US Bank N.A. v Chaves
2017 NY Slip Op 32680(U)
November 1, 2017
Supreme Court, Suffolk County
Docket Number: 1550/12
Judge: Thomas F. Whelan
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[* 1]

MEMO DECISION & ORDER

COPY

INDEX No. 1550/12

SUPREME COURT - STATE OF NEW YORK
IAS PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 9/28/17
SUBMIT DATE 10/20/17
Mot. Seq. # 001 - MG
CDISP Y____ N X

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US BANK NATIONAL ASSOCIATION, as Trustee for Home Equity Asset Trust 2004-8 Home Equity Pass-Through Certificates, Series 2004-8,

Plaintiff,

-against-

EDUARDO CHAVES, AMY L. KOBARG, BROOKHAVEN MEMORIAL HOSPITAL MEDICAL CENTER, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., as nominee for Accredited Home Lenders, Inc., "JOHN DOE #1" to "JOHN DOE #10", the last 10 names being fictitious and unknown to plaintiff, the persons or parties intended being the persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the verified complaint,

Defendants.

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Upon the following papers numbered 1 to 14 read on this motion to appoint a referee to compute among other things ; Notice of Motion/Order to Show Cause and supporting papers 1 - 8 ; Notice of Cross Motion and supporting papers: ; Opposing papers: 9-10 ; Reply papers ; Other 11-12 (memorandum); 13-14 (memorandum) ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

[* 2]

ORDERED that this motion (#001) by the plaintiff for, among other things, summary judgment and the appointment of a referee to compute, is granted in its entirety, and it is further

ORDERED that the proposed Order submitted by plaintiff, as modified by the court, is signed simultaneously herewith 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 § 202.5-b(h)(3).

The foreclosure action was commenced by filing on January 9, 2012. In essence, on August 13, 2004, the defendants, Eduardo Chaves and Amy L. Kobarg, borrowed, upon a promise to repay, $256,000.00 from the plaintiff's predecessor-in-interest and executed a promissory note and mortgage. However, the defendants defaulted on that promise by failing to make the required mortgage payment due on April 1, 2011. The defendants have answered this action. In their answer, defendants allege twelve affirmative defenses, with three cloaked as counterclaims.

In the moving papers, plaintiff addresses its burden of proof on this summary judgment motion and refutes the affirmative defenses and counterclaims of the answer. With regard to the issue of the default letter, plaintiff has established its prima facie burden with the submission of the affidavit of Shae Smith, sworn to on August 1, 2017, a Vice President of Wells Fargo Bank, N.A. the plaintiff's loan servicer. She explains Wells Fargo's practices and procedures and that she has personal knowledge of all the relevant documents.

With regard to the RPAPL § 1304 pre-action notice, she describes Wells Fargo's regular practice at the time concerning the first-class mailing, with the 10-digit tracking number and the certified mailing, with the 20-digit tracking numbers. She is familiar with the mailing practices and attests that the regular practice was adhered to with respect to the required mailings. She submits the US Postal Service printouts, as provided by a Track Right Report, which details the date and time of attempted delivery and the US Postage paid for each mailing, with the corresponding tracking numbers. Also submitted is the internally created NY Mailbook, which details the servicer's proof of mailing. Additionally, the US Postal Service unsigned certified mail return receipt card is offered. Finally, the filing with the NYS Department of Financial Services, pursuant to RPAPL §1306, is provided.

Therefore, plaintiff has satisfied its prima facie burden on this summary judgment motion (*see* ***HSBC Bank USA, Natl. Assn. v Espinal***, 137 AD3d 1079, 28 NYS3d 107 [2d Dept 2016]; ***U.S. Bank Natl. Assn. v Cox***, 148 AD3d 692, 49 NYS3d 527 [2d Dept 2017]).

The burden then shifts to the defendants (*see* ***Bank of America, N.A. v DeNardo***, 151 AD3d 1008, 58 NYS3d 469 [2d Dept 2017]; ***Redrock Kings, LLC v Kings Hotel, Inc.***, 109 AD3d 602, 970 NYS2d 804 [2d Dept 2013]) and it was thus incumbent upon the answering defendants to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's prima facie showing or in support of the affirmative defenses and counterclaims asserted in their answer or otherwise available to her (*see* ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012];

Grogg Assocs. v South Rd. Assocs., 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; ***Wells Fargo Bank v Karla,*** 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; ***Washington Mut. Bank v O'Connor***, 63 AD3d 832,880 NYS2d 696 [2d Dept 2009]; ***J.P. Morgan Chase Bank, NA v Agnello,*** 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; ***Aames Funding Corp. v Houston,*** 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]).

Notably, affirmative defenses predicated upon legal conclusions that are not substantiated with allegations of fact are subject to dismissal (*see* CPLR 3013, 3018[b]; ***Katz v Miller***, 120 AD3d 768, 991 NYS2d 346 [2d Dept 2014]; ***Becher v Feller***, 64 AD3 672, 677, 884 NYS2d 83 [2d Dept 2009]; ***Cohen Fashion Opt., Inc. v V & M Opt., Inc.***, 51 AD3d 619, 858 NYS2d 260 [2d Dept 2008]). Where a defendant fails to oppose some or all matters advanced on a motion for summary judgment, the facts as alleged in the movant's papers may be deemed admitted as there is, in effect, a concession that no question of fact exists (*see* ***Kuehne & Nagel, Inc. v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; *see also* ***Madeline D'Anthony Enter., Inc. v Sokolowsky***, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591[2d Dept 2010]). In addition, the failure to raise pleaded affirmative defenses in opposition to a motion for summary judgment renders those defenses abandoned and thus without any efficacy (*see* ***New York Commercial Bank v J. Realty F Rockaway, Ltd.***, 108 AD3d 756, 969 NYS2d 796 [2d Dept 2013]; ***Starkman v City of Long Beach***, 106 AD3d 1076, 965 NYS2d 609 [2d Dept 2013]).

In opposition, defendant only raises one claim, that is, compliance with RPAPL §1304. Therefore, all Affirmative Defenses and Counterclaims are dismissed as abandoned, except the Fourth Affirmative Defense.

Any claim that the RPAPL §1304 notice was not properly mailed is rejected. As noted by the Court of Appeals, "[i]t is a general rule that the law presumes that a letter properly addressed, stamped and mailed is duly delivered to the addressee" (***Trust & Guar. Co. v Barnhardt***, 270 NY 350, 1 NE2d 459 [1936]; *see also* ***Engel v Lichterman***, 95 AD2d 536, 538,467 NYS2d 642 [2d Dept 1983] ["[i]t has long been recognized in the law of evidence that a letter properly mailed is presumed to have been received"]). Here, in light of the submission of the affidavit of Vice President, Shae Smith, an employee of the servicer who mailed the notices, the Court need not address defendants' concerns as to the quality of the affidavit since it satisfied the admissibility requirements of CPLR 4518(a) (*see* ***Stewart Title Ins. Co. v Bank of New York Mellon***, __ AD3d __, 2017 WL 4399095 [2d Dept 2017]; ***Citigroup v Kopelowitz***, 147 AD3d 1014, 1015, 48 NYS3d 223 [2d Dept 2017]; *see generally*, ***Citimortgage, Inc. v Espinal***, 134 AD3d 876, 23 NYS3d 251 [2d Dept 2015]).

Moreover, the affidavit is more detailed than the affidavit submitted in the recent appellate holding of ***HSBC Bank USA v Ozcan***, __ AD3d __, 2017 WL 4657992 (2d Dept 2017), which clarified the requirements for satisfaction of the business records rule.

In any event, a business record will be admissible if that record "was made in the regular course of any business and ... 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" (***One Step Up, Ltd. v***

Webster Bus. Credit Corp., 87 AD3d 1, 925 NYS2d 61 [1st Dept 2011]; CPLR 4518[a]). While "the mere filing of papers received from other entities is insufficient to qualify the documents as business records, such records may be admitted into evidence 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" (***Deutsche Bank Natl. Trust Co. v Monica,*** 131 AD3d 737, 15 NYS3d 863 [3d Dept 2015]; *quoting* ***State v 158th St. & Riverside Dr. Hous. Co., Inc.***, 100 AD3d 1293, 956 NYS2d 196 [3d Dept 2012], *citing* ***People v Cratsley***, 86 NY2d 81, 90–91, 629 NYS2d 992 [1995]).

Appellate case authorities have thus held that a loan servicer may testify as to payment defaults and other matters relevant to a foreclosing plaintiff's prima facie case on records it maintains in the regular course of its business as servicer of the subject mortgage loan (*see* ***Pennymac Holdings, LLC v Tomanelli***, 139 AD3d 688, 32 NYS3d 181 [2d Dept 2016]; ***Deutsche Bank Natl. Trust Co. v Naughton***, 137 AD3d 1199, 28 NYS3d 444 [2d Dept 2016]; ***Deutsche Bank Natl. Trust Co. v Abdan***, 131 AD3d 1001, 16 NYS2d 459 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v Arias***, 121 AD3d 973, 995 NYS2d 118 [2d Dept 2014]; *see also* ***Deutsche Bank Natl. Trust Co. v Monica***, 131 AD3d 737, *supra*; ***HSBC Bank USA, Natl. Ass'n v Sage***, 112 AD3d 1126, 977 NYS2d 446 [3d Dept 2013]; ***Aames Capital Corp. v Ford***, 294 AD2d 134, 740 NYS2d 880 [1st Dept 2002]). It is also established law that an assignee or other transferee of the loan documents may rely upon the business records of the loan originator or other predecessors in interest to establish such transferee's claims for recovery of amounts due from the debtor so long as it establishes that it relied upon those records in the regular course of its business (*see* ***Landmark Capital Inv., Inc. v Li-Shan Wang***, 94 AD3d 418, 941 NYS2d 144 [1st Dept 2012]; *see also* ***Portfolio Recovery Assoc., LLC v Lall***, 127 AD3d 576, 8 NYS3d 101 [1st Dept 2015]).

That there is no requirement that the affiant have personal knowledge of every entry is clear, particularly where there is a business relationship between the entities entering and maintaining the records and those incorporating and relying upon them in the regular course of their business (*see* ***Citibank, NA v Abrams***, 144 AD3d 1212, 1216, 40 NYS3d 653 [3d Dept 2016] ["Polk was entitled to rely on the loan records in addressing the issue of possession, as CPLR 4518[a] does not require a person to have personal knowledge, ..."]; ***Deutsche Bank Natl. Trust Co. v Monica***, 131 AD3d 737, 739, *supra*; ***HSBC Bank USA, N.A. v Sage***, 112 AD3d 1126, 1127, *supra*; ***Landmark Capital Inv., Inc. v Li-Shan Wang***, 94 ADd3d 418, *supra* ["Plaintiff established its entitlement to judgment as a matter of law by relying in part on the original loan file prepared by its assignor. Plaintiff relied on these records in its regular course of its business"]).

Here, as set forth in the affidavit of Timothy Eckery, he is personally familiar with plaintiff's regular business practice, he describes the practice and swears that the business records were relied upon on a regular basis in the course of plaintiff's business as custodian, with respect to this loan in default. Therefore, plaintiff relied upon the records in its regular course of business and such reliability is key to its admissibility (*see* ***Corsi v Town of Bedford,*** 58 AD3d *at* 231-232, 868 NYS2d 258 [2d Dept 2008], *lv. denied* 12 NY3d 714, 883 NYS2d 797 [2009]; ***Matter of Carothers v GEICO Indem. Co.***, 79 AD3d at 865, 914 NYS2d 199 [2d Dept 2010]).

[* 5]

It is the Court which must determine the threshold requirement for admissibility (*see* ***People v Kennedy***, 68 NY2d at 576, 510 NYS2d 853 [1986]). The Court of Appeals in ***Bossuk v Steinberg***, 58 NY2d 916, 919, 460 NYS2d 509 (1983) held that there was no need to produce the person who did the actual mailings since "[t]he proof of the Sheriff's regular course of business in this regard sufficed." In ***Hospital for Joint Diseases v Elrac, Inc.***, 11 AD3d 432, 433, 783 NYS2d 612 (2d Dept 2004), the Second Department held that an affidavit based upon records maintained by an insurer in the ordinary course of business did constitute admissible evidence ("Personal knowledge of such documents, their history, or specific content are not necessarily required of a document custodian"). Various cases, particularly in the Second Department, have held that such business records are admissible (*see* ***CitiMortgage, Inc. v Espinal***, 134 AD3d 876, *supra*; ***Olympus America, Inc. v Beverly Hills Surgical Inst.***, 110 AD3d 1048, 974 NYS2d 89 [2d Dept 2013]; ***Burrell v Barreiro***, 83 AD3d 984, 922 NYS2d 465 [2d Dept 2011]; ***DeLeon v Port Auth. of N.Y. & N.J.***, 306 AD2d 146, 761 NYS2d 54 [1st Dept 2003]; ***We're Assocs. Co. v Rodin Sportswear Ltd.***, 288 AD2d 465, 734 NYS2d 104 [2d Dept 2001]; ***Spangenberg v Chaloupka***, 229 AD2d 482, 645 NYS2d 514 [2d Dept 1996]).

Here, Timothy Eckery and Shae Smith, as the current recipients of the records, can establish personal knowledge of the maker's business practices and procedures, "and the records themselves actually evince the facts for which they are relied upon (citations omitted)" (***Citigroup v Kopelowitz***, 147 AD3d 1014, *supra*). Therefore, this Court holds that the records relied upon, in the affidavit of Shae Smith, are admissible pursuant to the business records rule. Rejected as unmeritorious is defendant counsel's claim that the plaintiff's affidavit of merit is insufficient due to a lack of personal knowledge on the part of the affiant, who is an employee of the servicer which conducted the mailing.

Even under the dictates of ***CitiMortgage, Inc. v Pappas***, 147 AD3d 900, 47 NYS3d 415 (2d Dept 2017), plaintiff has met its burden. Due proof of the mailing of the RPAPL § 1304 notice can be established by any one of three alternative methods. First, by the submission of an affidavit of service (*see* ***JPMorgan Chase Bank, N.A. v Schott***, 130 AD3d 875, 15 NYS3d 359 [2d Dept 2015]; ***Wells Fargo v Moza***, 129 AD3d 946, 13 NYS3d 127 [2d Dept 2015]); second, by "proof of mailing by the post office" alternative method of proof of proper mailing set forth in ***CitiMortgage, Inc. v Pappas***, 147 AD3d 900, *supra*); or the third method, that is, the business record exception alternative of proof of proper mailing set forth in ***CitiMortgage, Inc. v Pappas***, 147 AD3d 900, *supra* (*see* CPLR 4518). Here, plaintiff satisfied the mailing requirements of RPAPL § 1304 with the submission of an affidavit that satisfies the second and third alternatives under ***CitiMortgage, Inc. v Pappas***, 147 AD3d 900, *supra*; *see generally*, ***Flagstar Bank, FSB v Mendoza***, 139 AD3d 898, 32 NYS3d 278 [2d Dept 2016]).

The affidavit adequately sets forth the basis of the Vice President's knowledge and established the admissibility of the documents appended to the affidavit as business records (*see* ***Olympus America, Inc. v Beverly Hills Surgical Inst.***, 110 AD3d 1048, *supra*; ***DeLeon v Port Auth. of N.Y. & N.J.***, 306 AD2d 146, *supra*).

The reason that entries made in the regular course of business are admissible as an exception to the hearsay rule is that since their purpose is to aid in the proper transaction of the business and

they are useless for that purpose unless accurate, the motive for following a routine of accuracy is great and the motive to falsify is nonexistent (*see* ***Nimble v Earls M. Jorgenson, Co.***, 358 Ill. App 3d 400, 414, 294 Ill. Dec. 402, 830 N.E.2d 814 [2005]).

Therefore, the Court grants plaintiff's motion (#001) in its entirety and simultaneously signs the proposed Order, as modified.

DATED: 11/1/17

THOMAS F. WHELAN, J.S.C.