

Wells Fargo Bank, N.A. v Smart
2022 NY Slip Op 33456(U)
September 21, 2022
Supreme Court, Queens County
Docket Number: Index No. 700435/16
Judge: Darrell L. Gavrin
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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DARRELL L. GAVRIN IA Part 27
Justice

WELLS FARGO BANK, NATIONAL
ASSOCIATION AS TRUSTEE FOR OPTION
ONE MORTGAGE LOAN TRUST 2007-2, ASSET
BACKED CERTIFICATES, SERIES 2007-2,

Index
Number 700435/16
Motion
Date March 8, 2022

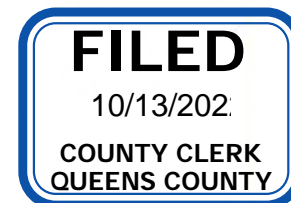
Plaintiff,

Motion Seq. No. 4

-against-

GLENFORD SMART, MARY BROWN, and JANE
SMITH,

Defendants.



On the following e-filed papers numbered E159-E165, E167-E170 on this motion (Seq. 4) of plaintiff for an order granting it leave to renew this court’s order of May 16, 2019, and upon renewal, granting plaintiff’s motion for an order (1) pursuant to CPLR 3212, granting it summary judgment, striking the answer of defendant, Glenford Smart, (Smart) including all of Smart’s affirmative defenses and counterclaims (2) for an order of reference; and on the e-filed papers numbered E56-E93 on the underlying motion (Seq. 2) by plaintiff for an order (1) awarding plaintiff summary judgment, (2) striking Smart’s answer and dismissing the remaining affirmative defenses and counterclaim, (3) discontinuing this action against the defendants sued herein as “John Doe # 3” through “John Doe # 12” and amending the caption to reflect same, (4) appointing a referee to ascertain and compute the amount due to plaintiff on the note and mortgage upon which this action is brought and to examine and report whether the mortgaged premises can be sold in one or more parcels, and (5) granting a default judgment against all the non-appearing defendants.

	<u>Papers numbered</u>
Notice of Motion (Seq. 4) - Affirmation - Exhibits - Memorandum of Law.....	E59-E165
Affirmation in Opposition. - Exhibit.....	E167-E168
Reply Memorandum of Law - Exhibit.....	E169-E170
Notice of Motion (Seq. 2) Affirmation - Exhibits - Memorandum of Law.....	E56-E90
Affirmation in Opposition – exhibit.....	E91-E92
Reply Memorandum of Law.....	E93

Upon the foregoing papers, it is ordered that the motion is determined as follows:

The motion in this action was filed on October 21, 2021. This motion seeks leave to renew a decision dated May 16, 2019. In its decision dated June 28, 2022, the Appellate Division, Second Department reversed the court’s May 16, 2019 decision on procedural grounds and directed that plaintiff’s summary judgment motion be decided on the merits.

The underlying facts remain unchanged. In December 2006, defendant, Smart obtained a residential loan from Option One Mortgage Corp. (Option One) and executed a note in the principal amount of \$561,000.00, plus interest. The note was secured by a mortgage on the real property known as 146-12 223rd Street, Springfield Gardens, New York executed by Smart in favor of Option One. The mortgage was assigned to plaintiff by assignment of mortgage executed on February 25, 2011. On May 23, 2011, plaintiff commenced a foreclosure action against Smart herein and other defendants, entitled *Wells Fargo Bank, NA. v Smart* (Supreme Court, Queens County, Index No. 12439/2011) based upon the alleged default in payment of the monthly mortgage installments due under the subject note and mortgage on December 1, 2009. By order entered on August 17, 2015, the complaint was dismissed as asserted against all the defendants.

Plaintiff commenced this action on January 14, 2016, seeking foreclosure based upon the same alleged default under the note and mortgage as was alleged in the prior action (Index No. 12439/2011). Defendant, Smart timely served an answer, asserting various affirmative defenses, including lack of standing, failure to comply with the notice requirements of RPAPL 1304, expiration of the applicable statute of limitations, failure to provide notice of default and improper acceleration, and interposing counterclaims. Plaintiff served a reply to the counterclaims. The remaining defendants herein have not appeared or answered.

In the decision (Seq. 1) dated November 8, 2017, wherein plaintiff first sought summary judgment, this court denied, among others, that branch of plaintiff’s motion that sought dismissal of Smart’s second and third affirmative defenses that alleged non-

compliance with RPAPL 1304 and RPAPL 1306. This order was not subject to appeal and was not vacated, and as such, is now the law of the case (*see Wells Fargo Bank, N.A. v Morales*, 178 AD3d 881 [2d Dept 2019]). “Where a defendant raises the issue of compliance with RPAPL 1304 as an affirmative defense, a party moving for summary judgment is required to make a *prima facie* showing of strict compliance with RPAPL 1304” (*see US Bank Nat. Assn. v Mendelovitz*, 189 AD3d 1307 [2d Dept 2020]). Strict compliance with the RPAPL 1304 notice requirement is a condition precedent to the commencement of a foreclosure action. (*Citibank, N.A. v Conte-Sheurer*, 172 AD3d 17 [2d Dept 2017]). Failure to comply with RPAPL 1304 is a defense that may be “raised at any time” (*Flagstar Bank, FSB v Jambelli*, 140 AD3d 829, 830 [2d Dept 2016]; and *see Wells Fargo Bank, N.A. v Morales*, 178 AD3d 881). Where plaintiff fails to establish compliance with the condition precedent of RPAPL 1304, the motion for summary judgment must be denied (*Wells Fargo v Trupia*, 150 AD3d 1049 [2d Dept 2017]).


In the case at bar, in support of its motion (Seq. 2), plaintiff submits an affidavit of merit from Howard R. Handville, (Handville), who is a senior loan analyst employed by Ocwen Loan Servicing, LLC, (Ocwen) the loan servicer and attorney-in fact. Handville avers that “I am familiar with Ocwen Loan Servicing, LLC's standard practices and procedures, and my review of the business records including, but not limited to, correspondence logs for Defendant's Loan, show that on October 5, 2015, a 90-day pre-foreclosure notice addressed to Defendant was sent on behalf of Ocwen Loan Servicing, LLC by Walz Group, LLC (“WALZ”), its vendor and agent, by regular and certified mail to the Property (the “90-Day Notice”). The certified mailing bore United States Postal Tracking Number: 9314810011700832698737.”

However, copies of the RPAPL 1304 notice (90-day notice) submitted with the Handville affidavit include additional documents from Ocwen pertaining to the Home Affordable Modification program (HAMP). Pursuant to the authority set forth by the Appellate Division in *Bank of Am., N.A. v Kessler* (202 AD3d 10 [2d Dept 2021]), a RPAPL 1304 notice must be served in a single envelope that is separate from any other mailing or notice and “inclusion of any material in the separate envelope sent to the borrower under RPAPL 1304 that is not expressly delineated in these provisions constitutes a violation of the separate envelope requirement of RPAPL 1304 (2)” (*id.* at 14; *see Wells Fargo Bank, N.A. v DeFeo*, 200 AD3d 1105 [2d Dept 2021] [HAMP materials improperly included with RPAPL 1304 mailing]).

Insofar as plaintiff has failed to establish, *prima facie*, that it strictly complied with the requirements of RPAPL 1304, the motion for summary judgment must be denied, regardless of the sufficiency of the opposition papers (*id.* at 19; *see US Bank Nat. Assn. v Mendelovitz*, 189 AD3d 1307).

This constitutes the decision and order of this court.

Dated: September 21, 2022



DARRELL L. GARRIN, J.S.C.