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.: 15078/2011
MOTION DATE: 3/19/2019
MOTION SEQ. NO.: #003 MG
#005 MD

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U.S. BANK N.A.,

Plaintiff,

-against-

CAROL FITZSIMMONS, et al.,

Defendants.

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PLAINTIFF'S ATTORNEY:
MCCABE, WEISBERG & CONWAY, PC
145 HUGUENOT ST., STE 201
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DEFENDANT'S ATTORNEY:
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Upon the following papers numbered 1 to 28 read on this motion : Notice of Motion/ Order to Show Cause and supporting papers 1-19 (#003) ; Notice of Cross Motion and supporting papers 20-26 (#005) ; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers 27-28 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff U.S. Bank, N.A. seeking an order: 1) granting summary judgment striking the answer with counterclaims asserted by defendant Carol Fitzsimmons: 2) deeming all appearing and non-appearing defendants in default; and 3) 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 cross motion by defendant Fitzsimmons seeking an order: 1) denying plaintiff's motion; and 2) dismissing the complaint or, in the alternative: 3) directing discovery, 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 $371,700.00 executed by defendant Carol Fitzsimmons dated March 24, 2003 in favor of Option One Mortgage Corporation. On the same date mortgagor Fitzsimmons executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. The mortgage and note were assigned to the plaintiff by assignment dated February 23, 2011. Plaintiff claims that mortgagor

Fitzsimmons 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 May 6, 2011. Defendant/mortgagor Fitzsimmons served an answer dated May 31, 2018 asserting ten (10) affirmative defenses and six (6) counterclaims.

Plaintiff's motion seeks an order granting summary judgment striking defendant's answer and for the appointment of a referee. In opposition defendant's cross motion claims that plaintiff has failed to prove it has standing to maintain this foreclosure and therefore the action must either be dismissed or be continued with a directive for discovery.

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)).

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 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 mortgage servicer/attorney-in-fact's (Ocwen Loan Servicing LLC's) senior loan analyst dated February 1, 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 mortgage servicer/attorney-in-fact; the fact that the books and records are made in the regular course of Ocwen's business; that it was Ocwen's regular course of business to maintain such records; that the records were made at or near the time the underlying transactions took place; that the records were created by an individual with personal knowledge of the underlying transactions; and that to the extent that the business records were recorded by a prior servicer those records have been incorporated into Ocwen's records in the ordinary course of business and are routinely relied upon as a regular business practice. Based upon the submission of this affidavit, 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's submission of documentary evidence in the form of a copy of the original promissory note with an attached allonge indorsed in blank by an authorized representative (assistant secretary) of the original mortgage lender- Option One Mortgage Corp.- which plaintiff has attached to the complaint, together with the certificate of merit (CPLR 3012-b), provides sufficient evidence of possession of the underlying note to establish the plaintiff's standing to prosecute this foreclosure action (*see Bank of New York Mellon v. Theobalds,* 161 AD3d 1137, 79 NYS3d 50 (2nd Dept., 2018); *Bank of New York Mellonv v. Burke,* 155 AD3d 932, 64 NYS3d 114 (2nd Dept., 2017); *Wells Fargo Bank, N.A. v. Thomas,* 150 AD3d 1312, 521 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); *JPMorgan Chase Bank, N.A. v. Weinberger, supra.; Nationstar Mortgage LLC v. Catizone, supra.*)). In addition plaintiff has established standing by submission of an affidavit from the mortgage lender/attorney-in-fact's assistant secretary attesting and confirming plaintiff's physical possession of the original promissory note with indorsed in blank allonge since June 30, 2009 which was prior to commencement of this action (*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. Carnival,* 138 AD3d 1220, 29 NYS3d 643 (1st Dept., 2016)). Any alleged issues concerning the mortgage assignment is therefore irrelevant to the issue of standing since plaintiff has established possession of the 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 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 Fitzsimmons'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 mortgagor'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 defendant's claim that she is entitled to additional discovery, CPLR 3214(b) imposes an automatic stay of discovery upon service of a summary judgment motion. Moreover, even were the court to further consider defendant's claim of entitlement to discovery, no legal or equitable grounds exist to further delay prosecution (particularly in light of the fact that there has been a nine (9) year and continuing default in making any payments by the mortgagor) since there has been no showing by the defendant how any additional evidence would create a genuine issue of fact. Absent some demonstration that reasonable attempts to discover facts might give rise to significant issues of fact, no basis exists to continue litigation in view of the fact that plaintiff has

submitted sufficient evidentiary proof to establish its entitlement fo foreclose this mortgage (*see Lee v. T.F. DeMilo Corp.*, 29 AD3d 867, 815 NYS2d 700 (2nd Dept., 2006); *Sasson v. Setina Mfg. Co., Inc.*, 26 AD3d 487, 810 NYS2d 500 (2nd Dept., 2006)).

Finally, defendant Fitzsimmons has failed to submit any admissible evidence to support her remaining affirmative defenses and counterclaims in opposition to plaintiff's motion. Accordingly, those defenses and counterclaims must be deemed abandoned and is 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 cross motion is denied 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: May 21, 2019

HON. HOWARD H. HECKMAN, JR.

J.S.C.