

CitiMortgage, Inc. v Castagna
2017 NY Slip Op 31535(U)
July 19, 2017
Supreme Court, Suffolk County
Docket Number: 31977/2012
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.: 31977/2012
MOTION DATE: 04/18/2017
MOTION SEQ. NO.: 003 MG

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CITIMORTGAGE, INC.,

Plaintiffs,

-against-

ALFREDO CASTAGNA, STEPHEN CASTAGNA,

Defendants.

-----X

PLAINTIFFS' ATTORNEY:
DAVIDSON FINK, LLP
28 EAST MAIN STREET
ROCHESTER, NY 14614

DEFENDANTS' ATTORNEYS:
JOHN J. CARACCILO, ESQ.
325 EAST SUNRISE HWY.
LINDENHURST, NY 11757

Upon the following papers numbered 1 to 23 read on this motion; Notice of Motion/ Order to Show Cause and supporting papers 1-12 (#003); Notice of Cross Motion and supporting papers___; Answering Affidavits and supporting papers 13-20; Replying Affidavits and supporting papers 21-23; Other___; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff CitiMortgage, Inc. seeking an order: 1) granting summary judgment striking the answer of defendants Alfredo Castagna and Stephen Castagna; 2) substituting Lisa Castagna as a named party defendant in place and stead of a defendant designated as "Mary Doe" and discontinuing the action against the remaining defendant identified 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 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 \$400,000.00 executed by defendants Alfredo Castagna and Stephen Castagna on March 13, 2007 in favor of CitiMortgage, Inc. On the same date defendant Alfredo Castagna executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. The mortgage was assigned to the plaintiff by assignment dated April 9, 2012. Plaintiff claims that the defendants have defaulted in making timely monthly mortgage payments since July 1, 2011.

By short form Order dated September 7, 2016 plaintiff's original motion seeking an order granting a default judgment and for the appointment of a referee was denied without prejudice to renew and defendants' cross motion seeking permission to vacate their default in appearing and to serve a late answer was granted to the extent that defendants were permitted to serve a late answer containing one affirmative defense claiming that plaintiff failed to comply with RPAPL 1304 notice requirements. Plaintiff's motion seeks to renew its application for judgment striking defendants' answer and for the appointment of a referee to compute the sums due and owing to the mortgage lender as a result of the defendants' continuing default in making mortgage payments since July, 2011.

In opposition, defendants submit an affidavit from defendant Stephen Castagna and an attorney's affirmation and claim that RPAPL 1304 90-day default notices mailed by the mortgage lender were defective for three reasons: 1) the notices stated (in error) that the defendants were in default for 346 days, when the notices should have correctly stated that the defendants were in default for 347 days; 2) the notices stated (in error) that the amount required to cure the default was the sum of \$35,809.19 when the notices should have correctly stated that the amount required to cure the default was approximately the sum of \$26,000.00; and 3) the notices failed to use statutorily required language in the first sentence of the notice accurately listing the number of days and the amount of dollars in default rather than (in error) listing the number of days in default in the notice's first sentence and thereafter the amount of dollars needed to "cure" the default in the third sentence of the notice's first paragraph. Defendants argue that absent strict compliance with the statute the notices were invalid and the complaint must be dismissed. Defendants also argue that the plaintiff failed to submit sufficient, admissible evidence to establish the mortgage lender's right to foreclose the mortgage loan.

In reply, the plaintiff submits an attorney's affirmation and argues that all notices required to be served pursuant to RPAPL 1304 were properly served and that the proof submitted in the form of an affidavit from the mortgage servicer provides sufficient evidence consistent with the business records exception to the hearsay rule to prove such compliance. Plaintiff claims that the notices were properly mailed to the mortgaged premises in compliance with statutory requirements; that the notices contained an accurate statement setting forth the number of days the mortgage payments were then in delinquency and the amount required to cure the default; and that the language contained in the notices conformed with RPAPL 1304 (2012) statutory requirements. Plaintiff also claims that sufficient proof has been submitted to award the mortgage lender summary judgment based upon the defendants' continuing default in making timely monthly payments due under the terms of the note and mortgage for the past 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. Eroboho*, 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)).

Proper service of an RPAPL 1304 notice on borrower(s) is a condition 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 relevant to the issues raised in this motion consists of: 1) a copy of the promissory note dated March 13, 2007 signed by defendant Alfredo Castagna with an indorsement in blank signed by a CitiMortgage, Inc. vice president.; 2) a copy of the mortgage dated March 13, 2007 signed by defendants Alfredo Castagna and Stephen Castagna ; 3) an affidavit from a CitiMortgage, Inc. vice president of document control testifying about the contents of the loan (business) records maintained by the mortgage lender; and 4) copies of the RPAPL 90-day notices claimed to have been mailed to the Castagna defendants, addressed to the mortgaged premises address, by certified and first class mail on June 11, 2012, together a copy of the RPAPL 1306 New York State Banking Department Proof of Filing Statements confirming mailing and filing.

At issue is whether the evidence submitted by the plaintiff is sufficient to establish its right to foreclose. The defendants do not argue that the Castagnas have not defaulted in making timely payments and do not contest that they have failed to make any payments for the past six years. Nor do these defendants argue that the RPAPL 1304 90-day notices were not properly mailed to them. Rather, the issues raised by the defendants concern whether the RPAPL 1304 90-day notices that were mailed contained inaccurate information and failed to state the exact language in the first sentence of the notice required by the statute and were therefore invalid, and whether sufficient proof exists to entitle the plaintiff to foreclose the mortgage.

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 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 (citations omitted).” The affidavit from CitiMortgage’s vice president of document control provides the evidentiary foundation for establishing the mortgage lender’s right to foreclose. The affidavit sets forth the mortgage lender/service representative’s review of the business records maintained by CitiMortgage: the fact that those books and records are made in the regular course of CitiMortgage’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 transactions 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 the issues raised concerning the RPAPL 1304 notices relative to their accuracy and content, the plaintiff's evidence establishes a prima facie showing of compliance with statutory requirements. Although the defendants contest the accuracy of the number of days in default and the cure amount stated in the notices, the plaintiff has provided sufficient proof in support of the bank's calculations set forth in the notices to show that the computation of stated number of days in default was, in fact, correctly calculated, and to prove that the cure amount was also correctly stated as of the date in the year 2012 when the notices were mailed to the defendants. Moreover, a review of the statute (RPAPL 1304) in existence when the June 11, 2012 notices were mailed, reveals that the notices contained the statutorily required information in compliance with the statute's 2012 requirements. In this respect, defendants' objection, claiming that the first sentence of the notice is required to contain specific language stating: "As of ___, your home loan is ___ days and ___ dollars in default"- is only required for notices mailed to defaulting debtors beginning December 20, 2016 and thereafter. No such requirement existed in June, 2012. Under these circumstances the relevant, admissible evidence establishes that the RPAPL 1304 90-day notices, were mailed to the defendants in compliance with the statute as conceded by the defendants, and were in full compliance with statutory requirements pertaining to accuracy and content. Accordingly the affirmative defense set forth in defendants' answer is hereby stricken.

Finally, the bank has shown and the defendants do not dispute that they have defaulted under the terms of the mortgage by failing to make timely monthly mortgage payments since July 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. Accordingly, the 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: July 19, 2017

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