Deutsche Bank Natl. Trust Co . v Carlin
2017 NY Slip Op 31887(U)
August 31, 2017
Supreme Court, Suffolk County
Docket Number: 28308/13
Judge: Howard H. Heckman, Jr.
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[* 1]

Short Form Order

SUPREME COURT - STATE OF NEW YORK
IAS PART 18 - SUFFOLK COUNTY

COPY

28308/13

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

INDEX NO.: ~~28303/2013~~
MOTION DATE: 12/13/2016
MOTION SEQ. NO.: 001 MG

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DEUTSCHE BANK NATIONAL TRUST CO.,

Plaintiffs,

-against-

MELISSA CARLIN, PAUL CARLIN,

Defendants.

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

DEFENDANTS' ATTORNEYS:
PETER PANARO, ESQ.
4216 MERRICK ROAD
MASSAPEQUA, NY 11758

Upon the following papers numbered 1 to 33 read on this motion : Notice of Motion/ Order to Show Cause and supporting papers 1-24 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 25-31 ; Replying Affidavits and supporting papers 32-33 ; Other ; (and after hearing counsel in support and opposed to the motion) it is.

ORDERED that this motion by plaintiff Deutsche Bank National Trust Company, seeking an order: 1) granting summary judgment striking the answer and counterclaims of defendants Melissa Carlin and Paul Carlin; 2) substituting Robyn Pussillo and Matthew Di Giacomo as named party defendants in place and stead of the 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 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 $242,400.00 executed by defendants Melissa Carlin and Paul Carlin on January 30, 2006 in favor of Fremont Investment & Loan. On the same date the defendants also executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. By assignment dated September 22, 2011 Mortgage Electronic Registration Systems, Inc. as nominee for Fremont Investment & Loan assigned the mortgage to plaintiff Deutsche Bank National Trust Co. Plaintiff claims that the defendants have defaulted in making timely monthly mortgage payments since April 1, 2011. Plaintiff's motion

seeks an order granting summary judgment striking defendant's answer and for the appointment of a referee.

In opposition, the Carlin defendants submit a joint affidavit and an attorney's affirmation and claim that the plaintiff failed to submit sufficient proof to show that the mortgage lender complied with pre-foreclosure default notice requirements pursuant to RPAPL1303 & 1304. Defendant claims that the plaintiff's proof fails to confirm that the 90 day notices were mailed by first class and certified mailing to the defendants residential premises. Defendants claim that the RPAPL 1303 notice was not served with the summons and complaint and claim that service of the RPAPL 1304 90-day notice was defective since the notice itself set forth an incorrect reinstatement amount.

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)).

Proper service of an RPAPL 1303 & 1304 notices on borrowers 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 1303 requires that notice be delivered with the summons and complaint to commence the foreclosure action. The notice must be in bold, fourteen-point type and shall be printed on colored paper that is other than the color of the summons and complaint, and the title of the notice shall be in bold, twenty-point type and the notice shall be on its own page. 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 promissory note signed by defendants Melissa Carlin and Paul Carlin with an indorsement in blank signed by a vice president of the original lender Fremont Investment & Loan; 2) a copy of the January 30, 2006 mortgage signed by defendants Melissa Carlin and Paul Carlin together with a copy of the September 22, 2011 assignment; 3) an affidavit from a Wells Fargo (the mortgage servicer) vice president of loan documentation testifying about the contents of the loan (business) records maintained by the mortgage lender; 4) copies of the mortgage loan default notices (claimed to have been mailed to the Carlin defendants at the property address and a second residential address by first class mail on May 1, 2013) together with copies of the bank's electronic record-keeping practice documents identified as "Mailbook" and "TrackRight Transaction History"; 5) copies of the RPAPL 1304 90-day notices (claimed to have been mailed to defendants at the property address and a second residential by certified and first class mail on May 1, 2013) with copies of the bank's electronic record-keeping practice documents identified as "Mailbook" and "TrackRight Transaction History" and a copy of the return image of the unclaimed envelope and return receipt card; and 6) a copy of the RPAPL1303 notice (claimed to have been served with the summons and complaint) together with copies of the amended affidavits of service dated December 3, 2013 indicating that service of the pleadings and notices were done by personal service upon defendant Paul Carlin and by substituted service (upon defendant Paul Carlin) upon defendant Melissa Carlin on October 31, 2013 at the mortgaged premises.

At issue is whether the evidence submitted by the plaintiff is sufficient to establish its right to foreclose. The defendants do not refute the fact that they have defaulted in making timely monthly mortgage payments for more than six years. The issues raised by the defendants concern whether, despite their continuing default, the mortgage lender gave them proper and adequate notice of the bank's intention to commence this foreclosure action, and whether the notice itself complied with statutory requirements.

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 623 (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 the Wells Fargo's vice president of loan documentation, together with the documentary evidence in the form of copies of the statutory notices and the mortgage servicer's internal business records, 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 Wells Fargo; the fact that those books and records are made in the regular course of Wells Fargo's business; that it was the servicer'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. The July 26, 2016 affidavit goes on to describe a dual tracking system maintained by the mortgage lender in the regular course of business referred to as "Mailbook" and "TrackRight", which required 10-digit specific and 20-digit specific tracking numbers affixed to the mortgage default notices and the RPAPL 1304 notices. Those specific tracking numbers related to the specific notices sent to the defaulting borrowers listing the manner in which each notice was

performed ("certificate of mail" (first class mailing) or "certified") and the date and time of mailing. The vice president of loan documentation's affidavit states that it was Wells Fargo's regular business practice to utilize the dual tracking systems ("Mailbook" & "TrackRight") and that the bank/service representative was familiar with the Wells Fargo regular practice which was adhered to in this instance. Based upon submission of the affidavit coupled with the documentary evidence, the plaintiff has provided an admissible evidentiary foundation which satisfies the business records exception to the hearsay rule with respect to issues concerning service and mailing of notices required under the terms of the mortgage and in compliance with RPAPL 1304 requirements.

With respect to the issues raised by the defendants concerning service of the RPAPL 1304 90-day notices, the defendants do not dispute that they were timely served with the required notices by first class mail. However in their joint affidavit they claim that they "did not receive a certified mailing of the notice" Plaintiff has submitted sufficient evidence of certified mailing of the 90-day notices by submission of the affidavit from the mortgage servicer attesting the required certified mailing, together with documentary proof in the form of the servicer's business records which reveals that the reason that defendants "did not receive" the certified mail was because it was "refused" when delivery was attempted on May 6, 2013 at both Rocky Point addresses. Based upon the proof submitted no viable defense exists concerning plaintiff's strict compliance with the mailing requirements of RPAPL 1304. Defendants also claim that the content of the statutory notices contain an inaccurate statement of the amount required to cure their default since the stated amount past due was identical to the amount set forth in the mortgage default notice which provided a "cure date" five days later than the statutory notice. Clearly a fair reading of the amount set forth in both default notices reveals no legal basis to defeat plaintiff's summary judgment motion on these grounds since the "cure"amount ($63,177.87) set forth on both notices was consistent based upon calculations of payment required on a monthly basis under the terms of the mortgage. Both notices therefore complied with the mortgage and statutory requirements.

With respect to service of the RPAPL 1303 notices, plaintiff's proof consists of a copy of the amended affidavits of service from the process server stating that "the required notice labeled Help for Homeowners in Foreclosure, with the title of the notice in bold, twenty-point type and the body in bold fourteen-point type, printed on paper that was a different color than the SUMMONS & COMPLAINT..." was personally served on defendant Paul Carlin and was served by substituted service on defendant Melissa Carlin on October 31, 2013 at 4:15 pm. The process server's affidavits constitute prima facie evidence of proper service of the RPAPL 1303 notices and it is therefore incumbent upon the defendants to submit credible, admissible evidence in the form of an affidavit containing specific and detailed contradictions of the claims set forth in the process server's affidavits. (CPLR 306; *U.S. Bank, N.A. v. Tauber*, 140 AD3d 1154, 36 NYS3d 144 (2nd Dept., 2016); *NYCTL v. Tsafinos*, 101 AD3d 1092, 956 NYS2d 571 (2nd Dept., 2012)). A close reading of the defendants' joint affidavit shows that neither defendant denied having been served with the RPAPL 1303 notice. The joint affidavit merely states that defendant Paul Carlin was served with the summons and complaint and accepted delivery of a second copy of the summons and complaint on behalf of his wife, defendant Melissa Carlin. It is defense counsel who raises the issue of service of the 1303 notice and who, himself, denies service was made on his clients. Under the circumstances, there is no relevant admissible evidence submitted by the defendants denying service of the notice and defense counsel's conclusory denial of such service fails to provide any credible, admissible evidence to raise a genuine issue of fact concerning service of this statutory condition precedent (*see Grogg v. South Road Associates*, 74 AD3d 1021, 907 NYS2d 22 (2nd Dept., 2010); *Emigrant*

Mortgage Co. v. Gosdin, 119 AD3d 639, 989 NYS2d 609 (2nd Dept., 2014)).

With respect to the defendants' remaining affirmative defenses and counterclaims set forth in their answer, the defendants have failed to raise any further evidence to address those remaining pleaded affirmative defenses and ten counterclaims in opposition to this motion. Those remaining defenses and the counterclaims must therefore be deemed abandoned and are hereby dismissed (*Citibank, N.A. v. Van Brunt Properties, LLC,* 95 AD3d 1158, 945 NYS2d 330 (2nd Dept., 2012); *Wells Fargo Bank Minnesota, N.A. v. Perez,* 41 AD3d 590, 837 NYS2d 877 (2nd Dept., 2007)).

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 April1, 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: August 31, 2017

HON. HOWARD H. HECKMAN, JR.

J.S.C.