

<b>Deutsche Bank Natl. Trust Co. v Rahman</b>
2019 NY Slip Op 33024(U)
September 30, 2019
Supreme Court, Queens County
Docket Number: 702624/2014
Judge: Denis J. Butler
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

ORIGINAL

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENIS J. BUTLER  
Justice

IAS Part 12

-----x  
DEUTSCHE BANK NATIONAL TRUST COMPANY, AS  
TRUSTEE FOR HARBORVIEW MORTGAGE LOAN  
TRUST 2006-7,

Index No.:  
702624/2014

Plaintiff,

DECISION AFTER  
TRIAL

-against-

ELORA RAHMAN, THE BANK OF NEW YORK  
MELLON FKA THE BANK OF NEW YORK, AS  
SUCCESSOR TRUSTEE TO JP MORGAN CHASE  
BANK N.A., AS TRUSTEE ON BEHALF ON THE  
CERTIFICATE HOLDERS OF THE CWHEQ INC.,  
CWHEQ REVOLVING HOME EQUITY LOAN TRUST,  
SERIES 2006-E,

Defendants.

FILED  
OCT - 8 2019  
COUNTY CLERK  
QUEENS COUNTY

-----x

Plaintiff commenced this action on April 17, 2014. The complaint seeks to foreclose a mortgage (the Mortgage), which encumbers the real property located at 25-15 35th Avenue, Astoria, New York 11106 (the Property).

On May 15, 2014, defendant Elora Rahman (Rahman) interposed an answer, denying the material allegations of the complaint and asserting numerous affirmative defenses, including standing and RPAPL 1304.

This action was tried before this Court without a jury on September 5 and September 11, 2019. Plaintiff was represented by Adam P. Hartley, Esq., of Greenberg Traurig, LLP. Defendant Rahman was represented by Bruce Richardson, Esq., of the Law Offices of Bruce Richardson, P.C. The other defendant, who is in default in appearing or answering, and against whom a default judgment was granted on September 11, 2019, failed to appear for trial.

Prior to the commencement of trial, counsel for plaintiff and counsel for defendant Rahman agreed that there were two issues

before the Court: (1) whether plaintiff has standing and (2) whether plaintiff complied with RPAPL 1304 and 1306.

At the conclusion of trial, counsel for plaintiff and counsel for defendant Rahman both submitted proposed findings of fact and conclusions of law to the Court.

### **Findings of Fact**

Plaintiff called two witnesses at the trial, Joseph Milanese (Milanese), a paralegal with Leopold & Associates, PLLC (Leopold), and Sony Prudent (Prudent), a Senior Loan Analyst with Ocwen Financial Corporation (OFC), the parent corporation of the Mortgage loan servicer, both of whom the Court found credible. Additionally, plaintiff submitted numerous documents into evidence. Defendant Rahman did not testify, nor did counsel for defendant Rahman call any witnesses to testify on his behalf.

The Court's findings of fact, based upon Milanese's and Prudent's testimony and the documents admitted into evidence, are set forth below:

On April 17, 2006, defendant Rahman executed a note (the Note) in favor of American Brokers Conduit (AMC) in the principal amount of \$625,500.00, plus interest. As security for the Note, defendant Rahman and AMC executed on said date the Mortgage.

American Home Mortgage Servicing, Inc. n/k/a Home Residential Inc. (Homeward) was the original servicer for the loan and was authorized to act on behalf of plaintiff, as evidenced by the Limited Power of Attorney. Ocwen Loan Servicing, LLC (OLS) thereafter took over servicing of the loan on March 1, 2013. The current servicer of the Mortgage loan for plaintiff is PHH Mortgage Corporation (PHH). All three servicing agents were authorized to act on behalf of plaintiff pursuant to their respective powers of attorney and a sub-servicing agreement.

In its capacity as servicer for plaintiff, OLS obtained physical possession of the original Note in November 2013 and had possession of same when the lawsuit was commenced. A copy of the original Note was attached to the complaint at the commencement of the foreclosure action, and the original Note was produced at trial.

By failing to make the payment due on January 1, 2012, and all subsequent payments, defendant Rahman defaulted relative to the Note.

On October 8, 2013, Leopold, as counsel for OLS, the loan servicer for plaintiff at the time, mailed notices pursuant to RPAPL 1304 by first-class and certified mail to defendant Rahman at the Property, as demonstrated by the copies of the envelopes and affidavit of service, which were admitted into evidence.

Within three (3) business days of the mailing of the RPAPL 1304 notices, plaintiff filed the necessary proof with the New York State Department of Financial Services pursuant to RPAPL 1306.

Plaintiff commenced this action on April 17, 2014. Annexed to the complaint is, inter alia, the Note, which is endorsed in blank.

Plaintiff established that through Prudent's testimony and the documents admitted into evidence that the amount due and owing pursuant to the Note, as of September 2, 2019, was \$1,017,627.95.

### Conclusions of Law

"Generally, in an action to foreclose a mortgage, a plaintiff establishes its prima facie entitlement to judgment as a matter of law through the production of the mortgage, the unpaid note and evidence of default [citations omitted]" (*U.S. Bank v Greenberg*, 168 AD3d 893, 894 [2d Dept 2019]). Plaintiff established its entitlement to a judgment of foreclosure and sale through (1) Prudent's testimony; (2) the documents admitted into evidence, including the Note and Mortgage; and (3) evidence of default (see *id.*). Defendant Rahman failed to rebut this showing.

Plaintiff also established its standing. "[W]here, 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. A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it was either the holder or assignee of the underlying note at the time the action was commenced. Either a written assignment of the underlying note or the physical delivery of the note prior to commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident [internal quotation marks and citations omitted]" (*Wells Fargo Bank, N.A. v Osias*, 156 AD3d 942 [2d Dept 2017]).

The Note is annexed to the summons and complaint. The Note is endorsed in blank. Therefore, plaintiff has established its standing (see *U.S. Bank v Sabloff*, 153 AD3d 879 [2d Dept 2017]; *Deutsche Bank Natl. Trust Co. v Carlin*, 152 AD3d 491 [2d Dept 2017]; *Wells Fargo Bank, N.A. v Thomas*, 150 AD3d 1312 [2d Dept

2017]; *Deutsche Bank Natl. Trust Co. v Logan*, 146 AD3d 861 [2d Dept 2017]; *Nationstar Mtge., LLC v Weisblum*, 143 AD3d 866 [2d Dept 2016]; *JPMorgan Chase Bank, N.A. v Weinberger*, 142 AD3d 643 [2d Dept 2016]).

Contrary to defendant Rahman's argument, plaintiff demonstrated compliance with the notice requirements of RPAPL 1304, which defendant Rahman pleaded as an affirmative defense in her answer. A plaintiff may establish that it mailed the notice required by the subject statutory provision via first class mail and certified mail through one of the 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 (see *id.*). Through such an affidavit, a standard office practice and procedure designed to ensure that items are properly addressed and mailed is established (see *id.*).

Through both Milanese's and Prudent's testimony and also the affidavit of service, plaintiff established that it mailed the notice prescribed by RPAPL 1304 to defendant Rahman by both first-class and certified mail (see *Citimortgage, Inc. v Pappas*, 147 AD3d 900 [2d Dept 2017]). In particular, Milanese testified that he was familiar with the mailing practices and procedures of his employer, Leopold, the entity that mailed the RPAPL 1304 notice.

Plaintiff further established that OLS was authorized to mail the RPAPL 1304 notice in conjunction with a limited power of attorney for Homeward and a sub-servicing agreement authorizing OLS to act on behalf of plaintiff, as demonstrated by the credible testimony of Prudent and the documents admitted into evidence. Where business records were created by another entity, such records are nevertheless admissible "if the recipient can establish personal knowledge of the maker's business practices and procedures, or establish that the records provided by the maker were incorporated into the recipient's own records and routinely relied upon by the recipient in its own business records" (*Bank of New York Mellon v Gordon*, 171 AD3d 197, 205 [2d Dept 2019]; see also *Aurora Loan Services, LLC v Vrionedes*, 167 AD3d 829, 832 [2d Dept 2018]). Although some of the business records for the Note and Mortgage were generated by the prior servicers, Homeward and OLS, Prudent testified that these records were incorporated into its business records and relied upon by PHH in the course of its servicing the loan.

An application for a default judgment against a defendant must be supported by "proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting defendant's failure to answer or appear" (*Aurora Loan Services, LLC v Movtady*, 165 AD3d 1025, 1026 [2d Dept 2018]). Plaintiff is entitled to a default judgment against defendant The Bank of New York Mellon fka The Bank of New York, as Successor Trustee to JP Morgan Chase Bank N.A., as Trustee on Behalf of the Certificate Holders of the CWHEQ Inc., CWHEQ Revolving Home Equity Loan Trust, Series 2006-E, because plaintiff established (1) service of the summons and complaint; (2) the facts constituting its claim; and (3) that said defendant has failed to answer, and that its time to do so has expired (see *id.*).

Based upon the credible testimony of Prudent and the documents admitted into evidence, plaintiff established entitlement to a judgment of foreclosure and sale in the amount of \$1,017,627.95, due as of September 2, 2019, together with per diem interest at the Note rate from said date up to the date of entry of judgment.

Lastly, based upon the testimony of Prudent and the documents admitted into evidence, including the Note and Mortgage, which demonstrates that the Property located at 25-15 35th Avenue, Astoria, New York 11106 is a single parcel, the Property should be sold in one parcel.


The Court has considered defendant Rahman's remaining arguments advanced at trial and in her post-trial submissions, and rejects same as unavailing.

For the reasons stated above, plaintiff is granted a judgment of foreclosure and sale in the amount of \$1,017,627.95, due as of September 2, 2019, together with per diem interest at the Note rate from said date up to the date of entry of judgment and statutory interest thereafter, and costs as taxed by the Clerk of the Court.

The Judgment of Foreclosure and Sale is issued herewith.

This constitutes the Decision of the Court.

Date: Jamaica, New York  
September 30, 2019

  
\_\_\_\_\_  
Denis J. Butler, J.S.C FILED

OCT - 8 2019  
COUNTY CLERK  
QUEENS COUNTY