

Wells Fargo Bank , N.A. v Bajnauth
2019 NY Slip Op 32962(U)
September 19, 2019
Supreme Court, Queens County
Docket Number: 703672/2013
Judge: Mojgan C. Lancman
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

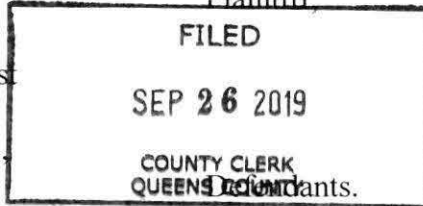
PRESENT: HONORABLE MOJGAN C. LANCMAN IAS Part 5

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WELLS FARGO BANK, N.A.,

Index No.: 703672/2013

Plaintiff



Motion Seq. No.: 4

-against-

Motion Date: 7.1.19

JOAN P. BAJNAUTH, et al.

Defendants.

Motion Cal. No.: 26

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The following papers numbered 1 to 10 read on: (1) the motion of the defendant Joan P. Bajnauth ("Bajnauth") for an Order granting summary judgment, dismissing the complaint; and (2) the plaintiff's cross-motion for an Order granting summary judgment in its favor against Bajnauth.

Notice of Motion – Affirmation in Support – Exhibits 1-3
 Notice of Cross-Motion – Affirmation – Exhibits 4-5
 Reply Affirmation in Support of Motion and in Opposition to Cross-Motion – Exhibits 6-7
 Affirmation in Further Support of Cross-Motion – Exhibits 8-9
 Supplemental Affirmation in Support of Motion and in Opposition to Cross-Motion 10

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided as follows:

This is an action to foreclose a mortgage encumbering the real property located at 18112 Dalny Road a/k/a 181-12 Dalny Road, Jamaica, New York 11432 (the "Property").

Presently before the Court is Bajnauth's motion for summary judgment, which the plaintiff opposes. The plaintiff also cross-moves for summary judgment, which is opposed by Bajnauth.

Pursuant to this Court's Order, dated December 18, 2018 and entered on January 3, 2019 (the "Prior Order"), the plaintiff's motion for summary judgment was denied because its submissions did not establish compliance with the notice requirement of RPAPL § 1304. All other defenses asserted in Bajnauth's answer were stricken.

Bajnauth now moves for summary judgment, contending that the plaintiff failed to comply with RPAPL § 1304. The plaintiff takes a diametrically opposed position, contending that it is entitled to summary judgment because its present submissions establish compliance with the subject statutory provision. Each application is considered and ruled upon separately below.

Bajnauth's Summary Judgment Motion

Bajnauth contends that she is entitled to summary judgment because the plaintiff failed to comply with RPAPL § 1304. Here, Bajnauth avers in her affidavit that: “[p]laintiff failed to send me the 90 day notice as required by RPAPL § 1304, as I never received such notice at any time.”

The law is now settled that a defendant's bare denial of receipt of the RPAPL § 1304 notice is insufficient to establish, *prima facie*, that the plaintiff did not comply with said statute (*see, Citibank, N.A. v Conti-Scheurer*, 172 AD3d 17 [2d Dept 2019]; *Nationstar Mtge., LLC v LaPorte*, 162 AD3d 784 [2d Dept 2018]; *HSBC Bank USA, N.A. v Ozcan*, 154 AD3d 822 [2d Dept 2017]; *Emigrant Mtge. Co., Inc. v Persad*, 117 AD3d 676 [2d Dept 2014]). Bajnauth's application for summary disposition is denied because it is predicated on her bare denial of the receipt of the RPAPL § 1304 notice (*see, Citibank, N.A. v Conti-Scheurer*, 172 AD3d 17).

To the extent that Bajnauth relies upon the Prior Order in support of the present motion, this reliance is misplaced. The Prior Order held only that the plaintiff's submissions were insufficient to establish compliance with RPAPL § 1304. However, it did not determine that the plaintiff failed to comply with the subject statutory provision or preclude the plaintiff from making this showing in the future.

Accordingly, for the reasons stated above, Bajnauth's motion for summary judgment is denied.

The Plaintiff's Cross-Motion for Summary Judgment

The plaintiff cross-moves for summary judgment to dismiss Bajnauth's only remaining defense, which is predicated upon RPAPL § 1304.

The threshold issue is whether this application should be entertained in light of the plaintiff's prior motions for the subject relief. “Generally, successive motions for summary judgment are not permitted. A court may, however, properly entertain such motion when it is substantively valid and the granting of the motion will further the ends of justice and eliminate an unnecessary burden on the resources of the court [internal quotation marks and citations omitted]” (*Kolel Damsek Eliezer, Inc. v Schlesinger*, 139 AD3d 810, 811 [2d Dept 2016], *lv to app den*, 28 NY3d 910 [2016]; *see, American Equity Ins. Co. v A & B Roofing, Inc.*, 106 AD3d 762 [2d Dept 2013]; *Fuller v Nesbitt*, 116 AD3d 999 [2d Dept 2014]). The Court exercises its discretion and will entertain the plaintiff's present application for summary disposition because, as explained below, it is valid in all respects, and granting the motion will further the ends of justice and limit the issues in this action, thereby eliminating an unnecessary burden on the Court and conserving the Court's resources (*see, Kolel Damsek Eliezer, Inc. v Schlesinger*, 139 AD3d 810, *lv to app den*, 28 NY3d 910).

With respect to compliance with RPAPL § 1304, a plaintiff may establish that it mailed the required notice by first class and certified mail through one of three mechanisms. First, it may submit an affidavit of service (*see, generally, Onewest Bank, N.A. v Mahoney*, 154 AD3d 770 [2d Dept 2017]; *Wells Fargo v Moza*, 129 AD3d 946 [2d Dept 2015]). Second, a plaintiff may submit proof of mailing by the post office (*see, Citimortgage, Inc. v Pappas*, 147 AD3d 900 [2d Dept 2017]). The third mechanism is to submit an affidavit that, *inter alia*, avers the affiant's familiarity with the

plaintiff's mailing practices and procedures (*id.*). Through such an affidavit, a standard office practice and procedure designed to ensure that items are properly addressed and mailed is established (*id.*).

On its last summary judgment motion, the plaintiff relied upon the affidavit of Astra Love-Easter, a Vice President Loan Documentation in its employ, to establish that it mailed the RPAPL § 1304 notice to Bajnauth pursuant to the third mechanism described above. The Court concluded that her affidavit was insufficient because it: “fail[s] to make the requisite showing that she was familiar with the plaintiff's mailing practices and procedures, and therefore did not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed [internal quotation marks and citations omitted]” (*US Bank, NA v Henderson*, 163 AD3d 601, 603 [2d Dept 2018]).

In the recent case of *HSBC Bank, USA, NA v Bermudez*, 175 AD3d 667, *3 [2d Dept 2019], the Second Department again considered the sufficiency of an affidavit relative to the mailing of a notice pursuant to RPAPL § 1304, holding as follows:

The plaintiff relied upon a detailed affidavit of a vice president of loan documentation for the loan servicer, Wells Fargo... Based upon her personal knowledge and her review of the books and records maintained by Wells Fargo in the course of business as loan servicer, the affiant stated that Wells Fargo mailed a 90-day notice pursuant to RPAPL 1304 to the defendants at the mortgaged property by both certified and first-class mail. She further explained that in 2012, Wells Fargo's regular practice was to generate and date such notices with the date on which the notice is printed, and, once mailed, to place a copy of the notice in Wells Fargo's file for that mortgage loan, as a record that the 90-day notice was mailed. In this case, she averred, two copies of each 90-day notice were printed: one was sent to the defendants at the mortgaged property by first-class mail, and the other was sent to the defendants at the mortgaged property by certified mail, which was “reflected in the copy with the twenty-digit U.S. Postal Service tracking number at the top of the notice.” ... In addition, she attached to her affidavit copies of the RPAPL 1304 notices with indicia of mailing, as well as a proof of filing statement pursuant to RPAPL 1306.

On its present motion, the plaintiff submits two affidavits of mailing pursuant to RPAPL § 1304, which were executed by Sherri W. McManus (“MaManus”), a Vice-President of Loan Documentation of the plaintiff. McManus' affidavits set forth all of the information that the Second Department held in *Bermudez, id.*, was sufficient to establish compliance with RPAPL § 1304.

For example, McManus avers that based upon her personal knowledge and her review of the books and records maintained by Wells Fargo in the course of business as the prior loan servicer, that it mailed a 90-day notice pursuant to RPAPL § 1304 to Bajnauth at the Property by both certified and first-class mail. She further explains Wells Fargo's regular practice and procedure for mailing the subject 90-day notice in 2013. Annexed to McManus' affidavit is Wells Fargo's letter log, reflecting the mailing of the said notice; the notice; documentation from the post office relative to mailing; and the proof of filing statement pursuant to RPAPL § 1306. In opposition, Bajnauth fails

to raise a triable issue of fact.

Accordingly, for the reasons stated above, the plaintiff's motion for summary judgment is granted.

This action is on the trial calendar and scheduled to appear in the Trial Assignment Part on December 9, 2019. Because the plaintiff is now granted full summary judgment and was previously granted a default judgment against all other defendants, this action shall proceed to inquest.

Accordingly, for the reasons stated above, it is hereby:

ORDERED, that Bajnauth's motion for summary judgment is denied; and it is further,

ORDERED, that the plaintiff's cross-motion for summary judgment is granted; and it is further,

ORDERED, that this cause shall proceed to inquest on a date designated by the Justice presiding in the Trial Assignment Part; and it is further,

ORDERED, that the plaintiff shall serve a copy of this Order with notice of entry upon all defendants on or before October 30, 2019.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York
September 19, 2019


MOJGAN C. LANCMAN, A.J.S.C.

