

HSBC Bank USA, N.A. v Hoffman
2019 NY Slip Op 34221(U)
September 30, 2019
Supreme Court, Westchester County
Docket Number: 59277/2018
Judge: Sam D. Walker
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To commence the statutory time 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 WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.**

-----X
HSBC BANK USA, National Association as Trustee for
Merrill Lunch Mortgage Investors Trust, Series MLLC
2006-3

Plaintiff,

DECISION & ORDER
Index No.: 59277/2018
Motion Sequence No. 3&4

-against-

PETER M. HOFFMAN A/K/A PETER HOFFMAN;
WENDY J. HOFFMAN A/K/A WENDY HOFFMAN;
MERRILL LYNCH CREDIT CORPORATION; FIA
CARD SERVICES NA; THE UNITED STATES OF
AMERICA; NEW YORK STATE DEPARTMENT
OF TAXATION & FINANCE; DISCOVER BANK;
PORTFOLIO RECOVERY ASSOCIATES LLC;
BROOK CLUB HOMEOWNER'S ASSOCIATION;
AMERICAN EXPRESS CENTURION BANK; CHASE
BANK USA, N.A.; AMERICAN EXPRESS BANK FSB
AMERICAN EXPRESS TOWER; THE PART LANE
RESERVE HOMEOWNER'S ASSOCIATION, INC.;
JOHN DOE (SAID NAME BEING FICTITIOUS TO
REPRESENT UNKNOWN TENANTS/OCCUPANTS
OF THE SUBJECT PROPERTY AND ANY OTHER
PARTY OR ENTITY OF ANY KIND, IF ANY, HAVING
OR CLAIMING AN INTEREST OR LIEN UPON THE
MORTGAGED PROPERTY),

Defendants.

-----X
The following papers were considered on Plaintiff's motion for summary judgment
and other relief requested:

Notice of Motion/Affirmations/Affidavit/Exhibit A-B & A-O	1-23
Notice of Cross-Motion/Affirmation/Affidavit/Exhibit 1-3 & 1-11 & 1-10	24-50
Memorandum of Law in Opposition & in Support of cross-Motion	51
Affidavit/Affirmation in Opposition to Cross-Motion	52

On or about July 14, 2006, Defendants executed and delivered a Note to Plaintiff's predecessor-in-interest in the sum of \$1,243,400.00. As security for the repayment of the Note, Defendants executed and delivered a mortgage in the amount of \$1,243,400.00 secured by the real property located at 65 Stonewall Circle, Harrison a/k/a West Harrison, NY 10604. On or about May 22, 2015, the original Note and Mortgage were transferred and delivered to Plaintiff and an assignment was recorded. Plaintiff alleges that Defendants defaulted on the terms of the Note and Mortgage by failing to make the mortgage payment that was due October 1, 2017 and each subsequent payment. On January 18, 2018, Plaintiff alleges that it mailed 90-day notices to Defendants by certified and first class mail, which notices were subsequently registered with the New York State Department of Financial Services. Plaintiff alleges that on November 20, 2017, its agent, Walz Group, LLC mailed a notice of default to Defendants in accordance with the terms of the Note and Mortgage and despite receiving notice of their default, Defendants failed to cure the default.

Plaintiff commenced this action on June 13, 2018, through the filing of the Summons, Complaint and Certificate of Merit in the Westchester County Clerk's Office. On the same date, Plaintiff filed a Notice of Pendency. According to the filed Affidavits of Service, each party was timely served with the Summons and Complaint. Despite being served with the Summons and Complaint, each Defendant defaulted in appearing in this action, except Defendants who filed a contesting answer and defendant United

States of America who appeared through counsel. Settlement conferences were held on August 16, 2018, September 25, 2018, November 1, 2018, December 7, 2018 and on January 18, 2019 at which time the matter was released to proceed.

Plaintiff now moves for an Order: granting summary judgment and striking the Answer filed by Defendants Peter M. Hoffman and Wendy J. Hoffman, pursuant to CPLR 3212; default judgment against the remaining non-appearing Defendants; appointing and directing a referee to compute the amount due to Plaintiff for principal, interest, late charges, costs of collection, taxes, insurance premiums, and any other payments and/or assessments advanced by Plaintiff during the pendency of this action in order to protect its security, and to examine and report how the mortgaged premises should be sold, pursuant to RPAPL §1321; and substituting the tenant Peter Hoffman, Jr. as a party Defendant in the place and stead of "JOHN DOE."

Defendants oppose Plaintiff's motion and cross-move for an order pursuant to CPLR 3212 granting summary judgment in favor of Defendants Peter M. Hoffman and Wendy J. Hoffman and against Plaintiff HSBC Bank USA, National Association and dismissing the action against Defendants Peter M. Hoffman and Wendy J. Hoffman.

DISCUSSION

In order to obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact, (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]; CPLR 3212[b]). "To establish a prima facie case in an action to foreclose a mortgage, the plaintiff must establish the existence of the mortgage and mortgage note, ownership of

the mortgage, and the defendant's default in payment," (*Campaign v. Barba*, 23 AD3d 327 [2d Dept. 2005]). Where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, (*Vermette v. Kenworth Truck Co.*, 68 N.Y.2d 714, 717 [1986]).

"In a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced," (*Bank of N.Y. v. Silverberg*, 86 A.D.3d 274, 279; *U.S. Bank N.A. v. Cange*, 96 A.D.3d 825, 8262; *U.S. Bank, N.A. v. Collymore*, 68 A.D.3d 752, 753–754; *Countrywide Home Loans, Inc. v. Gress*, 68 A.D.3d 709). "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident," (*U.S. Bank, N.A. v. Collymore*, 68 A.D.3d at 754; *HSBC Bank USA v. Hernandez*, 92 A.D.3d 843).

Here, Plaintiff has established through the Affidavit of Stephanie Bielecki, Assistant Vice President of PHH Mortgage services, the servicer for the loan at issue in this proceeding, that Plaintiff possessed the Note prior to the commencement of the action on June 13, 2018. The record reflects that the original Mortgage with Merrill Lunch Credit Corporation was recorded on December 12, 2006. An assignment of mortgage dated May 22, 2015 transferring the Mortgage from Bank of America, National Association, successor by merger to Merrill Lynch Credit Corporation to Plaintiff was duly recorded on May 27, 2015 in the Office of the Westchester County Clerk.

Plaintiff's standing, however, is also based upon physical delivery. To support physical delivery of the note and mortgage to Plaintiff prior to the commencement of the action, Plaintiff produced the copy of the Note and Mortgage as attachments to its Complaint that was served upon Defendants as evidence that it possessed the same at the time the action was commenced. By attaching the Note, Plaintiff has proven that delivery of the Note occurred prior to the commencement of the action. Since Plaintiff established its standing by physical delivery, the Court need not address the validity of any prior or subsequently executed document assigning the Mortgage and Note, (*Deutsche Bank Nat'l. Trust Co. v. Whalen*, 107 A.D.3d 931 citing cf *Deutsche Bank Nat'l. Trust Co. v. Spanos*, 102 A.D.3d at 912). Furthermore, as a general matter, once a promissory note is tendered to and accepted by an assignee, the mortgage passes as an incident to the note, (*Bank of New York v. Silverberg*, 86 A.D.3d 274 [2d Dept 2011]). Plaintiff has, therefore, established standing for the purpose of commencing this foreclosure action against Defendants.

Stephanie Bielecki also stated in her Affidavit that she had personal knowledge of Plaintiff's records and record making practices, and how such records are made, used and kept. Based upon these records, Defendants, Peter M. Hoffman and Wendy J. Hoffman defaulted under the terms of the Note and no payment has been made to the holders despite demand, by having failed to make payment due on October 1, 2017, and each month thereafter. Plaintiff has therefore, elected to accelerate the entire indebtedness which is presently due and owing in the amount of \$1,227,055.30 as of August 1, 2018. Interest continues to accrue from August 1, 2018, together with late charges and any advances made or to be made to protect the lien of the mortgage.

Plaintiff must also establish that it satisfied all of the conditions precedent to commencing an action in foreclosure. Paragraph 22 of the Mortgage provides that in the case of default, the lender must send to the borrower a notice of default giving the borrower at least 30 days from the date of the notice to correct the default. This notice must be sent pursuant to paragraph 15 of the Mortgage by first class mail to the property address or any other address the borrower designates by notice to the lender. Providing this notice is a condition precedent to commencing a foreclosure action.

William Long, Assistant Vice President of PHH Mortgage Corporation, the servicer for the loan at issue in this proceeding avers that he has personal knowledge of the records and record making practices, and how such records are made, used and kept and based upon the business records he reviewed, including the electronic screen prints, confirms that the servicer generated and caused to be mailed the 30-day contractual demand letter to Peter M. Hoffman and Wendy J Hoffman on November 20, 2017, in accordance with the terms of the Note and Mortgage. He provided copies of the business records he relied upon in his Affidavit.

The general rule is, a letter or notice that is properly stamped, addressed, and mailed is presumed to be received by the addressee, (*see News Syndicate Co. v. Gatti Paper Stock Corp.*, 256 N.Y. 211 [1931]; *New York New Jersey Products Dealers Coop. v. Mocker*, 59 A.D.2d [3rd Dept.1977]. A simple denial of receipt has been held insufficient to rebut this presumption, (*see ATM One, LLC v. Landaverde*, 2 N.Y.3d 472, 478 [2004]; *Countrywide Home Loans, Inc. v. Brown*, 305 A.D.2d 626 [2nd Dept 2003]). However, New York courts have stated that in order to raise the presumption, more than a general mailing affidavit is required. The presumption of receipt may be created by

either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed, (see *Residential Holding Corp. v. Scottsdale Ins. Co.*, 286 A.D.2d 679 [2d Dept 2001]; *Phoenix Ins. Co. v. Tasch*, 306 A.D.2d 288, 762 N.Y.S.2d 99 [2d Dept.2003]). Here, even though Plaintiff did not provide proof of actual mailing, Plaintiff did establish a standard office practice or procedure designed to ensure that items are properly addressed and mailed

Moreover, to benefit from any defect in the service of the default notice, Defendants would have had to raise Plaintiff's failure to comply with the provision of the Mortgage, requiring service of the notice of default, in opposition to Plaintiff's motion for summary judgment. By failing to raise this issue in opposition to Plaintiff's motion for summary judgment, Defendants are unable to challenge Plaintiff's service of the default notice. A broad reading of (*Nationstar Mortgage, LLC v. Silveri*, 126 A.D.3d 864 [2d Dept. 2015]) suggests that since no opposition was filed, no triable issue of fact was raised in response to the plaintiff's prima facie showing or as to the merits of any of the affirmative defenses, (see *Flagstar Bank v. Bellafiore*, 94 A.D.3d 1044, 1045). By not challenging service of the notice of default in their opposition to Plaintiff's motion for summary judgment, Defendants waived their right to raise this as an issue.

Plaintiff is also required to establish that a notice pursuant to RPAPL § 1304 was properly served upon Defendants. RPAPL 1304 provides that, "at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower, including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower in at least fourteen-point type",

909, 910 [2d Dept. 2013]). RPAPL § 1304(1) sets forth the requirements for the content of such notice and further provides that such notice must be sent by registered or certified mail, and also by first-class mail, to the last known address of the borrower, (see RPAPL § 1304[2]; see also *Deutsche Bank Nat. Trust Co. v. Spanos*, 102 A.D.3d 909, 910 [2d Dept. 2013]).

Here, Stephanie Bielecki avers that based upon her review of Plaintiff's business records and her knowledge of procedures regarding the creation and mailing of correspondence to borrowers, the 90-day pre-foreclosure notice was mailed to Peter M. Hoffman and Wendy J. Hoffman at the property address and at the last known address of the borrowers, if different, separate from any other mailing, by certified mail and also by first class mail on January 18, 2018. Plaintiff provided copies of the notice, showing the content, format, and the address to which it was sent, including both the first class mail notice and the certified mail notice. Bielecki further avers that based upon her further review of the business records and her knowledge of procedures regarding the creation and mailing of correspondence to borrowers, the 90-day demand letter was mailed to the Hoffmans.

Here, Plaintiff did establish a standard office practice and procedure which supports the presumption of receipt. A review of the record shows that Plaintiff followed office practices "geared so as to ensure the likelihood" that RPAPL § 1304 notices were always properly addressed and mailed on the date issued, (see *Hospital for Joint Diseases v. Nationwide Mut. Ins. Co.*, 284 A.D.2d 374 [2001]).

As the Second Department, opined in (*HSBC Bank USA, National Association v. Ozcan*, 154 A.D.3d 822 [2017]), "[t]here is no requirement that a plaintiff in a

foreclosure action rely on any 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" (see *Citigroup v. Kopelowitz*, 147 A.D.3d 1014, 1015, 48 N.Y.S.3d 223; cf. *Wells Fargo Bank, NA v. Thomas*, 150 A.D.3d 1312, 52 N.Y.S.3d 894). Thus, mailing of the RPAPL § 1304 notice and default notice may be proven by any number of documents meeting the requirements of the business records exception to the hearsay rule under CPLR 4518 (see *Viviane Etienne Med. Care, P.C. v. Country-Wide Ins. Co.*, 25 N.Y.3d 498, 508, 14 N.Y.S.3d 283, 35 N.E.3d 451; *CitiMortgage, Inc. v. Pappas*, 147 A.D.3d 900, 901, 47 N.Y.S.3d 415).

Here, Plaintiff is only required to demonstrate the admissibility of the records relied upon by Stephanie Bielecki under the business record exception to the hearsay rule [CPLR 4518(a)]. "A proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures", (see *Citibank, N.A. v. Cabrera*, 130 A.D.3d 861, 861; *Palisades Collection, LLC v. Kedik*, 67 A.D.3d 1329, 1331. Bielecki's Affidavit is based upon personal knowledge which was acquired from her review of the business records maintained in the ordinary course of business in the servicing of Defendants' loan made at or near the time by or from information provided by persons with knowledge of the activity and transactions reflected in such records, and are kept in the regular conducted business activities by PHH Mortgage Services as loan servicer to HSBC Bank, USA National Association.

With respect to Bielecki reviewing and relying on records received from prior servicers, ." [i]n this regard and with respect to mortgage foreclosures, a loan servicer's employee may testify on behalf of the mortgagee, 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 that the assignee/plaintiff establishes that it relied upon those records in the regular course of business (see *Landmark Capital Inv. Inc. v. Li-Shan Wang*, 94 A.D.3d 418 [1st Dept. 2012]; *Portfolio Recovery Associates, LLC v. Lall*, 127 A.D.3d 576 [1st Dept. 2015]; *Merrill Lynch Business Financial Services, Inc. v. Trataros Construction, Inc.*, 30 A.D.3d 336 [1st Dept. 2006]).

Plaintiff has met its initial burden of establishing its entitlement to judgment as a matter of law by producing the Mortgage, the unpaid Note, and an Affidavit from Stephanie Bielecki and William Long establishing the default in the payment obligations of Defendants (see *Baron Assoc., LLC v. Garcia Group Enters., Inc.*, 96 A.D.3d 793, 793; *GRP Loan, LLC v. Taylor*, 95 A.D.3d 1172, 1173; *Citibank, N.A. v. Van Brunt Props., LLC*, 95 A.D.3d 1158, 1159). Plaintiff has also established compliance with the default notice provision of the Mortgage as well as RPAPL § 1304. The burden now shifts to Defendants to establish triable issues of fact rebutting Plaintiff's prima facie showing or in support of the affirmative defenses asserted in their Answer or otherwise available to them (see *Nationstar Mtge., LLC v. Silveri*, 126 A.D.3d 864 [2d Dept 2015]; *Flagstar Bank v. Bellafiore*, 94 A.D.3d 1044 [2d Dept 2012]; *Grogg Assocs. v. South Rd. Assocs.*, 74 A.D.3d 1021 [2d Dept 2010]; *Wells Fargo Bank v. Karla*, 71 A.D.3d 1006, [2d Dept 2010].

In opposing the motion Defendants rely upon their Answer to Plaintiff's Complaint as well as a cross-motion seeking dismissal of the action. Defendants' Answer contained general denials or denials based upon information and belief as well as twelve affirmative defenses. To succeed in defeating Plaintiff's motion for summary judgment, Defendants are required to produce evidentiary proof in admissible form establishing a triable issue of material fact, not mere conclusions, hope, unsubstantiated allegations or assertions (*see Zuckerman v. City of New York*, 49 N.Y.2d 577).

Defendant raises two issues in their cross-motion. The first alleges Plaintiff's failure to serve Defendants separately with the required 90-Day Notice pursuant to RPAPL § 1304 and failure to establish proper mailing of the RPAPL § 1304 Notices. The Court has determined above that Plaintiff established a standard office practice and procedures designed to ensure that the RPAPL § 1304 Notices were mailed. The issue, however, is whether or not each Defendant should have been notified separately pursuant to RPAPL § 1304.

It is clear from the record that a single notice was sent via certified mail and first-class mail addressed to both Defendants. There is no indication in the record that separate notices were sent to each Defendant. Currently there are no appellate cases on this issue, however, several trial courts have weighed in, with cases going in both directions. However, this Court agrees with the line of cases which finds that not mailing notices to individual borrowers violates the mailing requirements of RPAPL § 1304, (*see Deutsche Bank National Trust Co. v. Jimenez*, 62 Misc 3d 811 (Sup Ct, Suffolk County 2018)).

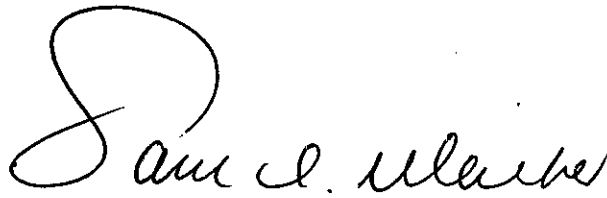
In *Jimenez*, the court found that a “[t]rustee of mortgage trust failed to send separate statutorily-required notices of default to each of two mortgagors, and thus trustee failed to comply with statutory condition precedent for foreclosure action; while the trustee sent notice by regular first class mail and certified mail addressed to both mortgagors, the statute required that notice be mailed separately to each borrower, since requiring only one notice be sent would have shifted responsibility to provide information contained in the notice from the lender or servicer to the borrower that accepted mail delivery. (N.Y. RPAPL § 1304” (*see also HSBC Bank USA, N.A. as Trustee for Certificate holders of Ace Securities Corp. Home Equity Loan Trust v. Ahmad*, 62 Misc.3d 1225(A), 2019 WL 1087863 [Sup. Ct. Suffolk County, 2019]; *HSBC Bank USA, National Association as Trustee for Opteum Mortgage Acceptance Corporation v. Patricola*, 62 Misc.3d 1209(A), 2019 WL 288263 [Sup. Ct. Suffolk County, 2019]). That being the case, by not establishing individual mailing to each defendant of the RPAPL § 1304 notice, Defendants have raised sufficient facts to rebut and defeat Plaintiff’s prima facie showing of its entitlement to judgment as a matter of law. Therefore, Plaintiff’s motion for summary judgment is denied and its Complaint dismissed for failure to comply with the mailing requirement of RPAPL § 1304.

There is no need for the Court to address the sufficiency of the remaining affirmative defenses raised by Defendants in their answer. That being the case, Plaintiff’s motion is DENIED and Defendants cross-motion for an order pursuant to CPLR 3212 granting summary judgment in favor of Defendants Peter M. Hoffman and Wendy J. Hoffman and against Plaintiff HSBC Bank USA, National Association and

dismissing the action against Defendants Peter M. Hoffman and Wendy J. Hoffman is
GRANTED.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
September 30, 2019



HON. SAM D. WALKER, J.S.C.