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.: 17259/2010
MOTION DATE: 09/07/2016
MOTION SEQ. NO.: 003 MG

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WELLS FARGO BANK, N.A.,

Plaintiffs,

-against-

SALAH U. AKAND,

Defendants.

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

DEFENDANTS' ATTORNEYS:
ALFRED S. WALENDOWSKI, P.C.
532 BROAD HOLLOW RD., STE. 144
MELVILLE, NY 11747

Upon the following papers numbered 1 to 17 read on this motion ; Notice of Motion/ Order to Show Cause and supporting papers 1-11 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 12-15 ; Replying Affidavits and supporting papers 16-17 ; 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 defendant Salah Akand; 2) substituting Renee "Doe" as a named party defendant in place and stead of the defendant designated as "John Doe #1" and discontinuing the action against defendants designated as "John Doe #2" through "John Doe #10"; 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 $213,750.00 executed by defendant Salah U. Akand on August 23, 2001 in favor of Green Point Funding, Inc. On the same date the defendant executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. Defendant subsequently executed a second mortgage and promissory note, and a consolidated mortgage agreement dated April 10, 2003, forming a single lien in the sum of $218,000.00. The consolidated mortgage was assigned to the plaintiff by assignment dated April 28, 2010. Plaintiff claims that the defendant defaulted under the terms of the mortgage

and note by failing to make timely monthly mortgage payments beginning May 1, 2009 and continuing to date. Plaintiff's motion seeks an order granting summary judgment striking defendant's answer and for the appointment of a referee.

In opposition, defendant submits a three page attorney's affirmation and claims that plaintiff lacks standing to maintain this action and has failed to submit sufficient evidence to prove that it owns the promissory note and mortgage. Defendant claims that significant issues of fact exist concerning the validity of the assignment of the consolidated mortgage to Wells Fargo Bank and the existence of the consolidated mortgage.

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. Erobobo*, 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)).

The plaintiff's proof in support of its motion consists of: 1) three copies of the promissory

notes signed by the defendant Salah U. Akand , each with an indorsement in blank signed by a representative of the original mortgage lender, Greenpoint Mortgage Funding, Inc.; 2) three copies of the mortgages signed by defendant Salah U. Akand; and 3) an affidavit from a Wells Fargo Bank, N.A., vice president of loan documentation dated June 29, 2016, testifying about the contents of the loan (business) records maintained by the mortgage lender.

At issue is whether the evidence submitted by the plaintiff is sufficient to establish its right to foreclose. The defendant does not contest his default in making timely payments due under the terms of the promissory notes and mortgage agreements, but raise issues concerning plaintiff's lack of standing.

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.*, 147 AD3d 1014, 48 NYS3d 223 (2nd Dept., 2017): "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 (Id @ pg. 1015 (citations omitted))."

The affidavit submitted from the Wells Fargo bank's vice president of loan documentation provides the evidentiary foundation for establishing the mortgage lender's right to foreclose. The affidavit sets forth the bank employee's review of the business records maintained by Wells Fargo; the fact that the books and records are made in the regular course of Wells Fargo's business; that it was the bank'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 the 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 Wells Fargo's vice president of loan documentation to prove the plaintiff has standing, as the holder of the original promissory note duly indorsed in blank by a representative of Greenpoint Funding and signed by the defendant, which has been in the plaintiff's possession beginning on April 1, 2009 and was in the plaintiff's possession on May 6, 2010, 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)).

The evidence submitted by the plaintiff has shown, and the defendant does not factually dispute, that he has defaulted under the terms of the mortgage by failing to make timely monthly mortgage payments since May 1, 2009. The mortgage lender, 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. Absent the submission of any admissible evidence to contradict the showing made by the plaintiff of the defendant's breach of the mortgage agreement, no legal basis exists to deny plaintiff's summary judgment motion. Plaintiff has therefore submitted sufficient proof to establish its right to foreclose this mortgage.

Finally as the defendant has failed to raise any evidence to address the remaining pleaded affirmative defenses set forth in his answer in opposition to this motion, those affirmative defenses must be deemed abandoned and are hereby dismissed (*see Kronick v. L.P. Therault 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: June 27, 2017

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