Short Form Order

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

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

INDEX NO.: 32413/2011
MOTION DATE: 01/14/2016
MOTION SEQ. NO.: 001 MD

----------X
DLJ MORTGAGE CAPTIAL, INC.,

Plaintiffs,

-against-

RICHARD KOSTURA, CHRISTIN KOSTURA A/K/A CHRISTINE BARR,

Defendants.
----------X

PLAINTIFFS' ATTORNEY:
SHELDON MAY & ASSOCIATES, P.C.
255 MERRICK ROAD
ROCKVILLE CENTRE, NY 11570

DEFENDANTS' ATTORNEYS:
CHARLES WALLSHEIN, ESQ.
115 BROADHOLLOW RD., STE. 350
MELVILLE, NY 11747

Upon the following papers numbered 1 to 18 read on this motion : Notice of Motion/ Order to Show Cause and supporting papers 1-14 : Notice of Cross Motion and supporting papers ___ : Answering Affidavits and supporting papers 15-16 ; Replying Affidavits and supporting papers 17-18 ; Other ___ : (and after hearing counsel in support and opposed to the motion) it is.

ORDERED that this motion by plaintiff DLJ Mortgage Capital, Inc., seeking an order: 1) granting summary judgment striking the answer of the defendant Richard Kostura; 2)substituting Thomas Kostura as a named party defendant in place and stead of the defendant designated as "John Doe" and discontinuing the action against the defendant designated as "Jane Doe"; 3) deeming all appearing and non-appearing defendants in default; 4) amending the caption; 5) extending the notice of pendency; and 5) appointing a referee to compute the sums due and owing to the plaintiff in this mortgage foreclosure action is denied without prejudice to renewal; 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; and it is further

ORDERED that the parties are directed to appear for a conference on January 17, 2017 at 9:30 a.m. at the Supreme Court IAS Term, Part 18, 1 Court Street, 3rd Floor, Riverhead, New York 11901.

Plaintiff's action seeks to foreclose a mortgage in the sum of $492,000.00 executed by the defendant Richard Kostura on July 29, 2005 in favor of Option One Mortgage Corporation. On that same date, the defendant executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. By assignment dated August 10, 2005, Option One Mortgage Corporation assigned the mortgage to GRP Loan, LLC. By assignment dated October 20, 2009,

GRP Loan, LLC, assigned the mortgage to plaintiff DLJ Mortgage, Inc.. Defendant executed a Home Affordable Modification Agreement dated April 5, 2010 modifying the terms of the original mortgage and creating a new principal note balance of $636,239.01. Plaintiff claims that the defendant has defaulted in making timely monthly mortgage payments beginning October 1, 2010. Plaintiff claims that additional payments were received and applied towards the amounts due and the default continues since May 1, 2011 after application of those late payments. The defendant served a pro se answer to the plaintiff's complaint asserting three affirmative defenses. Plaintiff's motion seeks an order granting summary judgment striking defendant's answer and for the appointment of a referee.

In opposition, the defendant submits an attorney's affirmation and claims that the plaintiff's motion must be denied based upon plaintiff's lack of standing to maintain this action. Defendant argues that the proof submitted by the plaintiff in the form of an affidavit from an employee of the mortgage servicer provides insufficient admissible evidence to support its claim that it is entitled to a foreclosure judgment. Defense counsel claims that the business records exception to the hearsay rule (CPLR 4518) does not permit admission of the testimony of the mortgage servicer's employee or admission of the business records into evidence absent a showing that he has personal knowledge of the prior servicer's methods of record keeping. Defendant contends that issues of fact therefore exist concerning the capacity of DLJ Mortgage to enforce the note at or prior to the commencement of this action and the details surrounding how the plaintiff came into possession of the promissory note.

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 (2nd Dept., 2015); *Wells Fargo Bank, N.A. v. Ali*, 122 AD3d 726, 995 NYS2d 735 (2nd Dept., 2014)). Where the plaintiff's standing is placed in issue by the defendants' answer, the plaintiff must also establish its standing as part of its prima facie showing (*Aurora Loan Services v. Taylor*, 25 NY2d 355, 12 NYS3d 612 (2015); *Loancare v. Firshing*, 130 AD3d 787, 14 NYS3d 410 (2nd Dept., 2015); *HSBC Bank USA, N.A. v. Baptiste*, 128 AD3d 77, 10 NYS3d 255 (2nd 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 (2nd Dept., 2015)). Either a written assignment of the note or the physical transfer of the note to the plaintiff prior to the 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 (2nd Dept., 2015); *U.S. Bank, N.A. v. Guy*, 125 AD3d 845, 5 NYS3d 116 (2nd Dept., 2015)).

The plaintiff's evidentiary proof in support of its summary judgment motion consists primarily of the submission of an affidavit from the assignee/mortgagee's current servicer's (Selene Finance, LP) employee, identified as a foreclosure manager, together with a copies of the mortgage and promissory note. The mortgage servicer's employee's affidavit sets forth the details confirming the borrower's default, the plaintiff's possession of the duly indorsed promissory note prior to commencement of this action, and service of the notice of default upon the defendant.

Paragraphs 2, 3 & 4 of the foreclosure manager's affidavit provides:

2. "Selene (Finance, LP) maintains records for the Loan in its capacity as plaintiff's servicer. As part of my job responsibilities for Selene, I am familiar with the type of records maintained by Selene in connection with the Loan."

3. "In the ordinary and regular course of its business, Selene utilizes various software systems, including a proprietary default and analytics servicing system, as well as an accounting system of record (collectively herein the "Systems") to process and store its customer information and to calculate the amount due and owing on any note at any given time. Selene utilizes the Systems in the ordinary and regular course of its business to track and maintains the amounts due and owing on the Loan at issue in this case. Based on my knowledge of Selene's business practices, recording such information is a regular practice of Selene's regularly conducted business activities for the purpose of referring to the information at a later date, and the entries in those records were made at the time of the events and conditions they describe, either by people with first-hand knowledge of those events and conditions or from information provided by people with such first-hand knowledge."

4. "I am familiar with and rely on the Systems in my daily work activity. In particular, I have knowledge that Selene utilized the Systems and now utilizes the Systems in the ordinary and regular course of its business to track and maintain the amounts due and owing from Richard Kostura on the Loan. I have reviewed the Systems with regards to the Loan and the information stated in this Affidavit is based on my personal knowledge of the information contained therein."

The mortgage servicer's affidavit goes on to confirm that the defendant defaulted in making payments due under the terms of the note and mortage beginning October 1, 2010, and that plaintiff held the promissory note prior to commencement of this action on October 14, 2011 and continues to retain possession of it. The sole issue to be determined is whether the plaintiff has submitted sufficient relevant, admissible evidence to prove its entitlement to summary judgment.

CPLR 4518 provides:

Business records.

(a) Generally. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or even, or within a reasonable time thereafter.

The Court of Appeals in *People v. Guidice,* 83 NY2d 630, 635, 612 NYS2d 350 (1994) explained that "the essence of the business records exception to the hearsay rule is that records systematically made for the conduct of a business... are inherently highly trustworthy because they are routine reflections of day-to-day operations and because the entrant's obligation is to have them truthful and accurate for purposes of the conduct of the enterprise" (quoting *People v. Kennedy,* 68 NY2d 569, 579, 510 NYS2d 853 (1986)). It is a unique hearsay exception since it represents hearsay deliberately created and it differs from all other hearsay exceptions which assume that declarations which come within them were not made deliberately with litigation in mind. Since a business record keeping system may be designed to meet the hearsay exception, it is important to provide predictability in this area and discretion should not normally be exercised to exclude such evidence on grounds not foreseeable at the time the record was made (*see Trotti v. Estate of Buchanan,* 272 AD2d 660, 706 NYS2d 534 (3rd Dept., 2000)).

The three foundational requirements of CPLR 4518(a) are: 1) the record must be made in the regular course of business- reflecting a routine, regularly conducted business activity, needed and relied upon in the performance of business functions; 2) it must be the regular course of business to make the records– (i.e. the record is made in accordance with established procedures for the routine, systematic making of the record); and 3) the record must have been made at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter, assuring that the recollection is fairly accurate and the entries routinely made (*People v. Kennedy supra @ p. 579-580*). It is important to distinguish that the "mere filing of papers received from other entities, even if such papers are retained in the regular course of business, is insufficient to qualify the documents as business records" (*People v. Cratsley,* 86 NY2d 81, 90, 629 NYS2d 992 (1995)). The records will be admissible "if the recipient can establish personal knowledge personal knowledge of the maker's business practices and procedures, or that the records provided by the maker were incorporated into the recipient's own records or routinely relied upon by the recipient in its business" (*State of New York v. 158th Street & Riverside Dr. Housing Company, Inc.,* 100 AD3d 1293, 1296, 956 NYS2d 196 (2012), *leave denied* 20 NY3d 858 (2013)). In this regard with respect to mortgage foreclosures, a loan servicer's employee may testify on behalf of the mortgagee and a representative of an assignee of the original lender can rely upon business records of the original lender to establish its claims for recovery of amounts due from the borrowers provided that the assignee/plaintiff establishes that it relied upon those records in the regular course of business (*Landmark Capital Inv. Inc. v. Li-Shan Wang,* 94 AD3d 418, 941 NYS2d 144 (1st Dept., 2012); *Portfolio Recovery Associates, LLC, v. Lall,* 127 AD3d 576, 8 NYS3d 101 (1st Dept., 2015); *Merrill Lynch Business Financial Services, Inc. v.*

Trataros Construction, Inc., 30 AD3d 336, 819 NYS2d 223 (1st Dept., 2006)). More recently, an additional requirement for admissibility requires that the loan servicer's employee must allege that he/she was *personally* familiar with the plaintiff's record keeping practices and procedures (*Aurora Loan Services, LLC, v. Baritz*, 2016 NY Slip Op (2nd Dept., 2016); *HSBC v. Royal*, 138 AD3d 650, 29 NYS3d 462 (2nd Dept., 2016); *Deutsche Bank National Trust Co. v. Brewton*, 140 AD3d 948, 34 NYS3d 463 (2nd Dept., 2016); *U.S. Bank, N.A. v. Handler*, 140 AD3d 948, 34 NYS3d 463 (2nd Dept., 2016); *Aurora Loan Services, LLC, v. Mercius*, 38 AD3d 650, 29 NYS3d 462 (2nd Dept., 2016); *Citibank, N.A. v. Cabrera*, 130 AD3d 861, 14 NYS3d 420 (2nd Dept., 2015)).

In this case, although the mortgage servicer employee's affidavit states that he has "personal knowledge" of his company's procedures and business practices and relies upon the records maintained in the regular course of business activities in his daily work activity (which records indicate that the defendant has not made a timely mortgage payment for more than six years), he does not claim that he is "personally familiar" with prior assignors'/servicers' record keeping practices and procedures. Plaintiff's counsel's affirmation concedes that a prior mortgage servicer, Select Portfolio Servicing, Inc., was involved in the prosecution of this foreclosure action. Since questions concerning the plaintiff's standing requires a review and confirmation of the prior mortgage servicer's record keeping practices, the affidavit submitted by the Selene Finance, LP foreclosure manager fails to provide a proper foundation for the admission of evidence to prove the necessary elements required to award the plaintiff summary judgment. Accordingly, the plaintiff's motion seeking an order granting summary judgment in favor of the mortgagee and for the appointment of a referee must be denied without prejudice to renewal upon submission of such proof. All parties are directed to appear for a conference on January 17, 2016 at 9:30 a.m. at the Supreme Court IAS Term, Part 18, 1 Court Street, 3rd Floor, Riverhead, New York 11901.

Dated: December 15, 2016

Howard A Heckler
J.S.C.