Short Form Order

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

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

INDEX NO.: 35713/2011
MOTION DATE: 02/20/2018
MOTION SEQ. NO.: 003 MG

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U.S. BANK N.A.,

Plaintiff,

-against-

MILTON GORDILLO, et.al.,

Defendants.

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PLAINTIFF'S ATTORNEY:
WOODS OVIATT GILMAN LLP
2 STATE STREET
ROCHESTER, NY 14614

DEFENDANTS' ATTORNEY:
RAYMOND LANG, ESQ.
532 BROADHOLLOW RD., STE. 114
MELVILLE, NY 11747

Upon the following papers numbered 1 to 40 read on this motion : Notice of Motion/ Order to Show Cause and supporting papers 1-25 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 26-38 ; Replying Affidavits and supporting papers 39-40 ; 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 defendant Mariana Sanchez; 2) substituting U.S. Bank, N.A., as Trustee for Bear Stearns Asset Backed Securities I Trust 2005-AC4, Asset-Backed Certificates, Series 2005-AC4 as the named party plaintiff in place and stead of plaintiff U.S. Bank, N.A., as Trustee for Bear Stearns Asset Backed Securities, 2005-AC4 Asset-Backed Certificates, Series 2005-AC4; 3) substituting nunc pro tunc "United States of America by the Internal Revenue Service" as a named party defendant in place and stead of defendant "United States of America"; 4) discontinuing the action against the defendant designated as "John Doe"; 5) deeming all appearing and non-appearing defendants in default; 6) amending the caption; and 7) 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 $268,000.00 executed by defendant Milton Gordillo on May 4, 2005 in favor of Union Federal Bank of Indianapolis. On the same date defendant Gordillo executed a promissory note promising to re-pay the entire amount

of the indebtedness to the mortgage lender. Defendant Gordillo executed a loan modification mortgage agreement dated June 30, 2010 creating a single lien in the sum of $299,585.56. By assignment dated November 8, 2011 the mortgage and note were assigned to plaintiff. Plaintiff claims that defendant defaulted under the terms of the mortgage and note by failing to make timely monthly mortgage payments beginning October 1, 2010 and continuing to date. Plaintiff commenced this action by filing a summons, complaint and notice of pendency in the Suffolk County Clerk's Office on November 17, 2011. Defendant Mariana Sanchez served an answer dated December 11, 2013.

Plaintiff's motion seeks an order granting summary judgment striking defendant's answer and for the appointment of a referee. Defendant's opposition seeks an order denying plaintiff's motion and dismissing plaintiff's complaint for failure to prove standing and for failure to prove service of pre-foreclosure notices required pursuant to RPAPL 1304. Defendant Sanchez claims that she owns the mortgaged premises but she did not sign the promissory note or the mortgages encumbering the premises.

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 eliminate any material question of fact from the case. The grant of summary judgment is appropriate only when it is clear that no material and triable issues of fact have been presented (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957)). The moving party bears the initial burden of proving entitlement to summary judgment (*Winegrad v. NYU Medical Center*, 64 NY2d 851 (1985)). Once such proof has been proffered, the burden shifts to the opposing party who, to defeat the motion, must offer evidence in admissible form, and must set forth facts sufficient to require a trial of any issue of fact (CPLR 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557 (1980)). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v. Associated Fur Manufacturers*, 46 NY2d 1065 (1979)).

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)). Where the plaintiff's standing is placed in issue by the defendant's answer, the plaintiff must also establish its standing as part of its prima facie showing (*Aurora Loan Services v. Taylor*, 25 NY3d 355, 12 NYS3d 612 (2015); *Loancare v. Firshing*, 130 AD3d 787, 14 NYS3d 410 (2nd Dept., 2015); *HSBC Bank USA, N.A. v. Baptiste*, 128 AD3d 77, 10 NYS3d 255 (2nd Dept., 2015)). In a foreclosure action, a plaintiff has standing if it is either the holder of, or the assignee of, the underlying note at the time that the action is commenced (*Aurora Loan Services v. Taylor, supra.; Emigrant Bank v. Larizza*, 129 AD3d 94, 13 NYS3d 129 (2nd Dept., 2015)). Either a written assignment of the note or the physical transfer of the note to the plaintiff prior to commencement of the action is sufficient to transfer the obligation and to provide standing (*Wells Fargo Bank, N.A. v. Parker,* 125 AD3d 848, 5 NYS3d 130 (2nd Dept., 2015); *U.S. Bank v. Guy,* 125 AD3d 845, 5 NYS3d 116 (2nd Dept., 2015)). A plaintiff's attachment of a duly indorsed note to its complaint or to the certificate of merit required pursuant to CPLR 3012(b), coupled with an affidavit in which it alleges that it had possession of the note prior to the commencement of the action, has been held to constitute due proof of the plaintiff's standing to prosecute its claims for foreclosure and sale (*JPMorgan Chase Bank, N.A. v. Weinberger,*

142 AD3d 643, 37 NYS3d 286 (2nd Dept., 2016); *FNMA v. Yakaputz II, Inc.*, 141 AD3d 506, 35 NYS3d 236 (2nd Dept., 2016); *Deutsche Bank National Trust Co. v. Leigh*, 137 AD3d 841, 28 NYS3d 86 (2nd Dept., 2016); *Nationstar Mortgage LLC v. Catizone*, 127 AD3d 1151, 9 NYS3d 315 (2nd Dept., 2015)).

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***, 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. The issues raised by the defendant concern whether the proof submitted by the mortgage lender provides sufficient admissible evidence to prove its entitlement to summary judgment based upon the default in making payments due under the terms of the mortgage agreements, plaintiff's compliance with statutory pre-foreclosure notice requirements, and plaintiff's standing to maintain this action.

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* @ 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); *see also Viviane Etienne Medical Care, P.C. v. Country-Wide Insurance Company,* 25 NY3d 498, 14 NYS3d 283 (2015); *Deutsche Bank National Trust Co. v. Monica,* 131 AD3d 737, 15 NYS3d (3rd Dept., 2015); *People v. DiSalvo,* 284 AD2d 547, 727 NYS2d 146 (2nd Dept., 2001); *Matter of Carothers v. GEICO,* 79 AD3d 864, 914 NYS2d 199 (2nd Dept., 2010)).

The statute (CPLR 4518) clearly does not require a person to have personal knowledge of each and every entry contained in a business record (*see Citibank N.A. v. Abrams,* 144 AD3d 1212, 40 NYS3d 653 (3rd Dept., 2016); *HSBC Bank USA, N.A. v. Sage,* 112 AD3d 1126, 977 NYS2d 446 (3rd Dept., 2013); *Landmark Capital Inv. Inc. v. LI-Shan Wang, supra.*)). As the Appellate Division, Second Department stated in *Citigroup v. Kopelowitz,* 147 AD3d 1014, 48 NYS3d 223 (2nd Dept., 2017): "There is no requirement that a plaintiff in a foreclosure action rely on a 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." 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. 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.

The affidavit submitted from the mortgage servicer's vice president of loan documentation provides the evidentiary foundation for establishing the mortgage lender's right to foreclose. The affidavit sets forth the employee's review of the business records maintained by the loan servicer; the fact that the books and records are made in the regular course of Wells Fargo's business; that it was Wells Fargo's regular course of business to maintain such records; that the records were made at or near the time the underlying transactions took place; and that the records were created by an individual with personal knowledge of the underlying transactions. Based upon the submission of this affidavit, together with a copy of the limited power of attorney and Pooling and Srevicing Agreement authorizing Wells Fargo as agent to act on behalf of the mortgagee, the plaintiff has provided an admissible evidentiary foundation which satisfies the business records exception to the hearsay rule with respect to the issues raised in this summary judgment application.

With respect to the issue of standing, plaintiff's submission of a copy of the indorsed in blank promissory note together with plaintiff's agent's affidavit provides relevant, admissible evidence to

establish plaintiff's standing to maintain this foreclosure action by attesting to plaintiff's possession of the promissory note on May 31, 2005, which possession was on or before November 21, 2011, the date this action was commenced. Such proof establishes plaintiff's standing to prosecute this action (*see HSBC Bank USA, N.A. v. Armijos,* 151 AD3d 943, 57 NYS3d 205 (2nd Dept., 2017) *Central Mortgage Co. v. Davis,* 149 AD3d 898, 53 NYS3d 325 (2nd Dept., 2017); *Wells Fargo Bank, N.A. v. Ostiguy,* 127 AD3d 1375, 8 NYS3d 669 (3rd Dept., 2015); *U.S. Bank, N.A. v. Cruz,* 147 AD3d 1103, 47 NYS3d 459 (2nd Dept., 2017)).

With respect to the issue of the default in making payments, in order to establish prima facie entitlement to judgment as a matter of law in a foreclosure action, the plaintiff must submit the mortgage, the unpaid note and admissible evidence to show default (*see PennyMac Holdings, Inc. V. Tomanelli,* 139 AD3d 688, 32 NYS3d 181 (2nd Dept., 2016)*; North American Savings Bank v. Esposito-Como,* 141 AD3d 706, 35 NYS3d 491 (2nd Dept., 2016); *Washington Mutual Bank v. Schenk,* 112 AD3d 615, 975 NYS2d 902 (2nd Dept., 2013)). Plaintiff has provided admissible evidence in the form of a copy of the note and mortgage, and an affidavit attesting to the defendant Gordillo's undisputed default in making timely mortgage payments sufficient to sustain its burden to prove the mortgagor has defaulted under the terms of the parties agreement by failing to make timely payments since October 1, 2010 (CPLR 4518; *see Wells Fargo Bank, N.A. v. Thomas, supra.; Citigroup v. Kopelowitz, supra.*)). Accordingly, and in the absence of any proof to raise an issue of fact concerning the mortgagor's continuing default, plaintiff's application for summary judgment based upon the mortgagor's breach of the mortgage agreement and promissory note must be granted.

With respect to service of the pre-foreclosure RPAPL 1304 90-day notices, the statute provides that a 90-day pre-foreclosure notice need only be served upon a "***borrower***". As defendant Sanchez did not sign the promissory note, the original mortgage, or the loan modification, she is clearly not a ***"borrower"*** and therefore the mortgage lender has no statutory or legal obligation to serve a 90-day notice to a "non-obligor" owner of the property (*see U.S. Bank, N.A. v. Hasan et al.,* 42 Misc3d 1221(A), 986 NYS2d 869 (Sup.Ct., Kings Cty., 2014); *U.S. Bank, N.A. v. Levine,* 52 Misc3d 736, 36 NYS3d 786 (Sup.Ct., West, Cty., 2016); *see also Aurora Loan Services, LLC v. Weisblum,* 85 AD3d 95, 923 NYS2d 609 (2nd Dept., 2011)). Nor can defense counsel assert this defense on behalf of the defaulting defendant Gordillo, whom he does not represent, and who has defaulted in appearing in this action and cannot therefore raise any defenses.

Finally, defendant Sanchez has failed to raise any admissible evidence to support her remaining affirmative defenses in opposition to plaintiff's motion. Accordingly, those defenses must be deemed abandoned and are hereby dismissed (*see Kronick v. L.P. Therault 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 0144, 943 NYS2d 551 (2nd Dept., 2012); *Wells Fargo Bank Minnesota, N.A. v. Perez,* 41 AD3d 590, 837 NYS2d 877 (2nd Dept., 2007)).

Accordingly, plaintiff's motion seeking summary judgment is granted. The proposed order of reference has been signed simultaneously with execution of this order.

Dated: April 24, 2018

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