

<b>HSBC Bank USA, N.A. v Shepetuk</b>
2017 NY Slip Op 31380(U)
June 22, 2017
Supreme Court, Suffolk County
Docket Number: 46240/2009
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.: 46240/2009  
MOTION DATE: 08/19/2016  
MOTION SEQ. NO.: 002 MG  
003 MD

-----X  
HSBC BANK USA, N.A.,

Plaintiffs,

-against-

RAYMOND SHEPETUK,  
MICHELLE GUALANDI,

Defendants.  
-----X

**PLAINTIFF'S ATTORNEY:**  
HOGAN LOVELLS US LLP  
875 THIRD AVENUE  
NEW YORK, NY 10022

**DEFENDANTS' ATTORNEYS:**  
RAYMOND SHEPETUK, ESQ.  
415 BEDFORD RD., STE. 002  
PLEASANTVILLE, NY 10570

Upon the following papers numbered 1 to 34 read on this motion \_\_\_\_\_; Notice of Motion/ Order to Show Cause and supporting papers 1-22 (#002) ; Notice of Cross Motion and supporting papers 23-29 (#003) ; Answering Affidavits and supporting papers 30-32 ; Replying Affidavits and supporting papers 33-34 ; Other \_\_\_\_\_ : (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion by plaintiff HSBC Bank, N.A., seeking an order: 1) granting summary judgment striking the answers of defendants Raymond Shepetuk and Michelle Gualandi; 2) substituting "John Doe #1" and "Jane Doe #1" as named party defendants in place and stead of defendants designated as "John Doe"; 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 the cross motion by defendants Raymond Shepetuk and Michelle Gualandi seeking an order pursuant to CPLR 3211(a)(3)&(7), 3216 & 3404 denying plaintiff's motion and dismissing plaintiff's complaint based upon plaintiff's lack of standing, failure to state a cause of action and failure to prosecute this foreclosure action 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 original sum of \$675,000.00 executed by defendants Raymond Shepetuk and Michelle Gualandi (by attorney in fact Shepetuk) on June 29,

2007 in favor of Wells Fargo Bank, N.A. On the same date defendant Shepetuk executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. By assignment dated October 21, 2009 Wells Fargo Bank, N.A. assigned the mortgage to plaintiff IHSBC Bank USA, N.A. The mortgage had been previously assigned to the Trust under the terms of the Wells Fargo/IHSBC pooling and servicing agreement dated September 28, 2007. Plaintiff claims that the defendants have defaulted in making timely monthly mortgage payments since December 1, 2008. Plaintiff's motion seeks an order granting summary judgment striking defendants' answers and for the appointment of a referee. Defendants' cross motion seeks an order dismissing plaintiff's complaint for lack of standing, failure to state a valid foreclosure claim and failure to prosecute.

In opposition and in support of their cross motion, defendants each submit an affidavit and claim that the plaintiff lacks standing to prosecute this foreclosure action since there is insufficient proof submitted to prove plaintiff's possession of the promissory note prior to commencing this foreclosure action. Defendants argue that absent such proof the assignee of the mortgage has failed to demonstrate that it has standing to prosecute this foreclosure action. Defendants also argue that plaintiff's five year delay in prosecuting this action requires that the complaint be dismissed. Defendants claim that they destroyed "records and notes" pertaining to the foreclosure in reliance upon their belief that the plaintiff was rescinding its right to accelerate the loan and contend that since the commencement of this action the mortgage lender has failed to offer the borrowers an opportunity to modify the mortgage loan.

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. Erohobo*, 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); *IHSBC 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)). A plaintiff's attachment of a duly indorsed mortgage 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 (2<sup>nd</sup> Dept., 2016); *FNMA v. Yakaputz II, Inc.*, 141 AD3d 506, 35 NYS3d 236 (2<sup>nd</sup> Dept., 2016); *Deutsche Bank National Trust Co. v. Leigh*, 137 AD3d 841, 28 NYS3d 86 (2<sup>nd</sup> Dept., 2016); *Nationstar Mortgage LLC v. Catizone*, 127 AD3d 1151, 9 NYS3d 315 (2<sup>nd</sup> Dept., 2015)).

Plaintiff has submitted sufficient evidence in the form of an affidavit from a representative of the mortgage servicer and custodian of the mortgage loan, identified as a Wells Fargo vice president of loan documentation (satisfying the business records exception to the hearsay rule) to prove it had standing, as the holder of the note by confirming that the promissory note was in its possession as the custodian of the plaintiff HSBC, prior to the commencement of this action. The affidavit, together with a copy of the promissory note, provides proof that the promissory note indorsed without recourse by the original lender Wells Fargo's representative (vice president) was in the physical custodial possession of the servicer on behalf of the plaintiff since September, 2007 up to and including until the date the action was commenced on November 19, 2009, thereby establishing the plaintiff's standing (*Aurora Loan Services v. Taylor, supra.*; *Wells Fargo Bank v. Parker, supra.*; *U.S. Bank, N.A. v. Ehrenfeld*, 144 AD3d 893, 41 NYS3d 269 (2<sup>nd</sup> Dept., 2016); *GMAC v. Sidberry*, 144 AD3d 863, 40 NYS3d 783 (2<sup>nd</sup> Dept., 2016); *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)).

With respect to defendants' claim that the complaint should be dismissed for failure to prosecute, a court's power to dismiss a complaint sua sponte is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal (*see Chase Home Finance, LLC v. Kornitzer*, 139 AD3d 784, 31 NYS3d 559 (2<sup>nd</sup> Dept., 2016); *Wachovia Bank, N.A. v. Akojenu*, 138 AD3d 1112, 30 NYS3d 659 (2<sup>nd</sup> Dept., 2016)). Court records indicate that this action was commenced in November, 2009 and was originally the subject of a summary judgment motion, which was subsequently withdrawn by the plaintiff on November 30, 2010. A CPLR 3408 mandatory court settlement conference was scheduled and the action was released from the foreclosure settlement part to an IAS Part on February 8, 2013. Records indicate that the borrowers were not represented and were determined to be not eligible for a settlement conference. Plaintiff's summary judgment motion was filed with the court on April 25, 2016. Five subsequent court conferences have been held beginning July 28, 2016 which was prior to this action being assigned to this court by order dated June 12, 2017.

Defendants characterization that this action was stricken as an "active" case is not supported by court records or any other relevant, admissible evidence. Upon the filing of a request for judicial intervention court procedures require that the clerk schedule a foreclosure action for a settlement conference in the court designated foreclosure department. Such conferences are overseen by court attorney/referees assigned to conduct the conferences. Once the court attorney referee determines that the action does not one qualify for a CPLR 3408 conference, the action is re-assigned to an IAS part. The re-assignment does not "strike the action" from the court calendar. It merely reassigns the action to a civil or mortgage foreclosure justice for further prosecution. In this regard defendants reference to dismissal based upon "abandonment" pursuant to CPLR 3404 is inapposite, since the

requirements of that statute pertain to actions where a note of issue has been filed and the action has been “stricken” from the court calendar based upon inactivity. No such facts exist here.

The legal grounds for dismissing this pre-note of issue action case are dictated by the requirements of CPLR 3216. The statute does not permit dismissal “unless a written demand is served upon the party against whom such relief is sought requiring the plaintiff to serve and file a note of issue within 90 days of receipt of the demand (CPLR 3216(b)(3); see *BankUnited v. Kheyfets*, 150 AD3d 948, 2017 NY Slip Op 03923 (2<sup>nd</sup> Dept., 2017)). In this case no written demand has ever been served upon the plaintiff and no extraordinary circumstances exist which could possibly warrant dismissal of the plaintiff’s complaint (see *Deutsche Bank National Trust Co. v. Cotton*, 147 AD3d 1020, 46 NYS3d 913 (2<sup>nd</sup> Dept., 2017); see also *Deutsche Bank National Trust Co. v. Rauf*, 139 AD3d 789, 29 NYS3d 811 (2<sup>nd</sup> Dept., 2016)).

With respect to the defendants remaining arguments concerning detrimental reliance based upon the borrowers claim of having destroyed records and notes, there is no description of the contents of those records and notes or any explanation concerning how the destruction of such records has any relevance to the defendants ability to assert a defense to plaintiff’s foreclosure action. Nor is there any showing of prejudice given the fact that defendants do not dispute their continuing breach of their obligation to make any payments due under the terms of the parties agreement or their more than eight year ability to maintain residence in the premises without making any payments in consideration of the lender having loaned the defendants the sum of \$675,000.00 more than ten years ago. As to defendants contention that the mortgage lender has failed to negotiate a loan modification, the mortgage lender has no legal obligation to offer a loan modification to the defaulting borrower. Moreover, court records indicate that five conferences have been scheduled since the parties filed these motions.

With respect to the remaining defenses asserted in the defendants’ answers, the defendants have failed to raise any further evidence to address their remaining pleaded affirmative defenses and one counterclaim in opposition to this motion. Those remaining defenses and counterclaim must therefore be deemed abandoned and are hereby dismissed (*Citibank, N.A. v. Van Brunt Properties, LLC*, 95 AD3d 1158, 945 NYS2d 330 (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 by the proof submitted in the form of the affidavit of the mortgage servicer attesting to the defendants continuing default in making timely payments due pursuant to the parties’ agreement and by submission of the original mortgage and duly indorsed promissory note, that the defendants have defaulted under the terms of the mortgage by failing to make timely monthly mortgage payments since December 1, 2008. 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. In fact neither defendant disputes the fact that mortgage payments due and owing have not been made for the past eight and one-half years.

Accordingly the defendants' cross motion is denied and 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: June 22, 2017

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

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J.S.C.