

GDBT I Trust 2011-1 v Deleva
2018 NY Slip Op 31317(U)
May 29, 2018
Supreme Court, Suffolk County
Docket Number: 002864/2014
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: 3-14-2018
Motion Sequence: 002-MotD

_____x
 GDBT I TRUST 2011-1,

Plaintiff,

-against-

JACQUELINE DELEVA A/K/A JACQUELINE DE
 LEVA, DAVID VALENTINE, CAPITAL ONE BANK
 USA NA AS SUCCESSOR IN INTEREST TO
 CAPITAL ONE BANK, NEW YORK STATE
 DEPARTMENT OF TAXATION AND FINANCE, NY
 FINANCIAL SERVICES LLC, PEOPLE OF THE
 STATE OF NEW YORK, STATE FARM FIRE &
 CASUALTY COMPANY ASO BIBI AZEEZ,

GROSS POLOWY, LLC
 Attorneys for Plaintiff
 1775 Wehrle Drive, Suite 100
 Williamsville, NY 14221

MICHAEL C. DELISA, ESQ.
 Attorney for Defendants
 Jacqueline Deleva a/k/a Jacqueline
 De Leva and David Valentine
 630 Johnson Avenue
 Suite GL-006
 Bohemia, NY 11716

JOHN DOE (being fictitious, the names unknown to
 Plaintiff intended to be tenants, occupants, persons or
 corporations having or claiming an interest in or lien
 upon the property described in the complaint or their heirs
 at law, distributees, executors, administrators, trustees,
 guardians, assignees, creditors or successors.),

Defendants.

_____x

Upon the following papers on this unopposed motion for summary judgment and an order of reference filed on February 22, 2018: notice of motion, proposed order of reference, affirmation of plaintiff's counsel Alexandra R. Heaney, Esq., dated February 12, 2018, with supporting exhibits A - O, memorandum of law in support of motion, and upon due consideration and deliberation, it is

ORDERED that this motion (002) by the plaintiff for, *inter alia*, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the answering defendants Jacqueline Deleva and David Valentine, striking their answer and dismissing the affirmative defenses set forth therein; (2) pursuant to CPLR 3215 fixing the defaults of the non-answering defendants; (3) pursuant to RPAPL § 1321 appointing a referee to (a) compute amounts due under the subject mortgage; and (b) examine and report whether the subject premises should be sold in one parcel or multiple parcels; (4) substituting plaintiff; and (5) amending the caption, is granted in part and denied in part; and it is further

ORDERED that so much of the plaintiff's motion that seeks an order striking the First, Second and Fifth through Thirteenth affirmative defenses is granted, and the motion for summary judgment dismissing the answer and an order of reference is otherwise denied; and it is further

ORDERED that so much of plaintiff's motion that seeks an order fixing the defaults of the non-answering defendants is granted; and it is further

ORDERED that so much of plaintiff's motion that seeks to substitute "WESTVUE NPL TRUST II" as plaintiff herein, and to amend the caption accordingly, is granted; and it is further

ORDERED that so much of the plaintiff's motion that seeks to delete defendant "JOHN DOE" and to amend the caption accordingly, is granted; and it is further

ORDERED, that the caption of this action shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK
-----X
WESTBUE NPL TRUST II,

Plaintiff,

-against-

Index No. 2864-2014

JACQUELINE DELEVA A/K/A JACQUELINE
DE LEVA, DAVID VALENTINE, CAPITAL ONE
BANK USA NA AS SUCCESSOR IN INTEREST
TO CAPITAL ONE BANK, NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE,
NY FINANCIAL SERVICES LLC, PEOPLE OF
THE STATE OF NEW YORK, STATE FARM
FIRE & CASUALTY COMPANY ASO BIBI AZEEZ,

Defendants.
-----X

and it is further,

ORDERED that the plaintiff is directed to serve a copy of this order amending the caption upon the Calendar Clerk of this Court; and it is further

ORDERED that the attorneys for the parties shall appear for a pre-trial conference in Part 49 in the Cromarty Court Building, 4th Floor, Courtroom 16, on **June 26, 2018 at 9:30 a.m.**, and it is further

ORDERED that the plaintiff is directed to serve a copy of this order with notice of entry upon all parties who have appeared herein and not waived further notice pursuant to CPLR 2103(b)(1), (2) or (3) within thirty (30) days of the date herein, and to promptly file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on real property situate in Suffolk County, New York. On April 11, 2008, defendant-mortgagors Jacqueline Deleva and David Valentine executed a note in favor of plaintiff's predecessor in the principal amount of \$276,587. To secure said note, on the same date, defendant-mortgagors gave the lender a mortgage on the property. Defendant-mortgagors allegedly defaulted on the note and mortgage by failing to make monthly payments of principal and interest which had come due on March 1, 2009. By way of a special endorsement via allonge, with physical delivery, the note was transferred to plaintiff prior to commencement of this action. Thereafter, the transfer of the note to the plaintiff was memorialized by an assignment, duly recorded in the Office of the Suffolk County Clerk. Plaintiff commenced the instant action by the filing of a *lis pendens*, summons and complaint on February 10, 2014. Issue was joined by the interposition of defendant-mortgagors' answer dated May 1, 2014. Subsequently, the note and mortgage were ultimately assigned to the proposed substituted plaintiff Westvue NPL Trust II.

By their answer, the defendant mortgagors generally deny the material allegations set forth in the complaint, and assert thirteen affirmative defenses. The remaining defendants have not answered herein. By order of this Court, dated January 30, 2017, plaintiff's prior motion (001), seeking the same relief as that being sought here, was denied. Plaintiff's prior motion was denied for failure to provide an affidavit of merit comporting with the business records exception to the hearsay rule under CPLR 4518(a). The Court denied the prior motion with leave to renew. Accordingly, plaintiff now renews its motion for summary judgment and an order of reference. Defendant-mortgagors do not oppose the motion.

A plaintiff seeking summary judgment in a foreclosure action is required to produce the mortgage, the unpaid note, and evidence of default (*see DLJ Mtg. Capital, Inc. v Sosa*, 153 AD3d 666, 60 NYS3d 278 [2d Dept 2017]; *Pennymac Holdings, LLC v Tomanelli*, 139 AD3d 688, 32 NYS3d 181 [2d Dept 2016]; *Wachovia Bank, N.A. v Carcano*, 106 AD3d 724, 965 NYS2d 516 [2d Dept 2013]). Further, when a defendant serves an answer which includes the affirmative defense of standing, the plaintiff must prove its standing so as to be entitled to relief (*see Bank of N.Y. Mellon v Visconti*, 136 AD3d 950, 25 NYS3d 630 [2d Dept 2016]; *Bank of N.Y. v Silverberg*, 86 AD3d 274, 926 NYS2d 532 [2d Dept 2011]). Here, plaintiff produced, *inter alia*, the note, the mortgage, and evidence of nonpayment. Plaintiff established its standing as the holder of the note by attaching it to the summons and complaint, demonstrating that the note was in its possession prior to the commencement of the action (*see Wells Fargo Bank v Thomas*, 150 AD3d 1312, 52 NYS3d 894 [2d Dept 2017]; *Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 362, 12 NYS3d 612, 614 [2015]; *U.S. Bank, N.A. v Saravanan*, 146 AD3d 1010, 45 NYS3d 547 [2d Dept 2017]; *Nationstar Mtge., LLC v Catizone*, 127 AD3d 1151, 1152, 9 NYS3d 315 [2d Dept 2015]).

With regard to defendant-mortgagors' default in payment, plaintiff provided an affidavit from David Haddad, an employee of Longvue Mortgage Capital, Inc., the servicing agent of proposed plaintiff Westvue NPL Trust II, dated November 2, 2017. The Haddad affidavit attests to the default in payment based upon personal knowledge acquired by a review of Longvue's business records kept in the ordinary course of business (*see Wells Fargo Bank, NA v. Thomas*, 150 AD3d 1312, 1313, 52 NYS3d 894, 895

[2d Dept 2017]; *U.S. Bank v. Ehrenfeld*, 144 AD3d 893, 41 NYS3d 269 [2d Dept 2016]; *U.S. Bank v. Godwin*, 137 AD3d 1260, 28 NYS3d 450 [2d Dept 2016]; *Deutsche Bank Nat. Trust Co. v. Abdan*, 131 AD3d 1001, 16 NYS2d 459 [2d Dept 2015], lv to appeal den, 26 NY3d 917 [2016]). Mr. Haddad avers that Longvue's business records include records of the prior loan servicers, which were fully incorporated and relied upon by Longvue in the routine course of business, and therefore the averments concerning payment default comport with CPLR 4518(a) (*see Carothers v GEICO Indemnity Co.*, 79 AD3d 864, 914 NYS2d 199 [2d Dept 2010]; *People of the State of New York v DiSalvo*, 284 AD2d 547, 727 NYS2d 146 [2d Dept 2001]; *Plymouth Rock Fuel Corp. v Leucadia*, 117 AD2d 727, 498 NYS2d 453 [2d Dept 1986]; *Johnson v Lutz*, 253 NY 124, 128 [1930]; *see also U.S. Bank N.A. v Noble*, 144 AD3d 788, 41 NYS3d 79 [2d Dept 2016]).

However, on renewal, plaintiff has again failed to establish its prima facie entitlement to judgment as a matter of law because it did not supply adequate evidentiary proof of compliance with the pre-foreclosure notice provisions of the subject mortgage and RPAPL § 1304 (*see Aurora Loan Servs. LLC v Weisblum*, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]; *HSBC Mortg. Corp. (USA) v Gerber*, 100 AD3d 966, 955 NYS2d 131 [2d Dept 2012]). The plaintiff submitted neither affidavits of service, nor an affidavit from one with personal knowledge of the practices and procedures customarily used in the ordinary course of business for mailing of statutory notices (*see Citimortgage v Papas*, 147 AD3d 900, 47 NYS3d 415 [2d Dept 2017]; *JPMorgan Chase Bank, Nat. Ass'n v. Kutch*, 142 A.D.3d 536, 537, 36 N.Y.S.3d 235, 236 [2d Dept 2016]). The Haddad affidavit, referenced above, states in conclusory fashion that the requisite notices were mailed based upon copies of the notices which were incorporated into Longvue's business records from a prior servicer and attached to the affidavit. Simply attaching or referencing copies of the notices and averring in conclusory fashion that mailings were made is not sufficient (*see Citibank v Wood*, 150 AD3d 813, 55 NYS3d 109 [2d Dept 2017]; *Citimortgage v Espinal*, 134 AD3d 876, 23 NYS3d 251 [2d Dept 2015]). While it is true that business records comporting with CPLR 4518(a) may be used in proving a prima facie case, such records, in order to raise a presumption of mailing, must enable an affiant to attest to familiarity with the mailing practices and procedures for mailing the notices, and to "establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed (citations omitted)" (*see Citimortgage v Papas, supra*. 147 AD3d at 901; *Wells Fargo Bank, N.A. v Trupia*, 150 AD3d 1049, 55 NYS3d 134 [2d Dept 2017]; *Bank of America N.A. v Wheatley*, 158 AD3d 736 [2d Dept 2018]). That standard has not been met here. Therefore, defendant's third and fourth affirmative defenses remain viable.

Plaintiff submitted sufficient proof to establish, *prima facie*, that the remaining affirmative defenses are subject to dismissal due to their unmeritorious nature (*see Becher v Feller*, 64 AD3d 672, 884 NYS2d 83 [2d Dept 2009]). Where a defendant fails to oppose some or all matters advanced on a motion for summary judgment, the facts as alleged in the movant's papers may be deemed admitted as there is, in effect, a concession that no question of fact exists (*see Kuehne & Nagel, Inc. v. Baiden*, 36 N.Y.2d 539, 369 N.Y.S.2d 667 [1975]; *see also Argent Mtge. Co., LLC v. Mentasana*, 79 A.D.3d 1079, 915 N.Y.S.2d 59 [2d Dept 2010]).

Transfer of the note and mortgage to Westvue NPL Trust II is demonstrated by a written assignment of the note and mortgage, duly recorded in the Office of the Suffolk County Clerk, as well as the Haddad affidavit referenced above, which attests to Westvue NPL Trust II's possession of the note (*see Bethpage Federal Credit Union v Caserta*, 154 AD3d 691, 61 NYS3d 645 [2d Dept 2017]; *Hudson City Sav. Bank v Genuth*, 148 AD3d 687, 48 NYS3d 706 [2d Dept 2017]).

Accordingly, plaintiff's motion is granted in part and denied in part as set forth herein, and the parties are directed to appear for a pre-trial conference.

Dated: May 29, 2018



HON. C. RANDALL HINRICHS, J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION