

**Wells Fargo Bank N.A. v Penny**

2017 NY Slip Op 31598(U)

April 10, 2017

Supreme Court, Suffolk County

Docket Number: 61686/2014

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.: 61686/2014  
MOTION DATE: 12/20/2016  
MOTION SEQ. NO.: 001 MG

-----X  
WELLS FARGO BANK N.A.,

Plaintiffs,

-against-

JANET PENNY, WAYNE PENNY,

Defendants.  
-----X

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

**DEFENDANTS' ATTORNEYS:**  
ALAN C. STEIN, P.C.  
7600 JERICHO TPKE., STE. 308  
WOODBURY, NY 11797

Upon the following papers numbered 1 to 53 read on this motion; Notice of Motion/ Order to Show Cause and supporting papers 1-29; Notice of Cross Motion and supporting papers     ; Answering Affidavits and supporting papers 30-41; Replying Affidavits and supporting papers     ; Other 42-53; (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 defendants Wayne Penny and Janet Penny; 2) deeming all appearing and non-appearing defendants in default; 3) granting permission to treat the answer as a limited notice of appearance; 4) substituting "Jane Doe" as a named party defendant in place and stead of defendants designated as "John Doe" and "Jane Doe"; 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.

Plaintiff's action seeks to foreclose a mortgage in the original sum of \$483,500.00 executed by defendants Wayne Penny and Janet Penny on May 3, 2007 in favor of World Savings Bank. On that same date the defendant Wayne Penny executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. On December 31, 2007 World Savings Bank FSB changed its name to Wachovia Mortgage, FSB. On November 1, 2009 Wachovia Mortgage, FSB was converted to a national bank known as Wells Fargo Bank Southwest National Association. On November 1, 2009 Wells Fargo Bank Southwest, National Association merged with and into Wells Fargo Bank N.A. Plaintiff claims that the defendants have defaulted in making timely

monthly mortgage payments since January 15, 2011. Plaintiff's motion seeks an order granting summary judgment striking defendants' answer and for the appointment of a referee.

In opposition, defendant Janet Penny submits an affidavit and an attorney's affirmation and claims that the plaintiff has failed to submit sufficient proof of compliance with pre-foreclosure mortgage and statutory notice requirements. Defendants contend that the plaintiff has failed to submit sufficient evidence to prove that it mailed the notice of default required by the mortgage by first class mail and has failed to show that it complied with the RPAPL 1304 90-day notice requirements by service via first class mail. Defendant Janet Penny concedes that she received the 90-day notice by certified mail, but denies having received notice by first class mail. Defendants also claim that their class action defense is viable since they never received a settlement check.

In reply, the plaintiff submits an attorney's affirmation and argues that all default notices required to be served under the terms of the mortgage and pursuant to RPAPL 1304 were properly served and no legal basis exists to deny the bank's summary judgment application. Plaintiff argues that pursuant to the terms of the mortgage and statutory requirements, plaintiff sent the notices by first class mail and certified mail. Plaintiff also claims that the defendants have abandoned and retain no right to assert a class action defense because they failed to assert it in opposition to plaintiff's summary judgment motion. Plaintiff maintains that even if the court were to address defendant's class action defense, this defense is barred as a result of defendant Wayne Penny's failure to opt out of the class action settlement.

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 (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)).

Proper service of an RPAPL 1304 notice on the 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 (2<sup>nd</sup> Dept., 2011); *First National Bank of Chicago v. Silver*, 73 AD3d 162, 899 NYS2d 256 (2<sup>nd</sup> 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.

Plaintiff's proof, set forth by Wells Fargo's Vice President of Loan Documentation affidavits dated May 10, 2016 and July 19, 2016, satisfy the business records exception to the hearsay rule and are sufficiently detailed in all other respects to provide evidence necessary to prove prima facie entitlement to summary judgment (CPLR 4518; *Landmark Capital Investments v. Li-Shan Wang*, 94 AD3d 418, 941 NYS2d 144 (1<sup>st</sup> Dept., 2012); *Merrill Lynch Business Financial Services, Inc. v. Trataros Construction, Inc.*, 30 AD3d 336, 819 NYS2d 223 (1<sup>st</sup> Dept., 2006)).

Moreover, the plaintiff has submitted sufficient proof to establish that notices of default were served upon the defendants in compliance with the requirements of the mortgage and RPAPL 1304. The plaintiff's proof consists of the affidavits submitted by the mortgagee's Vice President of Loan Documentation confirming that service was made in compliance with the terms of the mortgage by first class and certified mailing of the notice of default dated March 13, 2013, together with copies of two page notice of default and the U.S Postal Service certified mail receipts signed by defendant Wayne Penny. The plaintiff also submits proof of service in compliance with RPAPL 1304 requirements by certified and first class mailing of the required notices on March 13, 2103, which was more than 90 days prior to commencing this action on March 13, 2014, together with copies of the 90 day notices, copies of the U.S Postal Service certified mail receipts signed by defendant Wayne Penny, a copy of the Wells Fargo proprietary computer system screen shot confirming the first class and certified mailing on March 13, 2013 and a copy of the RPAPL 1306 New York State Banking Department filing statement also confirming the 90-day notice mailing to these defendants. The absence of an affidavit from the defendant Wayne Penny, whose signature is affixed to the four certified mailings, specifically denying receipt of such notices is fatal to defense counsel's claim that the plaintiff failed to comply with the statutory condition precedent (*see Grogg v. South Road Assoc.*, 74 AD3d 1021, 907 NYS2d 22 (2<sup>nd</sup> Dept., 2010); *Emigrant Mortgage Co. v. Gosdin*, 119 AD3d 639, 989 NYS2d 609 (2<sup>nd</sup> Dept., 2014)). Moreover, defendant Janet Penny's conclusory claim that notice was not received by her by first class mail is not supported by credible, 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 (2<sup>nd</sup> Dept., 2016); *HSBC Bank v. Espinal*, 137 AD3d 1079, 28 NYS3d 107 (2<sup>nd</sup> Dept., 2016)).

Similarly, the defendants' remaining argument with respect to their class action defense is not sustainable since the defendants concede that they never opted out of the class action settlement and are therefore barred from asserting the defense to this foreclosure action. As to defendants' additional affirmative defenses and counterclaim, the defendants have failed to raise any evidence to address those remaining numerous pleaded affirmative defenses and one counterclaim set forth in their answer in opposition to plaintiff's motion. Those affirmative defenses and counterclaim must be deemed abandoned and subject to dismissal (*see Kronick v. L.P. Thebault Co., Inc.*, 70 AD3d 648, 892 NYS2d 85 (2<sup>nd</sup> Dept., 2010); *Citibank, N.A. v. Van Brunt Properties, LLC*, 95 AD3d 1158, 945 NYS2d 330 (2<sup>nd</sup> Dept., 2012); *Flagstar Bank v. Bellafore*, 94 AD3d 1044, 943 NYS2d 551 (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 that the Penny defendants have defaulted under the terms of the mortgage by failing to make timely monthly mortgage payments since January 15, 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. Based upon these circumstances, 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: April 10, 2017

  
J.S.C.