

<b>Bank of Am., N.A. v Wood</b>
2020 NY Slip Op 31875(U)
February 6, 2020
Supreme Court, Suffolk County
Docket Number: 606884/2018
Judge: C. Randall Hinrichs
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SUPREME COURT - STATE OF NEW YORK
IAS PART 49 - SUFFOLK COUNTY

PRESENT: Hon. C. RANDALL HINRICHS
Justice of the Supreme Court

Motion Date: 9-25-2018
Adjourned Date: 10-25-2018
Motion Sequence: 001-MotD

BANK OF AMERICA, NA, X

Plaintiff,

-against-

FRENKEL, LAMBERT, WEISS, WEISMAN & GORDON LLP
Attorneys for Plaintiff
53 Gibson Street
Bay Shore, NY 11706

KEVIN C. WOOD, LISA WOOD, FLEET NATIONAL BANK, CLERK OF THE SUFFOLK COUNTY TRAFFIC & PARKING VIOLATIONS AGENCY, TERESA MANNING CARTER, RON CARTER, CLERK OF THE SUFFOLK COUNTY DISTRICT COURT, IDALINA E. COELLO, and "JOHN DOE #1" through "JOHN DOE #10", the last ten names being fictitious and unknown to the plaintiff, the person or parties if any, having or claiming an interest in or lien upon the Mortgage premises described in the Complaint,

RICHARD J. SULLIVAN, ESQ.
Attorney for Defendants, WOOD
P.O. Box 582
Port Jefferson, NY 11777

Defendants.

X

Upon the following papers: Notice of Motion by Plaintiff, dated August 29, 2018, Affirmation of Barry M. Weiss, Esq., Affidavit of Nicole Renee Williams sworn to on August 2, 2018, Affidavit of Kyra Schwartz sworn to on March 31, 2018, with supporting papers; Affirmation in Opposition by Defendants' counsel, dated September 18, 2018, Affidavit of the Defendant Kevin C. Wood, sworn to on September 14, 2018, dated , with supporting papers; Affirmation in Reply by Plaintiff's, counsel Barry M. Weiss, Esq., dated October 19, 2018, with supporting papers; and upon due consideration; it is

ORDERED that this motion (#001) by the plaintiff for, among other things, summary judgment on the complaint insofar as asserted against the defendants Kevin C. Wood and Lisa Wood is granted solely to the extent indicated below, otherwise denied with leave to renew within 120 days of the date herein, or, in the alternative, the filing of a note of issue within 120 days of the date herein for the reasons set forth below; and it is

ORDERED that, except for the defenses asserting non-compliance with RPAPL 1304 and RPAPL 1306, the remaining affirmative defenses asserted in the defendants' answer are dismissed with prejudice, and it is

ORDERED that the caption is amended by excising the fictitious "JOHN DOE #1" through "JOHN DOE #10" defendants; and it is

**ORDERED** that the caption of this action shall hereinafter appear as follows:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SUFFOLK

-----X

BANK OF AMERICA, NA,

Plaintiff,

Index Number:  
606884-2018

-against-

KEVIN C. WOOD, LISA WOOD, FLEET NATIONAL  
BANK, CLERK OF THE SUFFOLK COUNTY TRAFFIC  
& PARKING VIOLATIONS AGENCY, TERESA MANNING  
CARTER, RON CARTER, CLERK OF THE SUFFOLK  
COUNTY DISTRICT COURT and IDALINA E. COELLO,

Defendants.

-----x; and it is

**ORDERED** that the plaintiff shall serve a copy of this order amending the caption upon the Calendar Clerk of this Court of this I.A.S. Part; and it is further

**ORDERED** that counsel for the plaintiff shall serve a copy of this order with notice of entry pursuant to CPLR 2103(b)(1), (2), (3), (6) or (7) upon counsel for the defendants Kevin C. Wood and Lisa Wood, and by first-class mail upon all other appearing parties that have not waived further notice within thirty (30) days of the date of this order, and counsel shall promptly file the affidavit(s) of service with the Clerk of the Court.

This is an action to foreclose a mortgage on the real property known as 39 Ridgefield Drive, Shoreham, NY 11786 (the property). On May 14, 2003, the defendant Kevin C. Wood executed a home equity credit line agreement (the note) in favor of Fleet National Bank (Fleet) in the principal sum of \$250,000.00. To secure said note, Kevin and the defendant Lisa Wood (the defendants) gave Fleet a mortgage also dated May 14, 2003 on the property. The mortgage was subsequently duly recorded in the Suffolk County Clerk's Office on June 26, 2003. By a series of corporate mergers and/or name changes and by physical delivery, the note was allegedly acquired by the plaintiff prior to commencement of this action.

Kevin allegedly defaulted on the note by failing to make the monthly payments due on or about August 5, 2012, and each month thereafter. Thereafter, the plaintiff commenced this action against the defendants, among others, by the filing of the summons and complaint on April 11, 2018.

In response to the complaint, the defendants interposed a joint answer, asserting, among other things, the failure to comply "with the applicable provisions of the RPAPL, including, but not limited to, RPAPL 1304 and RPAPL 1306," the lack of standing and the statute of limitations.

Bank of America, N.A. as successor by merger to Fleet sued herein as Fleet (BANA), the holder of a subordinate mortgage, appeared and demands service of papers and notices herein. The remaining defendants have neither appeared nor answered.

The plaintiff now moves for, inter alia, an order granting it summary judgment on the complaint insofar as asserted against the defendants, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption. In support of the motion, the plaintiff submitted, among other things, the affidavit in support of Nicole Renee Williams, an Assistant Vice President from the plaintiff, an affidavit of Kyra Schwartz, an employee from the plaintiff's counsel, the affirmation of the plaintiff's attorney, Barry M. Weiss, Esq. and various exhibits.

In opposition to the motion, the defendant submitted, among other things, the affirmation from their counsel, Richard J. Sullivan, Esq., and the affidavit in opposition of Kevin C. Wood. In reply, the plaintiff submitted, among other things, the affirmation from its counsel, Barry M. Weiss, Esq. and various exhibits.

The court turns first to the issue of the plaintiff's compliance with certain conditions precedent to this action. The second affirmative defense, by which the defendants assert that the plaintiff failed to comply with "the applicable provisions of the RPAPL, including, but not limited to, RPAPL 1304 and RPAPL 1306" is overly broad as pleaded and insufficient to place the plaintiff on notice as to any specific defense (*see* CPLR 3013; 3014; 3015[a]; *Scholastic Inc. v Pace Plumbing Corp.*, 129 AD3d 75, 8 NYS3d 143 [1st Dept 2015] [combined affirmative defenses containing multiple defenses are in contravention of the civil practice rules]). By the affirmation of their counsel in opposition to the motion, however, the defendants have raised the defense of failure to demonstrate proper service of the 90-day notice pursuant to RPAPL 1304.

Under the facts presented herein, the plaintiff's submissions are insufficient to demonstrate proper service of the 90-day notice (*see Citibank, N.A. v Conti-Scheurer*, 172 AD3d 17, 98 NYS3d 273 [2d Dept 2019]; *Wells Fargo Bank, N.A. v Taylor*, 170 AD3d 921, 96 NYS3d 82 [2d Dept 2019]; *Wells Fargo Bank, N.A. v Trupia*, 150 AD3d 1049, 55 NYS3d 134 [2d Dept 2017]). In this case, the allegations by Williams are insufficient to demonstrate compliance with the service requirements of RPAPL 1304, where the mailing itself was allegedly completed by Walz Group, Inc. (Walz), an entity other than the plaintiff, via its "Track Right" system (*see LNV Corp. v Sofer*, 171 AD3d 1033, 98 NYS3d 302 [2d Dept 2019]; *see also Aurora Loan Servs., LLC v Vrionedes*, 167 AD3d 829, 91 NYS3d 150 [2d Dept 2018]).

More specifically, Williams did not allege that she is familiar with the standard mailing practices or procedures of Walz, the plaintiff's alleged mailing agent with respect to the 90-day notices, and that those practices or procedures were followed in this instance. Nor did Williams establish her personal knowledge of the business relationship between Walz as the plaintiff's mailing agent, the interplay between these entities, how these records are made on behalf of Walz, and, in the regular course of Walz' business, become part of the plaintiff's records, or her familiarity and training in Walz' mailing procedures. Thus, the plaintiff failed to submit admissible proof of mailing from the United States Postal Service for service of the 90-day notice to the defendants via first-class and certified mail, along with an authenticated correspondence log, or affidavits of service (from the individual who performed the alleged mailing).

The portion of the second affirmative defense, wherein the defendants assert non-compliance with filing requirements of RPAPL 1306, shall remain pending the future disposition, on renewal or at trial, of the issue of compliance with the notice requirement of RPAPL 1304, a necessary pre-condition.

Because the defendants failed to assert a defense relating to service of the 30-day notice in the answer or in any motion for leave to amend their answer, and the plaintiff never alleged compliance with the same in the complaint, this defense was waived (*see* CPLR 3015[a]; *Federal Natl. Mtge. Assn. v Onuoha*, 172 AD3d 1170, 102 NYS3d 214 [2d Dept 2019]; *Nationstar Mtge., LLC v Vordermeier*, 165 AD3d 822, 86 NYS3d 191 [2d Dept 2018]). Even if the 30-day notice had been timely asserted as an affirmative defense, if the plaintiff is able to demonstrate proper service of the 90-day notice by either certified or regular mail upon either Kevin or Lisa (*see* Note § 22), such will demonstrate compliance with the 30-day notice requirement in the mortgage (*see Wachovia Bank, N.A. v Carcano*, 106 AD3d 724, 965 NYS2d 516 [2d Dept 2013]; *Hudson City Sav. Bank v Friedman*, 146 AD3d 757, 43 NYS3d 912 [2d Dept 2017][notice of default substantially complied with the terms of the mortgage]).

The plaintiff established that it had standing to commence this action by submitting the affidavit of its representatives, along with the corporate merger document, which established that the plaintiff had physical possession of the note at the time it commenced this action (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 12 NYS3d 612 [2015]; *see also* Banking Law § 602; *Citimortgage, Inc. v Rockefeller*, 155 AD3d 998, 63 NYS3d 868 [2d Dept 2017][standing proven by proof of corporate merger]; *Citimortgage, Inc. v Goldberg*, 134 AD3d 880, 20 NYS3d 906 [2d Dept 2015][same]). In her affidavit, Williams alleges, among other things, that the plaintiff is the original mortgagee of the security instrument for the loan as successor-by-merger to Fleet, and that the plaintiff was in possession of the note on the date of commencement of this action.

Furthermore, in her affidavit Schwartz alleges, among other things, that the plaintiff's counsel received the original note on February 8, 2018, as custodian for the plaintiff (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 97 NYS3d 286 [2d Dept 2019][plaintiff's standing demonstrated by, inter alia, an affidavit from Kyra Schwartz, an employee of the plaintiff's counsel in foreclosure action]; *U.S. Bank, N.A. v Cardenas*, 160 AD3d 784, 71 NYS3d 368 [2d Dept 2018] [same]; *Bank of N.Y. Mellon v Cronin*, 151 AD3d 1504, 57 NYS3d 733 [3d Dept 2017] [same]; *PennyMac Corp. v Chavez*, 144 AD3d 1006, 42 NYS3d 239 [2d Dept 2016][same]). Attached to Schwartz's affidavit is "a true and accurate printout [she] made of the computer entry confirming the receipt . . . of the original note." Schwartz also attached a copy of the original note to her affidavit, and affirmed that she had compared this copy "to the original note which remains in storage under the custody of [her] team" and that the copy was "a true and accurate copy of the original note."

In any event, the documentary evidence submitted by the plaintiff includes, among other things, a copy of the original note which was attached to the e-filed complaint (*see U.S. Bank National Association v Echevarria*, 171 AD3d 979, 97 NYS3d 708 [2d Dept 2019]; *see also Wells Fargo Bank, N.A. v Ballard*, 172 AD3d 1440, 102 NYS3d 229 [2d Dept 2019] [judicial notice taken of the fact that the original complaint filed in the action, available electronically on the New York State Courts Electronic Filing System, included the note as an attachment]; *Matter of Transtechnology Corp. v Assessor*, 71 AD3d 1034, 897 NYS2d 494 [2d Dept 2010] [judicial notice of the New York State Unified Court System E-Courts public website]).

The plaintiff demonstrated that the statute of limitations is not a bar to this action which was commenced within six year of the default in payment (see CPLR 213[4]; *Wells Fargo Bank v Cohen*, 80 AD3d 753, 915 NYS2d 569 [2d Dept 2011]). By its submissions, the plaintiff established that the "acceleration" referenced in its counsel's first affirmation concerns an unrelated loan for another property (Lot 6, Randall Road, Shoreham) allegedly owned by the defendants. In opposition, the defendant failed to raise a triable issue of fact.

The plaintiff also demonstrated the default in payment (see *HSBC Bank USA, N.A. v Bazigos*, 175 AD3d 1506, 109 NYS3d 381 [2d Dept 2019]; *Bank of Am., N.A. v Cudjoe*, 157 AD3d 653, 69 NYS3d 101 [2d Dept 2018]). The affidavit of the plaintiff's representative, combined with the plaintiff's other submissions, including the plaintiff's payment records, show that the loan has been in default since August 5, 2012. In opposition, the defendants failed to raise a triable issue of fact.

In instances where a defendant fails to oppose a motion for summary judgment, the facts, as alleged in the moving papers, may be deemed admitted and there is, in effect, a concession that no question of fact exists (see *Kuehne & Nagel v Baiden*, 36 NY2d 539, 369 NYS2d 667 [1975]; *Argent Mtge. Co., LLC v Mentasana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]).

Therefore, except for the defenses asserting non-compliance with RPAPL 1304 and RPAPL 1306, the remaining affirmative defenses asserted in the answer are dismissed with prejudice (see *Emigrant Bank v Myers*, 147 AD3d 1027, 47 NYS3d 446 [2d Dept 2017][unmeritorious affirmative defenses dismissed]).

The branch of the motion for an order amending the caption is granted (see CPLR 1024). The plaintiff also established the default in answering on the part of the non-answering defendants, BANA (as subordinate mortgage holder), Teresa Manning Carter, Ron Carter, Clerk of the Suffolk County District Court and Idalina E. Coello (see RPAPL 1321; *HSBC Bank USA, N.A. v Alexander*, 124 AD3d 838, 4 NYS3d 47 [2d Dept 2015]). Accordingly, the default in answering of all of the non-answering defendants is fixed.

In view of the foregoing, and pursuant to CPLR 3212(g), the court finds that the sole remaining issues of fact relate to proof of proper service of the 90-day pre-foreclosure notice by regular and certified mail upon the defendants and compliance with the corresponding filing requirements of RPAPL 1306. Thus, the undecided branches of the plaintiff's motion are denied with leave to renew within 120 days of the date herein, or, in the alternative, the filing of a note of issue within 120 days of the date of this order. The plaintiff's renewal motion, if any, shall include a copy of this order.

The proposed long form order submitted by the plaintiff appointing a referee to compute has been marked "not signed."

Dated: Feb. 6, 2020

  
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HON. C. RANDALL HINRICHS, J.S.C.

\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION