647, 648 [2d Dept 2014]; *Wells Fargo Bank, N.A. v Cervini*, 84 AD3d 789, 790 [2d Dept 2011]). That branch of the cross motion by defendant, Alfred Hunte, to dismiss the complaint insofar as asserted against him based upon CPLR 3211(a)(1) is denied.

With respect to that branch of the motion by plaintiff for leave to reargue and renew its prior motion, a motion for leave to reargue or renew is addressed to the sound discretion of the court (*see HSBC Bank USA, N.A. v Halls*, 98 AD3d 718 [2d Dept 2012]; *Matter of Swingearn*, 59 AD3d 556 [2d Dept 2009]). A motion for reargument must be “based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion” (CPLR 2221[d][2]). A motion for renewal “shall be based upon new facts not offered on the prior motion that would change the prior determination” (CPLR 2221[e][2]).

That branch of the motion by plaintiff for leave to reargue its prior motion is denied. Plaintiff has failed to demonstrate that the court overlooked or misapprehended any matters of

fact or law in denying those branches of its prior motion for summary judgment against defendant, Marcia E. Hunte, to dismiss the affirmative defenses of defendant, Marcia E. Hunte, for leave to fix the defaults of defendants, New Century Mortgage Corporation, New York City Environmental Control Board, New York City Transit Adjudication Bureau and Alfred Hunte, and for leave to appoint a referee.

With respect to that branch of the motion by plaintiff for leave to renew its prior motion, the court has the discretion to grant renewal upon facts known to the movant at the time of the original motion, provided that the movant offers a “reasonable justification” for the failure to submit the additional facts on the original motion (*Matter of Allstate Ins. Co. v. Liberty Mut. Ins.*, 58 AD3d 727, 728 [2d Dept 2009]; *see Calle v Zimmerman*, 133 AD3d 809 [2d Dept 2015]; *Smith v State of New York*, 71 AD3d 866, 867–868 [2d Dept 2010]). What is considered a “reasonable justification” is a matter of the court’s discretion (*see Castor v Cuevas*, \_\_\_ AD3d \_\_\_, 2016 WL 803019, 2016 NY App Div LEXIS 1449 [2d Dept 2016]; *Calle v Zimmerman*, 133 AD3d 809 [2d Dept 2015]; *Heaven v McGowan*, 40 AD3d 583, 586 [2d Dept 2007]). “Law office failure can be accepted as a reasonable excuse in the exercise of the court’s sound discretion” (*Nwauwa v Mamos*, 53 AD3d 646, 649 [2d Dept 2008]; *see CPLR 2005; Calle v Zimmerman*, 133 AD3d 809 [2d Dept 2008]).

In this instance, plaintiff’s counsel failed to present a copy of the RPAPL 1303 notice in support of the original motion under the mistaken belief such copy was unnecessary to establish a *prima facie* case. Such failure constitutes an excuse of law office failure and is, under the circumstances, a reasonable justification for plaintiff’s failure to submit a copy of the RPAPL 1303 notice on the original motion (*see Calle v Zimmerman*, 133 AD3d 809; *Matter of Beren v Beren*, 92 AD3d 676, 677 [2d Dept 2012]; *Vita v Alstom Signaling*, 308 AD2d 582, 583 [2d Dept 2003]). That branch of the motion by plaintiff for leave to renew its prior motion is granted.

With respect to the branch of the motion by plaintiff for summary judgment against defendant, Marcia E. Hunte, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default (*see Wells Fargo Bank, N.A. v Erobo*, 127 AD3d 1176, 1176 [2d Dept 2015]; *Argent Mtge. Co., LLC v Mentosana*, 79 AD3d 1079, 1080 [2d Dept 2010]). Proper service of an RPAPL 1303 notice, where required, is a condition precedent to the commencement of a foreclosure action, which is the plaintiff’s burden to meet (*see First Natl. Bank of Chicago v Silver*, 73 AD3d 162, 169 [2d Dept 2010]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 102 [2d Dept 2011]). Where standing is at issue, the plaintiff seeking summary judgment must also submit evidence to show “[e]ither a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action” (*U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 754 [2d Dept 2009]; *see also Flagstar Bank, FSB v Anderson*, 129 AD3d 665 [2d Dept 2015]).

In support of its motion, plaintiff offers, among other things, a copy of the pleadings, the mortgage, the note, the affirmation of regularity of its counsel, the affidavits of Alan Feldman and an affidavit of Andrea Kruse, a vice president for loan documentation for Wells Fargo Bank, N.A. d/b/a America’s Servicing Company (Wells Fargo). Plaintiff asserts that it is the

holder of the note, and was assigned the note and mortgage prior to the commencement of the action.

The supplemental affidavit of Alan Feldman dated September 8, 2015, when read together with his original affidavit dated July 16, 2009, and the copy of the notice of RPAPL 1303 establish *prima facie* proof of proper service of the notice required by RPAPL 1303 upon defendant, Marcia E. Hunte, (*see First Natl. Bank of Chicago v Silver*, 73 AD3d 162, 169 [2d Dept 2010]); *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d at 102).

The note bears an undated indorsement in blank by Steve Nagy on behalf of New Century Mortgage Corp., the originator of the mortgage loan. According to Ms. Kruse, the note was indorsed in blank and the note and mortgage was assigned to the Structured Asset Securities Corporation Mortgage Loan Trust, 2006-NC1 (the Trust) as of June 1, 2006. Ms. Kruse states that Deutsche Bank is the document custodian for the Trust, and took physical possession of the note and mortgage on or around June 1, 2006, and the note and mortgage remained in the physical possession of Deutsche Bank at all material times, including the date the action was commenced. She states her knowledge is based upon her review of the books and business records of Wells Fargo, kept in the ordinary course of its business, regarding the custody of the original loan documents, including the subject note and mortgage and regarding the contents of the loan file maintained in relation to defendant, Hunte. This evidence that the note was physically delivered to Deutsche Bank, plaintiff's document custodian, prior to the commencement of this action is sufficient to establish, *prima facie*, plaintiff's standing as the holder of the note and mortgage (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361 [2015]; *YMJ Meserole, LLC v 98 Meserole St., LLC*, 133 AD3d 848, 849 [2d Dept 2015]; *Wells Fargo Bank, N.A. v Rooney*, 132 AD3d 980, 981 [2d Dept 2015]; *Kondaur Capital Corp. v McCary*, 115 AD3d 649, 650 [2d Dept 2014]; *cf. U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 754 [2d Dept 2009]). Ms. Kruse additionally attests to defendant, Hunte's default in making payments due under the mortgage. As a result, plaintiff has establish its *prima facie* entitlement to judgment as a matter of law (*see YMJ Meserole, LLC v 98 Meserole St., LLC*, 133 AD3d at 850; *Wells Fargo, N.A. v Rooney*, 132 AD3d at 982; *Loancare v Firshing*, 130 AD3d 787, 789 [2d Dept 2015]).

In opposition, defendant, Marcia E. Hunte, has failed to raise a triable issue of fact as to any bona fide defense to foreclosure (*see YMJ Meserole, LLC v 98 Meserole St., LLC*, 133 AD3d at 850; *Wells Fargo, N.A. v Rooney*, 132 AD3d at 982; *Loancare v Firshing*, 130 AD3d at 789). Her inability to recall having received the RPAPL 1303 notice is insufficient to rebut the presumption of proper service created by virtue of the affidavits of Alan Feldman dated July 16, 2009 and September 8, 2015 and the copy of the notice of RPAPL 1303 (*see Deutsche Bank Nat. Trust Co. v Quinones*, 114 AD3d 719 [2d Dept 2014]; *U.S. Bank N.A. v Tate*, 102 AD3d 859 [2d Dept 2013]; *see also Aurora Loan Servs., LLC v Weisblum*, 85 AD3d at 106). In addition, her claim that plaintiff has failed to include a copy of the notice of pendency in support of the motion for summary judgment does not preclude summary judgment to plaintiff on the issue of foreclosure. The filing of a notice of pendency is a prerequisite to obtaining a judgment of foreclosure and sale (*see RPAPL 1331; Deutsche Bank Natl. Trust Co. v Brown*, 133 AD3d 563 [2d Dept 2015]; *Slutsky v Blooming Grove Inn*, 147 AD2d 208 [2d

Dept 1989]). In any event, the court records reflect that a proper notice of pendency is on file.

That branch of the motion by plaintiff for summary judgment against defendant, Marcia E. Hunte, is granted.

That branch of the motion by plaintiff for leave to enter a default judgment against defendants, New Century Mortgage Corporation, New York City Environmental Control Board, New York City Transit Adjudication Bureau and Alfred Hunte, is granted.

That branch of the motion by plaintiff for leave to appoint a referee is granted (RPAPL 1321).

That branch of the cross motion by defendants, Marcia E. Hunte and Alfred Hunte, to cancel the notice of pendency, is denied.

Settle order with the caption that had been amended by order of this court dated March 2, 2015, to substitute Alfred Hunte in place and stead of John Doe.

DATED: April 7, 2016

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DARRELL L. GAVRIN, J.S.C.