

Wells Fargo Bank, N.A. v Bayram

2019 NY Slip Op 32456(U)

August 21, 2019

Supreme Court, Suffolk County

Docket Number: 24672/2010

Judge: Howard H. Heckman

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SUPREME COURT - STATE OF NEW YORK
IAS PART 18 - SUFFOLK COUNTY

PRESENT:
HON. HOWARD H. HECKMAN JR., J.S.C.

INDEX NO.: 24672/2010
MOTION DATE: 6/28/2019
MOTION SEQ. NO.: #002 Mot. D
#003 MD

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WELLS FARGO BANK, N.A.,

Plaintiff,

-against-

GULSEREN BAYRAM, et al.,

Defendants.
-----X

PLAINTIFF'S ATTORNEY:
SHAPIRO DICARO & BARAK, LLC
175 MILE CROSSING BLVD.
ROCHESTER, NY 14624

DEFENDANT'S ATTORNEY:
ALFRED S. WALENDOWSKI, ESQ.
532 BROADHOLLOW RD, #144
MELVILLE, NY 11747

Upon the following papers numbered 1 to 20 read on this motion; Notice of Motion/ Order to Show Cause and supporting papers 1-11 (#002); Notice of Cross Motion and supporting papers 12-18 (#003); Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers 19-20; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff Wells Fargo Bank N.A. seeking an order: 1) granting summary judgment striking the answer of defendant Gulseren Bayram ; 2) substituting John Bayram as a named party defendant in place and stead of a defendant designated as "John Doe #1" and discontinuing the action against defendants designated as "John Doe #2" through "John Doe #10"; 3) deeming all appearing and non-appearing defendants in default; 4) amending the caption; and 5) appointing a referee to compute the sums due and owing to the plaintiff in this mortgage foreclosure action is granted to the following extent:

ORDERED that plaintiff is awarded partial summary judgment dismissing all affirmative defenses set forth in defendant's answer except the affirmative defense raised for the first time in defendant's cross motion related solely to plaintiff's compliance with RPAPL 1304; and it is further

ORDERED that plaintiff's seeking to amend the caption by substituting John Bayram as a named party defendant and discontinuing the action against defendants designated as "John Doe #1" through "John Doe #10" is granted, and the caption is hereby amended; and it is further

ORDERED that plaintiff's application for an order appointing a referee to compute the amounts due and owing the mortgage lender is denied without prejudice, as such request is premature. The proposed order submitted by the plaintiff shall be marked "not signed"; and it is further

ORDERED that the cross motion by defendant Gulseren Bayram seeking an order pursuant to CPLR 3212 & RPAPL 1304 denying plaintiff's motion and dismissing plaintiff's complaint is denied; and it is further

ORDERED that pursuant to CPLR 3212(g) the sole issue remaining to be determined concerns proof of service of the RPAPL 1304 90-day notice. All parties shall appear for a court

conference for the purpose of scheduling a briefing schedule for additional summary judgment motions (*see Kolel Damsek Eliezer, Inc. v. Schlesinger*, 139 AD3d 810, 33 NYS3d 284 (2nd Dept., 2016)) at 9:30 a.m. on September 11, 2019 at the Supreme Court Courthouse, 1 Court Street, Courtroom 301- IAS Part 18, Riverhead, New York 11901; 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 ten 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 negative amortization mortgage in the original sum of \$376,000.00 with a loan amount not to exceed the sum of \$470,000.00 executed by defendant Gulseren Bayram on April 14, 2006 in favor of World Savings Bank, FSB. On the same date mortgagor Bayram executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. Plaintiff Wells Fargo Bank, N.A. is the successor by merger to Wachovia Mortgage FSB, which in turn is the successor by merger to the original lender World Savings Bank, N.A. by certificate of merger effective November 1, 2009. Plaintiff claims that the mortgagor defaulted under the terms of the mortgages and note by failing to make timely monthly mortgage payments beginning September 15, 2009 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 July 9, 2010. Defendant/mortgagor Bayram served an answer dated September 10, 2010 asserting three (3) affirmative defenses.

Plaintiff's motion seeks an order granting summary judgment striking defendant's answer and for the appointment of a referee. Defendant's opposition in the form of a cross motion claims that plaintiff's motion must be denied and the complaint must be dismissed because: 1) plaintiff has failed to prove standing; 2) plaintiff has failed to prove defendant's default in making payments due under the terms of the note and mortgage; and 3) plaintiff has failed to prove service of pre-foreclosure notices required pursuant to RPAPL 1304.

Plaintiff's motion seeking summary judgment was served on March 16, 2018 and made originally returnable on April 26, 2018 assigned to IAS Part 40. Defendant's cross motion was served on April 18, 2018 and made originally returnable on April 26, 2018 assigned to IAS Part 40. Both motions remained without decision for the past fourteen (14) months until this foreclosure action and the two pending motions were reassigned to this IAS Part 18 by Administrative Order #40-19 (Hinrichs, J.) dated June 6, 2019. Upon assemblage of motion papers the motions were submitted on the IAS Part 18 motion calendar on June 28, 2019.

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. Erobo*, 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. 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 possession of the note prior to the commencement of the action and thus its standing to prosecute its claim for foreclosure and sale (*Bank of New York Mellon v. Theobalds*, 161 AD3d 1137, 79 NYS3d 50 (2nd Dept., 2018); *Bank of New York Mellon v. Burke*, 155 AD3d 932, 64 NYS3d 114 (2nd Dept., 2017); *Wells Fargo Bank, N.A. v. Thomas*, 150 AD3d 1312, 52 NYS3d 894 (2nd Dept., 2017); *Deutsche Bank National Trust Co. v. Garrison*, 147 AD3d 725, 726, 46 NYS3d 185 (2nd Dept., 2017); *U.S. Bank, N.A. v. Saravanan*, 146 AD3d 1010, 1011, 45 NYS3d 547 (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 September 15, 2009. Rather, the issues raised by the defendant concern whether the proof submitted by the mortgage lender provides sufficient admissible evidence to prove its entitlement to summary judgment based upon the mortgagor's continuing default, plaintiff's compliance with RPAPL 1304 notice requirements, 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)). In this regard, with respect to mortgage foreclosures, a loan servicer’s employee may testify on behalf of the mortgage lender and a representative of an assignee of the original lender can rely upon business records of the original lender to establish its claims for recovery of amounts due from the borrowers provided the assignee/plaintiff establishes that it incorporated the original records into its own records and relied upon those records in the regular course of business (*Landmark Capital Inv. Inc. v. Li-Shan Wang*, 94 AD3d 418, 941 NYS2d 144 (1st Dept., 2012); *Portfolio Recovery Associates, LLC. v. Lall*, 127 AD3d 576, 8 NYS3d 101 (1st Dept., 2015); *Merrill Lynch Business Financial Services, Inc. v. Trataros Construction, Inc.*, 30 AD3d 336, 819 NYS2d 223 (1st Dept., 2006)).

The statute (CPLR 4518) clearly does not require a person to have personal knowledge of

each and every entry contained in a business record, particularly in this case, where there is a business relationship between mortgage servicing entities responsible for entering and maintaining accurate records, and where the current servicer has incorporated and relied upon the business records it maintains in its regular course of business (*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 recently 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 affidavits submitted from the plaintiff/successor by merger’s (Wells Fargo Bank, N.A.’s) vice president of loan documentation dated February 15, 2018, together with the lost note affidavit dated April 12, 2016, provide the evidentiary foundation for establishing the mortgage lender’s right to foreclose. The affidavits set forth the employee’s review of the business records maintained by the plaintiff/successor by merger; the fact that the books and records are made in the regular course of Wells Fargo’s business; that it was Wells Fargo’s regular course of business to maintain such records; and that the records were contemporaneously created at the time the underlying transactions occurred. Based upon the submission of these two affidavits, 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 has establish its standing by virtue of the documentary evidence submitted proving that Wells Fargo Bank, N.A. is the successor by merger of the original mortgage lender’s assets and loan commitments effective November 1, 2009 which was prior to the commencement of this action on July 9, 2010 (*see JPMorgan Chase Bank, N.A. v. Atedgi et al.*, 162 AD3d 756, 79 NYS3d 81 (2nd Dept., 2018); *CitiMortgage, Inc., Successor by Merger to ABN AMRO Mortgage Group, Inc. v. Rockefeller*, 155 AD3d 998, 63 NYS3d 868 (2nd Dept., 2017); *CitiMortgage, Inc. v. Goldberg*, 134 AD3d 880, 20 NYS3d 906 (2nd Dept., 2015)).

With respect to the issue of the lost promissory note, Uniform Commercial Code 3804 provides:

“The owner of an instrument which is lost, whether by destruction, theft, or otherwise may maintain an action in his own name and recover from any party liable thereon upon due proof of his ownership, the facts which prevent his production of the instrument and its terms.....”

The law provides that where a promissory note is lost, destroyed or stolen, a mortgage lender may foreclose provided that the lender proves ownership of the note, the circumstances surrounding the

lost, destroyed or stolen note, and the terms of the note (*Marazzo v. Piccolo*, 163 AD2d 369, 558 NYS2d 013 (2nd Dept., 1990); *Brown Bark II, L.P. v. Weiss & Mahoney, Inc.*, 90 AD3d 963, 935 NYS2d 637 (2nd Dept., 2011); *Ventricelli v. DeGennaro*, 221 AD2d 231, 633 NYS2d 315 (1st Dept., 195); *Genger v. Sharon*, 910 FSupp2d 656 (U.S. Dist. Ct., S.D., N.Y., 2012); *Weiss v. Phillips*, 157 AD3d 1, 65 NYS3d 147 (1st Dept., 2017)).

Plaintiff has submitted sufficient evidence in the form of copies of the original mortgage, the certificate of merger with the original mortgage lender, and the promissory note which was lost to establish ownership, together with an affidavit from the plaintiff's vice president of loan documentation to prove the fact that after a diligent search the original promissory note was lost, misplaced or inadvertently destroyed.. Proof of the terms of the note has been established by plaintiff's submission of a copy of the original promissory note signed by the defendant. Plaintiff has therefore established the three required elements necessary to prove the mortgage lender's right to foreclose the mortgage and its standing to maintain this action (*Marrazzo v. Piccolo, supra.*; *Weiss v. Phillips, supra.*).

With respect to the issue of the mortgagor'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 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 the mortgagor's undisputed default in making timely mortgage payments, together with business records in the form of the notices of default which were mailed to Bayram confirming her continuing default in making timely payments sufficient to sustain its burden to prove defendant has defaulted under the terms of the parties agreement by failing to make timely payments since September 15, 2009 (CPLR 4518; *see Wells Fargo Bank, N.A. v. Thomas, supra.*; *Citigroup v. Kopelowitz, supra.*)). The only opposition submitted by the defendant to issues surrounding her default is the attorney's affirmation submitted in support of her cross motion. An attorney's affirmation provides no relevant, admissible evidence to contradict the prima facie showing made by the plaintiff. Moreover a review of the affirmative defenses asserted in defendant's answer reveals that the mortgagor/defendant never asserted a defense claiming that she is not in default in making payments (for nearly ten years) as an affirmative defense in her answer. Based upon defendant's failure to assert plaintiff's alleged failure to assert payment as an affirmative defense, the defendant has waived her right to assert it in opposition to plaintiff's motion (CPLR 3015 & 3018(b); *see Emigrant Bank v. Marando*, 143 AD3d 856, 39 NYS3d 83 (2nd Dept., 2016); *Signature Bank v. Epstein*, 95 AD3d 1199, 945 NYS2d 347 (2nd Dept., 2012); *First N. Mortgage Corporation v. Yatrakis*, 154 AD2d 433, 546 NYS2d (2nd Dept., 1989); *see also Wilmington Trust v. Sukhu*, 155 AD3d 591, 63 NYS3d 853 (1st Dept., 2017); *Karel v. Clark*, 129 AD2d 773, 514 NYS2d 766 (2nd Dept., 1987)).

With respect to service of pre-foreclosure RPAPL 1304 90-day notices, the law provides that although this defense is non-jurisdictional, it is a special defense which must be proven by submission of proof by submission of an affidavit of service of the notices (*CitiMortgage, Inc. v. Pappas*, 147 AD3d 900, 47 NYS3d 415 (2nd Dept., 2017); *Deutsche Bank National Trust Company v. Spanos*, 102 AD3d 909, 961 NYS2d 200 (2nd Dept., 2013)); or by plaintiff's submission of sufficient proof to establish proof of mailing of the notices (*see Nationstar Mortgage LLC v.*

LaPorte, 162 AD3d 784, 79 NYS3d 70 (2nd Dept., 2018); *HSBC Bank USA, N.A. v. Ozcan*, 154 AD3d 822, 64 NYS3d 38 (2nd Dept., 2017); *Wells Fargo Bank, N.A. v. Trupia*, 150 AD3d 1049, 55 NYS3d 134 (2nd Dept., 2017)). Once either method is established a presumption of receipt arises (*Viviane Ettienne Medical Care, P.C. v. Country-Wide Insurance Company, supra.*; *Flagstar Bank v. Mendoza*, 139 AD3d 898, 32 NYS3d 278 (2nd Dept., 2016)).

In this case a significant question of fact exists concerning plaintiff's service of the 90-day notices required pursuant to RPAPL 1304. While plaintiff has submitted an affidavit from the plaintiff's (Wells Fargo's) vice president of loan documentation in which the testator verifies that he has "received training on, and has knowledge of how, Wells Fargo drafts, generates, triggers, sends and stores letters in the servicing process" – the documentary proof submitted by the mortgage lender fails to provide sufficient proof of mailing of the 90-day notices. Plaintiff has failed to submit copies of the certified mailing labels and/or a copy of the actual 90-day notice containing the twenty digit (+) article tracking number of the certified mailings and has failed to submit copies of actual business records reflecting the mailing together with a copy of the RPAPL 1306 filing statement confirming the mailing with the (then) State Banking Department. Based upon these circumstances the plaintiff has failed to demonstrate its entitlement to summary judgment with respect to the issue of compliance with RPAPL 1304 proof of mailing requirements (*see HSBC Bank USA, N.A. v. Ozcan, supra.*) and a significant issue of fact remains concerning the notice requirement. As to defendant's cross motion seeking dismissal based upon this issue, no legal grounds exist to dismiss the complaint based upon plaintiff's failure to prove service, particularly in view of the fact that this defendant has not even submitted an affidavit denying such service (*Citibank, N.A. v. Conti-Scheurer*, 172 AD3d 17, 98 NYS3d 273 (2nd Dept., 2019)).

Finally, defendant has failed to raise any admissible evidence to support her remaining affirmative defenses asserted in her answer in opposition to plaintiff's motion. Accordingly those affirmative defenses must be deemed abandoned and are 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. Bellafigliore*, 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 seeking dismissal of plaintiff's complaint is denied. Plaintiff's motion seeking summary judgment is granted solely to the extent indicated hereinabove. A conference shall be held on September 11, 2019. .

Dated: August 21, 2019

HON. HOWARD H. HECKMAN, JR.

J.S.C.