

<b>Central Mtge. Co. v Roy</b>
2017 NY Slip Op 31983(U)
September 14, 2017
Supreme Court, Queens County
Docket Number: 707007/2016
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

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CENTRAL MORTGAGE COMPANY, Index No.: 707007/2016
Plaintiff, Motion Date: 9/8/17
- against - Motion No.: 15

JAMES S. ROY; MORTGAGE ELECTRONIC Motion Seq.: 2
REGISTRATION SYSTEMS, INC.; AMNET
MORTGAGE IN LIEU OF TRUE CORPORATE
NAME AMERICAN MORTGAGE NETWORK, INC.;
CITIMORTGAGE, INC.; CITIBANK, N.A.;
AUDREY I. PHEFFER, IN HER CAPACITY AS
QUEENS COUNTY CLERK,

"John Doe #1" through "John Doe #12",
the last twelve names being fictitious
and unknown to plaintiff, the persons
or parties intended being the tenants,
occupants, persons or corporations, if
any, having or claiming an interest in
or lien upon the premises, described
in the complaint,

Defendants.

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The following electronically filed documents read on this motion
by plaintiff for an Order granting plaintiff summary judgment
against, and striking the answer of, JAMES ROY; granting
plaintiff default judgment against the non-answering and non-
appearing defendants; appointing a Referee to compute the sum due
and owing to plaintiff; and amending the caption:

Papers
Numbered
Notice of Motion-Affirmation-Exhibits.....EF 83 - 101
Affirmation in Opposition-Affidavit-Exhibits.....EF 103 - 106
Reply Affirmation.....EF 107

This is an action to foreclose a mortgage upon real property
located at 127-06 89th Avenue, Richmond Hill, NY 11418.

Based upon the record before this Court, on December 5, 2006, defendant James S. Roy (defendant) executed a note in the principal amount of \$543,750. As security for the note, defendant executed a mortgage in favor of Mortgage Electronic Registration Systems, Inc. as Nominee for Amnet Mortgage in lieu of True Corporate Name American Mortgage Network, Inc. Defendant defaulted pursuant to the terms of the note and mortgage by failing to make the payment due on November 1, 2015 and thereafter. Due to the default, plaintiff commenced this foreclosure action by filing a summons, complaint and notice of pendency on June 14, 2016. Defendant interposed an answer on June 30, 2016. All other defendants, including Leslie Familiar, Stephanie Aragonas, Tamara Diaz, Ken Diaz, Roberto Nunez, Monica Nunez, Jamie Nunez, Willie Nunez, and Jesus Conteras, are in default. This matter was released from the Residential Foreclosure Settlement Conference Part on December 16, 2016. The Court Attorney-Referee noted "Defendant failed to appear as directed and failed to submit any loan modification application documents." Plaintiff now moves for an Order of Reference.

It is well settled that a plaintiff in a mortgage foreclosure action establishes a prima facie case of entitlement to summary judgment through submission of proof of the existence of the underlying note, mortgage, and default in payment after due demand (see American Airlines Federal Credit Union v Mohamed, 117 AD3d 974 [2d Dept. 2014]; TD Bank, N.A. v 126 Spruce Street, LLC, 117 AD3d 716 [2d Dept. 2014]; Citibank, N.A. v Van Brunt Properties, LLC, 95 AD3d 1158 [2d Dept. 2012]). Upon such a showing, the burden shifts to the defendant to produce evidence in admissible form sufficient to raise a material issue of fact requiring a trial.

In support of the motion, plaintiff submits the affidavit of Kaye Weathers, an Assistant Vice President of Arvest Central mortgage Company f/k/a Central Mortgage Company (plaintiff). Kaye Weathers affirms that based upon a personal review of plaintiff's records as well as the prior servicer's records, plaintiff received physical delivery of the original note on June 1, 2007 and was in possession and the holder of the note and assignee of the mortgage prior to commencement of this action. Defendant is in default under the terms and conditions of the note and mortgage because the November 1, 2015 payment and subsequent payments were not made. A notice of default dated December 28, 2015 was sent by first class and certified mail to defendant at the mortgaged premises. A 90 Day Notice was mailed by first class and certified mail to defendant at the mortgaged premises on December 1, 2015.

Plaintiff contends that it has made a prima facie showing that it is entitled to summary judgment based upon its submission of the note, mortgage, and Kaye Weathers' affidavit evidencing defendant's failure to make the contractually required loan payments.

Defendant opposes the motion on the grounds that plaintiff lacks standing, Kaye Weathers' affidavit is insufficient, and plaintiff failed to comply with RPAPL 1304.

"[W]here as here, the plaintiff's standing is placed in issue by a defendant, the plaintiff must prove its standing as part of its prima facie showing" (JPMorgan Chase Bank, N.A. v Weinberger, 142 AD3d 643, 644 [2d Dept. 2016]). A plaintiff has standing where it is both the holder or assignee of the subject mortgage and the underlying note at the time the action is commenced (see Aurora Loan Services, LLC v Taylor, 114 AD3d 627 [2d Dept. 2014]; Deutsche Bank Natl. Trust Co. v Whalen, 107 AD3d 931 [2d Dept. 2013]; Bank of N.Y. v Silverberg, 86 AD3d 274 [2d Dept. 2011]). "A plaintiff may demonstrate that it is the holder or assignee of the underlying note 'by showing either a written assignment of the underlying note or the physical delivery of the note'" (Aurora Loan Servs., LLC v Mercius, 138 AD3d 650, 651 [2d Dept. 2016] quoting U.S. Bank N.A. v Guy, 125 AD3d 846 [2d Dept. 2015]).

Here, Kaye Weathers affirmed that plaintiff was in possession of the original note prior to and at the time this action was commenced. Moreover, plaintiff attached a copy of the endorsed note to the summons and complaint. Thus, plaintiff established its standing to bring the mortgage foreclosure action (see Deutsche Bank Nat. Trust Co. v Logan, 146 AD3d 861 [2d Dept. 2017] ["where the note is affixed to the complaint, it is unnecessary to give factual details of the delivery in order to establish that possession was obtained prior to a particular date"]; Deutsche Bank Nat. Trust Co. v Carlin, 152 AD3d 491 [2d Dept. 2017]; JPMorgan Chase Bank, N.A. v Weinberger, 142 AD3d 643 [2d Dept. 2016]; Nationstar Mtge., LLC v Catizone, 127 AD3d 1151 [2d Dept. 2015]).

Defendant's argument that Kaye Weathers' affidavit is defective is unavailing. An affidavit based on review of business records maintained in the ordinary course of business, as here, is admissible to establish summary judgment (see CPLR 3212[b]; CitiMortgage, Inc. v Espinal, 134 AD3d 876 [2d Dept. 2015] [finding that the Bank affidavit constituted competent evidence based upon the business records exception to the hearsay rule]; Deutsche Bank Natl. Trust Co. v Monica, 131 AD3d 737 [3d

Dept. 2015]; Portfolio Recovery Assoc., LLC v Lall, 127 AD3d 576 [1st Dept. 2015]; Merrill Lynch Bus. Fin. Servs. Inc. v Trataros Constr., Inc., 30 AD3d 336 [1st Dept. 2006]). Here, Kaye Weathers affirmed that her affidavit was based upon her review of plaintiff's business records created and maintained in the ordinary and regular course of business by persons who have a business duty to make such records as well as her own personal knowledge of how the records are kept and maintained. Thus, plaintiff sufficiently established the admissibility of Kaye Weathers' statements (see Citigroup v Kopelowitz, 147 AD3d 1014 [2d Dept. 2017]; U.S. Bank N.A. v Ehrenfeld, 144 AD3d 893 [2d Dept. 2016]; U.S. Bank N.A. v Carey, 137 AD3d 894 [2d Dept. 2016]).

Lastly, defendant contends that plaintiff failed to comply with RPAPL 1304 because plaintiff failed to provide the certified mail or registered mail number or an affidavit of service. RPAPL 1304 provides that at least 90 days before a lender begins an action against a borrower to foreclose on a mortgage, the lender must provide notice to the borrower that the loan is in default and his or her home is at risk (see Aurora Loan Services, LLC v Weisblum, 85 AD3d 95 [2d Dept. 2011]). "[P]roper service of the RPAPL § 1304 notice on the borrower or borrowers is a condition precedent to the commencement of the foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition" (Id. at 107). The presumption of receipt by the addressee "may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed" (see Residential Holding Corp. v Scottsdale Ins. Co., 286 AD2d 679 [2d Dept. 2001]).

Here, Kaye Weathers affirms that the 90 day notices were mailed on December 1, 2015. Copies of the notices are annexed to the motion papers. This Court finds defendant's conclusory denial of receipt of the 90 day notice lacks the factual specificity and detail required to rebut the prima facie proof of proper service set forth in Kaye Weathers' affidavit (see CitiMortgage, Inc. v Espinal, 134 AD3d 876 [2d Dept. 2015]; ACT Props., LLC v Garcia, 102 AD3d 712 [2d Dept. 2013]; Bank of N.Y. v Espejo, 92 AD2d 707 [2d Dept. 2012]; Deutsche Bank Natl. Trust Co. v Hussain, 78 AD3d 989 [2d Dept. 2010]).

The remainder of the issues raised in opposition fails to warrant denial of plaintiff's motion for summary judgment. This Court also notes that defendant does not deny the existence of the note, mortgage, or default thereunder.

Accordingly, for the reasons stated above, plaintiff CENTRAL MORTGAGE COMPANY's motion is granted in its entirety.

Order of Reference signed contemporaneously herewith.

Dated: September 14, 2017  
Long Island City, N.Y.

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**ROBERT J. MCDONALD**  
**J.S.C.**