

<b>Nationstar Mtge. LLC. v Galvis</b>
2017 NY Slip Op 32987(U)
October 10, 2017
Supreme Court, Suffolk County
Docket Number: 18319-2013
Judge: C. Randall Hinrichs
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SUPREME COURT - STATE OF NEW YORK  
IAS PART 49 - SUFFOLK COUNTY

PRESENT: HON. C. RANDALL HINRICHS  
Justice of the Supreme Court

Motion Date: 7/05/2017  
Adjourned Date: 8/4/2017

Motion Sequence: 003: MD; 004: MG

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NATIONSTAR MORTGAGE LLC.,

Plaintiff,

-against-

JORGE GALVIS, BANK OF AMERICA, N.A.  
"JOHN DOE #1" through "JOHN DOE #12", the  
last twelve 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.

Berkman, Henoeh, Peterson,  
Peddy & Fenchel, P.C.  
Attorneys for Plaintiff  
100 Garden City Plaza  
Garden City, NY 11530

Charles H. Wallshein, Esq.  
Attorney for Defendant GALVIS  
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Upon consideration of the notice of motion for an order granting summary judgment in favor of the successor-in-interest of the plaintiff Nationstar Mortgage LLC. ["Nationstar"], appointing a referee, striking certain defendants from the caption, and substituting U.S. Bank National Association, not in its individual capacity, but solely as Trustee for the RMAC Trust, Series 2016-CTT ["U.S. Bank"], as proper party plaintiff and amending the caption to reflect this amendment, the supporting affirmation, affidavits, memorandum of law, and exhibits (001), and the notice of cross-motion for summary judgment in favor of the defendant Jorge Galvis ["the defendant"], dismissing the complaint, the supporting affirmation, affidavit, and exhibits (004), and U.S. Bank's affirmation in opposition to the cross-motion and in further support of summary judgment, it is

**ORDERED** that U.S. Bank's motion for summary judgment, an order of reference and related relief is denied; and it is further

**ORDERED** that the defendant's cross motion for summary judgment dismissing the plaintiff's complaint in its entirety is granted.

In this residential foreclosure action, the plaintiff, Nationstar, alleges that the defendant executed a note in favor of Countrywide Home Loans, Inc. ["the lender"], in the amount of \$288,000.00 on April 7, 2006. According to Nationstar, the defendant gave Mortgage Electronic Registration Systems, Inc. ["MERS"], as nominee for the lender, a mortgage encumbering the premises located at 243 Sunflower Lane, Islandia, Suffolk County ["the subject premises"]. The complaint further alleges that the defendant defaulted for the payment due on April 1, 2009, and the payments due thereafter. The defendant admits (cross moving affirmation, at ¶ 26 ), that he received a notice of default written in Spanish by first-class mail dated October 5, 2009, sent to the subject premises by Bank of America Home Loans ["BOA"]. The defendant also admits that he received a pre-foreclosure notice from Nationstar written in the English language by certified mail addressed to the subject premises dated April 3, 2013. Nationstar commenced the action on July 15, 2013.

On or about August 22, 2013, the then self-represented defendant answered the complaint alleging no affirmative defenses and admitting that he defaulted on the loan. Nationstar originally moved for summary judgment, an order of reference, and related relief by motion returnable on June 10, 2015 (sequence 001). The defendant, by then represented by counsel, cross moved to amend the answer to assert, inter alia, the affirmative defenses of lack of standing to commence the action and the plaintiff's failure to satisfy the statutory notice requirements of RPAPL 1304 (sequence 002). Both motions were withdrawn by order dated January 31, 2017. Though not explicit in the papers, it appears from the moving affirmation (at ¶ 20), that the parties mutually agreed that the plaintiff would accept the defendant's [amended] answer dated February 15, 2017, which includes a standing affirmative defense.

The plaintiff served a "Notice to Admit the Genuineness of Paper or Document and Truth of Matters of Fact" dated March 6, 2017. Among the sought-after admissions was the fact of the defendant's receipt of correspondence via first class mail and certified mail dated April 3, 2013, addressed to the defendant at the subject premises with a list of housing counseling agencies", referencing the 90-day pre-foreclosure notice which was purportedly annexed to the Notice to Admit. The plaintiff asserts that the defendant's failure to respond to the Notice to Admit and specifically, to deny the genuineness of the referenced April 3, 2013 letter, constitutes an admission of receipt of the 90-day notice via first-class mail and certified mail (*see generally* CPLR 3123).

In further support of the instant application U.S. Bank, the plaintiff's successor-in-interest, has submitted three affidavits. The first affidavit is by Michael Bennett, Assistant Secretary of Rushmore Loan Management Services LLC ["Rushmore"], the Servicer and Attorney-in-Fact for U.S. Bank, dated February 15, 2017 ["the Bennett affidavit"]. According to the Bennett affidavit, the affiant has personal knowledge of the matters set forth in the affidavit based upon his review of the note, mortgage and other loan documents and related business records kept both by Rushmore and Nationstar. Bennett averred that MERS as nominee for the lender assigned the mortgage to BAC Home Loan Servicing, LP f/k/a Countrywide Home Loans Servicing, LP ["BAC"] by assignment dated June 11, 2009. Thereafter, Bank of America ["BOA"], successor by merger to BAC, assigned the mortgage to Nationstar by assignment of mortgage dated November 13, 2012. Nationstar then assigned the mortgage to U.S. Bank by assignment of mortgage dated August 1, 2016. The Bennett affidavit states "[t]hat Plaintiff or its agent(s) is currently in possession of the original Note indorsed in blank."

The second affidavit submitted in support of the motion is by Theresa Robertson, Document Execution Specialist at Nationstar, dated November 19, 2014 ["the Robertson affidavit"]. According to Robertson, her personal knowledge of the facts is based upon her familiarity with and review and analysis of Nationstar's relevant business records maintained in the ordinary course of business. Robertson attests that Nationstar received the original note on October 19, 2012; the note was endorsed in blank. As of the date of Robertson's affidavit, Nationstar continued to hold the original note. The Robertson affidavit attests that the mortgage loan was in default for the payment due on April 1, 2009, and all subsequent payments. Further, according to Robertson,

"the servicing records further show that the 90-day notice required by statute was mailed to Defendant by regular and certified mail to the subject property address, the Defendant's last known mailing address, on April 3, 2013. The letter was sent in a separate envelope from any other mailing or notice and was accompanied by a list of housing counseling agencies as required by statute."

The only copy of a 90-day notice addressed to the defendant submitted with the moving papers contains the notation at the top right, "Sent Via Certified Mail".

The plaintiff's third affidavit was from Nichole Renee Williams, Assistant Vice President of BOA dated May 15, 2017 ["the Williams affidavit"]. According to Williams, her affidavit is based upon a review of BOA's business records as a mortgage servicer. The Williams affidavit attested to the mailing of a Demand Notice dated October 5, 2009 sent to the defendant at the subject premises.

"Generally, in moving for summary judgment in an action to foreclose a mortgage, a plaintiff establishes its prima facie case through the production of the mortgage, the unpaid note, and evidence of default" (*Plaza Equities, LLC v. Lamberti*, 118 AD3d 688, 689, 986 NYS2d 843 [2d Dept 2014]). "Where, as here, standing is put into issue by a defendant, the plaintiff must prove its standing in order to be entitled to relief" (*Aurora Loan Servs., LLC v. Taylor*, 25 NY3d 355, 12 NYS3d 612 [2015]). A plaintiff in a mortgage foreclosure action has standing 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 at 361; *U.S. Bank N.A. v. Handler*, 140 AD3d 948, 949, 34 NYS3d [2d Dept 2016]). "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, 890 NYS2d 578 [2d Dept 2009]).

The plaintiff established, prima facie, that it had standing to commence the action by submitting the Robertson affidavit averring that Nationstar was the holder of the endorsed note on a date certain prior to commencement of the action (*see Citimortgage, Inc. v. Klein*, 140 AD3d 913, 915, 33 NYS3d 432 [2d Dept 2016]; *JPMorgan Chase Bank, N.A. v. Mantle*, 134 AD3d 903, 904, 23 NYS3d 258 [2d Dept 2015]; *Mortgage Elec. Registration Sys., Inc. v. Coakley*, 41 AD3d 674, 674, 838 NYS2d 622 [2d Dept 2015]). In opposition to the plaintiff's prima facie showing of standing, the defendant failed to raise a triable issue of fact.

The plaintiff also produced copies of the mortgage, the unpaid note, and evidence of the defendant's default in payment (*see generally Loancare v. Firshing*, 130 AD3d 787, 789, 14 NYS3d 410 [2d Dept 2015]; *HSBC Bank USA, N.A. v. Baptiste*, 128 A.D.3d 773, 774, 10 N.Y.S.3d 255 [2d Dept 2015]). However, proper service of the RPAPL 1304 notice is a condition precedent to the commencement of the action (*Aurora Loan Servs., LLC v. Weisblum*, 85 AD3d 95, 98, 923 NYS2d 609, 611 [2d Dept 2011]). The unsubstantiated and conclusory statements in the Robertson affidavit were insufficient to establish that the required RPAPL 1304 notice was mailed to the defendant by first class and certified mail (*Wells Fargo Bank, N.A. v. Lewczuk*, 153 AD3d 890, —NYS3d—, 2017 WL 3611646, at \*2 [2d Dept 2017], *citing CitiMortgage, Inc. v. Pappas*, 147 AD3d 900, 902, 47 NYS3d 415, 417 [2d Dept 2017]; *see also; JPMorgan Chase Bank, Nat. Ass'n v. Kutch*, 142 AD3d 536, 537, 36 NYS3d 235, 236 [2d Dept 2016]). The Robertson affidavit was insufficient since Robertson did not provide proof of a standard office mailing procedure and provided no independent proof of the actual mailing (*Inv'rs Sav. Bank v. Salas*, 152 AD3d 752, 58 NYS3d 600 [2d Dept 2017]; *M&T Bank v. Joseph*, 152 AD3d 579, 58 NYS3d 150, 152 [2d Dept 2017]).

The plaintiff's argument that the defendant's failure to respond to the Notice to Admit amounted to an admission that the 90-day notice was served by certified mail and first class mail on the defendant at the subject premises is unavailing. CPLR 3123 permits one party to require another party to admit

stated facts or the genuineness of a paper or document. The device may be used only when the seeking party “reasonably believes there can be no substantial dispute” about the matter and when it is within the knowledge of the other party or ascertainable by him upon reasonable inquiry (CPLR 3123 [a]). It is not a device to be used to compel the adverse party to concede the very dispute at issue (*Howlan v. Rosol*, 139 AD2d 799, 802, 526 NYS2d 674, 676 [3d Dept 1988]).

Thus, the plaintiff failed to establish its entitlement to judgment as a matter of law against defendant Jorge Galvis regardless of the sufficiency of the opposing papers (*Wells Fargo Bank, N.A. v. Lewczuk*, *supra*; *Wells Fargo Bank, N.A. v. Trupia*, 150 AD3d 1049, 1051, 55 NYS3d 134, 136 [2d Dept 2017]; *Citibank, N.A. v. Wood*, 150 AD3d 813, 55 NYS3d 109, 111 [2d Dept 2017]).

The defendant cross moves for summary judgment (sequence 004), based on the plaintiff’s alleged failure to strictly comply with the pre-foreclosure notice requirements of RPAPL 1304.<sup>1</sup> The defendant proffers a variety of reasons why the plaintiff’s proffer on RPAPL 1304 compliance was insufficient. The defendant admits receipt of the certified copy of the 90-day notice but, in an affidavit sworn to on June 27, 2017, denies ever having received the 1304 notice by first class mail. The defendant also argues that there are several content defects in the notice itself thereby invalidating the notice.

The argument that the RPAPL 1304 notice was defective because it was not in the borrower’s native language is without merit. The requirement imposing upon the lender the obligation to send the required notice in the borrower’s native language was not in effect when this action was commenced in 2013 (*see* RPAPL 1305 [5]). The defendant also asserts that the amount necessary to cure the default was incorrect based upon the number of days the loan had been in default and the amount of the monthly payment as alleged in the complaint. While an argument might be made that an error in the amount recited in the 90-day notice to cure the default renders the statutory notice defective on its face (*compare Flagstar Bank, FSB v Damaro*, 145 AD3d 858, 860, 44 NYS3d 128, 131 [2d Dept 2016]; *Hudson City Sav. Bank v. DePasquale*, 113 AD3d 595, 596, 977 NYS2d 895 [2d Dept 2014]), the defendant failed to establish that the amount to cure recited in the 90-day notice was incorrect as a matter of law (*Cent. Mortg. Co. v. Abraham*, 150 AD3d 961, 55 NYS3d 336, 338 [2d Dept 2017]). The statements in the defendant’s attorney’s affirmation regarding the amount necessary to cure the default as of the date of the 90-day notice were based solely “upon information and belief”. Although the defendant provided an affidavit in support of the cross-motion, the defendant’s affidavit did not address this issue.

The defendant’s affidavit dated June 27, 2017, did, however, attest that at no point did he receive the notices which Nationstar alleges it mailed by first-class mail, supported by a copy of the RPAPL 1304 notice annexed to the defendant’s affidavit with the notation “Sent Via Certified Mail”. The defendant asserts that the statutory notice was never received by him by first class mail.

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<sup>1</sup> Although the defendant’s notice of cross motion and the “Wherefore” clause in the cross moving affirmation seek summary judgment in the defendant’s favor based on the plaintiff’s lack of standing in addition to the failure to comply with RPAPL 1304, the discussion in the cross moving affirmation and affidavit is limited to the sole issue of the plaintiff’s alleged failure to comply with 1304’s pre-foreclosure notice requirements.

On his cross motion, the defendant established his prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against him by relying upon the same evidence as that submitted by the plaintiff, further supported by his own affidavit attesting that he did not receive a RPAPL 1304 notice by first class mail (*see Aurora Loan Servs., LLC v. Weisblum*, 85 AD3d 95, 106, 923 N.Y.S.2d 609 [2d Dept 2011]; *see also Wells Fargo Bank, N.A. v. Trupia*, 150 AD3d 1049, 1051, 55 NYS3d 134, 136 [2d Dept 2017]). Since the plaintiff did not rebut this showing with any evidence beyond the Robertson affidavit and the ineffective notice to admit, the defendant's cross motion to dismiss the complaint based upon the plaintiff's failure to strictly comply with the notice requirements of RPAPL 1304 is granted (*Aurora Loan Servs., LLC v. Weisblum, supra*; *CitiMortgage, Inc. v. Pappas*, 147 AD3d 900, 902, 47 NYS3d 415, 417 [2d Dept 2017]; *Hudson City Sav. Bank v. DePasquale*, 113 AD3d 595, 596, 977 NYS2d 895 [2d Dept 2014]).

The proposed order submitted with the plaintiff's moving papers has been stamped "Not Signed".

DATED: Oct. 10, 2017

  
 C. RANDALL HINRICHS  
 J.S.C.

FINAL DISPOSITION  ~~NON-FINAL DISPOSITION~~