

U.S. Bank, N.A. v Ostrove

2019 NY Slip Op 32585(U)

August 20, 2019

Supreme Court, Suffolk County

Docket Number: 23736-2013

Judge: Robert F. Quinlan

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COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT F. QUINLAN
Justice of the Supreme Court

MOTION DATE: 04/07/16
ADJ DATES: 05/23/16; 10/28/16; 01/09/17;
03/08/17; 03/29/17
SUBMIT DATE: 05/17/17
Mot. Seq.: #001-MotD

-----X
U.S. BANK, N.A. AS LEGAL TITLE TRUSTEE FOR
TRUMAN 2012 SC2 TITLE TRUST,

Plaintiff,

- against -

DAVID OSTROVE, TERESE OSTROVE, BANK OF
AMERICA, N.A., WELLS FARGO BANK, N.A., and
"JOHN DOE" #1-10 and "JANE DOES" 1-10, #12", the
last names being fictitious and unknown to plaintiff the
person and parties intended being tenants, occupants,
persons or corporations, if any, having or claiming an
interest in or lien upon the premises, described in the
complaint,

Defendants.
-----X

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ORDERED that this motion by plaintiff U.S. Bank, N.A. as Legal Title Trustee for Truman 2012 SC2 Title Trust for an order striking the answer and affirmative defenses of the defendants David Ostrove and Terese Ostrove, awarding it summary judgment, appointing a referee to compute pursuant to RPAPL § 1321, granting default judgment against the non-appearing and non-answering defendants, and amending the caption, is granted in part and denied in part as set forth below; and it is further

ORDERED that plaintiff is granted partial summary judgment pursuant to CPLR 3212 (e) as to defendants Davis Ostrove and Terese Ostrove, dismissing the 1st through 4th, and 6th through 9th affirmative defenses and all of the counterclaims raised in their answer; and it is further

ORDERED that defendants David Ostrove and Terese Ostrove's 5th affirmative defense raising plaintiff's failure to comply with the notice requirements of RPAPL § 1304 is not dismissed, nor is their answer, and that the court sets the action down for trial, pursuant to CPLR § 2218, which shall be limited to the proof of that issue; and it is further

ORDERED that plaintiff's application to amend the caption to sever and remove defendants "JOHN DOES" and "JANE DOES" is granted; and it is further

ORDERED that the caption shall now appear as follows:

-----X
U.S. BANK, N.A. AS LEGAL TITLE TRUSTEE
FOR TRUMAN 2012 SC2 TITLE TRUST,

Plaintiff,

- against -

DAVID OSTROVE, TERESE OSTROVE,
BANK OF AMERICA, N.A., WELLS FARGO
BANK, N.A.

Defendants.
-----X

and it is further

ORDERED that plaintiff is to serve a copy of this order upon the calendar clerk of this part within thirty (30) days of this order, and all further proceedings are to be under the amended caption; and it is further

ORDERED that the default of the non-appearing and non-answering defendant is fixed and set; and it is further

ORDERED that plaintiff's application to appoint a referee pursuant to RPAPL§ 1321 is denied and its proposed order submitted with this motion is marked "Not Signed"; and it is further

ORDERED that to facilitate the trial the court directs discovery on the limited issues set by this order; and that all discovery demands shall be served within 30 days of the date of this order, and all discovery is to be completed within 120 days of the date of this order; and it is further

ORDERED that a certification conference is scheduled for **Monday, December 16, 2019 at 9:30 AM** in Part 27 at which time the court will direct the filing of a note of issue and schedule a pre-trial conference to determine a trial date; and it is further

ORDERED that upon completion of discovery and filing of the note of issue the court grants the parties the right to file successive motions for summary judgment on the remaining issue, but in no case will such a summary judgment motion be entertained more than 45 days after the filing of the note of issue.

This is an action to foreclose a mortgage on residential real property known as 329 Arcadia Street, West Islip, Suffolk County, New York ("the property") given by defendants David Ostrove and Terese Ostrove ("defendants") to Wells Fargo Bank, N. A. ("Wells"), the predecessor in interest to plaintiff U.S. Bank, N.A. as Legal Title Trustee for Truman 2012 SC2 Title Trust ("plaintiff"). Defendants gave a mortgage to Wells on March 23, 2007 to secure a note defendants executed to Wells of the same date in the amount of \$720,000.00. The mortgage was filed with the Suffolk County Clerk ("Clerk") on May 17, 2007. Subsequently, on April 1, 2008, defendants and Wells allegedly entered into a Security Instrument Modification Agreement and a Promissory Note Modification Agreement relating to the transaction of March 23, 2007, which indicated that the principal balance on the loan secured by the mortgage of March 23, 2007 was reduced to \$640,000.00. Perhaps by serendipity, the attorney from defendants' counsels' office representing defendants in this action, appeared as counsel for a "funding bank," Central Mortgage Bancorp ("Central"), representing Wells' interest at the closing of the agreements on April 1, 2008 ("the closing"). Subsequently, on or about August 1, 2009, defendants defaulted on their obligation to make payment under the

financial agreements. On December 5, 2012, Wells executed an assignment of the mortgage of March 23, 2007 to plaintiff, which was filed with the Clerk on February 1, 2013. Plaintiff commenced this action by filing a summons, complaint and notice of pendency with the Clerk on September 4, 2013, and a supplemental summons, and amended complaint, along with a certificate of merit, were filed with the Clerk on October 3, 2013. Defendants filed a verified answer dated November 13, 2013 which consisted of general denials and contained nine affirmative defenses and four counterclaims. The other defendant did not answer and is in default.

The court's computer records show that four settlement conferences were held before the court's dedicated Foreclosure Settlement Conference Part between May 7, 2014 and November, 24, 2014, when the action was released to an IAS Part as no settlement had been reached. Compliance with the requirements of CPLR 3408 has been had.

Plaintiff then moved for an order granting summary judgment against defendants, striking their answer, affirmative defenses and counterclaims, amending the caption, fixing the default as against the non-appearing defendant and for an order of reference appointing a referee to compute pursuant to RPAPL § 1321. Defendants opposed the motion, submitting an affidavit of defendant David Ostrove, affirmations of counsel and supporting exhibits. The action, and motion, was originally assigned to Acting Supreme Court Justice Andrew Tarantino, but by AO # 58-16 of District Administrative Judge C. Randall Hinrichs, dated October 18, 2016, it was transferred to this part. On January 9, 2017, the motion appeared before this court for oral argument, after which the court directed counsel for both parties to submit memorandum of law on certain issues raised by their submission and arguments. On May 17, 2017 counsel for both parties, having made their submissions, appeared before the court and further oral argument was had.

In determining this motion, the court has considered plaintiff's motion, affirmations of counsel, an affidavit of a representative of Rushmore Loan Services, LLC ("Rushmore") attorney-in-fact and servicer for plaintiff, and attached exhibits; an affirmation from an attorney from defendants' counsel's law firm, as well as an affirmation from Pankaj Malik, Esq. ("Ms. Malik") also an attorney with defendants' counsel's law firm, who affirms that she acted as counsel for Central representing Wells' interest at the closing, an affidavit of defendant David Ostrove and attached exhibits; and an affirmation in reply from plaintiff's counsel and attached exhibits. Additionally, the court has also considered the comments of counsel for both parties at the oral argument of January 9, 2017, the submissions of both counsel of the memorandums of law requested by the court and the arguments of counsel at the further oral argument of May 17, 2017. As indicated in its directives to both counsel in submission of the memorandums of law and at the oral argument of May 17, 2017, the court has not considered new evidence or arguments of counsel made for the first time in the memorandum or at the second oral argument.

SUMMARY JUDGMENT

Summary judgment requires the movant to provide affirmative evidence in evidentiary form to establish as a matter of law entitlement to that relief (*see Winegrad v. New York University Medical Center*, 64 NY2d 851 [1985]; *Gilbert Frank Corp. v. Federal Insurance*, 70 NY2d 966 [1988]; *Torres v. Industrial Container*, 305 AD2d 136 [1st Dept 2003]). Failure to do so requires the denial of the motion regardless of the sufficiency of the opposition (*see William J. Jenack Estate Appraiser and Auctioneers v. Rabizadeh*, 22 NY3d 470 [2013]; *Jacobsen v. New York City Health & Hospital Corp.*, 22 NY3d 824 [2014]). It has long been recognized as a general principle of summary judgment that a moving party, as well as an opponent, is required to assemble and lay bare all its proof in support, or opposition, of the motion (*see Maurice O'Meara Co. v. National Park Bank of New York*, 239 NY 386 [1925]; *Dodwell & Co. Inc. v. Silverman*, 234 AD 362 [1st Dept 1932]; *M&S Mercury Air Conditioning Corp. v. Rodolitz*, 24 AD2d 873 [2d Dept 1965]). Failure to do so is done at the party's risk, as movant bears the heavy burden of establishing a prima facie showing of entitlement to judgment as a matter of law, providing sufficient evidentiary proof in admissible to demonstrate the absence of any material issue of fact (*see Deleon v. New York City Sanitation Dept.*, 25 NY3d 1102 [2015]). An opponent of summary judgment has to produce evidentiary proof in admissible

form sufficient to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action (*see Zuckerman v. City of New York*, 49 NY2d 557 [1980]; *Winegrad v New York Univ. Med. Ctr., supra*). In deciding the motion the court is to determine whether there are bonafide issues of fact and generally is not to delve into or resolve issues of credibility (*see Vega v Restani Corp.*, 18 NY3d 499 [2012]), unless it clearly appears that the issues are not genuine, but feigned (*see Curry v MacKenzie*, 239 NY 267 [1925]; *Glick & Dolleck, Inc. v Tri Pack Export Co.*, 22 NY2d 439 [1968]; *6243 Jericho Realty Corp. v AutoZone, Inc.*, 27 AD3d 447 [2d Dept 2006]; *Pryor & Mandelup, LLP v Sabbeth*, 82 AD3d 731[2d Dept 2011]).

Entitlement to summary judgment in favor of a foreclosing plaintiff is established, prima facie, by plaintiff's production of the mortgage, the unpaid note, and evidence of default in payment (*see Wells Fargo Bank, N.A. v DeSouza*, 126 AD3d 965 [2d Dept 2015]; *Wells Fargo, NA v Erobo*, 127 AD3d 1176 [2d Dept 2015]; *Wells Fargo Bank, NA v Morgan*, 139 AD3d 1046 [2d Dept 2016]). If established by proof submitted in evidentiary form, plaintiff has demonstrated its entitlement to summary judgment (CPLR 3212; RPAPL § 1321; *see Federal Home Loan Mtge. Corp. v Karastathis*, 237 AD2d 558 [2d Dept 1997]). The burden then shifts to defendants to demonstrate the existence of a triable issue of fact as to a bona fide defense (*see Capstone Bus. Credit, LLC v Imperia Family Realty, LLC*, 70 AD3d 882 [2d Dept 2010], *Zanfina v Chandler*, 79 AD3d 1031 [2d Dept 2010]; *Citibank, NA v Van Brunt Properties, LCC*, 95 AD3d 1158 [2d Dept 2012]). Defendants must then produce evidentiary proof in admissible form sufficient to demonstrate the existence of a triable issue of fact (*see Washington Mut. Bank v Valencia*, 92 AD3d 774 [2d Dept 2012]).

1ST, 6TH, 7TH AND 8TH AFFIRMATIVE DEFENSES AND ALL COUNTERCLAIMS DISMISSED

In opposition to plaintiff's motion, defendants' submissions do not support their 8th affirmative defense nor any of their four affirmative defenses and they are accordingly dismissed, (*see Kuehne & Nagel Inc. v Baiden*, 36 NY2d 539 [1975]; *Wells Fargo Bank Minn. Natl. Assoc. v Perez*, 41 AD3d 590 [2d Dept 2007]; *Wells Fargo Bank, N.A. v Thomas*, 150 AD3d 1312 [2d Dept 2017]; *JPMorgan Chase Bank, N.A. v Cao*, 160 AD3d 821 [2d Dept 2018]; *U.S. Bank, N.A. v Gonzalez*, 172 AD3d 1273 [2d Dept 2019]).

Defendants' 1st affirmative defense (lack of service) and 6th affirmative defense (failure to serve RPAPL § 1303 notice) are dismissed. Once defendants file an answer which raises as an affirmative defense a claim of improper service, they are required to move to dismiss on that ground within sixty (60) days of the filing or their claim is waived (CPLR 3211 [e]; *see Generation Mtge. C. v Medina*, 138 AD3d 688 [2d Dept 2016]; *Wells Fargo Bank, N.A. v Cajas*, 159 AD3d 997 [2d Dept 2018]; *U.S. Bank N.A. v Roque*, 172 AD3d 948 [2d Dept 2019]). Just as with service of a summons and complaint, a defendant's bare and unsubstantiated denial of receipt of the RPAPL § 1303 notice is insufficient to rebut the presumption of service created by the affidavit of service which was provided to the court, as here (*see Deutsche Bank Natl. Trust Co. v Hussain*, 78 AD3d 989 [2d Dept 2010]; *U. S. Bank Natl. v Tate*, 102 AD3d 859 [2d Dept 2013]; *Nationstar Mtg., LLC v Kamil*, 155 AD3d 966 [2d Dept 2017]; *U.S. Bank, N.A. v Sims*, 162 AD3d 825 [2d Dept 2018]; *U.S. Bank, N.A. v Ahmed*, _AD3d_, 2019 NY Slip Op 05577 [2d Dept 2019]).

As indicated above, as compliance with CPLR 3408 was made through the series of four settlement conferences, defendants' 7th affirmative defense is dismissed.

STANDING AND COMPLIANCE WITH RPAPL § 1304 MUST BE PROVEN

Defendants' 2nd through 4th affirmative defenses, and to the extent that their 9th affirmative defense claims the mortgage and note of 2007 were "satisfied," all raise claims that plaintiff lacks standing to prosecute the action, and their 5th affirmative defense raises the claim that they were never "served" with the notices required by RPAPL § 1304. Where plaintiff's standing has been placed in issue by defendant's answer, plaintiff also must establish its

standing as part of its prima facie showing (see *Aurora Loan Servs., LLC v. Taylor*, 25 NY3d 355 [2015]; *Green Tree Servicing, LLC v Vialiti*, 160 AD3d 816 [2d Dept 2018]; *Wells Fargo Bank, N.A. v Inigo*, 164 AD3d 545 [2d Dept 2018]; *Bank of America, N.A. v Cudjoe*, 157 AD3d 653 [2d Dept 2018]). In addition, where defendants have properly asserted non-compliance with the notice requirements of RPAPL § 1304 as a defense, plaintiff must adduce due proof that the pre-action foreclosure 90 day notice requirements have been satisfied (see *Bank of New York v. Aquino*, 131 AD3d 1186 [2d Dept 2015]; *Zarabi v. Movahedian*, 136 AD3d 895 [2d Dept 2016]; *M&T Bank v Joseph*, 152 AD3d 579 [2d Dept 2017]; *Deutsche Bank Natl. Trust Co. v Starr*, 173 AD3d 836 [2d Dept 2019]).

MAILING OF RPAPL § 1304 NOTICES NOT ESTABLISHED .

In support of its motion, plaintiff submits an affidavit of an employee of its attorney-in-fact and servicer Rushmore. The affiant shows her review of the business records of Rushmore kept in relation to the loan and establishes her ability to testify as to those records pursuant to CPLR 4518. Although her affidavit attempts to set out the practices and procedures used by Rushmore to mail the RPAPL § 1304 notices by both first class regular mail and certified mail to defendants, the affidavit fails to fully spell out those procedures and fails to provide copies of the records that she reviewed to substantiate the procedures and the mailings. Unsubstantiated and conclusory statements in the affidavits of plaintiff's representatives, along with dated copies of the notices, are insufficient to prove that the notices required by RPAPL § 1304 were properly mailed (see *US Bank, N.A. v Cope*, 167 AD3d 965 [2d Dept 2018]; *Wells Fargo Bank, N.A. v Sakizada*, 168 AD3d 789 [2d Dept 2019]). To establish mailing, plaintiff may provide proof of actual mailing or a description of its office's practice and procedure for mailing (see *New York & Presbyt. Hosp. v Allstate Ins. Co.* 29 AD3d 547 [2d Dept 2006]; *Citimortgage Inc. v Banks* 155 AD3d 936 [2d Dept 2017]; *Wells Fargo Bank, N.A. v Taylor*, 170 AD3d 921 [2d Dept 2019]). Due proof of the mailing of the RPAPL § 1304 notices is established by submission of an affidavit of service (see *Emigrant Mortgage Co., Inc. v Persad*, 117 AD3d 676 [2d Dept 2014]; *Investors Savings Bank v Salas*, 152 AD3d 752 [2d Dept 2017]), an affidavit of mailing (see *JPMorgan Chase Bank, NA v Schott*, 130 AD3d 875 [2d Dept 2015]), or through business records that detail a standard of office practice or procedure designed to ensure that items are properly addressed and mailed (see *Vivane Etienne Med. Care, P.C. v Country Wide Ins. Co.*, 25 NY3d 498 [2015]; *Residential Holding Corp. v Scottsdale Ins. Co.*, 286 AD2d 679 [2d Dept 2001]); *Bank of New York Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]; *U.S. Bank, N.A. v Ahmed*, _AD3d_, 2019 NY Slip Op 05577 [2d Dept 2019]).

Where, as here, the affiant established her ability to testify to the business records of the mailing entity which claim to prove the mailings required by RPAPL § 1304, and even established her familiarity with office practices and procedures for mailing, but failed to submit copies of the records she was relying upon, her affidavit is insufficient to prove the mailings required by RPAPL § 1304 (see *Bank of New York Mellon v Gordon*, *supra*; *Citimortgage v Osorio*, _AD3d_, 2019 NY Slip Op 05383 [2d Dept 2019]).

Accordingly, plaintiff's submission is insufficient to grant summary judgment dismissing defendants 5th affirmative defense, and prevents the granting of full summary judgment.

DEFENDANTS FAIL TO RAISE A QUESTION OF FACT AS TO STANDING

The question of plaintiff's standing to bring the action, at least according to defendants, is intertwined with defendants' unique argument that as a result of the closing, the note and mortgage of March 23, 2007 were "satisfied," and that although defendants and their counsel appear to agree that a "new note and mortgage" were executed that day to Wells, allegedly funded by Central, the new mortgage was never filed with the Clerk, and therefore, defendants argue, there is no mortgage on the property to foreclose. Despite this, in her arguments to the court at oral argument, Ms. Malik acknowledged there is a debt owed pursuant to the "new" note, which plaintiff can move to enforce. These arguments are supported by a very general oral statement in the affidavit of defendant David Ostrove, claiming that the March 23, 2007 "loan" of \$720,000.00 ("the original loan") "was paid in full as evidenced

by the HUD1 statement and closing documents.” The affirmation submitted on the motion by Ms. Malik is to the same general effect. Defendant David Ostrove does go on to aver that he “defaulted on the 2008 loan in or about September 2009.” Both Mr. Ostrove’s affidavit and Ms. Malik’s affirmation submitted on the motion, as well as her statements at oral arguments and in her memorandum submitted after oral argument, acknowledge that at the closing Ms. Malik represented the “funding entity,” Central, who was allegedly funding the loan on behalf of Wells. At the time of the closing, Ms. Malik was in her own practice and not a member of the law firm presently representing defendants.

None of these assertions made by defendant David Ostrove or Ms. Malik are supported by evidentiary proof in admissible form. The only “evidence” submitted to support their statements are blank copies of the HUD1 form which appear to relate to an \$80,000.00 Home Equity Loan Conversion (“HELOC”), rather than a “new” mortgage” of \$640,000.00, and other documents relating to it. None of these documents contain signatures or notarizations. Even if signed, these documents do not raise a question of fact, let alone establish that the original loan was paid in full on April 1, 2008.

Ms. Malik explained in the first oral argument, that although she was representing the funding entity at the closing, she was not responsible for filing the “new” mortgage that resulted therefrom, that was a responsibility of the title company. She was not positive of the name of the title company, but does know that it went out of business and that any records it had are now unavailable. She also represented at oral argument that the funding entity, Central, also went out of business, and their records are not available. Further, she stated that all of her records of the closing were destroyed six or seven years after it, which was her normal business practice, so she had no available records of any of this. It seems what documents that were produced on behalf of defendants came from defendants personal records.

Even if they had been in evidentiary admissible form, these documents and the statements of defendant David Ostrove and Ms. Malik are insufficient. These documents, and the statements of Ms. Malik, are contradictory at various points. Although the court need not determine credibility at this point, the contradictions raise questions of proof and relevancy relating to defendants’ proof on this motion. Not all of the documents included in defendants’ Exhibit “C” submitted in opposition appear to be the type of documents sent to a borrower such as defendants. The documents entitled “Wells Fargo Letter for Banker, HMC or Broker,” “Notary Instructions,” and “Closing/Escrow Instructions” appear to be directed to agents of the lender, not borrowers, raising an issue as to where they came from when Ms. Malik has no records, and both the title company and Central are defunct. This makes their admissibility questionable at best.

On the page 3 of the “Closing/Escrow Instructions,” Ms. Malik’s then law firm is listed as “Title/Escrow Company or Attorney,” and the HUD1 document makes no reference to a title company and the only fee recorded under line 1100 entitled “Title Charges” is \$250.00 to Ms. Malik’s past firm; there is no mention anywhere of a fee to a title company for services or recording. Additionally, the entries at the bottom of the last page of the HUD1 indicate a loan in the amount of \$80,000.00. All this fails to support the admissibility of the statements made about the unidentified, now defunct, title company and Central, as well as the claims that the mortgage and note of March 23, 2007 were “satisfied.”

Further, at oral argument Ms. Malik stated that although she did not represent defendants at the closing, at that time she knew defendant David Ostrove, as he was her accountant. At oral argument, the court made reference to the fact that it sometimes occurs that an attorney on the other side of an issue with a person is later retained by that person for similar services. But, as noted by plaintiff’s counsel at oral argument, if Ms. Malik and her present firm were retained to file the answer in late 2013, that would have been before the six or seven years standard of time after which Ms. Malik said she would have destroyed her file relating to the closing of April 2008.

Additionally, although defendants and Ms. Malik claim that the closing satisfied the original mortgage, there is no claim that a satisfaction was prepared by Ms. Malik as “closing” attorney representing the interests of Wells, or it’s now defunct funding bank, and given to the now defunct title company to file with the Clerk. No one has presented proof of any such document, nor are there claims that it was executed, or that it was to have been filed with the Clerk.

In reply papers plaintiff did present an un-executed copy of the “new mortgage” indicating the amount secured was now \$640,000.00. Presentation of this document in reply was an untimely submission and defendants have not agreed that it was the document they signed and which was not filed. As this document was not signed or filed, and the plaintiff has made no application to the court for it to be substituted as a “lost mortgage,” it has no real status as an effective mortgage. Any argument by plaintiff’s counsel that as defendants acknowledge they signed a “new,” unrecorded mortgage it is therefore effective is without merit. Plaintiff is correct that defendants’ counsel is in error when arguing that a mortgage must be recorded to be enforceable. The purpose of filing the mortgage is both to protect the interest of the mortgagee, and to provide a potential purchaser with notice of the mortgage on the title to the property. The filing is not for the benefit of the mortgagors, who would be bound by a written and signed security agreement, whether it is filed or not. This principle has been long recognized (*see Mutual Life Insurance Co. Of New York v Nicholas*, 144 AD 95 [1st Dept 1911]; *Commonwealth Land Title Insurance Co. v Lituchy*, 161 AD2d 517 [1st Dept 1990]), although Tax Law § 258 appears to require that the mortgage tax be paid before the courts can be used to foreclose such an unrecorded mortgage (*see Commonwealth Land Title Insurance Co. v Lituchy, supra; Bank of New York Mellon v Samuels*, 55 Misc.3d 704 [Sup. Ct., Orange County 2017]).

Defendants’ submissions have failed to raise a trial issue of fact as to plaintiff’s standing through evidence in admissible form.

STANDING OF PLAINTIFF ESTABLISHED

In support of its motion, plaintiff has submitted proof of the note and mortgage of March 23, 2007 to Wells by defendants, which mortgage was filed with the Clerk. It also produced copies of the Security Interest Modification Agreement, a copy of the Initial Interest Adjustable Rate Note Rider, and the Promissory Note Modification Agreement all signed by defendants on April 1, 2008. Both modification agreements state under “Recitals” paragraphs “A” that the Lender Wells, is owner of a mortgage dated March 23, 2007 encumbering the property and securing the note of the same date, and in both modification agreements, paragraphs “B,” “3” state that nothing in those documents invalidates or impairs that note and mortgage, and that as except as modified by these agreements, they remain in full force and effect. Not only do these executed documents refute the claim of defendants of a “satisfaction” of the original mortgage and note,” but they establish the continued vitality of the original note and mortgage of March 23, 2007.

As the above documents are presented through the affidavit of the employee of Rushmore, it could be claimed that these documents submitted by plaintiff are inadmissible hearsay, as the affiant has not established her familiarity with Wells record keeping practices to establish their admissibility and thereby plaintiff’s standing (*see Aurora Loan Servs., LLC v Bartiz*, 144 AD3d 618 [2d Dept 2016]; *Aurora Loan Servs v. Komarovsky*, 151 AD3d 924 [2d Dept 2017]; *Nationstar HECM Acquisition Trust 2015-2 v Andrews*, 167 AD3d 1025 [2d Dept 2018]); nor does she explain that these documents have been made part of Rushmore’s records through a thorough review and “boarding process (*see Bank of New York Mellon v Gordon*, 171 AD3d at 207); but defendants do not make such an argument, focusing instead on their arguments above. As pointed out by the Second Department in *Bank of New York Mellon v Gordon*, 171 AD3d at 202, “as a general matter, a court should not examine the admissibility of evidence submitted in support of a motion for summary judgment unless the nonmoving party has specifically raised that issue in its opposition to the motion [*Rosenblatt v. St. George Health & Racquetball Assoc., LLC*, 119 A.D.3d at 55, 984 N.Y.S.2d 401] for “[w]e are not in the business of blindsiding litigants, who expect us to decide their appeals on

rationales advanced by the parties, not arguments their adversaries never made' [*Misicki v. Caradonna*, 12 N.Y.3d 511, 519, 882 N.Y.S.2d 375, 909 N.E.2d 1213]. Indeed 'in civil cases, 'inadmissible hearsay admitted without objection may be considered and given such probative value as, under the circumstances, it may possess'." Following this rationale, as defendant has not objected to the Rushmore affidavit and these documents as hearsay, the court will consider them as part of plaintiff's proof of its standing.

Plaintiff establishes its standing by demonstrating that, when the action was commenced, it was either the holder or assignee of the underlying note (*see Aurora Loan Servs., LLC v Taylor, supra; Wells Fargo Bank, NA v Rooney*, 132 AD3d 980 [2d Dept 2015]). A written assignment or physical delivery prior to the commencement of the action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident thereto (*see U.S. Bank, NA v Collymore*, 68 AD3d 752 [2d Dept 2009]; *Bank of N.Y. Mellon v Gales*, 116 AD3d 723 [2d Dept 2014]; *Bank of New York Mellon v Lopes*, 158 AD3d 662 [2d Dept 2018]).

The Rushmore affiant establishes plaintiff's possession of the note of March 23, 2006 by Wells prior to the commencement of the action, bearing an undated indorsement in blank by Wells on the execution page, thus establishing plaintiff's standing. There is no requirement that an entity in possession of a negotiable instrument that has been endorsed in blank establish how it came into possession of the instrument in order to be able to enforce it (UCC 3-204[2]), nor is it necessary to give factual details of the delivery in order to establish possession prior to a particular date (*see JPMorgan Chase Bank, NA v Weinberger*, 142 AD3d 643 [2d Dept 2016] quoting from *Aurora Loan Servs., LLC v Taylor*, 25 NY 3d at 362; *US Bank N.A. v Coppola*, 156 AD3d 934 [2d Dept 2017]; *Deutsche Bank Natl. Trust Co. v Cardona*, 172 AD3d 1313 [2d Dept 2019]); *Nationstar Mortgage, LLC v Danzig*, 173 AD3d 883 [2d Dept 2019]).

The court notes that plaintiff's that an assignment of the mortgage by Wells to it which is not tainted by the involvement of Mortgage Electronic Registration Systems ("MERS") established its standing is insufficient. Although an assignment of the mortgage which includes language also assigning the note, or the obligation thereunder, is sufficient to establish standing of the assignee (*see Emigrant Bank v Larizza*, 129 AD3d 904 [2d Dept 2015]; *U. S. Bank N.A. v Akande*, 136 AD3d 887 [2d Dept 2016]; *Wells Fargo Bank. N. A. v Archibald*, 150 AD3d 937 [2d Dept 2017]), the court has reviewed the assignment here and there is no language within the mortgage assignment which can be read to also transfer the note.

Additionally, as to defendants' default in payments required pursuant to the note and mortgage, not only does the affidavit of the employee of Rushmore establish defendants default in payment, but such default is acknowledged by defendant David Ostrove in his affidavit. Therefore, plaintiff has established the basic requirements for summary judgment in a foreclosure action; the note, the mortgage and the default in payment, in addition to its standing to prosecute the action.

As the court finds that plaintiff has established its standing, and that there is no merit to defendants claim that the balance of the note was fully paid, defendants' 2nd, 3rd, 4th and 9th affirmative defenses are dismissed.

DISCOVERY ON LIMITED ISSUE

As there remains the outstanding issue of plaintiff's proof of compliance with the mailing of the notices required by RPAPL § 1304 which are set for limited issue trial, the court authorizes a 120 day period of discovery which is limited to that issue, and directs that the parties serve any discovery demands relating to that issue within 30 days of the date of this order. The court sets a certification conference for **Monday, December 16, 2019 at 9:30 AM** in Part 27 at which time the court will direct the filing of a note of issue and schedule a pre-trial conference to determine a trial date.

SUCCESSIVE SUMMARY JUDGMENT MOTIONS ON LIMITED ISSUE

Although multiple summary judgment motions are discouraged without a showing of newly discovered evidence, or other sufficient cause, a court may properly entertain a subsequent summary judgment motion when it is substantively valid and when granting the motion will further the ends of justice while eliminating an unnecessary burden on court resources (*see Detko v McDonald's Restaurants of New York, Inc.*, 198 AD2d 208 [2d Dept 1993]; *Valley National Bank v INI Holding, LLC*, 95 AD3d 1108 [2d Dept 2012]; *Graham v City of New York*, 136 AD3d 754 [2d Dept 2016]; *Kolel Damsek Eliezer, Inc. v Schlesinger*, 139 AD3d 810 [2d Dept 2016]). Such a motion is clearly appropriate where the court has already granted a party partial summary judgment and limited the issues to a few, or where such a motion would correct a simple defect, eliminating the burden on judicial resources which would otherwise require a trial (*see Rose v Horton Med. Ctr.*, 29 AD3d 977 [2d Dept 2006]; *Landmark Capital Investments, Inc. v Li-Shan Wang*, 94 AD3d 418 [1st Dept 2012]). The denial of a subsequent summary judgment motion which could be dispositive for the sole reason of the prohibition against second summary judgment motions has been held to be an improvident exercise of the court's discretion (*see Burbige v Siben & Ferber*, 152 AD3d 641 [2d Dept 2017]).

Upon the completion of discovery and filing of the note of issue the court grants the parties the right to file successive motions for summary judgment on the remaining issue, but in no case will such a summary judgment motion be entertained more than 45 days after the filing of the note of issue.

COUNSEL NOT DISQUALIFIED

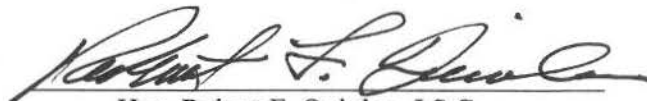
The court recognizes the unique circumstances presented by Ms. Malik's representation and evidence she provides in this case. Her affirmation in opposition to plaintiff's motion provided direct evidence as to a material fact that her clients wished to place in issue. Generally, where it is clear that an attorney representing a party is offering necessary testimony on behalf of her clients and ought to be called as a witness on their behalf, she should be disqualified from appearing on their behalf, and any doubts should be resolved in favor of disqualifying the lawyer (22 NYCRR § 1200.00 Rule 3.7 (a); *see People v. Paperno*, 54 NY2d 294 [1981]; *Matter of Benincasa v Garrubo*, 141 AD2d 636 [2d Dept 1988]; *108th St. Owners Corp. V. Overseas Commodities, Ltd.*, 238 AD2d 324 [2d Dept 1997]). In defendants' original submissions in opposition to the motion, another attorney from the firm presented the general arguments in opposition with Ms. Malik's affirmation being submitted as evidence, and as such would appear to comply with the general proposition that even if one lawyer from a firm may be disqualified as being a witness, another member of the firm may still represent the client (*see N.Y. Kids Club 125 5th Avenue, LLC v Three Kings, LLC*, 133 AD3d 580 [2d Dept 2015]; *Advanced Chimney, Inc. v Graziano*, 153 AD3d 478 [2d Dept 2017]).

But in the oral argument of January 9, 2017, the submission of defendants' memorandum of law and the oral argument of May 17, 2017, Ms. Malik actively represented her clients, even though she continued to act as a fact witness for their claims. When queried about this on January 7, 2017, plaintiff's counsel had no objection, and although the court asked this to be one of the issues briefed in the post argument memorandum of law, the parties did not address this. Again at the oral argument of May 17, 2017 plaintiff acquiesced to Ms. Malik's status as both counsel on the action and a factual witness. The court will not speculate as to plaintiff's reason for not objecting, but as the court does not act as a trier of fact in determining a summary judgment motion, credibility is not at issue (*see Vega v Restani Corp.*, *supra*) unless it clearly appears that the issues are not genuine, but feigned (*see Curry v MacKenzie*, *supra*; *Glick & Dolleck, Inc. v Tri Pack Export Co.*, *supra*; *6243 Jericho Realty Corp. v AutoZone, Inc.*, *supra*; *Pryor & Mandelup, LLP v Sabbeth*, *supra*; *Sullivan v Pilevsky*, 281 AD2d 410 [2d Dept 2001]; *Rodriguez v City of New York*, 295 AD2d 590 [2d Dept 2002]; *Dorazio v Delbene*, 37 AD3d 645 [2d Dept 2007]; *Carthen v Sherman*, 169 AD3d 416 [1st Dept 2019]).

The court sees no reason to *sua sponte* disqualify Ms. Malik at this point of the proceeding and direct another attorney from the defendants' counsel's firm to be substituted. If the issues raised by Ms. Malik's factual claims had been set for trial by this decision, despite any failure of plaintiff to object, the court would have exercised its obligation to *sua sponte* disqualify Ms. Malik from representing defendants at such trial (*see Disla v City of New York*, 142 AD3d 826 [2d Dept 2016]), and directed that another attorney from the firm appear to represent defendants as trial counsel. But as the limited issue trial here only concerns plaintiff's proof of mailing of the notices required by RPAPL§ 1304, something that does not involve Ms. Malik as a fact witness, she is not disqualified from her representation of defendants.

This constitutes the Order and decision of the Court.

Dated: August 20, 2019



Hon. Robert F. Quinlan, J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION