

U.S. Bank NA v John
2020 NY Slip Op 30898(U)
February 18, 2020
Supreme Court, Kings County
Docket Number: 509965/2014
Judge: Mark I. Partnow
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At an IAS Term, Part FRP-2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 18th day of February, 2020.

P R E S E N T:

HON. MARK I. PARTNOW,
Justice.

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U.S. BANK NA, SUCCESSOR TRUSTEE TO BANK OF AMERICA, NA, SUCCESSOR IN INTEREST TO LASALLE BANK NA, AS TRUSTEE, ON BEHALF OF THE HOLDERS OF THE WASHINGTON MUTUAL MORTGAGE PASS-THROUGH CERTIFICATES, WMALT, SERIES 2007-OC1,

Plaintiff,

- against -

MS#33 MS#5.
DECISION AND ORDER

Index No. 509965/2014

ABIGALE JOHN; NIGEL JOHN; CAPITAL ONE BANK (USA) NA; CRIMINAL COURT OF THE CITY OF NEW YORK; NEW YORK CITY TRANSIT ADJUDICATION BUREAU; NEW YOUR STATE DEPARTMENT OF TAXATION AND FINANCE; SLOMINS INC.; UNITED STATES OF AMERICA-INTERNAL REVENUE SERVICE; DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT; DAVE JOHN; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS INC. AS NOMINEE FOR THE MORTGAGE STORE FINANCIAL INC.; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; HAZEL ANN RODRIQUE S/H/A HAZEL ANN RODRIQUEZ; NEW YORK CITY PARKING VIOLATIONS BUREAU; "JOHN DOES" AND "JANE DOES", said names being fictitious, parties intended being possible tenants or occupants of premises and corporations, other entities or persons who have, claim, or may claim, a lien against, or other interest in, the premises,

Defendants.

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The following papers numbered 1 to 7 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-3 4
Opposing Affidavits (Affirmations) _____	5-6
Reply Affidavits (Affirmations) _____	7

U.S. Bank NA, Successor Trustee to Bank of America, NA, Successor in interest to Lasalle Bank N.A., as Trustee on behalf of the Holders of the Washington Mutual Mortgage Pass-Through Certificates, WMALT, Series 2007-OC1 (Plaintiff), moves for an order (motion sequence 3): (1) granting summary judgment, pursuant to CPLR 3212, in favor of Plaintiff against Abigale and Nigel John (Defendants); (2) appointing a referee, pursuant to RPAPL 1321, to compute the amount due to Plaintiff; (3) amending the caption, pursuant to CPLR 1024, by removing the names “John Does” and “Jane Does” from the caption; and (4) granting a default judgment, pursuant to CPLR 3215, against defendants Capital One Bank (USA) NA, Criminal Court of the City of New York, New York City Transit Adjudication Bureau, New York State Department of Taxation and Finance, Slomins Inc., United States of America - Internal Revenue Service, Department of Housing Preservation and Development, Dave John, Mortgage Electronic Registration Systems Inc. as Nominee for the Mortgage Store Financial, Inc., New York City Environment Control Board, Hazel Ann Roderique s/h/a Hazel Ann Rodriquez, and New York City Parking Violations Bureau.

Defendants cross-move (motion sequence 5) to dismiss this action for Plaintiff’s alleged failure to comply with the contractual and statutory conditions precedent to commencing this action.

Procedural History

This is an action to foreclose upon a mortgage dated February 1, 2007 (Mortgage). The promissory note is secured by the Mortgage in the original amount of \$527,200.00 (the Note), on real property located at 157 Pulaski Street, Brooklyn, New York, 11206 (property). The action was commenced by the filing of a summons and complaint on October 27, 2014. Defendants filed a pre-answer motion to dismiss the action alleging Plaintiff lacked standing to prosecute the action. By order dated July 1, 2015, the Honorable Justice Laura Jacobson denied Defendants’ pre-answer motion for failing to interpose an answer in this action. The order granted Defendants an additional sixty days to file a late answer or bring a motion challenging Plaintiff’s standing. Defendants thereafter moved to reargue the decision dated July 1, 2015, and for leave of Court to interpose a late answer. By order dated April 5, 2016, Justice Jacobson granted Defendants’ motion to the extent that Defendants were

permitted to interpose a late answer and denied Defendants' motion to reargue the dismissal with leave to renew. Subsequently, Defendants interposed an answer on May 17, 2016. On November 8, 2018, Plaintiff filed the instant summary judgment motion and Defendants cross-moved for dismissal.

Plaintiff's Summary Judgment Motion

"To establish a prima facie case in an action to foreclose a mortgage, a plaintiff must produce the mortgage, the unpaid note, and evidence of default" (*U.S. Bank National Association v. Seeley*, 177 A.D.3d 933, 934 [2d Dept 2019]). "Additionally, where, as here, the plaintiff's standing is placed in issue by a defendant, the plaintiff must prove its standing as part of its prima facie showing" (*id.* at 934) [internal citations omitted]. "A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that, when the action was commenced, it was either the holder or the assignee of the underlying note" (*id.*). "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" (*id.*). "Holder status is established where the plaintiff possesses a note that, on its face or by allonge, contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff" (*Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375, 1376 [2015]; see *Central Mtge. Co. v Davis*, 149 AD3d 898, 900 [2017]; *U.S. Bank, N.A. v Zwisler*, 147 AD3d 804 [2017]).

Here, Plaintiff established, prima facie, that it had standing to commence this action by annexing an indorsed in blank Note to the complaint (*Seeley* at 934).

Plaintiff attached a copy of the Note and Mortgage to the instant motion. Plaintiff must also provide evidence of default to establish its prima facie case for summary judgment. "A plaintiff may establish a payment default by an admission made in response to a notice to admit (see CPLR 3212[b]; 3123), by an affidavit from "a person having [personal] knowledge of the facts" (CPLR 3212[b]), or by other evidence "in admissible form" (*Bank of New York Mellon v. Gordon*, 171 AD3d 197, 208 [2d Dept 2019]). In support of its motion, Plaintiff submits an affidavit from Sherry Benight, the Document Control Officer for Select Portfolio Servicing, Inc. ("SPS"), the servicing agent and attorney-in-fact for the Plaintiff. Benight's affidavit states that the "Loan Records" establish the Defendants default on the terms of the Note and Mortgage. To prove evidence of default, Plaintiff annexes a default notice letter from Washington Mutual Home Loans. It is true that as a general rule, "the mere filing of papers received from other entities, even if they are retained in the regular course

of business, is insufficient to qualify the documents as business records” (*Gordon* at 209). “However, such records may be admitted into evidence 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” (*id.*)

Defendants point out that Plaintiff relies on the review of the “Loan Records” to prove Defendants default on the loan. Defendants argue the Loan Records do not establish evidence of default as Benight does not attest to having personal knowledge of Defendants’ payment history, nor does the Plaintiff submit any records of the loan payment history. Thus, Defendants argue a proper foundation has not been laid for the admission of the Loan Records.

However, Benight’s affidavit states that “to the extent that the business records of the loan in this matter were created by a prior servicer, the prior servicer’s records of the loan were integrated and boarded into SPS’s systems, such that the prior servicer’s records concerning the loan are now part of SPS’s business records. SPS maintains quality control and verification procedures as part of the boarding process to ensure the accuracy of the boarded records. It is the regular practice of SPS to integrate prior servicer’s records into SPS’s business records, and to rely upon the accuracy of those boarded records in providing its loan servicing functions. These prior servicer records are integrated and relied upon by SPS as part of SPS’s business records.”

Plaintiff contends that the default notice letter constitutes a business record, and in and of itself, is sufficient to establish Defendants’ default. As Benight’s affidavit states that the prior servicer’s records are integrated and relied upon by SPS as part of SPS’s business records, a proper foundation was laid for the introduction of the default notice letter (*See id.*). The Court finds that the default notice letter is sufficient to establish Defendants’ default, as the notice identifies the date of Defendants’ default and breaks down the monies owed to Plaintiff. Therefore, Plaintiff has successfully demonstrated Defendants’ default in this case.

Defendants further contend that Plaintiff has failed to meet its prima facie burden for summary judgment. Defendants allege that Plaintiff failed to comply with the RPAPL 1304 notice requirements necessary to prosecute this action. Proper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of a residential foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition’ ” (*U.S. Bank National Association v.*

Goldberg, 171 AD3d 981, 982 [2d Dept 2019] [internal citations omitted]). “The statute requires that such notice be sent by registered or certified mail, and also by first-class mail, to the last known address of the borrower” (*Id.* at 982). By requiring the lender or mortgage loan servicer to send the RPAPL 1304 notice by registered or certified mail and also by first-class mail, the Legislature implicitly provided the means for the plaintiff to demonstrate its compliance with the statute, i.e., by proof of the requisite mailing (*Wells Fargo Bank, NA v. Mandrin*, 160 AD3d 1014, 1016 [2d Dept 2018]). Proof of the requisite mailing is established with proof of the actual mailings, such as affidavits of mailing or domestic return receipts with attendant signatures, or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure (*Mandrin* at 116).

To prove compliance with RPAPL 1304, Plaintiff relies on the affidavit of mailing of Linda E. Walker, Vice President of JP Morgan Chase Bank, National Association. Walker’s affidavit states that based upon her review of the business records associated with the subject mortgage loan, the RPAPL 1304 Ninety-Day (90) Pre-Foreclosure Notices were sent by regular first-class mail and certified mail to the Defendants on November 6, 2013. Plaintiff attaches copies of the certificates of bulk mailing, generated by the postal office, evincing that the RPAPL 1304 notices were mailed to Defendants. The affidavit further claims that “it was Chase’s regular practice to obtain and image proof of mailing from the United States Post Office at or near the time of mailing in the ordinary course of its regularly conducted business activity... and that those records are imaged at or near the time of the event by authorized persons.”

In response, Defendants argue that the statements in Walker’s affidavit are unsubstantiated and conclusory and cannot support Plaintiff’s motion. Furthermore, Defendants argue that Walker’s affidavit does not state that the RPAPL 1304 notices were sent as part of the bulk mailings.

Here, Plaintiff failed to establish, *prima facie*, that it complied with RPAPL 1304. Mailing may be proven by documents meeting the requirements of the business records exception to the rule against hearsay. Although Walker’s affidavit states that the RPAPL 1304 notices were sent to Defendants via regular first-class mail and certified mail, Walker did not make the requisite showing that she was familiar with 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 (*See Nationstar Mortgage, LLC v. Jean- Baptiste*, 2019 WL 6884926 [2d Dept 2019]). Furthermore,

Walker's affidavit is insufficient to prove compliance with notice requirements as required by the terms of the mortgage. For these reasons, Plaintiff's motion for summary judgment must be denied.

Defendant's Cross-Motion to Dismiss pursuant to CPLR 3212

Defendants' cross-motion must also be dismissed for failure to attach an affidavit denying receipt of either the RPAPL 1304 notice or the default notice as required by the Mortgage (*M&T Bank v. Biordi*, 176 AD3d 1194, 1194 [2d Dept 2019]). Accordingly, it is:

ORDERED that Plaintiff's motion for summary judgment for an order of reference is denied; and it is further

ORDERED that Plaintiff's motion to amend the caption to remove the names "Jane Does" and "John Does" is granted; and it is further

ORDERED that Plaintiff's motion for a default judgment against defendants Capital One Bank (USA) NA, Criminal Court of the City of New York, New York City Transit Adjudication Bureau, New York State Department of Taxation and Finance, Slomins Inc., United States of America - Internal Revenue Service, Department of Housing Preservation and Development, Dave John, Mortgage Electronic Registration Systems Inc. as Nominee for the Mortgage Store Financial, Inc., New York City Environment Control Board, Hazel Ann Roderique s/h/a Hazel Ann Rodriquez, and New York City Parking Violations Bureau, is denied; and it is further

ORDERED that the Defendants' motion for summary judgment is denied in its entirety; and it further

ORDERED that the amended caption shall read as follows:

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U.S. BANK NA, SUCCESSOR TRUSTEE TO BANK OF AMERICA, NA, SUCCESSOR IN INTEREST TO LASALLE BANK NA, AS TRUSTEE, ON BEHALF OF THE HOLDERS OF THE WASHINGTON MUTUAL MORTGAGE PASS-THROUGH CERTIFICATES, WMALT, SERIES 2007-OC1,

Plaintiff,

- against -

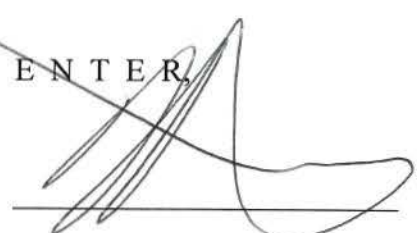
ABIGALE JOHN; NIGEL JOHN; CAPITAL ONE BANK (USA) NA; CRIMINAL COURT OF THE CITY OF NEW YORK; NEW YORK CITY TRANSIT ADJUDICATION BUREAU; NEW YOUR STATE DEPARTMENT OF TAXATION AND FINANCE; SLOMINS INC.; UNITED STATES OF AMERICA-INTERNAL REVENUE SERVICE; DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT; DAVE JOHN; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS INC. AS NOMINEE FOR THE MORTGAGE STORE FINANCIAL INC.; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; HAZEL ANN RODRIQUE S/H/A HAZEL ANN RODRIQUEZ; NEW YORK CITY PARKING VIOLATIONS BUREAU,

Defendants.

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This constitutes the decision and order of the court.

ENTER



Hon. Mark I. Partnow, J. S. C.

KINGS COUNTY CLERK
FILED
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