

Bayview Loan Servicing, LLC v Nelson

2023 NY Slip Op 33607(U)

October 3, 2023

Supreme Court, Kings County

Docket Number: Index No. 503752/2018

Judge: Cenceria P. Edwards

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part FRP1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 26th day of May, 2022.

P R E S E N T:

HON. CENCERIA P. EDWARDS, C.P.A.,

Justice.

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BAYVIEW LOAN SERVICING, LLC,

Plaintiff(s),

-against-

KENYATTA NELSON, a/k/a KENYATTA A. NELSON,
FIRST UNITED MORTGAGE BANKING CORP., et al.,

Defendant(s).
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ORDER

Calendar #(s): 7

Index #: 503752/2018

Mot. Seq. #(s): 1

The following e-filed papers read herein:

NYSCEF Doc. Nos.:

Notice of Motion/Order to Show Cause/Petition/Cross-Motion and
Affidavits (Affirmations) and Exhibits _____
Opposing Affidavits (Affirmations) and Exhibits _____
Reply Affidavits (Affirmations) and Exhibits _____

34-58

69-75

76-80

In December of 2006, defendant Kenyatta Nelson (“Nelson”), the owner of the residential real property known as 41 Rochester Avenue, in Brooklyn, New York, executed with Plaintiff’s predecessor-in-interest, defendant First United Mortgage Banking Corp. (“First United”), two notes in the respective amounts of \$519,200.00 and \$129,800.00, each of which was secured by a mortgage against the premises, and both mortgages were recorded on January 24, 2007. On February 23, 2018, Plaintiff commenced this action to foreclose on the mortgage securing the larger of these debts (hereinafter, “the subject note and mortgage”). In his answer to the complaint, Nelson raises various defenses, including lack of standing, statute of limitations, and failure to send the 90-day pre-foreclosure notice required by RPAPL §1304.

Plaintiff now moves, *inter alia*, for summary judgment on the complaint as against defendant Nelson, and for default judgment against the other defendants who purportedly failed

to appear or answer the complaint. In support, Plaintiff submits, *inter alia*, the affidavit of its “Document Coordinator,” Sandra Burgess, who attests to the accuracy and veracity of Plaintiff’s business records, purporting to demonstrate its standing, as well as compliance with the statutory and contractual notice requirements (*see* NYSCEF doc. no. 36). Nelson opposes the motion.

Summary judgment is a drastic remedy that will be granted only if the movant has demonstrated, through submission of evidence in admissible form, the absence of any material issues of fact (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]), and has affirmatively established the merit of his or her cause of action or defense (*see Zuckerman v New York*, 49 NY2d 557, 562 [1980]). A failure to make a *prima facie* showing of entitlement to judgment as a matter of law “requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If a movant makes the *prima facie* showing, the burden then shifts to the non-movant to raise a material issue of fact requiring a trial (*see id.*). Courts must view the evidence in the light most favorable to the non-movant (*see Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), and draw all reasonable inferences in his or her favor (*see Haymon v Pettit*, 9 NY3d 324, 327, n* [2007]).

The issue of Plaintiff’s compliance with RPAPL §1304 is dispositive of this motion. The statute provides that at least 90 days before commencing a legal action against the borrower, a plaintiff must send a particular notice (“the 90-day notice”) by registered or certified mail and also by first-class mail to the borrower’s last known address, advising that they may be at risk of losing their home to foreclosure because they are in default on their mortgage payments, and providing informational resources to help them achieve a resolution (*see* RPAPL §1304[1] and [2]). “Strict compliance with RPAPL 1304 notice to the borrower or borrowers is a condition precedent to the commencement of a foreclosure action” (*Citibank, N.A. v Conti-Scheurer*, 172 AD3d 17, 20 [2d Dept 2019]). When a defendant has raised the issue of compliance with RPAPL §1304 as an affirmative defense, a plaintiff seeking summary judgment is also required to make a *prima facie* showing of strict compliance with the statute (*see Wells Fargo Bank, N.A. v Cascarano*, 208 AD3d 729, 730 [2d Dept 2022]).

At the outset, Plaintiff argues that the subject loan is exempt from the notice requirements because the property is not occupied by the borrower, defendant Nelson, as his principal dwelling. As proof of the latter claim, Plaintiff’s attorney’s supporting affirmation cites to “Exhibit M,” without describing its content or how it proves said factual assertion (*see* NYSCEF

Doc. No. 35, p. 24, ¶(ii)(a)). As Exhibit M consists of 19 pages of the various proofs of service of the summons and complaint upon the various defendants (*see* NYSCEF Doc. No. 52), Plaintiff appears to contend that these documents show that Nelson's principal dwelling at the time of the commencement of this action was not at the subject premises. Indeed, an affidavit of service shows that Nelson was served in-person at a different Brooklyn address denominated as "C/O Access Unlimited Real Estate," and the affidavit of service by mail made pursuant to CPLR 3215(g)(3)(i) indicates that Plaintiff's agent mailed an additional copy of the summons to Nelson at the same location, also addressed as "in care of" that business (*see id.*, pp. 2-3). Since Plaintiff acknowledges that it mailed papers to Nelson at that address in care of the real estate company, and his physical presence at that business site at the time of in-person service is not probative as to whether he dwelled there, Plaintiff has failed to present evidence demonstrating that the mortgaged premises was not Nelson's principal dwelling. Moreover, even if Plaintiff had submitted such evidence, the argument is unavailing because that would only render the 90-day period inapplicable, as RPAPL §1304(3) makes clear that even "if the borrower no longer occupies the residence as the borrower's principal dwelling," "[n]othing herein shall relieve the lender, assignee or mortgage loan servicer of the obligation to send such notice, which notice shall be a condition precedent to commencing a foreclosure proceeding." Plaintiff's contention that it was exempt from the statutory pre-foreclosure notice requirement is, thus, rejected.

Plaintiff, nonetheless, argues that it sent the 90-day pre-foreclosure notices to defendant Nelson out of an abundance of caution. A plaintiff demonstrates compliance with RPAPL §1304 "by proof of the requisite mailing, which can be established with proof of the actual mailings, such as affidavits of mailing or domestic return receipts with attendant signatures, or proof 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" (*Bank of Am., N.A. v Bittle*, 168 AD3d 656, 658 [2d Dept 2019] [internal quotation marks omitted]).

With respect to a standard office mailing procedure, Ms. Burgess avers that Plaintiff's business records show that on November 3, 2017, it sent the 90-day notices to Nelson by regular first-class mail and first-class certified mail, separate from any other mailings, addressed to the subject premises and to another location in Brooklyn, purported to be the last known address provided by him (*see* NYSCEF doc. no. 36, ¶21). In sum and substance, this merely amounts to a recitation of the acts of mailing commonly described in a typical affidavit of service by mail,

declared upon personal knowledge by an affiant who performed said acts. Nowhere in her affidavits does Ms. Burgess state that she actually performed any of these acts, or that she witnessed another person perform them. To the contrary, she makes clear that her averment that the acts occurred is “based on the business records associated with this loan,” but the only records Ms. Burgess cites for this purported fact are the electronically stored copies of the notices themselves, which, she states are not uploaded into Plaintiff’s imaging system until they are mailed (*see id.*, ¶22). She also cites to a letter log containing notations that the notices were mailed, and, similarly, states that those entries are added only once the notices have been sent (*see id.*, ¶¶ 23-24). Rather than present proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, Ms. Burgess has, in essence, testified that the 90-day notices were mailed because Plaintiff’s records say that they were mailed. This constitutes “unsubstantiated and conclusory statement[s]” that are “insufficient to establish that the notice was actually mailed to [the borrower] by first-class and certified mail” (*Wells Fargo Bank, NA v Mandrin*, 160 AD3d 1014, 1016 [2d Dept 2018]; *see also Matter of Frankel v Citicorp Ins. Servs., Inc.*, 80 AD3d 280, 284 [2d Dept 2010]).

Plaintiff also failed to submit proof of the actual mailing of the 90-day notices, such as an affidavit of service or domestic return receipts with attendant signatures. Rather, the copies of the certified mailing receipts included with this motion contain only pre-printed address labels, and they lack postmarks or recipient signatures showing that they had actually been mailed (*see Pennymac Corp. v. Levy*, 207 AD3d 735, 737 [2d Dept 2022] [holding that “the unsigned certified mail receipts, bearing no postmark from the United States Postal Service, do not prove that the notices were actually mailed”]). Additionally, “[w]ith respect to first-class mail, the mere assertion that notice was mailed, supported by someone with no personal knowledge of the mailing, in the absence of proof of office practices to ensure that the item was properly mailed, does not give rise to the presumption of receipt” (*JPMorgan Chase Bank, N.A. v Grennan*, 175 AD3d 1513, 1518 [2d Dept 2022] [internal quotation marks and original alterations omitted]). Accordingly, Plaintiff failed to present proof in admissible form establishing strict compliance with RPAPL §1304’s notice requirement. Plaintiff’s failure to make its *prima facie* showing mandates denial of its motion for summary judgment on the complaint regardless of the sufficiency of the opposing papers (*see Citibank, N.A. v Conti-Scheurer*, 172 AD3d at 21; *Wells*

Fargo Bank, NA v Mandrin, 160 AD3d at 1016; *Wells Fargo Bank, N.A. v Trupia*, 150 AD3d 1049, 1051 [2d Dept 2017]).

Plaintiff also failed to demonstrate that Nelson's standing defense should be stricken. "When moving to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is 'without merit as a matter of law'" (*Bank of NY v Penalver*, 125 AD3d 796, 797 [2d Dept 2015], quoting *Vita v New York Waste Servs., LLC*, 34 AD3d 559, 559 [2d Dept 2006]). "A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that when the action was commenced, it was either the holder or assignee of the underlying note" (*Bank of Am., N.A. v Wheatley*, 158 AD3d 736, 736 [2d Dept 2018]). An endorsed note attached to the filed summons and complaint serves as *prima facie* proof of a plaintiff's possession of the note, and, thus, of its standing, at the time of the commencement of an action (*see Deutsche Bank Natl. Trust Co. v Murray*, 176 AD3d 1172, 1174 [2d Dept 1019]).

Plaintiff argues that it made a *prima facie* showing of its standing by attaching the endorsed note to the filed summons and complaint. However, that version of the note is not endorsed in blank, but is made payable only to the loan originator, First United (*see* NYSCEF Doc. No. 1, pp. 17-19). Moreover, as alleged in the complaint and set forth in the documents comprising Schedule D annexed thereto, First United's immediate successor-in-interest assigned the subject note and mortgage to the second successor through a written assignment on April 27, 2017, and recorded May 3, 2017 (*see id.*, pp. 39-41). Thereafter, by written assignment dated May 1, 2017, and recorded May 10, 2017, the second successor purportedly assigned the subject mortgage to Plaintiff (*see id.*, pp. 42-44). Curiously, Schedule D shows that another seemingly duplicative assignment of the subject mortgage to Plaintiff was executed on May 24, 2017 and recorded on May 31, 2017 (*see id.*, pp. 45-47). However, while the first written assignment dated April 27, 2017 indicated that First United's successor was assigning both the mortgage and the underlying note, denominated as the "indebtedness thereby secured [by the 'mortgage or deed of trust']" and as "the Note or obligation described in said mortgage (*see id.*, p. 40), the latter written assignments to Plaintiff mention only assignment of the mortgage, but are silent as to the note. The note, not the mortgage, is the dispositive document of title as to the underlying loan or debt (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361-362 [2015]). Since the copy of the note annexed to the filed complaint was endorsed to First United, and the record lacks proof of a proper series of assignments of the note, rather than just the mortgage, the Court

finds that Plaintiff has failed to demonstrate, *prima facie*, that Nelson's standing defense is without merit as a matter of law. Hence, this branch of Plaintiff's motion must be denied.

Plaintiff has also failed to make a *prima facie* showing that Nelson's statute of limitations defense is without merit as a matter of law. In his answer, Nelson alleged, upon information and belief, that the subject loan "went into default on or about October 1, 2012 and plaintiff, or its predecessor, accelerated the loan and demanded the entire amount due on the note and mortgage due on or about that date." Even accepting this allegation as true, this action was commenced on February 23, 2018, which is within the 6-year statute of limitations. However, in attempting to make its *prima facie* showing as to this defense, Plaintiff argues, in its counsel's affirmation in support of the motion, that Nelson initially defaulted on the subject mortgage by failing to tender funds for the November 1, 2008 payment, the loan was not accelerated until more than nine years later when the instant action was commenced, and "[a]s a business decision, Plaintiff elected to waive all installments which were older than six (6) years at the time the instant action was commenced" (NYSCEF doc. # 35, pp. 16-17). Counsel, thus, stated that Plaintiff was claiming only those payments due on and after November 1, 2012 (*see id.* at 17). Counsel cited the affidavit of Ms. Burgess, who reiterated Plaintiff's waiver of installment payments that were older than six years when this action was commenced (*see* NYSCEF doc. #36, pp. 9-10). Ms. Burgess also stated, however, that Nelson "breached his obligations under the mortgage by failing to successfully tender funds for the November 1, 2012 payments and all successive payments thereafter," but she was silent as to the October 1, 2012 and November 1, 2008 breach dates proffered by Nelson and Plaintiff's counsel, respectively, and she did not make any mention of an acceleration of the loan, much less controvert Nelson's assertion that an acceleration happened in or around October of 2012. As Plaintiff's submissions raise questions as to when Nelson first breached his obligations under the mortgage, and fail to eliminate issues of fact as to whether and when a prior acceleration occurred, Plaintiff has necessarily failed to satisfy its *prima facie* burden as the proponent of summary judgment. Hence, the Court must deny this branch of Plaintiff's motion regardless of the sufficiency of the opposing papers.

The branch of Plaintiff's motion seeking a default judgment against those defendants who have purportedly failed to answer and/or appear is also denied. In the affirmation of its attorney submitted in support of this motion, Plaintiff asserts only in conclusory terms that it is entitled to a default judgment because these defendants have failed to timely answer or move against the

complaint. Rather than present specific legal and factual arguments in support of its position, Plaintiff has simply appended a series of affidavits of service to its motion. Plaintiff has failed to specifically articulate when these various defendants were served, by which method, when service was deemed complete, and when each defendant’s answer was due. The proponent of a motion always bears the burden to affirmatively demonstrate entitlement to the relief sought, and this includes articulating coherent legal arguments supported by admissible evidence. The Court will not comb through the various evidentiary submissions in order to determine, in the first instance, the veracity and accuracy of the legal and factual assertions upon which Plaintiff’s motion for a default judgment is predicated. This branch of the motion is, thus, denied, with leave to renew upon papers affirmatively demonstrating Plaintiff’s entitlement to a default judgment as against each defendant alleged to have failed to timely answer the complaint.

Plaintiff additionally moves to amend the caption to replace the defendants designated therein as John Doe with the following persons who were served at the subject premises and subsequently identified as tenants or occupants: Noel Ripoll, Peleir Rohes, and Andre Huffste. *This branch of the motion is granted, and the caption shall be amended to read as follows:*

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BAYVIEW LOAN SERVICING, LLC,

Plaintiff(s),

-against-

KENYATTA NELSON, a/k/a KENYATTA A. NELSON,
FIRST UNITED MORTGAGE BANKING CORP.;
ROBERT TREUBER; NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD; NEW YORK
CITY TRANSIT ADJUDICATION BUREAU, NOEL
RIPOLL, PELEIR ROHES, ANDRE HUFFSTE,

Defendant(s).

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It is also noted that this action is in its early procedural stages, as there is no indication that a preliminary conference has been held, or that any disclosure has been exchanged. On such

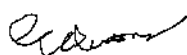
a sparse evidentiary record, the Court declines Plaintiff's request to dismiss defendant Nelson's several other affirmative defenses and counterclaims, many of which present as fact-intensive.

Accordingly, the above-referenced motion by Plaintiff for, *inter alia*, summary judgment on the complaint, default judgment, and an order of reference, is **GRANTED solely to the extent** that the Clerk is directed to amend the caption as indicated above, and the motion is **otherwise DENIED** in its entirety.

The foregoing constitutes the Decision and Order of this Court.

ENTER,

Dated: October 3, 2023



Hon. Cenceria P. Edwards, JSC, CPA

KINGS COUNTY CLERK
FILED
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