Wells Fargo Bank, N.A. v Smart
2017 NY Slip Op 32811(U)
November 8, 2017
Supreme Court, Queens County
Docket Number: 700435/16
Judge: Darrell L. Gavrin
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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** Justice | IA PART 27

WELLS FARGO BANK, NATIONAL ASSOCIATION AS TRUSTEE FOR OPTION ONE MORTGAGE LOAN TRUST 2007-2, ASSET BACKED CERTIFICATES, SERIES 2007-2,

Plaintiff,

- against-

GLENFORD SMART, "JOHN DOE #1" through "JOHN DOE #12," the last twelve names being fictitious and unknown to plaintiff, the person or parties intended being the tenants, occupants, persons, or corporations, if any, having or claiming an interest in or lien upon the premises, described in the complaint,

Defendants.

Index No. 700435/16

Motion Date May 26, 2017

Motion Cal. No. 120

Motion Seq. No. 1

The following papers read on this motion by plaintiff for summary judgment as against defendant, Glenford Smart ("defendant"), to strike defendant's answer and dismiss the affirmative defenses and counterclaims asserted therein, to discontinue the action against those defendants sued herein as "John Doe #1" through "John Doe #12," for leave to amend the caption accordingly, for leave to appoint a referee to ascertain and compute the amount due and owing plaintiff and to examine and report whether the mortgaged premises can be sold in one or more parcels, for leave to enter a default judgment against all the non-appearing defendants, and for leave to enter a default judgment against defendant for his failure to appear at the settlement conference held on April 13, 2016.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits............................	EF Doc. #24-#43
Affirmation in Opposition - Exhibits....................................	EF Doc. #45-#51
Reply Memorandum of Law - Affidavit...............................	EF Doc. #52-#53

Upon the foregoing papers, it is ordered that the motion is determined as follows:

In December 2006, defendant obtained a residential loan from Option One Mortgage Corp. (Option One) and executed a note in the principal amount of $561,000.00, plus interest (the subject note) to evidence it. The note was secured by a mortgage on the real property known as 146-12 223rd Street, Springfield Gardens, New York (the subject property) executed by defendant in favor of Option One (the subject mortgage). The mortgage was assigned to plaintiff by assignment of mortgage executed on February 25, 2011.

On May 23, 2011, plaintiff commenced a foreclosure action against defendant herein and other defendants, entitled *Wells Fargo Bank, N.A. v Smart* (Supreme Court, Queens County, Index No. 12439/2011) based upon a claimed default in payment of the monthly mortgage installment due under the subject note and mortgage on December 1, 2009. By order entered on August 17, 2015, the complaint was dismissed as asserted against all the defendants.

Plaintiff commenced this action on January 14, 2016, seeking foreclosure based upon the same alleged default under the note and mortgage as was alleged in the prior action (Index No. 12439/2011), and in addition, to reform the legal description of the subject property contained within the subject mortgage. In the instant complaint, plaintiff alleges it is the holder of the note. Plaintiff further alleges that there is a discrepancy between the legal description in the deed for the subject property, and the legal description in the subject mortgage. Plaintiff additionally alleges it was the intention of the parties to the mortgage transaction that the real property described in the legal description annexed to the complaint as “Exhibit A” be the property encumbered by the subject mortgage.

Defendant timely served an answer, asserting various affirmative defenses, including lack of standing, failure to comply with the notice requirements of RPAPL 1304, expiration of the applicable statute of limitations, failure to provide notice of default and improper acceleration, and interposing counterclaims. Plaintiff served a reply to the counterclaims. The remaining defendants herein have not appeared or answered.

A residential foreclosure conference was held on March 31, 2016, and continued on April 13, 2016. By order of April 13, 2016, the Court Attorney Referee found that the case met the criteria of the foreclosure settlement conference part, but that defendant had defaulted in appearing at the conference held that date. The Court Attorney Referee noted that defendant’s counsel previously had appeared, without the client, at the March 31, 2016 conference. The Court Attorney Referee indicated that at the March 31, 2016 conference, plaintiff had offered defendant a “streamlined” loan modification, pursuant to which, a first payment was due on April 1, 2016. The Court Attorney Referee observed that such payment had not been made and directed plaintiff to appear at a status conference on October 18, 2016 and file an application seeking an order of reference by the status conference date. A status conference was held on

October 18, 2016, and the Court Attorney Referee directed plaintiff to appear at a final status conference on February 14, 2017 and file a foreclosure affirmation or certificate of merit pursuant to Administrative Order 208/2013 by the final status conference date.

Plaintiff timely made the instant motion on February 13, 2017. Defendant opposes the motion. In support of its motion, plaintiff offers, among other things, an affirmation of its counsel, affidavits of service, an affidavit of Howard R. Handville, a senior loan analyst employed by Ocwen Financial Corp. (Ocwen Financial) and copies of the pleadings, mortgage, note with allonge, limited power of attorney, assignment of mortgage dated February 25, 2011, and excerpts of a Pooling and Servicing Agreement dated as of February 1, 2007.

With respect to that branch of the motion by plaintiff to "discontinue" the action against defendants, "John Doe #1" through "John Doe #12," plaintiff, in the caption of the summons and complaint, described those fictitiously-named as persons or parties whose names were unknown but who are intended as those persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises. In support of its motion, plaintiff offers affidavits of service dated January 28, 2016, indicating that Mary Brown s/h/a "John Doe #1" and Jane Smith s/h/a "John Doe #2" were served with process and a copy of an RPAPL 1303 notice at the subject premises. In its proposed order, plaintiff proposes that the caption be amended substituting Mary Brown for "John Doe #1," but makes no mention of Jane Smith. Rather, the proposed amended caption retains the reference to "John Doe #2" through "John Doe #12" in the caption. In addition, it is unclear from plaintiff's submissions whether "John Doe #3" through"John Doe #12" are necessary party defendants herein and have been served with process. The affirmation of Matthew B. Corwin, Esq., dated February 13, 2017, fails to address the issue. Under such circumstances, plaintiff has failed to show that defendants "John Doe #3" through "John Doe #12" are not necessary party defendants (*see Wells Fargo Bank, NA v Ambrosov*, 120 AD3d 1225 [2d Dept 2014]; *Flagstar Bank v Bellafiore*, 94 AD3d 1044, 1046 [2d Dept 2012]; *US Bank, N.A. v Boyce*, 93 AD3d 782, 783 [2d Dept 2012]). The branch of the motion by plaintiff for leave to amend the caption is granted only to the extent of substituting Mary Brown and Jane Smith for defendants "John Doe #1" and "John Doe #2."

[* 4]

It is ORDERED that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY
--X
WELLS FARGO BANK, NATIONAL ASSOCIATION AS TRUSTEE FOR OPTION ONE MORTGAGE LOAN TRUST 2007-2, ASSET-BACKED CERTIFICATES, SERIES 2007-2,

Index No. 700435/2016

Plaintiff

-against-

GLENFORD SMART, MARY BROWN, JANE SMITH, "JOHN DOE #3" through "JOHN DOE #12," the last ten names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises, described in the complaint,

Defendants
---X.

That branch of the motion by plaintiff for leave to enter a default judgment against defendant for his failure to appear at the April 13, 2016 settlement conference, is denied. CPLR 3408 provides for mandatory settlement conferences in certain residential foreclosure actions for the purpose of holding settlement discussions pertaining the relative rights and obligations of the parties under the loan documents, including, but not limited to determining whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home (*see* former CPLR 3408[a]). Although, the plaintiff and the defendant must appear in person or by counsel at any conference held pursuant to CPLR 3408 and engage in good faith negotiations to reach a mutually agreeable resolution, including a loan modification, if possible (*see former* CPLR 3408[c], [f]), the version of CPLR 3804 in effect on April 13, 2016 (*see* L 2009, c 507, § 9, effective February 13, 2010) did not include a specific remedy for a defendant's failure to negotiate in good faith (*cf.* CPLR 3408[k] [L 2016, c 73, pt Q, §§ 2, 3, effective December 20, 2016]). Nevertheless, the release by the Court Attorney Referee of the case from the settlement conference part upon the non-appearance by defendant or his counsel, constituted an appropriate and sufficient sanction in keeping with the remedial purposes of CPLR 3408 (*see U.S. Bank Nat. Assn. v Sarmiento*, 121 AD3d 187, 199 [2d Dept 2014]).

With respect to that branch of the motion by plaintiff for summary judgment against defendant, it is well established that 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 demonstrate the absence of any material issues of fact," (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The failure to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

A foreclosure plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default (*see Wells Fargo Bank, N.A. v Erobobo*, 127 AD3d 1176, 1176 [2d Dept 2015]; *Argent Mtge. Co., LLC v Mentesana*, 79 AD3d 1079, 1080 [2d Dept 2010]). Where, as here, the issue of standing is raised by a defendant, a plaintiff must prove its standing in order to be entitled to relief (*see HSBC Bank USA, N.A. v Roumiantseva*, 130 AD3d 983, 983 [2d Dept 2015]; *HSBC Bank USA, N.A. v Calderon*, 115 AD3d 708, 709 [2d Dept 2014]). A plaintiff has standing in a mortgage foreclosure action where it is the holder or assignee of the underlying note at the time the action is commenced (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361 [2015]). "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident" (*U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 754; *see Deutsche Bank Natl. Trust Co. v Weiss*, 133 AD3d 704 [2d Dept 2015]). Proper service of a 90-day RPAPL 1304 notice, where required, is a condition precedent to the commencement of a foreclosure action (*see Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 102 [2d Dept 2011]). The filing of the appropriate form with the superintendent pursuant to RPAPL 1306 within three days of the mailing of the RPAPL 1304 notice to the borrower is also a condition precedent to the commencement of the foreclosure action (*see TD Bank, N.A. v Leroy*, 121 AD3d 1256 [3d Dept 2014]). The plaintiff has the burden of establishing satisfaction of these conditions (*see TD Bank, N.A. v Leroy*, 121 AD3d 1256; *First Natl. Bank of Chicago v Silver*, 73 AD3d 162, 169 [2d Dept 2010)]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 102-107).

With respect to the issue of standing, plaintiff relies upon evidence of physical delivery rather than the written assignment of mortgage. The note, by an undated allonge, contains an undated blank indorsement by Option One without recourse. A note indorsed in blank without recourse does not evidence a plaintiff's possessory interest (*see Bank of New York Mellon v McClintock*, 138 AD3d 1372 [3d Dept 2016]). Plaintiff offers the affidavit of Handville to show its possession of the subject note at the time of commencement of the action. In his affidavit, Handville states that Ocwen Financial's indirect subsidiary is Ocwen Loan Servicing, LLC (Ocwen), and Ocwen is plaintiff's loan servicing agent and attorney-in-fact. To the extent the limited power of attorney appoints Ocwen as the agent for plaintiff, it is unclear the basis that Handville, as an employee of Ocwen Financial, is authorized to execute an affidavit of merit on plaintiff's behalf. Handville avers that the original note with allonge and mortgage

were transferred to plaintiff by physical delivery on December 28, 2006, and have been in plaintiff's continuous possession since that date, and that defendant is in default in payment of the installment due on December 1, 2009. However, Handville concedes that the source of his knowledge is his review of the "computerized systems, together with the proprietary and business records of Ocwen, [p]laintiff, and their agents which are made in the regular course of business and are in the possession, custody and control of [Ocwen], [p]laintiff and their agents." According to Handville, his job duties include reviewing such computerized systems and records, and it is within his responsibilities to review the records of Ocwen, plaintiff and their agents and sign certifications and affidavits.

" 'A proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures (*Citibank, N.A. v Cabrera*, 130 AD3d 861, 861 [2d Dept 2015])" (*see Cadlerock Joint Venture, L.P. v Trombley*, 150 AD3d 957 [2d Dept 2017]). Handville does not identify any agent other than Ocwen, and fails to state that he is personally familiar with Ocwen's, plaintiff's or the unnamed agents' record keeping practices. Thus, he has failed to lay a proper foundation for the admission of records concerning the physical possession of the note and the default in payment under the note (*see* CPLR 4518[a]; *HSBC Mtge. Servs., Inc. v Royal*, 142 AD3d 952, 954 [2d Dept 2016]; *Citibank, N.A. v Cabrera*, 130 AD3d at 861).

To the degree Handville's statements regarding the mailing of the 90-day pre-foreclosure notice pursuant to RPAPL 1304 are based upon his review of the "servicing records," he does not identify the maker of those records. Even assuming the servicing records are those of Ocwen (insofar as the 90-day pre-foreclosure notice is from Ocwen), Handville does not state the address to which the mailings were purportedly sent. Nor does Handville make the requisite showing that he is familiar with Ocwen's mailing practices and procedures. Therefore, plaintiff has not established proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed (*see Wells Fargo Bank, N.A. v Lewczuk*, 153 AD3d 890 [2d Dept 2017]; *see Citibank, N.A. v Wood*, 150 AD3d 813 [2d Dept 2017]; *CitiMortgage, Inc. v Pappas*, 147 AD3d 900, 901 [2d Dept 2017]). Plaintiff has provided no independent proof of the actual mailings (*see Citibank, N.A. v Wood*, 150 AD3d 813, 814).

With respect to the second cause of action for reformation, plaintiff has failed to establish *prima facie* that there is a discrepancy between the legal description contained in the mortgage and the deed for the subject property, and that the parties to the mortgage loan transaction intended that the mortgage encumber the premises as described in the deed. Plaintiff has failed to present a copy of the deed and any evidence of the transacting parties' intent.

Under such circumstances, plaintiff has failed to establish *prima facie* entitlement to summary judgment against defendant (*see Aurora Loan Services, LLC v Komarovsky*, 151 AD3d 924 [2d Dept 2017]; *HSBC Mtge. Servs., Inc. v Royal*, 142 AD3d 952; *Aurora Loan Servs., LLC v Mercius*, 138 AD3d 650 [2d Dept 2016]).

Accordingly, that branch of the motion by plaintiff for summary judgment against defendant, is denied.

With respect to that branch of the motion by plaintiff to strike the affirmative defenses asserted by defendant, plaintiff bears the burden of demonstrating that the defenses are without merit as a matter of law (*see Butler v Catinella*, 58 AD3d 145, 157-148 [2d Dept 2008]*; Vita v New York Waste Servs.*, LLC, 34 AD3d 559, 559 [2d Dept 2006]).

That branch of the motion by plaintiff to strike the first affirmative defense asserted by defendant in his answer based upon lack of standing, is denied. Plaintiff has failed to establish such defense is without merit as a matter of law (*see Vita v New York Waste Servs.*, LLC, 34 AD3d 559, 559 [2d Dept 2006]).

With respect to that branch of the motion by plaintiff to strike the second and third affirmative defenses asserted by defendant in his answer based upon failure to comply with RPAPL 1304 and 1306, plaintiff has failed to establish the defense based upon non-compliance with RPAPL 1304 is without merit as a matter of law. Because plaintiff has failed to demonstrate *prima facie* compliance with RPAPL 1304, it has also failed to establish *prima facie* strict compliance with RPAPL 1306 (*see Hudson City Savings Bank v Seminario*, 149 AD3d 706 [2d Dept 2017]; *TD Bank, N.A. v Leroy*, 121 AD3d 1256 [3d Dept 2014]). Accordingly, that branch of the motion by plaintiff to dismiss the second and third affirmative defenses asserted by defendant in his answer, is denied.

With respect to the fourth affirmative defense asserted by defendant, that plaintiff failed to comply with RPAPL 1303, the affidavit of service dated January 28, 2016 of a licensed process server indicates service of, among other things, a copy of the summons and complaint, and the notice required under RPAPL 1303 on blue-colored paper, upon defendant, by in-hand delivery of those items to him on January 14, 2016 at 8:58 P.M. at 146-12 223rd Street, Springfield Gardens, New York. This affidavit constitutes proof of proper service of the notice required by RPAPL 1303 upon defendant (*see U.S. Bank N.A. v Tate*, 102 AD3d 859 [2d Dept 2013]; *see also Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 103). Defendant has failed to rebut the presumption of proper service of RPAPL 1303. Accordingly, that branch of the motion by plaintiff to strike the fourth affirmative defense asserted by defendant in his answer, is granted.

The fifth affirmative defense asserted by defendant in his answer is based upon the expiration of the applicable statute of limitations. An action to foreclose a mortgage is governed by a six-year statute of limitations (CPLR 213[4]). With respect to a mortgage payable in installments, separate causes of action accrue for each installment that is not paid and the statute of limitations begins to run on the date each installment becomes due (*see Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753 [2d Dept 2010]; *Loiacono v Goldberg*, 240 AD2d 476 [2d Dept 1997]). Once a mortgage debt is accelerated, however, the entire amount is due and the statute of limitations begins to run on the entire debt (*Wells Fargo Bank, N.A. v Burke*,

94 AD3d 980 [2d Dept 2012]; *EMC Mtge. Corp. v Patella*, 279 AD2d 604 [2d Dept 2001]). Here, the acceleration of the debt is made optional to the holder of the note and mortgage (*see* ¶7 of the note, and ¶21 of the mortgage). In the complaint filed and served in the prior action (Index No. 12439/2011), plaintiff elected to accelerate the mortgage debt (*see EMC Mtge. Corp. v Smith*, 18 AD3d 602, 603 [2d Dept 2005]; *Clayton Natl. v Guldi*, 307 AD2d 982, 982 [2d Dept 2003]). Plaintiff brought this action less than six years thereafter, and defendant has failed to raise a triable issue of fact relative to this showing. This action is not time-barred (*see Nationstar Mortg., LLC v Weisblum*, 143 AD3d 866 [2d Dept 2016]). Accordingly, that branch of the motion by plaintiff to strike the fifth affirmative defense asserted by defendant in his answer based upon the expiration of the applicable statute of limitations, is granted.

That branch of the motion by plaintiff to dismiss the sixth affirmative defense asserted by defendant in his answer based upon failure to provide him with proper notice of default as required by the mortgage documents and the Banking Law, is granted. Defendant has failed to cite to any provision in the note or mortgage which required plaintiff to give him notice of default prior to demanding payment of the loan in full. Rather, the subject mortgage provides that if any installment under the mortgage note is not paid when due, all sums secured by the mortgage "shall at once become due and payable at the option of the Lender without prior notice, except as otherwise required by applicable law, and regardless of any prior forbearance" (¶21 of the subject mortgage). Such acceleration clause is in statutory form (*see* Real Property Law §§ 254[2], 258 [schedule N], ¶ 4). Hence, under the terms of the subject mortgage and note, neither notice of default nor demand for payment. Plaintiff, therefore, is accorded the right to exercise the acceleration option at any time after the expiration of the grace period without providing a notice of default or demand for payment. Defendant has also failed to cite to any provision in the Banking Law which requires a notice of default to be sent to a mortgagor prior to acceleration of the mortgage debt for non-payment.

Defendant asserts as a seventh affirmative defense that pursuant to UCC 3-302, plaintiff is not a holder of the subject note in due course. Plaintiff need not prove it is a holder in due course of the note, for an indorsement in blank on the allonge makes the note payable to the bearer and may be negotiated by delivery alone until specially indorsed (*see* UCC 3-204 [2]; *JPMorgan Chase Bank, N.A. v Weinberger*, 142 AD3d 643 [2d Dept 2016]). To the extent defendant alleges that "upon information and belief" plaintiff did not take the note in good faith and had notice it was overdue or dishonored, such allegations are conclusory and unsupported by any facts (*see M & T Mortgage Corp. v Alpha and Omega, Inc.*, 309 AD2d 905 [2d Dept 2003]). Accordingly, that branch of the motion by plaintiff to dismiss the seventh affirmative defense asserted by defendant in his answer, is granted.

The first counterclaim by defendant is based upon his claim that he is entitled to attorneys' fees pursuant to the "Access to Justice in Lending Act" (Real Property Law § 282) (L 2010, ch 550, § 12). Real Property Law § 282 provides that "[w]henever a covenant contained in a mortgage on residential real property shall provide that ... the mortgagee may recover attorneys' fees and/or expenses incurred as the result of the failure of the mortgagor to

perform any covenant or agreement contained in such mortgage ... there shall be implied in such mortgage a covenant by the mortgagee to pay to the mortgagor the reasonable attorneys' fees and/or expenses incurred by the mortgagor ... in the successful defense of any action or proceeding commenced by the mortgagee against the mortgagor arising out of the contract" (Real Property Law § 282[1]). The subject mortgage provides for the lender's recovery of reasonable attorneys' fees in a foreclosure action brought as a result of a default in payment (*see* ¶21 and ¶31). It does not contain any provision regarding an award of attorneys' fees to the mortgagor. If defendant ultimately is successful in his defense of this action, he may seek an award of reasonable attorneys' fees and/or expenses incurred, pursuant to Real Property Law § 282(1). Accordingly, that branch of the motion by plaintiff to dismiss the first counterclaim asserted by defendant, is denied.

The branch of the motion by plaintiff to dismiss the second counterclaim asserted by defendant, is granted. Defendant alleges as a second counterclaim that plaintiff is in breach of contract insofar as it failed to satisfy the conditions precedent under the note prior to demanding performance based on "an alleged acceleration clause." As previously discussed, the subject note and mortgage permit acceleration without prior notice or demand.

The third counterclaim asserted by defendant is based upon alleged violation of the Federal Debt Collection Practices Act (*see* 15 USC § 1692 *et seq.*) (the FDCPA). The FDCPA, however, does not generally apply to a creditor seeking to enforce a contract, such as a mortgage or note (*see United Cos. Lending v Candela*, 292 AD2d 800, 801–802 [4th Dept 2002], citing 15 USC § 1692a [6][F][iii]; *see also Maguire v Citicorp Retail Servs.*, 147 F3d 232, 235 [2d Cir 1998]). Defendant makes no allegation that plaintiff "in the process of collecting [its] own debts, used any name other than [its] own which would indicate that a third person [wa]s collecting or attempting to collect such debts" (15 USC § 1692a[6]; *see United Cos. Lending v Candela*, 292 AD2d 800, 801-802; *Trebatch Lichtenstein Avrutine and Co., Inc. v Goro*, 45 Misc 3d 132[A] [App Term, 1st Dept 2014]). Accordingly, that branch of the motion by plaintiff to dismiss the third counterclaim asserted by defendant, is granted.

The fourth counterclaim asserted by defendant is based upon a claim for an award of reasonable attorneys' fees and costs and is duplicative of the first counterclaim. Accordingly, that branch of the motion by plaintiff to dismiss the fourth counterclaim asserted by defendant, is granted.

That branch of the motion by plaintiff for leave to enter a default judgment against the non-appearing defendants, is denied. Plaintiff has failed to establish whether defendants, Mary Brown and Jane Smith, are in default in the action, and whether defendants, "John Doe #3 through John Doe #12, have been joined in the action, and are in default in the action (*see* CPLR 3215[f]).

That branch of the motion by plaintiff for leave to appoint a referee, is denied at this juncture.

Dated: November 8, 2017

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DARRELL L. GAVRIN, J.S.C.