

Bayview Loan Servicing, LLC v Covington

2023 NY Slip Op 31428(U)

April 27, 2023

Supreme Court, New York County

Docket Number: Index No. 850009/2019

Judge: Francis A. Kahn III

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. FRANCIS A. KAHN, III **PART** **32**

Justice

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BAYVIEW LOAN SERVICING, LLC,	INDEX NO. <u>850009/2019</u>
Plaintiff,	MOTION DATE _____
- v -	MOTION SEQ. NO. <u>002</u>

PAUL L COVINGTON, THE BOARD OF MANAGERS OF
THE 143 WEST 122ND STREET BROWNSTONE
CONDOMINIUM, JOHN DOE

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 79, 80, 81, 82, 83, 84, 85, 86

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, the motion is determined as follows:

In this action, Plaintiff seeks to foreclose on a mortgage on residential real property located at 143 West 122nd Street, Apt 2, New York, New York. Plaintiff filed an affidavit of service of the summons and complaint and RPAPL §1303 notice on Defendant mortgagor Paul Covington (“Covington”) wherein the process server attested that he served Covington by personal delivery at the mortgaged premises on January 30, 2019. Covington attempted to join issue by filing an answer on April 17, 2019. In that pleading, Covington raised eight affirmative defenses including lack of standing. Plaintiff filed a notice of rejection of the answer on April 23, 2019. The branch of a prior motion for summary judgment was denied by order of this Court dated November 8, 2021 on the basis that Plaintiff failed to demonstrate a *prima facie* case.

Now, Plaintiff moves again for, *inter alia*, summary judgment against Defendant mortgagor Paul Covington (“Covington”) and to appoint a referee to compute. Defendant Covington opposes the motion.

On the branch of Plaintiff’s motion for summary judgment on its claim for foreclosure, it was required to establish *prima facie* proof of the mortgage, the note, and evidence of the borrower’s default (*see U.S. Bank, N.A., v James*, 180 AD3d 594 [1st Dept 2020]; *Bank of NY v Knowles*, 151 AD3d 596 [1st Dept 2017]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1st Dept 2010]). Proof supporting a *prima facie* case on a motion for summary judgment must be in admissible form (*see CPLR §3212[b]*; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780 [1st Dept 2019]). A plaintiff may rely on evidence from persons with personal knowledge of the facts, documents in admissible form and/or persons with knowledge derived from produced admissible records (*see eg U.S. Bank N.A. v Moulton*, 179 AD3d 734,

738 [2d Dept 2020]). No particular set of business records must be proffered, as long as the admissibility requirements of CPLR 4518[a] are fulfilled and the records evince the facts for which they are relied upon (*see eg Citigroup v Kopelowitz*, 147 AD3d 1014, 1015 [2d Dept 2017]).

Plaintiff's motion was supported with an affidavit from Talya Harris ("Harris"), a Document Execution Associate for Nationstar Mortgage LLC d/b/a Mr. Cooper ("Nationstar"), the assignee of the note and mortgage. Harris' affidavit laid a proper foundation for the admission of Nationstar's records into evidence under CPLR §4518 (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). The records of other entities were also admissible since Harris sufficiently established that those records were received from the makers and incorporated into the records Nationstar kept and that it routinely relied upon such documents in its business (*see U.S. Bank N.A. v Kropp-Somoza*, 191 AD3d 918 [2d Dept 2021]). Further, annexed to the motion were records referenced by Harris (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]). Nationstar demonstrated its authority to act as it is the assignee of the note and mortgage, post-commencement of the action. Pursuant to CPLR §1018, Nationstar is authorized to continue prosecution of the action despite the transfer (*see CPLR §1018; Wells Fargo Bank, NA v McKenzie*, 183 AD3d 574 [2d Dept 2020]; *B & H Fla. Notes LLC v Ashkenazi*, 149 AD3d 401 [1st Dept 2017]).

Harris' affidavit and the referenced documents sufficiently evidenced the note and mortgage. As to the Mortgagor's default, it "is established by (1) an admission made in response to a notice to admit, (2) an affidavit from a person having personal knowledge of the facts, or (3) other evidence in admissible form" (*Deutsche Bank Natl. Trust Co. v McGann*, 183 AD3d 700, 702 [2d Dept 2020]). Here, Harris' review of the attached account records demonstrated that the Mortgagor defaulted in repayment under the note (*see eg ING Real Estate Fin. (USA) LLC v Park Ave. Hotel Acquisition, LLC*, 89 AD3d 506 [1st Dept 2011]).

In opposition, Defendant Covington's arguments concerning the sufficiency of Harris' affidavit and the admissibility of the relevant business records are without merit.

Accordingly, it is

ORDERED that Plaintiff is awarded summary judgment against Defendant Paul Covington; and it is further

ORDERED that **Paul Sklar, Esq., 551 5th Avenue, Ste 2200, New York, New York 10176-0001- (212) 972-8845** is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff and examine whether the tax parcel can be sold in parcels; and it is further

ORDERED that in the discretion of the Referee, a hearing may be held, and testimony taken; and it is further

ORDERED that by accepting this appointment the Referee certifies that he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not

limited to §36.2 (c) (“Disqualifications from appointment”), and §36.2 (d) (“Limitations on appointments based upon compensation”), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

ORDERED that, pursuant to CPLR 8003(a), and in the discretion of the court, a fee of \$350 shall be paid to the Referee for the computation of the amount due and upon the filing of his report and the Referee shall not request or accept additional compensation for the computation unless it has been fixed by the court in accordance with CPLR 8003(b); and it is further

ORDERED that the Referee is prohibited from accepting or retaining any funds for himself or paying funds to himself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that if the Referee holds a hearing or is required to perform other significant services in issuing the report, the Referee may seek additional compensation at the Referee’s usual and customary hourly rate; and it is further

ORDERED that plaintiff shall forward all necessary documents to the Referee and to defendants who have appeared in this case within 30 days of the date of this order and shall *promptly* respond to every inquiry made by the referee (promptly means within two business days); and it is further

ORDERED that if defendant(s) have objections, they must submit them to the referee within 14 days of the mailing of plaintiff’s submissions; and include these objections to the Court if opposing the motion for a judgment of foreclosure and sale; and it is further

ORDERED the failure by defendants to submit objections to the referee shall be deemed a waiver of objections before the Court on an application for a judgment of foreclosure and sale; and it is further

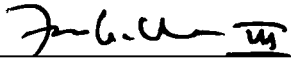
ORDERED that plaintiff must bring a motion for a judgment of foreclosure and sale within 30 days of receipt of the referee’s report; and it is further

ORDERED that if plaintiff fails to meet these deadlines, then the Court may *sua sponte* vacate this order and direct plaintiff to move again for an order of reference and the Court may *sua sponte* toll interest depending on whether the delays are due to plaintiff’s failure to move this litigation forward; and it further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the parties being removed pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address (www.nycourts.gov/supctmanh)); and it is further

All parties are to appear for a virtual conference via Microsoft Teams on **August 9, 2023, at 11:40 a.m.** If a motion for judgment of foreclosure and sale has been filed Plaintiff may contact the Part Clerk Tamika Wright (tswright@nycourt.gov) in writing to request that the conference be cancelled. If a motion has not been made, then a conference is required to explore the reasons for the delay.

<u>4/27/2023</u> DATE			 FRANCIS A. KAHN, III, A.J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/> HON. FRANCIS A. KAHN III
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> J.S.C.
	<input type="checkbox"/>	DENIED	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> REFERENCE
	<input type="checkbox"/>		<input checked="" type="checkbox"/> FIDUCIARY APPOINTMENT
	<input type="checkbox"/>		<input type="checkbox"/> GRANTED IN PART
	<input type="checkbox"/>		<input type="checkbox"/> SUBMIT ORDER