Wells Fargo Bank, N.A. v Glasgow
2019 NY Slip Op 31504(U)
April 4, 2019
Supreme Court, Kings County
Docket Number: 508105/2013
Judge: Mark I. Partnow
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At an IAS Term, Part 43 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 4th day of April, 2019.

P R E S E N T:
HON. MARK I. PARTNOW, JSC

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WELLS FARGO BANK, N.A., NOT IN ITS INDIVIDUAL CAPACITY BUT SOLELY AS TRUSTEE FOR THE RMAC REMIC TRUST, SERIES 2009-4,

Index No.: 508105/2013

Plaintiff,

BENCH TRIAL DECISION

- against -

FERNELLA GLASGOW; MNM BROOKLYN TRUST; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; DECISION ONE MORTGAGE COMPANY, LLC; JANICE TAYLOR; CRIMINAL COURT OF THE CITY OF NEW YORK; NEW YORK CITY PARKING VIOLATIONS BUREAU; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; "JOHN DOE #1 through JOHN DOE #10"inclusive, the names of the ten last name Defendants being fictitious, real names unknown to the Plaintiff, the parties intended being persons or corporations having an interest in, or tenants or persons in possession of, portions of the mortgaged premises described in the Complaint,

Defendants.

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Background

Wells Fargo Bank, N.A. (plaintiff) commenced this foreclosure action against Fernella Glasgow (defendant) and others by filing a summons and complaint on December 19, 2013. This foreclosure action involves a residential mortgage executed by the defendant on May 19, 2006

encumbering a one family house located at 3708 Avenue H in Brooklyn, New York (property) which secured a promissory note in favor of Decision One Mortgage in the amount of $305,280.00. Plaintiff's complaint alleged that:

> "[p]ursuant to the terms of the evidence of obligation, guarantee, or the note secured thereby, [defendant] has defaulted in making the aforesaid monthly payments for a period exceeding thirty (30) days. More precisely, the Defendant Glasgow has defaulted in making the monthly payment due on August 19, 2008 and monthly thereafter."

Plaintiff further alleges that "on July 31, 2013, notice of the default pursuant to Paragraph 22 of the mortgage was mailed via first class mail to the Defendant..." and that "on May 30, 2013, notices pursuant to RPAPL § 1304 were mailed via certified and first mail to the Defendant..." On March 21, 2014, plaintiff and defendant executed a stipulation extending defendant's time to answer and waiving any personal jurisdictional defenses. Defendant's answer contains only general denials.

On October 3, 2014, plaintiff filed its motion for summary judgment and for the appointment of a referee to compute the amount due and owing. Defendant cross-moved for an order denying plaintiff's motion and to dismiss the instant action as against the defendant. By decision dated June 20, 2017, the Honorable Justice Dear denied both motions finding that plaintiff failed to demonstrate that the RPAPL § 1304 and default notices were properly sent. The decision further noted that in "denying the paragraph relating to mailing the default notices [defendant] preserves the condition precedent defense even in the absence of a separate affirmative defense." This matter was then assigned to this Part by the Honorable Justice Knipel from the Non Jury Trial Assignment Part on October 30, 2018, at which time the Court conducted the trial. The Court directed the parties to submit proposed finding of fact and conclusions of law along with a copy of the transcript.

Testimony

Anthony Younger (Younger)

The witness testified that he is employed by Rushmore Loan Management (Rushmore), a mortgage servicer (Tt. 10/30/2018, Pg. 5, Lines 13-16). He stated that he has been employed by Rushmore for almost five years as a legal proceedings representative (Tt. 10/30/2018, Pg. 6, Lines 10-13). The witness testified that Rushmore is the servicer of the subject loan and began to service it in July of 2012 (Tt. 10/30/2018, Pg. 7, Lines 3-9). The witness identified plaintiff's exhibit 1 as limited powers of attorney permitting Rushmore to service the loan and to testify on plaintiff's behalf (Tt. 10/30/2018, Pg. 8, Lines 1-22). Plaintiff's exhibit 1 was moved into evidence without objection (Tt. 10/30/2018, Pg. 9, Lines 7-13). The witness thereafter testified that US Bank National Association is the current holder of the note (Tt. 10/30/2018, Pg. 11, Lines 9-10). The witness identified plaintiff's exhibit 2 as the original note and the document was moved into evidence without objection (Tt. 10/30/2018, Pg. 11, Lines 11-25). The witness then identified plaintiff's exhibit 3 as a screen shot of a loan detail screen in Rushmore's system that was created by Rushmore (Tt. 10/30/2018, Pg. 14, Lines 3-15). The witness testified that the screen shot tracks the note and the document was moved into evidence without objection (Tt. 10/30/2018, Pg. 15, Lines 7-23). A copy of the mortgage was moved into evidence without objection as plaintiff's exhibit 4 (Tt. 10/30/2018, Pg. 17, Lines 6-19).

The witness further identified plaintiff's exhibit 6 as notices of intent to foreclosure or 30 day letter (Tt. 10/30/2018, Pg. 20, Lines 13-22). The witness testified that a 30 day letter is the letter sent to the borrower giving them 30 days to bring current the amount (Tt. 10/30/2018, Pg.

20, Lines 24-25). The witness stated that this document is sent along with a 90 day letter as required by the mortgage (Tt. 10/30/2018, Pg. 21, Lines 2-10). The witness testified that Rushmore creates this document and the exhibit was moved into evidence without objection (Tt. 10/30/2018, Pg. 21, Lines 16-25). Younger testified that the notice contains the subject loan number, property address, the amount due at the time and the date by which the amount is due (Tt. 10/30/2018, Pg. 22, Lines 6-22). The witness stated that the notice is mailed by Rushmore's third party service mailer NCP, that the information is given to them and then uploaded in Rushmore's system, audited and mailed (Tt. 10/30/2018, Pg. 23, Lines 4-9). He further stated that he is familiar with the third party's practices and procedures for mailing from his own training and testified that the third party's practices and procedures are Rushmore's as they follow Rushmore's guidelines as to printing these documents (Tt. 10/30/2018, Pg. 23, Lines 17-23).

Younger testified that the information is put into MSP, plaintiff's servicing platform system by Rushmore and that Rushmore inputs a code directing NCP to print the letter (Tt. 10/30/2018, Pg. 24, Lines 1-14). The witness testified that the letter was mailed by certified mail and first class mail to defendant on July 31, 2013 to 870 East 95th Street and to the property address (Tt. 10/30/2018, Pg. 24-25, Lines 16-5). Younger stated that there is a certified mail receipt and a first call mail stamp to show proof of mailing (Tt. 10/30/2018, Pg. 25, Lines 6-12). The witness testified that the letter was mailed on July 31, 2013 as the policy and procedure is that the letter is mailed out the date it is dated (Tt. 10/30/2018, Pg. 25, Lines 16-20). Plaintiff's counsel introduced into evidence, plaintiff's exhibit 7, Rushmore's consolidated notes log which

is a log of notes from different departments consolidated onto a document (Tt. 10/30/2018, Pg. 26, Lines 6-23). The log contains notes pertaining to foreclosures, taxes, and other notes. The exhibit was moved into evidence over defendant's objection (Tt. 10/30/2018, Pg. 28, Lines 12-16). The witness testified that the log contains entries when notes are mailed and that the entries are made at or near the time of the event happening (Tt. 10/30/2018, Pg. 28, Lines 1-24). The entry for July 31, 2013 indicates that the New York additional letter was sent, the letter being the notice of intent to foreclosure (Tt. 10/30/2018, Pg. 29, Lines 1-13).

The witness introduced into evidence, without objection, the RPAPL 1304 notice as plaintiff's exhibit 8 (Tt. 10/30/2018, Pg. 29-31, Lines 14-9). The witness testified that the letter was sent by NCP to the defendant on May 30, 2013 to 870 East 95th Street and to the subject property (Tt. 10/30/2018, Pg. 31-32, Lines 11-8). The witness testified that there is a certified mailing receipt and a first class mail stamp as proof of mailing (Tt. 10/30/2018, Pg. 32, Lines 9-10). The witness also testified that the notice was returned as unclaimed as no one claimed the certified letter when it was mailed (Tt. 10/30/2018, Pg. 32, Lines 11-22). According to the witness, the entry of the phrase "New York NOI" would not have been made on May 30, 2013 into the consolidated notes log in evidence as plaintiff's exhibit 7 if the notice was not mailed (Tt. 10/30/2018, Pg. 33, Lines 11-22). The witness testified that the 90 day notice was filed with the New York State Banking Department by Rushmore as evidenced by the proof of filing statement introduced into evidence as plaintiff's exhibit 9, without objection (Tt. 10/30/2018, Pg. 33-35, Lines 23-4). The witness also testified that the registration gets completed only if the notice was mailed (Tt. 10/30/2018, Pg. 35, Lines 5-8). Lastly, the witness testified that the

defendant failed to make the payment due on August 19, 2008 or any payment thereafter as evidenced by the payment history for the loan admitted into evidence as plaintiff's exhibit 10 over defendant's objection (Tt. 10/30/2018, Pg. 35-38, Lines 19-24).

The witness was thereafter subject to cross-examination by defendant's counsel. During cross-examination, the witness testified that the notices were mailed by NCP, a third party vendor of Rushmore, and that NCP follows Rushmore's mailing practices and procedure (Tt. 10/30/2018, Pg. 41, Lines 2-20). When asked whether the witness knew whether the notices were actually mailed, the witness testified that it was his experience that the policy and procedures are followed (Tt. 10/30/2018, Pg. 41-42, Lines 11-22). The witness testified that the information on the certified mail receipts in evidence as plaintiff's exhibit 6 is entered by NCP and not Rushmore or the postal office since NCP mails the letters and enters the certified postal information (Tt. 10/30/2018, Pg. 42-43, Lines 11-18). Further, the witness testified that the certified mail receipt in plaintiff's exhibit 6 does not contain a postmark stamp in the spot for a postmark nor is there a return receipt card (Tt. 10/30/2018, Pg. 43-44, Lines 21-14).The witness also testified that NCP handled the mailings including placing the first class stamp (Tt. 10/30/2018, Pg. 44-45, Lines 15-8). The witness further testified that the entry in the consolidated notes log was made the same day the notice was mailed stating that if the entry was made, 15 or 20 minutes later it was actually placed in the mail (Tt. 10/30/2018, Pg. 47, Lines 2-21). Additionally, the witness testified that the consolidated notes log does not actually state that the notices were mailed by certified and first class mail in the log on the entry made on July 31, 2013 (Tt. 10/30/2018, Pg. 48, Lines 9-25). As for RPAPL 1304 notice, the witness testified that

he did not independently verify that NCP mailed the document as he did not speak to anyone from NCP (Tt. 10/30/2018, Pg. 49, Lines 2-24). The witness also testified that the return receipt card does not have a signature on it (Tt. 10/30/2018, Pg. 51-52, Lines 25-5). The witness was then asked several questions regarding the assignment chain of the note and its custody (Tt. 10/30/2018, Pg. 57-64, Lines 17-2).

Fernella Glasgow

The defendant testified that she did not recognize the default letter marked as plaintiff's exhibit 6 nor did she ever receive it personally or in the mail (Tt. 10/30/2018, Pg. 66-67, Lines 19-1). Defendant also testified that she has trouble getting her mail sometimes (Tt. 10/30/2018, Pg. 67, Lines 2-6). Defendant further testified that she never personally received the RPAPL 1304 notice by mail or otherwise introduced into evidence as plaintiff's exhibit 8 (Tt. 10/30/2018, Pg. 67, Lines 11-19). The witness also testified that she did not remember making any mortgage payments (Tt. 10/30/2018, Pg. 68, Lines 1-15).

Discussion

When a case is tried without a jury, the Court's authority is broad, and the Court may render a judgment it finds warranted by the facts taking into account its ability to see the witnesses and hear the testimony (see *Finney v. Morton*, 170 AD3d 811, 811 [2d Dept 2019]). The Court's credibility determinations are entitled to great weight because, as the trier of fact, it has the opportunity to see and hear the witnesses and observe their demeanor (see, *Minelli Construction Co., Inc. v. New York City School Construction Authority*, 167 AD3d 593, 593 [2d Dept 2018]; citing *Matter of Piller v. Schwimmer*, 135 AD3d 766, 769 [2d Dept 2016]). "Where

the findings of fact rest in large measure on considerations relating to the credibility of witnesses, deference is owed to the trial court's credibility determinations" (*Ning Xiang Liu v. Al Ming Chen*, 133 AD3d 644, 644 [2d Dept 2015] [internal citations omitted]).

Generally, to establish prima facie entitlement to judgment as a matter of law in an action to foreclose a mortgage, a plaintiff must produce the mortgage, the unpaid note, and evidence of default (see *Deutsche Bank Trust Co. Ams. v Garrison*, 147 AD3d 725, 726 [2d Dept 2017]; *Deutsche Bank Natl. Trust Co. v Abdan*, 131 AD3d 1001, 1002 [2d Dept 2015]; *Plaza Equities, LLC v Lamberti*, 118 AD3d 688, 689 [2d Dept 2014). The issue of standing "[i]s waived absent some affirmative statement on the part of a mortgage foreclosure defendant, which need not invoke magic words or strictly adhere to any ritualistic formulation, but which must clearly, unequivocally, and expressly place the defense of lack of standing in issue by specifically identifying it in the answer" (*US Bank N.A., v. Nelson*, 169 AD3d 110, 117 [2d Dept 2019]). "A mere denial of factual allegations will not suffice for this purpose" (*id.*).

Where the issue of standing is raised by defendant, a plaintiff must also establish its standing as part of its prima facie case (see *Deutsche Bank Trust Co. Ams. v Garrison*, 147 AD3d at 726; *Security Lending, Ltd. v New Realty Corp.*, 142 AD3d 986, 987 [2d Dept 2016]; *LGF Holdings, LLC v Skydel*, 139 AD3d 814, 814 [2d Dept 2016]). A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that, when the action was commenced, it was either the holder of, or the assignee of, the underlying note (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361–362 [2015]; *Security Lending, Ltd. v New Realty*

Corp., 142 AD3d at 987; *LGF Holdings, LLC v Skydel*, 139 AD3d at 814; *Wells Fargo Bank, N.A. v Rooney*, 132 AD3d 980, 981 [2015]).

"Proper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition" (*CitiMortgage, Inc. v Pappas*, 147 AD3d 900, 901 [2d Dept 2017]). "The statute requires that such notice be sent by registered or certified mail, and also by first-class mail, to the last known address of the borrower" *(id.)*. In addition, a plaintiff must show compliance with any condition precedent contained in the mortgage agreement in order to establish a prima facie case (*HSBC Mtge. Corp. [USA] v Gerber*, 100 AD3d 966 [2d Dept 2012]; *Norwest Bank Minn. v Sabloff*, 297 AD2d 722 [2d Dept 2002]; *GE Capital Mtge. Servs. v Mittelman*, 238 AD2d 471 [2d Dept 1997]). A plaintiff can prove mailing by submitting an affidavit of service, by proof of mailing by the post office, by admissible business records pursuant to CPLR 4518, or by testimony from someone who is familiar with the mailing practices and procedures (*CitiMortgage, Inc. v Pappas* 147 AD3d at 901).

Pursuant to CPLR 4518(a), the business record exception to the hearsay rule applies to a writing or record. "[T]he foundation for admission of a business record usually is provided by the testimony of the custodian, the author or some other witness familiar with the practices and procedures of the particular business [as] it is the business record itself...that serves as proof of the matter asserted" (*Bank of New York Mellon v. Gordon*, 2019 NY Sip Op 02306 [2d Dept 2019] [internal citations omitted]). "[E]vidence of the contents of business records is admissible only where the records themselves are introduced [since] without their introduction, a witness's

testimony as to the contents of the records is inadmissible hearsay" (*id.*). There is "[n]o requirement that a plaintiff in a foreclosure action rely on any particular set of business records to establish a...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" (*id.*).

"The mere filing of papers received from other entities, even if they are retained in the regular course of business, is insufficient to qualify the documents as business records" (*id.*). "However, such records may be admitted into evidence if the recipient can establish personal knowledge of the maker's business practices and procedures, or establish that the records provided by the maker were incorporated into the recipient's own records and routinely relied upon by the recipient in its own business" (*id.*).

Here, the Court had the opportunity to observe both witnesses over the course of the trial on the issues raised and finds that Younger was credible. He did not seem guarded, had clear and detailed answers to the questions asked and stated when he was unable to answer a particular question. He was well versed in the subject matter and his testimony was relevant and probative concerning Rushmore's business practices. The defendant's testimony was very brief, lacked detail and her answers were conclusory denials.

The Court finds that plaintiff established prima facie entitlement to judgment as a matter of law by producing the mortgage, note and evidence of default. The mortgage was introduced into evidence as plaintiff's exhibit 4 without objection (Tt. 10/30/2018, Pg. 17, Lines 6-19). The note was introduced into evidence as plaintiff's exhibit 2 without objection (Tt. 10/30/2018, Pg.

11, Lines 11-25). Plaintiff further established that the defendant defaulted on the payment due on August 19, 2008 as evidenced by the payment history for the loan admitted into evidence as plaintiff's exhibit 10 (Tt. 10/30/2018, Pg. 35-38, Lines 19-24). The defendant's testimony did not dispute the default and stated that she did not remember making any mortgage payments (Tt. 10/30/2018, Pg. 68, Lines 1-15).

The Court need not address the issue of standing as defendant failed to specifically raise standing as a defense in her answer. In any event, plaintiff established its standing as the holder of the note at the time of commencement by attaching the note, specifically endorsed to plaintiff to the summons and complaint when the action was commenced (see *U.S. Bank N.A. v. Sartavanan*, 146 AD3d 1010, 1011 [2d Dept 2017]).

Additionally, the Court finds that plaintiff established strict compliance with RPAPL 1304 notice prior to the commencement of this action. Plaintiff introduced into evidence the RPAPL 1304 notice as well as proof of mailing as plaintiff's exhibit 8 (Tt. 10/30/2018, Pg. 29-31, Lines 14-9). This exhibit was introduced into evidence without objection. Included in this exhibit are two separate certified mail receipts from the U.S. Postal Service. The first receipt (first receipt) indicates that the notice was sent to the defendant at the subject property. The first receipt indicates that the postage was paid and contains a 20 digit article number. In this same exhibit, the first receipt is followed by what appears to be a copy of the envelope containing a bar code, the same 20 digit article number, proof of postage dated May 30, 2013 and a stamp or sticker that states that mail went unclaimed, the post office was unable to forward and should be returned to sender. This stamp or sticker is dated July 30, 2013. Plaintiff's exhibit 8 contains

another RPAPL 1304 sent to the defendant at a different address, 870 East 95th Street in Brooklyn, New York and is followed by a separate certified mail receipt from the U.S. Postal Service (second receipt). The second receipt indicates that the postage was paid and contains a different 20 digit article number than the first receipt. Additionally, Rushmore's consolidated notes log indicates that the RPAPL 1304 notice was sent on May 30, 2013 as Younger testified that the entry of the phrase "New York NOI" would not have been made if the notice was not mailed. The Court finds that the plaintiff established compliance with RPAPL 1304 as evidenced by the certified mailing receipts, testimony and Rushmore's consolidated notes log.

Lastly, the Court finds that the plaintiff established that the contractual default notice was also properly sent. The subject mortgage provides for such notice upon certain events of a default, which in relevant part, states:

> "22. Lender's Rights If Borrower Fails to Keep Promises and Agreements. ...Lender May require Immediate Payment in Full under this Section 22 only if all of the following conditions are met:
>
> (a) [The borrower] fail to keep any promise or agreement made in this Security Instrument or the Note, including, but not limited to, the promises to pay the Sums Secured when due, or if another default occurs under this Security Instrument;
>
> (b) Lender sends to [the borrower], in the manner described in Section 15 of this Security Instrument, a notice that states:
>
> (1) The promise or agreement that [the borrower] failed to keep or the default that has occurred;
>
> (2) the action that [the borrower] must take to correct that default;
>
> (3) a date by which [the borrower] must correct the default. That date will be at least 30 days from the date on which the notice is given;
>
> (4) that if [the borrower] [does not] correct the default by the date stated in the notice, Lender may require Immediate Payment in

> Full, and Lender or another Person may acquire the Property by means of Foreclosure and Sale;
>
> (5) that if [the borrower] [meets] the conditions stated in Section 19 of this Security Instrument, [the borrower] will have the right to have Lender's enforcement of this Security Instrument stopped and to have the Note and this Security Instrument remain fully effective as if Immediate Payment in Full had never been required; and
>
> (6) that [the borrower] [has] the right in any lawsuit for Foreclosure and Sale to argue that [the borrower] did not keep [their] promises and agreements under the Note and under this Security Instrument, and to present any other defenses that [the borrower] may have..."

Section 15 of the Mortgage provides, in relevant part, as follows:

> "15. Notices Required under this Security Instrument. All notices given by me or Lender in connection with this Security Instrument will be in writing. *Any notice to me in connection with this Security Instrument is considered given to me when mailed by first class mail or when actually delivered to my notice address if sent by other means*. Notice to any one Borrower will be notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address is the address of the Property unless I give notice to Lender of a different address. I will promptly notify Lender of my change of address.". (Section 15, Plaintiff Exhibit 4)

Plaintiff's exhibit 6 was introduced into evidence without objection. The exhibit contains the default letter followed by two certified mailing receipts. The top receipt lists the subject property as the address where the default letter was mailed while the bottom receipt addresses the letter to the 95th Street property. Each receipt has a postage amount and its own 20 digital article number. According to Younger, the consolidated notes log indicates that the default letter was sent on July 31, 2013 as it is sent the date it is dated. Under these circumstances, the Court

finds that the plaintiff mailed the contractual default notice. Thus, the Court finds that the plaintiff is entitled to judgement. It is hereby,

ORDERED, that plaintiff is hereby directed to settle a form order of reference, on notice to all defendants within 60 days of the entry date of this order.

This constitutes the decision and order of the court.

E N T E R,

MARK PARTNOW, J. S. C

HON. MARK I PARTNOW
SUPREME COURT JUSTICE

KINGS COUNTY CLERK
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