

Citibank, N.A. v Wood
2019 NY Slip Op 31561(U)
May 31, 2019
Supreme Court, Suffolk County
Docket Number: 015428/2010
Judge: James Hudson
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SHORT FORM ORDER

COPY

Supreme Court - State of New York
IAS Part XL - Suffolk County

PRESENT: HON. JAMES HUDSON*Acting Supreme Court Justice*

X-----X

CITIBANK, N.A., AS TRUSTEE FOR GSAA HOME
 EQUITY TRUST 2007-10
 3476 Stateview Blvd.
 Ft. Mill, SC 29715

Plaintiff,

-against-

JOSEPH WOOD, COVE DELI, MORTGAGE
 ELECTRONIC REGISTRATION SYSTEMS, INC.,
 AS NOMINEE FOR CITIBANK, N.A., NEW YORK
 STATE DEPARTMENT OF TAXATION AND
 FINANCE, PEOPLE OF THE STATE OF NEW
 YORK, SOUTH FORK DELI, SUFFOLK COUNTY
 CHILDSUPPORT ENFORCEMENT BUREAU OBO
 JEAN A. WOODS, THERESA BRAND,
 CATHERINE WOOD, BRIAN DANUCCIO and
 KRISTY TAYLOR,

Defendants.

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MOT. SEQ. NO.:004-Mot D

MOT. SEQ. NO.:005-Mot D

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 New York, NY 10022

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Upon the following papers: Notice of Motion by Plaintiff, dated November 30, 2017, with supporting papers and memorandum of law; Affirmation in Opposition, dated December 19, 2017, with supporting papers and Notice of Cross-Motion, dated January 18, 2018, with supporting papers, by Defendant Joseph Wood; Plaintiff's Affirmation in Further Support of Motion and in Opposition to Cross Motion, dated February 28, 2018, with supporting memorandum of law; and upon due consideration; it is

ORDERED that this renewal motion (004) by the Plaintiff for, *inter alia*, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the answering Defendant Joseph Wood, striking his answer and dismissing the remaining affirmative defense set forth therein; (2) pursuant to RPAPL § 1321 appointing a referee to (a) compute amounts due under the subject mortgage; and (b) examine and report whether the subject premises should be sold in one parcel or multiple parcels; and (3) extinguishing allegedly subordinate liens, is denied; and it is further

ORDERED that this cross motion (005) by Defendant Joseph Wood, pursuant to CPLR 3025(b), for leave to file an amended answer, is denied; and it is further

ORDERED that the Plaintiff is directed to serve a copy of this Order with notice of entry upon the answering Defendant within thirty (30) days of the date herein, and to promptly file the affidavit of service with the Clerk of the Court; and it is further

ORDERED that the attorneys for the parties shall appear for a pre-trial conference in **Part XL at the New York State Supreme Court of Suffolk County, One Court Street, Riverhead, NY, on Tuesday, July 9th, 2019 at 10:00 a.m.**, at which time the parties shall select a date for a limited issue trial in accordance herewith.

The parties' familiarity with the relevant facts in this action is assumed, having been fully set forth in this Court's prior Order dated June 30, 2014 (J. Martin), as well as the decision and Order of the Appellate Division 2d Department, dated May 10, 2017, partially reversing this Court's prior Order. Plaintiff's prior motion (001), seeking summary judgment against answering Defendant Joseph Wood, an order of reference, an order fixing the defaults of non-answering Defendants, identifying unknown Defendants, and amending the caption, was granted. Defendant's cross motion (002) seeking dismissal of the complaint was denied. The Appellate Division reversed this Court's prior Order to the extent that it granted summary judgment as against Defendant Joseph Wood and an order of reference, because Plaintiff failed to establish, *prima facie*, that it had complied with the pre-foreclosure notice requirements of RPAPL 1304. Accordingly, Plaintiff now renews its motion for, *inter alia*, summary judgment and an order of reference. Defendant opposes Plaintiff's motion based upon alleged failure to demonstrate compliance with RPAPL 1303, 1304 and 1306. Defendant also cross moves for leave to amend his answer, primarily to add an affirmative defense alleging non-compliance with RPAPL 1303, and a counterclaim alleging that Plaintiff wrongfully retained insurance proceeds which resulted from a property damage claim at the subject premises.

On renewal, Plaintiff has again failed to establish its *prima facie* entitlement to judgment as a matter of law because it did not supply adequate evidentiary proof of compliance with the pre-foreclosure notice provisions of RPAPL §1304. In support of the present motion, Plaintiff

submitted an affidavit, dated November 20, 2017, from Richard L. Penno, an officer of Wells Fargo Bank, N.A. (“Wells Fargo”), the originating lender and now Plaintiff’s loan servicing agent. Mr. Penno attested to the mailing of requisite notices dated August 16, 2009. Mr. Penno further averred as follows: that pursuant to Wells Fargo’s regular business practice, it provides information for the 1304 notices, such as content and borrower name and address, to an independent mail contractor, Walz Group, Inc. (“Walz”); that Walz then physically generates, prints and mails the notices; that Walz then generates a computerized “TrackRight Report” reflecting, among other things, the date of mailing and the certified and first-class tracking numbers; and that Wells Fargo has direct access to the TrackRight system and uses this system as a means of memorializing its mailings. Attached as exhibits to the Penno affidavit are copies of the relevant notices with tracking numbers and the accompanying electronic TrackRight Reports. It is of concern to the Court that the affidavit submitted by Plaintiff in support of its prior motion to establish mailing of the RPAPL 1304 notices, made absolutely no mention of the fact that the mailing was actually performed by an agent, as is disclosed here. In any event, Plaintiff’s submission here is not satisfactory because the affiant did not aver that he was familiar with the mailing practices and procedures of the entity that allegedly sent the RPAPL 1304 notices, so as to establish a standard office practice and procedure designed to ensure that items are properly addressed and mailed (*see Aurora Loan Services, LLC v Vrionedes*, 167 AD3d 829, 832, 91 NYS3d 150 [2d Dept 2018]; *Wells Fargo Bank, N.A. v Moran*, 168

AD3d 1128, 92 NYS3d 716 [2d Dept 2019]; *LNV Corporation v Sofer*, 2019 NY Slip Op 02860 [2d Dept]; *Citibank, N.A. v Conti-Scheurer*, 2019 NY Slip Op 02846 [2d Dept]). Several recent cases have addressed this identical issue, specifically with regard to Walz (*see Wells Fargo Bank, N.A. v Rodriguez*, 2019 NY Slip Op 50079(U) [Sup. Ct. Suffolk County] [“Although properly admitted business records may be used to establish mailings, the records alone are insufficient if Plaintiff does not establish the mailing entities practices and procedures to ensure proper mailing. Here, all Plaintiff’s affiant says is that the Walz system records, incorporated into Plaintiff’s records, establishes the mailing. There is no explanation as to how that system works to ensure proper mailings”]; *Nationstar Mtge. LLC v Corrao*, 2019 NY Slip Op 50328(U) [Sup. Ct. Suffolk County]; *Bank of Am. NA v Ahmad*, 2018 NY Slip Op 51801(U) [Sup. Ct. Suffolk County] [“He did not establish how BANA’s practices and procedures in relying upon Walz for mailing would establish any proof of Walz’s practices and procedures for mailing the notices”]; *Nationstar Mtge., LLC v Saintval*, 2018 NY Slip Op 50751(U) [Sup. Ct. Suffolk County]).

Defendant’s arguments regarding deficiencies in the content of the 1304 notice are without merit. Defendant claims that two of the counseling agencies listed in the notice were “not local to where the borrower resides.” In fact, four of the listed agencies were located in Suffolk County and one was located in Nassau County, all of which “serve the region where the borrower resides,” as required by the statute in effect at the time. Defendant’s bare assertion that the notice “does not appear to be in the required fourteen-point type” is not sufficient to overcome the sworn statement

in the affidavit of Mr. Penno, referenced above, that the copies of the notice were printed in size fourteen font or greater, an averment which does comport with CPLR 4518(a). Defendant's argument that Plaintiff failed to comply with the filing requirement under RPAPL 1306, is likewise without merit. The filing requirement of RPAPL 1306 did not become effective until February 13, 2010, six months after the notices were purportedly mailed here.

With regard to RPAPL 1303, Defendant renews an argument made in his prior motion that the format of the 1303 notice did not conform to statutory requirements. Despite failing to assert that claim as an affirmative defense in his answer, Defendant was permitted to raise it for the first time in the prior motion and the Court accordingly addressed it (*see First Natl. Bank of Chicago v Silver*, 73 AD3d 162, 899 NYS2d 256 [2d Dept 2010]). Specifically, Defendant denied receiving the RPAPL 1303 notice and argued that the copy of the notice filed with the Suffolk County Clerk begins half way down the page, which was not true of the copy of the notice served upon Defendant and submitted by Plaintiff in support of motion. The certified copy of the notice filed with the County Clerk, provided by Defendant, shows that the filed copy bears a caption of the action on the top half of the page. The Court rejected Defendant's arguments and held that Plaintiff satisfied its burden that service of the 1303 notice was properly made by providing an affidavit of service attesting to all statutorily-required content. Defendant failed to rebut the presumption of proper service created by that affidavit.

Accordingly, to the extent that Defendant's first affirmative defense alleges non-compliance with the *mailing* requirement of RPAPL 1304, it remains viable. To the extent the first affirmative defense alleges non-compliance with RPAPL 1306, it is stricken. All of Defendant's other affirmative defenses and the counterclaim were stricken in the Court's prior Order.

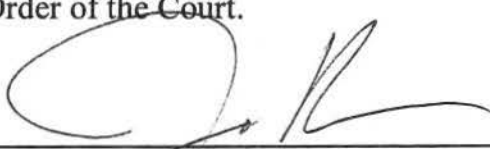
Defendant's answer in this matter is dated May 5, 2010. There were ten settlement conferences held in this matter pursuant to CPLR 3408, between June 17, 2010 and December 8, 2011. Defendant now moves for leave to file an amended answer. "A motion for leave to amend a pleading should be freely granted in the absence of prejudice or surprise resulting directly from the delay, unless the amendment would be palpably insufficient or patently devoid of merit (citations omitted)" (*HSBC Mortg. Servs., Inc. v Alphonso*, 163 AD3d 934, 936, 82 NYS3d 478 [2d Dept 2018]). "The matter of allowing an amendment is committed 'almost entirely to the court's discretion to be determined on a sui generis basis' (citation omitted), 'the widest possible latitude' being extended to the courts (citations omitted)" (*Murray v City of New York*, 43 NY2d 400, 405, 401 NYS2d 773 [1977]; *see also U.S. Bank N.A. v Lomuto*, 140 AD3d 852, 35 NYS3d 123 [2d Dept 2016]). One of Defendant's proposed amendments here seeks to add an affirmative defense alleging non-compliance with RPAPL 1303. As set forth above, that alleged defense has already been argued, despite not being raised in the answer, and the Court has rendered a decision on it. Defendant's other proposed amendment seeks to add a counterclaim, alleging that Plaintiff

wrongfully retained monies received from an insurance settlement concerning a property damage claim at the subject premises. The insurance check was allegedly made out to Defendant and Plaintiff jointly, and Plaintiff applied the amount of the check to Defendant's account instead of returning it to him to reimburse him for the repair. Defendant has provided no further information about this claim, significantly as to when it occurred, nor any justification for including it as a defense at this late date. The Court therefore, in its discretion, finds the proposed amendments to be patently devoid of merit. In any event, a dispute as to the total amount of indebtedness may be properly raised before a referee in computing the amount due (*see Excel Capital Group Corp. v 225 Ross St. Realty, Inc.* 165 AD3d 1223, 87 NYS3d 604 [2d Dept 2018]).

Accordingly, Plaintiff's renewal motion is denied, Defendant's cross motion is denied, and the parties are directed to appear for a pre-trial conference.

The foregoing constitutes the decision and Order of the Court.

Dated: May 31st, 2019



HON. JAMES HUDSON
Acting Justice of the Supreme Court

____ FINAL DISPOSITION X NON-FINAL DISPOSITION