

**Bank of Am., N.A. v Jones**

2016 NY Slip Op 32541(U)

November 1, 2016

Supreme Court, Suffolk County

Docket Number: 28358/2012

Judge: Howard H. Heckman, Jr.

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SUPREME COURT - STATE OF NEW YORK  
IAS PART 18 - SUFFOLK COUNTY

**PRESENT:**

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

INDEX NO.: 28358/2012  
MOTION DATE: 10/25/2016  
MOTION SEQ. NO.: 001 MG  
002 MD

-----X  
BANK OF AMERICA, N.A.,

Plaintiffs,

-against-

JAMES M. JONES, JUDITH A. JONES,

Defendants.  
-----X

**PLAINTIFFS' ATTORNEY:**

SANDELANDS EYET LLP  
112 W. 34<sup>TH</sup> STREET, 18<sup>TH</sup> FLOOR  
NEW YORK, NY 10120

**DEFENDANTS' ATTORNEYS:**

RONALD D. WEISS, P.C.  
734 WALT WHITMAN RD., STE. 203  
MELVILLE, NY 11747

Upon the following papers numbered 1 to 59 read on this motion; Notice of Motion/ Order to Show Cause and supporting papers 1-22 #001; Notice of Cross Motion and supporting papers 23-51 #002; Answering Affidavits and supporting papers 52-57; Replying Affidavits and supporting papers 58-59; Other \_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion by plaintiff Bank of America, N.A., seeking an order: 1) granting summary judgment striking the answer of defendants James M. Jones and Judith A. Jones; 2) substituting Nationstar Mortgage LLC as the named party plaintiff in place and stead of Bank of America, N.A.; 3) deeming all appearing and non-appearing defendants in default; 4) amending the caption; 5) reforming the metes and bounds description contained in the mortgage to include and to identify tax lot 046 as part of the premises encumbered by the mortgage; and 6) 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 James Jones and Judith Jones seeking an order pursuant to CPLR 3211(a)(3), 3124, 3126, 3212 & 3408, N.Y. Banking Law 6-L & RPAPL 1304: 1) denying plaintiff's summary judgment motion; 2) dismissing plaintiff's complaint for lack of standing; 3) dismissing plaintiff's complaint for failure to serve a 90 day notice; 4) dismissing plaintiff's complaint based upon the lender's predatory lending practices and failure to negotiate in good faith; or, in the alternative, 5) compelling plaintiff to conduct discovery and produce original documents; 6) restoring this action to the mandatory foreclosure settlement part for an additional conference; and 7) denying plaintiff's motion based upon accounting errors and for the inclusion of Lot 46.00 which parcel was never included as collateral for the mortgage, 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 mortgage in the sum of \$417,000.00 executed by defendants James M. Jones and Judith A. Jones on June 24, 2008 in favor of plaintiff Bank of America. On the same date the defendant James M. Jones also executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. By assignment dated December 21, 2013, Bank of America, N.A., assigned the mortgage to Nationstar Mortgage LLC. Plaintiff claims that the defendants have defaulted in making timely monthly mortgage payments since June 1, 2010. Plaintiff's motion seeks an order granting summary judgment striking defendants' answer and for the appointment of a referee.

In opposition and in support of the cross motion, the defendants submit an affidavit from defendant James Jones and two attorney affirmations, and claim that Bank of America has refused to negotiate in good faith to modify the terms of the mortgage loan and has engaged in predatory lending practices. Defendants claim that they are entitled to responses to their discovery demands which involve obtaining copies of records relative to the bank's standing, the bank's lack of collateralization for the second lot (46.00), the lender's predatory lending practices, and the bank's failure to negotiate with the borrowers in good faith. Defendants argue that issues of fact exist concerning plaintiff's lack of standing, plaintiff's failure to include the second lot when recording and indexing the mortgage, plaintiff's failure to comply with the RPAPL 1304 notice requirements, and plaintiff's submission of inadmissible proof in the form of a "hearsay" affidavit from the mortgage servicer sufficient to defeat the plaintiff's summary judgment motion and to dismiss plaintiff's complaint. Defendants also raise a myriad of additional claims arguing that: the borrowers are entitled to another mandatory court settlement conference; the notarization on the mortgage is defective; the assignment of the mortgage was collusive and fraudulent; and plaintiff's claim of the amount of arrears due under the terms of the parties' agreement is incorrect.

In reply, the plaintiff submits an attorney's affirmation and argues that all discovery demands served by the defendants have been responded to and that defendants have not sought additional discovery since April, 2014. Plaintiff also claims that there is no evidence submitted to support the defendants claim that the bank has not negotiated in good faith to resolve their continuing default in making mortgage payments and therefore no grounds exist to compel the scheduling of another court mandated foreclosure settlement conference. Plaintiff contends that it was merely a scrivener's error which incorrectly omitted lot 46 from the mortgage and maintains that every relevant loan document assembled in preparation of the closing included the metes and bounds description for both lots to be encumbered by the mortgage. It is plaintiff's contention that the evidence proves that it clearly was the intention of all parties to include both lots as collateral for the mortgage loan. Plaintiff asserts that the employee affidavit submitted in support of the summary judgment motion, which is based upon documentary evidence maintained by the mortgage lender, provides sufficient proof to establish the bank's entitlement to summary judgment. Plaintiff claims that records maintained in the ordinary course of business can be relied upon by the bank's litigation resolution analyst as adequate evidentiary proof in support of the bank's claims. Plaintiff asserts that the admissible evidence submitted proves that Bank of America, N.A. had standing to maintain this action as the holder of the note by demonstrating that the note has been in Bank of America's possession since November 17, 2011 prior to commencement of this action on September 13, 2012. Plaintiff also claims that all

notices required to be served pursuant to RPAPL 1304 were properly served and that the defendants remaining defenses, alleging predatory lending, a defective notarization, collusion stemming a fraudulent mortgage assignment and plaintiff's miscalculation of arrears, are not supported by any admissible, credible evidence to raise a genuine issue of fact sufficient to defeat plaintiff's summary judgment motion.

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)).

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 evidence in the form of an affidavit from the bank's litigation resolution analyst (satisfying the business records exception to the hearsay rule) to prove it had standing, as the holder of the note by confirming that the note was in Bank of America's possession prior to the commencement of this action (*Aurora Loan Services v. Taylor, supra.*; *Wells*

*Fargo Bank v. Parker, supra.*; *CitiMortgage v. Klein*, 140 AD3d 913, 33 NYS3d 432 (2<sup>nd</sup> Dept., 2016); *One West Bank v. Albanese*, 139 AD3d 831, 30 NYS3d 337(2<sup>nd</sup> Dept., 2016)).

Plaintiff has also submitted sufficient proof to establish that notice was given to the defendants in compliance with the requirements of RPAPL 1304. Plaintiff's proof consists of the affidavit submitted by the bank's litigation resolution analyst stating that service was made in compliance with statutory requirements on September 26, 2011 which was more than 90 days prior to commencing this action, together with copies of the 90 day notices containing tracking numbers for the certified mailing 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 the defendants. The absence of an affidavit from either defendant denying receipt of such notices is fatal to defense counsel's claim that the plaintiff failed to comply with the statutory condition precedent (*see Grogg v. South Road Assoc.*, 74 AD3d 1021, 907 NYS2d 22 (2<sup>nd</sup> Dept., 2010); *Emigrant Mortgage Co. v. Gosdin*, 119 AD3d 639, 989 NYS2d 609 (2<sup>nd</sup> Dept., 2014); *Emigrant Mortgage Co. v. Persad*, 117 AD3d 676, 985 NYS2d 608 (2<sup>nd</sup> Dept., 2014)). Moreover, defense counsel's claim, based upon information and belief, that notice was not properly served on the defendant, is not supported by any relevant, admissible evidence sufficient to raise an issue of fact which would defeat plaintiff's summary judgment application (*see PHH Mortgage Corp. v. Muricy*, 135 AD3d 725, 24 NYS3d 137 (2<sup>nd</sup> Dept., 2016); *HSBC Bank v. Espinal*, 137 AD3d 1079, 28 NYS3d 107 (2<sup>nd</sup> Dept., 2016)).

With respect to the issue related to the "scrivener's error", the relevant documentary evidence shows that the metes and bounds description set forth in the mortgage describes the premises encumbered by the mortgage which would include both lots 026 and 046. This is confirmed by the additional documentary evidence submitted by the plaintiff in the form of a copy of the 2008 title report (containing a legal description identical to that set forth in the mortgage); a copy of the September 5, 1997 deed conveying title to the property from Miles T. Tateyama and Glen R. Tateyama to the Jones defendants (containing a metes and bounds description identical to that contained in the mortgage); and a February 7, 2011 mortgage foreclosure search certificate (again containing the identical metes and bounds description of the mortgaged premises). All the documentary evidence reveals the same metes and bounds description of the premises, refers to both lots 026 and 046, and identifies the property as "3 Beach Plum Drive, Northport, New York 11768" with the sole exception that the metes and bounds description contained in the mortgage (as exhibit "A") which provides at the base of the document a "Tax ID" description as:

"SEC 007.00 BLK 02.00 LOT 026"

but does not refer to Lot 046. Both the title report and the foreclosure certificate metes and bounds description contain the identical tax identification description at the base of the description with the additional notation of "Lot 046". The 1997 metes and bounds description does not contain a tax identification description at the base of the page, but does identify both lots on the second page of the bargain and sale deed.

Based upon this evidence, it is clear that the intent of the parties was to encumber both lots as collateral for underlying indebtedness and the failure to write in "Lot 046" at the base of the mortgage description page was a scrivener's error. While defense counsel alludes to a claim that an unidentified bank officer was aware of the description error, yet intentionally chose to expedite the

loan process and encumber only one lot, there is no relevant, admissible, credible proof submitted to support this version of the events. In this regard, the submission of an attorney's affirmation under circumstances where he fails to explain how he gained personal knowledge of the parties 2008 transaction, fails to provide any admissible, credible evidence to raise an issue of fact sufficient to defeat plaintiff's application. An attorney's affirmation based upon hearsay, or information and belief, provides insufficient proof to support the claims advanced by the defendants.

The defendant's remaining claims set forth in his opposition with respect to plaintiff's claimed "bad faith" and predatory loan practices, defendant's right to conduct discovery, and defendant's right to another mandatory court settlement conference are equally without merit and fail to raise issues of fact sufficient to deny plaintiff's summary judgment motion (*see Seaway Capital Corp. v. 50 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); *Citibank, N.A. v. Barclay*, 124 AD3d 174, 999 NYS2d 375 (1<sup>st</sup> Dept., 2014); *U.S. Bank, N.A. v. Sarmiento*, 121 AD3d 187, 991 NYS2d 68 (2<sup>nd</sup> Dept., 2014)). Moreover, as the defendants have failed to raise any evidence to address the numerous remaining pleaded affirmative defenses and counterclaims set forth in their answer in opposition to plaintiff's motion, those affirmative defenses and counterclaims must be deemed abandoned and subject to dismissal (*see Kronick v. L.P. Thebault Co., Inc.*, 70 AD3d 648, 892 NYS2d 85 (2<sup>nd</sup> Dept., 2010); *Citibank, N.A. v. Van Brunt Properties, LLC*, 95 AD3d 1158, 945 NYS2d 330 (2<sup>nd</sup> Dept., 2012); *Flagstar Bank v. Bellafore*, 94 AD3d 1044, 943 NYS2d 551 (2<sup>nd</sup> Dept., 2012); *Wells Fargo Bank Minnesota, N.A. v. Perez*, 41 AD3d 590, 837 NYS2d 877 (2<sup>nd</sup> Dept., 2007)).

Finally, the bank has shown that the defendants have defaulted under the terms of the June 24, 2008 mortgage by failing to make timely monthly mortgage payments since June 1, 2010. 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: November 1, 2016



J.S.C.

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