SHORT FORM ORDER **INDEX NO. 033776/2013**

SUPREME COURT - STATE OF NEW YORK
IAS PART 50 - SUFFOLK COUNTY

PRESENT: HON. MARTHA L. LUFT
Acting Justice Supreme Court

MOTION DATE: 5-4-17
ADJ. DATE: 6-6-17
Mot. Seq. # 004 - MG
Mot. Seq. # 005 - MD

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR GSAA HOME EQUITY TRUST 2006-12, ASSET-BACKED CERTIFICATES SERIES 2006-12

Plaintiff,

-against-

RAFFAELA PEMBROKE, DANIEL PEMBROKE, EDWARD CARRERA, 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.

GROSS POLOWY
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ADAM D'ANTONIO, ESQ.
Attorney for Defendants
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Upon consideration of the notice of motion for an order granting summary judgment in favor of the plaintiff U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR GSAA HOME EQUITY TRUST 2006-12, ASSET-BACKED CERTIFICATES SERIES 2006-12 ["the plaintiff"], striking the affirmative defenses in the Answer of the defendants RAFFAELA PEMBROKE and DANIEL PEMBROKE ["the defendants"], deeming the non-answering, non-appearing defendants in default, amending the caption, and appointing a referee to compute, the supporting affirmation, affidavits, exhibits, and memorandum of law (004), the defendants' notice of cross motion for an order denying summary judgment in the plaintiff's favor, and ordering a bad faith hearing, the supporting affirmation, exhibits, and memorandum of law (005), the plaintiff's affirmation in opposition to the cross motion dated May 25, 2017, the plaintiff's reply affirmation in further support of summary judgment dated May 25, 2017, and the defendants' reply affirmation in further support of the cross motion dated June 2, 2017, and supporting exhibits, it is

ORDERED that this motion by the plaintiff for, inter alia, an order: (1) pursuant to CPLR §3212 granting summary judgment, (2) striking the affirmative defenses in the defendants' answer, (3) pursuant to CPLR §3215 fixing the defaults of the non-answering defendants, (4) pursuant to RPAPL §1321 appointing a referee to compute amounts due under the subject mortgage, and (5) amending the caption 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 this Court; and it is further

ORDERED that the defendants' cross motion seeking a bad faith hearing is denied; 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 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.

In this foreclosure action, by order dated July 27, 2015 (Tarantino, Jr., J.), the plaintiff's first motion for summary judgment was denied, the Court there concluding that the plaintiff's submissions raised triable issues of fact as to standing and the plaintiff's strict compliance with RPAPL 1304 precluding summary judgment. The order referred the parties for a compliance conference to schedule discovery. The underlying facts are set forth in the prior order and will not be repeated here except to the extent necessary to inform the instant decision. In the three years since summary judgment was denied, discovery ensued and the defendants made at least two loan modification applications. In addition, many court-assisted settlement conferences were conducted between the parties, without success.

In support of its post-discovery summary judgment motion the plaintiff submitted, inter alia, the affidavit of Armenia L. Harrell, Vice President of Loan Documentation of Wells Fargo Bank, NA ["Wells Fargo"], the plaintiff's loan servicer, dated January 27, 2017 ["the Harrell affidavit"]. According to the Harrell affidavit, and based upon the affiant's familiarity with the business records maintained by Wells Fargo for the purpose of servicing mortgage loans, including the defendants' loan, Harrell acquired personal knowledge of the matters stated in her affidavit by examining Wells Fargo's business records relating to the subject mortgage loan. Based upon Harrell's review of Wells Fargo's records, Harrell attested that the plaintiff had possession of the promissory note endorsed in blank on April 27, 2012, and continued to have possession until the action was commenced on December 23, 2013. The endorsed note was annexed to the complaint when the action was commenced.

Where, as here, standing is put into issue by a defendant, the plaintiff must prove its standing in order to be entitled to relief (*see* ***Deutsche Bank Trust Co. Ams. v Garrison***, 147 AD3d 725, 46 NYS3d 185 [2d Dept 2017]; ***Wells Fargo Bank, N.A. v. Arias***, 121 AD3d 973, 973–974, 995 NYS2d 118 [2d Dept 2014]). A plaintiff in a mortgage foreclosure action has standing where it is the holder or assignee of the underlying note at the time the action is commenced (*see* ***Aurora Loan Servs., LLC v. Taylor***, 25 NY3d 355, 361, 12 NYS3d 612, 34 NE3d 363 [2015]; ***U.S. Bank N.A. v. Handler***, 140 AD3d 948, 949, 34 NYS3d 463 [2d Dept 2016]). Either a written assignment of the underlying note or the physical delivery of the note, properly endorsed, is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident (*see* ***Bank of Am., N.A. v. Martinez***, 153 AD3d 1219, 61 NYS3d 271 [2d Dept 2017]; ***Deutsche Bank Natl. Trust Co. v Brewton***, 142 AD3d 683, 685, 37 NYS3d 292 [2d Dept 2016]).

Here, the plaintiff established that it had standing by demonstrating through the Harrell affidavit that the plaintiff had physical possession of the original note, endorsed in blank, at the time the action was commenced (***U.S. Bank Nat. Assoc. v. Ellis***, 154 AD3d 710, 712, 61 NYS3d 663, 665 [2d Dept 2017]; ***US Bank Nat. Ass'n v. Ehrenfeld***, 144 AD3d 893, 894, 41 NYS3d 269, 271 [2d Dept 2016]). An affidavit of plaintiff's representative based upon personal knowledge and review of books and business records maintained in the ordinary course of business that establishes plaintiff's possession of the note on a date prior to commencement of the action is

sufficient to establish plaintiff's standing (*see* ***Aurora Loan Services, LLC v. Taylor,*** *supra*; ***Wells Fargo Bank, N.A. v. Charlaff***, 134 AD3d 1099, 1100, 24 NYS3d 317 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v. Joseph***, 137 AD3d 896, 26 NYS3d 583 [2d Dept 2016]; ***HSBC Bank, USA v. Espinal***, 137 AD3d 1079, 1080, 28 NYS3d 107 [2d Dept 2016]; ***US Bank, NA v. Ellis***, *supra*). Because "the mortgage passes as an incident to the note" (***Aurora Loan Servs., LLC v. Taylor***, 25 NY3d at 361, [internal quotation marks omitted]), the validity of the purported assignment of the mortgage is irrelevant to the issue of the plaintiff's standing, or to the plaintiff's entitlement to summary judgment (***Wells Fargo Bank, N.A. v. Charlaff***, 134 AD3d 1099, 1100, 24 NYS3d 317, 319 [2d Dept 2015]).

Alternatively, the plaintiff established its standing as the holder of the note when the action was commenced by its attachment of a copy of the note, endorsed in blank, to the summons and complaint at the time the action was commenced (***Nationstar Mortg., LLC v. LaPorte***,162 AD3d 784, 2018 WL 2945632, at *2 [2d Dept 2018][citations omitted]; ***US Bank Nat'l Ass'n v. Cohen***, 156 AD3d 844, 846, 67 NYS3d 643, 645 [2d Dept 2017] [same]).

Additionally, the plaintiff established its prima facie entitlement to judgment as a matter of law by submitting the mortgage, the note, and the Harrell affidavit attesting to the defendants' default in payment (*see* ***Deutsche Bank Nat'l Tr. Co. v. Iarrobino***, 159 AD3d 670, 69 NYS3d 503 [2d Dept 2018]; ***Wells Fargo Bank, NA v. Thomas***, 150 AD3d 1312, 1313, 52 NYS3d 894, 895 [2d Dept 2017]). The Harrell affidavit, attesting to the payment default, was based upon personal knowledge acquired by a review of business records kept by Wells Fargo in the ordinary course of business and comports with CPLR 4518(a) (*see* ***Wells Fargo Bank, NA v. Thomas***, *supra* at 1313; ***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 NYS3d 459 [2d Dept 2015], *lv denied*, 26 NY3d 917 [2016]).

Furthermore, in a residential foreclosure action, a plaintiff moving for summary judgment must tender "sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL 1304" (***U.S. Bank Nat'l Ass'n v. Henderson***,---AD3d---, 2018 WL 3291660, at *1 [2d Dept, *decided* July 5, 2018], *citing* ***Aurora Loan Servs., LLC v. Weisblum***, 85 AD3d 95, 106, 923 NYS2d 609 [2d Dept 2011]). RPAPL 1304(1), which applies to home loans, provides that "at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower ... including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower." At the time the action was commenced, a home loan was a loan "secured by a mortgage or deed of trust on real estate improved by a one to four family dwelling, or a condominium unit, in either case, used or occupied, or intended to be used or occupied wholly or partly, as the home or residence of one or more persons and which is or will be occupied by the borrower as the borrower's principal dwelling" (RPAPL § 1304 [a][5][iii]).

As pointed out by the plaintiff, albeit in the context of the applicability of CPLR 3408, the subject loan was not a home loan as defined in RPAPL §1304 since the subject premises was one of several rental properties owned by the defendants rather than the defendants' primary residence. The fact that the subject premises was not the defendants' primary residence was not disputed by the defendants in their reply affirmation in further support of their cross motion dated June 2, 2017. Although the defendants object to the plaintiff's proof of mailing of the statutory notice, they do not dispute or offer any facts contradicting the assertion that the subject loan is not a "home loan." The affidavits of service of process indicate the defendants' residence at an address

other than the mortgaged premises. The "1-4 Family Rider" to the subject note provided for "Assignment of Rents" (*see* ***JP Morgan Chase Bank, N.A. v Venture***, 148 AD3d 1269, 48 NYS3d 824 [3d Dept 2017]; *see also* ***Wells Fargo Bank, N.A. v Muskopf***, 44 Misc3d 1223(A), 999 NYS2d 799 [Sup Ct, Suffolk County, 2014]). The defendants' exhibits in connection with their loan modification applications also corroborate that the subject premises was not the defendants' primary residence but one of several rental properties. Accordingly, the plaintiff was not required to comply with RPAPL §§1304 or 1306 (*see* ***HSBC Bank USA, Nat. Ass'n. v. Ozcan***, 154 AD3d 822, 825, 64 NYS3d 38, 42 [2d Dept 2017]; ***Wells Fargo Bank, N.A. v. Berkovits***, 143 AD3d 696, 698, 38 NYS3d 579, 580 [2d Dept 2016]; ***JP Morgan Chase Bank, Nat. Ass'n v. Venture***, 148 AD3d 1269, 1271, 48 NYS3d 824, 827 [3d Dept 2017]; *see also* ***Aurora Loan Servs., LLC v. Komarovsky***, 151 AD3d 924, 928, 58 NYS3d 96, 100 [2d Dept 2017]).

In any event, even if the subject loan were a "home loan", the plaintiff demonstrated, prima facie, that it complied with the mailing requirements of RPAPL 1304 by submitting evidence that it mailed the pre-foreclosure notice to the defendants at the subject premises and their last-known address by both certified and first-class mail (***HSBC Bank USA, Nat. Ass'n. v. Ozcan***, *supra* at 826, 64 NYS3d 38, 43; ***Nationstar Mortg., LLC v. LaPorte***, 162 AD3d 784, 2019 WL 2945632 [2d Dept, *decided* June 13, 2018]). The evidence establishing the appropriate mailing of the required notices created a rebuttable presumption that the intended recipients actually received them (***Flagstar Bank, FSB v. Mendoza***, 139 AD3d 898, 900, 32 NYS3d 278, 280 [2d Dept 2016]). In opposition, the defendants failed to raise a triable issue of fact (*id.*; ***CitiMortgage, Inc. v. McKenzie***, 161 AD3d 1040, 2018 WL 2325923 [2d Dept 2018]).

In light of the foregoing, the plaintiff established its entitlement to judgment as a matter of law (***Prop. Asset Mgmt., Inc. v. Souffrant***, 162 AD3d 919, 75 NYS3d 432, 433 [2d Dept 2018]).

The defendants oppose the plaintiff's motion and have cross moved seeking a "bad faith hearing" based upon the plaintiff's alleged failure to adequately explain the basis for its modification denials and ultimately, its refusal to offer the defendants a loan modification. [1] When this action was commenced, CPLR 3408 entitled "Mandatory settlement conference in residential foreclosure actions" provided, in relevant part, that in any residential foreclosure action involving a home loan as such term is defined in section thirteen hundred four of the real property actions and proceedings law, in which the defendant is a resident of the property subject to foreclosure, the court shall hold a mandatory conference for the purpose of holding settlement discussions. The statute requires that both the plaintiff and defendant negotiate in good faith to reach a mutually agreeable resolution, including but not limited to a loan modification, short sale, deed in lieu of foreclosure, or any other loss mitigation, if possible (*see* CPLR 3408[f]). Compliance with the obligation to negotiate in good faith pursuant to this section shall be determined by considering whether the totality of the circumstances demonstrates that the party's conduct did not constitute a meaningful effort at reaching a resolution (***U.S. Bank Nat. Ass'n v. Sarmiento***, 121 AD3d 187, 203, 991 NYS2d 68, 79 [2d Dept 2014]).

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[1] The papers before the Court indicate that the defendants were given a loan modification in September 2010 from which they defaulted in 2011.

As an initial matter, the plaintiff correctly argues that as the statute's title suggests, the requirements of CPLR 3408 apply during the mandatory settlement conferences (*see also* 22 NYCRR 202.12-a). Although this case has appeared on the Court's conference calendar many times, the case initially appeared on the residential foreclosure settlement part calendar four times between May 19, 2014, and December 8, 2015, whereupon it was released from that part without any referral for bad faith. The defendants have not alleged that the plaintiff failed to negotiate in good faith during this mandatory time period. Moreover, the statute only applies to residential foreclosures involving a home loan as defined in RPAPL 1304 and further, where the defendant is a resident of the property subject to foreclosure (CPLR 3408 [a]). Thus, even if the Court were to extend the good faith requirement of CPLR 3408(f) beyond the mandatory conference part, the statute would still be inapplicable since it is undisputed that the defendants did not reside at the subject premises (***Josovich v. Ceylan***, 133 AD3d 570, 572, 19 NYS3d 554, 557 [2d Dept 2015]; *see also* ***Indep. Bank v. Valentine***, 113 AD3d 62, 66, 976 NYS2d 504, 507 [2d Dept 2013]; *compare* ***Fed. Nat. Mortg. Ass'n v. Anderson***, 119 AD3d 892, 893, 991 NYS2d 85, 87 [2d Dept 2014]). Based on the defendants' submissions on these motions, the subject premises was one of several properties the defendants owned that generated rental income for them.

Again assuming, for the sake of argument only, that the good faith requirement imposed by CPLR 3408 (f) applied to this matter notwithstanding that the defendants fault the plaintiff's conduct outside of the mandatory settlement conference process, and that the subject loan was not a home loan when the action was commenced, the defendants nevertheless failed to sufficiently allege that the totality of the circumstances demonstrated that the conduct of the plaintiff and its servicer did not constitute a meaningful effort at reaching a resolution to warrant a hearing (*see* ***CitiMortgage, Inc. v. Pugliese***, 143 AD3d 659, 662, 38 NYS3d 576, 578–79 [2d Dept 2016]). Defendants' counsel did not acknowledge, much less address the evidence that there were multiple grounds for the HAMP Tier 2 denial in addition to the 1 % overage in the debt-to-income ratio including a negative Net Present Value and the fact that a modified payment would not have reduced the principal and interest payment by 10% or more, which was a requirement for a HAMP Tier 2 modification. The defendant did not dispute the plaintiff's calculations demonstrating that after capitalizing the undisputed $118,124.81 in interest arrears, the proposed modified payment would actually increase the prior payment.

Thus, under any view of the facts, the defendants are not entitled to a bad faith hearing and their cross motion is denied.

The proposed order submitted with the moving papers has been signed concurrently herewith.

Dated: September 5, 2018

Marsha L. Steinhardt
A.J.S.C.

____ FINAL DISPOSITION XX NON-FINAL DISPOSITION