Short Form Order

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

COPY

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

INDEX NO.: 26702/2013
MOTION DATE: 07/18/2017
MOTION SEQ. NO.: 001 MG

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US BANK, N.A.,

Plaintiffs,

-against-

ANTHONY COSTARELLI a/k/a ANTHONY J. COSTARELLI, DANA COSTARELLI a/k/a DANA F. COSTARELLI, a/k/a DANA F. GENOVESE,

Defendants.

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PLAINTIFF'S ATTORNEY:
HOGAN LOVELLS US LLP
875 THIRD AVENUE
NEW YORK, NY 1002

DEFENDANTS' ATTORNEY:
DELISA LAW GROUP, PLLC
630 JOHNSON AVE., STE. 006
BOHEMIA, NY 11716

Upon the following papers numbered 1 to 29 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 25-27 ; Replying Affidavits and supporting papers 28-29 ; 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 of defendants Anthony Costarelli and Dana Costarelli; 2) discontinuing the action against 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 $318,000.00 executed by defendants Anthony J. Costarelli and Dana F. Costarelli on August 23, 2004 in favor of BNC Mortgage, Inc. 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 mortgagors executed two subsequent loan modification agreements ultimately creating a single lien in the sum of $381,397.65. Plaintiff claims that the mortgagor defendants defaulted under the terms of the mortgage and note by

failing to make timely monthly mortgage payments beginning December 1, 2011. Plaintiff's motion seeks an order granting summary judgment striking defendants' answer and counterclaim, and for the appointment of a referee. In opposition, defendants claim that plaintiff failed to prove compliance with RPAPL 1304 requirements.

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)).

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.

At issue is whether the evidence submitted by the plaintiff is sufficient to establish its right to foreclose. Neither defendant disputes his/her continuing default in making any payments due under the terms of the promissory note and mortgage agreements. Rather, the issues raised by the defendants concern plaintiff's compliance with the statutory pre-foreclosure notice requirements pursuant to RPAPL 1304.

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* at 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-Sham 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)).

Of primary importance in determining whether the affidavit conforms to requirements for admissibility as business records exceptions to the hearsay rule, is the issue of whether the hearsay contained in the business documents is essentially reliable given the rationale for the existence of the exception which is that records systematically made for the conduct of business as a business are inherently highly trustworthy since the records serve in place of the safeguards ordinarily afforded by confrontation and cross-examination (*see Williams v. Alexander*, 309 NY 283, 129 NE 2nd 417 (1955)). The statute (CPLR 4518) clearly doe not require a person to have personal knowledge of each and every entry contained in a business record.

As recently stated in the Appellate Division, Second Judicial Department decision in *Citigroup, etc., v. Kopelowitz, et al.*, 147 AD3d 1014, 48 NYS3d 223 (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)." 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. And clearly, if each of these criteria are established the records maintained by the mortgage servicer can be introduced as evidence in support of a foreclosing plaintiff's prima facie case since those business entries accurately recorded underlies the intent of the

business records exception (*People v. Cratsley, supra.; Citibank v. Abrams, supra.; Deutsche Bank National Trust Co. v. Monica, supra.; HSBC Bank USA, N.A. v. Sage, supra.; Landmark Capital Inv. Inc. v. Li-Shan Wang, supra.*). 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 service of the pre-foreclosure 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 (*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" which can be proven by admissible evidence provided by the business records exception to the hearsay rule (*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 Company, supra.; Flagstar Bank v. Mendoza*, 139 AD3d 898, 32 NYS3d 278 (2nd Dept., 2016); *Residential Holding Corp., v. Scottsdale Insurance Co.*, 286 AD3d 679, 729 NYS2d 766 (2nd Dept., 2001)).

Plaintiff has submitted sufficient evidence to establish that notices were served in accordance statutory requirements. Plaintiff's proof consists of: 1) the affidavit of mailing from the mortgage servicer's (Wells Fargo's) vice president of loan documentation confirming that service was made by Wells Fargo by separate mailings done by certified mail and first class mail to the borrowers addressed to the mortgaged premises on February 7, 2013; 2) a copy of the 1304 notice; 3) a copy of the certified receipt card with tracking numbers related to the certified mailing 4) a copy of the servicer's business record identified as the "Manifest" memorializing the certified mailing by certified article number entitled "NY 90 Certified Manifest"; 5) a copy of a page from the servicer's proprietary computer system identified as the "DLQ Screen" confirming mailing of both notices on February 7, 2013 at approximately 3:16 p.m.; and 6) a copy of the RPAPL 1306 proof of filing statement with the New York State Banking Department. The submission of this testimonial and documentary evidence establishes strict compliance with the RPAPL 1304 mailing requirements (*CitiMortgage, Inc. v. Pappas, supra.*) and defendants' counsel's conclusory claim that the notices were not properly served on the defendants, is not supported by any relevant, admissible evidence sufficient to raise an issue of fact which would defeat plaintiff's summary judgment application (*see PHH Mortgage Corp. v. Muricy*, 135 AD3d 725, 24 NYS3d 137 (2nd Dept., 2016); *HSBC Bank v. Espinal*, 137 AD3d 1079, 28 NYS3d 107 (2nd Dept., 2016)).

With respect to plaintiff's application seeking summary judgment, the evidence submitted by the Trust has shown, and the defendants do not factually dispute, that the mortgagors have defaulted under the terms of the mortgage agreements by failing to make timely monthly mortgage payments since December 1, 2011. The Trust 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. Plaintiff is therefore entitled to an award of judgment.

Finally, as the defendants have failed to raise any evidence to address any of their remaining

twelve affirmative defenses and one counterclaim in opposition to plaintiff's motion, those affirmative defenses and counterclaim must be deemed abandoned and are hereby dismissed (*see Kronick v. L.P. Theriault Co., Inc.*, 70 AD3d 648, 892 NYS2d 85 (2nd Dept., 2010); *Citibank, N.A. v. Van Brunt Properties, LLC*, 95 AD3d 1158, 945 NYS2d 330 (2nd Dept., 2012); *Flagstar Bank v. Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 (2nd Dept., 2012); *Wells Fargo Bank Minnesota, N.A v. Perez*, 41 AD3d 590, 837 NYS2d 877 (2nd 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.

Hon. Howard H. Heckman Jr.

Dated: October 6, 2017

J.S.C.