

<b>U.S. Bank N.A. v Johnsen</b>
2017 NY Slip Op 32363(U)
May 30, 2017
Supreme Court, Suffolk County
Docket Number: 37996/2012
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.: 37996/2012  
MOTION DATE: 10/23/2017  
MOTION SEQ. NO.: 001 MG  
002 MD

-----X  
U.S. BANK N.A.,

Plaintiffs,

-against-

TIMOTHY O. JOHNSEN, BARBARA R. JOHNSEN,

Defendants.  
-----X

**PLAINTIFFS' ATTORNEY:**  
PARKER IBRAHIM & BERGER LLC  
5 PENN PLAZA, STE. 2371  
NEW YORK, NY 10001

**DEFENDANTS' ATTORNEYS:**  
LAW OFFICES OF ELLIOT S. SCHLISSEL  
479 MERRICK ROAD  
LYNBROOK, NY 11563

Upon the following papers numbered 1 to 50 read on this motion \_\_\_\_\_; Notice of Motion/ Order to Show Cause and supporting papers 1-38; Notice of Cross Motion and supporting papers 39-46; Answering Affidavits and supporting papers 47-50; Repeating Affidavits and supporting papers \_\_\_\_\_; Other \_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion by plaintiff U.S. Bank, N.A. seeking an order: 1) granting summary judgment striking the answer and counterclaims asserted by defendants Timothy O. Johnsen and Barbara R. Johnsen; 2) discontinuing the action against defendants designated as "John Doe #1-5" and "Jane Doe #1-5"; 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 the cross motion by defendants Timothy O. Johnsen and Barbara Johnsen seeking an order pursuant to CPLR 3211(a)(3) & RPAPL 1304 dismissing plaintiff's complaint and awarding counsel fees is denied; 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 \$330,000.00 executed by defendants Timothy O. Johnsen and Barbara R. Johnsen on July 18, 2006 in favor of Argent Mortgage Company, LLC. On the same date both defendants executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. The mortgage loan was assigned to the plaintiff by assignment dated May 23, 2012. Plaintiff claims that the

mortgagor/defendants defaulted under the terms of the mortgage and note by failing to make timely monthly mortgage payments beginning January 1, 2010 and continuing to date. Plaintiff commenced this action by filing a notice of pendency, summons and complaint with the Suffolk County Clerk's Office on December 20, 2012. The Johnsen defendants served their answer on January 22, 2013. Plaintiff's motion seeks an order granting summary judgment striking defendant Cheryl Maurer's answer with counterclaims and for the appointment of a referee.

In opposition defendants submit a cross motion asserting defenses claiming that plaintiff lacks standing to prosecute this action and that plaintiff has failed to prove it has complied with RPAPL 1304 requirements. Defendants' opposition seeks an order dismissing plaintiff's complaint and awarding attorneys fees.

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 (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)). 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 (2<sup>nd</sup> Dept., 2015); *HISBC Bank USA, N.A. v. Baptiste*, 128 AD3d 77, 10 NYS3d 255 (2<sup>nd</sup> 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 (2<sup>nd</sup> 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 (2<sup>nd</sup> Dept., 2015); *U.S. Bank v. Guy*, 125 AD3d 845, 5 NYS3d 116 (2<sup>nd</sup> 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 (2<sup>nd</sup> Dept., 2016); *FNAA v. Yakuputz II, Inc.*, 141 AD3d 506, 35 NYS3d 236 (2<sup>nd</sup> Dept., 2016); *Deutsche Bank National Trust Co. v. Leigh*, 137 AD3d 841, 28 NYS3d 86 (2<sup>nd</sup> Dept., 2016); *Nationstar Mortgage LLC v. Catizone*, 127 AD3d 1151, 9 NYS3d 315 (2<sup>nd</sup> Dept., 2015)).

Proper service of RPAPL 1303 & 1304 notices on borrower(s) are conditions 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 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 the "reduced payment fixed rate" promissory note dated July 18, 2006 signed by both Johnsen defendants indorsed in blank and signed by the president and the C.F.O of the original mortgage lender, Argent Mortgage Company, LLC; 2) a copy of the recorded mortgage dated July 18, 2006 signed by both Johnsen defendants; 3) a copy of the Pooling and Servicing Agreement dated November 1, 2006 together with a copy of the mortgage assignment to plaintiff dated May 23, 2012; 4) three separate affidavits from mortgage servicer (JPMorgan Chase Bank, N.AA) testifying about the contents of the loan (business) records maintained by the mortgage lender; 5) four copies of the RPAPL 90 day notices dated February 29, 2012 for first class and certified mailing separately addressed to Timothy O. Johnsen and Barbara R. Johnsen to the mortgaged premises; together with United Postal Records identified as a "Certificate of Bulk Mailing" confirming mailing and payment of fees for mailing letters on February 29, 2012 and identified as "USPS Track & Confirm" revealing details of the mailing, and Chase internal business records identified as: "Chase Mortgage Banking First Class Proof of Mailing Report" identifying separate mailing of four letters to the Johnsen defendants at the mortgaged premises on February 29, 2012 and as: "Chase Mortgage Banking Certified Regulatory Mail Register" indicating two letters with individual article numbers addressed to the Johnsen defendants to the mortgaged premises on February 29, 2012; and 6) a copy of two RPAPL 1306 Proof of Filing Statements from the New York State Department of Financial Services confirming mailing of the 90-day notices to Timothy O. Johnsen and Barbara R. Johnsen.

At issue is whether defense counsel's breach of a written stipulation requiring the receipt of opposition papers to be made on a date certain, and counsel's subsequent submission of cross motion papers more than 24 days after the stipulated service receipt date, mandates the court's rejection of such opposition so that plaintiff's motion is considered unopposed and, if so, whether the evidence submitted by the plaintiff is sufficient to establish its right to foreclose. Or, if the court considers such opposition, whether issues of fact exist sufficient to defeat plaintiff's summary judgment motion or to require that the complaint be dismissed.

With respect to the issue of plaintiff's rejection of untimely filed opposition ("cross motion") papers, the record is clear that counsel for both parties executed a written stipulation requiring that defense counsel serve opposition papers and that such papers be received by plaintiff's counsel by September 27, 2016. Defense counsel breached the agreement by attempting to serve late cross motion papers (and not opposition papers as stipulated to by counsel) on October 20, 2016. Absent a reasonable explanation for defense counsel's failure to abide the written agreement, this court will

not consider defendant's cross motion papers in opposition to plaintiff's motion since the written stipulation is binding upon both parties to the agreement, just as a signed mortgage or promissory note is a binding agreement requiring re-payment of the amount of money borrowed over an agreed upon period of time (*see Turko v. Duffy's Inc.*, 111 AD3d 615, 974 NYS2d 126 (2<sup>nd</sup> Dept., 2013)). Based upon defense counsel's breach, the opposing papers are jurisdictionally defective as "the failure to provide proper service of motion papers deprives the court of jurisdiction to entertain the contents of such papers" (*Lee v. I-Sheng Li*, 129 AD3d 923, 10 NYS3d 451 (2<sup>nd</sup> Dept., 2015); *Crown Waterproofing, Inc. v. Tadco Construction Corp.*, 99 AD3d 964, 953 NYS2d 254 (2<sup>nd</sup> Dept., 2012)). Under the circumstances the opposition papers are deemed untimely and a nullity, in view of defense counsel's failure to strictly comply with the parties agreement. The Court will not consider defendant's "cross motion" as a timely submitted cross motion, but will determine its merits based upon the defendant's default in opposing plaintiff's original motion and the implicit consequences of defendants' failure to timely oppose that motion.

With respect to plaintiff's unopposed motion for summary judgment, the affidavits submitted by the mortgage lender's vice president, together with the attorney's affirmation and submission of copies of the duly indorsed promissory note and mortgage, provide the evidentiary foundation for establishing the mortgage lender's right to foreclose. This evidence shows prima facie that the defendants failed to comply with the terms of the promissory note and mortgage by their default in making timely monthly mortgage payments since January 1, 2010. 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 by failing to submit any timely opposition to the plaintiff's motion. Accordingly the plaintiff's motion must be granted in its entirety.

Even were the Court to consider defense counsel's "cross motion" papers in opposition to plaintiff's motion, the relevant, admissible evidence in this record proves the plaintiff's entitlement to foreclose the mortgage. With respect to the issue of standing, plaintiff has submitted sufficient evidence in the form of the affidavit from the mortgage lender's mortgage servicer's vice president (which satisfies the business records exception to the hearsay rule (CPLR 4518)) and plaintiff's counsel's affirmation to prove the plaintiff has standing, as the holder of the indorsed in blank original promissory note signed by the defendants which has been in plaintiff's possession prior to and on the date the action was commenced on December 20, 2012 (*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 (2<sup>nd</sup> Dept., 2016); *GMAC Mortgage, LLC v. Sidberry*, 144 AD3d 863, 40 NYS3d 783 (2<sup>nd</sup> Dept., 2016)).

With respect to the issue of service of the pre-foreclosure RPAPI, 1304 90-day notices, the proof required to show strict compliance with the statute is: 1) submission of an affidavit of service of the notices (*CitiMortgage, Inc. v. Pappas*, 147 AD3d 900, 47 NYS3d 415 (2<sup>nd</sup> Dept., 2017); *Bank of New York Mellon v. Aquino*, 131 AD3d 1186, 16 NYS3d 770 (2<sup>nd</sup> Dept., 2015)); or 2) by plaintiff's submission of sufficient proof to establish proof of mailing by the post office which can be proven by admissible evidence provided by the business records exception to the hearsay rule (*HSBC Bank USA, N.A. v. Ozcan*, 2017 WL 4651992, 2017 NY Slip Op 07242 (2<sup>nd</sup> Dept., 10/18/17); *CitiMortgage v. Pappas; supra.; Bank of New York Mellon v. Davis*, 56 Misc 3<sup>rd</sup> 897, 59 NYS3d 252 (Suff. Cty. Sup. Ct., 2017)). Once either method is established a presumption of receipt arises (*see*

*Viviane Etienne Medical Care, P.C. v. Country-Wide Insurance Company*, 25 NY3d 498, 14 NYS3d 283 (2015); *Flagstar Bank v. Mendoza*, 139 AD3d 898, 32 NYS3d 278 (2<sup>nd</sup> Dept., 2016); *Residential Holding Corp. v. Scottsdale Insurance Company*, 286 AD3d 679, 729 NYS2d 766 (2<sup>nd</sup> Dept., 2001)).

Plaintiff has submitted sufficient evidence to establish that the 1304 notices were served in accordance with statutory requirements. Plaintiff's proof consists of testimonial and documentary evidence from the mortgage servicer (Chase) that performed the mailing and from United States Postal Service records. The proof submitted specifically includes: 1) the testimony of the mortgage servicer's (Chase's) "MB Default Ops Spec II" who confirms in his "affidavit of mailing" that the required mailings were served on February 29, 2012; 2) copies of the February 29, 2012 notices mailed to both defendants at the mortgaged premises; 3) United States Postal records corroborating the first class and certified mailings sent to the Johnsen defendants; and 4) copies of internal business records maintained by Chase further corroborating the mailing. The submission of this testimonial and documentary evidence establishes strict compliance with RPAPL 1304 mailing requirements (see *HSBC Bank USA, N.A. v. Ozcan, supra.*; *CitiMortgage, Inc. v. Pappas, supra.*). Absent the submission of any evidence in opposition to plaintiff's motion, plaintiff has submitted sufficient uncontroverted proof to establish its right to foreclose the mortgage.

Based upon the foregoing, and in view of defendant's failure to submit timely opposition to plaintiff's motion, the only issue remaining is to address the application submitted by the defendants, which although characterized as a "cross motion" is considered as an independent motion seeking to dismiss plaintiff's complaint. Defendant's application provides no reasonable excuse for counsel's default in serving timely opposition to the motion and therefore based upon their default the award of judgment in plaintiff's favor has become the law of the case. Defendant's motion provides no evidence to disturb

With respect to defendant's remaining contentions concerning the right to conduct discovery and to remand this action for another mandatory settlement conference, court records indicate that this action was scheduled for court settlement conferences on May 7, 2015 and July 7, 2015. Records show that based upon the Maurer defendants failure to appear for the July 7<sup>th</sup> conference, the action was marked "not settled" and referred to an IAS court part. It is therefore confusing to understand defense counsel's assertion in his opposition papers placing blame on plaintiff's counsel for defendants' default (presumably in appearing at the July 7<sup>th</sup> conference). Defense counsel claims that plaintiff (counsel) had "no right to file an RJI prior to the expiration of the time to have the issue joined" (claiming the RJI requesting a settlement conference was filed ten days before defendants' answer was served, so that defense counsel never received formal notice of the settlement conference date). While such claim might have been defensible had only one such conference been held, the record indicates that defendant(s) appeared for the May 7<sup>th</sup> conference and therefore had every opportunity to notify counsel of the second conference date, yet failed to appear. No legal basis exists to remand this action for a third conference or to further conduct discovery.

Finally and in view of defendants' failure to submit timely opposition, the defendant has failed to raise any evidence to address any of her forty one affirmative defenses in opposition to plaintiff's 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 (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. Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 (2<sup>nd</sup> Dept., 2012); *Wells Fargo Bank Minnesota*,

*N.I. v. Perez*, 41 AD3d 590, 837 NYS2d 877 (2<sup>nd</sup> 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: May 30, 2017

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

**Hon. Howard H. Heckman Jr,**