

<b>Wells Fargo Bank, N.A. v Valle</b>
2018 NY Slip Op 32467(U)
September 20, 2018
Supreme Court, Suffolk County
Docket Number: 14-840
Judge: James Hudson
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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART XL - SUFFOLK COUNTY

**PRESENT:**

Hon. JAMES HUDSON  
Acting Justice Supreme Court

MOTION DATE 3-12-15 (001)  
MOTION DATE 4-16-15 (002)  
ADJ. DATE 12-20-17  
Mot. Seq. # 001 - MotD  
# 002 - MD

-----X  
WELLS FARGO BANK, N.A.,

Plaintiff,

- against -

ROSA VALLE A/K/A ROSA I. VALLE, A/K/A  
ROSA PACHEO, ALBERTO NIEVES A/K/A  
ALBERTO NIEVES, JR., WASHINGTON  
MUTUAL BANK, LVLV FUNDING LLC,  
A/P/O GE CAPITAL, MIDLAND FUNDING  
LLC D/B/A IN NEW YORK AS MIDLAND  
FUNDING OF DELAWARE APO CITIBANK,  
CAPITAL ONE BANK USA, N.A., and "JOHN  
DOE", said name being fictitious, it being the  
intention of plaintiff to designate any and all  
occupants of premises being foreclosed herein,  
and any parties, corporations, or entities, if any,  
having or claiming an interest or lien upon the  
mortgaged premises,

Defendants.  
-----X

SHAPIRO, DICARO & BARAK, LLC  
Attorney for Plaintiff  
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Alberto Nieves aka Alberto Nieves, Jr., Pro Se  
170 Westview Avenue  
Deer Park, New York 11729

Washington Mutual Bank  
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New York New York 10011

Midland Funding LLC  
99 Washington Avenue  
Albany, New York 12210

LVNV Funding LLC APO GE Capital  
99 Washington Avenue  
Albany, New York 12210

Upon the following papers numbered 1 to 13 read on these motions for summary judgment and dismissal : Notice of Motion/ Order to Show Cause and supporting papers 1 - 3 ; 4 - 9 ; Notice of Cross Motion and supporting papers      ; Answering Affidavits and supporting papers      ; Replying Affidavits and supporting papers 10 - 13 ; Other      ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion (001) by the plaintiff for, inter alia, an order: (1) pursuant to CPLR 3212, awarding summary judgment in its favor and against the answering defendant, Rosa Valle a/k/a Rosa I. Valle a/k/a Rosa Pacheo, striking her answer and dismissing the affirmative defenses and counterclaims set forth therein; (2) pursuant to CPLR 1024, substituting the name GINGER ROSE VALLE for "JOHN DOE," and amending the caption accordingly; (3) pursuant to CPLR 3215, fixing the defaults of the non-answering defendants; and (4) pursuant to RPAPL §1321, appointing a referee to compute amounts due under the subject mortgage, and examine and report whether the subject premises should be sold in one parcel or multiple parcels, is granted to the extent set forth herein, and is otherwise denied; and it is further

**ORDERED** that so much of the plaintiff's motion that seeks an order striking the answering defendant's affirmative defenses as to plaintiff's standing is granted, and the branch of the motion for summary judgment and an order of reference as to this defendant is denied, with leave to renew within 120 days of the date of this order, not to be extended without leave of Court, and it is further

**ORDERED** that the motion (002) by the defendant Rosa Valle, incorrectly denominated as a cross motion, for, inter alia, an order dismissing the complaint as asserted against her is denied; 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 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, commenced on January 13, 2014. On November 20, 2003, the defendants Rosa I. Valle and Alberto Nieves, Jr. executed a note in favor of Washington Mutual Bank, FA ("WaMu"), in the amount of \$285,000.00. To secure the note, on the same date, Ms. Valle gave WaMu a mortgage on the subject property. On April 18, 2007, WaMu executed an assignment of mortgage in favor of the plaintiff. The subject note is indorsed by WaMu in blank, though this indorsement is undated. By its complaint, the plaintiff alleges that Ms. Valle and Mr. Nieves defaulted on the note. By her answer, Ms. Valle generally denies the material allegations as set forth in the complaint and asserts 11 affirmative defenses, including lack of standing, and failure to comply with the notice requirements prescribed by Real Property Actions and Proceedings Law (RPAPL) § 1304, as well as a counterclaim for attorneys' fees. No other defendants have answered the complaint or appeared in this action. By order dated November 20, 2017, this Court granted Ms. Valle's attorneys leave to withdraw as counsel in this matter, and these proceedings were stayed for 30 days.

The plaintiff now moves for summary judgment, and for an order of reference. In support of its motion, the plaintiff submits, among other things, copies of the note and mortgage, several duly executed

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affidavits of service, and an affidavit of Eugene A. Skrypko, Vice President of Loan Documentation of plaintiff. Ms. Valle opposes the motion and moves for an order dismissing the complaint as asserted against her, arguing, inter alia, that the plaintiff lacks standing to prosecute the instant action, that it has failed to establish its compliance with RPAPL § 1304, and that she is entitled to attorneys' fees as prescribed by Real Property Law § 282. In addition, Ms. Valle withdraws her remaining affirmative defenses and counterclaims. In opposition, and in support of her motion, Ms. Valle submits several documents, including an affirmation of her attorney and her own affidavit. In opposition to Ms. Valle's motion, and in further support of its motion, the plaintiff submits, among other things, an affidavit of Kimberly Ann Mueggenberg, Vice President of Loan Documentation, and copies of notices purportedly sent to Ms. Valle.

Here, as Ms. Valle served an answer that included 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]; *CitiMortgage, Inc. v Rosenthal*, 88 AD3d 759, 931 NYS2d 638 [2d Dept 2011]; *Bank of N.Y. v Silverberg*, 86 AD3d 274, 926 NYS2d 532 [2d Dept 2011]). The plaintiff established its standing as the holder of the note by attaching the indorsed note to the summons and complaint, demonstrating that the note was in its possession prior to the commencement of the action, and that the subject mortgage passed to plaintiff with the note as an inseparable incident (*see 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]; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]).

The plaintiff's submissions as to Ms. Valle establish its prima facie entitlement to summary judgment on its mortgage foreclosure action by producing the indorsed note, the mortgage, and evidence of nonpayment (*see Pennymac Holdings, LLC v Tomanelli, supra*; *Wachovia Bank, N.A. v Carcano, supra*; *Capital One, N.A. v Knollwood Props. II, LLC*, 98 AD3d 707, 950 NYS2d 482 [2d Dept 2012]). By his affidavit of merit, Mr. Skrypko attests that, based on records kept during the regular course of plaintiff's business, Ms. Valle and Mr. Nieves failed to make a payment on the note scheduled for September 1, 2009, and that they failed to make subsequent payments to bring the loan current (*see CPLR 4518[a]*; *American Airlines Fed. Credit Union v Mohamed*, 117 AD3d 974, 986 NYS2d 530 [2d Dept 2014]; *Bank of Smithtown v 219 Sagg Main, LLC*, 107 AD3d 654, 968 NYS2d 95 [2d Dept 2013]).

Further, the plaintiff's submissions as to Mr. Nieves, namely the mortgage, the underlying unpaid note, the complaint setting forth the facts establishing the claim, Mr. Skrypko's affidavit attesting to the default, and proof that he did not answer within the time allowed, demonstrate its entitlement to an order of reference (*see RPAPL §1321*; *HSBC Bank USA v Angeles*, 143 AD3d 671, 38 NYS3d 580 [2d Dept 2016]; *Wells Fargo Bank, NA v Ambrosov*, 120 AD3d 1225, 993 NYS2d 322 [2d Dept 2014]; *HSBC Bank v Taher*, 104 AD3d 815, 962 NYS2d 301 [2d Dept 2013]). By his affidavit of service, the plaintiff's process server attests that Mr. Nieves was duly served with the summons and complaint on January 18, 2014, pursuant to CPLR 308 (2), a copy of same was mailed to him at his residence on January 23, 2015, and this affidavit of service was filed with the Suffolk County Clerk on January 31, 2014. As Mr. Nieves failed to answer the complaint or to move for leave to file a late answer, he is in

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default and, as such, he is “deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them” (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71, 760 NYS2d 727, 733 [2003]).

To successfully oppose the instant motion, the defaulting defendants must provide a reasonable excuse for their failure to serve an answer and demonstrate a potentially meritorious defense to the action (see *HSBC Bank USA N.A. v Wider*, 101 AD3d 683, 955 NYS2d 202 [2d Dept 2012]; *Wells Fargo Bank v Cervini*, 84 AD3d 789, 921 NYS2d 643 [2d Dept 2011]; *Maspeth Fed. Sav. & Loan Assn. v McGown*, 77 AD3d 889, 909 NYS2d 403 [2d Dept 2010]). As Mr. Nieves has not submitted any papers in response to the plaintiff’s motion, he fails to proffer a reasonable excuse for his failure to answer the complaint; thus, the Court need not determine whether a potentially meritorious defense to the action was shown (see *EMC Mtge. Corp. v Toussaint*, 136 AD3d 861, 25 NYS3d 312 [2d Dept 2016]; *BAC Home Loans Servicing, LP v Reardon*, 132 AD3d 790, 18 NYS3d 664 [2d Dept 2015]; *Wells Fargo Bank v Cervini*, *supra*). Further, as all of the non-answering defendants are in default, they have waived any affirmative defenses as to the plaintiff’s standing (see *HSBC Bank USA v Angeles*, *supra*; *HSBC Bank v Taher*, *supra*; *Bank of N.Y. v Alderazi*, 99 AD3d 837, 951 NYS2d 900 [2d Dept 2012]) or its compliance with RPAPL §1304 (see *Flagstar Bank, FSB v Jambelli*, 140 AD3d 829, 32 NYS3d 625 [2d Dept 2016]; *U.S. Bank N.A. v Carey*, 137 AD3d 894, 28 NYS3d 68 [2d Dept 2016]; *PHH Mortg. Corp. v Celestin*, 130 AD3d 703, 11 NYS3d 871 [2d Dept 2015]).


However, as Ms. Valle raised the plaintiff’s failure to comply with RPAPL §1304 in her answer to the complaint, the plaintiff must demonstrate its strict compliance with the statute so as to be entitled to summary judgment (see *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 106, 923 NYS2d 609, 616 [2d Dept 2011]). Here, the plaintiff has not supplied the Court with adequate evidentiary proof of its compliance with RPAPL §1304 (see *Cenlar, FSB v Weisz*, 136 AD3d 855, 25 NYS3d 308 [2d Dept 2016]; *Bank of N.Y. Mellon v Aquino*, 131 AD3d 1186, 16 NYS3d 770 [2d Dept 2015]; *Wells Fargo Bank, NA v Burke*, 125 AD3d 765, 5 NYS3d 107 [2d Dept 2015]; *Hudson City Sav. Bank v DePasquale*, 113 AD3d 595, 977 NYS2d 895 [2d Dept 2014]). Although Mr. Skrypko avers that the 90-day pre-foreclosure notices were sent to the borrowers via certified and first class mail, the statements set forth in this affidavit are conclusory, and are insufficient to meet the requirements of the statute, as he failed to provide proof of a standard office mailing procedure or any independent proof of actual mailing (see *Citibank, N.A. v Wood*, 150 AD3d 813, 55 NYS3d 109 [2d Dept 2017]; *CitiMortgage, Inc. v Pappas*, 147 AD3d 900, 47 NYS3d 415 [2d Dept 2017]; *JPMorgan Chase Bank, N.A. v Kutch*, 142 AD3d 536, 537, 36 NYS3d 235 [2d Dept 2016]; *cf. HSBC Bank USA, N.A. v Ozcan*, 154 AD3d 822, 64 NYS3d 38 [2d Dept 2017]). As the plaintiff has failed to establish its compliance with this condition precedent (see *Aurora Loan Servs., LLC v Weisblum*, *supra*), its motion as to Ms. Valle is denied, regardless of the sufficiency of the opposing papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

As to Ms. Valle’s motion, she submits her own affidavit, alleging, among other things, that the plaintiff’s submissions fail to demonstrate its standing to pursue this action, and that it failed to comply with RPAPL §1304. However, as the plaintiff established standing via physical delivery of the note, the validity of the subsequent assignments of the subject mortgage is irrelevant (see *Aurora Loan Servs., LLC v Taylor*, *supra*; *Wells Fargo Bank, N.A. v Charlaff*, 134 AD3d 1099, 24 NYS3d 317 [2d Dept

2015]; *Deutsche Bank Natl. Trust Co. v Whalen*, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]). Nevertheless, by her affidavit, Ms. Valle meets her initial burden on her motion to dismiss the complaint as asserted against her, as she avers that she “unequivocally attest[s] and swear[s] to the fact that [she] never received the mandatory 90-day notices - neither by First-Class mail delivery, nor by Certified mail delivery, nor by Registered mail” (see *U.S. Bank, N.A. v Henry*, 157 AD3d 839, 69 NYS3d 656 [2d Dept 2018]; *CitiMortgage, Inc. v Pappas*, *supra*, at 902; *Aurora Loan Servs., LLC v Weisblum*, *supra*). The burden then shifted to the plaintiff to produce evidentiary proof, in admissible form, which raises a triable issue of fact as to its strict compliance with the statute (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Aurora Loan Servs., LLC v Weisblum*, *supra*). The plaintiff’s submissions, namely Ms. Mueggenberg’s affidavit attesting to its mailing practices and procedures, along with copies of its correspondence log and a copy of a signed certified mailing return receipt, are sufficient to raise triable issues of fact as to its compliance with RPAPL §1304, and as such, Ms. Valle’s motion to dismiss the complaint as asserted against her on this ground is denied (see *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, *supra*; see *Citibank, N.A. v Wood*, *supra*; *CitiMortgage, Inc. v Pappas*, *supra*; cf. *U.S. Bank, N.A. v Henry*, *supra*). Moreover, as the Court has denied the portion of Ms. Valle’s motion to dismiss the complaint as asserted against her, the branch of same that seeks attorneys’ fees is also denied (see Real Property Law § 282 [1]; *Bank of America, N.A. v Destino*, 138 AD3d 654, 29 NYS3d 56 [2d Dept 2016]; *DKR Mortgage Asset Trust I v Rivera*, 130 AD3d 774, 14 NYS3d 414 [2d Dept 2015]).

Accordingly, the plaintiff’s motion for summary judgment and for an order of reference is granted in part and denied in part, with leave to renew within 120 days of the date of this order, the defendant’s cross motion is denied, and the parties’ proposed orders have been marked “not signed.”

Dated: Sept 20, 2018

  
A.J.S.C.  
HON. JAMES C. HUDSON

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION