

<b>Wells Fargo Bank, N.A. v Bedell</b>
2017 NY Slip Op 32528(U)
September 20, 2017
Supreme Court, Suffolk County
Docket Number: 16603/2012
Judge: Jr., Howard H. Heckman
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SUPREME COURT - STATE OF NEW YORK  
IAS PART 18 - SUFFOLK COUNTY

**COPY**

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

INDEX NO.: 16603/2012  
MOTION DATE: 06/13/2017  
MOTION SEQ. NO.: 001 MD  
002 Mot D  
003 MD

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

Plaintiffs,

-against-

WILLIAM BEDELL A/K/A WILLIAM A. BEDELL  
III,

Defendants.  
-----X

**PLAINTIFF'S ATTORNEY:**  
LEOPOLD & ASSOCIATES, PLLC  
80 BUSINESS PARK DR., STE. 110  
ARMONK, NY 10504

**DEFENDANT'S ATTORNEY:**  
ZINKER & HERZBERG, LLP  
300 RABRO DR., STE. 104  
HAUPPAUGE, NY 11788

Upon the following papers numbered 1 to 25 read on this motion; Notice of Motion/ Order to Show Cause and supporting papers 1-6 (#001), 7-14(#002), 15-18 (#003); Notice of Cross Motion and supporting papers 19-20; Answering Affidavits and supporting papers\_\_\_; Replying Affidavits and supporting papers 21-23; Other 24-25; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion (#001) by defendant William Bedell for an order pursuant to CPLR 3124 compelling the plaintiff to provide adequate responses to the defendant's discovery demands is denied. Any remaining discovery issues are hereby referred to conference; and it is further

**ORDERED** that the cross motion (#002) by plaintiff Wells Fargo Bank, N.A. seeking an order: 1) granting summary judgment striking the answer of defendant William Bedell; 2) discontinuing the action against defendants designated as "John Doe 1" through "John Doe 25"; 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 fourth affirmative defense set forth in defendant's answer related solely to the plaintiff's compliance with RPAPL 1304; and it is further

**ORDERED** that plaintiff's application to discontinue this action against defendants designated as "John Doe #1" through "John Doe #25" 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 motion (#003) by defendant Bedell seeking an order dismissing plaintiff's complaint pursuant to CPLR 1018 & 3211(a)(3) & GBL 130 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 (2<sup>nd</sup> Dept., 2016)) at 9:30 a.m. on October 10, 2017 at the Supreme Court Courthouse located at 1 Court Street, 3<sup>rd</sup> Floor, Part 18, 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 \$336,000.00 executed by defendant William Bedell on May 7, 2007 in favor of World Savings Bank, FSB. On the same date defendant Bedell also executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. Plaintiff obtained ownership of the note and mortgage as a result of a merger with the original mortgage lender. Plaintiff claims that defendant Bedell defaulted under the terms of the mortgage and note by failing to make timely monthly mortgage payments beginning November 1, 2011 and continuing to this day. Plaintiff commenced this action by filing a summons, complaint and notice of pendency in the Suffolk County Clerk's Office on May 30, 2012. Plaintiff's cross motion seeks an order granting summary judgment striking defendant's answer and for the appointment of a referee.

Defendant submits two motions. The first motion seeks responses to defendant's discovery demands; the second motion seeks dismissal of the complaint on the basis that the current assignee/real party in interest, MTGLA Investors, LP, is not authorized to do business in New York and therefore lacks standing to continue to prosecute this action. Defendant's opposition to plaintiff's summary judgment motion raises defenses concerning plaintiff's failure to produce a certificate of conformity from its primary out-of-state (Texas) witness; plaintiff's lack of standing; and plaintiff's failure to submit sufficient admissible evidence to prove that it served pre-foreclosure default notices in compliance with the mortgage and RPAPL 1304 requirements. Defendant also seeks a computation hearing before the court appointed referee to cross examine the mortgage lender's representative concerning the amount of monies due the plaintiff as a result of the defendant's default.

With respect to plaintiff's application for an award of summary judgment, 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 (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)). Plaintiff has submitted sufficient proof in support of its motion including copies of the promissory note and mortgage signed by Bedell, together with an affidavit from the plaintiff's vice president of loan documentation which satisfies the business records exception to the hearsay rule (CPLR 4518) and does not require a certificate of conformity. The admissible evidence submitted shows that the defendant has not made a mortgage payment during the past 70 months and continuing to date. Accordingly, plaintiff has established its entitlement to judgment based upon the defendant's continuing breach of the parties' agreement.

With respect to the mortgage lender's capacity to prosecute this foreclosure action, 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); *HSBC 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); *FNMA v. Yakaputz 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)).

Plaintiff has proven that it has standing to maintain this action by submission of the affidavit from its vice president of loan documentation together with copies of the merger documents establishing that the original mortgage lender merged with and became known as Wells Fargo Bank, N.A. Based upon the submission of this evidence, Wells Fargo established its standing to prosecute its claims as a result of its possession of the promissory note at and prior to the commencement of this action (*see HSBC Bank USA, N.A. v. Armijos*, 151 AD3d 943, 2017 WL 2662557 (2<sup>nd</sup> Dept., 2017); *Central Mortgage Co. v. Davis*, 149 AD3d 898, 53 NYS3d 325 (2<sup>nd</sup> Dept., 2017); *Wells Fargo Bank, N.A. v. Ostiguy*, 127 AD3d 1375, 8 NYS3d 669 (3<sup>rd</sup> Dept., 2015); *U.S. Bank, N.A. v. Cruz*, 147 AD3d 1103, 47 NYS3d 459 (2<sup>nd</sup> Dept., 2017)). Any alleged issues surrounding the mortgage assignment are irrelevant concerning the issue of standing since the plaintiff has established standing by possession of the promissory note prior to commencement of this action (*FNMA v. Yakaputz 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)).

With respect to plaintiff's service of pre-foreclosure default notices, a fair reading of the mortgage agreement reveals that, based upon the undisputed facts in this case, there was no

requirement under the terms of the mortgage that the mortgage lender serve a notice of default as a condition precedent to commencing this action. Paragraph 11 of the promissory note does not require service of a letter of acceleration based upon this defendant's default in making timely monthly mortgage payments.

However, proper service of RPAPL 1304 notices on a borrower is a statutorily mandated 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.

With respect to service of the pre-foreclosure mortgage RPAPL 1304 90-day notices, case law dictates 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 (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); *Deutsche Bank National Trust Co. v. Spanos*, 102 AD3d 909, 961 NYS2d 200 (2<sup>nd</sup> 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 (2<sup>nd</sup> 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 (2<sup>nd</sup> Dept., 2016); *Residential Holding Corp. v. Scottsdale Insurance Co.*, 286 AD2d 679, 729 NYS2d 766 (2<sup>nd</sup> 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 (2<sup>nd</sup> Dept., 2017); *JPMorgan Chase Bank v. Kutch*, 142 AD3d 536, 36 NYS3d 235 (2<sup>nd</sup> 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 and through the post office. In this case, the only proof of mailing besides the affidavit submitted by the bank representative, was a copy of the 1304 notice and two documents titled "Certified Mail Receipt" containing Bedell's name and address with a notation of the date sent (1/25/12) and two "certified mail numbers". These documents are insufficient to establish strict compliance of certified and first class mailing of the required notices. Based upon these circumstances, plaintiff has failed to demonstrate its entitlement to summary judgment solely with respect to the issue of compliance with the requirements of RPAPL 1304 (*Citibank, N.A. v. Wood*, 150 AD3d 813, 2017 WL 1903218 (2<sup>nd</sup> Dept., 2017); *M & T Bank v. Joseph*, 152 AD3d 579, 2017 WL 2961421 (2<sup>nd</sup> Dept., 2017)).

With respect to defendant's remaining contentions, defendant's application for discovery is moot except with respect to the sole remaining issue of plaintiff's compliance with RPAPL 1304 requirements, which will be the subject of the conference scheduled on October 10, 2017. Defendant's claim that the complaint must be dismissed since Wells Fargo is no longer the real party in interest is denied, since CPLR 1018 provides for continuation of the prosecution of this action by the original party plaintiff pending future substitution. Defendant's request for a computation hearing is denied as premature as no referee has yet been appointed. Finally, as the defendant has failed to address any remaining affirmative defenses asserted in his answer in opposition to plaintiff's cross motion, those remaining affirmative defenses must be deemed abandoned and are hereby dismissed (*Citibank, N.A. v. Van Brunt Properties, LLC*, 95 AD3d 1158, 945 NYS2d 330 (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)).

Accordingly, the defendant's motions seeking dismissal of plaintiff's complaint are 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 20, 2017

**HON. HOWARD H. HECKMAN, JR.**

J.S.C.