

HSBC Bank, USA, N.A. v Tartaglione
2019 NY Slip Op 31918(U)
July 2, 2019
Supreme Court, Suffolk County
Docket Number: 010440/2012
Judge: William G. Ford
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SUPREME COURT - STATE OF NEW YORK
IAS PART 38 - SUFFOLK COUNTY

PRESENT:

Hon. WILLIAM G. FORD
 Justice of the Supreme Court

x

HSBC Bank, USA, National Association as Trustee for the
 Holders of Deutsche Alt-A Securities Mortgage Loan
 Trust, Series 2007-1,

Plaintiff,

-against-

Linda Tartaglione a/k/a Linda J. Beckwith a/k/a Linda
 Jean Casinover, Fred J. Tartaglione, Jeanette Tartaglione,
 Discover Bank, Kenneth LaCasse, Citibank South Dakota,
 N.A.,

"JOHN DOE 1 TO JOHN DOE 25", said names being
 fictitious, the persons or parties intended being the
 persons, parties, corporations or entities if any, having or
 claiming an interest in or lien upon the mortgaged
 premises described in the complaint,

Defendants.

x

MOTION DATE: 1/25/18

ADJ. DATE: 3/21/18

Mot. Seq. # 003 -MotD

Attorney for Plaintiff:

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Upon the following papers: Notice of Motion by plaintiff, dated December 11, 2017, and supporting papers; Affirmation Opposition by defendants, dated February 20, 2018, with Memorandum of Law and supporting papers; Reply Affirmation by plaintiff, dated March 15, 2018, and supporting papers; it is

ORDERED that the plaintiff's re-submitted motion (003), which seeks, *inter alia*, an order granting plaintiff summary judgment, an order of reference and amendment of the caption, is hereby granted in part and denied in part, as set forth herein; and it is further

ORDERED that so much of the plaintiff's motion which seeks an order granting plaintiff summary judgment and an order of reference is hereby denied for failure of plaintiff to make a *prima facie* showing of plaintiff's standing at the time this action was commenced; and it is further

ORDERED that so much of the plaintiff's motion, which seeks an order striking the Tartaglione defendants' affirmative defenses, is decided solely to the extent that said defendants' First, Fourth, Fifth and Seventh through Ninth Affirmative Defenses are hereby dismissed; and it is further

ORDERED that so much of the plaintiff's motion, which seeks an order amending the caption, striking defendants "John Doe #1" through "John Doe #25," is hereby granted and the caption is amended accordingly; and it is further

ORDERED that the attorneys for the parties shall appear for a **Pre-trial Conference on September 10, 2019, at 10:30 a.m.**, in Chambers for the undersigned, One Court Street, Riverhead, New York 11901, at which time the parties shall select a date for a limited issue trial with regard to defendants' Second, Third and Sixth Affirmative Defenses (Standing); and it is further

ORDERED that plaintiff's counsel shall promptly serve, via First Class Mail, a copy of this Order upon all parties who have appeared in this action and upon the Calendar Clerk, and shall promptly thereafter file the affidavit(s) of such service with the Suffolk County Clerk.

On April 19, 2007, defendant Linda Tartaglione executed a note for a mortgage in the amount of \$300,000.00 from Wachovia Mortgage Corp., which was secured as a lien against the premises located at 4 Wedgewood Lane, Miller Place, New York. Defendant Fred J. Tartaglione executed only the mortgage as the husband of Linda Tartaglione. Teresa Davis executed only the Mortgage, as attorney-in-fact for defendant Jeannette Tartaglione who holds a life estate interest in the premises. The plaintiff alleges that the defendants defaulted in making required monthly payments beginning April 1, 2011 and following, and plaintiff commenced this foreclosure proceeding on March 29, 2012. Defendants filed an answer asserting various defenses including, among others, those related to plaintiff's alleged lack of standing (Second, Third and Sixth Affirmative Defenses) and plaintiff's alleged failure to provide proper notice of default under terms of the mortgage and as required by statute (Eighth Affirmative Defense).

Previously, plaintiff filed a motion for summary judgment and defendants cross-moved for dismissal of plaintiff's complaint. By Order of Hon. Glenn A. Murphy, dated October 20, 2015, both motions were denied. With regard to plaintiff's motion, Judge Murphy found that:

The papers supplied by the plaintiff, specifically the affidavit proffered as proof of delivery of the note does not sufficiently establish that actual delivery occurred prior to the commencement of the action. The affidavit's claim that the note came into their possession by 'virtue' of the mortgage assignment does not rise to the level required under *Aurora v Taylor*, 25 NY3d 355 (2015).

The Order also scheduled a discovery conference. Plaintiff now resubmits its request for an order granting, *inter alia*, summary judgment and an order of reference. Defendants oppose the motion, challenging plaintiff's standing and alleging that plaintiff failed to comply with the notice of default requirements set forth in the mortgage and the pre-commencement notice requirements of RPAPL §1304.

To establish prima facie entitlement to judgment as a matter of law in an action to foreclose a residential mortgage, a plaintiff must produce the mortgage, the unpaid note, and evidence of default (*see Bank of New York Mellon v Zavolunov*, 157 AD3d 754, 69 NYS3d 356 [2d Dept 2018]; *M&T Bank v Joseph*, 152 AD3d 579, 58 NYS3d 150 [2d Dept 2017]; *Bank of New York Mellon v Aquino*, 131 AD3d 1186, 16 NYS3d 770 [2d Dept 2015]). Where a plaintiff's standing to commence a foreclosure action is placed in issue by a defendant, it is also incumbent upon the plaintiff to prove its standing to be entitled to relief (*see Bank of New York Mellon*

v Aiello, 164 AD3d 632, 83 NYS3d 135 [2d Dept 2018]; *Encore Credit Corp. v Yakubov*, 156 AD3d 683, 67 NYS3d 39 [2d Dept 2017]; *Wells Fargo Bank, N.A. v Arias*, 121 AD3d 973, 995 NYS2d 118 [2d Dept 2014]). In addition, where the defendant raises the issue of compliance with RPAPL §1304 as an affirmative defense in his or her answer, the plaintiff is required to make a prima facie showing of compliance with RPAPL §1304 (see *Citimortgage, Inc. v Wallach*, 163 AD3d 520, 81 NYS3d 210 [2d Dept 2018]; *Bank of America, N.A. v Wheatley*, 158 AD3d 736, 73 NYS3d 88 [2d Dept 2018]; *U.S. Bank N.A. v Carey*, 137 AD3d 894, 28 NYS3d 68 [2d Dept 2016]).

In support of its resubmitted motion, plaintiff annexes a December 5, 2017 affidavit from Matthew Joseph Julian, Vice President of Wells Fargo Bank, N.A., plaintiff's servicing agent. By its motion, plaintiff has produced the mortgage, the unpaid note, and evidence of defendant's default in payments (see *M&T Bank v Capolino*, 168 AD3d 1045, 93 NYS3d 117 [2d Dept 2019]; *CitiMortgage v Guillermo*, 143 AD3d 852, 39 NYS3d 86 [2d Dept 2016]). Through Mr. Julian's affidavit, plaintiff has also shown compliance with the requirements of RPAPL §1304. Mr. Julian's affidavit establishes that he is personally familiar with the mailing practices of Wells Fargo, who sent the notices, and that the notices required pursuant to RPAPL §1304 were sent to the defendant by certified and first class mail in accord with Wells Fargo's standard business practices and procedures. The affidavit includes copies of the notices with tracking numbers and a computerized mail register kept in the ordinary course of business (see *Citimortgage, Inc. v Wallach*, 163 AD3d 520, 81 NYS3d 210 [2d Dept 2018]; *Nationstar Mortgage, LLC, v LaPorte*, 162 AD3d 784, 79 NYS3d 70 [2d Dept 2018]; *Citimortgage v Banks*, 155 AD3d 936, 64 NYS3d 121 [2d Dept 2017]; *Flagstar Bank, FSB v Mendoza*, 139 AD3d 898, 32 NYS3d 278 [2d Dept 2016]; *Citimortgage, Inc. v Espinal*, 134 AD3d 876, 878, 23 NYS3d 251, 253 [2d Dept 2015]; *HSBC v Ozcan*, 154 AD3d 822, 64 NYS3d 38 [2d Dept 2017]). Moreover, the Julian affidavit creates a presumption that the notice of default required under the mortgage was properly mailed in accordance with the terms of the mortgage (see *Pennymac Holdings, LLC v Lane*, 171 AD3d 774, 97 NYS3d 194 [2d Dept 2019]; *Hudson City Sav. Bank v. Friedman*, 146 AD3d 757, 758, 43 NYS3d 912, 913 [2d Dept 2017]; see also *Wachovia Bank, Nat. Ass'n v Carcano*, 106 AD3d 724, 725, 965 NYS2d 516, 517 [2d Dept 2013]).

Plaintiff, however, has failed to make a *prima facie* showing that it had proper standing to commence this action. Where, as here, a plaintiff's standing to commence a foreclosure action is placed in issue by a defendant, it is incumbent upon the plaintiff to prove its standing to be entitled to relief (see *Bank of New York Mellon v Aiello*, 164 AD3d 632, 83 NYS3d 135 [2d Dept 2018]; *Encore Credit Corp. v Yakubov*, 156 AD3d 683, 67 NYS3d 39 [2d Dept 2017]; *Wells Fargo Bank, N.A. v Arias*, 121 AD3d 973, 995 NYS2d 118 [2d Dept 2014]). Here, on its resubmitted motion, the plaintiff has again failed to meet its prima facie burden of establishing that it had standing as the holder or assignee of the note at the time it commenced the action (see *U.S. Bank N.A. v Laino*, ___ AD3d ___, ___ NYS3d ___, 2019 NY Slip Op 03647 [2d Dept 2019]; *Wells Fargo Bank, N.A. v Talley*, 153 AD3d 583, 59 NYS3d 743 [2d Dept 2017]). In paragraph 3 of Mr. Julian's affidavit, he generally asserts that the mortgage has been assigned to the plaintiff. In this regard, plaintiff annexes to its motion papers a copy of a July 22, 2011 assignment that purports to establish plaintiff's standing.

Generally, where the plaintiff is the assignee of the mortgage and the underlying note at the time the foreclosure action was commenced, the plaintiff has standing to maintain the action (see *Bank of New York Mellon v Cutler*, 154 AD3d 910, 62 NYS3d 532 [2d Dept 2017]; *Wells Fargo Bank, N.A. v Marchione*, 69 AD3d 204, 887 NYS2d 615 [2d Dept 2009]). Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident (see *U.S. Bank N.A. v Haber*, 170 AD3d 775,

93 NYS3d 578 [2d Dept 2019]; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]). It is the transfer or possession of the note, not the mortgage, that conveys standing to foreclose (*see Aurora v Taylor*, 25 NY3d 355, 12 NYS3d 612 [2015]; *Bank of New York Mellon v Cutler*, 154 AD3d 910, 62 NYS3d 532 [2d Dept 2017]). Here, the assignment annexed to the plaintiff's papers conveys only the mortgage, not the note. It is settled that foreclosure of a mortgage may not be brought by one who has no title to it and absent transfer of the note, the assignment of the mortgage is a nullity (*see U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; *Kluge v Fugazy*, 145 AD2d 537, 536 NYS2d 92 [2d Dept 1988]). Accordingly, the July 22, 2011 assignment is, *per se*, insufficient to establish plaintiff's standing to commence this action.

Mr. Julian, on behalf of plaintiff's servicer, also asserts at paragraph 4 of his affidavit that plaintiff had possession of the note endorsed in blank on March 17, 2011, prior to the March 29, 2012 commencement of this action. In general, a plaintiff may establish, *prima facie*, its standing by demonstrating that the original note endorsed in blank was in its possession when plaintiff commenced the action, as evidenced by its attachment of a copy of that note, endorsed in blank, to the summons and complaint at the time of filing (*see Deutsche Bank Natl. Trust Co. v Kingsbury*, 171 AD3d 871, 95 NYS3d 893 [2d Dept 2019]; *Wells Fargo Bank, N.A. v Inigo*, 164 AD3d 545, 83 NYS3d 95 [2d Dept 2018]; *CitiMortgage, Inc. v McKenzie*, 161 AD3d 1040, 78 NYS3d 200 [2d Dept 2018]).

Where, however, as here, the affiant employed by plaintiff's servicer does not attest that he is personally familiar with the record-keeping practices and procedures of the plaintiff, there is no showing that the records relied upon by its affiant are admissible under the business records exception to the hearsay rule (*see CPLR 4518[a]*; *Deutsche Bank Nat'l Trust Co. v Lee*, 170 AD3d 1117, 97 NYS3d 160 [2d Dept 2019]; *Deutsche Bank Trust Co. Amer. v Blount*, 171 AD3d 703, 97 NYS3d 215 [2d Dept 2019]; *HSBC Mtge. Servs., Inc. v Royal*, 142 AD3d 952, 37 NYS3d 321 [2d Dept 2016]; *Citibank, N.A. v Cabrera*, 130 AD3d 861, 14 NYS3d 420 [2d Dept 2015]). When an affiant fails to lay a proper foundation for admission of the records on which he or she relied, the assertions based on those records are inadmissible, thereby warranting denial of summary judgment in favor of plaintiff, regardless of the sufficiency of the defendant's opposition papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Deutsche Bank Nat'l Trust Co. v Lee*, 170 AD3d 1117, 97 NYS3d 160 [2d Dept 2019]; *US Bank Nat'l Ass'n v Madero*; 125 AD3d 757, 5 NYS3d 105 [2d Dept 2015]).

Inasmuch as the plaintiff's assertions regarding plaintiff's standing are based on evidence that is not in admissible form, plaintiff has failed to establish its *prima facie* entitlement to judgment as a matter of law (*see Deutsche Bank Natl. Trust Co. v Jung Lee*, 170 AD3d 1117, 97 NYS3d 160 [2d Dept 2019]; *HSBC Mtge. Servs., Inc. v Royal*, 142 AD3d 952, 37 NYS3d 321 [2d Dept 2016]). Plaintiff has also otherwise failed to establish that the note, endorsed in blank, was attached to the plaintiff's complaint at the time of filing.

Based upon the foregoing, the plaintiff has failed to show entitlement to dismissal of the defendants' Second, Third and Sixth Affirmative Defenses (Standing). The remaining affirmative defenses, however, are dismissed, since the plaintiff has submitted sufficient proof to establish, *prima facie*, that said affirmative defenses are subject to dismissal as a matter of law and the defendants failed to raise a triable issue of fact in opposition (*see U.S. Bank N.A. v Echevarria*, 171 AD3d 979, 97 NYS3d 708 [2d Dept 2019]; *JPMorgan Chase Bank, N.A. v Zhan Hua Cao*, 160 AD3d 82, 176 NYS3d 82 [2d Dept 2018]; *Katz v Miller*, 120 AD3d 768, 991 NYS2d 346 [2d Dept 2014]; *Becher v Feller*, 64 AD3d 672, 884 NYS2d 83 [2d Dept 2009]). Where certain affirmative defenses are conclusory in nature and unsubstantiated with factual allegations in opposition to a motion for summary judgment, the facts as alleged in the movant's papers may be deemed admitted as there

is, in effect, a concession that no question of fact exists (*see Kuehne & Nagel, Inc. v. Baiden*, 36 NY2d 539, 369 NYS2d 667 [1975]; *Argent Mtge. Co., LLC v. Mentosana*, 79 AD3d 1079, 915 NYS2d 59 [2d Dept 2010]).

Plaintiff's conclusory request for entry of a default judgment against the non-answering defendants is denied for failure to establish entitlement to such relief (*see US Bank N.A. v Vogel*, 171 AD3d 1243, 99 NYS3d 47 [2d Dept 2019]).

In light of the foregoing, the plaintiff's proposed order of reference is marked "not signed."

This constitutes the Decision and Order of the Court.

Dated: July 2, 2019
Riverhead, New York



WILLIAM G. FORD, J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION