

**Bank of Am., N.A. v Adaszewski**

2020 NY Slip Op 33464(U)

October 22, 2020

Supreme Court, Suffolk County

Docket Number: 0012751/2013

Judge: Robert F. Quinlan

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SHORT FORM ORDER

INDEX NO. 0012751/2013

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 27 SUFFOLK COUNTY

PRESENT: HON. ROBERT F. QUINLAN  
Justice of the Supreme Court

Motion Date: 12-19-19  
Motion Sequence.: #004 - MG

-----X  
BANK OF AMERICA, N.A.,

Plaintiff,

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

-against-

EDWARD S. ADASZEWSKI, AMY  
ADASZEWSKI, and AGNES ADASZEWSKI

Defendants.

FRED M. SCHWARTZ, ESQ.  
Attorney for Defendants Edward S. and Agnes  
Adaszewski  
317 Middle Country Road, Suite 5  
Smithtown, NY 11787

-----X

AMY ADASZEWSKI  
Defendant In Default  
21 Shire Court,  
Greenlawn, NY 11740

Upon the following papers numbered 1 to 61 read on this application by plaintiff Bank of America, N.A. for an order pursuant to CPLR §§ 3211 (b) and 3212 dismissing defendants' remaining affirmative defense and granting summary judgment against them, striking their answer and appointing a referee to compute: plaintiff's Notice of Motion and supporting papers; 1-49; defendants' Affirmation in Opposition and supporting papers: 50-56; Reply Affirmation and supporting papers: 57-61; and

**UPON** the court having held conferences in person on this action on October 8, 2020 and October 22, 2020 pursuant to the requirements of AO/157/20 of the Chief Administrative Judge of the Courts, dated July 23, 2020, and counsel for plaintiff and defendants Edward S. Adaszewski and Agnes Adaszewski having appeared on October 8, 2020, and although having been notified by the court of both conference dates, self represented defendant Amy Adaszewski failed to appear at either conference or notify the court requesting an adjournment, the court has complied with the requirements of AO/157/20; it is

**ORDERED** that pursuant to the provisions of AO/115/20 and AO/121/20 of the Chief Administrative Judge of the Courts, the parties are to immediately take all steps necessary to convert this action into one in conformity with the requirements for electronic filing pursuant to NYSCEF; and it is further

**ORDERED** that defendants Edward S. Adaszewski and Agnes Adaszewski's sole remaining affirmative defense, their 10<sup>th</sup>, is dismissed and plaintiff Bank of America, N.A. is granted summary judgment dismissing and striking their answer; and it is further

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**ORDERED** that the default of defendant Amy Adaszewski having been fixed and set by the court's order of September 9, 2019, the court grants plaintiff Bank of America, N.A.'s application for the appointment of a referee to compute and report pursuant to RPAPL § 1321; and it is further

**ORDERED** that plaintiff Bank of America, N.A. shall submit a proposed order to this court granting it summary judgment in conformity with this decision within thirty (30) days of the date of entry of this order, and which order, in addition to the standard terms of such an order, shall include the additional following terms:

**UPON** the court having held conferences in person on this action on October 8, 2020 and October 22, 2020 pursuant to the requirements of AO/157/20 of the Chief Administrative Judge of the Courts, dated July 23, 2020, and counsel for plaintiff and defendants Edward S. Adaszewski and Agnes Adaszewski having appeared on October 8, 2020, and although having been notified by the court of both conference dates, self represented defendant Amy Adaszewski failed to appear at either conference or notify the court requesting an adjournment, the court has complied with the requirements of AO/157/20; it is

**ORDERED** that plaintiff is to include in any proposed order of judgment of foreclosure and sale language complying with the Suffolk County Local Rule for filing of the Suffolk County Foreclosure Surplus Monies form contained in Suffolk County Administrative Order # 41-13; and it is further

**ORDERED**, that, if a prior notice of pendency is outdated, plaintiff is directed to file a successive notice of pendency at least twenty (20) days prior to the submission of any proposed judgment of foreclosure and sale, submitting a copy thereof with proof of filing with any proposed judgment of foreclosure and sale; and it is further.

**ORDERED** that within 30 days of the date of entry of this order, plaintiff is to serve a copy of the order of reference upon all parties who have appeared in this action, as well as upon the referee and thereafter file the affidavits of service with the Clerk of the Court; and it is further

**ORDERED** that within 60 days of the date of entry of this order, plaintiff is to provide the referee, and defendants who have appeared, all papers and documents necessary for the referee to perform the determinations required by this order (plaintiff's submissions); defendants may submit written objections and proof in support thereof (defendants' objections) to the referee within 14 days of the mailing of plaintiff's submissions; and it is further

**ORDERED** that the referee's report is to be prepared and submitted to plaintiff within 30 days of receipt of plaintiff's submissions, and the referee's report is to be submitted by plaintiff with its application for a judgement of foreclosure and sale; and it

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is further

**ORDERED** that the referee's duties are defined by this order of reference (CPLR 4311, RPAPL § 1321), and the referee has no power beyond that which is limited by this order of reference to the ministerial functions of computing amounts due and owing to plaintiff and determining whether the premises can be sold in parcels; the referee shall hold no hearing, take no testimony or evidence other than by written submission, and make no ruling on admissibility of evidence; the referee's report is merely advisory and the court is the ultimate arbiter of the issues, if defendants' objections raise issues as to the proof of amounts due and owing the referee is to provide advisory findings within his/her report; and it is further

**ORDERED** that if defendants' objections have been submitted to the referee, defendants shall also submit them to the court if opposing plaintiff's application for a judgment of foreclosure and sale; failure to submit defendants' objections to the referee will be deemed a waiver of objections before the court on an application for a judgment of foreclosure and sale; failure to raise and submit defendants' objections made before the referee in opposition to plaintiff's application for a judgment of foreclosure and sale shall constitute a waiver of those objections on the motion; and it is further

**ORDERED** that plaintiff is to file an application for a judgment of foreclosure and sale within a time consistent with any existing administrative orders of the court of this order; and it is further

**ORDERED** that this action shall be calendared for a status conference on Monday, February 22, 2021 at 9:30 AM before a justice to be determined for the court to monitor the progress of this action ; and it is further

**ORDERED** that failure to comply with any term of this order will not form the basis for a motion to dismiss the action, but will be the subject of the status conference at which future compliance will be determined; and it is further

**ORDERED** that this action shall be calendared for a status conference on Monday, February 22, 2021 at 9:30 AM before a justice to be determined for the court to monitor the progress of this action.

This is an action to foreclose a mortgage on a residential property know as 21 Shire Court, Greenlawn, Suffolk County, New York ("the property") given by defendants Edward S. Adaszewski, Amy Adaszewski, Agnes Adaszewski and Edward A. Adaszewski ("decendent") to Lend-Mor Mortgage Banker's Corp., a predecessor in interest to plaintiff Bank of America, N. A. ("plaintiff"). The prior history of this action is set forth in the prior decisions and orders of this court and more specifically in this court's decision and order of September 9, 2019 (Mot. Seq. #003). That order, which among other things acknowledged the discontinuance of the action against decendent ( Mot. Seq. #002) and corrected

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an error in the caption, fixed and set the default of defendant Amy Adaszewski and granted plaintiff partial summary judgment dismissing defendants Edward S. Adaszewski's and Agnes Adaszewski's ("defendants") counterclaims and all of their affirmative defenses except their 10<sup>th</sup> affirmative defense, which raised the issue of mailing of the notices required by RPAPL § 1304 ("the notices"), and denied plaintiff's motion for the appointment of a referee pursuant to RPAPL § 1321. That decision also disposed of defendant Agnes Adaszewski's claim that any notices sent to her were sent to an improper address. The court set the issue of proof of mailing of the notices raised by defendants' 10<sup>th</sup> affirmative defense for a limited issue trial, and authorized the parties to submit successive summary judgment motions on that issue within sixty (60) days of the filing of a note of issue. Plaintiff filed a note of issue on November 15, 2019 and timely filed this motion.

In support of this motion plaintiff submits an affidavit of an officer of Covius Document Services ("Covius"), formerly known as Walz Group LLC ("Walz"). Through his affidavit he established his ability to testify to Covius' and Walz' business records, practices and procedures pursuant to CPLR 4518. Along with his affidavit he presented copies his employer's business records which he had reviewed and relied upon in executing his affidavit, which included copies of the notices mailed to defendants at the property, as well as records which showed the dates that those notes were mailed by both first class and certified mail. He established through his affidavit his familiarity with the mailing practices and procedures of Walz, as his employer was known at the time of the mailings, and established through a review of those documents, and his familiarity with the mailing procedures, that the notices were mailed to defendants at the property by both first class and certified mail more than ninety days before this action was commenced.

To establish mailing, plaintiff may provide proof of actual mailing or description of its office's practice and procedure for mailing (*see New York & Presbyt. Hosp. v Allstate Ins. Co.*, 29 AD3d 547 [2d Dept 2006]; *Wells Fargo Bank, N.A. v Taylor*, 170 AD3d 921 [2d Dept 2019]; *Bank of New York Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). An affiant must show his familiarity with office practices and procedures to establish office practices and procedures to insure proper addressing and mailing (*see CitiMortgage, Inc v Pappas*, 147 AD3d 900 [2d Dept 2017]; *US Bank, N.A. v Cope*, 175 AD3d 527 [2d Dept 2019]). Where an affiant establishes his ability to testify as to the business records, describes uniform procedure for mailing notices, provides copies of records that establish mailing and provides the date on which the mailings were sent, such evidence is sufficient to establish the mailings (*see Citimortgage, Inc. v Goldberg*, 179 AD3d 1006 [2d Dept 2020]). The affidavit and records provided here meets these standards and provide proof in admissible form establishing the mailings of the notices by both first class and certified mail to each defendant at the property, thereby establishing compliance with RPAPL § 1304's mailing requirements.

Defendants' counsel's argument that because the officer's affidavit and the records show that in addition to the mailings made to each defendant individually at the property on June 5, 2012, there is an additional single mailing addressed and entitled to three defendants at the property sent on June 6, 2012 is of no moment. As the mailings of June 5, 2012 provide proof of compliance with the statute, the mailing on June 6, 2012 of a potentially defective notice is irrelevant. (The court recognizes that if the decedent Edward A. Adaszewski' was still a defendant, the mailing of June 5, 2012 sent merely to

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“Edward A.” would have failed to comply with the statute, but that issue is moot.) The court notes that defendants have not challenged the content of the notices and information sent on June 5, 2019.

Additionally, the court finds defendants’ counsel’s argument that plaintiff did not establish the relationship between Covius and Walz through the affidavit of the officer to be without merit. Even if the court is incorrect in its position that as a vice-president of Covius the affiant was able to establish the relationship, plaintiff’s submission in reply provides proof that the difference in names was not a merger, but merely a change of name. As this issue was raised for the first time by defendants’ in their opposition, such a submission was appropriate to clarify the issue (*see Central Mtge. Co v Jahnsen*, 150 AD3d 661 [2d Dept 2017]; *Citibank, N.A. v Corrado*, 162 AD3d 994 [2d Dept 2018]; *Citimortgage, Inc. v Goldberg*, 179 AD3d 1006 [2d Dept 2020]).

Accordingly, plaintiff’s motion seeking dismissal of defendant’s 10<sup>th</sup> affirmative defense is granted, and plaintiff is now granted full summary judgment dismissing and striking defendants’ answer, as is its application for the appointment of a referee pursuant to RPAPL § 1321.

The court has searched plaintiff’s submissions and cannot find a copy of plaintiff’s proposed order. Therefore, plaintiff is directed to serve upon defendants, and the court, a proposed order granting summary judgment and the appointment of a referee to compute, to include in such proposed order, in addition to plaintiff’s counsel’s stock order, the language required by the court above. Such proposed order shall be submitted within thirty (30) days of the date of entry of this order.

The caption, as amended by the order of September 9, 2019, shall be used in all further proceedings, not the caption under which plaintiff submitted this motion.

This constitutes the decision and order of the court.

DATED: October 22, 2020



HON. ROBERT F. QUINLAN  
J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION