

**Bank of America, N.A. v Angstadt**

2016 NY Slip Op 32693(U)

January 25, 2016

Supreme Court, Suffolk County

Docket Number: 16718/13

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.: 16718/13  
MOTION DATE: 07/20/2016  
MOTION SEQ. NO.: 002 MD

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

Plaintiffs,

-against-

DEBORAH ANGSTADT, GARY FLOR,

Defendants.

-----X

**PLAINTIFFS' ATTORNEY:**  
KNUCKLES, KOMOSINSKI & ELLIOTT, LLP  
565 TAXTER ROAD, STE. 590  
ELMSFORD, NY 10523

**DEFENDANTS' ATTORNEYS:**  
HAROLD M. SOMER, ESQ.  
1025 OLD COUNTRY RD., STE. 404  
WESTBURY, NY 11590

Upon the following papers numbered 1 to 19 read on this motion \_\_\_\_\_; Notice of Motion/ Order to Show Cause and supporting papers 1-17; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 18-19; Replying Affidavits and supporting papers \_\_\_\_\_; 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 the defendants Deborah Angstadt and Gary Flor as co-executors of the Estate of Harry Flor and as Heirs at law and Next of Kin of Harry Flor and individually and the Estate of Harry Flor; 2) substituting Wilmington Savings Fund Society, FSB, doing Business as Christiana Trust, not in its individual capacity, but solely as trustee for BCAT 2014- 12TT as the named party plaintiff in place and stead of Bank of America, N.A.; 3) substituting Tom Flor as a named party defendant in place and stead of a defendant designated as "John Does" and "Jane Does" and discontinuing the action against defendants designated as "John Doe #1 through John Doe #10 and Jane Doe #1 through Jane Doe #10 Intending to be the Unknown Heirs of the Estate of Harry Flor who was born on September 23, 1925 and died on October 28, 2010, and who died in the County of Suffolk, Deceased, and Successors in Interest of any of the aforesaid defendants who may be deceased, and the Respective Heirs at Law, Next of Kin, Distributees, Devisees, Grantees, Trustees, Lienors, Creditors, Assignees, and Successors in Interest of the aforesaid classes of person, if they or any of them be dead, and their Respective Husbands, Wives or Widows, if any, all of whom and whose"; 4) substituting "United States of America - Internal Revenue Service" as a named party defendant in place and stead of "Unites States of America - Internal Revenue Service"; 5) deeming all appearing and non-appearing defendants in default; 6) amending the caption; and 7) 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 February 21, 2016 at 9:30 a.m. at the Supreme Court IAS Term, Part 18, 1 Court Street, 3<sup>rd</sup> Floor, Riverhead, New York 11901.

Plaintiff's action seeks to foreclose a consolidated mortgage in the sum of \$495,000.00 executed by the defendant Harry Flor on September 29, 2006 in favor of Washington Mutual Bank, FA. On that same date the defendant executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. On October 2, 2002 the defendant executed the original mortgage and promissory note in the sum of \$425,000.00 (with a negative amortization amount not to exceed \$467,500.00) in favor of Washington Mutual. On September 29, 2006 defendant Flor signed a second note and mortgage in the sum of \$90,179.38 in favor of Washington Mutual. The consolidated mortgage which is the subject of this action was signed by the defendant on the same date. By assignment dated January 23, 2012, JPMorgan Chase Bank, N.A., Successor in Interest by Purchase from the FDIC as Receiver of Washington Mutual Bank F/K/A Washington Mutual Bank, FA assigned the consolidated mortgage to Bank of America, N.A. By assignment dated February 6, 2015, Bank of America, NA. assigned the consolidated mortgage to Wilmington Savings Fund Society, doing Business as Christiana Trust, not in its individual capacity, but solely as trustee for BCAT 2014- 12TT. Plaintiff claims that the defendant has defaulted in making timely monthly mortgage payments since September 1, 2010. Plaintiff's motion seeks an order granting summary judgment striking defendants' answer and for the appointment of a referee.

In opposition, the defendants submit an attorney's affirmation and claim that the plaintiff's motion must be denied since the proof submitted by the plaintiff in the form of an affidavit from an employee of the current mortgage service provider fails to provide sufficient admissible evidence to support its claim that it is entitled to a foreclosure judgment. Defendants claim that the current servicing agent's affidavit is not based upon personal knowledge of the facts which would establish the plaintiff's standing to prosecute this action since the agent relies upon records maintained by a prior mortgage servicer. Defendants argue that the proof submitted by the plaintiff, in an attempt to establish the bank's possession of the original promissory note, constitutes hearsay and therefore the mortgagee's summary judgment motion must be denied.

In reply, the plaintiff claims that the mortgage service provider agent's affidavit is based upon personal knowledge gained as a result of reviewing the business records maintained by the mortgage lenders and that under the business records exception the foreclosure specialist's affidavit provides sufficient relevant, admissible proof that the plaintiff has standing to maintain this action through possession of the duly indorsed consolidated promissory note prior to commencement of this action on June 26, 2013.

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 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 (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 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 (2<sup>nd</sup> Dept., 2015); *U.S. Bank, N.A. v. Guy*, 125 AD3d 845, 5 NYS3d 116 (2<sup>nd</sup> Dept., 2015)).

The plaintiff's evidentiary proof in support of its summary judgment motion consists primarily of the submission of an affidavit from the mortgage service provider and attorney in fact, identified as Selene Finance LP, for the mortgage assignee Wilmington Savings Fund Society, FSB. The mortgage service provider's (Selene Finance LP) employee is identified as a contested foreclosure specialist. Selene Finance LP has serviced the mortgage loan since the assignment from Bank of America, N.A. in February, 2015. The affidavit states that the information provided is taken from the assignee/mortgage servicer's business records which includes records acquired from the prior servicer of the mortgage loan. The 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 the details surrounding the mortgage lender's service of the 30 day mortgage default notice and service and filing of the 90 day default notice in compliance with mortgage requirements and pursuant to RPAPL 1304 & 1306.

Paragraphs 3 & 4 of the foreclosure specialists affidavit provides in pertinent part:

3. "In the regular performance of my job functions, I have access to and am familiar with the business records relating to the servicing of the mortgage loan at issue in this foreclosure action. The Servicing Records document transactions relating to the Loan, including, *inter alia*, loan documents, vault document management, payment and default histories, borrower/account notes, correspondence, workout documentation and prior court filings. The Servicing Records were made at or near the time of the Transactions documented thereby by a person with knowledge of the Transactions or from information transmitted by a person with knowledge of the Transactions, and were made and are maintained in

the regular and usual course of business. Moreover, measures have been incorporated to detect changes made to electronic records which are relied upon in lieu of a non-electronic original.”

4. “It is the regular practice of Selene on behalf of the Wilmington Savings to make such Servicing Records. Moreover, Selene and/or Wilmington Savings incorporated and relied upon said Servicing Records in order to perform and satisfy its contractual and legal duties. To the extent that said Servicing Records were created by a prior servicer, those Servicing Records were integrated and boarded into Selene’s systems, such that the prior servicer’s Servicing Records are now part of Selene’s Servicing Records. Selene maintains quality control and verification procedures as part of the boarding process to ensure the accuracy of the boarded Servicing Records. It is the regular business practice of Selene to integrate the prior servicer’s Servicing Records into Selene’s Servicing Records, and to rely upon the accuracy of those boarded Servicing Records in providing its loan servicing functions. These prior servicer Servicing Records are integrated and relied upon by Selene as part of Selene’s Servicing Records in order to perform and satisfy its contractual and legal duties. I have continuing access to such Servicing Records, I am familiar with how each document attached to the moving papers was retrieved and compiled, and I have personally reviewed each document attached to the moving papers herein.

The mortgage servicer’s affidavit goes on to confirm that the defendants defaulted in making payments due under the terms of the note and mortgage since September 1, 2010, and that the mortgage lender retained possession of the duly indorsed promissory note prior to commencement of this action.

Based upon the submission of copies of the duly indorsed promissory note, the mortgage and mortgage assignments, taken together with the affidavit from the mortgage servicer’s employee, establishing the factual grounds for the defendant’s default and plaintiff’s standing, sufficient proof exists to grant the plaintiff’s summary judgment motion provided the mortgage servicer’s affidavit provides admissible evidence to make a prima facie case to entitle the mortgage lender to foreclose the mortgage. 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 (3<sup>rd</sup> 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 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. 158<sup>th</sup> 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 (1<sup>st</sup> Dept., 2012); *Portfolio Recovery Associates, LLC, v. Lall*, 127 AD3d 576, 8 NYS3d 101 (1<sup>st</sup> Dept., 2015); *Merrill Lynch Business Financial Services, Inc. v. Trataros Construction, Inc.*, 30 AD3d 336, 819 NYS2d 223 (1<sup>st</sup> 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 (2<sup>nd</sup> Dept., 2016); *HSBC v. Royal*, 138 AD3d 650, 29 NYS3d 462 (2<sup>nd</sup> Dept., 2016); *Deutsche Bank National Trust Co. v. Brewton*, 140 AD3d 948, 34 NYS3d 463 (2<sup>nd</sup> Dept., 2016); *U.S. Bank, N.A. v. Handler*, 140 AD3d 948, 34 NYS3d 463 (2<sup>nd</sup> Dept., 2016); *Aurora Loan Services, LLC, v. Mercius*, 38 AD3d 650, 29 NYS3d 462 (2<sup>nd</sup> Dept., 2016); *Citibank, N.A. v. Cabrera*, 130 AD3d 861, 14 NYS3d 420 (2<sup>nd</sup> Dept., 2015)).

In this case, although the mortgage servicer employee’s affidavit avers that she has “personal knowledge of the facts in (her) Affidavit based upon a review of the business records defined below (and) am competent to testify about such facts”, she does not claim that she is “personally familiar” with the prior assignors’/servicers’ record keeping practices and procedures and only claims that the

prior servicer's records have been integrated and boarded into Selene's systems. Since the question surrounding the plaintiff's standing is one that requires a review and confirmation of a prior mortgage servicer's record keeping practices, the affidavit submitted by the Selene Finance LP's employee fails to provide a proper foundation for the admission of evidence to prove the necessary elements required to award the plaintiff summary judgment based upon the appellate court's most recent rulings. Under these circumstances, 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 February 21, 2016 at 9:30 a.m. at the Supreme Court IAS Term, Part 18, 1 Court Street, 3<sup>rd</sup> Floor, Riverhead, New York 11901.

Dated: January 25, 2016

  
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J.S.C.