

Bank of N.Y. Mellon v Bosboom

2023 NY Slip Op 33845(U)

October 23, 2023

Supreme Court, New York County

Docket Number: Index No. 850016/2018

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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INDEX NO. 850016/2018

THE BANK OF NEW YORK MELLON FKA THE BANK OF
NEW YORK, AS TRUSTEE (CWALT 2007-24),

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 006

- v -

DORLINE BOSBOOM, STEVEN DECRESCENZO, BOARD
OF MANAGERS OF THE 140 EAST 56TH STREET
CONDOMINIUM, UNITED STATES OF AMERICA BY THE
INTERNAL REVENUE SERVICE, NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE,
COMMISSIONER OF LABOR STATE OF NEW YORK
DEPARTMENT OF LABOR, JOHN DOE

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 152, 153, 154, 155, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 186, 196, 197, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 217, 218, 219, 220, 221, 222, 223

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, the motion and cross-motions are determined as follows:

In this action, Plaintiff seeks to foreclose on a mortgage encumbering real property identified as 140 East 56th Street a/k/a 140 East 56 Street Unit 1-B a/k/a 140 East 56 Street Unit IB, a/k/s 140 East 56th Street Apt IB a/k/a 140 East 56th Street Apt 16D, New York, New York. The mortgage, dated May 15, 2007, was given by Defendants Dorline Bosboom ("Bosboom") and Steven Decrescenzo ("Decrescenzo") to non-party Mortgage Electronic Registration Systems ("MERS") as nominee for National Fidelity Mortgage, Inc ("National"). The mortgage secures a loan with an original principal amount of \$800,000.00 which is evidenced by a note of the same date as the mortgage.

Plaintiff alleges Mortgagors defaulted in repayment of the loan on or about March 1, 2010. Non-party The Bank Of New York Mellon FKA The Bank Of New York, As Trustee for the Certificate Holders CWALT, Inc., Alternative Loan Trust 2007-24 Mortgage Pass-Through Certificates, Series 2007-24, the alleged noteholder at the time, commenced an action to foreclose the mortgage on July 29, 2011 (see *BONY v Bosboom, et al.*, NY Cty Index No 810238/2011). In its complaint, that Plaintiff pled it elected to declare the entire principal balance due and owing. By order dated May 30, 2013, Justice Manuel J. Mendez granted Plaintiff's motion pursuant to CPLR §3217 and permitted discontinuance of the action.

Plaintiff commenced this action on January 22, 2018, again seeking foreclosure of the mortgage based on the 2010 default. Mortgagors answered and pled some ten affirmative defenses. By order dated December 11, 2019, Justice Arlene Bluth denied Plaintiff's motion for summary judgment and granted Mortgagors' cross-motion to amend their answer to include, among other things, an affirmative defense of expiration of the statute of limitations. The Court record contains no indication that Defendant Board of Managers of the 140 East 56th Street Condominium ("Board") ever appeared or answered in this matter. By order of this Court dated May 3, 2021, Mortgagors' motion for summary judgment dismissing the complaint based upon expiration of the statute of limitations was denied. The Court's decision was founded on the then recently decided Court of Appeals decision in *Freedom Mtge. Corp. v Engel*, 37 NY3d 1 (2021).

Now, Plaintiff moves for summary judgment against Mortgagor Defendants, to strike their answer and affirmative defenses, for a default judgment against the non-appearing parties, for an order of reference and to amend the caption. Defendant Board opposes the motion and cross-moves to dismiss Plaintiff's complaint pursuant CPLR §3211[a][7]. Mortgagor Defendants oppose the motion and cross-move pursuant to CPLR §3212 for summary judgment dismissing Plaintiff's complaint as time barred, relying on the amendments made to the applicable statutes under the Foreclosure Abuse Prevention Act ("FAPA") (L 2022, ch 821 [eff Dec. 30, 2022]), as well as upon Plaintiff's alleged failure to comply with RPAPL §1304. Plaintiff opposes both cross-motions.

In moving for summary judgment on its foreclosure cause of action, Plaintiff was required to establish *prima facie* entitlement to judgment as a matter of law though proof of the mortgage, the note, and evidence of Defendant's default in repayment (*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]). Since Mortgagor Defendants raised lack of compliance with RPAPL §§1303 and 1304, Plaintiff was obliged to demonstrate its strict compliance with these statutes (*see U.S. Bank, NA v Nathan*, 173 AD3d 1112 [2d Dept 2019]; *HSBC Bank USA, N.A. v Bermudez*, 175 AD3d 667, 669 [2d Dept 2019]).

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]).

With regard to compliance with RPAPL §1304, Plaintiff was required to proffer "sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL 1304" (*Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 106 [2d Dept 2011]). The Court of Appeals has "has long recognized a party can establish that a notice or other document was sent through evidence of actual mailing or—as relevant here—by proof of a sender's routine business practice with respect to the creation, addressing, and mailing of documents of that nature" (*Cit Bank N.A. v Schiffman*, 36 NY3d 550, 556 [2020][internal citations omitted]). A satisfactory office practice giving rise to the presumption "must be geared so as to ensure the likelihood that [the] notice . . . is always properly addressed and mailed" (*Nassau Ins. Co. v Murray*, 46 NY2d 828, 830 [1978]) and can be demonstrated via an affiant who explains "among other things, how the notices and envelopes were generated, posted and sealed, as

well as how the mail was transmitted to the postal service” (*Cit Bank N.A. v Schiffman*, supra). An affidavit from the person who performed the actual mailing is not necessary (*see Bossuk v Steinberg*, 58 NY2d 916, 919 [1983]). Proof from a person with “personal knowledge of the practices utilized by the [sender] at the time of the alleged mailing” is sufficient (*Preferred Mut. Ins. Co. v Donnelly*, 22 NY3d 1169, 1170 [2014]; *see also Citibank, N.A. v Conti-Scheurer*, 172 AD3d 17, 21 [2d Dept 2019][internal quotation marks omitted]). Fulfillment of this requirement can raise a presumption that the required notice was sent and received by the projected addressee (*Cit Bank N.A. v Schiffman*, supra).

Regarding the mailing of these notices, Plaintiff offered the affidavit of Jaimie Inman (“Inman”) (“Wallace”), a Verification Specialist with NewRez LLC d/b/a Shellpoint Mortgage Servicing (“Shellpoint”), the alleged Servicing Agent for Plaintiff. Inman acknowledged that Bayview Loan Servicing (“Baview”), not Shellpoint, performed the mailings. Affiant did not claim to have personal knowledge of the mailing itself, professed no familiarity personal familiarity with Bayview’s mailing practices and procedures, nor described Bayview’s that procedure in any detail (*cf. United States Bank Trust, N.A. v Mehl*, 195 AD3d 1054 [2d Dept 2021]; *see also Freedom Mtge Corp v Granger*, 188 AD3d 11631165 [2d Dept 2020]; *M & T Bank v Biordi*, 176 AD3d 11941196 [2d Dept 2019]; *cf. Citimortgage, Inc. v Ustick*, 188 AD3d 793, 794 [2d Dept 2020]). Further, documentary proof that the certified and first-class mailings occurred was absent (*see US Bank v Zientek*, 192 AD3d 1189, 1191 [2d Dept 2021]; *US Bank v Hammer*, 192 AD3d 846, 848-849 [2d Dept 2021]). Mere annexation of the notices with a bar code and 10-digit code number does not constitute proof the notice was delivered to the postal authority (*see U.S. Bank N.A. v Hammer*, 192 AD3d 846 [2d Dept 2021]; *U.S. Bank, N.A. v Zientek*, 192 AD3d 1189 [2d Dept 2021]).

Accordingly, Plaintiff failed to establish *prima facie* that it sent pre-foreclosure notices pursuant to RPAPL §1304.

Defendant Board’s cross-motion is denied as they defaulted in appearing and cannot proffer any non-jurisdictional defenses until it has demonstrated a basis to vacate its default (*see eg Deutsche Bank Natl Trust Co. v Hall*, 185 AD3d 1006, 1011 [2d Dept 2020]). In any event, Board’s claimed reliance on RPAPL §1304 is unavailing as a stranger to the note and mortgage cannot raise alleged non-compliance with that section (*see Bank of Am, NA v Lestrade*, 189 AD3d 969 [2d Dept 2020]).

Mortgagor Defendants’ cross-motion must be denied as procedurally defective. Since Mortgagors previous motion for summary judgment based upon expiration of the statute of limitations was denied, that issue is law of the case and cannot be reviewed by this Court absent a motion to renew and/or reargue (*see generally Matter of Dondi v Jones*, 40 NY2d 8, 15 [1976]; *Martin v City of Cohoes*, 37 NY2d 162 [1975]). CPLR §2221[e] mandates that a motion to renew or reargue “shall be identified specifically as such”. Here, Mortgagor’s motion does not seek, in either the notice of motion or the supporting papers, renewal or reargument of its prior motion. Accordingly, the Court is required by the express terms of CPLR §2221[e] to deny the branch of Mortgagors’ cross-motion for summary judgment (*see Barasch v Williams Real Estate Co., Inc.*, 104 AD3d 490 [1st Dept 2013]). Mortgagors’ reliance on *Bank of America, N.A. v Kessler*, 202 AD3d 10 [2d Dept 2021] is misplaced as that decision was reversed (*see Bank of America, NA v Kessler*, 39 NY3d 317 [2023]).

Accordingly, it is

ORDERED that the motion and cross-motions are denied in their entirety, and it is

ORDERED that this matter is set down for a status conference on **November 29, 2023 @ 11:00 am** via Microsoft Teams.

10/23/2023
DATE

Francis A. Kahn III

FRANCIS KAHN, III, A.J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

**HON. FRANCIS A. KAHN III
J.S.C.**

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE