

Bank of N.Y. v DeJohn
2018 NY Slip Op 32610(U)
October 10, 2018
Supreme Court, Suffolk County
Docket Number: 27967/2008
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.: 27967/2008
MOTION DATE: 9/25/2018
MOTION SEQ. NO.: #10 MG

-----X
THE BANK OF NEW YORK,

Plaintiff,

-against-

JOHN DEJOHN, et al.,

Defendants.

-----X

PLAINTIFF'S ATTORNEY:
ECKERT SEAMANS CHERIN &
MELLOT
10 BANK STREET, STE 700
WHITE PLAINS, NY 10601

DEFENDANT'S ATTORNEY:
IRWIN POPKIN, ESQ.
445 BROAD HOLLOW ROAD, SUITE 25
MELVILLE, NY 11747

Upon the following papers numbered 1 to 23 read on this motion 1-12; Notice of Motion/ Order to Show Cause and supporting papers ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 13-14; Replying Affidavits and supporting papers 15-23; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff The Bank of New York seeking an order: 1) vacating a prior Order of Reference (Farneti, J.) dated January 25, 2010; 2) granting summary judgment striking the answer asserted by defendant John DeJohn; 3) confirming that portion of the prior January 25, 2010 Order of Reference (Farneti, J.) to the extent that the caption was amended to substitute Ann DeJohn as a named party defendant in place and stead of a defendant previously designated as "John Doe #1", and striking the remaining defendants designated as "John Doe #2" through "John Doe #10"; 4) striking and withdrawing the answer asserted by defendant HSBC Bank USA, N.A. as assignee of Mortgage Electronic Registration Systems, Inc. as Nominee for Fremont Investment and Loan as a result of a stipulation signed by counsel for plaintiff and defendant HSBC Bank USA, N.A. dated September 25, 2018; 5) amending the caption; 6) deeming all appearing and non-appearing defendants in default; and 7) 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 \$507,500.00 executed by defendant John DeJohn on September 19, 2006 in favor of United Northern Bankers, Ltd. On the same date defendant/mortgagor DeJohn executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. By assignment dated March 13, 2008 the mortgage and note were assigned to the plaintiff. Plaintiff claims that DeJohn defaulted under the terms of the mortgage and note by failing to make timely monthly mortgage payments beginning

March 1, 2008 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 September 24, 2008. Defendant DeJohn served an answer dated November 3, 2008.

Court records indicate that the present motion is the tenth motion made in this foreclosure action. Plaintiff previously made a total of three (3) default/summary judgment motions. By Order (Farneti, J.) dated April 28, 2009 plaintiff's initial two default/summary judgment motions were denied. By Order (Farneti, J.) dated January 25, 2010 plaintiff's unopposed motion for an order granting a default/summary judgment and appointing a referee was granted. Defendant HSBC Bank USA's motion ((#004) seeking to vacate its default in appearing was withdrawn after counsel for both parties executed a stipulation dated October 13, 2010 permitting HSBC Bank USA to vacate its default and to serve a late answer. Defendant served a motion (#005) seeking dismissal on December 2, 2010 with an original return date December 30, 2010. That motion was denied by short form Order (Farneti, J.) dated October 13, 2011. Defendant served another motion (#006) seeking to strike plaintiff's complaint on April 12, 2012 made returnable May 10, 2012, which was marked withdrawn by oral decision (Farneti, J.) dated September 27, 2012. Three subsequent motions were made (#007, #008 & #009) seeking relief in the form of withdrawal of counsel; the first motion with respect to plaintiff's counsel (originally returnable August 14, 2014 and granted January 6, 2015); the second with respect to defendant's counsel (originally returnable October 15, 2015 and granted December 7, 2015); and the third with respect to defendant's counsel (originally returnable November 17, 2016 and granted January 19, 2017).

The current motion (#010) seeks an order vacating the prior Order of Reference (Farneti, J.) dated January 25, 2010, granting summary judgment striking defendant DeJohn's answer and appointing a referee to compute the sums due and owing to the plaintiff. The motion was submitted to the clerk's office on December 1, 2016 and made originally returnable December 20, 2016. The motion and action were assigned to this part by Administrative Order (Hinrichs, J.) dated April 5, 2018. By stipulation dated September 25, 2018 defendant HSBC Bank USA agreed to withdraw its opposition to plaintiff's motion and to withdraw its answer. Plaintiff's motion was thereafter marked submitted on September 25, 2018 with respect to the remaining opposition submitted by defendant DeJohn. Defendant DeJohn's opposition consists of an attorney's affirmation claiming that: 1) plaintiff has failed to prove that it complied with pre-foreclosure mortgage default notice service requirements; and 2) plaintiff lacks standing to maintain this action.

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 *Wells Fargo Bank N.A. v. Erobobo*, 127 AD3d 1176, 9 NYS3d 312 (2nd Dept., 2015); *Wells Fargo Bank, N.A. v. Ali*, 122 AD3d 726, 995 NYS2d 735 (2nd 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 (2nd Dept., 2015); *HSBC Bank USA, N.A. v. Baptiste*, 128 AD3d 77, 10 NYS3d 255 (2nd 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 (2nd 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 (2nd Dept., 2015); *U.S. Bank v. Guy*, 125 AD3d 845, 5 NYS3d 116 (2nd 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 has been held to constitute due proof of the plaintiff's possession of the note prior to the commencement of the action and thus its standing to prosecute its claim for foreclosure and sale (*Bank of New York Mellon v. Theobalds*, 161 AD3d 1137, 79 NYS3d 50 (2nd Dept., 2018); *Bank of New York Mellon v. Burke*, 155 AD3d 932, 64 NYS3d 114 (2nd Dept., 2017); *Wells Fargo Bank, N.A. v. Thomas*, 150 AD3d 1312, 52 NYS3d 894 (2nd Dept., 2017); *Deutsche Bank National Trust Co. v. Garrison*, 147 AD3d 725, 726, 46 NYS3d 185 (2nd Dept., 2017); *U.S. Bank, N.A. v. Saravanan*, 146 AD3d 1010, 1011, 45 NYS3d 547 (2nd Dept., 2017); *JPMorgan Chase Bank, N.A. v. Weinberger*, 142 AD3d 643, 37 NYS3d 286 (2nd Dept., 2016); *FNMA v. Yakaputz II, Inc.*, 141 AD3d 506, 35 NYS3d 236 (2nd Dept., 2016); *Deutsche Bank National Trust Co. v. Leigh*, 137 AD3d 841, 28 NYS3d 86 (2nd Dept., 2016); *Nationstar Mortgage LLC v. Catizone*, 127 AD3d 1151, 9 NYS3d 315 (2nd Dept., 2015)).

At issue is whether the evidence submitted by the plaintiff is sufficient to establish its right to foreclose. The defendant does not contest his failure to make timely payments due under the terms of the promissory note and mortgage agreement for the past decade (+). 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 the mortgagor's continuing default, plaintiff's compliance with mortgage notice requirements, and plaintiff's standing to maintain this action

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 (3rd 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. 158th 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 (3rd Dept., 2015); *People v. DiSalvo*, 284 AD2d 547, 727 NYS2d 146 (2nd Dept., 2001); *Matter of Carothers v. GEICO*, 79 AD3d 864, 914 NYS2d 199 (2nd Dept., 2010)). In this regard, with respect to mortgage foreclosures, a loan servicer’s employee may testify on behalf of the mortgage lender and a representative of an assignee of the original lender can rely upon business records of the original lender to establish its claims for recovery of amounts due from the borrowers provided the assignee/plaintiff establishes that it incorporated the original records into its own records and relied upon those records in the regular course of business (*Landmark Capital Inv. Inc. v. Li-Shan Wang*, 94 AD3d 418, 941 NYS2d 144 (1st Dept., 2012); *Portfolio Recovery Associates, LLC. v. Lall*, 127 AD3d 576, 8 NYS3d 101 (1st Dept., 2015); *Merrill Lynch Business Financial Services, Inc. v. Trataros Construction, Inc.*, 30 AD3d 336, 819 NYS2d 223 (1st Dept., 2006)).

The statute (CPLR 4518) clearly does not require a person to have personal knowledge of each and every entry contained in a business record, particularly in this case, where there is a business relationship between mortgage servicing entities responsible for entering and maintaining accurate records, and where the current servicer has incorporated and relied upon the business records it maintains in its regular course of business (*see Citibank N.A. v. Abrams*, 144 AD3d 1212, 40 NYS3d 653 (3rd Dept., 2016); *HSBC Bank USA, N.A. v. Sage*, 112 AD3d 1126, 977 NYS2d 446 (3rd Dept., 2013); *Landmark Capital Inv. Inc. v. LI-Shan Wang, supra.*). As the Appellate Division, Second Department recently stated in *Citigroup v. Kopelowitz*, 147 AD3d 1014, 48 NYS3d 223 (2nd

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 affidavits submitted from Ditech Financial, LLC’s (mortgage servicer/attorney-in-fact’s) litigation representatives provide the evidentiary foundation for establishing the mortgage lender’s right to foreclose. The affidavits set forth the employees’ review of the business records maintained by the mortgage servicer; the fact that the books and records are made in the regular course of Ditech’s business; that it was Ditech’s regular course of business to maintain such records; that the records were contemporaneously created at the time the underlying transactions occurred; that, to the extent that the records were compiled by a prior servicer, such records were incorporated into Ditech’s loan records and relied upon in its regular course of its business; and that such records are part of its regularly conducted business activities and are checked for accuracy upon being boarded into Ditech’s service system . Based upon the submission of these affidavit’s, 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 has proven standing by submission of two affidavits from the mortgage servicer/attorney-in-fact’s litigation representatives, each attesting and corroborating plaintiff’s physical possession of the original promissory note with attached allonge indorsed in blank, beginning with delivery of the note and attached allonge to the plaintiff on October 7, 2006, and at the time this action was commenced on July 24, 2008 (*Aurora Loan Services, LLC v. Taylor, supra.*; *U.S. Bank v. Ehrenfeld*, 144 AD3d 893, 41 NYS3d 269 (2nd Dept., 2016); *JPMorgan Chase Bank, N. A. v. Weinberger*, 142 AD3d 643, 37 NYS3d 286 (2nd Dept., 2016); *CitiMortgage, Inc. v. Klein*, 140 AD3d 913, 33 NYS3d 432 (2nd Dept., 2016); *U.S. Bank, N.A. v. Godwin*, 137 AD3d 1260, 28 NYS3d 450 (2nd Dept., 2016); *Wells Fargo Bank, N.A. v. Joseph*, 137 AD3d 896, 26 NYS3d 583 (2nd Dept., 2016); *Emigrant Bank v. Larizza*, 129 AD3d 904, 13 NYS3d 129 (2nd Dept., 2015); *Deutsche Bank National Trust Co. v. Whalen*, 107 AD3d 931, 969 NYS2d 82 (2nd Dept., 2013)). Any alleged issues surrounding the mortgage assignment are irrelevant in this case concerning the issue of standing since the plaintiff has established possession of a duly indorsed promissory note prior to commencing this action (*FNMA v. Yakaputz II, Inc.*, 141 AD3d 506, 35 NYS3d 236 (2nd Dept., 2016); *Deutsche Bank National Trust Co. v. Leigh*, 137 AD3d 841, 28 NYS3d 86 (2nd Dept., 2016)).

With respect to the issue of the defendant’s 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*, 162 AD3d 919, 75 NYS3d 432 (2nd Dept., 2018); *PennyMac Holdings, Inc. V. Tomanelli*, 139 AD3d 688, 32 NYS3d 181 (2nd Dept., 2016); *North American Savings Bank v. Esposito-Como*, 141 AD3d 706, 35 NYS3d 491 (2nd Dept., 2016); *Washington*

Mutual Bank v. Schenk, 112 AD3d 615, 975 NYS2d 902 (2nd Dept., 2013)). Plaintiff has provided admissible evidence in the form of a copy of the note and mortgage, and two affidavits attesting to the defendant's undisputed default in making timely mortgage payments sufficient to sustain its burden to prove defendant has defaulted under the terms of the parties agreement by failing to make timely payments since March 1, 2008 (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 his continuing default, plaintiff's application for summary judgment against the defendant based upon his breach of the mortgage agreement and promissory note must be granted.

With respect to the issue of plaintiff's service of the mortgage default notice, a review of the affirmative defenses asserted in defendant's answer reveals that the mortgagor/defendant never asserted plaintiff's failure to serve a mortgage default notice as required under the terms of the mortgage, as an affirmative defense. Defendant's seventh affirmative defense states: "The Plaintiff failed to properly adhere to the underlying mortgage in that Plaintiff failed to provide to the answering Defendant, John DeJohn with proper notices." Defendant's eighth affirmative defense states: "Plaintiff failed to properly accelerate and as such cannot maintain the instant action." Neither defense mentions the default notice requirement set forth pursuant to paragraphs fifteen (15) & twenty-two (22) of the mortgage and references a failure to properly accelerate which is not required under the terms of the mortgage and which most often applies to commencement of an action by the filing of a summons, complaint and notice of pendency in the Suffolk County Clerk's Office. Paragraph twenty-two (22) does require a notice demanding "Immediate Payment in Full" but there is no description or reference of this requirement in defendant's answer. Equally vague is plaintiff's alleged failure to provide defendant with "proper notices" and without an explanation of what "proper notices" defendant refers to, no legal basis exists to interpret defendant's answer as having raised the affirmative defense of "failure to serve a mortgage default notice" (CPLR 3015(a)). Accordingly based upon defendant's failure to assert such claim as an affirmative defense, the defendant has waived his right to assert it in opposition to plaintiff's motion (CPLR 3015 & 3018(b); *see Emigrant Bank v. Marando*, 143 AD3d 856, 39 NYS3d 83 (2nd Dept., 2016); *Signature Bank v. Epstein*, 95 AD3d 1199, 945 NYS2d 347 (2nd Dept., 2012); *First N. Mortgage Corporation v. Yatrakis*, 154 AD2d 433, 546 NYS2d (2nd Dept., 1989); *see also Wilmington Trust v. Sukhu*, 155 AD3d 591, 63 NYS3d 853 (1st Dept., 2017); *Karel v. Clark*, 129 AD2d 773, 514 NYS2d 766 (2nd Dept., 1987)).

Moreover, even were the court to consider defendant's answer as having asserted such defense, the plaintiff has submitted sufficient proof to show that the default notice was mailed to the mortgagor defendant in compliance with mortgage requirements. The plaintiff's proof consists of two affidavits submitted by the mortgage servicer's representatives confirming that the mailing was done by first class mailing of the notice of default on April 16, 2008, together with a copy of the notice of default dated the same date (April 16, 2008) and addressed to DeJohn at the mortgaged premises. Such proof provides sufficient evidence of compliance with the mortgage default notice requirements and defense counsel's conclusory denial of service, fails to raise a genuine issue of fact concerning service of the default notice (*see PHH Mortgage Corp. v. Muricy, supra.*; *HSBC Bank v. Espinal, supra.*).

Finally, defendant has failed to raise any admissible evidence to support the remaining affirmative defenses and one counterclaim asserted in his answer in opposition to plaintiff's motion. Accordingly those defenses and counterclaim must be deemed abandoned and are hereby dismissed

(see *Kronick v. L.P. Therault Co., Inc.*, 70 AD3d 648, 892 NYS2d 85 (2nd Dept., 2010); *Citibank, N.A. v. Van Brunt Properties, LLC*, 95 AD3d 1158, 945 NYS2d 330 (2nd Dept., 2012); *Flagstar Bank v. Bellafigiore*, 94 AD3d 0144, 943 NYS2d 551 (2nd Dept., 2012); *Wells Fargo Bank Minnesota, N.A. v. Perez*, 41 AD3d 590, 837 NYS2d 877 (2nd Dept., 2007)).

Accordingly plaintiff's motion seeking summary judgment is granted. The proposed order of reference has been signed simultaneously with execution of this order.

Dated: October 10, 2018

HON. HOWARD H. HECKMAN, JR.

J.S.C.