

Wilmington Sav. Fund Socy., FSB v Mastro
2020 NY Slip Op 31876(U)
February 6, 2020
Supreme Court, Suffolk County
Docket Number: 608447/2017
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: 10-5-2018
Motion Sequence: 001-MotD

WILMINGTON SAVINGS FUND SOCIETY, FSB, AS
TRUSTEE OF UPLAND MORTGAGE LOAN TRUST A,

Plaintiff,

WOODS OVIATT GILMAN LLP
Attorneys for Plaintiff
500 Bausch & Lomb Place
Rochester, NY 14604

-against-

STEVEN MASTRO A/K/A STEVE MASTRO, NEW
YORK STATE DEPARTMENT OF TAXATION AND
FINANCE and JOHN DOE,

Defendants.

RICHARD J. SULLIVAN, ESQ.
Attorney for Defendant
STEVEN MASTRO a/k/a
STEVE MASTRO
P.O. Box 582
Port Jefferson, NY 11777

Upon the following papers: Notice of Motion with Memorandum of Law by plaintiff, dated August 24, 2018, and supporting papers; Affirmation in Opposition by counsel for defendant Steven Mastro, dated September 27, 2018, and supporting papers; it is,

ORDERED that the motion (001) by plaintiff, which seeks an order, inter alia, granting summary judgment in favor of plaintiff, dismissing the answer and affirmative defenses of defendant Steven Mastro, appointing a referee to compute the amounts owed to plaintiff, granting a default judgment against the non-answering defendants, and amending the caption, is decided to the extent set forth herein; and it is further

ORDERED that so much of the plaintiff's motion, which seeks an order granting summary judgment in favor of plaintiff and appointing a referee to compute, is hereby denied for failure to make a prima facie showing of compliance with the notice of default provisions of the mortgage (Fourth Affirmative Defense) and the pre-commencement notice requirements of RPAPL §1304 (part of Second Affirmative Defense); and it is further

ORDERED that so much of the plaintiff's motion, which seeks an order striking defendant Mastro's answer, is decided to the extent that the following Affirmative Defenses are dismissed: First (Standing); Third (Failure to State a Cause of Action); Fifth (RPAPL §1301); and so much of the Second Affirmative Defense which alleges that plaintiff failed to comply with RPAPL §1303 and RPAPL §1306; and it is further

ORDERED that plaintiff is granted leave to file a successive motion for summary judgment within 120 days from the date of this Order as to defendant Mastro's Fourth Affirmative Defense (Notice of Default) and as to so much of defendant Mastro's Second Affirmative Defense as relates to RPAPL §1304, or in the alternative, plaintiff shall file its Note of Issue within 120 days from the date of this Order; and it is further

ORDERED that so much of the plaintiff's motion, which seeks an order amending the caption, is granted and the names of "John Doe (Refused Name)" and "Jane Doe (Refused Name)" are added as defendants in the place and stead of defendant "John Doe;" and it is further

ORDERED, that the caption of this action shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK
-----X
WILMINGTON SAVINGS FUND SOCIETY, FSB,
AS TRUSTEE OF UPLAND MORTGAGE LOAN
TRUST A,

Plaintiff,

Index No. 608447-2017

-against-

STEVEN MASTRO A/K/A STEVE MASTRO,
NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE, "JOHN DOE"
(REFUSED NAME) and "JANE DOE" (REFUSED
NAME),

Defendants.

-----X

and it is further,

ORDERED that plaintiff is directed to serve a copy of this Order amending the caption upon the Calendar Clerk of this Court; and it is further

ORDERED that so much of plaintiff's motion, which seeks an order granting a default judgment against the non-answering defendants, is hereby granted; and it is further

ORDERED that a copy of this Order shall be annexed as an exhibit to any future motions submitted in accordance with this Order; and it is further

ORDERED that plaintiff's counsel shall promptly serve, via First Class Mail, a copy of this Order upon all parties who have appeared in this action and upon the Calendar Clerk, and shall promptly thereafter file the affidavit(s) of such service with the Suffolk County Clerk.

On April 8, 2008, the defendant, Steven Mastro (hereinafter "defendant") executed a note in the sum of \$400,000.00 in favor of nonparty, Washington Mutual Bank, F.A., for a loan that was secured by a mortgage against real property located at 109 Dark Hollow Road, Port Jefferson, Suffolk County. Effective November 14, 2014, the loan was modified, with the amount of \$538,811.36 as the new unpaid principal balance. On or about May 3, 2017, the plaintiff commenced this mortgage foreclosure action, alleging that the defendant had defaulted on payment obligations of the note and modification agreement as of April 1, 2017. A copy of the note, which was endorsed in blank, was annexed to the complaint when the action was commenced. The defendant interposed and answer with five Affirmative Defenses, including, as relevant here, that the plaintiff lacked standing to commence the action (First), that the plaintiff failed to comply with the notice of default provisions of the mortgage (Fourth), and that plaintiff failed to comply with the pre-commencement notice requirements of RPAPL §1304 (set forth as part of the Second Affirmative Defense). By its motion, plaintiff seeks an order, inter alia, granting summary judgment in its favor and appointing a referee to compute the amounts owed to plaintiff, which is opposed by defendant.

To establish prima facie entitlement to judgment as a matter of law in an action to foreclose a residential mortgage, a plaintiff must produce the mortgage, the unpaid note, and evidence of default (*see Federal Natl. Mortgage Assn. v Onuoha*, 172 AD3d 1170, 102 NYS3d 214 [2d Dept 2019]; *Bank of New York Mellon v Zavolunov*, 157 AD3d 754, 69 NYS3d 356 [2d Dept 2018]; *M&T Bank v Joseph*, 152 AD3d 579, 58 NYS3d 150 [2d Dept 2017]; *Bank of New York Mellon v Aquino*, 131 AD3d 1186, 16 NYS3d 770 [2d Dept 2015]). Where a plaintiff's standing to commence a foreclosure action is placed in issue by a defendant, it is also incumbent upon the plaintiff to prove its standing to be entitled to relief (*see Wells Fargo Bank, N.A. v Gonzalez*, 174 AD3d 555, 104 NYS3d 167 [2d Dept 2019]; *Bank of New York Mellon v Aiello*, 164 AD3d 632, 83 NYS3d 135 [2d Dept 2018]; *Encore Credit Corp. v Yakubov*, 156 AD3d 683, 67 NYS3d 39 [2d Dept 2017]; *Wells Fargo Bank, N.A. v Arias*, 121 AD3d 973, 995 NYS2d 118 [2d Dept 2014]). In addition, where the defendant raises the issue of compliance with RPAPL §1304 as an affirmative defense in his or her answer, the plaintiff is required to make a prima facie showing of compliance with RPAPL §1304 (*see Citimortgage, Inc. v Wallach*, 163 AD3d 520, 81 NYS3d 210 [2d Dept 2018]; *Bank of America, N.A. v Wheatley*, 158 AD3d 736, 73 NYS3d 88 [2d Dept 2018]; *U.S. Bank N.A. v Carey*, 137 AD3d 894, 28 NYS3d 68 [2d Dept 2016]).

Plaintiff has produced a copy of the note and mortgage, as well as evidence of defendant's default in making payments. Contrary to defendant's arguments, plaintiff has also established, *prima facie*, its standing as the holder of the note by demonstrating that the note was in its possession at the time it commenced the action, as evidenced by the attachment of a copy of the note, endorsed in blank, to the complaint (*see Wells Fargo Bank, N.A. v Grosz*, 173 AD3d 1247, 103 NYS3d 535 [2d Dept 2019]; *Federal Natl. Mortgage Assn. v Onuoha*, 172 AD3d 1170, 102 NYS3d 214 [2d Dept 2019]; *U.S. Bank N.A. v Cohen*, 156 AD3d 844, 67 NYS3d 643 [2d Dept 2017]). Therefore, defendant's First Affirmative Defense (Standing) is dismissed.

Also dismissed is defendant's Third Affirmative Defense (Failure to State a Cause of Action), defendant's Fifth Affirmative Defense (RPAPL §1301), and so much of defendant's Second Affirmative Defense which alleges that plaintiff failed to comply with RPAPL §1303 and RPAPL §1306. Such defenses are conclusory and unsubstantiated with facts, and plaintiff has established prima facie entitlement to dismissal of those affirmative defenses without the defendant raising questions of fact in opposition (*see U.S. Bank N.A. v Echevarria*, 171 AD3d 979, 97 NYS3d 708 [2d Dept 2019]; *JPMorgan Chase Bank, N.A. v Zhan Hua Cao*, 160 AD3d 82, 176 NYS3d 82 [2d Dept 2018]; *Katz v Miller*, 120 AD3d 768, 991 NYS2d 346 [2d Dept 2014]; *Becher v Feller*, 64 AD3d 672, 884 NYS2d 83 [2d Dept 2009]; *Cohen Fashion Optical, Inc. v V & M Optical, Inc.*, 51 AD3d 619, 858 NYS2d 260 [2d Dept 2008]).

The Court, however, agrees with the defendant's assertions, that the plaintiff failed to establish entitlement to dismissal of defendant's Fourth Affirmative Defense, which alleges that plaintiff failed to comply with the notice of default provisions of the mortgage, and so much of defendant's Second Affirmative Defense as relates to the pre-commencement notice requirements of RPAPL §1304. In support of its motion, plaintiff submits the February 15, 2018 affidavit of Tom Croft, SVP of Default, and the July 17, 2018 affidavit of Elizabeth Gonzales, Default Document Manager, both of Carrington Mortgage Services, LLC ("Carrington"), plaintiff's servicer. Contrary to plaintiff's contentions, while each allege compliance with RPAPL §1304 and the notice provisions of the mortgage, and each attests to familiarity with business records transferred to and maintained by Carrington, neither submit proof of a standard office mailing procedure or any independent proof of the actual mailing by M&T Bank, the entity whose letterhead appears on the notices (*see JPMorgan Chase Bank, N.A. v Akanda*, ___ AD3d ___, ___ NYS3d ___, 2019 NY Slip Op 08180 [2d Dept 2019]; *JPMorgan Chase Bank, N.A. v Williams*, 170 AD3d 1142, 94 NYS3d 882 [2d Dept 2019]; *Wells Fargo Bank, N.A. v Moran*, 168 AD3d 1128, 92 NYS3d 716 [2d Dept 2019]). Absent from plaintiff's proofs are any affidavits of actual service, or proof of M&T Bank's standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of that procedure (*see KeyBank N.A. v Barrett*, ___ Ad3d ___, ___ NYS3d ___, 2019 NY Slip Op 08835 [2d Dept 2019]; *Wells Fargo Bank, NA v Mandrin*, 160 AD3d 1014, 76 NYS3d 182 [2d Dept 2018]).

Since the plaintiff failed to provide evidence of the actual mailing, or evidence 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, the plaintiff failed to establish its strict compliance with RPAPL §1304 (*see M&T Bank v Biordi*, ___ AD3d ___, 176 AD3d 1194 [2d Dept 2019]; *U.S. Bank N.A. v Cope*, 175 AD3d 527, 107 NYS3d 104 [2d Dept 2019]; *Citibank, N.A. v Conti-Scheurer*, 172 AD3d 17, 98 NYS3d 273 [2d Dept 2019]).

Plaintiff's proofs are, likewise, insufficient to establish prima facie compliance with the notice of default provisions of the mortgage. A plaintiff must establish, prima facie, that it complied with the condition precedent contained in the mortgage requiring it to give notice of default prior to demanding payment in full (*see Emigrant Bank v Myers*, 147 AD3d 1027, 47 NYS3d 446 [2d Dept 2017]). An affidavit of a representative of the plaintiff's loan servicer is insufficient, where it claims that notice of default was sent to the defendant, but is conclusory and unsubstantiated, and even when considered together with a copy of the notice of default, it does not establish that the notice was sent in accordance

with the terms of the mortgage (see *U.S. Bank N.A. v Callender*, 176 AD3d 1249, 111 NYS3d 65 [2d Dept 2019]; *PNMAC Mortgage Opportunity Fund Investors, LLC v Torres*, 175 AD3d 1335, 108 NYS3d 143 [2d Dept 2019] *GMAC Mtge., LLC v Bell*, 128 AD3d 772, 11 NYS3d 73 [2d Dept 2015]; *Wells Fargo Bank, N.A. v Eisler*, 118 AD3d 982, 988 NYS2d 682 [2d Dept 2014]).

Plaintiff is granted leave to file a successive motion for summary judgment on the issues related to the defendant's Fourth Affirmative Defense (Notice of Default) and that portion of defendant's Second Affirmative Defense as relates to RPAPL §1304, such motion, if any, to be filed within 120 days from the date of this Order (see *Kolel Damsek Eliezer, Inc. v Schlesinger*, 139 AD3d 810, 33 NYS3d 284 [2d Dept 2016]; *Valley Nat. Bank v INI Holding, LLC*, 95 AD3d 1108, 945 NYS2d 97 [2d Dept 2012]; *Rose v Horton Med. Ctr.*, 29 AD3d 977, 816 NYS2d 174 [2d Dept 2006]; *Detko v McDonald's Rests. of N.Y.*, 198 AD2d 208, 603 NYS2d 496 [2d Dept 1993], *lv denied*, 83 NY2d 752, 611 NYS2d 134 [1994]). In the alternative, plaintiff shall file its Note of Issue within 120 days from the date of this Order.

This constitutes the Decision and Order of the Court.

In light of the foregoing, the plaintiff's proposed order of reference is marked "Not Signed."

Dated: Feb 6, 2020


C. RANDALL HINRICHS, JSC

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