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.: 65267/2014
MOTION DATE: 10/18/2016
MOTION SEQ. NO.: 001 MG

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U.S. BANK N.A.,

Plaintiffs,

-against-

GARY SAUSA, DIANE ERHARDT,

Defendants.

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PLAINTIFFS' ATTORNEY:
ECKERT SEAMANS CHERIN & MELLOTT, LLC
10 BANK STREET, STE. 700
WHITE PLAINS, NY 10606

DEFENDANTS' ATTORNEYS:
LAW OFFICES OF FRED M. SCHWARTZ
317 MIDDLE COUNTRY RD., STE. 5
SMITHTOWN, NY 11787

Upon the following papers numbered 1 to 35 read on this motion : Notice of Motion/ Order to Show Cause and supporting papers 1-32 ; Notice of Cross Motion and supporting papers ___ ; Answering Affidavits and supporting papers 33-35 ; 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 U.S. Bank, N.A. seeking an order: 1) granting summary judgment striking the answer of defendants Gary Sausa and Diane Erhardt; 2) substituting "Mark Smith" and "Marge Smith" as named party defendants in place and stead of defendants designated as "John Doe #1" and "John Doe #2" and discontinuing the action against defendants designated as "John Doe #3" through "John Doe #7"; 3) deeming all appearing and non-appearing defendants in default; 4) amending the caption; and 5) 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.

Plaintiff's action seeks to foreclose a mortgage in the original sum of $291,050.00 executed by defendants Gary Sausa and Diane Erhardt on January 31, 2005 in favor of Sunset Mortgage Company, L.P. On the same date both defendants executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. The mortgagors executed subsequent loan modification agreements creating a single lien in the sum of $323,206.70. The mortgage was assigned to the plaintiff by assignment dated April 6, 2012. Plaintiff claims that the mortgagor defendants defaulted under the terms of the mortgage and note by failing to make timely monthly mortgage payments beginning August 1, 2011. Plaintiff's motion seeks an order granting summary

judgment striking defendants' answer and for the appointment of a referee.

In opposition, defendants Sausa and Erhardt submit an affidavit from defendant Sausa and an attorney's affirmation and claim that: 1) plaintiff lacks standing to maintain this action; 2) plaintiff failed to serve pre-foreclosure notices of default in compliance with mortgage and RPAPL 1304 requirements; 3) plaintiff's complaint fails to state a valid cause of action; and 4) insufficient admissible proof is submitted to establish the validity of loan modifications by the lender's mortgage servicer. Defendant Sausa claims that he will suffer "great financial hardship" and "loss" should plaintiff's motion be granted and requests that the action be scheduled for a preliminary conference so that discovery can be conducted

In reply, the plaintiff submits an attorney's affirmation and argues that no basis exists to deny granting plaintiff's application for an award of summary judgment. Plaintiff claims that the proof submitted in the form of an affidavit from the mortgage servicer's employee together with copies of the promissory note and mortgage agreements provide sufficient evidence entitling the mortgage lender to foreclose the mortgage. Plaintiff contends the mortgage servicer's representative's affidavit detailing the bank records pertaining to the defendant's note and mortgage satisfies the business records exception to the hearsay rule and reveals that defendants have defaulted under the terms of the mortgage by failing to make mortgage payments for nearly the past six years. Plaintiff claims the evidence shows that U.S. Bank, N.A. has standing to maintain this action based upon plaintiff having attached a copy of the indorsed promissory note to its complaint based upon evidence that the mortgage lender has retained continuous physical possession of the promissory note since prior to the commencement of this action. Plaintiff also claims that the proof submitted shows that the defendants were properly served with pre-foreclosure default notices in compliance with the terms of the mortgage and RPAPL 1304.

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 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 note to its complaint or to the certificate of merit required pursuant to CPLR 3012(b), coupled with an affidavit in which it alleges that it had possession of the note prior to the commencement of the action, has been held to constitute due proof of the plaintiff's standing to prosecute its claims for foreclosure and sale (*JPMorgan Chase Bank, N.A. v. Weinberger*, 142 AD3d 643, 37 NYS3d 286 (2nd Dept., 2016); *FNMA v. Yakaputz II, Inc.*, 141 AD3d 506, 35 NYS3d 236 (2nd Dept., 2016); *Deutsche Bank National Trust Co. v. Leigh*, 137 AD3d 841, 28 NYS3d 86 (2nd Dept., 2016); *Nationstar Mortgage LLC v. Catizone*, 127 AD3d 1151, 9 NYS3d 315 (2nd Dept., 2015)).

Proper service of RPAPL 1304 notices on borrower(s) are conditions 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 (2nd Dept., 2011); *First National Bank of Chicago v. Silver*, 73 AD3d 162, 899 NYS2d 256 (2nd 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.

The plaintiff's proof in support of its motion consists of: 1) a copy of the adjustable rate promissory note and prepayment addendum to note signed by both defendants together with an allonge indorsed in blank and signed by the assistant secretary of the original mortgage lender, Sunset Mortgage Company ; 2) copies of the January 31, 2005 mortgage and adjustable rate rider signed by defendants Sausa and Erhardt, together with copies of three loan modification agreements dated June 22, 2006, February 4, 2009 and July 15, 2010 each signed by defendants Sausa and Erhardt; 3) a copy of the assignment of the mortgage dated April 6, 2012 from MERS as nominee for Sunset Mortgage Company, L.P. to U.S. Bank, N.A. ; 4) an affidavit from Select Portfolio Servicing Inc.'s (SPS) document control officer testifying about the contents of the loan (business) records maintained by the mortgage lender; 4) copies of the pre-foreclosure mortgage loan default notices dated November 1, 2011 (sent by a prior servicer- Chase) and March 18, 2014 (sent by the current mortgage servicer- SPS) , together with copies of the mortgage default notices and RPAPL 90 day notices, and a copy of the RPAPL 1306 Proof of Filing Statement from the New York State Department of Financial Services confirming mailing of the 90-day notices.

At issue is whether the evidence submitted by the plaintiff is sufficient to establish its right to foreclose. Despite claiming "great financial hardship" both defendants have received a discharge in bankruptcy and neither defendant disputes their continuing default in making any payments due under the terms of the promissory note and mortgage agreements. Rather, the issues raised by the defendants concern plaintiff's compliance with mortgage and statutory pre-foreclosure notice requirements, plaintiff's standing, and defendants' right to conduct discovery.

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 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 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 (*see People v. Kennedy, supra* @ pp. 579-580)). 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 Drive Housing Company, Inc.*, 100AD3d 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 mortgage lender 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 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)).

As recently stated in the Appellate Division, Second Judicial Department decision in *Citigroup, etc., v. Kopelowitz, et al.*, 2017 NY Slip Op 01331 (2nd Dept., 2/22/17): "There is no requirement that a plaintiff in a foreclosure action rely upon any particular set of business records to establish a prima facie case, so long as the plaintiff satisfies the admissibility requirements of CPLR 4518(a), and the records themselves actually evince the facts for which they are relied upon (citations omitted)."

The affidavit submitted by the mortgage service provider's document control officer provides the evidentiary foundation for establishing the mortgage lender's right to foreclose. The affidavit sets forth the servicer employee's review of the business records maintained by SPS; the fact that the books and records are made in the regular course of the prior servicers and SPS's business; that the records include and incorporate the computerized business records of prior servicers of the subject loan which are routinely relied upon in the industry; that it was the mortgage servicer's regular course of business to maintain such records; that the records were made at or near the time the underlying transaction took place; and that the records were created by individuals with personal knowledge of the underlying transactions. Based upon submission of this affidavit, the plaintiff has provided an admissible evidentiary foundation which satisfies the business records exception to the hearsay rule with respect to issues raised in its summary judgment application.

With respect to the issue of standing, plaintiff has submitted sufficient evidence in the form of the affidavit from the mortgage servicer's document control officer to prove the plaintiff has standing, as the holder of the endorsed in blank original promissory note signed by the defendants which has been in its possession on or before July 10, 2014 which was the date the action was commenced (*Aurora Loan Services v. Taylor; supra.; Wells Fargo Bank, N.A. v. Parker, supra.; U.S. Bank, N.A. v. Ehrenfeld*, 144 AD3d 893, 41 NYS3d 269 (2nd Dept., 2016); *GMAC Mortgage, LLC v. Sidberry*, 144 AD3d 863, 40 NYS3d 783 (2nd Dept., 2016)). In addition, plaintiff established its standing to maintain this action by attaching a certified copy of the indorsed promissory note to its complaint together with the required affidavit (see *JPMorgan Chase Bank, N.A. v. Weinberger, supra.; Nationstar Mortgage LLC v. Catizone, supra.*)

With respect to the issues concerning plaintiff's service of pre-foreclosure default notices, the plaintiff has submitted sufficient evidence to establish that notices were served in accordance with mortgage and statutory requirements. With respect to RPAPL1304 notice requirements, plaintiff's proof consists of: 1) the affidavit of mailing from the mortgage servicer's document control officer confirming that service was made by the current servicer, SPS, by certified mail and first class mail to the mortgaged premises on March 18, 2014; and 2) copies of the 1304 notices with tracking numbers related to the certified mailing together with a copy of the RPAPL 1306 filing statement. With respect to the mortgage default notice, plaintiff's proof consists of the affidavit from the mortgage servicer's document control officer confirming service of the notice was made by the prior servicer, Chase, as required by the terms of the mortgage, by first class mail to the mortgaged premises by notice dated November 1, 2011 together with copies of notices of default dated November 1, 2011 Defendant Sausa's conclusory assertion that he never received the notices and defense counsel's conclusory claim that the notices were not properly served on the defendants, are 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 (2nd Dept., 2016); *HSBC Bank v. Espinal*, 137 AD3d 1079, 28 NYS3d 107 (2nd Dept., 2016)).

With respect to defendant's remaining contention concerning the claimed "invalidity" of the three loan modifications granted the mortgagors, there is no supporting documentation submitted by the borrowers to show that each of the signed agreements modifying the terms of the original mortgage agreement were in any manner fraudulent or contained terms which did not reflect the agreements entered into by the mortgage lender with the borrowers. Absent any admissible evidence to prove that any of the three modification agreements were fraudulent no legal basis exists to defeat the plaintiff's summary judgment motion on these grounds. The evidence submitted by the bank has shown, and the defendants do not factually dispute, that the mortgagors have defaulted under the terms of the mortgages by failing to make timely monthly mortgage payments since August 1, 2011. 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. While defendant Sausa's affidavit alleges that: "I have and will continue to suffer great financial hardship and loss, absent denial of plaintiff's application", the record remains undisputed that mortgagor Sausa has not made a payment for well in excess of five years. It is therefore difficult to understand what great financial hardship the mortgagor is referencing and absent submission of relevant, admissible proof to show that the defendants have not breached their obligations under the terms of the note and mortgages there is no basis to deny plaintiff's summary judgment motion.

Finally, as the defendants have failed to raise any evidence to address any of their remaining twenty two affirmative defenses and one counterclaim in opposition to plaintiff's motion, those affirmative defenses and counterclaim must be deemed abandoned and are hereby dismissed (*see Kronick v. L.P. Theriault 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); *Flagstar Bank v. Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 (2nd Dept., 2012); *Wells Fargo Bank Minnesota, N.A v. Perez*, 41 AD3d 590, 837 NYS2d 877 (2nd Dept., 2007)).

Accordingly the plaintiff's motion seeking an order granting summary judgment and for the appointment of a referee is granted. The proposed order for the appointment of a referee has been signed simultaneously with the execution of this order.

Dated: May 5, 2017

Hon. Howard H. Heckman Jr.

J.S.C.