

Sterling Natl. Bank v Harrow
2019 NY Slip Op 33916(U)
June 3, 2019
Supreme Court, Rockland County
Docket Number: 30407/2017
Judge: Kathie E. Davidson
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To commence the statutory time period for appeals as of right (CPLR 5513(a)), you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND - MAP FORECLOSURE PART

-----X
STERLING NATIONAL BANK, A NATIONAL
ASSOCIATION FORMERLY KNOWN AS
PROVIDENT BANK,

Plaintiff,

-against-

DECISION & ORDER

Index No. 30407/2017

Motion Seq. No. 2, 4

ROBERT P. HARROW, JR.,

Defendant.

-----X
DAVIDSON, J.

The following papers were read on the motion filed by the plaintiff (Motion Seq. 2) for an order confirming the referee's report and a judgment of foreclosure and sale.

Notice of Motion - Attorney Affirmation - Exhibits A-P
NYSCEF Record¹

The following papers were read on the cross-motion filed by the defendant (Motion Seq. 4) for an order vacating the prior order of reference and upon vacatur, an order granting dismissal of this action due to the plaintiff's lack of standing and failure to strictly comply with the notice requirements of RPAPL 1304.

Notice of Cross-Motion - Attorney Affirmation Defendant Affidavit- Exhibits A
Reply Affirmation in Opposition and in Further Support of
Summary Judgment - Exhibits A-C
Reply Affirmation

Upon the foregoing papers, and all prior papers and proceedings in this action, the motions are determined as follows:

Plaintiff commenced this foreclosure action by filing a Summons and Complaint on January 23, 2017. The complaint alleged that the borrower Robert P. Harrow, Jr. defaulted under

¹ Any references herein to "Doc #" are citing to the NYSCEF Record.

certain loan obligations deriving from a series of promissory notes, thereafter consolidated and modified by the loan modification agreement dated April 6, 2015 in the original lender Providence Bank in the principal amount of \$328,088.15. (Doc. 1 ¶10, ¶10[a]). The loan obligation was secured by a mortgage encumbering the subject property located at 7 Blossom Road, Suffern, New York (Rockland County). According to the complaint, the plaintiff Sterling National Bank, f/k/a Providence Bank is the “holder of the subject note and mortgage” (*id.* at ¶11[a]) and has complied with the 90-day notice requirements of RPAPL 1304 (*id.* at ¶11[c]).

The borrower interposed an answer. (Doc. 12). The answer contains general denials and sixteen affirmative defenses including, as pertinent to the instant motions, the lack of standing (*id.* at ¶10) and failure to strictly comply with the RPAPL 1304 notice requirements (*id.* at ¶14).

Plaintiff previously moved for an order granting summary judgment against the borrower and for an order appointing a referee for computation purposes. (Motion Seq. 1). The court’s order dated May 21, 2018 granted plaintiff’s motion. (Doc. 36). Following computation by the court-appointed referee, plaintiff filed the instant motion (Motion Seq. 2) for an order confirming the referee’s report and a judgment of foreclosure and sale.

The borrower filed a cross-motion (Motion Seq. 4) for an order vacating the prior order of reference and upon vacatur, an order granting dismissal of this action due to the plaintiff’s lack of standing and failure to strictly comply with the notice requirements of RPAPL 1304. Counsel argues that the borrower’s former counsel failed to oppose plaintiff’s prior motion for summary judgment and an order of reference.

As for the merits, counsel contends that the plaintiff failed to demonstrate standing and failed to demonstrate compliance with RPAPL 1304. As to standing, counsel challenges the sufficiency of the plaintiff’s supporting affidavit of Tracey Duck, Assistant Secretary for Sterling National Bank f/k/a Providence Bank, the original lender of the subject loan. It is alleged that Duck lacks personal knowledge to authenticate the business records of a prior servicer, thus plaintiff failed to establish plaintiff’s status as the holder of the loan with the right to foreclose. As to the latter, counsel contends that Duck’s affidavit makes a conclusory statement regarding RPAPL 1304 notice and failed to proffer any evidence of actual delivery thereof.

Decision

To obtain a vacatur of a prior default, the moving party must demonstrate both (1) a reasonable excuse for the default and (2) a potentially meritorious claim or defense to the underlying action. (*See generally* CPLR 5015[a][1]). Here, the borrower’s counsel proffered a reasonable excuse by stating that the borrower’s failure to oppose the plaintiff’s prior motion for summary judgment and related relief was the result of the law office error of prior counsel. Turning to the merits, the borrower’s contentions that the plaintiff lacks standing and failed to establish compliance with the RPAPL 1304 notice requirements are belied by the record.

Standing

Plaintiff established its ownership of the note and mortgage at commencement by attaching to the complaint a copy of the note, mortgage, and attendant loan documents endorsed by plaintiff. (See generally *U.S. Bank, N.A. v. Saravanan*, 45 N.Y.S.3d 547, 548 [2d Dept. 2017]; *JPMorgan Chase Bank, N.A., v. Weinberger*, 37 NYS3d 286, 288-289 [2d Dept. 2016]; see also Doc. 1). Here, the underlying notes were endorsed by Providence Bank, after which the plaintiff succeeded Providence Bank by merger (Doc. 22 pg. 7-10), after which the borrower executed a loan modification agreement in favor of plaintiff. Accordingly, the documentary evidence, namely the loan documents, establish the plaintiff's standing to commence this foreclosure action.

RPAPL 1304 Notice

To establish mailing of the RPAPL 1304 notice, plaintiff may provide proof of actual mailing or a description of its office's practice and procedure for mailing (see *Citimortgage Inc. v Banks*, 155 AD3d 936 [2d Dept 2017]). Actual mailing of the notice is established by submission of an affidavit of service (see *Emigrant Mortgage Co., Inc. v Persad*, 117 AD3d 676 [2d Dept 2014]; *Bank of NY Mellon v Aquino*, 131 AD3d 1186 [2d Dept 2015]), an affidavit of mailing (see *Wells Fargo v Moza*, 129 AD3d 946 [2d Dept 2015]; *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 *Citimortgage v Banks*, 155 AD3d at 937 [2d Dept 2017]). The affiant must demonstrate a familiarity with office practices and procedures to establish office practices and procedures to insure proper addressing and mailing (see *Citibank, N.A. v Wood*, 150 AD3d 813 [2d Dept 2017]; *Wells Fargo Bank, NA v Trupia*, 150 AD3d 1049 [2d Dept 2017]; *Bank of NY Mellon v Zavolunov*, 157 AD3d 754 [2d Dept 2018]; *Wells Fargo Bank, N.A. v Moran*, 168 AD3d 1128 [2d Dept 2019]).

Here, the plaintiff proffered a copy of the RPAPL 1304 notice with certified mailing confirmation receipt and the affidavit of merit of Tricia Ho, in her capacity as an officer of Dovenmuehle Mortgage Inc. (hereinafter "DMI"), the mortgage loan subservicer for this loan on behalf of Sterling National Bank. (Doc. 26 at pg. 8; Doc. 89 respectively). The Ho Affidavit attests to the standard of office practices and procedures of DMI designed to ensure the RPAPL 1304 notice was properly addressed and mailed to the borrower by first class mail and certified mail, return receipt. Tricia Ho, an agent of the loan servicer, sufficiently testified to the sender's business records pursuant to CPLR 4518[a], and demonstrated that the notices were actually mailed to the borrower (see *Citimortgage Inc. v Banks*, 155 AD3d 936 [2d Dept 2017]; *One West Bank, FSB v Simpson*, 148 AD3d 920 [2d Dept 2017]; *Citimortgage, Inc. v Wallach*, 163 AD3d 520 [2d Dept 2018]).

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion for an order confirming the referee's report and a judgment of foreclosure and sale is granted. (Motion Seq. 2). The proposed judgment as modified by this court is simultaneously executed herewith. It is further


ORDERED that defendant's cross-motion for dismissal (Motion Seq. 4) is denied for the reasons herein stated. It is further

ORDERED that plaintiff's counsel shall serve a copy of this decision and order with notice of entry upon all parties/counsel entitled to notice within ten (10) days hereof.

Any relief not specifically granted herein is denied and/or rendered moot by the foregoing determination.

The foregoing constitutes the Decision and Order of this court.

Dated: 6/3/, 2019
White Plains, New York



HON. KATHIE E. DAVIDSON, J.S.C.

TO:

Decision and Order uploaded to NYSCEF