Short Form Order

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

COPY

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

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WELLS FARGO BANK, N.A. D/B/A AMERICAS SERVING CO.,

Plaintiffs,

-against-

JASON SCHLOMANN,

Defendants.

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INDEX NO.: 018292/2011
MOTION DATE: 05/09/2017
MOTION SEQ. NO.: 002 Mot D
003 Mot D

PLAINTIFF'S ATTORNEY:
WOODS OVIATT GILMAN, LLP
700 STATE STREET
ROCHESTER, NY 14614

DEFENDANT'S ATTORNEY:
IVAN YOUNG, ESQ.
80 ORVILLE DR., STE. 100
BOHEMIA, NY 11716

Upon the following papers numbered 1 to 32 read on this motion : Notice of Motion/ Order to Show Cause and supporting papers 1-13 ; Notice of Cross Motion and supporting papers 14-30 ; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers 31-32 ; Other ; (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 defendant Jason Schlomann; 2) substituting Kerri Murphy as a named party defendant in place and stead of the defendant 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 to the following extent:

ORDERED that plaintiff is awarded partial summary judgment dismissing all affirmative defenses set forth in defendants' answer except the defense asserted in the defendant's cross motion papers related solely to the plaintiff's compliance with RPAPL 1304; and it is further

ORDERED that plaintiff's application to substitute Kerri Murphy as a named party defendant in place and stead of the defendant designated as "John Doe" is granted and the caption is hereby amended; and it is further

ORDERED that plaintiff's application for an order appointing a referee to compute amounts due is denied without prejudice, as such request is premature. The proposed order submitted by the plaintiff shall be marked "not signed"; and it is further

ORDERED that the cross motion by defendants Melisa Sabo and Joseph G. Kubacki for an order pursuant to CPLR 3211(a)(3), 3212 & RPAP 1304 dismissing plaintiff's complaint for lack of standing and for failure to timely serve pre-foreclosure statutorily required 90-day notices of default

or, in the alternative, denying plaintiff's summary judgment motion is denied; and it is further

ORDERED that pursuant to CPLR 3212(g) in aid for disposition of the action, the sole remaining issue to be determined in this foreclosure action shall concern whether the plaintiff complied with pre-foreclosure RPAPL 1304 90-day notice requirements and the trial of this action shall be limited to that issue; and it is further

ORDERED that all parties shall appear for a court conference to ready this matter for trial or to provide a briefing schedule for an additional summary judgment motion (*see Kolel Damsek Eliezer, Inc. v. Schlesinger*, 139 AD3d 810, 33 NYS3d 284 (2nd Dept., 2016)) at 9:30 a.m. on September 26, 2017 in Part 18 at the Courthouse located at 1 Court Street, Riverhead, NY; 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 file a notice of entry within five days of receipt of this Order pursuant to 22 NYCRR Section 202.5-b(h)(3).

Plaintiff's action seeks to foreclose a mortgage in the original sum of $297,500.00 executed by defendant Jason Schlomann on December 15, 2005 in favor of American Brokers Conduit. On the same date defendant Schlomann also executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. By assignment dated July 28, 2010 Mortgage Electronic Registration Systems, Inc. as nominee for American Brokers Conduit assigned the mortgage to plaintiff Wells Fargo Bank, N.A. Plaintiff claims that defendant Schlomann defaulted under the terms of the mortgage and note by failing to make timely monthly mortgage payments beginning January 1, 2011. Plaintiff commenced this action by filing a summons, complaint and notice of pendency in the Suffolk County Clerk's Office on June 3, 2011. Plaintiff's motion seeks an order granting summary judgment striking defendant's answer and for the appointment of a referee.

In support of their cross motion and in opposition to plaintiff's motion, defendant submits an an attorney's affirmation and claims that: 1) plaintiff failed to serve pre-foreclosure 90-day notices of default in compliance with RPAPL 1304 requirements; and 2) plaintiff lacks standing to maintain this action requiring dismissal of the complaint. Defendant claims that plaintiff failed to strictly comply with RPAPL 1304 since there is insufficient proof of service of the required 90-day notices and since the contents of the claimed notices is deficient in failing to set forth the correct toll-free helpline number and in failing to list five approved housing counseling agencies. Defendant also claims the evidence submitted by plaintiff in support of its summary judgment motion fails to prove that the plaintiff has standing to prosecute this action since the documentary evidence proves that the original lender owned the mortgage and note on the date this action was commenced.

In opposition to the cross motion and in further support of its motion, plaintiff submits two attorney affirmations and an affidavit from a Wells Fargo Bank vice president of loan documentation, and argues that no basis exists to deny plaintiff's application for an order granting summary judgment. Plaintiff claims that the proof submitted in the form of the affidavit from the Wells Fargo vice president, together with copies of the promissory note and mortgage agreement,

provide sufficient evidence entitling the mortgage lender to foreclose the mortgage. Plaintiff contends the vice president's affidavit detailing the bank records pertaining to the defendant's note and mortgage satisfies the business records exception to the hearsay rule and reveals that the defendant has defaulted under the terms of the mortgage by failing to make mortgage payments for more than six years. Plaintiff claims the evidence shows that Wells Fargo Bank, N.A. has standing to maintain this action as the holder and physical possessor of the promissory note with an attached allonge indorsed in blank since June 22, 2006. Plaintiff also claims that the proof submitted shows that the defendant was properly served with the pre-foreclosure 90-day default notices in compliance with RPAPL Section 1304.

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. Erobobo*, 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)). 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 (2nd Dept., 2015); *U.S. Bank v. Guy*, 125 AD3d 845, 5 NYS3d 116 (2nd 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 (2nd Dept., 2016); *FNMA v. Yakaputz II, Inc.*, 141 AD3d 506, 35 NYS3d 236 (2nd Dept., 2016); *Deutsche Bank National Trust Co. v. Leigh*, 137 AD3d 841, 28 NYS3d 86 (2nd Dept., 2016); *Nationstar Mortgage LLC v. Catizone*, 127 AD3d 1151, 9 NYS3d 315 (2nd Dept., 2015)).

Proper service of RPAPL 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 (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 consists of: 1) a copy of the promissory note dated December 15, 2005 in the sum of $297,500.00 signed by defendant Jason Schlomann indorsed to EMC Mortgage Corporation by an assistant secretary of the original mortgage lender American Brokers Conduit with attached allonge dated December 15, 2005 indorsed by a senior vice president of EMC Mortgage Corporation and made payable in blank; 2) a copy of the December 15, 2005 mortgage in the sum of $297,500.00 signed by defendant Jason Schlomann; 3) a copy of the assignment of the mortgage dated July 28, 2010 from MERS as nominee for American Brokers Conduit to Wells Fargo Bank, N.A. ; 4) an affidavit from a vice president of loan documentation of Wells Fargo Bank, N.A., attesting to the contents of the loan (business) records maintained by the mortgage lender; and 5) copies of the RPAPL 90 day notices dated January 16, 2011.

At issue is whether the evidence submitted by the plaintiff is sufficient to establish its right to foreclose. The defendant does not contest his failure to make payments due under the terms of the promissory note and mortgage agreement. Rather, the issues raised by the defendant concern whether the proof submitted by the mortgage lender provides sufficient admissible evidence to prove its entitlement to summary judgment based upon defendant's continuing default, plaintiff's compliance with statutory pre-foreclosure notice requirements and plaintiff's standing to maintain this action

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* (a) 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); *see also Viviane Etienne Medical Care, P.C. v. Country-Wide Insurance Company*, 25 NY3d 498, 14 NYS3d 283 (2015); *Deutsche Bank National Trust Co. v. Monica*, 131 AD3d 737, 15 NYS3d (3rd Dept., 2015); *People v. DiSalvo*, 284 AD2d 547, 727 NYS2d 146 (2nd Dept., 2001); *Matter of Carothers v. GEICO*, 79 AD3d 864, 914 NYS2d 199 (2nd Dept., 2010)). 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 incorporated the original records into its own records and 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)).

The statute (CPLR 4518) clearly does not require a person to have personal knowledge of each and every entry contained in a business record, particularly in this case, where there is a business relationship between mortgage servicing entities responsible for entering and maintaining accurate records, and where the current servicer has incorporated and relied upon the business records it maintains in its regular course of business (*see Citibank N.A. v. Abrams*, 144 AD3d 1212, 40 NYS3d 653 (3rd Dept., 2016); *HSBC Bank USA, N.A. v. Sage*, 112 AD3d 1126, 977 NYS2d 446 (3rd Dept., 2013); *Landmark Capital Inv. Inc. v. Li-Shan Wang, supra.*)). As the Appellate Division, Second Department recently stated in *Citigroup v. Kopelowitz*, 147 AD3d 1014, 48 NYS3d 223 (2nd Dept., 2017): "There is no requirement that a plaintiff in a foreclosure action rely on a 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." Decisions interpreting CPLR 4518 are consistent to the extent that the three foundational requirements: 1) that the record be made in the regular course of business, 2) that it is in the regular course of business to make the record; and 3) that the record must be made at or near the time the transaction occurred. if demonstrated, make the records admissible since such records are considered trustworthy and reliable. Moreover, the language contained in the statute specifically

authorizes the court discretion to determine admissibility by stating "*if the judge finds*" that the three foundational requirements are satisfied the evidence shall be admissible.

With respect to the issue of standing, paragraph 6 of plaintiff's vice president's affidavit states the following:

> "6. Wells Fargo Bank, N.A. is in possession of the Promissory Note. The Promissory Note was indorsed in blank. I confirm that Wells Fargo Bank, N.A. had possession of the Promissory Note on June 22, 2006. I confirm that Wells Fargo Bank, N.A. had possession of the Promissory Note on or before June 3, 2011, the date this action was commenced."

This sworn statement provides relevant, admissible evidence to establish plaintiff's standing to maintain this foreclosure action since submission of an affidavit from the mortgage lender attesting to plaintiff's possession of the note at or prior to the commencement of the action is sufficient to establish the bank's standing (*see HSBC Bank USA, N.A. v. Armijos*, 151 AD3d 943, 2017 WL 2662557 (2nd Dept., 2017); *Central Mortgage Co. v. Davis*, 149 AD3d 898, 53 NYS3d 325 (2nd Dept., 2017); *Wells Fargo Bank, N.A. v. Ostiguy*, 127 AD3d 1375, 8 NYS3d 669 (3rd Dept., 2015); *U.S. Bank, N.A. v. Cruz*, 147 AD3d 1103, 47 NYS3d 459 (2nd Dept., 2017)). Any alleged issues surrounding the mortgage assignment are irrelevant in this case concerning the issue of standing since the plaintiff has established possession of a duly indorsed promissory note with allonge indorsed in blank prior to commencing this action (*FNMA v. Yakaputz II, Inc.*, 141 AD3d 506, 35 NYS3d 236 (2nd Dept., 2016); *Deutsche Bank National Trust Co. v. Leigh*, 137 AD3d 841, 28 NYS3d 86 (2nd Dept., 2016)). Defendant's contention that the mortgage servicer's vice president's affidavit constituted inadmissible hearsay because she did not have personal knowledge of the plaintiff's record-keeping practices and procedures is without merit (CPLR 4518; *see Wells Fargo Bank, N.A. v. Thomas*, 150 AD3d 1312, 52 NYS3d 894 (2nd Dept., 2017); *Citigroup v. Kopelowitz, supra.*); *Wells Fargo Bank, N.A. v. Gallagher*, 137 AD3d 898, 28 NYS3d 84 (2nd Dept., 2016)).

With respect to the issue of the defendant Schlomann's default in making payments, paragraph 7 of plaintiff's vice president's affidavit states the following:

> "7. There is in fact a default under the terms and conditions of the Promissory Note and Mortgage, because the January 1, 2011 payment and subsequent payments were not made."

In order to establish prima facie entitlement to judgment as a matter of law in a foreclosure action, the plaintiff must submit the mortgage, the unpaid note and admissible evidence to show default (*see PennyMac Holdings, Inc. V. Tomanelli*, 139 AD3d 688, 32 NYS3d 181 (2nd Dept., 2016); *North American Savings Bank v. Esposito-Como*, 141 AD3d 706, 35 NYS3d 491 (2nd Dept., 2016); *Washington Mutual Bank v. Schenk*, 112 AD3d 615, 975 NYS2d 902 (2nd Dept., 2013)). Plaintiff has provided admissible evidence in the form of a copy of the note and mortgage, and an affidavit attesting to the defendant's undisputed default in making timely mortgage payments sufficient to sustain its burden to prove defendant has defaulted under the terms of the parties agreement by failing to make timely payments since January 1, 2011 (CPLR 4518; *see Wells Fargo Bank, N.A. v. Thomas, supra.; Citigroup v. Kopelowitz, supra.*)). Accordingly, and in the absence of any proof to raise an issue of fact concerning her continuing default, plaintiff's application for partial summary

judgment against the defendant based upon her breach of the mortgage agreement and promissory note must be granted.

With respect to service of the pre-foreclosure mortgage RPAPL 1304 90-day notices, the proof required to prove strict compliance with the statute can be satisfied: 1) by plaintiff's submission of an affidavit of service of the notices (*see CitiMortgage, Inc. v. Pappas*, 147 AD3d 900, 47 NYS3d 415 (2nd Dept., 2017); *Bank of New York Mellon v. Aquino*, 131 AD3d 1186, 16 NYS3d 770 (2nd Dept., 2015); *Deutsche Bank National Trust Co. v. Spanos*, 102 AD3d 909, 961 NYS2d 200 (2nd Dept., 2013)); or 2) by plaintiff's submission of sufficient proof to establish "proof of mailing by the post office" (*CitiMortgage, Inc. v. Pappas, supra pg. 901; see Wells Fargo Bank, N.A. v. Trupia*, 150 AD3d 1049, 55 NYS3d 134 (2nd Dept., 2017)). Once either method is established a presumption of receipt arises (*see Viviane Etienne Medical Care, P.C. v. Country-Wide Insurance Co., supra.; Flagstar Bank v. Mendoza*, 139 AD3d 898, 32 NYS3d 278 (2nd Dept., 2016); *Residential Holding Corp. v. Scottsdale Insurance Co.*, 286 AD2d 679, 729 NYS2d 766 (2nd Dept., 2001)).

While the business records exception to the hearsay rule provides a mechanism to establish the foundation for the proof necessary to prove compliance, recent appellate rulings have required that the affidavit submitted by the mortgage lender's representative set forth his/her personal familiarity with the mailing practices and procedures of the business entity responsible for doing the actual mailing (*CitiMortgage, Inc. v. Pappas, supra.; Wells Fargo Bank, N.A. v. Trupia, supra.; Investors Savings Bank v. Salas*, 152 AD3d 752, 2017 WL 3161068 (2nd Dept., 2017); *JPMorgan Chase Bank v. Kutch*, 142 AD3d 536, 36 NYS3d 235 (2nd Dept., 2016)). In this case, there is insufficient evidence to prove that mailing by certified and first class mail was done by the post office, since plaintiff has failed to submit either an affidavit of service by mailing or to submit an affidavit from a representative personally familiar with the mailing practices used by Wells Fargo or to submit sufficient documentary evidence of proof of mailing by the post office. In this case, the only proof of mailing beyond the affidavit submitted by the bank representative were copies of the 1304 notice which is in and of itself insufficient to establish strict compliance. Based upon these circumstances, plaintiff has failed to demonstrate its entitlement to summary judgment on the issue of compliance with the requirements of RPAPL 1304 and a significant issue of fact remains concerning the notice requirement (*Citibank, N.A. v. Wood*, 150 AD3d 813, 2017 WL 1903218 (2nd Dept., 2017); *M & T Bank v. Joseph*, 152 AD3d 579, 2017 WL 2961421 (2nd Dept., 2017)).

Accordingly, the defendant's cross motion seeking dismissal of plaintiff's complaint is denied. Plaintiff's motion seeking summary judgment is granted solely to the extent indicated hereinabove. A conference shall be held for the purpose of either scheduling a limited issue trial pursuant to CPLR 3212(g), or a briefing schedule for submission of another summary judgment motion.

Dated: September 11, 2017

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