

Federal Natl. Mtge. Assoc. v Lorenz

2019 NY Slip Op 30585(U)

February 28, 2019

Supreme Court, Suffolk County

Docket Number: 20202/2012

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.: 20202/2012
MOTION DATE: 1/18/2019
MOTION SEQ. NO.: #001 MD
#002 MG
#003 MD

-----X
FEDERAL NATIONAL MORTGAGE ASSOC.

Plaintiff,

-against-

ANN MARIE LORENZ, et al.,

Defendants.

-----X

PLAINTIFF'S ATTORNEY:
FEIN SUCH & CRANE, LLP
1400 OLD COUNTRY RD, STE C103
WESTBURY, NY 11590

DEFENDANT'S ATTORNEY:
YOUNG LAW GROUP, PLLC
80 ORVILLE DRIVE, STE 100
BOHEMIA, NY 11716

Upon the following papers numbered 1 to 55 read on this motion ; Notice of Motion/ Order to Show Cause and supporting papers 1-14 (#001), 15-25 (#002) ; Notice of Cross Motion and supporting papers 26-46 (#003) ; Answering Affidavits and supporting papers 47-48, 49-50, 51-53 ; Replying Affidavits and supporting papers 54-55 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff Federal National Mortgage Association seeking an order: 1) granting summary judgment striking the answer of defendant Ann Marie Lorenz ; 2) substituting Andre Lorenz as a named party defendant in place and stead of a defendant designated as "John Doe"; 3) deeming all appearing and non-appearing defendants in default; 4) amending the caption; and 5) 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 the two motions by defendant seeking an order pursuant to CPLR 3126 & 3212 & RPAPL 1304 & RPL 282: 1) striking plaintiff's complaint for failure to provide adequate responses to defendant's notices to admit; 2) denying plaintiff's summary judgment motion; 3) dismissing plaintiff's complaint for failure to prove service of statutorily compliant pre-foreclosure 90-day mortgage default notices; and 4) awarding defendant costs, disbursements and reasonable attorneys' fees is denied; 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 \$333,700.00 executed by defendant Ann Marie Lorenz on April 28, 2004 in favor of First Rate Capital Corporation. On the same date mortgagor Lorenz executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. Defendant Lorenz executed a loan modification agreement

dated December 11, 2009 creating a single lien in the sum of \$332,530.62. The mortgage and note were assigned to plaintiff by assignment dated June 11, 2012. Plaintiff claims that defendant made one payment under the terms of the loan modification and thereafter defaulted under the terms of the mortgage and note by failing to make timely monthly mortgage payments beginning March 1, 2010 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 5, 2012. Defendant Lorenz served an answer dated November 13, 2012.

Plaintiff's motion seeks an order granting summary judgment striking defendant's answer and for the appointment of a referee. Defendant's initial motion seeks an order striking plaintiff's complaint based upon plaintiff's alleged failure to provide adequate responses to defendant's requests for notice to admit. Defendant's cross motion seeks an order denying plaintiff's motion and dismissing plaintiff's complaint for failure to prove service of pre-foreclosure statutorily compliant mortgage default 90-day notices required pursuant to RPAPL 1304.

Defendant's original CPLR 3126 motion (#001) was served on February 27, 2013 and made returnable on March 25, 2013. Plaintiff's CPLR 3212 (#002) summary judgment motion was served on May 22, 2014 and made returnable on June 17, 2014. Defendant's CPLR 3212/RPAPL 1304 cross motion (#003) was served on September 24, 2014 and made returnable on October 28, 2014. The action and motions were assigned to IAS Part 25 by Administrative Order (Hinrichs, J.) dated June 30, 2015. The motions remained sub judice until the action and the three motions were reassigned to this IAS Part 18 by Administrative Order 114-18 (Hinrichs, J.) dated December 7, 2018. Upon the transfer of the file and assemblage of motion papers, these three motions were marked submitted on IAS Part 18's motion calendar on January 18, 2019

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. Mandrin*, 160 AD3d 1014 (2nd Dept., 2018) *Tribeca Lending Corp. v. Lawson*, 159 AD3d 936 (2nd Dept., 2018); *Deutsche Bank National Trust Co. v. Iarrobino*, 159 AD3d 670 (2nd Dept., 2018); *Central Mortgage Company v. Davis*, 149 AD3d 898 (2nd Dept., 2017); *U.S. Bank, N.A. v. Ehrenfeld*, 144 AD3d 893, 41 NYS3d 269 (2nd Dept., 2016); *JPMorgan Chase Bank 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, supra.*; *Deutsche Bank National Trust Co. v. Whalen*, 107 AD3d 931, 969 NYS2d 82 (2nd Dept., 2013); *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 standing to prosecute its claims for foreclosure and sale (*Nationstar Mortgage, LLC v. LaPorte*, 162 AD3d 784, 75 NYS3d 432 (2nd Dept., 2018); *Bank of New York Mellon v. Theobalds*, 161 AD3d 1137 (2nd Dept., 2018); *HSBC Bank USA, N.A. v. Oscar*, 161 AD3d 1055, 78 NYS3d 428 (2nd Dept., 2018); *CitiMortgage, Inc. v. McKenzie*, 161 AD3d 1040, 78 NYS3d 200 (2nd Dept., 2018); *U.S. Bank, N.A. v. Duthie*, 161 AD3d 809, 76 NYS3d 226 (2nd Dept., 2018); *Bank of New York Mellon v. Genova*, 159 AD3d 1009, 74 NYS3d 64 (2nd Dept., 2018); *Mariners Atl. Portfolio, LLC v. Hector*, 159 AD3d 686, 69 NYS3d 502 (2nd Dept., 2018); *Bank of New York Mellon v. Burke*, 155 AD3d 932, 64 NYS3d 114 (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)).

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 her failure to make timely payments due under the terms of the promissory note and mortgage agreement since March 1, 2010. 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 standing, plaintiff's compliance with statutory pre-foreclosure notice and form of notice requirements, and plaintiff's failure to provide discovery.

With respect to the issue of standing, plaintiff's submission of documentary evidence in the form of a copy of the original promissory note with an attached allonge containing two indorsements:

the first endorsed to Greenpoint Mortgage Funding, Inc. by an assistant secretary of the original mortgage lender, First Rate Capital Corporation; the second endorsed in blank by a vice president of GreenPoint Mortgage Funding, Inc.-- together with the affidavit from the mortgage servicer/attorney-in-fact's (Seterus, Inc.'s) foreclosure specialist attesting to physical delivery and receipt by the plaintiff of the note and attached allonge prior to the commencement of this action on July 5, 2012. Such evidence establishes plaintiff's possession of the indorsed in blank note sufficient to prove standing (*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 (2nd Dept., 2016); *GMAC v. Sidberry*, 144 AD3d 863, 40 NYS3d 783 (2nd Dept., 2016); *U.S. Bank, N.A. v. Carnivale*, 138 AD3d 1220 (3rd Dept., 2016)). Any alleged issues concerning the mortgage assignment and the fact that defendant obtained an un-indorsed copy of the note are therefore irrelevant to the issue of standing since plaintiff has established possession of the indorsed in blank promissory note with attached allonge prior to commencing this action (*FNMA v. Yakuputz II, Inc.*, 141 AD3d 506, 35 NYS3d 236 (2nd Dept., 2016); *Deutsche Bank National Trust Company 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 et al.*, 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 an affidavit attesting to mortgagor Lorenz's undisputed default in making timely mortgage payments sufficient to sustain its burden to prove this defendant has defaulted under the terms of the parties agreement by failing to make timely payments since March 1, 2010 (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 (*see 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 case 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 (*Nationstar Mortgage, LLC v. LaPorte, supra.*; *HSBC Bank USA, N.A. v. Ozcan supra.*; *see also Bank of America, N.A. v. Brannon*, 156 AD3d 1, 63 NYS3d 352 (1st Dept., 2017)). Moreover, the issue raised by the defendant in her opposition to plaintiff's motion and in support of her cross motion seeking dismissal, is not that the 90-day notice was not mailed in accordance with RPAPL 1304 requirements, but rather that the notice that Lorenz concedes she received did not contain five Suffolk County housing counseling agencies as statutorily required.

With respect to the listing of five housing counseling agencies in the notice, the terms of the statute (RPAPL 1304(2)) in effect when the notice was mailed required "at least five housing counseling agencies as designated by the division of housing and community renewal, that serve the *region* where the borrower resides." The statute did not require that the housing counseling agencies be located in Suffolk County, but only the *region* where the borrower resides. In this case plaintiff's notice contained five such agencies in the Long Island region-- three in Suffolk County, one in Nassau County, and one in Queens County. Such proof satisfies strict compliance requirements for service of RPAPL 1304 notice requirements. Defendant's claim that the statute requires only Suffolk County housing counseling agencies is not correct since the amendment to this statute requiring a listing of five Suffolk County housing agencies only came into effect in December, 2016. .

With respect to defendant's motion seeking an order pursuant to CPLR 3126, requests to admit are intended to eliminate from litigation factual matters which will not be in dispute at trial (CPLR 3123; *Berg v. Flower Fifth Avenue Hospital*, 102 AD2d 760, 476 NYS2d 895 (1st Dept., 1984)). It is to be used regarding specific facts upon which there is general agreement; it is not to be used concerning issues which will be in dispute at trial that are legitimately in controversy for the purpose of proving or disproving a party's claims (*see DeSilva v. Rosenberg*, 236 AD2d 508, 654 NYS2d 30 (2nd Dept., 1997); *Sagiv v. Gamache*, 26 AD3d 368, 810 NYS2d 481 (2nd Dept., 2006); *Nacherilla v. Prospect Park Alliance*, 88 AD3d 770, 930 NYS2d 643 (2nd Dept., 2011)). Moreover the purpose of a notice to admit is not to obtain information in lieu of other disclosure devices (*Falkowitz v. Kings Highway Hospital*, 43 AD2d 696, 349 NYS2d 790 (2nd Dept., 1973); *Priceless Custom Homes v. O'Neill*, 104 AD3d 664, 960 NYS2d 455 (2nd Dept., 2013)). There is no legal basis to strike plaintiff's complaint for failure to provide adequate responses to defendant's notice to admit. A review of defendant's notice reveals that many requests to admit propose legal conclusions in controversy, seek irrelevant information, and seek to compel plaintiff to concede facts which would properly be the subject of discovery (*see Berg v. Flower Fifth Avenue Hospital, supra.*; *Falkowitz v. Kings Highway Hospital, supra.*). Defendant's motion seeking an order striking plaintiff's complaint must therefore be denied.

Finally, defendant Lorenz has failed to submit any admissible evidence to support 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 (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, defendant's motion and cross motion are denied in their entirety, and plaintiff's motion seeking an order granting summary judgment is granted. The proposed order of reference has been signed simultaneously with execution of this order.

Dated: February 28, 2019



J.S.C.