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| Wells Fargo Bank, N.A. v Yapkowitz |
| 2017 NY Slip Op 33332(U) |
| September 26, 2017 |
| Supreme Court, Rockland County |
| Docket Number: 033182/13 |
| Judge: Gerald E. Loehr |
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| This opinion is uncorrected and not selected for official publication. |

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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WELLS FARGO BANK, N.A., AS TRUSTEE FOR
THE CERTIFICATEHOLDERS OF THE MERRILL
LYNCH MORTGAGE INVESTORS TRUST,
MORTGAGE LOAN ASSET-BACKED
CERTIFICATES, SERIES 2005-HE3,

Plaintiff,

DECISION AND ORDER
Index No.: 033182/13

-against-

FRED J. YAPOWITZ A/K/A FRED
YAPOWITZ; ELAINE M. YAPOWITZ, ET AL.,

Defendants.

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LOEHR, J.

The following papers numbered 1-4 were read on the Plaintiff's motion for summary judgment for an Order of Reference.

| | <u>Papers Numbered</u> |
|---|------------------------|
| Notice of Motion - Affirmation - Affidavit - Exhibits | 1 |
| Affirmation in Opposition - Exhibits | 2 |
| Memorandum of Law in Opposition | 3 |
| Reply Affirmation | 4 |

Upon the foregoing papers, in this foreclosure action, it appears that on May 6, 2005 Fred and Elaine Yapowitz (the "Borrowers") borrowed \$532,000 from Argent Mortgage Company, LLC, evidenced by a Note and secured by a Mortgage on the property located at 10 Ducey Court, Pomona, New York. The Note was indorsed by Argent and delivered to Plaintiff. The Borrowers

defaulted on January 1, 2009. Wilshire Credit Corporation, possibly the prior servicer, allegedly sent the Borrowers a default notice dated January 22, 2009 and Plaintiff commenced an action to foreclose the Mortgage on or about July 30 2009 (the "First Foreclosure"). Pursuant to a Stipulation dated March 26, 2013, the First Foreclosure was discontinued, apparently due to "various issues with the default notification." Allegedly on December 12, 2012, Bank of America, possible a subsequent servicer, sent the Borrowers 90-day notices and Plaintiff commenced this action on June 20, 2013. The Borrowers answered and disputed the service of the default notice and 90-day notices and Plaintiff timely moved for summary judgment.

In support of its motion, Plaintiff has submitted the affidavit of an employee of Nationstar Mortgage LLC, apparently the current servicer of the loan. As the condition precedent notices (*see Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95 [2d Dept 2011]), were served, if they were served, by entities other than the current servicer who apparently has no basis of knowledge that these notices were served – except for the senders' records which are inadmissible hearsay when offered by the current servicer, Plaintiff has failed to establish its prima facie entitlement to summary judgment (*National Association v Madero*, 125 AD3d 757 [2d Dept 2015]). The motion is therefore denied.

The parties shall appear at the TAP Part on October 18, 2017 at 9:30 am. This constitutes the decision and order of the Court.

Dated: New City, New York
September 26, 2017



Hon. GERALD E. LOEHR
J. S.C.

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