

<b>HSBC Bank USA, N.A. v Teramo</b>
2018 NY Slip Op 31544(U)
July 6, 2018
Supreme Court, Suffolk County
Docket Number: 1818/2014
Judge: Howard H. Heckman
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SUPREME COURT - STATE OF NEW YORK  
IAS PART 18 - SUFFOLK COUNTY

**PRESENT:**

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

INDEX NO.: 1818/2014  
MOTION DATE: 6/19/2018  
MOTION SEQ. NO.: #001 MG

-----X  
HSBC BANK USA, N.A.,

Plaintiff,

-against-

MARTHA TERAMO A/K/A MARTHA PACCIANI;  
RICHARD TERAMO: NEW YORK, et al.,

Defendants.

-----X

**PLAINTIFF'S ATTORNEY:**

RAS BORISKIN, LLC  
900 MERCHANTS CONCOURSE  
WESTBURY, NY 11590

**DEFENDANTS' ATTORNEYS:**

THE RANALLI LAW GROUP PLLC  
742 VETERANS MEMORIAL HIGHWAY  
HAUPPAUGE, NY 11788

Upon the following papers numbered 1 to 27 read on this motion 1-16 ; Notice of Motion/ Order to Show Cause and supporting papers       ; Notice of Cross Motion and supporting papers        ; Answering Affidavits and supporting papers 17-18 ; Replying Affidavits and supporting papers 19-27 ; Other        ; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion by plaintiff HSBC Bank USA, N.A., seeking an order: 1) granting leave to amend the complaint nunc pro tunc to include an additional claim in paragraph six (6) of the complaint to state that plaintiff was in possession of the original promissory note prior to the commencement of the action; and upon granting such amendment; 2) granting summary judgment striking the answer of defendant Martha Teramo a/k/a Martha Pacciani; 3) substituting Anthony "Smith" as a named party defendant in place and stead of a defendant designated as "John Doe #1" and discontinuing the action against defendants designated as "John Doe #2 through John Doe #7" and "Jane Doe #1 through Jane Doe #7"; 4) deeming all appearing and non-appearing defendants in default; 5) amending the caption; and 6) 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 \$308,700.00 executed by defendants Martha Teramo and Richard Teramo on August 25, 2006 in favor of People's Choice Home Loan, Inc. On the same date defendant Martha Teramo executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. By assignment dated September 12, 2007 the mortgage and note were assigned to plaintiff. Both defendant mortgagors executed a loan modification mortgage agreement dated February 10, 2012 creating a single lien in the sum of \$474,325.70. Plaintiff claims that defendants/mortgagors defaulted under the terms of the

modified mortgage and note by failing to make timely monthly mortgage payments beginning July 1, 2012 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 January 27, 2014. Defendant Martha Teramo served an answer dated February 20, 2014 asserting nine (9) affirmative defenses. Plaintiff's motion seeks an order granting summary judgment striking defendant's answer and for the appointment of a referee.

Defendant submits an attorney's affirmation in opposition and claims that plaintiff has failed to submit sufficient admissible evidence to prove compliance with RPAPL 1303, 1304 & 1306 pre-foreclosure notice requirements. Although defendant Martha Teramo's counsel does not represent co-defendant Richard Teramo, the attorney also claims that judgment should not be entered against co-defendant/mortgagor Richard Teramo based upon plaintiff's failure to seek judgment within one year of his default pursuant to CPLR 3215(c).

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 RBS Citizens, N.A. v. Galperin*, 135 AD3d 735, 23 NYS3d 307 (2<sup>nd</sup> Dept., 2016); *Wells Fargo Bank N.A. v. Erobobo*, 127 AD3d 1176, 9 NYS3d 312 (2<sup>nd</sup> Dept., 2015); *Wells Fargo Bank, N.A. v. Ali*, 122 AD3d 726, 995 NYS2d 735 (2<sup>nd</sup> 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 (2<sup>nd</sup> Dept., 2015); *HSBC Bank USA, N.A. v. Baptiste*, 128 AD3d 77, 10 NYS3d 255 (2<sup>nd</sup> 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 (2<sup>nd</sup> 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 (2<sup>nd</sup> Dept., 2015); *U.S. Bank v. Guy*, 125 AD3d 845, 5 NYS3d 116 (2<sup>nd</sup> 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 (2<sup>nd</sup> Dept., 2016); *FNMA v. Yakaputz II, Inc.*, 141 AD3d 506, 35 NYS3d 236

(2<sup>nd</sup> Dept., 2016); *Deutsche Bank National Trust Co. v. Leigh*, 137 AD3d 841, 28 NYS3d 86 (2<sup>nd</sup> Dept., 2016); *Nationstar Mortgage LLC v. Catizone*, 127 AD3d 1151, 9 NYS3d 315 (2<sup>nd</sup> Dept., 2015)).

Proper service of RPAPL 1303 & 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 (2<sup>nd</sup> Dept., 2011); *First National Bank of Chicago v. Silver*, 73 AD3d 162, 899 NYS2d 256 (2<sup>nd</sup> Dept., 2010)). RPAPL 1303 requires that a notice in proper form be delivered with the summons and complaint to commence the foreclosure action. 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(s), 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 defendant/mortgagor does not contest her failure to make timely payments due under the terms of the promissory note and mortgage agreements beginning July 1, 2012 and continuing for the past six (6) years. Rather, 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 defendants/mortgagors' continuing default, plaintiff's compliance with statutory pre-foreclosure notice requirements, plaintiff's standing to maintain this action and plaintiff's failure to seek judgment against the co-defendant/mortgagor within one year of his default.

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 (3<sup>rd</sup> 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. 158<sup>th</sup> 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 (3<sup>rd</sup> Dept., 2015); People v. DiSalvo, 284 AD2d 547, 727 NYS2d 146 (2<sup>nd</sup> Dept., 2001); Matter of Carothers v. GEICO, 79 AD3d 864, 914 NYS2d 199 (2<sup>nd</sup> 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 (3<sup>rd</sup> Dept., 2016); HSBC Bank USA, N.A. v. Sage, 112 AD3d 1126, 977 NYS2d 446 (3<sup>rd</sup> 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 (2<sup>nd</sup> 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 two affidavits submitted from the mortgage servicer’s (Ocwen’s) vice presidents provide the evidentiary foundation for establishing the mortgage lender’s right to foreclose. The affidavits set forth each employee’s review of the business records maintained by Ocwen; the fact that the books and records are made in the regular course of Ocwen’s business; that it was Ocwen’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 these two affidavits, 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 mortgage servicer’s vice president’s affidavit, together with documentary evidence in the form of a copy of the original indorsed

promissory note which plaintiff has attached to the complaint, together with the certificate of merit (CPLR 3012-b), provides sufficient evidence of possession of the underlying note to establish the plaintiff's standing to prosecute this foreclosure action (*see JPMorgan Chase Bank, N.A. v. Weinberger, supra.; Nationstar Mortgage LLC v. Catizone, supra.*) In addition, plaintiff has proven standing by submission of the "affidavit of possession" from the Ocwen vice president attesting to the mortgagee's possession and acquisition of the original note beginning January 2, 2013 and to the date this action was commenced on January 27, 2014 (*Aurora Loan Services v. Taylor, supra.; Wells Fargo Bank, N.A. v. Parker, supra.; U.S. Bank, N.A. v. Ehrenfeld*, 144 AD3d 893, 41 NYS3d 269 (2<sup>nd</sup> Dept., 2016); *GMAC v. Sidberry*, 144 AD3d 863, 40 NYS3d 783 (2<sup>nd</sup> Dept., 2016)). Any alleged issues concerning the mortgage assignments are therefore irrelevant to the issue of standing since plaintiff has established possession of the promissory note prior to commencing this action (*FNMA v. Yakaputz II, Inc.*, 141 AD3d 506, 35 NYS3d 236 (2<sup>nd</sup> Dept., 2016); *Deutsche Bank National Trust Company v. Leigh*, 137 AD3d 841, 28 NYS3d 86 (2<sup>nd</sup> Dept., 2016)).

With respect to the issue of the mortgagors' 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 Property Asset Management, Inc. v. Souffrant*, 2018 NY Slip Op 04582 (2<sup>nd</sup> Dept., 6/20/2018); *PennyMac Holdings, Inc. V. Tomanelli*, 139 AD3d 688, 32 NYS3d 181 (2<sup>nd</sup> Dept., 2016); *North American Savings Bank v. Esposito-Como*, 141 AD3d 706, 35 NYS3d 491 (2<sup>nd</sup> Dept., 2016); *Washington Mutual Bank v. Schenk*, 112 AD3d 615, 975 NYS2d 902 (2<sup>nd</sup> Dept., 2013)). Plaintiff has provided admissible evidence in the form of a copy of the note and mortgage, and an affidavit attesting to the defendants/mortgagors' undisputed default in making timely mortgage payments sufficient to sustain its burden to prove defendants have defaulted under the terms of the parties agreement by failing to make timely payments since July 1, 2012 (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 mortgagors' continuing default, plaintiff's application for summary judgment based upon defendant's breach of the mortgage agreement and promissory note must be granted.

With respect to service of the RPAPL 1303 notice, plaintiff's proof consists of a copy of the affidavit of service from the process server confirming that the 1303 notice in proper form was served upon defendant Martha Teramo pursuant to CPLR 308(2) by delivery to a person of suitable age and discretion on February 4, 2014 at approximately 5:25 p.m. The affidavit of service together with the documentary proof constitutes prima facie evidence of proper service of the RPAPL 1303 notice and it is therefore incumbent upon the defendant Martha Teramo to submit relevant, admissible evidence in the form of an affidavit containing specific and detailed contradictions of the claims set forth in the process server's affidavit (CPLR 306; *U.S. Bank, N.A. v. Tauber*, 140 AD3d 1154, 36 NYS3d 144 (2<sup>nd</sup> Dept., 2016); *NYCTL v. Tsafinos*, 101 AD3d 1092, 956 NYS2d 571 (2<sup>nd</sup> Dept., 2012)). Defendant Martha Teramo's submission of an attorney's affirmation claiming generally that plaintiff did not serve a proper 1303 notice provides no admissible evidentiary proof to contradict plaintiff's prima facie showing and therefore defendant's RPAPL 1303 defense must be stricken.

With respect to service of the pre-foreclosure RPAPL 1304 90-day notices, the proof required to prove strict compliance with the statute (RPAPL 1304) can be satisfied: 1) by plaintiff's submission of an affidavit of service of the notices (*see CitiMortgage, Inc. v. Pappas*, 147 AD3d

900, 47 NYS3d 415 (2<sup>nd</sup> Dept., 2017); *Bank of New York Mellon v. Aquino*, 131 AD3d 1186, 16 NYS3d 770 (2<sup>nd</sup> Dept., 2015); *Deutsche Bank National Trust Co. v. Spanos*, 102 AD3d 909, 961 NYS2d 200 (2<sup>nd</sup> Dept., 2013)); or 2) by plaintiff's submission of sufficient proof to establish proof of mailing by the post office (see *HSBC Bank USA, N.A. v. Ozcan*, 154 AD3d 822, 64 NYS3d 38 (2<sup>nd</sup> Dept., 2017); *CitiMortgage, Inc. v. Pappas*, supra pg. 901; see *Wells Fargo Bank, N.A. v. Trupia*, 150 AD3d 1049, 55 NYS3d 134 (2<sup>nd</sup> Dept., 2017)). Once either method is established a presumption of receipt arises (see *Viviane Etienne Medical Care, P.C. v. Country-Wide Insurance Co.*, supra.; *Flagstar Bank v. Mendoza*, 139 AD3d 898, 32 NYS3d 278 (2<sup>nd</sup> Dept., 2016); *Residential Holding Corp. v. Scottsdale Insurance Co.*, 286 AD2d 679, 729 NYS2d 766 (2<sup>nd</sup> Dept., 2001)).

In this case the record shows that plaintiff was not obligated to serve pre-foreclosure 90-day notices to the borrowers since RPAPL 1304(3) provides that the notice requirement "shall not apply, or shall cease to apply, if the borrower has filed an application for an adjustment of debts..." By agreement dated February 10, 2012 the borrowers agreed to the terms of a loan modification which qualifies as an "adjustment of debts" and therefore under the terms of the statute plaintiff was under no obligation to serve pre-foreclosure notices.

Moreover, even were the court to ignore defendants' adjustment of debts, the record shows that there is sufficient evidence to prove that mailing by certified and first class mail was done by the post office proving strict compliance with RPAPL 1304 mailing requirements. Plaintiff has submitted proof in the form of an affidavit from an Ocwen vice president confirming that the mailings were done on June 26, 2013 which was more than 90 days prior to commencing this action; together with a copy of the 90 day notice; one having been mailed by first class mail and the second by certified mailing with a twenty digit certified article (tracking) number (71069017515165618342) sent to the mortgagor at the mortgaged premises; together with a copy of the RPAPL 1306 filing statements with the New York State Department of Financial Services confirming mailing of the notices to the defendant/mortgagor. Such proof is entirely consistent with the evidence submitted by the plaintiff in *HSBC Bank USA, N.A. v. Ozcan supra*. which the appellate court determined was in strict compliance with RPAPL 1304 requirements (see also *Nationstar Mortgage, LLC. v. LaPorte*, 2018 NY Slip Op 04334 (2<sup>nd</sup> Dept., 6/13/2018); *Bank of America, N.A. v. Brannon*, 156 AD3d 1, 63 NYS3d 352 (1<sup>st</sup> Dept., 2017)). Defense counsel's conclusory denial of service, is not supported by any relevant, admissible evidence sufficient to raise a genuine issue of fact which would defeat plaintiff's summary judgment motion (see *PHH Mortgage Corp., v. Muricy*, 135 AD3d 725, 24 NYS3d 137 (2<sup>nd</sup> Dept., 2016); *HSBC Bank v. Espinal*, 137 AD3d 1079, 28 NYS3d 107 (2<sup>nd</sup> Dept., 2016)).

With respect to counsel's claim that the complaint must be dismissed as against a co-defendant/mortgagor the attorney does not represent, counsel has no authority to seek dismissal on behalf of an individual he concedes that he does not represent. No legal basis therefore exists for this court to sua sponte dismiss the complaint against a non-appearing defendant. Moreover, there is no evidence submitted to prove that plaintiff has "abandoned" prosecution of this action against any named defendant, particularly in view of the fact that this action has been the subject of ten (10) court conferences since its inception and up until March 20, 2018. As long as proceedings are being taken which manifest an intent not to abandon the action but to seek judgment, the action should not be subject to dismissal (*Brown v. Rosedale Nurseries*, 259 AD2d 256, 686 NYS2d 22 (1<sup>st</sup> Dept., 1999); *Aurora Loan Services, LLC v. Gross*, 139 AD3d 772, 32 NYS3d 249 (2<sup>nd</sup> Dept., 2016)). No legal grounds therefore exist to dismiss plaintiff's complaint against the defaulting defendant

Richard Teramo as abandoned.

Finally, with respect to the answering defendant's remaining affirmative defenses set forth in her answer, defendant has failed to raise any admissible evidence to support any of 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 (2<sup>nd</sup> Dept., 2010); *Citibank, N.A. v. Van Brunt Properties, LLC*, 95 AD3d 1158, 945 NYS2d 330 (2<sup>nd</sup> Dept., 2012); *Flagstar Bank v. Bellafore*, 94 AD3d 0144, 943 NYS2d 551 (2<sup>nd</sup> Dept., 2012); *Wells Fargo Bank Minnesota, N.A. v. Perez*, 41 AD3d 590, 837 NYS2d 877 (2<sup>nd</sup> Dept., 2007)).

Accordingly, plaintiff's motion seeking an order granting summary judgment and for the appointment of a referee is granted. The proposed order of reference has been signed simultaneously with execution of this order.

Dated: July 6, 2018

**HON. HOWARD H. HECKMAN, JR.**

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J.S.C.