

Wells Fargo Bank, N.A. v Ruszkowski

2017 NY Slip Op 30524(U)

January 25, 2017

Supreme Court, Suffolk County

Docket Number: 601862/2015

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.: 601862/2015
MOTION DATE: 01/05/2016
MOTION SEQ. NO.: 001 MG

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WELLS FARGO BANK, N.A.,

Plaintiffs,

-against-

TERI RUSZKOWSKI, JOSEPH RUSZKOWSKI,

Defendants.

-----X

PLAINTIFFS' ATTORNEY:
FRENKEL, LAMBERT, WEISS,
WEISMAN & GORDON, LLP
53 GIBSON STREET
BAY SHORE, NY 11706

DEFENDANTS' ATTORNEYS:
GRAUSSO & FOY, LLP
131 MAIN STREET
RIVERHEAD, NY 11901

Upon the following papers numbered 1 to 22 read on this motion : Notice of Motion/ Order to Show Cause and supporting papers 1-14 ; Notice of Cross Motion and supporting papers 15-19 ; Answering Affidavits and supporting papers ___ ; Replying Affidavits and supporting papers 20-22 ; Other ___ : (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff Wells Fargo Bank, N.A., seeking an order: 1) granting summary judgment striking the answer of the defendant Teri Ruzzkowski; 2) substituting Wells Fargo Bank, National Association, as Trustee for Bank of America Alternative Loan Trust 2005-8 Mortgage Pass-Through Certificates, Series 2005-8 as the named party plaintiff in place and stead of Wells Fargo Bank, National Association, as Trustee for Banc of America Alternative Loan Trust 2005-8; 3) substituting Britney Ruzzkowski as a named party defendant in place and stead of a defendant designated as "John Doe #1" and discontinuing the action against defendants designated as "John Doe #2-10" ; 4) deeming all appearing and non-appearing defendants in default; 5) amending the caption; 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 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; and it is further

Plaintiff's action seeks to foreclose a mortgage in the original sum of \$350,000.00 executed by the defendants Teri Ruzzkowski and Joseph Ruzzkowski on June 22, 2005 in favor of Bank of America, N.A. On that same date, the defendant Teri Ruzzkowski executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. By assignment

dated December 27, 2013 and by correction assignment dated June 17, 2014 Bank of America, N.A. assigned the mortgage to plaintiff Wells Fargo Bank, N.A. Plaintiff claims that the defendants have defaulted in making timely monthly mortgage payments since February 1, 2010. Plaintiff's motion seeks an order granting summary judgment striking defendant Teri Ruszkowski's answer and for the appointment of a referee to compute the sums due and owing to the plaintiff..

In opposition, the defendant submits an attorney's affirmation and claim that the plaintiff has failed to provide sufficient evidence to prove its entitlement to foreclose the mortgage loan. Defendant claims that the submission of an affidavit from a third-party mortgage servicer document execution specialist fails to provide relevant, admissible evidence from the plaintiff bank itself and argue that the servicer's employee's affidavit, which relies solely upon the mortgage servicer's records, constitutes inadmissible hearsay. Defendant contends that the only admissible evidence which would provide an evidentiary framework to establish a legal basis to award plaintiff summary judgment and which would comply with CPLR 4518, is by submission of an affidavit made by the party and not a mortgage servicing agent. Defendant claims that the evidence fails to prove that the plaintiff has standing to prosecute this action since there is insufficient proof to show that the plaintiff had possession of the indorsed promissory note prior to commencing this action and to show that the assignment to the plaintiff effectively transferred title to the mortgage since the assignment was not executed by a party with authority to convey title. Defendant also argues that the purported assignment of the mortgage to the Trust was not made within 90 days of the formation of the Trust and was therefore invalid.

In reply, the plaintiff submits an attorney's affirmation and contends that the affidavit submitted by the mortgage servicer provides sufficient admissible evidence to make a prima facie showing of the mortgage lender's entitlement to foreclose the mortgage. Plaintiff claims that the affidavit provides a proper foundation for the admissibility of the proof submitted which is contained in the business records maintained by the mortgage servicer and which reveal that the defendants executed the mortgage agreement and promissory note (defendant Teri Ruszkowski having individually signed promissory note) and thereafter defaulted in making mortgage payments due under the terms of the parties' agreement in excess of six years.

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 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 (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 v. Guy*, 125 AD3d 845, 5 NYS3d 116 (2nd Dept., 2015)). A plaintiff's attachment of a duly indorsed promissory note to its complaint coupled with an affidavit in which it alleges that it had possession of the note prior to the commencement of the action constitutes due proof of the plaintiff's standing to prosecute its claim for foreclosure and sale (*see Nationstar Mortgage, LLC. v. Catizone*, 127 AD3d 1151, 9 NYS3d 315 (2nd Dept., 2015)).

The plaintiff's proof submitted in support of its motion consists of a copy of the mortgage and promissory note signed by the defendants, together with a copy of the Limited Power of Attorney authorizing the mortgage servicer to act on behalf of its principal (Wells Fargo Bank), and an affidavit from the bank's mortgage servicer's document execution specialist detailing the history of the transaction, the defendants' default and the actions taken by the mortgage servicer prior to and subsequent to the commencement of the foreclosure action.

Paragraphs 1, 2 & 4 of the document execution specialist's affidavit provides in pertinent part:

1. I am employed as a Document Execution Specialist of Nationstar Mortgage LLC, the servicer of the mortgage loan that is the subject of this action and attorney in fact for plaintiff. I have personal knowledge of the facts contained in this Affidavit by virtue of my position at Nationstar, my familiarity with Nationstar's processes and based upon my review and analysis of the relevant business records and other documents of Nationstar referenced and attached herein. While many of Nationstar's processes are automated, the information manually entered by Nationstar employees relating to loans on those systems is based upon personal knowledge of the information and entered into the system at or near the time of the knowledge was acquired. These computerized records are created and maintained in the regular course of its business as a loan servicer and Nationstar relies on the records in the ordinary course to conduct its business as loan servicer. I am duly authorized to execute this Affidavit on behalf of Nationstar in support of Nationstar's application for Summary Judgment and the appointment of a Referee.
2. Nationstar as agent for Plaintiff, has physical possession of the original Note endorsed to Plaintiff. Nationstar received the original note on May 7, 2014. A true copy of the original note in Nationstar's possession is attached as Exhibit A.

4. The Mortgage loan is in default and is due for the February 1, 2010 payment and all subsequent payments. The amount due and owing under the terms of the note and mortgage is \$329,352/12.

The sole issue to be determined is whether the plaintiff has submitted sufficient relevant, admissible evidence to prove its entitlement to summary judgment. There has been no substantive relevant, admissible evidence submitted by the defendant in opposition to the plaintiff's motion and the defendant has not submitted an affidavit refuting the fact that there has been a default in making payments due under the terms of the parties' agreements since February, 2010 which continues to date. Moreover the evidence submitted by the plaintiff provides a legally sufficient factual foundation to establish its standing to prosecute this foreclosure action, based upon the Trust's possession of a duly indorsed promissory note prior to commencing this action, provided the affidavit submitted in support of this motion by the mortgage servicer complies with the business records exception to the hearsay rule.

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 event, 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 must be noted 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. 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, the mortgage servicer employee’s affidavit avers that he has “personal knowledge of the facts contained in (his) Affidavit by virtue of (his) position at Nationstar, (his) familiarity with Nationstar’s processes and based upon (his) review and analysis of the relevant business records and other documents referenced herein” and states that “the computerized records are created and maintained in the regular course of (the loan servicer’s) business.... (and that while such records are automated) the information manually entered by Nationstar employees relating to loans on those systems is based upon personal knowledge of the information and entered into the system at or near the time of the knowledge was acquired”. The servicing agent goes on to state that the servicer’s office prepared and mailed the 30 day mortgage default notice and, in accordance with office procedure, prepared and mailed the 90 day default notice in compliance with RPAPL 1304 requirements to the borrowers. In this regard, this is not merely a third-party servicer’s employee reviewing records created by a prior servicer(s) and/or mortgage lender and merely repeating the contents of its predecessor’s records, but is an affidavit from the servicer which entity incorporated the business records of the prior mortgagee as its own, documented the continuing default by the borrowers of not having made any payments since February 1, 2010, and thereafter participated and aided in commencing the prosecution of this action through its customary practice of complying with the mortgage and statutory requirements by mailing notices of default and retaining the original duly indorsed promissory note on behalf of the Trust for commencement and prosecution of this foreclosure action. Under these circumstances the submission of copies of the unpaid promissory note and mortgage coupled with the servicer’s power of attorney, together with the affidavit from an employee of the mortgage servicer establishing the facts underlying the defendants’ default and plaintiff’s standing to prosecute this action based upon its possession of the duly indorsed original promissory note prior to commencement of this action, provides sufficient proof to establish the bank’s right and entitlement to an order granting foreclosure.

Accordingly, the bank having proven entitlement to summary judgment, it is incumbent upon the defendant to submit relevant, evidentiary proof sufficiently substantive to raise genuine issues of fact concerning why the lender is not entitled to foreclose the mortgage. Defendant has wholly failed to do so. The defendant's submission of an attorney's affirmation provides no relevant, admissible evidence to establish any questions of fact sufficient to defeat plaintiff's motion. The only evidence sufficient to raise such an issue would have been by submission of an affidavit from the defendant denying her default and having failed to submit such evidence the defendant has effectively conceded that fact.

With respect to the remaining defenses asserted by the defendant in opposition to the plaintiff's motion, the record is clear that the defendant does not have standing to contest the assignments made by and between the mortgage lenders and there is no proof to show that the assignments were invalid or to show that the Trust did not have authority to obtain title to the mortgage as a result of the assignments. Moreover, as the defendant has failed to submit any proof to address any of her remaining eighteen pleaded affirmative defenses set forth in her answer in opposition to this motion, those affirmative defenses must be deemed abandoned and subject to dismissal (*see Kronick v. Thebault Co., Inc.*, 70 AD3d 648, 892 NYS2d 85 (2nd Dept., 2010); *Citibank, N.A. v. Van Brunt Properties, LLC*, 95 AD3d 1158, 945 NYS2d 330 (2nd Dept., 2012); *Wells Fargo Bank Minnesota N.A. v. Perez*, 41 AD3d 590, 837 NYS2d 877 (2nd Dept., 2007)).

Plaintiff's motion is therefore granted in its entirety and the proposed order of reference has been signed simultaneously with execution of this order.

Dated: January 25, 2017


J.S.C.