

<b>Wells Fargo Bank, N.A. v Punter</b>
2019 NY Slip Op 31478(U)
May 28, 2019
Supreme Court, Westchester County
Docket Number: 67092/2017
Judge: Sam D. Walker
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.**

SUPREME COURT OF THE STATE OF NEW YORK  
WESTCHESTER COUNTY  
PRESENT: HON. SAM D. WALKER, J.S.C.

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

Plaintiff,

DECISION & ORDER  
Index No. 67092/2017  
Motion Sequence # 2 & 3

-against-

LISA PUNTER AKA LISA ROSEMARY PUNTER  
INDIVIDUALLY AND AS CO-TRUSTEE OF THE  
PUNTER LIVING TRUST DATED SEPTEMBER  
14, 2006, RICHARD K. PUNTER AKA R. KENYATTA  
PUNTER, AKA R. K. PUNTER INDIVIDUALLY AND  
AS CO- TRUSTEE OF THE PUNTER LIVING TRUST  
DATED SEPTEMBER 14, 2006, UNITED STATES OF  
AMERICA ACTING THROUGH THE IRS, NEW YORK  
STATE DEPARTMENT OF TAXATION & FINANCE,

Defendants.  
-----X

The following papers were considered on Plaintiff's motion seeking to confirm the Referee's Report and for a Judgment of Foreclosure and Sale and on Defendant's cross-motion to stay the action and dismiss the action:

Notice of Motion/Affirmation/Affidavit/Exhibits 1-19	1-22
Notice of Cross-Motion/Affirmation/Affidavit/Exhibit A	23-25
Affirmation in Opposition to Cross-Motion/Exhibit A-I	26-35
Affidavit/Affirmation in Reply	36

This is an action to foreclose a Mortgage on property located at 4 Glenn Place, Hastings-on-Hudson, New York 10706, executed by Lisa Punter AKA Lisa Rosemary

Punter and Richard K. Punter AKA R. Kenyatta Punter, AKA R. K. Punter dated July 10, 2006 and recorded in the Office of the Westchester County Clerk on August 29, 2006.

Plaintiff commenced this foreclosure action by filing the Summons and Complaint in the Westchester County Clerk's Office on October 12, 2017. On October 12, 2017, Plaintiff also filed a Notice of Pendency in accordance with RPAPL § 1331 and CPLR Article 65.

Plaintiff alleges that on October 12, 2017, it was the holder of the subject Note. The Certificate of Merit pursuant to CPLR 3012-b was filed with supporting documents. According to the affidavit of service filed in the Westchester County Clerk's Office, the Summons was served with the Complaint. Defendants were served with the notice required by RPAPL § 1303 printed on colored paper together with the summons and complaint printed on white paper. The RPAPL § 1303 notice complies with the requirements of that statute, with the title in bold, 20-point type and the text in bold, 14-point type. The RPAPL § 1303 notice was delivered to the mortgagors on its own separate page, together with the summons and complaint. Plaintiff alleges that Defendants were timely served with the 90-Day Pre-Foreclosure Notice required by RPAPL §1304. Plaintiff further alleges that it filed the name, address and telephone number of the Defendants, the amount claimed to be due, and the type of loan at issue with the superintendent of banks within three business days of the mailing of the 90-Day Pre-Foreclosure notice as required by RPAPL §1306. Plaintiff also alleges that it served Defendants with copies of the summons in compliance with CPLR 3215(g)(3).

Per this Court's Order of Reference, Defendant(s) Richard K. Punter AKA R. Kenyatta Punter, AKA R. K. Punter and New York State Department of Taxation &

Finance were deemed in default. On June 11, 2018, the Plaintiff moved for an Order of Reference. Plaintiff's motion was granted by the Court by Order dated August 17, 2018. Plaintiff mailed a Notice of Entry of the Order of Reference to Defendants or their attorney(s) on August 29, 2018 and filed the Notice of Entry with the Westchester County Clerk on August 29, 2018.

This Court appointed, John M. Perone Esq., as Referee to compute the amount due to Plaintiff and to examine and report whether the mortgaged premises can be sold in parcels. On December 14, 2018, the Referee executed an Oath and Report of Amount Due which computed the amount due Plaintiff to be \$413,452.84, as of April 20, 2018, and determined that the property should be sold as one parcel. Plaintiff also alleges that it is entitled to interest at the Note rate until the Judgment of Foreclosure and Sale is entered and at the statutory default rate thereafter.

Defendant, Lisa Punter, opposes Plaintiff's motion alleging that since foreclosure actions are equitable, a stay of this action should be granted so that the property can be sold now that the Defendant's divorce has been finalized. Defendant also states that this matter should be dismissed due to Plaintiff's failure to comply with RPAPL § 1304. She further states that Plaintiff's motion should be denied for failure to hold a Referee's hearing and failure to provide supporting documentation to the oath and report. Additionally, Defendant asserts that Plaintiff's motion for Judgment of Foreclosure and Sale incorrectly moves "in accordance with RPAPL § 1321," which allows for moving for judgment pursuant to default or admission. She alleges that Plaintiff then misstates the procedural history making it appear as if Defendant, Lisa Punter, was in default by leaving out the facts that 1) Defendant, Lisa Punter, filed an answer in this matter on

January 12, 2018 and 2) Plaintiff moved for summary judgment and an Order of Reference on June 11, 2018, and was granted summary judgment not just an Order of Reference. Due to Plaintiff's inaccurate moving papers, Defendant moves that the action be dismissed.

### DISCUSSION

Pursuant to the Order of Reference, the Referee computed the total amount due plaintiff in the sum of \$413,452.84 as of April 20, 2018. The amount included principal, interest, late charges, and escrow advances for real estate taxes, hazard insurance, and other charges pursuant to the Mortgage dated July 10, 2006, executed by Defendants, Lisa Punter AKA Lisa Rosemary Punter and Richard K. Punter AKA R. Kenyatta Punter, AKA R. K. Punter. The Referee also determined that Wells Fargo Bank, National Association was entitled, pursuant to its rights under the Mortgage, to recover per diem interest in accordance with the variable rate as set forth in the Note.

In a mortgage foreclosure action, a referee is required to hold a hearing on notice to the defendant prior to computing the amount of principal, interest, and attorney fees due to the plaintiff, (CPLR 4313; *see also 243 West 98th Condominium v. Shapiro*, 12 A.D.3d 591[2d Dept. 2004]). However, even in the absence of a waiver, the failure to conduct a hearing on due notice to appearing parties does not necessarily warrant remitting the matter back to the referee to hold a hearing, since unlike references to hear and determine, references to hear and report pursuant to RPAPL § 1321 are advisory only, which leaves the court as the ultimate arbiter of the issues referred (CPLR 4311; *see also Shultis v. Woodstock Land Dev. Assoc.*, 195 A.D.2d 677 [3d Dept. 1993]).

A referee is authorized to consider both documentary and oral evidence in computing the amount due on the mortgage (RPAPL 1321; 15 Carmody-Wait 2d, N.Y.Prac., § 92:198, pp. 105–106; *Wolcott v. Weaver*, 3 How.Pr. 159). The introduction of the bond and mortgage and of the assignment into evidence establishes a prima facie case of ownership and non-payment, 15 Carmody-Wait 2d, N.Y.Prac., § 92:208, p. 118; (see also *Gamble v. Lewis*, 88 Misc. 139, 151 N.Y.S. 778). Courts have routinely found the establishment of a prima facie case of ownership and nonpayment by introduction of the consolidated mortgage and assignment into evidence, and oral testimony of the principal amount due, (see *Isaacson v. Karpe*, 84 A.D.2d 868; *Keahon v. Spinelli*, 135 A.D.2d 503).

Here, Plaintiff has established a prima facie case by introducing the Note, Mortgage and Assignment of Mortgage. Plaintiff has also established the Defendants' default in payment. Although, there was no oral testimony, the Referee relied upon the written submission, which included the Affidavit of Adriana R. Valdivia, Vice President Loan Documentation of Wells Fargo Bank, N.A., a copy of the Summons and Complaint filed on October 12, 2017, in the Office of the Clerk of the County of Westchester, Affidavit of Merit and Amount Due, and a copy of the Note and Mortgage. The Referee reviewed the documentation provided and found same to be sufficient to support his Report. Copies of the same were sent to Defendant's counsel. Furthermore, Defendant has had the opportunity to review and object to the Referee's Report upon notice of Plaintiff's motion for Judgment of Foreclosure and Sale. Defendant had an opportunity to review, and object, to the findings of Plaintiff but provided no opposition, and still fails to provide anything factual to show the findings of the Referee are incorrect.

In fact, Defendant did not offer any evidence to challenge the date of default in payment, the interest rate, the unpaid principal balance, or the escrow payment advanced. Defendant is not claiming that she made any payment or caused any payments to be made of taxes or insurance during the period of default. Neither is she claiming that the tax payments were not made. She provides no basis to dispute the Referee's findings other than the Referee's reliance upon, the Note, Mortgage, the Order appointing the Referee to Compute and the Affidavit of Adriana Valdivia

Moreover, Andriana Valdivia is an employee of Wells Fargo Bank and Plaintiff is only required to demonstrate the admissibility of the records relied upon by Valdivia under the business record exception to the hearsay rule rule (CPLR 4518[(a)]. "A proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures", (see *Citibank, N.A. v. Cabrera*, 130 A.D.3d 861, 861; *Palisades Collection, LLC v. Kedik*, 67 A.D.3d 1329, 1331).

Adriana Valdivia's Affidavit is based upon personal knowledge which was acquired from her review of the business records maintained in the ordinary course of business in the servicing of Defendants' loan. Valdivia avers that Wells Fargo Bank maintained these records for the purpose of servicing mortgage loans; that these records are made at or near the time by, or from information provided by persons with knowledge of the activity and transactions reflected in such records; and are kept in the course of business activity conducted regularly by Wells Fargo Bank. Further, Defendant's claim that she was not sent notice of the documents submitted to the

Referee for review is also without merit, since copies of the same were sent to Defendant's Counsel.

The Order appointing the Referee requires that the Referee submit a Referee's Report stating, among other things, the amount due Plaintiff, the date which the amount became due, and that the stated amount is accurate based on the Referee's own independent verification of the computation prepared by the lender and/or Plaintiff. The Order further provides that Plaintiff shall make application for a Judgment of Foreclosure and Sale within six months of the date of entry of the Order of Reference, unless an extension is granted by the Court for good cause.

Defendant offered no support for her contention that holding a hearing or providing documents for review, even though documents were in fact provided, would have mattered. Additionally, Defendant's assertions are not based upon admissible evidence, since she relies solely upon her attorney's affirmation. An affirmation by a defendant's attorney who lacks personal knowledge of the facts and provides no supporting documentation is insufficient to defeat a prima facie showing of entitlement to judgment, (*see Mobil Oil Corporation v. Penna*, 139 A.D.2d 501, 526 N.Y.S.2d 849 [2d Dept. 1988]) and has no probative value or evidentiary significance, (*see Currie v. Wilhouski*, 93 A.D.3d 816 [2d Dept. 2012]). The Affidavit submitted by Lisa Punter does not address the substance of the Referee's findings and she offered no documentary evidence that would call into question, the Report submitted by the Referee.

The Mortgage also provides that Plaintiff is entitled to reasonable attorneys' fees to enforce the Security Instrument. Where a mortgage provides for legal costs or reasonable attorney's fees, it will be enforced (2 Bergman, op. cit., § 26.01). An award

of attorney's fees should bear a reasonable relation to the time and effort expended by the plaintiff's attorney in the foreclosure action (see *Green Point Sav. Bank v. Tornheim*, 261 A.D.2d 360, 360; *Bankers Trust Co. v. Hoovis*, 263 A.D.2d 937, 939), taking into account such factors as the customary fee charged for similar services, (see *Morgan & Finnegan v. Howe Chem. Co.*, 210 A.D.2d 62, 63).

Here, Plaintiff's attorney seeks an amount above what the Court customarily awards, without setting forth the time spent on various tasks, whether by counsel or paralegal and the hourly rate for each. That being the case, the Court is unable to ascertain whether the amount requested was reasonable based on the work performed. Therefore, the Court will grant \$3,500, the customary amount for this Court for attorney's fees in foreclosure actions.

In opposition to Plaintiff's motion, Defendant alleges non-compliance with RPAPL § 1304. Serving the RPAPL § 1304 Notice is a mandatory condition precedent to foreclosure, compliance with which must be established by Plaintiff. Failure to demonstrate compliance was held not to be an affirmative defense, but may be raised at any time, (see *First National Bank of Chicago v. Silver*, 41 Misc.3d 903, 973 N.Y.S.2d 539, 2013 N.Y. Slip Op. 23338 [2d Dept. 2010]).

RPAPL 1304 provides that, "at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower, including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower in at least fourteen-point type", ( see RPAPL § 1304(1); see also *Deutsche Bank Nat. Trust Co. v. Spanos*, 102 A.D.3d 909, 910, 961 N.Y.S.2d 200 [2d Dept. 2013]). RPAPL § 1304 sets forth the requirements for the content of such notice,

RPAPL § 1304(1), and further provides that such notice must be sent by registered or certified mail, and also by first-class mail, to the last known address of the borrower, (see RPAPL § 1304[2]; see also *Deutsche Bank Nat. Trust Co. v. Spanos*, 102 A.D.3d 909, 910 [2d Dept. 2013]).

To support mailing of the RPAPL § 1304 Notice, Plaintiff offered the Affidavit of Gary Garza II, Vice President Loan Documentation of Wells Fargo Bank N.A. Gary Garza avers that in the regular performance of his job functions he is authorized and trained to access Wells Fargo's business records for servicing mortgage loans. In connection with making this Affidavit, he stated that he has acquired personal knowledge of the matters stated herein by examining Wells Fargo's business records. He further avers that he has personal knowledge of Wells Fargo's record keeping practices and procedures including but not limited to creation, maintenance, storage, and retrieval of its business records. Wells Fargo's records include data compilations, electronically imaged documents, and other computerized and paper records, which are made at or near the time of the transaction, by persons with knowledge of the transaction who have a business duty to make such records.

Garza states that it is Wells Fargo's standard practice in its mortgage servicing business to make and rely on these records and store them in the ordinary course of its regularly conducted business activity. He further states that in the regular performance of his job functions he has received training and has personal knowledge of Wells Fargo's standard office practice to prepare, address, mail and store letters used in its mortgage servicing business, and how to retrieve such information. He also states that based on his training and knowledge, he is familiar with Wells Fargo's standard

practices and procedures used to create, mail and store data regarding the 90-Day Pre-Foreclosure Notice required by New York law and the Notice of Default required by the Mortgage, that are designed to ensure that these letters are properly addressed, mailed and that data reflecting those events is stored in Wells Fargo's business records.

Garza also further avers that as a standard business practice and procedure, an electronic file is maintained for each loan serviced by Wells Fargo Bank. For each loan, the borrower's mailing address and the property address, if different from the borrowers mailing address, are input into Wells Fargo's business records after a review of the loan documentation, Note, Mortgage, and correspondence from borrower(s). This address is the notice address pursuant to the Mortgage and used for mailing correspondence to the borrower. This standard business practice and procedure ensures that the borrower's mailing address and the property address, if different from the borrower's mailing address, are correct, consistent and conform to the notice provisions of the Mortgage.

Garza avers that as a standard business practice and procedure, the 90-Day Notice contained a current list of at least five housing counseling agencies serving the County where the property is located, and envelopes for both certified and first-class mail are created upon default. The envelopes are addressed, from the data stored in Wells Fargo's business records, with the borrower(s)' last known address and the address of the residence that is subject to the Mortgage. The 90-Day Notices and list of housing counseling agencies are enclosed, separate from any other notice, in both certified and first-class mail, postage prepaid envelopes. The envelopes are sealed and provided to the United States Post Office for mailing.

Garza certified and affirmed that, in accordance with Wells Fargo's standard business practice and procedure and in compliance with RPAPL § 1304, a 90-Day Notice and a current list of at least five housing counseling agencies were mailed to Lisa Punter AKA Lisa Rosemary Punter and Richard K. Punter AKA R. Kenyatta Punter, AKA R. K. Punter by certified and first class mail , in envelopes separate from any other notice to the last known address of the borrower(s) at 2005 A C P Jr Blvd, New York, NY 10027, and to the residence that is the subject of the Mortgage at 4 Glenn Pl, Hastings-on-Hudson, NY 10706. The 90-Day Notices were mailed on or about February 22, 2017. Plaintiff provided a copy of the 90-Day Notices addressed to Defendants at both addresses.

Garza also certified and affirmed that within three business days of mailing the 90-Day Notice, Wells Fargo electronically filed the Notice with the Superintendent of Financial Services on February 27, 2017 as required by RPAPL §1306(2). A copy of Proof of Filing Statement issued by the New York State Department of Financial Services 90-Day Pre-Foreclosure Filings website was provided.

It is Wells Fargo's standard business practice and procedure to update its business records with the mailing information for both the 90-Day Notice and Notice of Default. In addition, once mailed, copies of these Notices are saved to the electronic loan file to make a permanent record of the actual mailing, including the name of the borrower(s) the Notices were mailed to, the date and method of mailing, reference number, addresses that the Notices were mailed to, and any tracking numbers provided by the United States Post Office.

Once a notice is mailed, the presumption of receipt may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed, (see *Residential Holding Corporation v. Scotsdale Insurance Company*, 286 A.D.2d 679, 729 N.Y.S.2d 776, 2001 N.Y. Slip Op. 07060 [2d Dept 2001]). A mere denial of receipt is not enough to rebut the presumption." (see *Kihl v Pfeffer*, 94 NY2d 118, 122 [1999]; see also *Grogg v S. Rd. Assoc., L.P.*, 74 A.D.3d 1021 [2d Dept 2010] (citing *Countrywide Home Loans, Inc. v Brown*, 305 A.D.2d 626 [2d Dept 2003])). Here, Plaintiff offered proof of mailing of the Notices by establishing a standard office practice or procedure designed to ensure that the Notices were properly addressed and mailed.

As the Second Department, opined in (*HSBC Bank USA, National Association v. Ozcan*, 154 A.D.3d 822 [2017]), "[t]here is no requirement that a plaintiff in a foreclosure action rely on any 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" (see *Citigroup v. Kopelowitz*, 147 A.D.3d 1014, 1015; cf. *Wells Fargo Bank, NA v. Thomas*, 150 A.D.3d 1312). Thus, mailing of the RPAPL § 1304 Notice and Default Notice may be proven by any number of documents meeting the requirements of the business records exception to the hearsay rule under CPLR 4518 (see *Viviane Etienne Med. Care, P.C. v. Country-Wide Ins. Co.*, 25 N.Y.3d 498, 508; *CitiMortgage, Inc. v. Pappas*, 147 A.D.3d 900, 901).

Here, Plaintiff is only required to demonstrate the admissibility of the records relied upon by Gary Garza under the business record exception to the hearsay rule

[CPLR § 4518(a)]. "A proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures", (see *Citibank, N.A. v. Cabrera*, 130 A.D.3d 861, 861, 14 N.Y.S.3d 420; *Palisades Collection, LLC v. Kedik*, 67 A.D.3d 1329, 1331, 890 N.Y.S.2d 230. Garza's Affidavit is based upon personal knowledge which was acquired from his review of the business records maintained in the ordinary course of business in the servicing of Defendant's loan, and the records are made at or near the time of the transactions and provided by persons with knowledge of the activity and transactions reflected in such records.

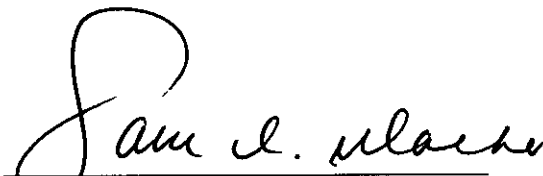
Defendant's request that the Court exercise its equitable powers and stay these proceedings to allow Defendant to sell the property is denied. Now that the parties' divorce action has finalized they can now focus on selling the marital property. The motion was marked fully submitted more than two months ago giving Defendants time to consummate a sale. However, if a contract is in place and the only question is an extension of time to close on the sale, the Court will not be adverse to entertaining an order to show cause seeking such relief. However, this must occur prior to the property being sold at a Referee's sale.

Defendant's remaining claims are without merit. "To establish a prima facie case in an action to foreclose a mortgage, the plaintiff must establish the existence of the mortgage and mortgage note, ownership of the mortgage, and the defendant's default in payment," (see *Campaign v. Barba*, 23 AD3d 327 [2d Dept. 2005]). Plaintiff has established a prima facie case and its entitlement to a judgment as a matter of law.

In light of the Court's broad discretion in presiding over foreclosure proceedings, (see *Notey v. Darien Constr. Corp.*, 41 N.Y.2d 1055), and in view of the records before the Court, it would not be an abuse of power for the Court to accept the Referees Oath and grant the Judgment of Foreclosure and Sale. The record is very clear, Defendants defaulted in their payment obligation to Plaintiff. Defendant defaulted in the payment obligation to Plaintiff. It is the finding of the Court that the Referee offered sufficient evidence to support his finding in ascertaining and computing the amount due. Also, Plaintiff offered sufficient documentary evidence to support the confirmation of the Referee's Oath and its Judgment of Foreclosure and Sale.

The foregoing constitutes the Opinion, Decision and Order of the court.

Dated: White Plains, New York  
May 28, 2019

  
HON. SAM D. WALKER, J.S.C.