SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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Wells Fargo Bank, N.A.,

Plaintiff,

-against-

John C. Belknap a/k/a John Belkna;; M. Alison Belknap a/k/a M. Belknap; et al.,

Defendants.

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DECISION & ORDER

Index No.: 68609/2012
Sequence No. 1

WOOD, J.

The following papers numbered 1-20, were read in connection with plaintiff's ("the Bank"), (Seq. 1) motion: for an order directing the entry of summary judgment in its favor against defendants, John C. Belknap, and M. Alison Belknap ("defendants"); a default judgment against all other parties in default of answering; for an order directing appointment of a referee to compute; for an order amending title of this action by dropping defendant heretofore mentioned in the Summons and Complaint as "John Doe":

The Bank's Notice of Motion, Counsel's Affirmation, Magdaleno Affidavit, Exhibits A-J, proposed order.	1-14
Defendants' Counsel's Affirmation in Opposition, Exhibits A-D.	15-19
The Bank's Reply Affirmation.	20

NOW, based upon the foregoing papers, the motion is decided as follows:

The underlying action was brought by the Bank to foreclose upon a mortgage made by defendants to Mortgage Electronic Registrations Systems, Inc. (MERS), as nominee for Wachovia Mortgage Corporation ("original lender") on property known as 149 Meeting House

Road, in Bedford Corners. On December 17, 2004, defendants executed to the original lender a Fixed/Adjustable Rate Note in the amount of $1.5 million ("the Note"). According to the Bank, the Note and Mortgage were transferred to it, which was memorialized by an Assignment of Mortgage executed on September 6, 2011.

Due to non payment on the Note, the Bank filed the summons and complaint in this action on October 31, 2012. Defendant interposed his answer on or about November 21, 2012. On October 25, 2013, a settlement conference was held, and the matter was not settled or resolved and was released from the settlement conference part for plaintiff to continue with this foreclosure action. Aside from defendants, no other defendant has appeared in this action. Defendants oppose this instant motion for summary judgment, arguing that the Bank failed to provide the proper notices of default, and that the Bank lacked standing.

Summary Judgment

It is well settled that "a proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; see also Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact. (see Zuckerman v New York, 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). Conclusory, unsubstantiated assertions will not suffice to defeat a motion for summary judgment. (Barclays Bank of New York, N.A. v. Sokol, 128 AD2d 492 [2d Dept 1987]).

A party opposing a motion for summary judgment may do so on the basis of deposition testimony as well as other admissible forms of evidence, including an expert's affidavit, and eyewitness testimony. (Marconi v. Reilly, 254 AD2d 463 [2d Dept 1998]). In deciding a motion for summary judgment, the court is required to view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion." (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). The court must accept as true the evidence presented by the non-moving party and must deny the motion if there is "even arguably any doubt as to the existence of a triable issue." (Kolivas v. Kirchoff, 14 AD3d 493 [2d Dept 2005]); Baker v. Briarcliff School Dist., 205 AD2d 652, 661-662 [2d Dept 1994]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez v. Prospect Hospital, 68 NY2d 320,324 [1986]).

A plaintiff seeking summary judgment in a mortgage foreclosure action establishes its prima facie entitlement to judgment as a matter of law by producing the mortgage and the unpaid note, and evidence of the default (Washington Mut. Bank v. Schenk, 112 AD3d 615, [2d Dept.2013]). The defendant borrowers are then required to assert any bona fide defenses which would raise a question of fact concerning their default on the mortgages such as "waiver by the mortgagee, or estoppel, or bad faith, fraud, oppressive or unconscionable conduct on the [plaintiff's] part (Home Sav. Bank v Schorr Bros. Dev. Corp., 213 AD2d 512, 513 [2d Dept 1995]).

Here, the Bank sustained its initial burden of demonstrating its entitlement to judgment as a matter of law by tendering proof of the existence of the note, mortgage, and assignment

agreement, and defendants' default in payment (Mahopac Natl. Bank v Baisley, 244 AD2d 466, 467 [1997]). However, defendants oppose the Bank's motion for summary judgment as set forth below.

Plaintiff's Standing to Bring This Action

Where, as here, standing is put into issue by defendants, plaintiff must prove its standing in order to be entitled to relief (U.S. Bank, N.A. v Adrian Collymore, 68 AD3d 752 [2d Dept 2009]). In a mortgage foreclosure action, "a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced" (Bank of New York v Silverberg, 86 AD3d 274, 279 [2d Dept 2011]). Once a promissory note is tendered to and accepted by an assignee, the mortgage passes as an incident to the note (Mortgage Elec. Registration Sys., Inc. v. Coakley, 41 A.D.3d 674, Bank of New York v Silverberg, 86 AD3d 274, 280 [2d Dept 2011]). By contrast, "a transfer of the mortgage without the debt is a nullity, and no interest is acquired by it. A mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation. Consequently, the foreclosure of a mortgage cannot be pursued by one who has not demonstrated "right to the debt" (Bank of New York v Silverberg, 86 AD3d 274, 280 [2d Dept 2011]). Moreover, an assignment of a note and mortgage need not be in writing and can be effectuated by physical delivery (LaSalle Bank Natl. Assn. v. Ahearn, 59 A.D.3d 911, 912, [3d Dept 2009]). Plaintiff establishes its lawful status as assignee, either by written assignment or physical delivery, prior to the filing of the complaint (Aurora Loan Services, LLC v Weisblum, 85 AD3d 95 [2d Dept 2011]). Written assignment of the underlying note or physical delivery of the note prior to the commencement of the action is sufficient to transfer the obligation (HSBC Bank

USA, Nat. Ass'n v Gilbert, 120 AD3d 756, 757 [2d Dept 2014]). An assignment of a mortgage without assignment of the underlying note or bond is a nullity, and no interest is acquired by it (HSBC Bank USA v. Hernandez, 92 A.D.3d 843 [2d Dept 2012]). Further, the affidavit from the plaintiff or its servicing agent must include specific factual details of a physical delivery of the note to establish that the plaintiff had physical possession of the note prior to commencing an action (HSBC Bank USA v. Hernandez, 92 AD3d 843, 844, (2d Dept 2012]).

If the plaintiff asserts standing based upon a written assignment executed after the commencement of the action, the plaintiff must also prove physical delivery of the note before commencement (Wells Fargo Bank, N.A. v. Marchione, 69 AD3d 204, 210, [2d Dept. 2009]). Indeed, where the plaintiff "establish[es] its standing as the holder of the note and mortgage by physical delivery prior to commencement of the action," it is unnecessary to "address the validity of [a] subsequently executed document assigning the mortgage and note" (Deutsche Bank Natl. Trust Co. v Whalen, 107 AD3d 931, 932 [2d Dept 2013]).

In considering standing, a court must consider the negotiability of the promissory note. Pursuant to UCC § 3-202, negotiation is defined as the transfer of an instrument in such form that the transferee becomes a holder. UCC § 3-204 provides that a special indorsement specifies the person to whom or to whose order the instrument is payable (UCC § 3-204[1]), Pursuant to UCC §3-204(2): "An indorsement in blank specifies no particular indorsee and may consist of a mere signature. An instrument payable to order and indorsed in blank becomes payable to bearer and may be negotiated by delivery alone until specially indorsed." The indorsement must be made either on the face of the note or on an allonge so firmly affixed to the note as to become a part thereof UCC Section 3-202(20).

Moreover, a party must interpose an answer or file a timely pre-answer motion which asserts the defense of standing, or else said defense is waived pursuant to CPLR 3211 (e) (HSBC Bank, USA v Dammond, 59 AD3d 679, 680 [2d Dept 2009]).

Here, defendants' verified answer sets forth lack of standing as the eighth affirmative defense. Since the Bank is not the original lender and standing is at issue, the Bank must demonstrate that it received both the Mortgage and Note by a proper assignment or by delivery prior to commencement of the action (Midfirst Bank v. Agho, 121 AD3d 343 [2d Dept 2014]). The Bank claims the underlying Note was indorsed by the original lender, and also contains a blank indorsement, and same was delivered to the Bank prior to the commencement of this action. The Bank further claims this transfer was evidenced by the Note being attached to plaintiff's complaint, which shows *ipso facto,* it possessed same at such time.

To further support its motion, the Bank offered the affidavit of Garet Michael Magdaleno, Vice President of Loan Documentation of the Bank, who represents that he is familiar with business records maintained by the Bank for the purpose of servicing mortgage loans. He attests that as of the date the foreclosure complaint was filed, the Bank was in possession of the Note.

Defendants argue that the only proof provided in regard to the acquisition of the Note is a blanket statement that the Bank is in possession of the Note.

Courts have held that the affidavit of plaintiff's servicing agent must give factual details as to the physical delivery of the note (Homecomings Fin., LLC v Guldi, 108 AD3d 50 [2d Dept 2013]). Where an officer's knowledge has been obtained either from unnamed and unsworn employees or unidentified and unproduced work records, the affidavit lacks any probative value Dempsey v Intercontinental Hotel Corp., 126 AD2d 477, 479 (1st Dept 1987). Similarly, the

Bank's representative's affidavit was lacking factual details of a physical delivery of the Note, in that it failed to submit any factual details concerning when the Note was indorsed or when it received physical possession of the Note. This without more, is just not enough to make out a case of standing, inasmuch as the Bank failed to establish that it had physical possession of the Note prior to commencing this action (HSBC Bank USA v. Hernandez, 92 AD3d 843, 844 [2d Dept 2012]).

Moreover, the assignment of the Mortgage, which the Bank acknowledges that it may not rely on to demonstrate ownership of the Note, is insufficient because on its face it only assigns the Mortgage. It does not include an assignment of the Note or the underlying debt (Bank of New York v. Silverberg, 86 AD3d 274 [2d Dept 2011]). Accordingly, contrary to the Bank's contentions, it failed to demonstrate its prima facie entitlement to judgment as a matter of law because it did not submit sufficient evidence to demonstrate its standing as the lawful holder or assignee of the Note on the date it commenced this action, it also failed to establish that the Note was negotiated to it or that plaintiff acquired all of the rights of the original lender prior to commencement of this action. (U.S. Bank, N.A. v. Adrian Collymore, 68 AD3d 752, 754 [2d Dept 2009]). Accordingly, an issue of fact exists as to whether the Bank has standing to bring this action.

Required Proper Notices

The Notice of Intent to Foreclose (the 30 day default letter)

A mortgage is a contract, and if the agreement of the parties provides for notice requirements as a prerequisite for acceleration, it will be enforced. However, absent clear language mandating notice, notice will not be necessary (1 Mortgages and Mortgage Foreclosure

in N.Y. § 28:7). Where a mortgage contains a notice of default clause, compliance with that provision is a condition precedent to acceleration of the mortgage. Any alleged failure by a plaintiff "to satisfy a condition precedent in the mortgage by failing to provide him with 30 days written notice of his default in making mortgage payment, even if true, did not deprive the Court of subject matter jurisdiction to enter the judgment of foreclosure and sale" (Deutsche Bank Trust Co. Americas v Shields, 116 AD3d 653 [2d Dept 2014]). Moreover, an attorney's affirmation containing conclusory assertions that notice was given, would be insufficient to establish that the lender served on the borrower the requisite notice to cure their default as expressly required in the mortgage agreement (Norwest Bank Minnesota, N.A. v. Sabloff, 297 AD2d 722, 723, [2d Dept 2002]).

It is well-settled that CPLR 2103 provides that service of papers by mail is deemed complete upon deposit of such papers in the mail and such manner of service creates a presumption of proper mailing to the addressee. While service of mail is complete upon a deposit of a properly stamped and addressed envelope, and presumed to be received, there still must be some form of evidence that a properly stamped and addressed envelope was mailed. "Generally, proof that an item was properly mailed gives rise to a rebuttable presumption that the item was received by the addressee" (Mid City Const. Co. v. Sirius Am. Ins. Co., 70 AD3d 789, 790, [2d Dept 2010]). "The presumption may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed" (Mid City Const. Co. v. Sirius Am. Ins. Co., 70 AD3d 789, 790, [2d Dept 2010]). Courts have held that the affidavit of a claims representative was insufficient to raise a triable issue of fact since he did not have personal knowledge of the mailing of said notice (Mid City

Const. Co. v. Sirius Am. Ins. Co., 70 AD3d 789, 790 [2d Dept 2010]); (New York & Presbyt. Hosp. v. Allstate Ins. Co., 29 AD3d 547 [2d Dept 2006]).

Here, the Bank attached said notice dated June 20, 2012 to its papers. In support of its motion, the Bank also offers the same affidavit of Mr. Magdaleno, who represents that in accordance with the provisions of the Mortgage, a notice of default was mailed to defendants at the last known address provided to the Bank.

Defendants point out that Paragraph 22 of the Mortgage requires that a detailed 30 day notice be given before a mortgage debt can be accelerated and same is a necessary condition precedent to the commencement of this action.

The Mortgage provides that any notice is considered given to defendant when mailed by first class mail. Notably, defendant does not deny receipt of said 30 day notice of default, and does not allege prejudice resulted from the purported irregularities in said notice.

However, no presumption of mailing was created because the affidavit of the Bank's representative failed to demonstrate that: he actually mailed the 30 day notice; or had knowledge of the person who did mail it and other factual details concerning such mailing; or describe the Bank's office's practice and procedure for mailing 30 day notices to borrowers (Hospital for Joint Diseases v Nationwide Mut. Ins. Co., 284 AD2d 374, 375 [2d Dept 2001]); HSBC Mortgage Corp. (USA) v. Gerber, 100 AD3d 966, [2d Dept 2012]). Thus, the evidence submitted by the Bank failed to establish the appropriate mailing of the required notices, which failed to create a rebuttable presumption that the intended recipient actually received it (Grogg v. S. Rd. Associates, L.P., 74 AD3d 1021, 1022, [2d Dept 2010]).

RPAPL 1304 (90 Day Notice)

RPAPL 1304 provides that, "at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower, including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower in at least fourteen-point type" (RPAPL 1304[1]; Deutsche Bank Nat. Trust Co. v. Spanos, 102 A.D.3d 909, 910, 961 N.Y.S.2d 200 [2nd Dept 2013]). RPAPL 1304 sets forth the requirements for the content of such notice (see RPAPL 1304[1]), and further provides that such notice must be sent by registered or certified mail, and also by first-class mail, to the last known address of the borrower (RPAPL 1304[2]; Deutsche Bank Nat. Trust Co. v. Spanos, 102 A.D.3d 909, 910, 961 N.Y.S.2d 200 [2nd Dept 2013]). RPAPL 1304 currently applies to any home loan, as defined in RPAPL 1304(5)(a). (effective January 14, 2010) (Aurora Loan Servs., LLC, 85 AD3d 95, 105)

Proper service of RPAPL 1304 notice on the borrower is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition (Deutsche Bank Nat. Trust Co. v. Spanos, 102 AD3d 909, 910 [2d Dept 2013]). The Bank's failure to make a prima facie showing of strict compliance with RPAPL 1304 requires denial of its motion for summary judgment, regardless of the sufficiency of the opposing papers (Hudson City Sav. Bank v. DePasquale, 113 AD3d 595, 596, [2d Dept 2014).

To support it motion, the Bank offers the same affidavit of Mr. Magdaleno, who represents that a 90 day notice was sent to defendants by certified mail and also by first class mail to the last known address of defendants. The Bank attached said notice to this application.

Defendants raise the issue that the Bank failed to adequately prove the transmission of the

notice. A representative of the lender, must provide details backed up by documentation of the certified or registered mailing to meet the burden imposed upon a lender in a residential foreclosure action. The Bank's representative's affidavit, however, is conclusory in that it does not allege any facts as to how compliance was accomplished. He does not state the date said notice was sent; or that he served the 90 day notice or identify the individual who did so. He does not include any sort of receipt of mailing, or any tracking number of certified mail, or receipt from the post office. Nor does he refer to a standard office practice by the Bank to ensure that items are properly addressed and mailed (Nocella v. Fort Dearborn Life Ins. Co. of NY, 99 AD3d 877 [2d Dept 2012]). The presumption of receipt by the addressee "may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed" (Residential Holding Corp. v. Scottsdale Ins. Co., 286 A.D.2d 679 [2d Dept 2001]), which was not demonstrated in this case. In conclusion, the Bank has not made a prima facie showing of proper service in compliance with the RPAPL 1304 notice requirements. Proper service of the RPAPL 1304 notice containing the statutorily-mandated content is a condition precedent to the commencement of the foreclosure action (Aurora Loan Servs., LLC v. Weisblum, 85 AD3d 95, 103 [2d Dept 2011]), which was not effectuated here.

In light of the foregoing, the Bank's motion for an order granting summary judgment against Defendant striking defendant's answer, appointing a referee to compute and finding all non-answering defendants in default is denied without prejudice.

Amend Caption

With regard to that branch of the Bank's motion to amend the caption, is granted (Neighborhood Hous. Servs. of N.Y. City, Inc. v. Meltzer, 67 A.D.3d 872, 873–874) US Bank, NA v. Boyce, 93 A.D.3d 782, 783, [2d Dept 2012]).

NOW, THEREFORE, based upon the stated reasons, it is hereby:

ORDERED, that the Bank shall serve a copy of this order with notice of entry upon the parties within ten (10) days of entry, and file proof of service within five (5) days of service.

In the event that the Bank seeks the same relief in a subsequent motion, it is directed to annex the instant decision and order with its motion papers.

The arguments by the parties not explicitly addressed herein have been reviewed and deemed to be devoid of merit. This constitutes the Decision and Order of the Court.

Dated: **February 3, 2015**
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

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