Castle Peak 2012-1 Loan Trust Mtge. Backed Notes, Series 2012-1 v Connor
2018 NY Slip Op 31131(U)
June 6, 2018
Supreme Court, Suffolk County
Docket Number: 4481-2013
Judge: Robert F. Quinlan
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SHORT FORM ORDER

INDEX NO.: 4481-2013

SUPREME COURT - STATE OF NEW YORK
IAS PART 27 - SUFFOLK COUNTY

DECISION AFTER TRIAL

PRESENT: Hon. ROBERT F. QUINLAN
Justice of the Supreme Court

x

CASTLE PEAK 2012-1 LOAN TRUST MORTGAGE BACKED NOTES, SERIES 2012-1, BY U.S. BANK NATIONAL ASSOCIATION, AS INDENTURE TRUSTEE

Plaintiff,

-against-

FRANK E. CONNOR, JR, VANESSA CONNOR, COLUMBIA UNIVERSITY MEDICAL CENTER ANESTHESIA, TOWN OF SUPERVISOR TOWN OF BABYLON, AMERICAN EXPRESS CENTURION BANK A UTAH BANKING INSTITUTION, THEODORE BROWN and "JOHN DOE" #1" through "JOHN DOE #12," the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended being tenants, occupants, persons or corporations, if any, having or claiming an interest, in or lien upon the premises being foreclosed herein,

Defendants.

x

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PROCEDURAL HISTORY

This is an action to foreclose a mortgage on residential real property known as 25 Penndale Drive, Amityville, Suffolk County, New York ("the property") given by defendant Frank E. Connor, Jr. ("defendant") to BankUnited, FSB ("BankUnited"), a predecessor in interest to Castle Peak 2012-1 Loan Trust Mortgage Backed Notes, Series 2012-1, by U.S. Bank National Assoc, as Indenture Trustee ("plaintiff"), on June 20, 2006, to secure a note given the same day to BankUnited by defendant. The history of this action is set forth in the court's decision on plaintiff's motion for summary judgment and associated relief placed on the record after oral argument on July 7, 2016 (Mot. Seq. #001), which granted plaintiff partial summary judgment, dismissing eleven of the twelve affirmative defenses raised in defendant's answer, leaving only his third affirmative defense, compliance with the mailing requirements of RPAPL § 1304, for a limited issues trial pursuant to CPLR 3212 (g) and CPLR § 2218, amended the caption to remove the "John Doe" defendants and substitute in their place Shirley Smith, fixed and set the default of the non-answering defendants, and set a limited issues trial solely as to plaintiff's proof of mailing of the notices required by RPAPL § 1304 ("the notices") to defendant. The court issued a written discovery and scheduling order authorizing further discovery, as well as allowing the parties to make successive summary judgment motions upon completion of discovery, within thirty days of filing of a note of issue.

Plaintiff filed a note of issue dated November 30, 2016 and submitted a successive motion for summary judgment dated December 29, 2016 relating to subject of the limited issue trial(Mot. Seq #003). In response thereto, defendant's counsel filed opposition that only addressed the sufficiency of plaintiff's filing in compliance with RPAPL § 1306, an affirmative defense dismissed by the court's decision of July 7, 2016. As defendant did not cross-move to renew or reargue this claim, the opposition failed to bring that issue properly before the court, and the court did not consider defendant's claim. After oral argument on the motion on April 6, 2017 the court issued a decision on the record which gave a further history of the action, and denied plaintiff's successive motion, as it's submissions again failed to establish it's compliance with the mailing requirements of RPAPL § 1304. As plaintiff had failed on two motions on this issue, the court set a trial date for the limited issue trial, precluding any further motions. After a series of conferences to set a trial date, the limited issue trial was held on December 8, 2017.

TRIAL

Preliminarily, the court notes that in oral statements before the trial began defendant's counsel again attempted to raise the issue of the sufficiency of plaintiff's compliance with the filing requirements of RPAPL § 1306. The court again advised defendant's counsel that the issue had been resolved against defendant in the court's decision of July 7, 2016 and that as he had not moved to renew or reargue that decision, the only issue before the court was plaintiff's compliance with the mailing requirements of the notices.

In further remarks before the trial, defendant's counsel claimed that even if the mailings of the notices on behalf of plaintiff were established, they were fatally insufficient as they were mailed to a post office box, arguing that defendant does not reside at a post office box.

Before any testimony was elicited, the parties, upon consent, admitted into evidence plaintiff's exhibits "1"-"18" and defendant's exhibit "A." Plaintiff's exhibits "1"-"18," included copies of the notices mailed to defendant on behalf of plaintiff by regular and certified mail to both the property and P.O. Box 6, Amityville, New York ("the P.O. Box"). Defendant's exhibit "A," (also plaintiff's exhibit "14,") is a copy of proof of filing statement from the N.Y.S. Banking Department showing compliance with RPAPL § 1306.

Plaintiff presented Kelly Marling, presently employed by Planet Home Lending, LLC as a portfolio manager. Ms. Marling testified that she had previously worked for AMS Servicing LLC ("AMS"), which also operated under the names of LSS and Seneca Mortgage Servicing, from 2007 through 2016, which included the time that AMS was servicer of the loan in question and the mailing of the notices to defendant occurred. She established her ability, without objection, to testify to the business record practices of AMS, and the servicing of the loan involved in this action from January 3, 2012, when AMS took over servicing the loan for plaintiff, until the servicing was transferred from AMS to Selene Finance ("Selene") on February 14, 2014. She also established through her testimony and the exhibits, the authority of AMS to act under the servicing agreement with plaintiff. Through examination of exhibits "5" through "14," and her testimony, pursuant to CPLR 4518, she established the record keeping practices of AMS that explained how the notices were generated and then mailed on October 10, 2012 by both regular and certified mail, and how the records of AMS established proof of their mailings, all without objection. Again, without objection, she testified that the notices were mailed to defendant at both the property address and at the P.O. Box. In response to questioning by defendant's counsel, she testified that her review of the records of AMS indicated that the P.O. Box was used by AMS as it was the last known mailing address as provided to AMS by defendant, a statement that was further supported by her unobjected to testimony to the same effect on re-direct examination.

Plaintiff also presented Clayton Gordon, an attorney employed by Carrington Mortgage Services, LLC ("Carrington"), the present loan servicer for plaintiff's successor in interest Wilmington Savings Fund Society, FSB

("Wilmington"). He established his ability to testify to Carrington's records, without objection, pursuant to CPLR 4518. Carrington began servicing the loan for Wilmington on November 7, 2014 replacing Selene. He testified, without objection, that Carrington incorporated all of the records of prior servicers into it's records and that those records also confirm the mailing of the notices on October 10, 2012. On cross-examination defendant's counsel obtained a concession from Mr. Gordon that plaintiff's exhibit "14," the proof of filing pursuant to RPAPL § 1306, showed the "first mailings" as October 10, 2012, and the filing of the notices with the Banking Department done later the same day, yet the copy of the envelopes returned for the certified mailings to the property (plaintiff's exhibit "6") and to the P.O. Box (plaintiff's exhibit "10"), both had postal marks dated October 11, 2012, not October 10, 2012.

DECISION BY THE COURT

Plaintiff established through the exhibits admitted on consent, and through the testimony of Ms. Mailing, admitted without objection, that the notices were mailed by AMS on behalf of plaintiff to defendant by both regular mail and certified mail on October 10, 2012, with the certified mailings bearing a postmark of October 11, 2012. To establish mailing, plaintiff may provide proof of actual mailing or, as here, a description of its office's practice and procedure for mailing (*see New York& Presby. Hosp. v Allstate Ins. Co.* (29 AD3d 547 [2d Dept 2006]; *Citibank, N.A. v Wood*, 150 AD3d 813 [2d Dept 2017]; *Citimortgage Inc. v Banks* 155 AD3d 936 [2d Dept 2017]). The testimony of Ms. Mailing, along with the business records of AMS admitted into evidence, detail a standard office practice or procedure designed to ensure that items are properly addressed and mailed and in fact were mailed (*see Residential Holding Corp. v Scottsdale Ins. Co.*, 286 AD2d 679 [2d Dept 2001]; *Vivane Etienne Med. Care, P.C. v Country Wide Ins. Co.*, 25 NY3d 498 [2015]; *Citimortgage v Banks*, supra). Ms. Mailing's testimony established her familiarity with office practices and procedures of AMS to insure proper addressing and mailing, established that those procedures were followed, and provided proof of the mailing of the notices by both certified and regular mail (*see CitiMortgage, Inc v Pappas,* 147 AD3d 900 [2d Dept 2017]; *Wells Fargo Bank, NA v Trupia*, 150 AD3d 1049 [2d Dept 2017]; *Investors Savings Bank v Salas*, 152 AD3d 752 [2d Dept 2017]; *US Bank v Henry,* 157 AD3d 839 [2d Dept 2018]; *Bank of NY Mellon v Zavolunov*, 157 AD3d 754 [2d Dept 2018]; *Bank of America, NA v Wheatley*, 158 AD3d 736 [2d Dept 2018]; *J.P. Morgan Mtge. Acquistion Corp v Kagan*, 157 AD3d 875 [2d Dept 2018]). The computer records admitted into evidence along with her testimony are sufficient to demonstrate that the notices were mailed to defendant (*see One West Bank, FSB v Simpson,* 148 AD3d 920 [2d Dept 2017]).

Both sets of mailings were addressed to both the property address and defendant's last known address provided to plaintiff, a prior servicer or AMS, and included in AMS' business records at the time of the mailings, as testified to by Ms. Mailing. Defendant has offered no evidentiary proof in admissible form to contradict these facts. The fact that plaintiff's evidence established the mailing were made on October 10, 2012 is not contradicted by the fact that the returned certified mailing was postmarked the next day. First, defendant offers no proof that the mailings occurred on October 11th, as opposed to the testimony and records presented by plaintiff that shows the mailings were done on October 10th. The court recognizes that items mailed one day can be postmarked by the U. S. Postal Service ("USPS") the next day. Further, defendant has offered no proof that the regular and certified mailings must be made on the same day, nor does the statute require such. The version of RPAPL § 1304 (1) in effect in October 2012, as well as now, merely required that the notices be sent by both form of mail 90 days before a foreclosure action can be commenced. Although it appears to court to be the general practice for plaintiffs or servicers to mail the notices simultaneously, there is no requirement in the law that the mailings be done simultaneously. This action was filed February 13, 2013, more than 90 days after the mailings of October 10 and the postmarking of the returned certified mailing on October 11, 2013, in compliance with RPAPL § 1304.

The claim by defendant's counsel that because "no one resides at a post office box" the mailings were deficient is without merit. RPAPL § 1304 (2) states in pertinent part: "Such notice shall be sent by such lender,

assignee or mortgage loan servicer to the borrower, by registered or certified mail and also 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 statute does not require that the notices be sent to the borrower's last known residence, but rather to his last known address. Ms. Mailing established on her direct, cross, and re-direct examinations that AMS's records showed that defendant had provided the P. O. Box as his address and that this was the last known address that AMS had for defendant. Although the court agrees with defendant's counsel that "no one resides at a post office box," a post office box is recognized as a mailing address. The fact that someone other than defendant may have signed for the certified mailing is of no moment; people may share P. O. Boxes, have others pick up their mail, or perhaps defendant gave up the P. O. Box but failed to notify AMS, BankUnited or a prior servicer. As defendant did not testify or offer any other evidence to contradict Ms. Marling's testimony and AMS's business records that he had provided the P. O. Box as his last known address, or that he had stopped using the P. O. Box and notified AMS or BankUnited of that fact, the only credible evidence presented to the court is that provided by Ms. Mailing and those records. Defendant's claim that the mailings of the notices to him failed to comply with RPAPL § 1304 (2) is dismissed.

Defendant made no other complaint concerning plaintiff's compliance with RPAPL § 1304, and the court notes that the form and content of the notices, including the list of at least five available housing counseling agencies, conform to the statutory requirements.

Despite the proof at trial that established the mailing of the notices and the postmarking of the returned certified mailing, defendant has taken no action to renew or reargue his claim of lack of compliance with RPAPL § 1306 ("the filing"). The court will not undertake such a motion *sua sponte*. The court notes the fact that the returned certified mailing was postmarked October 11, 2012, rather than October 10, 2012 as indicated in the filing of the mailings with the Department of Financial Services ("DFS"), could be considered an error or irregularity in the filing that could be disregarded by the court as a substantial right of defendant has not been prejudiced (CPLR 2001). Through Ms. Mailing's testimony and the business records admitted into evidence on consent, the proof at trial established the mailings by AMS of the notices on October 10, 2012, with the "proof of mailing" filed with DFS the same day. The returned certified mailing showed that it was postmarked the next day, October 11, 2012. This did not prejudice a substantial right of defendant; the proof is that the mailings were submitted to the USPS on October 10, 2012 and the filing made the same day. This discrepancy with the postmark is not a situation that would require dismissal, as in *Hudson City Savings Bank v Seminario,* 149 AD3d 706 (2d Dept 2017) were no DFS filing was ever made, or *TD Bank, NA v Oz Leroy*, 121 AD3d 1256 (3rd Dept 2014) were the filing was made over three months later.

In discussing the applicability of CPLR 2001 to the facts before it in *TD Bank, NA v Oz Leroy*, supra, the Third Department noted that a three month delay in making the filing required by statute could not be deemed a mere irregularity which could be overlooked. There is not a failure to file or a delay in filing here, there is a filing that states the plaintiff's servicer mailed the certified mailings, which was a day before the postmark on the returned certified mailing. The fact that it was returned established that it was mailed.

Defendant appears to argue that the filing showing that all the notices were mailed a day before the unclaimed certified mailing was postmarked, shows a failure of "strict compliance" with the filing requirement of RPAPL § 1306, since the filing was a day before the mailings, thereby mandating dismissal. Such an argument fails on at least two grounds. First, it presumes that the postmarking was done on the day of mailing; there is no proof of that offered. Without proof to the contrary, it is logical to conclude the USPS postmarked the certified mailing the day after mailing occurred. There is no proof offered that the postmarking was done by an entity other than the USPS, before depositing with the USPS.

Additionally, such an argument flies in the face of the legislative purpose of the filing requirement of RPAPL § 1306, as set forth in the statute and in the analysis of the legislative intent in enacting the statute given in *TD Bank, NA v Oz Leroy*, supra, and exalts form over compliance with the intent and purpose of the statute. In *Aurora Loan*

Services, LLC v Weisblum, 83AD3d 95, 107-108 (2d Dept 2011), after determining that mailing of the notice to only one defendant-borrower failed to strictly comply with the statutory requirements of RPAPL § 1304, the Second Department addressed an attempt by plaintiff to liken its failure to give the notice to an error which can be disregarded pursuant to CPLR 2001. The Appellate Division said that a substantial failure to comply with a mandatory condition precedent of RPAPL Article 13 could not be disregarded, but it went on to say that it declined to express an opinion when, if ever, a defect or irregularity in the content of a notice might be so minimal as to warrant the exercise of the court's discretion under CPLR 2001 to avoid dismissal of an action. The Court made it clear that there could be possible circumstances under which a defect or irregularity in the strict compliance required by RPAPL Article 13 may be so de minimus as to warrant ignoring it in an exercise of the court's discretion under CPLR 2001. The facts present here, even if it were proven that the postmarking established the date of mailing, is such a circumstance. CPLR 2001 allows a court, at any stage, to disregard a party's mistake, omission, defect or irregularity if a substantial right of a party is not prejudiced, (*see U.S. Bank, N.A. v Eaddy*, 109 AD3d 908 [2d Dept 2013]; *Deutsche Bank National Trust Company v Lawson*, 134 AD3d 760 [2d Dept 2015]). No substantial or real right of defendant has been shown to be affected by this "error or irregularity"in the filing, if there is one. The mailings were proven by admissible evidence. Even if the filing occurred one day earlier than a postmark or mailing date, there is no harm to defendant. A claim that plaintiff failed to comply with RPAPL § 1306 under these facts, would have no merit.

Therefore, plaintiff having established at trial the mailing of the notices by both first class mail and certified mail, defendant's third affirmative defense is dismissed, defendant's answer is stricken, plaintiff is granted judgment on its complaint, and it's application for the appointment of a referee pursuant to RPAPL § 1321 is granted.

CAPTION AMENDED

Although the court's decision placed on the record on July 7, 2016 (Mot. Seq. # 001) amended the caption to substitute Shirley Smith in place of the "John Doe" defendants, that decision failed to recognize plaintiff's application to substitute Wilmington Savings Fund Society, FSB as Trustee for Stanwich Mortgage Loan Trust Series 2014-5 ("Wilmington") as plaintiff. As that decision held plaintiff had established it's standing to bring the action and dismissed defendant's affirmative defense alleging plaintiff's lack of standing, plaintiff established it's ability to transfer the note and mortgage to Wilmington, and the court should have granted the application to amend the caption to substitute Wilmington for plaintiff. In the decision placed on the record on April 6, 2017 (Mot. Seq. #003) denying plaintiff's successive motion for summary judgment, which also sought to amend the caption by substituting Wilmington for plaintiff, the court incorrectly stated that it had already granted the request for substitution in deciding Mot. Seq. #001. In any event, even if the substitution had been granted in the decisions, as they were placed on the record and not in writing, the court has learned through experience, that the Suffolk County Clerk's office would not recognize the amended caption. Therefore, to correct this error, the court clarifies its prior rulings to reflect that the caption is amended to substitute Wilmington for plaintiff, and will make that clear in this order.

ORDERED that as plaintiff's application to amend the caption to remove the "John Doe #1" through "John Doe #12" and substitute Shirley Smith in their place was granted in the court's decision placed on the record on July 7, 2016, and the court now grants plaintiff's application to substitute Wilmington Savings Fund Society, FSB as Trustee for Stanwich Mortgage Loan Trust Series 2014-5 in it's place as plaintiff, and the caption is amended to read:

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WILMINGTON SAVINGS FUND SOCIETY, FSB AS TRUSTEE FOR STANWICH MORTGAGE LOAN TRUST SERIES 2014-5,

Plaintiff,

- against -

FRANK E. CONNOR, JR, VANESSA CONNOR, COLUMBIA UNIVERSITY MEDICAL CENTER ANESTHESIA, TOWN OF SUPERVISOR TOWN OF BABYLON, AMERICAN EXPRESS CENTURION BANK A UTAH BANKING INSTITUTION, THEODORE BROWN and SHIRLEY SMITH,

Defendants

----------X;
and it is further

ORDERED that plaintiff is to serve a copy of this order amending the caption upon the Clerk of this Court within thirty (30) days of this order and all further proceeding are to be under the amended caption; and it is further

ORDERED that defendant's third affirmative defense is dismissed, his answer is dismissed and stricken, plaintiff is granted judgment upon it's complaint, and plaintiff is granted an order of reference pursuant to RPAPL § 1321; and it is further

ORDERED that as the court had marked plaintiff's prior proposed order of reference "not signed" after denying its prior motions for summary judgment, plaintiff is directed to serve a new order of reference in conformity with this decision within 45 days of the date of the decision, which in addition to the usual language, shall include the following:

ORDERED that plaintiff is to include in any proposed order of judgment of foreclosure and sale language complying with the Suffolk County Local Rule for filing of the Suffolk County Foreclosure Surplus Monies form contained in Suffolk County Administrative Order # 41-13; and it is further

ORDERED, that, if a prior notice of pendency is outdated, plaintiff is directed to file a successive notice of pendency at least twenty (20) days prior to the submission of any proposed judgment of foreclosure and sale, submitting a copy thereof with proof of filing with any proposed judgment of foreclosure and sale; and it is further

ORDERED that within 30 days of the date of this order, plaintiff is to serve a copy of the order of reference upon all parties who have appeared in this action, as well as upon the referee and thereafter file the affidavits of service with the Clerk of the Court; and it is further

ORDERED that within 60 days of the date of this order, plaintiff is to provide the referee, and defendants who have appeared, all papers and documents necessary for the referee to perform the determinations required by this order, "plaintiff's submissions"; defendant(s) may submit written objections and proof in support thereof, "defendant's objections," to the referee within 14 days of the mailing of plaintiff's submissions; and it is further

ORDERED that the referee's report is to be prepared and submitted to plaintiff within 30 days of receipt of

plaintiff's submissions, and the referee's report is to be submitted by plaintiff with its application for a judgement of foreclosure and sale; and it is further

ORDERED that the referee's duties are defined by this order of reference (CPLR 4311, RPAPL § 1321), and the referee has no power beyond that which is limited by this order of reference to the ministerial functions of computing amounts due and owing to plaintiff and determining whether the premises can be sold in parcels; the referee shall hold no hearing, take no testimony or evidence other than by written submission, and make no ruling on admissibility of evidence; the referee's report is merely advisory and the court is the ultimate arbiter of the issues, if defendant's objections raise issues as to the proof of amounts due and owing the referee is to provide advisory findings within his/her report; and it is further

ORDERED that if defendant's objections have been submitted to the referee, defendant(s) shall also submit them to the court if opposing plaintiff's application for a judgment of foreclosure and sale; failure to submit defendant's objections to the referee will be deemed a waiver of objections before the court on an application for a judgment of foreclosure and sale; failure to raise and submit defendant's objections made before the referee in opposition to plaintiff's application for a judgment of foreclosure and sale shall constitute a waiver of those objections on the motion; and it is further

ORDERED that plaintiff is to file an application for a judgment of foreclosure and sale within 120 days of the date of this order (by this the court refers to the "to be submitted new proposed order of reference"); and it is further

ORDERED that this action shall be calendared for a status conference on **Wednesday, October 10, 2018 at 9:30 AM in Part 27** for the court to monitor the progress of this action. If a judgment of foreclosure and sale is filed with the court before that date, no appearance will be necessary; and it is further

ORDERED that failure to comply with any term of this order will not form the basis for a motion to dismiss the action, but will be the subject of the status conference at which future compliance will be determined.

This constitutes the Order and decision of the Court.

Dated: June 6, 2018

HON. ROBERT F. QUINLAN, J.S.C

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION