Bank of N.Y. Mellon v Signorelli
2016 NY Slip Op 31808(U)
April 13, 2016
Supreme Court, Suffolk County
Docket Number: 2559-13
Judge: James Hudson
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[* 1]

SHORT FORM ORDER

COPY

INDEX
NO.: 2559-13

SUPREME COURT - STATE OF NEW YORK
IAS PART 40 - SUFFOLK COUNTY

PRESENT: Hon. JAMES HUDSON
Acting Supreme Court Justice

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The Bank of New York Mellon formerly known as The Bank of New York as Successor Trustee to JPMorgan Chase Bank, as Trustee under the pooling and servicing agreement dated March1, 2003, ABFS Mortgage Loan Trust 2003-1,

Plaintiff,

-against-

Lena Signorelli a/k/a Lena Signorekki a/k/a Lena C. Bivona a/k/ Lana Signorekki; Thomas De Sana a/k/a Thomas P. Desena; Richard Bivona; Thomas P. Desema, as Executor of the Estate of Mary Ann De Sena a/k/a Maryann Desena a/k/a Mary Ann Desena; United States of America o/b/o Internal Revenue Service New York State Department of Taxation and Finance; People of the State of New York; John T. Mather Memorial Hospital of Port Jefferson, Inc.; Charmer Industries, Inc.; Clerk of the Suffolk County District Court; Sherman Acquisitions II, LP Household; GE Money Bank; Portfolios Acquisitions, LLC; Arrow Financial Services, LLC; Clare Rose, Inc.; People of the State of New York C/O Town Supervisor; Midland Funding, LLC; Twister Three Inc. D/B/A T/A N Country Spotlite Limo; North Suffolk Cardiology Association PC; "JOHN DOE #1-5" and "JANE DOE #1-5" said names being fictitious, it being the intention of Plaintiff to designate any and all occupants, tenants, persons or corporations, if any, having or claiming an interest in or lien upon the premises being foreclosed herein,

Defendants.

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MOTION DATE: 11-21-14
ADJ. DATE: _____
File Re-Assigned to this IAS Part 40
Mot. Seq. # 001-MotD

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Upon the following papers on this motion for summary judgment and an order of reference: proposed order of reference, affirmation of plaintiff's counsel, Michael S. Hanusek, Esq. dated October 16, 2014, with supporting exhibits A-F; affirmation in opposition of defendant's counsel Irwin Popkin, Esq. dated November 11, 2014; affirmation in reply of plaintiff's counsel, Richard A. Gerbino, Esq., dated April 24, 2015, with supporting exhibits A; and letter of defendant's counsel Irwin Popkin, Esq. dated May 1, 2015; and upon due consideration and deliberation, it is

ORDERED that this motion (001) by the plaintiff for, inter alia, an order awarding summary judgment in its favor and against the defendant Lena Signorelli, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption is granted solely to the extent that the first affirmative defense asserted in the amended answer is stricken; and it is further

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon all parties who have appeared herein and not waived further notice within thirty (30) days of the date herein, and shall promptly file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on real property known as 4 Lolly Lane, Centereach, NY 11720. On January 31, 2003, the defendants Lena Signorelli and Mary Ann DeSena executed a fixed-rate note in favor of American Business Mortgage Service Inc. ("the lender") in the principal sum of $272,000.00. To secure said note, Lena Signorelli, Mary Ann DeSena, Thomas DeSena and Richard Bivona ("the defendant mortgagors") gave the lender a mortgage also dated January 31, 2003 on the property. The mortgage was subsequently recorded in the Suffolk County Clerk's Office on April 18, 2003.

By way of two undated endorsements and two assignments, the note and mortgage were allegedly transferred from the lender to The Bank of New York Mellon formerly known as The Bank of New York as Successor Trustee to JPMorgan Chase Bank, as Trustee under the pooling and servicing agreement dated March 1, 2003, ABFS Mortgage Loan Trust 2003-1 ("the plaintiff") prior to commencement. The first assignment from the lender was executed on August 31, 2004, and transferred the mortgage "[together] with the note or bond secured thereby" to JPMorgan Chase Bank, as Trustee, on behalf of ABFS Mortgage Loan Trust 2003-1, JPMorgan Chase Bank, Institutional Trust Services ("the trustee"). The second assignment from the trustee was executed on August 23, 2010, and transferred the mortgage "and all rights accrued under said [m]ortgage and all indebtedness secured thereby" to the plaintiff. The assignments were subsequently duly recorded in the Suffolk County Clerk's Office on November 26, 2008 and September 2, 2010.

The defendant Mary Ann DeSena allegedly died testate on February 11, 2008, a resident of the County of Suffolk. By Decree dated December 17, 2010 (Czygier, J.), the Last Will and Testament of Mary Ann DeSena dated August 31, 2006 was admitted to probate, and on December 23, 2010 letters testamentary for said decedent's estate were granted to Thomas DeSena, Executor.

The defendants Lena Signorelli, Thomas DeSena, individually and as Executor of the Estate of Mary Ann DeSena, and Richard Bivona allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on or about December 6, 2009, and each month thereafter. After said defendants allegedly failed to cure the default in payment, the plaintiff commenced the instant action by the filing of a summons and complaint on January 23, 2013, followed by the filing a supplemental summons and amended complaint on January 25, 2013.

The defendant Lena Signorelli ("Signorelli") interposed an answer to the complaint and an amended answer to the amended complaint. By her amended answer, Signorelli denies all of the material allegations in the amended complaint and asserts two affirmative defenses, alleging, inter alia, the plaintiff's lack of standing; and the failure to provide Signorelli with the notice required by section 1304 of the Real Property Actions and Proceedings Law.

By way of background, the parties began negotiations in an attempt to agree on a loan modification, and foreclosure settlement conferences were conducted or adjourned beginning on July 26, 2013 and lasting until January 28, 2014. A representative of the plaintiff attended and participated in all settlement conferences. On

the last date, this case was dismissed from the conference program as the parties were unable to modify the loan or otherwise reach a settlement. Accordingly, there has been compliance with CPLR 3408; no further conference is required under any statute, law or rule.

The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor against Signorelli, striking her answer and the affirmative defenses set forth therein; (2) pursuant to CPLR 3215 fixing the defaults of the non-answering defendants; (3) pursuant to RPAPL § 1321 appointing a referee to (a) compute amounts due under the subject mortgage; and (b) examine and report whether the subject premises should be sold in one parcel or multiple parcels; and (4) amending the caption. In opposition to the motion, Signorelli filed an affirmation from her counsel. In response, the plaintiff filed a reply. Initially, the untimely reply of the plaintiff's counsel, which was filed with the court on April 28, 2015, without any excuse for the late filing, has not been considered in this determination (*see*, CPLR 2214 [b]; ***Foitl v G.A.F. Corp.***, 64 NY2d 911, 488 NYS2d 377 [1985]; ***Moore v Isl. Coll. Hosp.***, 273 AD2d 365, 714 NYS2d 683 [2d Dept 2000]).

A plaintiff in a mortgage foreclosure action establishes a prima facie case for summary judgment by submission of the mortgage, the note, bond or obligation, and evidence of default (*see*, ***Valley Natl. Bank v Deutsch***, 88 AD3d 691, 930 NYS2d 477 [2d Dept 2011]; ***Wells Fargo Bank v Das Karla***, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; ***Washington Mut. Bank, F.A. v O'Connor***, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]). The burden then shifts to 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" (***Capstone Bus. Credit, LLC v Imperia Family Realty, LLC***, 70 AD3d 882, 883, 895 NYS2d 199 [2d Dept 2010], quoting ***Mahopac Natl. Bank v Baisley***, 244 AD2d 466, 467, 644 NYS2d 345 [2d Dept 1997]).

When moving to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is "without merit as a matter of law" (*see*, CPLR 3211 [b]; ***Vita v New York Waste Servs., LLC***, 34 AD3d 559, 559, 824 NYS2d 177 [2d Dept 2006]). In reviewing a motion to dismiss an affirmative defense, this court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference (*see*, ***Fireman's Fund Ins. Co. v Farrell***, 57 AD3d 721, 869 NYS2d 597 [2d Dept 2008]). Moreover, if there is any doubt as to the availability of a defense, it should not be dismissed (*see, id.*). "A defense not properly stated or one that has no merit, however, is subject to dismissal pursuant to CPLR 3211(b). It, thus, may be the target of a motion for summary judgment by the plaintiff seeking dismissal of any affirmative defense after the joinder of issue" (***Carver Fed. Sav. Bank v Redeemed Christian Church of God, Intl. Chapel, HHH Parish, Long Is., NY, Inc.***, 35 Misc3d 1228 [A], 954 NYS2d 758 [Sup Ct, Suffolk County 2012, slip op, at 3]). In order for a defendant to successfully oppose such a motion, the defendant must show his or her possession of a bona fide defense, *i.e.*, one having "a plausible ground or basis which is fairly arguable and of substantial character" (***Feinstein v Levy***, 121 AD2d 499, 500, 503 NYS2d 821 [2d Dept 1986]). Self-serving and conclusory allegations do not raise issues of fact (*see*, ***Rosen Auto Leasing, Inc. v Jacobs***, 9 AD3d 798, 799-800, 780 NYS2d 438 [3d Dept 2004]), and do not require the plaintiff to respond to alleged affirmative defenses which are based on such allegations (***Charter One Bank, FSB v Leone***, 45 AD3d 958, 959, 845 NYS2d 513 [3d Dept 2007]).

The court first turns to the standing defense asserted in Signorelli's answer. Where, as here, an answer served includes the defense of standing, the plaintiff must prove its standing in order to be entitled to relief (*see*,

CitiMortgage, Inc. v Rosenthal, 88 AD3d 759, 931 NYS2d 638 [2d Dept 2011]). The standing of a plaintiff in a mortgage foreclosure action is measured by its ownership, holder status or possession of the note and mortgage at the time of the commencement of the action (*see*, ***Bank of N.Y. v Silverberg***, 86 AD3d 274, 926 NYS2d 532 [2d Dept 2011]; ***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]). A mortgage "is merely security for a debt or other obligation, and cannot exist independently of the debt or obligation" (***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, 911, 961 NYS2d 200 [2d Dept 2013] [internal quotation marks and citations omitted]). Holder status is established where the plaintiff is the special indorsee of the note or takes possession of a mortgage note that contains an endorsement in blank on its face or attached thereto, as the mortgage follows an incident thereto (*see*, ***Mortgage Elec. Registration Sys., Inc. v Coakley***, 41 AD3d 674, 838 NYS2d 622 [2d Dept 2007]; ***First Trust Natl. Assn. v Meisels***, 234 AD2d 414, 651 NYS2d 121 [2d Dept 1996]). "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident" (***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, *supra* at 754 [internal quotation marks and citations omitted]). Further, "[n]o special form or language is necessary to effect an assignment as long as the language shows the intention of the owner of a right to transfer it" (***Suraleb, Inc. v International Trade Club, Inc.***, 13 AD3d 612, 612, 788 NYS2d 403 [2d Dept 2004] [internal quotation marks and citations omitted]). Moreover, "[o]ur courts have repeatedly held that a bond or mortgage may be transferred by delivery without a written instrument of assignment" (***Flyer v Sullivan***, 284 AD 697, 699, 134 NYS2d 521[1st Dept 1954]). Thus, "a good assignment of a mortgage is made by delivery only" (***Curtis v Moore***, 152 NY 159, 162 [1897], quoting ***Fryer v Rockefeller***, 63 NY 268, 276 [1875]; *see*, ***People's Trust Co. v Tonkonogy***, 144 AD 333, 128 NYS 1055 [2d Dept 1911]).

The effect of an endorsement is to make the note "payable to bearer" pursuant to UCC § 1-201 (5) (*see*, UCC 3-104; ***Franzese v Fidelity N.Y., FSB***, 214 AD2d 646, 625 NYS2d 275 [2d Dept 1995]). When an instrument is indorsed in blank (and thus payable to bearer), it may be negotiated by transfer of possession alone (*see*, UCC § 3-202; § 3-204; § 9-203 [g]; ***Mortgage Elec. Registration Sys., Inc. v Coakley***, 41 AD3d 674, *supra*; ***First Trust Natl. Assn. v Meisels***, 234 AD2d 414, *supra*; ***Franzese v Fidelity N.Y., FSB***, 214 AD2d 646, *supra*). Furthermore, UCC § 9-203 (g) explicitly provides that the assignment of an interest of the seller or grantor of a security interest in the note automatically transfers a corresponding interest in the mortgage to the assignee.

In support of the motion, the plaintiff submitted, inter alia, an affidavit from Heather Craft, a Vice President of the plaintiff's servicer, JPMorgan Chase Bank, N.A., wherein it is alleged that the plaintiff, directly or through a custodial agent, was in possession of the original promissory note on at the time of filing of the complaint, a copy of which was attached to the complaint (*see*, ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, 12 NYS3d 612 [2015]; ***Kondaur Capital Corp. v McCary***, 115 AD3d 649, 981 NYS2d 547 [2d Dept 2014]; ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]). The documentary evidence submitted by the plaintiff also includes, among other things, the note transferred via an endorsement in blank (*cf.*, ***Slutsky v Blooming Grove Inn, Inc.***, 147 AD2d 208, 542 NYS2d 721 [2d Dept 1989]). Additionally, the plaintiff submitted, among other things, assignments of the mortgage and note executed prior to commencement, which memorialized the transfer of the same to it prior to commencement (*see*, ***GRP Loan, LLC v Taylor***, 95 AD3d 1172, *supra*). Moreover, an examination of the assignments show that each of them include a reference to the mortgage note and/or the indebtedness (*see*, ***Chase Home Fin., LLC v Miciotta***, 101 AD3d 1307, *supra*; ***Deutsche Bank Natl. Trust Co. v Williams***, 2015 NY Misc LEXIS 3792, 2015 WL 7008076,

2015 NY Slip Op 31945 [U] [Sup Ct, Suffolk County 2015]). In any event, the plaintiff annexed copy of the endorsed note to the complaint as an exhibit (*see*, ***Emigrant Bank v Larizza***, 129 AD3d 904, 13 NYS3d 129 [2d Dept 2015]; ***Nationstar Mtge., LLC v Catizone***, 127 AD3d 1151, 9 NYS3d 315 [2d Dept 2015]; ***Bank of N.Y. Mellon Trust Co., NA v Sachar***, 95 AD3d 695, 943 NYS2d 893 [2d Dept 2012]; *cf.*, ***Deutsche Bank Natl. Trust Co. v Haller***, 100 AD3d 680, 954 NYS2d 551 [2d Dept 2012]). Such evidence demonstrates that the plaintiff holds the original note. The plaintiff also submitted, inter alia, assignments of the mortgage, whereby the transfer of the note to the plaintiff prior to commencement was memorialized (*see*, ***GRP Loan, LLC v Taylor,*** 95 AD3d 1172, 945 NYS2d 336 [2d Dept 2012]). Therefore, it appears that the plaintiff is the transferee and holder of the original note as well as the assignee of the mortgage, which followed as an incident to the note (*see*, ***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]). Therefore, the plaintiff demonstrated its prima facie burden as to its standing. The opposition in response to this branch of the motion fails to raise a triable issue of fact (*see*, ***Wells Fargo Bank, N.A. v Charlaff***, 134 AD3d 1099, 24 NYS3d 317 [2d Dept 2015]; ***LNV Corp. v Francois***, 134 AD3d 1071, 22 NYS3d 543 [2d Dept 2015]). Accordingly, the first affirmative defense asserted in Signorelli's amended answer is stricken.

The court next turns to the second affirmative defense asserted in Signorelli's answer. In its present form, RPAPL § 1304 provides that in a legal action, including a residential mortgage 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). Such notice shall be sent by the lender, assignee or mortgage loan servicer in a separate envelope from any other mailing or notice (*id.*). 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.*). RPAPL § 1304 provides that the notice must be sent to the "borrower," a term not defined in the statute (***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 105, 923 NYS2d 609 [2d Dept 2011]).

Proper service of the RPAPL § 1304 notice containing the statutorily-mandated content on the "borrower" or "borrowers" is a condition precedent to the commencement of a foreclosure action, and the plaintiff's failure to show strict compliance requires dismissal (***Hudson City Sav. Bank v DePasquale***, 113 AD3d 595, 596, 977 NYS2d 895 [2d Dept 2014]; ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, 910, 961 NYS2d 200 [2d Dept 2013]; ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, *supra* at 103; *see also*, ***Pritchard v Curtis***, 101 AD3d 1502, 1504, 957 NYS2d 440 [3d Dept 2012]). Since this action was commenced on January 23, 2013, the 90-day notice requirement set forth in the statute is applicable. Thus, in support of its motion for summary judgment on the complaint, the plaintiff was required to prove its allegations by tendering sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL 1304, and failure to make this showing requires denial of the motion, regardless of the opposing papers (***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d at 106 [citation omitted]).

In meeting this burden, the plaintiff benefits from the long-standing doctrine of presumption of regularity: generally, a letter or notice that is properly stamped, addressed, and mailed is presumed to be delivered by that addressee (***Trusts & Guar. Co. v Barnhardt***, 270 NY 350, 352 [1936]; ***News Syndicate Co. v Gatti Paper Stock Corp.***, 256 NY 211, 214-216 [1931]; ***Connolly v Allstate Ins. Co.***, 213 AD2d 787, 787, 623 NYS2d 373 [3d Dept 1995]; ***Kearney v Kearney***, 42 Misc3d 360, 369, 979 NYS2d 226 [Sup Ct, Monroe County 2013]). The

presumption of receipt by the addressee "may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed" (***Residential Holding Corp. v Scottsdale Ins. Co.***, 286 AD2d 679, 680, 729 NYS2d 776 [2d Dept 2001]). CPLR 2103 (f) (1) defines mailing as "the deposit of a paper enclosed in a first class postpaid wrapper, addressed to the address designated by a person for that purpose or, if none is designated, at that person's last known address, in a post office or official depository under the exclusive care and custody of the United States Postal Service within the state" (*see*, ***Lindsay v Pasternack Tilker Ziegler Walsh Stanton & Romano LLP***, 129 AD3d 790, 12 NYS3d 124 [2d Dept 2015]). "If that proof is established, the burden shifts to the borrower," and "the final legal truism prevails: once the presumption of proper service has been established, mere denial of receipt is insufficient to rebut the presumption" (***Kearney v Kearney***, 42 Misc3d 360, *supra* at 370; *see*, ***Matter of ATM One v Landaverde***, 2 NY3d 472, 478, 779 NYS2d 808 [2004]).

The plaintiff failed to establish its prima facie entitlement to judgment as a matter of law because it failed to supply adequate evidentiary proof of compliance with RPAPL § 1304 (*see*, ***Bank of N.Y. Mellon v Aquino***, 131 AD3d 1186, 16 NYS3d 770 [2d Dept 2015]; ***Wells Fargo Bank, NA v Burke***, 125 AD3d 765, 5 NYS3d 107 [2d Dept 2015]; ***Hudson City Sav. Bank v DePasquale***, 113 AD3d 595, 977 NYS2d 895 [2d Dept 2014]). The plaintiff submitted neither an affidavit of service of the 90-day notice upon Signorelli, nor an affidavit from one with personal knowledge of the mailing, along with copies of the certified mailing receipts stamped by the United States Post Office on the date of the alleged mailing (*see*, ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, *supra*). Under the facts presented, the conclusory statements set forth in the affidavit of Ms. Craft that, inter alia, a ninety day pre-foreclosure notice typed in 14 point type and dated January 27, 2012 was sent to Signorelli "at the address of the property secured by the [m]ortgage, and to the last known address ... by certified and first class mail[]," even when combined with copies of certain submitted documentation, are insufficient to meet the requirements of the statute (*see*, ***Hudson City Sav. Bank v DePasquale***, 113 AD3d 595, *supra*; ***US Bank N.A. v Lampley***, 46 Misc3d 630, 996 NYS2d 499 [Sup Ct, Kings County 2014]). Even though Ms Craft set forth the date of the subject notice, she did not allege sufficient facts as to how or when compliance was accomplished. She also did not state that she served the notice; nor did she identify the individual who allegedly did so. Further, it is noted that Ms. Craft's affidavit does not constitute proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed by certified mail and by first class mail (*see*, ***Nocella v Fort Dearborn Life Ins. Co. of N.Y.***, 99 AD3d 877, 955 NYS2d 70 [2d Dept 2012]; *cf.*, ***Preferred Mut. Ins. Co. v Donnelly***, 111 AD3d 1242, 974 NYS2d 682 [4th Dept 2013]; ***Residential Holding Corp. v Scottsdale Ins. Co.***, 286 AD2d 679, *supra*).

Thus, the plaintiff failed to establish its prima facie entitlement to judgment as a matter of law. The plaintiff's failure to make a prima facie showing requires the denial of the motion, regardless of the sufficiency of the opposing papers (*see*, ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

In view of the open question of whether the plaintiff strictly complied with the 90-day notice requirement of RPAPL §1304, the remaining branches of the plaintiff's motion are denied at this juncture.

Accordingly, the plaintiff's motion for summary judgment is granted solely to the extent indicated above, otherwise denied. In view of the foregoing, the proposed order submitted by the plaintiff has been marked "not signed."

Dated: 4/13/16

Hon. JAMES HUDSON, A.S.C.J.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**