Short Form Order

SUPREME COURT - STATE OF NEW YORK
IAS PART 18 - SUFFOLK COUNTY

PRESENT:
HON. HOWARD H. HECKMAN JR., J.S.C.

INDEX NO.: 20255/2013
MOTION DATE: 10/24/2018
MOTION SEQ. NO.: #002 MG

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JPMORGAN CHASE BANK, N.A.,

Plaintiff,

-against-

MAXINE SMITH, et al.,

Defendants.

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PLAINTIFF'S ATTORNEY:
FEIN, SUCH & CRANE, LLP
28 EAST MAIN ST., STE 1800
ROCHESTER, NY 14614

DEFENDANT'S ATTORNEY:
ADAM E. MIKOLAY, P.C.
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Upon the following papers numbered 1 to 21 read on this motion 1-15 ; Notice of Motion/ Order to Show Cause and supporting papers 1 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 16-19 ; Replying Affidavits and supporting papers 20-21 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff JPMorgan Chase Bank, N.A., seeking an order: 1) granting summary judgment striking the answer of defendant Maxime Smith; 2) adding Clerk of the Suffolk County Traffic and Parking Violation Agency as a named party defendant pursuant to a Stipulation dated November 29, 2017; 3) deeming all appearing and non-appearing defendants in default; 4) substituting Manufacturers and Traders Trust Company a/k/a M&T Bank, successors by merger with Hudson City Savings Bank as the named party plaintiff in place and stead of JPMorgan Chase Bank, N.A.; 5) discontinuing the action against defendants designated as "John Doe and Jane Doe #1 through #7"; 6) amending the caption; and 7) appointing a referee to compute the sums due and owing to the plaintiff in this mortgage foreclosure action is granted.

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 $422,000.00 executed by defendant Maxime Smith on October 31, 2005 in favor of JPMorgan Chase Bank, N.A. On the same date defendant executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. By assignment dated June 1, 2017 the mortgage and note were assigned to M&T Bank. Plaintiff claims that defendant Smith defaulted under the terms of the mortgage and note by failing to make timely monthly mortgage payments beginning December 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 July 31, 2013. Defendant Smith served an answer dated August 26, 2013 asserting thirteen (13) affirmative defenses and one (1) counterclaim.

Plaintiff's motion seeks an order granting summary judgment striking defendant's answer and for the appointment of a referee. Defendant's opposition seeks an order denying plaintiff's motion claiming that plaintiff has failed to prove it has standing to prosecute this action and has failed to prove service of pre-foreclosure notices required by the mortgage and pursuant to RPAPL 1304.

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), 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 (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)).

Proper service of RPAPL 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 (2nd Dept., 2011); *First National Bank of Chicago v. Silver*, 73 AD3d 162, 899 NYS2d 256 (2nd Dept., 2010)). 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 does not contest his failure to make timely payments due under the terms of the promissory note and mortgage agreement in nearly six years. Rather, the issues raised by the defendant concerns whether the proof submitted by the mortgage lender provides sufficient admissible evidence to prove its entitlement to summary judgment based upon defendant's continuing default, plaintiff's compliance with mortgage and statutory pre-foreclosure 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)).

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 (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 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 affidavit submitted from the plaintiff/mortgage servicer's (JPMorgan Chase Bank's) vice president dated February 13, 2018 provides the evidentiary foundation for establishing the mortgage lender's right to foreclose. The affidavit sets forth the employee's review of the business records maintained by the plaintiff/mortgage servicer; the fact that the books and records are made in the regular course of Chase's business; that it was Chase'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 this affidavit, 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 has proven standing by submission of an affidavit from Chase's vice president, together with documentary evidence in the form of a copy of the original promissory note which plaintiff has attached to the complaint, together with a certificate of merit (CPLR 3012-b), which provides sufficient proof of possession of the underlying promissory note to establish standing (*see 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, 46 NYS3d 185 (2nd Dept., 2017);

U.S. Bank, N.A. v. Saravanan, 146 AD3d 1010, 45 NYS3d 547 (2nd Dept., 2017)). Any alleged issues surrounding the mortgage assignment are irrelevant to the issue of standing in this case since the plaintiff has established possession of the duly indorsed promissory note prior to commencing this action (*Federal National Mortgage Assoc. 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 defendant's claim that the named party plaintiff (Chase) no longer has standing to submit this summary judgment motion based upon the June 1, 2017 assignment to M&T Bank, CPLR 1018 permits a party which obtains or receives a transfer of interest during the pendency of an action to continue to prosecute its claims by or against the original parties unless the court directs substitution or joinder. In this action plaintiff has established its standing to maintain the foreclosure action and no basis exists to deny substitution of the named party plaintiff based upon the proof submitted by the plaintiff which shows that M&T Bank has acquired ownership of the note and mortgage subsequent to the commencement of this action (*see Buywise Holding LLC v. Harris,* 31 AD3d 681, 821 NYS2d 213 (2nd Dept., 2006)).

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 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 an affidavit in support 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 December 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 defendant's 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 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 (s*ee CitiMortgage, Inc. v. Pappas,* 147 AD3d 900, 47 NYS3d 415 (2nd Dept., 2017); *Bank of New York Mellon v. Aquino,* 131 AD3d 1186, 16 NYS3d 770 (2nd Dept., 2015); *Deutsche Bank National Trust Co. v. Spanos,* 102 AD3d 909, 961 NYS2d 200 (2nd Dept., 2013)); or 2) by plaintiff's submission of sufficient proof to establish proof of mailing by the post office (*see Nationstar Mortgage, LLC v. LaPorte,* 162 AD3d 784, 79 NYS3d 70 (2nd Dept., 2018); *HSBC Bank USA, N.A. v. Ozcan,* 154 AD3d 822. 64 NYS3d 38 (2nd Dept., 2017); *CitiMortgage, Inc. v. Pappas, supra pg. 901; see Wells Fargo Bank, N.A. v. Trupia,* 150 AD3d 1049, 55 NYS3d 134 (2nd 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 (2nd Dept., 2016); *Residential Holding Corp. v. Scottsdale Insurance Co.,* 286 AD2d 679, 729 NYS2d 766 (2nd Dept., 2001)).

In this action, 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 the plaintiff/mortgage servicer's (Chase) vice president confirming his familiarity with the plaintiff's standard business procedure regarding the mailing of notices with regards to a defaulted mortgage loan; that the 90-day notice mailings were done on January 7, 2013 which was more than 90 days prior to commencing this action on July 31, 2013; together with two (2) copies of the 90 day notices which were mailed to the mortgagor: one (1) containing a twenty digit tracking numbers with respect to certified mailing addressed to mortgagor Maxime Smith at the mortgaged premises (71901075446017103891); and one (1) mailed by first class mail to mortgagor Maxime Smith to the mortgaged premises; together with a copy of Chase's business records screen images entitled "Letter Log History File" confirming mailing of each of the 90-day notices. In addition, plaintiff has submitted proof of mailing by submission of the RPAPL 1306 proof of filing statement with the New York State Department of Financial Services confirming mailing of the notices to the defendant/mortgagor on January 7, 2013. Such proof is sufficient to establish strict compliance with RPAPL 1304 requirements (*see Nationstar Mortgage LLC v. LaPorte, supra; HSBC Bank USA, N.A. v. Ozcan, supra.; Bank of America, N.A. v. Brannon,* 156 AD3d 1, 63 NYS3d 352 (1st Dept., 2017)). Defendant Smith's and 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 (2nd Dept., 2016); *HSBC Bank v. Espinal,* 137 AD3d 1079, 28 NYS3d 107 (2nd Dept., 2016)).

Similarly with respect to the issue of service of pre-foreclosure mortgage default notices, plaintiff has submitted sufficient proof to show that the default notice was mailed to the mortgagor in compliance with mortgage requirements. Plaintiff's proof consists of an affidavit from the mortgage servicer's (Chase's) vice president dated February 13, 2018 confirming the mailing of the notice of default to Smith on March 6, 2013 addressed to the mortgagor at the mortgaged premises; together with a copy of the mortgage default notice; together with a copy of Chase's business records screen images entitled "Letter Log History File" confirming mailing of the mortgage default notice on March 6, 2013. Such proof provides sufficient evidence of substantial compliance with mortgage default notice requirements (*Hudson City Savings Bank v. Friedman,* 146 AD3d 757, 43 NYS3d 912 (2nd Dept., 2017); *PennyMac Holdings, LLC v. Tomanelli,* 139 AD3d 688, 32 NYS3d 181 (2nd Dept., 2016); *IndyMac Bank, FSB v. Kamen,* 68 AD3d 931, 890 NYS2d 649 (2nd Dept., 2009); *First Trust, N.A. v. Meisels,* 234 AD2d 414, 651 NYS2d 121 (1st Dept., 1996)), and defendant Smith and defense counsel's self-serving and conclusory denial of service fails to raise a genuine issue of fact concerning service of the default notices (*see PHH Mortgage Corp. v. Muricy, supra.; HSBC Bank USA v. Espinal, supra.*)). Moreover, even were the Court to deem the proof submitted with respect to service of the March 6, 2013 mortgage default notice insufficient, plaintiff's proof submitted in support of service of the RPAPL 1304 90-day notices on January 7, 2013, satisfies the mortgage lender's obligations under the terms of the mortgage concerning the pre-foreclosure notice of default requirements (*Wachovia Bank, N.A. v. Carcano,* 106 AD3d 724, 965 NYS2d 516 (2nd Dept., 2013)).

Finally, the defendant has failed to raise any admissible evidence to support any of his remaining affirmative defenses and counterclaim 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. Bellafiore,* 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 31, 2018

HON. HOWARD H. HECKMAN, JR.

J.S.C.