PROGRAM NOTICE

DEFENDING THE HOMEOWNER IN THE AFTERMATH OF THE FORECLOSURE CRISIS

Who Says You Have To Pay Your Mortgage?

Thursday, November 15, 2018, 5:30 p.m.
Nassau County Bar Association,
15th & West Streets, Mineola, New York

BIOGRAPHIES

MICHAEL CIAFFA is of Counsel to Forchelli Deegan Terrana LLP in the firm's Litigation Department, handling a wide variety of complex civil litigation matters from their inception through appeal, together with select criminal appeals. He was a Nassau County District Court Judge from 2009-2014, where he presided over the busy trial and motion calendar and heard thousands of no-fault disputes and other civil and criminal cases. During his tenure, he many "Decisions of Interest" published in the *New York Law Journal*. More than two dozen of his decisions were accepted for publication in the New York Miscellaneous Reports, the most of any District Court Judge during his six years on the bench. Between 1994 and 1998, he worked as a litigator at Meyer, Suozzi, English & Klein, P.C. Before that, he served as the Law Secretary to Justice Jeffrey G. Stark of the Supreme Court, Nassau County. During his first six years of his legal career, he was a member of the Criminal Appeals Bureau of the Legal Aid Society of New York.

Throughout the course of a legal career spanning more than three decades, Mr. Ciaffa has achieved notable success litigating high profile commercial cases, partnership disputes, insurance coverage issues and lawsuits challenging illegal or unconstitutional government actions. In McCann v. Scaduto, he saved a widow's home after Nassau County sold it to a tax lien speculator because the widow had missed a small payment. In a precedent-setting ruling by the New York Court of Appeals, it accepted his argument that Nassau County's tax foreclosure law violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Mr. Ciaffa is a member of the New York State and Nassau County Bar Associations. He is admitted to practice law in the State of New York, and before the United States District Courts for the Southern and Eastern Districts of New York, the U.S. Court of Appeals for the Second Circuit, and the United States Supreme Court. In 2008, 2014, 2016 and 2017j, he was found "well qualified" to serve as a District Court Judge by the Nassau County Bar Association. He obtained his J.D. degree from

St. John's Law School in 1977. He received a B.A. from Colgate University in 1974.

VERONICA EBHUOMA has been in private practice for almost 13 years. She spent just over 12 years with the Law Office of Vernita Charles in Brooklyn, New York. The firm represents clients in a variety of civil matters, including appeals. Veronica's focus was in the areas of Foreclosure Defense, Family law, Probate/Estate Administration, and Landlord/Tenant. In addition, she researched and drafted the firm's appellate briefs.

Today, Veronica is with the law firm of Sanders Phillips Grossman, LLC., in Garden City, New York, where she practices in Mass Torts litigation.

Veronica has also served as a Community Liaison for New York State Assemblyman Edward P. Ra. Assemblyman Ra represents the 19th Assembly District which encompasses the areas of Albertson, Brookville, Carle Place, Franklin Square, Garden City, Glen Head, Mineola, New Hyde Park, West Hempstead, Westbury, East Williston and Williston Park. As Community Liaison, Veronica played an integral role in the management of constituent affairs.

Prior to entering into private practice, Veronica served as Associate Counsel to the New York State Assembly Codes Committee for nearly five years. The Assembly Codes Committee reviews all proposed legislation regarding the Penal law, CPLR, and other areas of law that would impose or change any fines, terms of imprisonment, forfeiture of rights, other types of penal sanctions, and the procedures related thereto. In this capacity, Veronica had the privilege of not only reviewing and drafting legislation, but also seeing many pieces of legislation that she helped to draft become law in New York State. She also counseled Codes Committee Members regarding the legality, potential impact, and sagacity of proposed legislation.
Veronica received her B.A. (magna cum laude) from the State University of New York at Albany and her J.D. from Boston University School of Law. Veronica is currently a member of the Theodore Roosevelt American Inn of Court and the New York State Bar Association.

NEIL A. MILLER, ESQ. is a 1981 graduate from University of Chicago Law School is currently a partner in the firm of Miller, Rosado & Algios, LLP, in Garden City. He was admitted to the practice of law in 1982, and has been in private practice since then, primarily in the area of commercial litigation, both at the trial and appellate levels, since that time. His firm has represented homeowners and their assigns in mortgage foreclosure litigation, and has been appointed by several

different title insurance companies over the years to represent homeowners and lenders facing title claims, including those relating to mortgage foreclosures. He has been selected in various years as a New York Metro Area Super Lawyer in Commercial Litigation. He received his undergraduate degree from Franklin & Marshall College.

ROBERT L. PRYOR is a partner and founder of the Westbury law firm of Pryor & Mandelup, L.L.P., concentrating in bankruptcy, reorganization and insolvency-related litigation. Mr. Pryor is past Chairman of the Bankruptcy Committee of the Nassau County Bar Association. He served as a Law Clerk to the Hon. C. Albert Parente, United States Bankruptcy Chief Judge, Eastern District of New York. Additionally, he has served as a member of the panel of Chapter 7 Trustees for the eastern District of New York from 1985 until present. He has lectured on behalf of organizations including the St. Johns Tax Institute, New York State Bar Association, Nass County and Suffolk Academies of Law, NCCPAP, National Business Institute and as a guest lecturer at Touro Law School, and has authored numerous articles on bankruptcy law.

KAYLA DIMATOS is a second year student at St. John's University School of Law, a staff member on the American Bankruptcy Institute Law Review, a Mattone Institute Real Estate Fellow, a Vice President of the Women's Law Society, and an Executive Officer of the Real Property Law Society. She is also a student intern in the Consumer Justice for the Elderly: Litigation Clinic where she is responsible for all aspects of case management. In 2017, Kayla graduated *magna cum laude* from Binghamton University with a B.A. in political science and minor in urban and regional planning.

CAROLINA JORDAN is a second year student at St. John's University Law School, with an interest in litigation. She is a student intern in the Consumer Justice for the Elderly: Litigation Clinic where she is responsible for all aspects of case management.

DRAKE WILSON is a second year student at St. John's University Law School.

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Craig D. Robins, Esq., has been a practicing attorney for over 33 years. During most of this time, he has devoted his practice almost exclusively to bankruptcy, foreclosure defense and debt-related matters. Mr. Robins has had experience in thousands of bankruptcy cases which has included representing both consumers in Chapter 7 and 13 cases, and businesses in Chapter 11 cases.

Craig D. Robins, Esq. received a Bachelor of Arts degree from Emory University in 1981. He studied law in London, England from 1982 to 1983 through the Notre Dame Law School Concannon Program in International Law. He received a Juris Doctorate from Western New England Law School in 1984. He was admitted to the Massachusetts and New York Bars in 1985 and the Florida Bar in 1987. He is also admitted to practice in various Federal District Courts, the United States Tax Court, and the United States Claims Court. Mr. Robins briefly interned as a judicial law clerk to the Honorable Richard Wallach, Supreme Court Judge (New York, First Department).

Martindale-Hubbell, the nationally recognized service that rates attorneys by peer review, has rated Mr. Robins "high to very high."

Mr. Robins has written extensively on bankruptcy law and has authored over 200 published articles on a variety of topics including bankruptcy law and procedure, bankruptcy legislation, bankruptcy practice, and the interaction of bankruptcy law on personal injury cases and matrimonial rights. He continues to be a regular columnist on bankruptcy law for the *Suffolk Lawyer* where he has written for about 28 years, and also writes articles for the *Nassau Lawyer*.

Mr. Robins is recognized as an authority on bankruptcy law and practice and is often sought out by the media. He has lectured on bankruptcy law for the Nassau County Bar Association and has discussed bankruptcy law on radio and television talk shows and news programs.

In addition to bankruptcy, Mr. Robins actively defends foreclosure cases brought against Long Island homeowners. The *New York Times* wrote a page-one story about a foreclosure case that he successfully dismissed.

He has been interviewed on News 12 several times and has been interviewed and quoted in *Newsday* about 20 times, and in a host of other periodicals including *New York Times*, *New York Law Journal*, *Boston Globe*, *Washington Post*, and *Long Island Business News*. Since 1991, he has also been actively involved in giving presentations on bankruptcy law and foreclosure law to attorneys and Federal and State Court Judges through the Theodore Roosevelt Chapter of the American Inns of Court, of which he is a member and also sits on its executive board. While Chairman of that organization's annual banquet, he hosted dinners honoring United States Supreme Court Justice Samuel A. Alito, Jr., and New York's highest judge, Judith S. Kay, Chief Judge of the New York State Court of Appeals.

Mr. Robins is active in the Bankruptcy Committees of both the Nassau and Suffolk Bar Associations, and is on the Suffolk County Bar Association Mentor Program where he is called upon to provide assistance to younger members of the Bar. He is a long-time member of the American Bankruptcy Institute and the National Association of Consumer Bankruptcy Attorneys.

Mr. Robins is a founding co-chairman of the Nassau County Bar Association's *Pro Bono* Bankruptcy Committee. He holds the distinction of having represented more *pro bono* debtors than any other attorney on Long Island. The Nassau County Bar Association awarded Mr. Robins a Presidential Recognition Award for his dedication in representing *pro bono* debtors in bankruptcy proceedings and also awarded him the *Pro Bono* Attorney of the Year Award. Mr. Robins was recognized by the Volunteer Lawyers Project for his *pro bono* work when he was named *Pro Bono* Attorney of the Month three times. *Newsday* honored Mr. Robins by naming him in its "Winners" column for his dedication to community work.

Mr. Robins has represented a wide and diverse range of debtors in bankruptcy cases. In addition to representing numerous typical Long Islanders, he represented a former New York Yankees baseball player, dozens of professionals including attorneys, doctors, dentists and C.P.A.'s, and a variety of businesses, ranging from a professional sports franchise to multi-million dollar companies to mom-and-pop storefronts.

When not practicing law, Mr. Robins enjoys traveling and bicycle riding. He has been a competitive bicycle racer for over thirty years and won numerous races. He is also an avid photographer known for his avante garde style. His images, which have won numerous awards, have appeared in museums and galleries, and have been published in *The New York Times* and *Newsday*, and on several magazine covers. He lives in Suffolk County with his wife and son, Max, who recently won the Suffolk County Mock Trial High School Championship.

[Nov. 2018]

PROGRAM:

1. Introduction & The Genesis of The Explosion of Mortgage Foreclosures - Neil A. Miller, Esq. (5 minutes).

2. Sloppy and Shoddy Foreclosure Practices by Some Law Firms - Craig Robins, Esq. (5 minutes).

3. The Legislative and Court Responses to the Problems – Veronica Ebhoma, Esq. (5 minutes)

4. Skit 1 - 2011 - Helga Homeowner meets with her attorneys to review allegations of complaint brought by Huge Bank, and possible defenses and strategies, including bankruptcy. Kayla Dimatos, Veronica Ebhuoma, Esq. & Robert Pryor, Esq. (15 minutes)

5. Skit 2 - 2012. Foreclosure Settlement Conference before Referee. Present are attorneys for Huge Bank and Helga. Neil A. Miller, Esq., Veronica Ebhuoma, Esq. & Michael Ciaffa, Esq. (10 minutes)

6. Presentation regarding certain changes in law after 2012 and certain issues not covered in skits - Neil A. Miller, Esq. (10 minutes)

    - Danger of re-starting the statute of limitations by an acknowledgment of debt with promise to pay. Loan modification application does not re-start; bankruptcy Chapter 13 plan may do so
    - CPLR 3215[c]: failure to move for a default judgment within one year
    - Inactive and Purge Calendars, and ability to restore.
    - Possible suspension of interest under Second Department law regardless of plaintiff's bad faith
    - Standing determinations for mortgages not secured by a negotiable instrument: home equity line of credit obligations and typical underlying obligation for reverse mortgage.

7. Skit 3 - 2018 - Helga (Kayla) consults with new foreclosure counsel to review allegations of a new complaint in a second foreclosure action, this one commenced by Gigantic Bank, and possible defenses and strategies. Craig Robins, Esq. & Kayla Dimatos (15 minutes)

8. Skit 4 - 2018 - Argument on Gigantic Bank's Motion for Summary Judgment - Neil A. Miller, Esq., Carlina Jordan & Michael Ciaffa, Esq. (15 minutes)

9. Skit 5 - After the grant of summary judgment to Gigantic Bank, Helga Homeowner consults with counsel with respect to bankruptcy and other last-ditch options. Kayla Dimatos, Craig Robins, Esq. & Robert Pryor, Esq. (10 minutes)

10. Question and Answer Session, wrap up (10 minutes).

CLE Credit Requested: 2 hours of professional practice.

STATE OF NEW YORK UNIFIED COURT SYSTEM

2017 Report of the Chief Administrator of the Courts on the

STATUS *of* FORECLOSURES

Pursuant to Chapter 507 of the Laws of 2009

LAWRENCE K. MARKS
Chief Administrative Judge

2017 Report of the Chief Administrator of the Courts on the

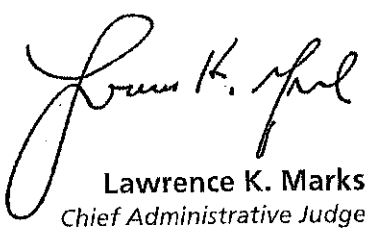
STATUS *of* FORECLOSURES

Pursuant to Chapter 507 of the Laws of 2009

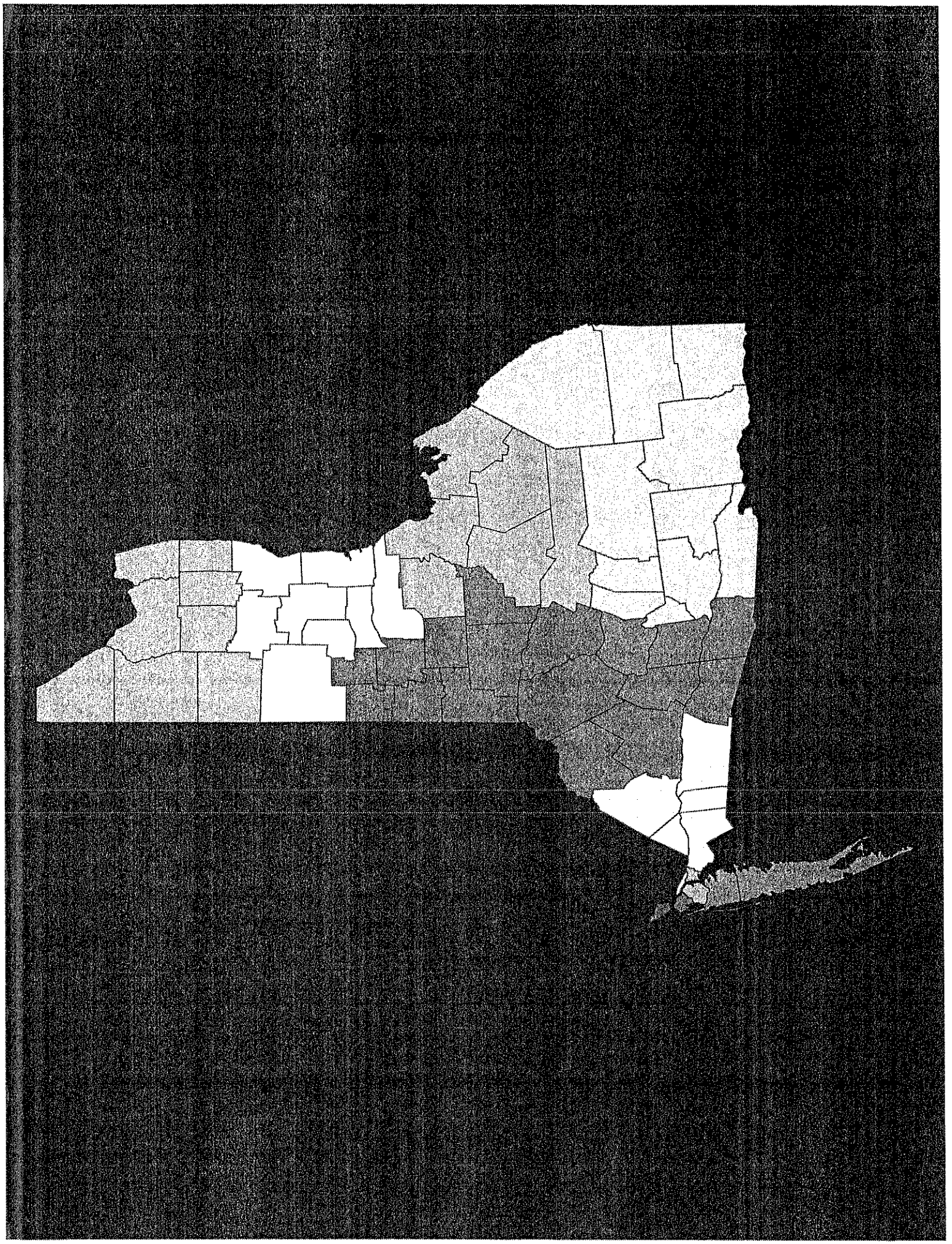
Preface

To the Governor and the Legislature of the State of New York:

I am pleased to submit this report on the status of foreclosure settlement conferences in the New York State Courts. Section 10-a(2) of Chapter 507 of the Laws of 2009 directs that "the chief administrator of the courts shall submit a report...to the governor [and key legislative officials] on the adequacy and effectiveness of the settlement conferences authorized [under section 10-a(1)]...which shall include, but not be limited to the number of adjournments, defaults, discontinuances, dismissals, conferences held, and the number of defendants appearing with and without counsel." Accordingly, this Report provides the required data and other additional information regarding residential foreclosure cases and the foreclosure settlement conferences for the period October 11, 2016 to October 9, 2017.



Lawrence K. Marks
Chief Administrative Judge



I. Introduction

Foreclosures have affected New York State's economy and our cities, towns, and rural communities for the better part of a decade. These cases likewise significantly affect the Unified Court System's (UCS) operations, representing 21% of the Supreme Court civil inventory statewide – although that is a decrease from the high of nearly 33% as reported in 2013 (see Fig. 1). Because of the ongoing commitment of Chief Judge Janet DiFiore, and in furtherance of the Excellence Initiative, the Judiciary continues to prioritize these cases not only to better assist litigants, but also to strengthen neighborhoods across the state.

This significant reduction in the pending foreclosure inventory is in part due to the fact that the UCS has continued to invest heavily in foreclosure-related resources. Dedicated judges and court personnel have been assigned to these important cases. Court procedures have been streamlined to improve access to justice for lower income New Yorkers. As a result, during the October 11, 2016 to October 9, 2017 reporting period (Reporting Period), 62% of homeowners appearing for statutorily mandated foreclosure settlement conferences received the legal representation they needed, loan modifications were on the rise, and the total number of foreclosure cases in New York State was reduced.

This Report reviews the UCS's 2017 foreclosure initiatives and examines important caseload trends and statistics.

II. Excellence Initiative

In response to Chief Judge DiFiore's Excellence Initiative, the UCS continues to improve foreclosure case processing statewide, and a number of innovative yet budget-neutral measures have been implemented to eliminate case backlogs. These include improved computer caseload tracking, streamlined court processes, enhanced services for unrepresented litigants, and standardized conference forms and motion templates.

Uniform Foreclosure Settlement Conference (FSC) forms are now mandated for use across the state in every settlement conference. These forms provide each and every homeowner and lender with clear instructions as to their responsibilities for future court appearances. As a result, homeowners now have a better understanding of their role in the settlement conference process, lenders are better-informed of their responsibilities, and courts have more complete records than ever before.

Master calendars have been implemented in courts statewide to more efficiently track foreclosure cases in which settlement conference efforts were unavailing. These calendars enable courts to ensure that all parties comply with court orders and motion practice deadlines. Creation of the master calendars also allows for dismissal of foreclosure actions brought by plaintiffs who abandoned their cases without notifying the court. In many of those cases, the lien was vacated upon being dismissed, thereby removing a barrier that was otherwise needlessly impacting homeowners' creditworthiness.

In a noteworthy step, the UCS is improving court access for litigants who are facing foreclosure and divorce proceedings at the same time. As discussed below, to benefit divorcing couples, recommendations have been made to amend court rules for judgments in matrimonial actions.

To provide easy-to-understand information to the public, the UCS Office of Policy and Planning is producing a foreclosure informational video for homeowners. The video, to be available online, will provide homeowners with a step-by-step guide to the conference process and the structure of a foreclosure case. Updates have been made to the UCS website to provide more information to the public on court operations and available resources. Foreclosure seminars are again being scheduled to update judges and court personnel on legal and operational issues and best practices. We anticipate that members of the plaintiff and defense bars will participate in these seminars to further the ongoing dialogue between the courts and practitioners. Site visits to courts statewide continue in order to ensure best practice standards and to resolve local practice issues.

Uniform Foreclosure Motion Templates have been approved by the UCS's Administrative Board of the Courts after a public comment period during which the UCS received valuable feedback from civil legal service providers, attorneys, public officials, and members of the public. These motion templates will create uniform standards for foreclosure motion practice, further increasing case processing efficiencies. The motion templates will be mandated for use statewide in 2018.

Finally, this past year New York law was amended to make most reverse mortgage cases settlement conference eligible. Before this legislative change, many courts had taken the initiative and conferenced reverse mortgage cases to afford homeowners every opportunity to remain in their homes. With the new statutory requirements, all reverse mortgage cases (with a few statutory exceptions) will be conferenced.

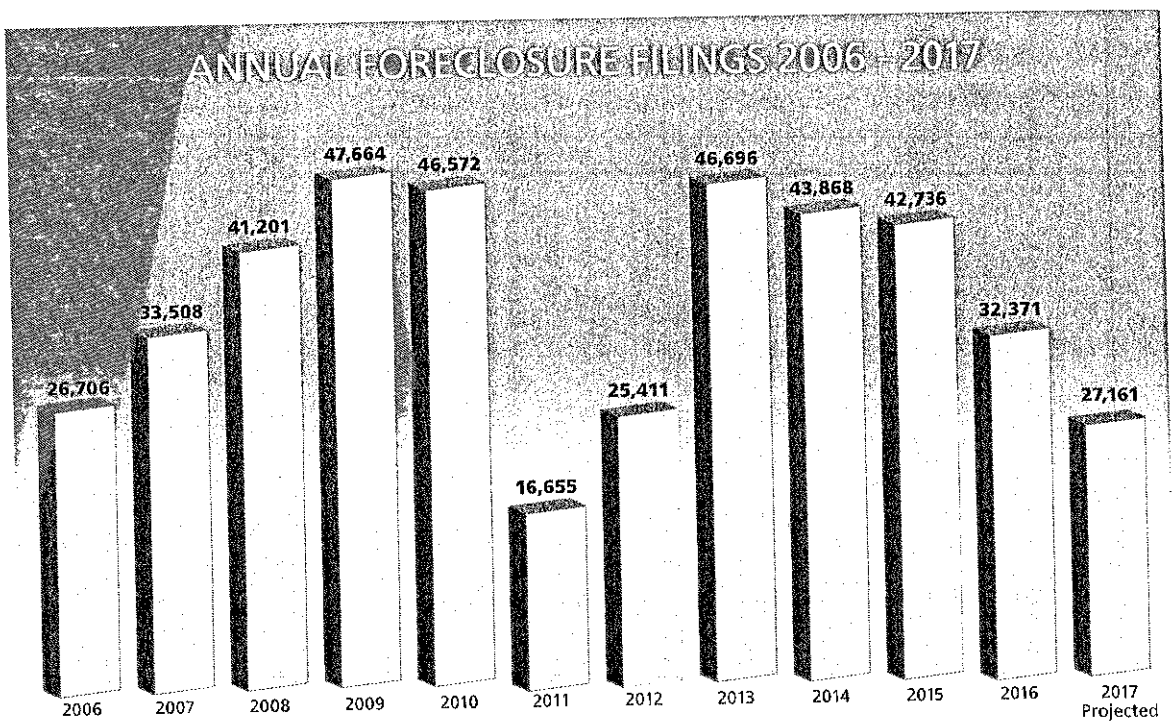


Figure 1

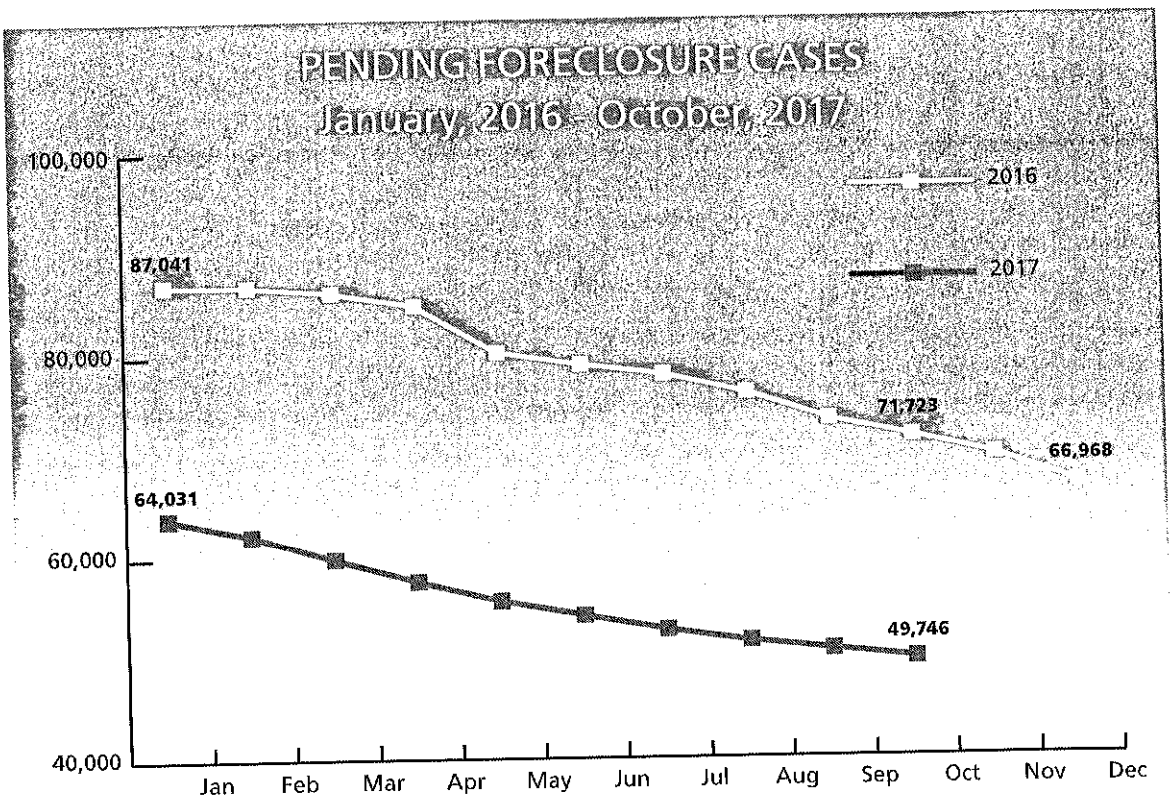


Figure 2

III. Filing Trends

During the Reporting Period (October 11, 2016 – October 9, 2017), 26,949 foreclosure cases were filed statewide. This represents a decrease of almost 20% from the 33,641 foreclosure cases filed as reported in the 2016 Annual Report and a 36% decrease from the 42,162 foreclosure filings reported in the 2015 Annual Report (see Fig. 1).[1]

Of the 26,949 new foreclosure cases filed during the Reporting Period, more than 19,687 required statutorily-mandated foreclosure settlement conferences. The UCS will continue to dedicate substantial resources to these conferences, which now include most reverse mortgage cases. Additional court attorney-referees have been hired and assigned to settlement conference parts statewide.

The volume of new filings in the Reporting Period varied by court term, with a statewide high of 2,380 in Term 1 of 2017 and a statewide low of 1,762 in Term 9 of 2017. New filings in courts within New York City totaled 6,452. New filings in courts outside of New York City totaled 20,497.

As of October 9, 2017, the end of the Reporting Period, 49,746[2] foreclosure cases were pending statewide (see Fig. 2). This number represents a reduction of more than 30% from the 71,723 cases pending at the end of the previous reporting period (as set forth in the 2016 Annual Report), and a 44% reduction from the 89,365 pending cases (as reported in the 2015 Annual Report).

1 The numbers depicted in Fig. 1 for the years 2006-2016 represent annual filings. The 2017 number is a projection.

2 This includes estimated numbers for Westchester County, due to the transition to a new case management system.

IV. Foreclosure Settlement Conferences

During the Reporting Period, 58,387 foreclosure settlement conferences were held in courts statewide (see Fig. 3). This number reflects the significant downward trend from the high of 118,394 conferences reported in the 2014 Annual Report, the 101,523 reported in the 2015 Annual Report, and the 81,138 reported in the 2016 Annual Report. Additionally, during the Reporting Period, there were 36,586 adjournments in the foreclosure settlement parts. Defaults by homeowners occurred in 6,446 cases; voluntary discontinuances were recorded in 445 cases; and 117 cases were dismissed by the court.

With the expiration at the end of 2016 of the federal Home Affordable Modification Program (HAMP), which enabled homeowners to qualify for lower interest rate loan modifications, New York State is doing its part to increase opportunities for homeowners to secure a loan modification. To that end, the NYS Mortgage Assistance Program (MAP) provides 0% interest mortgage loans of up to $40,000 to eligible New York homeowners at risk of foreclosure so they can reinstate their mortgages. UCS judges and court attorney referees who preside over settlement conferences have been informed about these loss-mitigation options and continue to work with all parties to provide homeowners the best possible opportunity to remain in their homes or achieve the most financially viable resolution. Because of the Chief Judge's commitment to families in need, the UCS continues to provide judges and referees who preside over foreclosure cases the legal and technological resources needed to conference thousands of cases each year so that all litigants in our courts have full and meaningful access to court and community resources.

More than 28%[3] of homeowners who participated in the settlement conferences obtained modifications of their home loans to an affordable level. These modifications have allowed thousands of families in communities across the state to continue to build equity in their own homes. The 28% constitutes a slight increase from the 27% of homeowners who obtained home loan modifications in 2016.

3 This represents cases conferenced and released from the foreclosure settlement conference parts during the reporting period, excluding defaults, cases that were stayed, and cases that are still actively being conferenced.

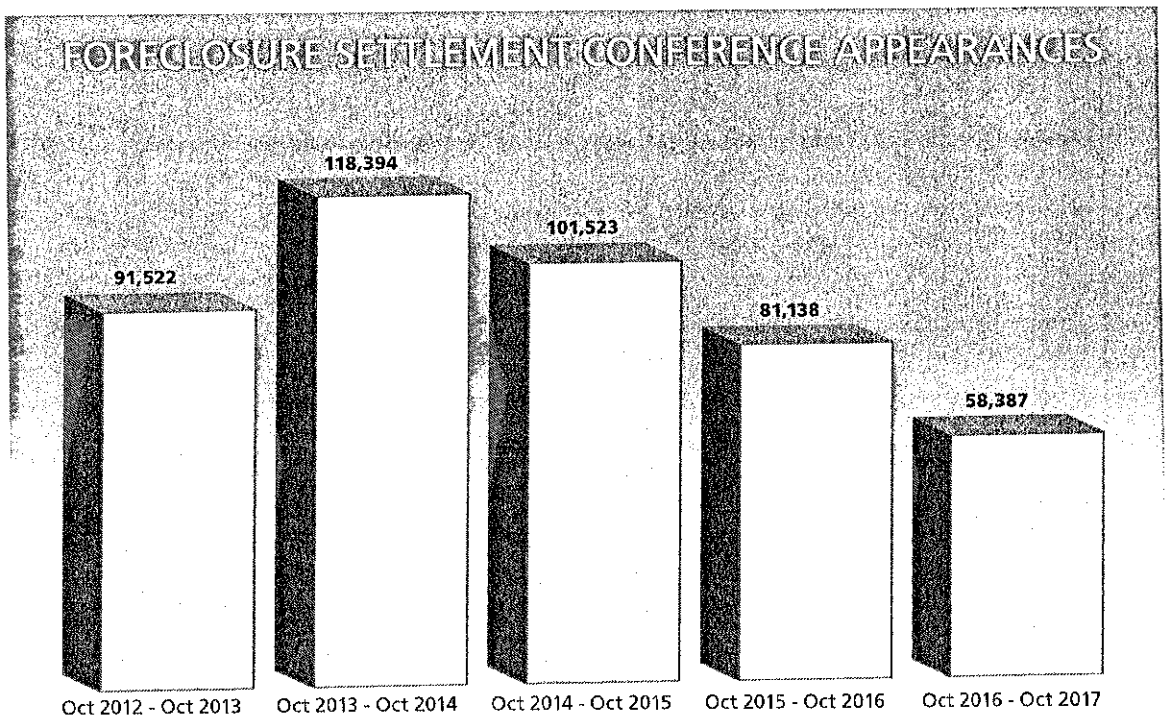


Figure 3

V. Legislation and Court Rules

As reported in the 2016 Annual Report, recent amendments to New York law expanded the responsibilities of banks and homeowners during the settlement conferences, and for the first time required judges and court personnel who preside over foreclosure settlement parts to instruct homeowners on the importance of filing an answer. To comply with this legislation, the UCS created a bench card for judges and an information packet to be provided to all homeowners at their first settlement conference. The information packet includes a sample answer and a list of free local and statewide civil legal service providers and housing counselors. These documents have proven to be very effective in advising homeowners of their rights and the resources available to them.

The Legislature also amended the Real Property and Proceedings Law by requiring the UCS to send a special notice to a homeowner if a bank moves for a judgment of foreclosure and sale on the ground that the subject property is vacant and abandoned. To ensure consistency statewide, and recognizing that many homeowners are not familiar with legal terminology, the Office of Policy and Planning and the Access to Justice Program developed a "plain-language" notice to ensure that homeowners understand their rights and responsibilities under the amended law.

Reverse mortgages present special issues, as they tend to have a greater impact on New York's elderly than on other segments of the population. Thus, for years, many courts statewide had included foreclosure cases involving reverse mortgages in their settlement conference programs even though there was no requirement that they do so. As noted above, however, recent legislative changes to the foreclosure process mandate the inclusion of reverse mortgage cases in the settlement

conference process. The UCS has therefore ensured that all eligible homeowners in foreclosure cases with reverse mortgages have an opportunity to resolve their matters and remain in their homes.

Similarly, complicated legal issues surround couples facing foreclosure and divorce proceedings at the same time. Because of financial constraints, it can often be difficult for divorcing couples to maintain the marital home. In some cases, a failure to file the requisite documents to fully transfer the home to the spouse who has been given the home by court order or agreement can further compound the hardship as lenders require all titled parties to apply for a loan modification. Without participation from all titled parties, the mortgage loan is usually ineligible for modification, thereby precluding otherwise qualified families from being able to remain in their homes.

Thus, to prevent families from losing their homes because a titled party has failed to participate in the loan modification process, the UCS Matrimonial Practice Advisory and Rules Committee, in collaboration with the UCS Office of Policy and Planning, has drafted a proposed court rule change that would require the parties in both uncontested and contested divorce cases to effectuate the transfer of any title, deed, and any other relevant mortgage documents as a condition of a divorce judgment. This will ensure that the person who remains in the home will have all documents necessary to enable him or her to apply for a mortgage loan modification or other loss mitigation option if necessary.

As noted above, foreclosure settlement conference (FSC) forms are now mandated for use in all settlement conferences. Accordingly, intake and status forms were created and approved for use in all foreclosure settlement conferences. Since being implemented in 2016, the FSC forms have not only proven beneficial to the litigants, but have also helped courts keep better track of case progress and reduce backlogs. Likewise, the UCS has developed and will shortly be implementing Uniform Foreclosure Motions Templates, which, like the FSC forms, will further assist in streamlining case processing and reducing backlogs. These templates were developed in consultation with, and after extensive feedback from, the UCS's Statewide Foreclosure Working Group composed of judges and court personnel from each judicial district, as well as members of the New York City Bar Association's Residential Mortgage Foreclosure Task Force, which includes representatives from civil legal service providers, the defense bar, and the plaintiffs' bar. Comments were also solicited from the public. These new forms do not present the first instance of uniform motion forms being adopted for use in civil cases. For many years now, uniform motion forms have been used in uncontested divorce cases and have proven highly effective. As with divorce cases, the standardization of motion practice in foreclosure cases will enable judges and court personnel to more efficiently review and process cases and will assist litigants by ensuring uniformity of practice statewide.

VI. Legal Representation

Chief Judge DiFiore's commitment to civil legal representation for lower income New Yorkers remains steadfast. In collaboration with our partners in government, the UCS has continued to provide civil legal and housing counseling services to New Yorkers, especially low-income individuals and families who cannot afford to retain a private attorney. Over 151,000 New Yorkers have already benefited from housing and foreclosure-related legal services during the UCS' 2017 fiscal year.

That over 151,000 individuals benefitted from civil legal and housing counseling services is in large part due to the Judiciary's dedication of $100,000,000 from its own budget to civil legal service providers and housing counselors. The UCS oversees and monitors these providers to ensure high-quality free representation for indigent homeowners.

During the reporting period, 62% of defendants in foreclosure cases were represented by counsel (Fig. 4). This is identical to the 62% as reported in the 2016 Annual Report and continues the upward trend from the 33% reported in 2011.

Underscoring the UCS's commitment to access to representation for indigent New Yorkers is the appointment of Hon. Edwina Mendelson as Deputy Chief Administrative Judge in the newly created Office for Justice Initiatives (OJI). OJI's mission is to ensure meaningful access to justice for all New Yorkers, and as such is spearheading a program to make it easier for unrepresented homeowners to file an answer to a foreclosure complaint.

The UCS continues to collaborate with civil legal service providers, housing counseling agencies, bar associations, law schools, and law firms to promote access to free legal services for homeowners facing foreclosure.

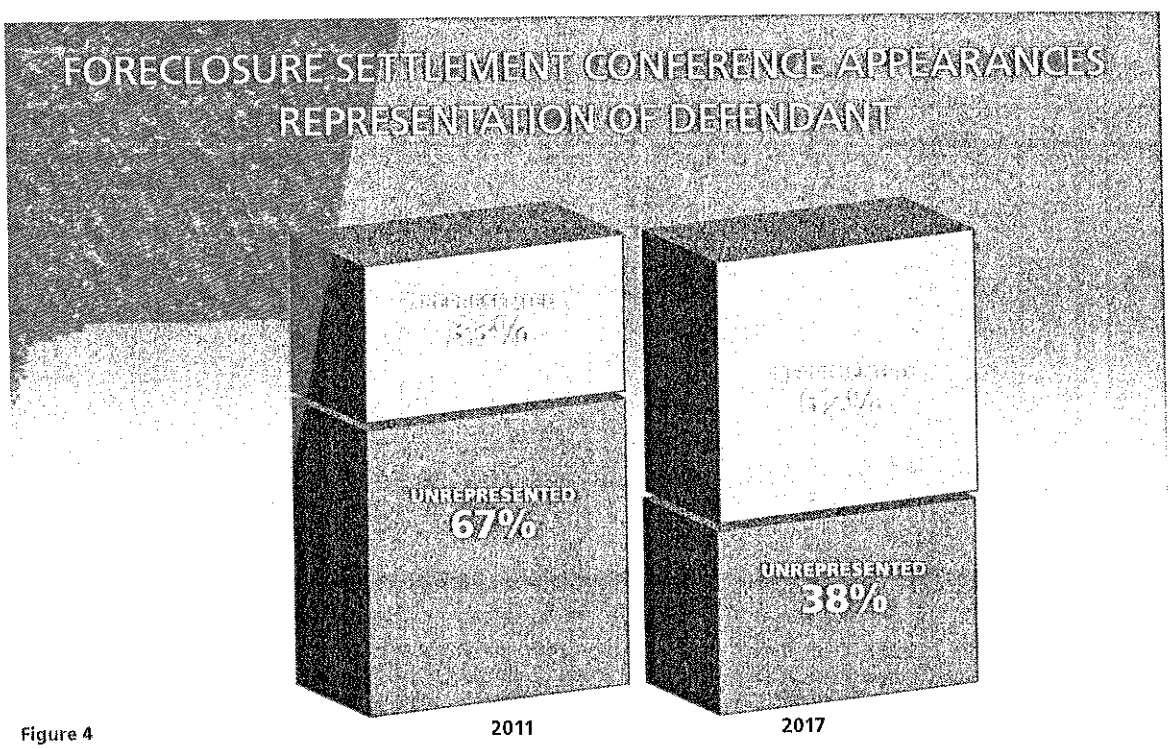


Figure 4

VII. Specialized Foreclosure Parts

Specialized foreclosure parts have proven to be effective tools in reducing backlogs. Several counties have implemented new procedures and programs for enhancing the foreclosure process by facilitating the expeditious review of loan modification applications.

Servicer part programs are being expanded to include additional banks and loan servicers in many counties statewide. For example, in 2017 servicer calendars were implemented in the Eighth Judicial District, which includes Buffalo and the surrounding areas, and in the Third Judicial District, which includes Albany and the surrounding areas. Under these programs, like many other servicer parts, banks are required to send to settlement conferences a representative with knowledge of the cases and the authority to enter into meaningful settlement negotiations. These servicer parts have been embraced by both counsel for the banks and the local legal service providers.

To assist with the recent legislative changes that permit homeowners to file an answer within 30 days of the initial foreclosure settlement conference, the Westchester County Pro Bono Local Action Committee started an Attorney for the Day program in January 2017. Supervised by court personnel and staffed by volunteer attorneys in private practice, program participants assist homeowners in preparing answers to foreclosure complaints and motions to vacate judgments of foreclosure, and offer general foreclosure advice. Homeowners still have access to certified housing counselors in the settlement conferences, but this Attorney for the Day program provides much needed help to homeowners who need litigation assistance.

In addition, Queens County has an Expedited Trial Part for cases where the homeowner has not appeared at the foreclosure settlement conferences and, despite court outreach, no answer has been filed or served. At trial, the bank must present sufficient evidence to warrant a determination that it is entitled to a judgment of foreclosure. This program enables the foreclosure case to proceed on a faster track.

VIII. Statewide Foreclosure Committee

The Statewide Foreclosure Committee is an internal UCS working group of judges, court attorney-referees, chief clerks, district executives, and court personnel from across the state. Chaired by the Hon. Sherry Klein Heitler, Chief of the Office of Policy and Planning, committee members regularly communicate with each other regarding foreclosure trends, best practices, and new legal issues. Committee members were also actively involved in the development of the Uniform Foreclosure Settlement Conference forms and the Uniform Foreclosure Motion Form Templates. The committee meets regularly to discuss legal issues, data trends and operational issues as they arise.

IX. Collaboration

In addition to working closely with our partners in government, UCS representatives meet regularly with members of both the plaintiff bar and defense bar for the purpose of improving court operations. UCS personnel also meet regularly with lender and loan servicer attorneys, civil legal service providers, members of the private defense bar, and housing counseling agencies, all of whom were instrumental in the drafting of the Foreclosure Motion Form Templates.

SUMMARY TABLE
OCTOBER 11, 2016 - OCTOBER 9, 2017

Conferences Held	**58,387**
Number of Adjournments	**36,586**
Discontinuances	**445**
Dismissals	**117**
Defaults	**6,446**
Defendants Appearing with Counsel*	**31,916**
Defendants Appearing without Counsel*	**19,829**

* Based upon the conferences held between October 11, 2016 and October 9, 2017, excluding appearances where the defendant defaulted.

X. Conclusion

Since 2009, the UCS has been on the front line of the mortgage foreclosure crisis brought on by the economic downturn. Foreclosures have had an enormous impact on families and communities across New York State, from our largest cities to our rural hamlets. These cases have affected court operations in the form of record high filings and record high pending caseloads, although the foreclosure case inventory has declined recently.

With a sustained dedication to the highest standards inspired by Chief Judge DiFiore, circumstances have improved. Case dispositions are now outpacing filings across the state, and New Yorkers have benefitted from much needed legal assistance. The pending foreclosure inventory has been significantly reduced. As a direct result of the Chief Judge's commitment to provide free legal representation to New Yorkers in need, more than 151,000 people have benefitted from foreclosure-related legal services. Indeed, 58,387 settlement conferences were held in courts throughout the state during this past year, to provide every opportunity for homeowners in need to explore all avenues to remain in their homes and communities.

UCS judges and court staff have streamlined court processes, implemented uniform practice standards statewide, and improved data collection and oversight, all the while ensuring that the rights of the parties are not infringed. The Judiciary is committed to adjudicating these resource-intensive cases fairly and efficiently. To achieve that goal, we will continue to invest in foreclosure settlement conference parts, and ensure that civil legal service providers receive the funding they need to assist low income New Yorkers throughout the foreclosure process.

The Judiciary remains fully dedicated to providing the highest level of service to litigants involved in these important matters.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1. *Onewest Bank, F.S.B. v. Drayton, 29 Misc. 3d 1021*
   Client/Matter: -None-
   Search Terms: schack & robo-signing
   Search Type: Terms and Connectors
   Narrowed by:

Content Type	Narrowed by
Cases	Court: New York

Onewest Bank, F.S.B. v. Drayton

Supreme Court of New York, Kings County

October 21, 2010, Decided

15183/09

Reporter
29 Misc. 3d 1021 *; 910 N.Y.S.2d 857 **; 2010 N.Y. Misc. LEXIS 5169 ***; 2010 NY Slip Op 20429 ****

[****1] OneWest Bank, F.S.B., Plaintiff, v Covan Drayton, et al., Defendants.

Prior History: *Indymac Bank, FSB v Bethley, 22 Misc 3d 1119A, 880 NYS2d 873, 2009 N.Y. Misc. LEXIS 225 (2009)*

Core Terms

mortgage, documents, vice-president, deposition, foreclosure, assign, nominee, signing, Notary, instant action, assignee, notarize, Lender, vice president, robo-signer, Electronic, assignor, recorded, foreclosure action, executing, questions, services, motion for an order, affidavit of merit, notice of pendency, three year, entity, renew, real property, sounds

Case Summary

Procedural Posture

Upon the default of defendant mortgagor in a foreclosure action, plaintiff, the purported assignee of the mortgage, moved for an order of reference and related relief under *RPAPL § 1321*. Plaintiff's counsel then requested, without explanation, that the application be withdrawn.

Overview

In the instant foreclosure proceeding, documents had been executed by a "robo-signer," who admitted in a deposition in another case that she signed about 750 mortgage documents a week without reading them or having a notary present. The court also found that plaintiff did not submit sufficient evidence that it owned the mortgage. The interest of judicial economy required dismissal until plaintiff provided the following documents: 1) proof of the grant of authority from the lender to its nominee to assign the mortgage to plaintiff's predecessor, which later assigned it to plaintiff; 2) affidavits establishing the "robosigner's" employment status and explaining why she "wore so many corporate hats"; 3) an affirmation under penalty of perjury from plaintiff's counsel, on the new standard court form, that he took reasonable steps, including inquiring of plaintiff and the lender, and reviewing all papers, to verify the accuracy and notarizations of the documents submitted in support of the foreclosure action. The dismissal of the action required cancellation of the notice of pendency pursuant to *CPLR § 6514(a)*.

Outcome

The request to withdraw the motion for an order of reference was granted and the foreclosure action was dismissed without prejudice, with leave to renew the motion for an order of reference within 60 days by providing the court with necessary and additional documentation.

LexisNexis® Headnotes

Civil Procedure > Judicial Officers > Referees > Appointment of Referees

Real Property Law > Financing > Foreclosures > Judicial Foreclosures

HN1[] **Referees, Appointment of Referees**

RPAPL § 1321 allows the court in a foreclosure action, upon the default of the defendant or the defendant's admission of mortgage payment arrears, to appoint a referee to compute the amount due to the plaintiff.

Real Property Law > Priorities & Recording > Lis Pendens

HN2[] **Priorities & Recording, Lis Pendens**

CPLR § 6501 provides that the filing of a notice of pendency

against a property is to give constructive notice to any purchaser of real property or encumbrancer against real property of an action that would affect the title to, or the possession, use or enjoyment of real property, except in a summary proceeding brought to recover the possession of real property. The purpose of the doctrine is to assure that a court retains its ability to effect justice by preserving its power over the property, regardless of whether a purchaser had any notice of the pending suit; the statutory scheme permits a party to effectively retard the alienability of real property without any prior judicial review.

Real Property Law > Priorities & Recording > Lis Pendens

HN3[] **Priorities & Recording, Lis Pendens**

See *CPLR § 6514(a)*.

Civil Procedure > Dismissal > General Overview

Real Property Law > Financing > Foreclosures > Judicial Foreclosures

Real Property Law > Priorities & Recording > Lis Pendens

HN4[] **Civil Procedure, Dismissal**

The plain meaning of the word "abated," as used in *CPLR § 6514(a)*, is the ending of an action. "Abatement" is defined as the act of eliminating or nullifying. An action which has been abated is dead, and any further enforcement of the cause of action requires the bringing of a new action, provided that a cause of action remains. Cancellation of a notice of pendency can be granted in the exercise of the inherent power of the court where its filing fails to comply with *CPLR § 6501*. Thus, the dismissal of a foreclosure complaint must result in the mandatory cancellation of the plaintiff's notice of pendency against the subject property in the exercise of the inherent power of the court.

Business & Corporate Law > ... > Authority to Act > Business Transactions > Property

Contracts Law > Standards of Performance > Assignments > General Overview

Real Property Law > Ownership & Transfer > General Overview

Real Property Law > Financing > Mortgages & Other Security Instruments > General Overview

Real Property Law > Ownership & Transfer > Powers of Attorney

HN5[] **Business Transactions, Property**

To have a proper assignment of a mortgage by an authorized agent, a power of attorney is necessary to demonstrate how the agent is vested with the authority to assign the mortgage. No special form or language is necessary to effect an assignment as long as the language shows the intention of the owner of a right to transfer it.

Business & Corporate Law > ... > Authority to Act > Business Transactions > Property

Contracts Law > Standards of Performance > Assignments > General Overview

Real Property Law > Ownership & Transfer > General Overview

Real Property Law > Financing > Mortgages & Other Security Instruments > General Overview

HN6[] **Business Transactions, Property**

The word "nominee" is defined as a person designated to act in place of another, usually in a very limited way, or a party who holds bare legal title for the benefit of others. This definition suggests that a nominee possesses few or no legally enforceable rights beyond those of a principal whom the nominee serves. The legal status of a nominee depends on the context of the relationship of the nominee to its principal. A nominee of the owner of a note and mortgage may not effectively assign the note and mortgage to another for want of an ownership interest in said note and mortgage by the nominee.

Business & Corporate Law > Agency Relationships > Fiduciaries > Fiduciary Duties

HN7[] **Fiduciaries, Fiduciary Duties**

The relationship of agent and principal is a fiduciary relationship, resulting from the manifestation of consent by one person to another, allowing the other to act on his behalf,

subject to his control and consent. The principal is the one for whom action is to be taken, and the agent is the one who acts. The agent, who has a fiduciary relationship with the principal, is a party who acts on behalf of the principal with the latter's express, implied, or apparent authority. Agents are bound at all times to exercise the utmost good faith toward their principals. They must act in accordance with the highest and truest principles of morality. An agent is prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties.

Business & Corporate Law > Agency Relationships > Authority to Act > General Overview

Evidence > Burdens of Proof > Preponderance of Evidence

Business & Corporate Law > Agency Relationships > General Overview

HN8[] **Agency Relationships, Authority to Act**

A party who claims to be the agent of another bears the burden of proving the agency relationship by a preponderance of the evidence, and the declarations of an alleged agent may not be shown for the purpose of proving the fact of agency. The acts of a person assuming to be the representative of another are not competent to prove the agency in the absence of evidence tending to show the principal's knowledge of such acts or assent to them.

Headnotes/Syllabus

Headnotes

Mortgages -- Foreclosure -- Sufficiency of Papers Supporting Motion for Order of Reference

Plaintiff's mortgage foreclosure action was dismissed, without prejudice, with leave to renew plaintiff's motion for an order of reference by providing the court with proof of the grant of authority from the original mortgagee to its nominee enabling the nominee to assign the mortgage and note to plaintiff's predecessor, which in turn assigned it to plaintiff; an affidavit from plaintiff's vice-president, a conflicted "robo-signer" who signed an affidavit of merit in support of the subsequently withdrawn motion for an order of reference, explaining her employment status for the past three years; and an affirmation from plaintiff's counsel, using the new standard court form, that he has personally reviewed plaintiff's documents and records in the instant action and has confirmed the factual accuracy of the court filings and the notarizations in those documents. Plaintiff's vice-president, who admitted in an unrelated foreclosure action to having executed sworn documents outside the presence of a notary public without reading them, must explain why a conflict of interest does not exist here in how she executed the assignment from the original mortgagee's nominee to plaintiff's predecessor in her capacity as a vice-president of the nominee, the assignment from plaintiff's predecessor to plaintiff in her capacity as a vice-president of plaintiff's predecessor, and the affidavit of merit in her capacity as a vice-president of plaintiff.

Counsel: [***1] *Stein Wiener & Roth, L.L.P.*, Carle Place (*Gerald Roth* of counsel), for plaintiff.

Judges: HON. ARTHUR M. ***SCHACK***, J. S. C.

Opinion by: ARTHUR M. ***SCHACK***

Opinion

[**859] [*1022] Arthur M. ***Schack***, J.

In this foreclosure action, plaintiff OneWest Bank, F.S.B. moved for an order of reference and related relief for the premises located at 962 Hemlock Street, Brooklyn, New York (block 4529, lot 116, County of Kings), upon the default of all defendants. The Kings County Supreme Court Foreclosure Department forwarded the motion papers to me on August 30, 2010. While drafting this decision and order, I received on October 14, 2010, in the midst of the present national media attention about "robo-signers," an October 13, 2010 letter from plaintiff's counsel, by which "[i]t is respectfully requested that plaintiff's application be withdrawn at this time." There was no explanation or reason given by plaintiff's counsel for his request to withdraw the motion for an order of reference other than "[i]t is our intention that a new application containing updated information will be re-submitted shortly."

The court grants the request of plaintiff's counsel to withdraw the instant motion for an order of reference. However, [***2] to prevent the waste of judicial resources, the instant foreclosure action is dismissed, without prejudice, with leave to renew the instant motion for an order of [****2] reference within 60 days of this decision and order, by providing the court with necessary and additional documentation.

First, the court requires proof of the grant of authority from the original mortgagee, Cambridge Home Capital, LLC, to its nominee, Mortgage Electronic Registration Systems, Inc.

(MERS), to assign the subject mortgage and note on March 16, 2009 to IndyMac Federal Bank, FSB. IndyMac subsequently assigned the subject mortgage and note to its successor, OneWest, on May 14, 2009.

Second, the court requires an affidavit from Erica A. Johnson-Seck, a conflicted "robo-signer," explaining her employment status. A "robo-signer" is a person who quickly signs hundreds or thousands of foreclosure documents in a month, despite swearing that he or she has personally reviewed the mortgage documents but has not done so. Ms. Johnson-Seck, in a July 9, 2010 deposition taken in a Palm Beach County, Florida foreclosure case, admitted that she: is a "robo-signer" who executes about 750 mortgage documents **[***3]** a week, without a notary public present; does not spend more than 30 seconds signing each document; does not read the documents before signing them; and did not provide me with affidavits about her employment **[**860]** in two **[*1023]** prior cases. (*See* Stephanie Armour, *Mistakes Widespread on Foreclosures, Lawyers Say*, USA Today, Sept. 27, 2010; Ariana Eunjung Cha, *OneWest Bank Employee: 'Not More Than 30 Seconds' to Sign Each Foreclosure Document*, Washington Post, Sept. 30, 2010.)

In the instant action, Ms. Johnson-Seck claims to be: a vice-president of MERS in the March 16, 2009 MERS to IndyMac assignment; a vice-president of IndyMac in the May 14, 2009 IndyMac to OneWest assignment; and a vice-president of OneWest in her June 30, 2009 affidavit of merit. Ms. Johnson-Seck must explain to the court, in her affidavit: her employment history for the past three years; and why a conflict of interest does not exist in the instant action with her acting as a vice-president of assignor MERS, a vice-president of assignee/assignor IndyMac, and a vice-president of assignee/plaintiff OneWest. Further, Ms. Johnson-Seck must explain: why she was a vice-president of both assignor MERS and assignee Deutsche Bank **[***4]** in a second case before me, *Deutsche Bank Natl Trust Co. v Maraj, (18 Misc 3d 1123[A], 856 NYS2d 497, 2008 NY Slip Op 50176[U] [Sup Ct, Kings County 2008]*); why she was a vice-president of both assignor MERS and assignee IndyMac in a third case before me, *IndyMac Bank, FSB, v Bethley, (22 Misc 3d 1119[A], 880 NYS2d 873, 2009 NY Slip Op 50186[U] [Sup Ct, Kings County 2009]*); and why she executed an affidavit of merit as a vice-president of Deutsche Bank in a fourth case before me, *Deutsche Bank v Harris, 2008 N.Y. Misc. LEXIS 7707 (Sup Ct, Kings County, Feb. 5, 2008, Index No. 35549/07)*.

Third, plaintiff's counsel must comply with the new court filing requirement, announced yesterday by Chief Judge Jonathan Lippman, which was promulgated to preserve the integrity of the foreclosure process. Plaintiff's counsel must submit an affirmation, using the new standard court form, that he has personally reviewed plaintiff's documents and records in the instant action and has confirmed the factual accuracy of the court filings and the notarizations in these documents. Counsel is reminded that the new standard court affirmation form states that "[t]he wrongful filing and prosecution of foreclosure proceedings which are discovered to suffer from these defects may be cause for disciplinary and other sanctions upon participating **[***5]** counsel."

Background

Defendant Covan Drayton executed the subject **[****3]** mortgage and note on January 12, 2007, borrowing $492,000 from Cambridge. **[*1024]** MERS, "acting solely as a nominee for Lender [Cambridge]" and "FOR PURPOSES OF RECORDING THIS MORTGAGE, MERS IS THE MORTGAGEE OF RECORD," recorded the instant mortgage and note on March 19, 2007, in the Office of the City Register of the City of New York, at City Register file number (CRFN) 2007000143961. Plaintiff Drayton allegedly defaulted in his mortgage loan payment on September 1, 2008.

Then, MERS, as nominee for Cambridge, assigned the instant nonperforming mortgage and note to IndyMac, on March 16, 2009. Erica A. Johnson-Seck executed the assignment as a vice-president of MERS, as nominee for Cambridge. This assignment was recorded in the Office of the City Register of the City of New York, on March 24, 2009, at CRFN 200900084809. However, as will be discussed below, there is an issue whether MERS, as Cambridge's nominee, was authorized by Cambridge, its principal, to assign the subject Drayton mortgage and note to plaintiff IndyMac.

Subsequently, almost two months later, Ms. Johnson-Seck, now as a vice-president **[**861]** of IndyMac, on **[***6]** May 14, 2009, assigned the subject mortgage and note to OneWest. This assignment was recorded in the Office of the City Register of the City of New York, on May 22, 2009, at CRFN 2009000155018.

Plaintiff OneWest commenced the instant foreclosure action on June 18, 2009 with the filing of the summons, complaint and notice of pendency. On August 6, 2009, plaintiff OneWest filed the instant motion for an order of reference. Attached to plaintiff OneWest's moving papers is an affidavit of merit by Erica A. Johnson-Seck, dated June 30, 2009, in which she claims to be a vice-president of plaintiff OneWest. She states, in paragraph one, that "[t]he facts recited herein are from my own knowledge and from review of the documents and records kept in the ordinary course of business with respect to the servicing of this mortgage." There are outstanding questions about Ms. Johnson-Seck's employment,

whether she executed sworn documents without a notary public present and whether she actually read and personally reviewed the information in the documents that she executed.

July 9, 2010 Deposition of Erica A. Johnson-Seck in the *Machado* Case

On July 9, 2010, nine days after executing the affidavit of merit in [***7] the instant action, Ms. Johnson-Seck was deposed in a Florida foreclosure action, *IndyMac Fed. Bank, FSB v Machado* **[*1025]** (15th Cir Ct, Palm Beach County, Fla, case No. 50 2008 CA 037322XXXX MB AW), by defendant Machado's counsel, Thomas E. Ice, Esq. Ms. Johnson-Seck admitted to being a "robo-signer," executing sworn documents outside the presence of a notary public, not reading the documents before signing them and not complying with my prior orders in the *Maraj* and *Bethley* decisions.

Ms. Johnson-Seck admitted in her *Machado* deposition testimony that she was not employed by IndyMac on May 14, 2009, the day she assigned the subject mortgage and note to OneWest, even though she stated in the May 14, 2009 assignment that she was a vice-president of IndyMac. According to her testimony she was employed on May 14, 2009 by assignee OneWest. The following questions were asked and then answered by Ms. Johnson-Seck (deposition at 4, line 11--5, line 4):

"Q. Could you state your full name for the record, please.

"A. Erica Antoinette Johnson-Seck. **[****4]**

"Q. And what is your business address?

"A. 7700 West Parmer Lane, P-A-R-M-E-R, Building D, Austin, Texas 78729.

"Q. **[***8]** And who is your employer?

"A. OneWest Bank.

"Q. How long have you been employed by OneWest Bank?

"A. Since March 19th, 2009.

"Q. Prior to that you were employed by IndyMac Federal Bank, FSB?

"A. Yes.

"Q. And prior to that you were employed by IndyMac Bank, FSB?

"A. Yes.

"Q. Your title with OneWest Bank is what?

"A. Vice president, bankruptcy and foreclosure."

Despite executing, on March 16, 2009, the MERS, as nominee for Cambridge, assignment to IndyMac, as vice-president of MERS, she admitted that she is not an officer of MERS. Further, she claimed to have "signing authority" from several major banking institutions and the Federal Deposit Insurance Corporation (FDIC). The following questions were **[**862]** asked and then answered by Ms. Johnson-Seck (deposition at 6, lines 5-21):

"Q. Are you also an officer of Mortgage Electronic **[*1026]** Registration Systems?

"A. No.

"Q. You have signing authority to sign on behalf of Mortgage Electronic Registration Systems as a vice president, correct?

"A. Yes.

"Q. Are you an officer of any other corporation?

"A. No.

"Q. Do you have signing authority for any other corporation?

"A. Yes.

"Q. What corporations are those?

"A. IndyMac Federal Bank, Indymac Bank, FSB, FDIC as receiver for Indymac Bank, FDIC as conservator **[***9]** for Indymac, Deutsche Bank, Bank of New York, U.S. Bank. And that's all I can think of off the top of my head."

Then, she answered the following question about her "signing authority" (deposition at 7, lines 3-10):

"Q. When you say you have signing authority, is your authority to sign as an officer of those corporations?

"A. Some. Deutsche Bank I have a POA [power of attorney] to sign as attorney-in-fact. Others I sign as an officer. The FDIC I sign as attorney-in-fact. IndyMac Bank and IndyMac Federal Bank I now sign as attorney-in-fact. I only sign as a vice president for OneWest."

Ms. Johnson-Seck admitted that she is not an officer of

MERS, has no idea how MERS is organized and does not know why she signs assignments as a MERS officer. Further, she admitted that the MERS assignments she executes are prepared by an outside vendor, Lender Processing Services, Inc. (LPS), which ships the documents to her Austin, Texas office from Minnesota. Moreover, she admitted executing MERS assignments without a notary public **[****5]** present. She also testified that after the MERS assignments are notarized they are shipped back to LPS in Minnesota.

LPS, in its 2009 Form 10-K, filed with the U.S. Securities and Exchange **[***10]** Commission, states that it is "a provider of integrated technology and services to the mortgage lending industry, with market leading positions in mortgage processing and default management services in the U.S." (Form at 1); "we offer lenders, **[*1027]** servicers and attorneys certain administrative and support services in connection with managing foreclosures" (Form at 4); "[a] significant focus of our marketing efforts is on the top 50 US banks" (Form at 5); and "our two largest customers, Wells Fargo Bank, N.A. and JP Morgan Chase Bank, N.A., each accounted for more than 10% of our aggregate revenue" (Form at 5).

LPS is now the subject of a federal criminal investigation related to its foreclosure document preparation. (*See* Ariana Eunjung Cha, *Lender Processing Services Acknowledges Employees Allowed to Sign for Managers on Foreclosure Paperwork*, Washington Post, Oct. 5, 2010.) Last week, on October 13, 2010, the Florida Attorney General issued to LPS an "Economic Crimes Investigative Subpoena Duces Tecum," seeking various foreclosure documents prepared by LPS and employment records for various "robo-signers."

The following answers to questions were given by Ms. Johnson-Seck in the *Machado* deposition (deposition at **[***11]** 116, line 4--119, line 16):

> "Q. Now, given our last exchange, I'm sure you will agree that you are not a vice president of MERS in any sense of **[**863]** the word other than being authorized to sign as one?
>
> "A. Yes.
>
> "Q. You are not--
>
> "A. Sorry.
>
> "Q. That's all right. You are not paid by MERS?
>
> "A. No.
>
> "Q. You have no job duties as vice president of MERS?
>
> "A. No.
>
> "Q. You don't attend any board meetings of MERS?
>
> "A. No.
>
> "Q. You don't attend any meetings at all of MERS?
>
> "A. No.
>
> "Q. You don't report to the president of MERS?
>
> "A. No.
>
> "Q. Who is the president of MERS?
>
> "A. I have no idea.
>
> "Q. You're not involved in any governance of MERS?
>
> "A. No.
>
> **[*1028]** "Q. The authority you have says that you can be an assistant secretary, right?
>
> "A. Yes.
>
> "Q. And yet you don't report to the secretary--
>
> "A. No.
>
> "Q.--of MERS. You don't have any MERS' employees who report to you? **[****6]**
>
> "A. No.
>
> "Q. You don't have any vote or say in any corporate decisions of MERS?
>
> "A. No.
>
> "Q. Do you know where the MERS' offices are located?
>
> "A. No.
>
> "Q. Do you know how many offices they have?
>
> "A. No.
>
> "Q. Do you know where they are headquartered?
>
> "A. No.
>
> "Q. I take it then you'[ve] never been to their headquarters?
>
> "A. No.
>
> "Q. Do you know how many employees they have?

"A. No.

"Q. But you know that you have counterparts [***12] all over the country signing as MERS's vice presidents and assistant secretaries?

"A. Yes.

"Q. Some of them are employees of third-party foreclosure service companies, like LPS?

"A. Yes.

"Q. Why does MERS appoint you as a vice president or assistant secretary as opposed to a manager or an authorized agent to sign in that capacity?

"A. I don't know.

"Q. Why does MERS give you any kind of a title?

"A. I don't know.

"Q. Take me through the procedure for drafting and--the drafting and execution of this Assignment of Mortgage which is Exhibit E.

"A. It is drafted by our forms, uploaded into process management, downloaded by LPS staff in Minnesota, [*1029] shipped to Austin where we sign and notarize it, and hand it back to an LPS employee, who then ships it back to Minnesota, uploads a copy and mails the original to the firm.

"Q. Very similar to all the other document, preparation of all the other documents.

[**864] "A. (Nods head.)

"Q. Was that a yes? You were shaking your head.

"A. Yes.

"Q. As with the other documents, you personally don't review any of the information that's on here--

"A. No.

"Q.--other than to make sure that you are authorized to sign as the person you're signing for?

"A. Yes. [****7]

"Q. Okay. As with the other [***13] documents, you signed these and took them to be notarized just to a Notary that's outside your office?

"A. Yes.

"Q. And they will get notarized as soon as they can. It may or may not be the same day that you executed it?

"A. That's true."

Further, with respect to MERS, Ms. Johnson-Seck testified in answering questions (deposition at 138, line 2--139, line 17):

"Q. Do you have an understanding that MERS is a membership organization?

"A. Yes, yes.

"Q. And the members are--

"A. Yes.

"Q.--banking entities such as OneWest?

"A. Yes.

"Q. In fact, OneWest is a member of MERS?

"A. Yes.

"Q. Is Deutsche Bank National Trust Company a member of MERS?

"A. I don't know.

"Q. Most of the major banking institutions in the United States, at least, are members of MERS, correct?

"A. That sounds right.

"Q. It's owned and operated by banking institutions?

[*1030] "A. I'm not a big--I don't, I don't know that much about the ins and outs of MERS. I'm sorry. I understand what it's for, but I don't understand the nitty-gritty.

"Q. What is it for?

"A. To track the transfer of doc--of interest from one entity to another. I know that it was initially created so that a servicer did not have to record the assignments, or if they didn't, there was still a [***14] system to keep track of the transfer of property.

"Q. Does it also have a function to hold the mortgage separate and apart from the note so that note can be transferred from entity to entity to entity, bank to bank to bank--

"A. That sounds right.

"Q.--without ever having to rerecord the mortgage?

"A. That sounds right.

"Q. So it's a savings device. It makes it more efficient to transfer notes?

"A. Yes.

"Q. And cheaper?

"A. Yes."

Moreover, Ms. Johnson-Seck testified that one of her job duties was to sign documents, which at that time took her about 10 minutes per day (deposition at 11). Further, she admitted (at 13, line **[****8]** 11--14, line 15) that she signs about 750 documents per week and doesn't read each document.

"Q. Okay. *How many documents would you say that you sign on a week on average, in a week on average?*

"A. I could have given you that number if you had that question in there because I would [have] brought the report. However, I'm going to guess, today I saw an e-mail **[**865]** that 1,073 docs are in the office for signing. So if we just--and there's about that a day. So let's say 6,000 a week and I do probably--let's see. There's eight of us signing documents, so what's the math?

"Q. *Six thousand divided by **[***15] eight, that gives me 750.*

"A. *That sounds, that sounds about right.*

"Q. Okay. That would be a reasonable estimate of **[*1031]** how many you sign, you personally sign per week?

"A. Yes.

"Q. And that would include Lost Note Affidavits, Affidavits of Debt?

"A. Yes.

"Q. What other kinds of documents would be included in that?

"A. Assignments, declarations. I can sign anything related to a bankruptcy or a foreclosure.

"Q. *How long do you spend executing each document?*

"A. I *have changed my signature considerably. It's just an E now. So not more than 30 seconds.*

"Q. *Is it true that you don't read each document before you sign it?*

"A. *That's true.*" (Emphasis added.)

Ms. Johnson-Seck, in the instant action, signed her full name on the March 16, 2009 MERS, as nominee for Cambridge, assignment to IndyMac. She switched to the letter E in signing the May 14, 2009 IndyMac to OneWest assignment and the June 30, 2009 affidavit of merit on behalf of OneWest.

Additionally, she testified about how LPS prepares the documents in Minnesota and ships them to her Austin office, with LPS personnel present in her Austin office (deposition at 16-17). Ms. Johnson-Seck described the document signing process (deposition at 17, line 6--18, line 18):

"Q. Take me through **[***16]** the procedure for getting your actual signature on the documents once they've gone through this quality control process?

"A. The documents are delivered to me for signature and I do a quick purview to make sure that I'm not signing for an entity that I cannot sign for. And I sign the document and I hand it to the Notary, who notarizes it, who then hands it back to LPS who uploads the document so that the firms know it's available and they send an original.

"Q. 'They' being LPS?

"A. Yes.

"Q. Are all the documents physically, that you were supposed to sign, are they physically on your desk?

"A. Yes. **[****9]**

"Q. You don't go somewhere else to sign documents?

[*1032] "A. No.

"Q. *When you sign them, there's no one else in your office?*

"A. *Sometimes.*

"Q. *Well, the Notaries are not in your office, correct?*

"A. *They don't sit in my office, no.*

"Q. *And the witnesses who, if you need witnesses on the*

document, are not sitting in your office?

"A. *That's right.*

"Q. So you take your ten minutes and you sign them and then you give them to the supervisor of the Notaries, correct?

"A. I supervise the Notaries, so I just give them to a Notary.

"Q. You give all, you give the whole group that you just signed to one Notary?

"A. Yes." (Emphasis added.)

[866]** Ms. **[***17]** Johnson-Seck testified (deposition at 20, line 1--21, line 4) about notaries not witnessing her signature:

"Q. I'm mostly interested in how long it takes for the Notary to notarize your signature.

"A. I can't say categorically because the Notary, that's not the only job they do, so.

"Q. In any event, it doesn't have to be the same day?

"A. No.

"Q. When they notarize it and they put a date that they're notarizing it, is it the date that you signed it or is it the date that they're notarizing it?

"A. I don't know.

"Q. When you execute a sworn document, do you make any kind of a verbal acknowledgment or oath to anyone?

"A. I *don't know if I know what you're talking about. What's a sworn document?*

"Q. Well, an affidavit.

"A. Oh. No.

"Q. *In any event, there's no Notary in the room for you to--*

"A. *Right.*

"Q.*--take an oath with you, correct?*

"A. *No there is not.*

[*1033] "Q. *In fact, the Notaries can't see you sign the documents; is that correct?*

"A. Not unless th[ey] made it their business to do so?

"Q. To peek into your office?

"A. Yes." (Emphasis added.)

As noted above, I found Ms. Johnson-Seck engaged in "***robo-signing***" in *Deutsche Bank v Maraj* and *IndyMac Bank, FSB v Bethley*. In both foreclosure cases, I denied plaintiffs' motions **[****10]** for orders **[***18]** of reference without prejudice with leave to renew if, among other things, Ms. Johnson-Seck could explain in affidavits: her employment history for the past three years; why she was a vice-president of both assignor MERS and assignee Deutsche Bank National Trust Company in *Maraj*; and why she was vice-president of IndyMac in *Bethley*. Mr. Ice questioned Ms. Johnson-Seck about my *Maraj* decision and showed her the *Maraj* decision as exhibit M in the *Machado* deposition. The following colloquy at the *Machado* deposition took place (deposition at 153, line 15--156, line 9).

"Q. Exhibit M is a document that you saw before in your last deposition, correct?

"A. Yes.

"Q. It's an opinion from Judge ***Schack*** up in New York--

"A. Yes.

"Q.--correct? You're familiar with that?

"A. Yes.

"Q. In it, he says that you signed an Assignment of Mortgage as the vice president of MERS, correct--

"A. Yes.

"Q.--just as you did in this case? Judge ***Schack*** also says that you executed an affidavit as an officer of Deutsche Bank National Trust Company, correct?

"A. Yes.

"Q. And is that true, you executed an affidavit for Deutsche Bank in that case?

"A. That is not true.

"Q. You never executed a document as an officer of Deutsche Bank National Trust Company **[***19]** in that case, Judge ***Schack***'s case?

"A. Let me just read it so I can--I have to refresh my memory completely.

[*1034] "Q. Okay.

"A. I don't remember. Most likely.

"Q. That you did?

[**867] "A. It sounds reasonable that I may have. I don't remember, and since it's not attached, I can't say.

"Q. And as a result, Judge ***Schack*** wanted to know if you were engaged in self-dealing by wearing two corporate hats?

"A. Yes.

"Q. And the court was concerned that there may be fraud on the part of the bank?

"A. I guess.

"Q. I mean he said that, right?

"A. Oh, okay. I didn't read the whole thing. Okay.

"Q. Okay. The court ordered Deutsche Bank to produce an affidavit from you describing your employment history for the past three years, correct? [****11]

"A. That's what this says.

"Q. Did you do that?

"A. No, because we were never--no affidavit ever existed and no request ever came to produce such a document. The last time we spoke, I told you that in-house counsel was reviewing the whole issue and that's kind of where--and we still haven't received any communication to produce an affidavit.

"Q. From your counsel?

"A. From anywhere.

"Q. Well, you're reading Judge ***Schack***'s opinion. He seems to want one. Isn't that pretty clear on its face.

"A. We didn't [***20] get--we never even got a copy of this.

"Q. Okay. But now you have it--

"A. And--

"Q. And you had it when we met at our deposition back in February 5th.

"A. And our in-house counsel's response to this is we were never--this was never requested of me and it was his recommendation not to comply.

"Q. What has become of that case?

"A. I don't know.

"Q. Was it settled?

"A. I don't know."

[*1035] After a break in the *Machado* deposition proceedings, Mr. Ice questioned Ms. Johnson-Seck about various documents that were subpoenaed for the July 9, 2010 deposition, including her employment affidavits that I required in both *Maraj* and *Bethley*. Ms. Johnson-Seck answered the following questions (deposition at 159, line 19--161, line 9):

"Q. So let's start with the duces tecum part of you[r] notice, which is the list of documents. No. 1 was: The affidavit of the last three years of deponent's employment provided to Judge ***Schack*** in response to the order dated January 31st, 2008 in the case of *Deutsche Bank National Trust Company vs. Maraj*, Case No. 25981-07, Supreme Court of New York. We talked about that earlier. There is no such affidavit, correct?

"A. Correct.

"Q. By the way, why was IndyMac permitted to bring the case in Deutsche [***21] Bank's name in that case?

"A. I don't--I don't know. Now, errors have been made.

"Q. No. 2: The affidavit of the deponent provided to Judge ***Schack*** in response to the order dated February 6th, 2009 in the case of *IndyMac Bank, FSB vs. Bethley*, New York Slip Opinion 50186, New York Supreme Court 2/5/09, 'explaining,' and this is in quotes, 'her employment history for the past three years; and, why a conflict of interest does not exist in how she acted as vice president of assignee [****12] IndyMac Bank, FSB in the instant action, and vice president of both Mortgage Electronic Registrations Systems, Inc. and Deutsche Bank in Deutsche Bank vs. Maraj,' and it gives the citation and that's the case [**868] referred to in item 1 of our request. Do you have that affidavit with you here today?

"A. No.

"Q. Were you aware of that second opinion where Judge ***Schack*** asks for a second affidavit?

"A. Nope. Where is Judge ***Schack*** sending these?

"Q. Presumably to your counsel.

"A. *I wonder if he has the right address. Maybe that's what we should do, send Judge* ***Schack*** *the most recent, and I will gladly show up in his court and provide him everything he wants.*

[*1036] "Q. Okay. Well, I sent you this back in March. Have your or your counsel **[***22]** or in-house counsel at IndyMac pursued that?

"A. No." (Emphasis added.)

Counsel for plaintiff OneWest has leave to produce Ms. Johnson-Seck in my courtroom to "gladly show up ... and provide [me] ... everything he wants."

Discussion

HN1[↑] *Real Property Actions and Proceedings Law § 1321 (1)* allows the court in a foreclosure action, upon the default of the defendant or defendant's admission of mortgage payment arrears, to appoint a referee "to compute the amount due to the plaintiff." In the instant action, plaintiff OneWest's application for an order of reference is a preliminary step to obtaining a default judgment of foreclosure and sale against defendant Drayton. (*Home Sav. of Am., F.A. v. Gkanios, 230 AD2d 770, 646 NYS2d 530 [2d Dept 1996]*.) Plaintiff's request to withdraw its application for an order of reference is granted. However, to allow this action to continue without seeking the ultimate purpose of a foreclosure action, to obtain a judgment of foreclosure and sale, makes a mockery of, and wastes the resources of the judicial system. Continuing the instant action without moving for an order of reference is the judicial equivalent of a "timeout." Granting a "timeout" to plaintiff OneWest to allow **[***23]** it to re-submit "a new application containing new information ... shortly" is a waste of judicial resources. Therefore, the instant action is dismissed without prejudice, with leave granted to plaintiff OneWest to renew its motion for an order of reference within 60 days of this decision and order, if plaintiff OneWest and plaintiff OneWest's counsel can satisfactorily address the various issues previously enumerated.

Further, the dismissal of the instant foreclosure action requires the cancellation of the notice of pendency.*HN2*[↑] *CPLR 6501* provides that the filing of a notice of pendency against a property is to give constructive notice to any purchaser of real property or encumbrancer against real property of an action that "would affect the title to, or the possession, use or enjoyment of, real property, except in a summary proceeding brought to recover the possession of real property." The Court of Appeals, in *5303 Realty Corp. v O & Y Equity Corp. (64 NY2d 313, 319, 476 NE2d 276, 486 NYS2d 877 [1984])*, commented that "[t]he purpose of the doctrine was to assure that a court retained its ability to effect justice by **[*1037]** preserving its power over the property, regardless of **[****13]** whether a purchaser had any notice **[***24]** of the pending suit," and that "the statutory scheme permits a party to effectively retard the alienability of real property without any prior judicial review" (at 320).

HN3[↑] *CPLR 6514 (a)* provides for the mandatory cancellation of a notice of pendency:

> "*The Court*, upon motion of any person aggrieved and upon such notice as it may require, *shall direct any county [**869] clerk to cancel a notice of pendency*, if service of a summons has not been completed within the time limited by section 6512; or *if the action has been* settled, discontinued or *abated*; or if the time to appeal from a final judgment against the plaintiff has expired; or if enforcement of a final judgment against the plaintiff has not been stayed pursuant to section 5519." (Emphasis added.)

HN4[↑] The plain meaning of the word "abated," as used in *CPLR 6514 (a)* is the ending of an action. "Abatement" is defined as "[t]he act of eliminating or nullifying." (Black's Law Dictionary 3 [7th ed 1999].) "An action which has abated is dead, and any further enforcement of the cause of action requires the bringing of a new action, provided that a cause of action remains (2A Carmody-Wait 2d §11.1)." (*Nastasi v Nastasi, 26 AD3d 32, 40, 805 NYS2d 585 [2d Dept 2005]*.) **[***25]** Further, *Nastasi (at 36)* held that the

> "[c]ancellation of a notice of pendency can be granted in the exercise of the inherent power of the court where its filing fails to comply with *CPLR § 6501* (*see 5303 Realty Corp. v O & Y Equity Corp., supra at 320-321; Rose v Montt Assets, 250 AD2d 451, 451-452, 673 NYS2d 406 [1998]*; Siegel, NY Prac §336 [4th ed])."

Thus, the dismissal of the instant complaint must result in the mandatory cancellation of plaintiff OneWest's notice of pendency against the subject property "in the exercise of the inherent power of the court."

Moreover, *HN5*[↑] "[t]o have a proper assignment of a mortgage by an authorized agent, a power of attorney is necessary to demonstrate how the agent is vested with the authority to assign the mortgage." (*HSBC Bank, USA, N.A. v Yeasmin, 27 Misc 3d 1227 [A], 91 NYS2d 693, 2010 NY Slip Op 50927[U], *4 [Sup Ct, Kings County 2010]*.)"No special form or language is necessary to effect an assignment as long as the language shows the *intention of the owner of a right to*

transfer it" (*Tavil v Finkelstein Bruckman [*1038] Wohl Most & Rothman, 223 AD2d 52, 55, 646 NYS2d 691 [1st Dept 1996]* [emphasis added]; *see Suraleb, Inc. v International Trade Club, Inc., 13 AD3d 612, 788 NYS2d 403 [2d Dept 2004]*).

MERS, as described above, recorded **[***26]** the subject mortgage as "nominee" for Cambridge. *HN6*[↑] The word "nominee" is defined as "[a] person designated to act in place of another, usu. in a very limited way" or "[a] party who holds bare legal title for the benefit of others." (Black's Law Dictionary 1076 [8th ed 2004].) "This definition suggests that a nominee possesses few or no legally enforceable rights beyond those of a principal whom the nominee serves." (*Landmark Natl. Bank v Kesler, 289 Kan 528, 538, 216 P.3d 158, 166 [2009]*.) The Supreme Court of Kansas, in *Landmark Natl Bank, (289 Kan at 539, 216 P.3d at 166)*, observed that

> "[t]he legal status of a nominee, then, depends on the context of the relationship of the nominee to its principal. Various courts have interpreted the relationship of MERS and the lender as an agency relationship. See *In re Sheridan, 2009 Bankr. LEXIS 552, 2009 WL631355, at *4 (Bankr. D. Idaho, March 12, 2009)* (MERS 'acts not on its own account. Its **[****14]** capacity is representative.'); *Mortgage Elec. Registrations Systems, Inc. v Southwest, 2009 Ark. 152, --, 301 S.W.3d 1, --, 2009 WL 723182 *3 (March 19, 2009)* ('MERS, by the terms of the deed of trust, and its own stated purposes, was the lender's agent'); *LaSalle Bank Nat. Ass'n v Lamy, 12 Misc 3d 1191, 824 NYS2d 769, 2006 NY Slip Op 51534[U], 2006 WL 2251721 at *2 (Sup 2006)* **[***27]** ... ('A nominee of the owner of a note and mortgage may not effectively assign **[**870]** the note and mortgage to another for want of an ownership interest in said note and mortgage by the nominee.')."

The New York Court of Appeals, in *Matter of MERSCORP, Inc. v Romaine (8 NY3d 90, 861 NE2d 81, 828 NYS2d 266 [2006])*, explained how MERS acts as the agent of mortgagees, holding:

> "In 1993, the MERS system was created by several large participants in the real estate mortgage industry to track ownership interests in residential mortgages. Mortgage lenders and other entities, known as MERS members, subscribe to the MERS system and pay annual fees for the electronic processing and tracking of ownership and transfers of mortgages. *Members contractually agree to appoint MERS to act as their common agent on all* **[*1039]** *mortgages they register in the MERS system.*" (Emphasis added.)

Thus, it is clear that MERS's relationship with its member lenders is that of *HN7*[↑] agent with principal. This is a fiduciary relationship, resulting from the manifestation of consent by one person to another, allowing the other to act on his behalf, subject to his control and consent. The principal is the one for whom action is to be taken, and the agent is the one who acts. It **[***28]** has been held that the agent, who has a fiduciary relationship with the principal, "is a party who acts on behalf of the principal with the latter's express, implied, or apparent authority." (*Maurillo v Park Slope U-Haul, 194 AD2d 142, 146, 606 NYS2d 243 [2d Dept 1993]*.) "Agents are bound at all times to exercise the utmost good faith toward their principals. They must act in accordance with the highest and truest principles of morality." (*Elco Shoe Mfrs. v Sisk, 260 NY 100, 103, 183 NE 191 [1932]*; *see Sokoloff v Harriman Estates Dev. Corp., 96 NY2d 409, 754 NE2d 184, 729 NYS2d 425 [2001]*; *Wechsler v Bowman, 285 NY 284, 34 NE2d 322 [1941]*; *Lamdin v Broadway Surface Adv. Corp., 272 NY 133, 5 NE2d 66 [1936]*.) An agent "is prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties." (*Landin, at 138*)

Therefore, in the instant action, MERS, as nominee for Cambridge, is an agent of Cambridge for limited purposes. It can only have those powers given to it and authorized by its principal, Cambridge. Plaintiff OneWest has not submitted any documents demonstrating how Cambridge authorized MERS, as nominee for Cambridge, to assign the subject **[***29]** Drayton mortgage and note to IndyMac, which subsequently assigned the subject mortgage and note to plaintiff OneWest.

Recently, in *Bank of N.Y. v Alderazi, (28 Misc 3d 376, 379-380 [2010])*, my learned colleague, Kings County Supreme Court Justice Wayne Saitta, explained that

> "*HN8*[↑] [a] party who claims to be the agent of another bears the burden of proving the agency relationship by a preponderance of the evidence (*Lippincot v East Riv. Mill & Lbr Co., 79 Misc 559, 141 N.Y.S. 220 [1913]*), **[****15]** and '[t]he declarations of an alleged agent may not be shown for the purpose of proving the fact of agency.' (*Lexow & Jenkins v Hertz Commercial Leasing Corp., 122 AD2d 25, 504 NYS2d 192 [2d Dept 1986]*; *see also Siegel v Kentucky Fried Chicken of Long Is., 108 AD2d 218, 488 NYS2d 744 [2d Dept 1985]*; *Moore v Leaseway Transp. Corp., 65 AD2d 697, 409 NYS2d 746 [1st Dept 1978]*.) '[T]he acts of a person assuming **[*1040]** to be the representative of another are not competent to prove the **[**871]** agency in the absence of evidence tending to show the

> principal's knowledge of such acts or assent to them.' (*Lexow & Jenkins v Hertz Commercial Leasing Corp., 122 AD2d at 26*, quoting 2 NY Jur 2d, Agency and Independent Contractors § 26.)
>
> "Plaintiff has submitted no evidence to demonstrate that **[***30]** the original lender, the mortgagee America's Wholesale Lender, authorized MERS to assign the secured debt to plaintiff."

Therefore, in the instant action, plaintiff OneWest failed to demonstrate how MERS, as nominee for Cambridge, had authority from Cambridge to assign the Drayton mortgage to IndyMac. The court grants plaintiff OneWest leave to renew its motion for an order of reference, if plaintiff OneWest can demonstrate how MERS had authority from Cambridge to assign the Drayton mortgage and note to IndyMac.

Then, plaintiff OneWest must address the tangled employment situation of "robo-signer" Erica A. Johnson-Seck. She admitted in her July 9, 2010 deposition in the *Machado* case that she never provided me with affidavits of her employment for the prior three years and an explanation of why she wore so many corporate hats in *Maraj* and *Bethley*. Further, in *Deutsche Bank v Harris*, Ms. Johnson-Seck executed an affidavit of merit as vice-president of Deutsche Bank. If plaintiff renews its motion for an order of reference, the court must get to the bottom of Ms. Johnson-Seck's employment status and her "***robo-signing***." The court reminds plaintiff OneWest's counsel that Ms. Johnson-Seck volunteered at **[***31]** the *Machado* deposition (at 161, lines 4-5) to "gladly show up in his court and provide him everything he wants."

Lastly, if plaintiff OneWest's counsel moves to renew its application for an order of reference, plaintiff's counsel must comply with the new filing requirement to submit, under penalties of perjury, an affirmation that he has taken reasonable steps, including inquiring of plaintiff OneWest, the lender, and reviewing all papers, to verify the accuracy of the submitted documents in support of the instant foreclosure action. According to yesterday's Office of Court Administration press release, Chief Judge Lippman said:

> "We cannot allow the courts in New York State to stand by idly and be party to what we now know is **[*1041]** a deeply flawed process, especially when that process involves basic human needs--such as a family home--during this period of economic crisis. This new filing requirement will play a vital role in ensuring that the documents judges rely on will be thoroughly examined, accurate, and error-free before any judge is asked **[****16]** to take the drastic step of foreclosure." (*See* Gretchen Morgenson and Andrew Martin, *Battle Lines Forming in Clash over Foreclosures*, **[***32]** New York Times, Oct. 21, 2010, at A1; Andrew Keshner, *New Court Rule Says Attorneys Must Verify Foreclosure Papers*, NYLJ, Oct. 21, 2010, at 1.)

Conclusion

Accordingly, it is ordered, that the request of plaintiff OneWest Bank, F.S.B., to withdraw its motion for an order of reference, for the premises located at 962 Hemlock Street, Brooklyn, New York (block 4529, lot 116, County of Kings) is granted; and it is further ordered, that the instant action (index No. 15183/09) is dismissed without prejudice; and it is further ordered, that the notice of pendency in the instant action, filed with the Kings County Clerk on June 18, 2009, by plaintiff **[**872]** OneWest Bank, F.S.B., to foreclose a mortgage for real property located at 962 Hemlock Street, Brooklyn, New York (block 4529, lot 116, County of Kings) is cancelled; and it is further ordered, that leave is granted to plaintiff, OneWest Bank, F.S.B., to renew, within 60 days of this decision and order, its motion for an order of reference for the premises located at 962 Hemlock Street, Brooklyn, New York (block 4529, lot 116, County of Kings), provided that plaintiff, OneWest Bank, F.S.B., submits to the court:

(1) proof of the grant of authority from **[***33]** the original mortgagee, Cambridge Home Capital, LLC, to its nominee, Mortgage Electronic Registration Systems, Inc., to assign the subject mortgage and note to IndyMac Federal Bank, FSB; and

(2) an affidavit by Erica A. Johnson-Seck, vice-president of plaintiff OneWest Bank, F.S.B., explaining: her employment history for the past three years; why a conflict of interest does not exist in how she acted as a vice-president of assignor Mortgage Electronic Registration Systems, Inc., a vice-president of assignee/assignor IndyMac Federal Bank, FSB, and a vice-president of assignee/plaintiff OneWest Bank, F.S.B. in this action; why she was a vice-president of both assignor Mortgage **[*1042]** Electronic Registration Systems, Inc. and assignee Deutsche Bank in *Deutsche Bank Natl. Trust Co. v Maraj, 18 Misc 3d 1123 [A], 856 NYS2d 497, 2008 NY Slip Op 50176[U] [2008]*); why she was a vice-president of both assignor Mortgage Electronic Registration Systems, Inc. and assignee IndyMac Bank, FSB in *IndyMac Bank, FSB, v Bethley, (22 Misc 3d 1119 [A], 880 NYS2d 873, 2009 NY Slip Op 50186[U] [2009]*); and, why she executed an affidavit of merit as a vice-president of Deutsche Bank in *Deutsche Bank v Harris, 2008 N.Y. Misc. LEXIS 7707 (Sup Ct, Kings County, Feb. 5, 2008, Index No. 35549/07)*; and

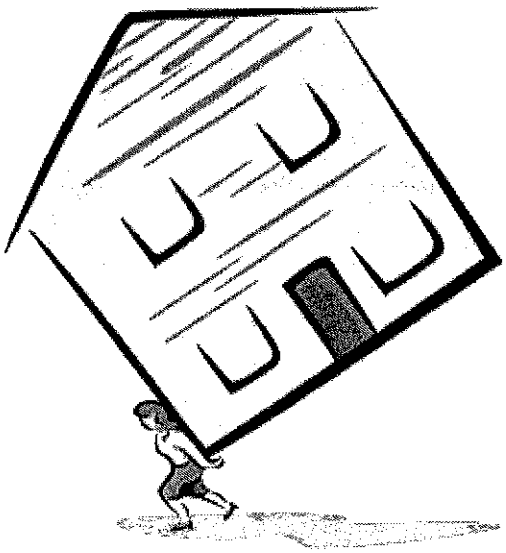
(3) counsel **[***34]** for plaintiff OneWest Bank, F.S.B. must

comply with the new court filing requirement, announced by Chief Judge [****17] Jonathan Lippman on October 20, 2010, by submitting an affirmation, using the new standard court form, pursuant to *CPLR 2106* and under the penalties of perjury, that counsel for plaintiff OneWest Bank, F.S.B. has personally reviewed plaintiff OneWest Bank, F.S.B.'s documents and records in the instant action and counsel for plaintiff OneWest Bank, F.S.B. confirms the factual accuracy of plaintiff OneWest Bank, F.S.B.'s court filings and the accuracy of the notarizations in plaintiff OneWest Bank, F.S.B.'s documents.

End of Document

Has Steven J. Baum, P.C. Served You with Foreclosure Papers?

Posted on Tuesday (March 23, 2010) at 10:30 pm to **Creditors Engaging in Abusive Bankruptcy Practices**
Current Events
Foreclosure Defense
Mortgages & Sub-Prime Mortgage Meltdown



Written by Craig D. Robins, Esq.

Steven J. Baum, P.C. is a foreclosure Factory. It is Long Island's largest foreclosing law firm.

If you live in New York, and you are in foreclosure, then there is a very high chance that the foreclosure law firm suing you is Steven J. Baum, P.C., located in Buffalo, New York.

Over the past several years, the Baum law firm has become one of the largest foreclosure factories in the country, representing dozens of banks in foreclosure cases.

Last year they filed a staggering 12,551 foreclosure lawsuits, which comes out to about 50 a day. Many of the foreclosure cases we defend for our Long Island clients were brought by Steven J. Baum, P.C.

More Foreclosure Cases Mean More Complaints

It seems that as foreclosure firms expand and become literal foreclosure factories, they tend to do sloppy work and make frequent mistakes.

There have been a multitude of complaints against the Baum law firm. Here are some complaints as revealed in a recent New York Post article:

Failing to Divulge Mortgage Payments

Blanca Garcia filed for bankruptcy In the White Plains Bankruptcy Court. Baum's firm filed papers claiming Garcia was in arrears. However, Garcia demonstrated that she actually made payments and showed the court her receipts which had not been credited to her account. Even though Garcia's bankruptcy attorney provided this proof of payment, Baum's firm still ignored the receipts and sent an attorney to bankruptcy court to argue that the mortgage was in arrears.

Creating Questionable Assignments

I've written extensively about mortgage companies that bring foreclosure proceedings when then they do not have proper legal standing to do so. See **Many New York Foreclosure Suits Are Dismissed Because They Are Defective**. Here, the Baum firm has brought numerous actions when their mortgage clients failed to have proper legal standing. See also: **Mortgage Companies Entitlement to Bring Foreclosure Proceedings: Prove It or Lose It** .

Judge Jeffrey Arlen Spinner, sitting in Suffolk County judge took it upon himself to investigate a filing by Baum's firm when it attempted to foreclose on the home of Gloria E. Marsh. "A careful review," the judge wrote

in a four-page order, "reveals a number of glaring discrepancies and unexplained issues of substance."

Judge Spinner determined that the Baum law firm filed the action before the date it claimed its client took ownership of the mortgage To see a copy of the decision, click: GMAC Mortgage v. Marsh — Decision of Judge Spinner Denying Order of Reference.

For another highly publicized decision written by Judge Spinner, see: **Judge Cancels Mortgage Due to Mortgagee's Shocking Behavior in Long Island Foreclosure Action**.

Filing Botched Assignment Papers

In the bankruptcy of Matthew Austin, Baum's firm tried to prove that its client owned the mortgage to Austin's house by filing an assignment of that mortgage from a Florida company signed by an executive of that company — but it was notarized in Buffalo, NY.

"To the extent assignor flew to upstate New York to appear before a notary in the law offices of Steven J. Baum, PC, defies all logic," the lawyer said in court papers. "Clearly this is a manufactured document intended to defraud the Court."

Improper Conduct in Bankruptcy Court

Earlier this year, a New York Bankruptcy Court judge said he has "probably cause" to believe that lawyers for the Baum law firm acted inappropriately.

What Can You Do If You Are In Foreclosure?

In assisting clients with Long Island mortgage foreclosure defense, we routinely come across situations where the paperwork submitted by the foreclosing bank is not in order.

However homeowners have rights afforded by the law. A bank cannot foreclose unless they do it the right way and all of their papers were prepared properly. If they are not, then the homeowner has a meritorious defense to the foreclosure action.

Even if the bank eventually corrects the problems, a homeowner can usually add many additional months or years to the time that they can stay in their home. It therefore pays to meet with an experienced **Long Island foreclosure defense attorney**.

Who Is Steven J. Baum?

Mr. Baum, only 41 years old, took over his father's sleepy Buffalo law practice several years ago, moved it to Amherst, New York, and then super-sized it with a 500 employees — truly making it into a factory.

He also started his own legal document processing company — Pillar Processing.

Who Are Baum's Clients?

The list goes on and on. Bank of America, Chase, Wells Fargo, HSBC, US Bank, GMAC Mortgage, Deutsche Bank, Sovereign Bank, Citibank, OneWest, M&T Bank, Bank of New York Mellon, to name just a dozen, according to court records.

Where In New York Are Baum's Foreclosure Actions Filed?

Steven J. Baum's law firm filed 12,551 foreclosure actions in the New York area last year.

Long Island
Nassau 2,210
Suffolk 3,083

New York City Boroughs
Queens 2,231
Brooklyn 1,592
Staten Island 692
Bronx 678
Manhattan 119

Upstate Suburbs
Westchester 796
Rockland 444
Orange 706

Totals: 12,551 or 241/week or 48/day

That's a lot of foreclosures!

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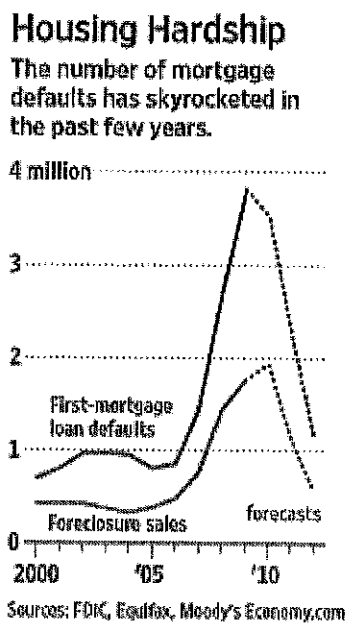
One Response to "Has Steven J. Baum, P.C. Served You with Foreclosure Papers?"

Judicial Sentiment Against Foreclosing-Banks Reaching All-Time High

Posted on Monday (December 28, 2009) at 1:00 am to **Foreclosure Defense**
Mortgages & Sub-Prime Mortgage Meltdown



Written by Craig D. Robins, Esq.

Judges Have Had It with Foreclosing Mortgage Companies Who Skirt the Rules

When I discussed Judge Spinner's recent case in the Suffolk County Supreme Court in which he canceled the IndyMac mortgage of a Long Island family, I indicated my opinion that the tides had changed in the way judges look at banks. See **Judge Cancels Mortgage Due to Mortgagee's Shocking Behavior in Long Island Foreclosure Action**.

A ***Wall Street Journal*** article on December 24, 2009, provided great support for this proposition. The article mentioned the Judge Spinner decision and concluded that such cases demonstrate a new phase in the judiciary's battle to stem the rising tide of foreclosures by punishing mortgage companies for paperwork mistakes and alleged mistreatment of borrowers.

The article highlighted a handful of cases in which state and federal judges presiding over foreclosures are going to the extraordinary lengths of wiping away borrowers' mortgage debt, invalidating foreclosure sales and even barring some foreclosures outright.

The Current Economic Climate Is Adding to Judges' Desires to Help the Homeowner, Thus Creating a New Breed of Activist Judges

Todd Zywicki, a law professor at George Mason University, who was interviewed for the article, questioned whether judges are changing the rules in the middle of the game . . . just because there is a financial crisis.

Apparently, about a year and a half ago, judges in foreclosure cases would routinely dismiss foreclosure cases if they could find reason to do so. But those judges usually permitted the banks and mortgage companies to refile their foreclosure proceedings after correcting any paperwork mistakes that they previously made.

However, the times have changed. Now, after the country has been mired in a housing crisis for several years, more and more judges are penalizing lenders on their paperwork glitches, and in some cases going much further in their efforts to help homeowners.

It seems that the national housing problem has actually propelled some jurists to become activist judges who seek to protect the underdog homeowner from the evils of indifferent, careless and sloppy mortgage companies.

In my own Long Island foreclosure defense practice, this has become evident as we have been able to successfully persuade the court to dismiss foreclosure suits because we called attention to the lender's defective paperwork. For example, in a recent case, the lender failed to demonstrate that they had legal standing. This is because the lender neglected to properly perfect some mortgage assignment documents with the County Clerk.

Mortgage Companies Have Not Been Filing Proper Documents and Are Now Paying the Price

The Wall Street Journal article commented that many of the recent foreclosure case decisions that punished the lender highlighted what became a common practice among mortgage companies: filing a foreclosure lawsuit without showing proof that they actually own the mortgage and have the right to foreclose. This occurs in large part because mortgages often change hands multiple times after the original mortgage loan is made; yet the mortgage transfer documents are never revised to reflect those changes. Consequently, years later, it can be difficult to verify who is the owner of the mortgage.

The article quoted Raymond Brescia, an assistant professor at Albany Law School, who said that it makes sense for judges to demand that mortgage companies follow the rules to the letter if they want to win foreclosure cases in court.

Massachusetts Judge Invalidates Foreclosure Sale Held Two Years Ago

There was another controversial ruling in October by Keith Long, a state-court judge in Massachusetts. Judge Long invalidated two foreclosure sales that had occurred more than two years ago because the mortgagees, U.S. Bancorp and Wells Fargo & Co., never had the right to sell the homes.

Judge Long ruled that even though the mortgage companies physically held the relevant mortgage documents, the mortgages were never legally assigned to them and recorded with the state. As such, they were selling something they don't own, despite the fact that the mortgagees may have been operating in the same way they have done so for the past decade or two.

Most mortgage foreclosures continue to be routinely processed by the courts because the homeowners neglect to take steps to protect their rights. The proceedings go unchallenged. However, any Long Island homeowner who has fallen behind with their mortgage payments, and who has been served with foreclosure papers, should consider consulting with a Long Island foreclosure defense attorney to learn how to protect their rights.

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1. **Many New York Foreclosure Suits Are Dismissed Because They Are Defective**
2. **Judge Cancels Mortgage Due to Mortgagee's Shocking Behavior in Long Island Foreclosure Action**
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NY CLS RPAPL § 1302

Current through 2018 Chapters 1-321

New York Consolidated Laws Service > Real Property Actions And Proceedings Law (Arts. 1 — 21) > Article 13 Action to Foreclose a Mortgage (§§ 1301 — 1391)

§ 1302. Foreclosure of high-cost home loans and subprime home loans

1.Any complaint served in a proceeding initiated pursuant to this article relating to a high-cost home loan or a subprime home loan, as such terms are defined in section six-l and six-m of the banking law, respectively, must contain an affirmative allegation that at the time the proceeding is commenced, the plaintiff:

(a)is the owner and holder of the subject mortgage and note, or has been delegated the authority to institute a mortgage foreclosure action by the owner and holder of the subject mortgage and note; and

(b)has complied with all of the provisions of section five hundred ninety-five-a of the banking law and any rules and regulations promulgated thereunder, section six-l or six-m of the banking law, and section thirteen hundred four of this article.

2.It shall be a defense to an action to foreclose a mortgage for a high-cost home loan or subprime home loan that the terms of the home loan or the actions of the lender violate any provision of section six-l or six-m of the banking law or section thirteen hundred four of this article.

History

Add, *L 2002, ch 626, § 3*, eff April 1, 2003; amd, *L 2008, ch 472, § 17*, eff Aug 5, 2008.

Annotations

Notes

Editor's Notes:

Laws 2002, ch 626, § 4, eff April 1, 2003, provides as follows:

§ 4. This act shall take effect on the one hundred eightieth day after it shall have become a law and shall apply only to loans for which application is made on or after such effective date; provided that the superintendent of banks is authorized to promulgate any and all rules and regulations and take any other measures necessary to implement this act on its effective date on or before such date.

Laws 2008, ch 472, § 28, **subs a and g,** eff Aug 5, 2008, provides as follows:

§ 28. This act shall take effect immediately; provided, however, that:

a. sections one and seventeen of this act shall apply to actions that are commenced on or after September 1, 2008;

g. provided however, effective immediately the promulgation of any rules, regulations or actions necessary for timely implementation of the provisions of this act are hereby authorized.

NY CLS RPAPL § 1303

Current through 2018 Chapters 1-321

New York Consolidated Laws Service > Real Property Actions And Proceedings Law (Arts. 1 — 21) > Article 13 Action to Foreclose a Mortgage (§§ 1301 — 1391)

§ 1303. Foreclosures; required notices

1.The foreclosing party in a mortgage foreclosure action, involving residential real property shall provide notice to:

(a)any mortgagor if the action relates to an owner-occupied one-to-four family dwelling; and

(b)any tenant of a dwelling unit in accordance with the provisions of this section.

2.The notice to any mortgagor required by paragraph (a) of subdivision one of this section shall be delivered with the summons and complaint. Such notice shall be in bold, fourteen-point type and shall be printed on colored paper that is other than the color of the summons and complaint, and the title of the notice shall be in bold, twenty-point type. The notice shall be on its own page.

3.The notice to any mortgagor required by paragraph (a) of subdivision one of this section shall appear as follows:

Help for Homeowners in Foreclosure

New York State Law requires that we send you this notice about the foreclosure process. Please read it carefully.

Summons and Complaint

You are in danger of losing your home. If you fail to respond to the summons and complaint in this foreclosure action, you may lose your home. Please read the summons and complaint carefully. You should immediately contact an attorney or your local legal aid office to obtain advice on how to protect yourself.

Sources of Information and Assistance

The State encourages you to become informed about your options in foreclosure. In addition to seeking assistance from an attorney or legal aid office, there are government agencies and non-profit organizations that you may contact for information about possible options, including trying to work with your lender during this process.

To locate an entity near you, you may call the toll-free helpline maintained by the New York State Department of Financial Services at (enter number) or visit the Department's website at (enter web address).

Rights and Obligations

YOU ARE NOT REQUIRED TO LEAVE YOUR HOME AT THIS TIME. You have the right to stay in your home during the foreclosure process. You are not required to leave your home unless and until your property is sold at auction pursuant to a judgment of foreclosure and sale.

Regardless of whether you choose to remain in your home, YOU ARE REQUIRED TO TAKE CARE OF YOUR PROPERTY and pay property taxes in accordance with state and local law.

Foreclosure rescue scams

Be careful of people who approach you with offers to "save" your home. There are individuals who watch for notices of foreclosure actions in order to unfairly profit from a homeowner's distress. You should be extremely careful about any such promises and any suggestions that you pay them a fee or sign over your deed. State law requires anyone offering such services for profit to enter into a contract which fully describes the services they will perform and fees they will charge, and which prohibits them from taking any money from you until they have completed all such promised services.

3-a. No later than sixty days after the effective date of this subdivision, the department of financial services shall publish a Consumer Bill Of Rights, in consultation with all stakeholders, which shall detail the rights and responsibilities of the plaintiff and defendant in a foreclosure proceeding. Such Bill of Rights shall be updated on an annual basis and as appropriate.

4.The notice to any tenant required by paragraph (b) of subdivision one of this section shall be delivered within ten days of the service of the summons and complaint. Such notice shall be in bold, fourteen-point type, and the paragraph of the notice beginning with the words "ALL RENT-STABILIZED" and ending with the words "FULL HEARING IN COURT" shall be printed entirely in capital letters and underlined. The foreclosing party shall provide its name, address and telephone number on the notice. The notice shall be printed on colored paper that is other than the color of the summons and complaint, and the title of the notice shall be in bold, twenty-point type. The notice shall be on its own page. For buildings with fewer than five dwelling units, the notice shall be delivered to the tenant, by certified mail, return receipt requested, and by first-class mail to the tenant's address at the property if the identity of the tenant is known to the plaintiff, and by first-class mail delivered to "occupant" if the identity of the tenant is not known to the plaintiff. For buildings with five or more dwelling units, a legible copy of the notice shall be posted on the outside of each entrance and exit of the building.

5.The notice required by paragraph (b) of subdivision one of this section shall appear as follows:

> Notice to Tenants of Buildings in Foreclosure
>
> New York State Law requires that we provide you this notice about the foreclosure process. Please read it carefully.
>
> We, (name of foreclosing party), are the foreclosing party and are located at (foreclosing party's address). We can be reached at (foreclosing party's telephone number).
>
> The dwelling where your apartment is located is the subject of a foreclosure proceeding. If you have a lease, are not the owner of the residence, and the lease requires payment of rent that at the time it was entered into was not substantially less than the fair market rent for the property, you may be entitled to remain in occupancy for the remainder of your lease term. If you do not have a lease, you will be entitled to remain in your home until ninety days after any person or entity who acquires title to the property provides you with a notice as required by *section 1305 of the Real Property Actions and Proceedings Law*. The notice shall provide information regarding the name and address of the new owner and your rights to remain in your home. These rights are in addition to any others you may have if you are a subsidized tenant under federal, state or local law or if you are a tenant subject to rent control, rent stabilization or a federal statutory scheme.
>
> ALL RENT-STABILIZED TENANTS AND RENT-CONTROLLED TENANTS ARE PROTECTED UNDER THE RENT REGULATIONS WITH RESPECT TO EVICTION AND LEASE RENEWALS. THESE RIGHTS ARE UNAFFECTED BY A BUILDING ENTERING FORECLOSURE STATUS. THE TENANTS IN RENT-STABILIZED AND RENT-CONTROLLED BUILDINGS CONTINUE TO BE AFFORDED THE SAME LEVEL OF PROTECTION EVEN THOUGH THE BUILDING IS THE SUBJECT OF FORECLOSURE. EVICTIONS CAN ONLY OCCUR IN NEW YORK STATE PURSUANT TO A COURT ORDER AND AFTER A FULL HEARING IN COURT.
>
> If you need further information, please call the New York State Department of Financial Services' toll-free helpline at (enter number) or visit the Department's website at (enter web address).

6.The department of financial services shall prescribe the telephone number and web address to be included in either notice.

7.The department of financial services shall post on its website or otherwise make readily available the name and contact information of government agencies or non-profit organizations that may be contacted by mortgagors for information about the foreclosure process, including maintaining a toll-free helpline to disseminate the information required by this section.

History

Add, *L 2006, ch 308, § 4*, eff Feb 1, 2007; amd, *L 2007, ch 154, § 13*, eff July 3, 2007; *L 2008, ch 472, § 1*, eff Aug 5, 2008; *L 2009, ch 507, § 1*, eff Jan 14, 2010; *L 2010, ch 358, § 1*, eff Sept 12, 2010; *L 2011, ch 62, § 104* (Part A), eff Oct 3, 2011; *L 2012, ch 155, § 83*, eff July 18, 2012; *L 2016, ch 73, § 5* (Part Q), eff Dec 20, 2016.

Annotations

Notes

Editor's Notes:

***Laws 2006, ch 308, §§ 1* and 5,** eff Feb 1, 2007, provide as follows:

Section 1. Short title. This act shall be known and may be cited as the "home equity theft prevention act".

§ 5. This act shall take effect February 1, 2007 and shall apply to any covered contract entered into on or after such date.

***Laws 2008, ch 472, § 28*, subs a and g,** eff Aug 5, 2008, provides as follows:

§ 28. This act shall take effect immediately; provided, however, that:

a. sections one and seventeen of this act shall apply to actions that are commenced on or after September 1, 2008;

g. provided however, effective immediately the promulgation of any rules, regulations or actions necessary for timely implementation of the provisions of this act are hereby authorized.

***Laws 2009, ch 507, § 25*, sub a,** eff Jan 14, 2010, provides as follows:

§ 25. This act shall take effect immediately; provided, however, that:

a. Sections one, one-a, two and three of this act shall take effect on the thirtieth day after this act shall have become a law and shall apply to notices required on or after such date; provided, however, that section one-a of this act shall expire and be deemed repealed 10 years after such effective date (Amd, *L 2014, ch 29, § 1*, eff June 19, 2014.).

Amendment Notes:

2012. Chapter 155, § 83 amended:

Sub 5, notice, closing par by deleting at fig 1 "Banking Department's", at fig 2 "1-877-BANK-NYS (1-877-226-5697)", at fig 3 "http://www.banking.state.ny.us" and adding the matter in italics.

2011. Chapter 62, § 104 (Part A) amended:

Sub 3, notice, third heading, second undesignated par at fig 1 by substituting "Department of Financial Services" for "Banking Department".

Sub 6 at fig 1 by substituting "department of financial services" for "banking department".

Sub 7 at fig 1 by substituting "department of financial services" for "banking department".

2010. Chapter 358, § 1 amended:

Sub 4 by adding the matter in italics.

2009. Chapter 507, § 1 amended:

By redesignating part of sub 1 as sub 1, opening par and deleting at fig 1 "which involves", at fig 2 "consisting of owner-occupied one-to-four-family dwellings" and at fig 3 "the mortgagor" and adding the matter in italics.

By adding sub 1, par (a).

By redesignatiing part of sub as sub 1, par (b) and deleting at fig 1 "with regard to information and assistance about the foreclosure process" and adding the matter in italics.

Sub 2 by deleting at fig 1 "to commence a foreclosure action", at fig 2 "The", at fig 3 "required by this section" and adding the matter in italics.

Sub 3, opening par by adding the matter in italics.

Sub 3, notice, third heading, first undesignated par by adding the matter in italics.

By adding sub 4.

By redesignating former sub 4 as sub 6.

By redesignatiing former sub 5 as sub 7.

2008. Chapter 472, § 1 amended:

By deleting sub 3, notice, first heading, second undesignated par.

By adding sub 3, notice, second heading.

By adding sub 3, notice, second heading, undesignated par.

By deleting sub 3, notice, third heading, third undesignated par.

By adding sub 3, notice, fourth heading.

By adding sub 3, notice, fourth heading, undesignated par.

The 2016 amendment by ch 73, § 5 (Part Q), added the fifth paragraph of the notice of 3 and added 3-a.

Commentary

PRACTICE INSIGHTS:

NOTICE REQUIRED TO BE SERVED IN FORECLOSURES OF OWNER-OCCUPIED ONE-TO-FOUR-FAMILY DWELLINGS.

Damaris E. Torrent, Esq., Deputy Counsel at the New York State Judicial Institute.

INSIGHT

RPAPL § 1303 was enacted as part of the Home Equity Theft Prevention Act. The procedural and substantive provisions of the Act are set forth in *RPL § 265-a*. It is important to be aware that the statutory notice required by this section must be served in *all* foreclosures of owner-occupied one-to-four family dwellings, and not just those which fall within the definition of "covered contracts" under *RPL § 265-a*.

ANALYSIS

NY CLS RPAPL § 1304

Current through 2018 Chapters 1-321

New York Consolidated Laws Service > Real Property Actions And Proceedings Law (Arts. 1 — 21) > Article 13 Action to Foreclose a Mortgage (§§ 1301 — 1391)

§ 1304. Required prior notices

1.[Eff until Jan 14, 2020] Notwithstanding any other provision of law, with regard to a home loan, at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower, or borrowers at the property address and any other address of record, including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower in at least fourteen-point type which shall include the following:

"YOU MAY BE AT RISK OF FORECLOSURE.

PLEASE READ THE FOLLOWING NOTICE CAREFULLY"

"As of _____, your home loan is _____ days and _____ dollars in default. Under New York State Law, we are required to send you this notice to inform you that you are at risk of losing your home.

Attached to this notice is a list of government approved housing counseling agencies in your area which provide free counseling.You can also call the NYS Office of the Attorney General's Homeowner Protection Program (HOPP) toll-free consumer hotline to be connected to free housing counseling services in your area at 1-855-HOME-456 (1-855-466-3456), or visit their website at http://www.aghomehelp.com/. A statewide listing by county is also available at http://www.dfs.ny.gov/consumer/mortg_nys_np_counseling_agencies.htm. Qualified free help is available; watch out for companies or people who charge a fee for these services.

Housing counselors from New York-based agencies listed on the website above are trained to help homeowners who are having problems making their mortgage payments and can help you find the best option for your situation. If you wish, you may also contact us directly at _____ and ask to discuss possible options.

While we cannot assure that a mutually agreeable resolution is possible, we encourage you to take immediate steps to try to achieve a resolution. The longer you wait, the fewer options you may have.

If you have not taken any actions to resolve this matter within 90 days from the date this notice was mailed, we may commence legal action against you (or sooner if you cease to live in the dwelling as your primary residence.)

If you need further information, please call the New York State Department of Financial Services' toll-free helpline at (show number) or visit the Department's website at (show web address).

IMPORTANT: You have the right to remain in your home until you receive a court order telling you to leave the property. If a foreclosure action is filed against you in court, you still have the right to remain in the home until a court orders you to leave. You legally remain the owner of and are responsible for the property until the property is sold by you or by order of the court at the conclusion of any foreclosure proceedings. This notice is not an eviction notice, and a foreclosure action has not yet been commenced against you.

1.[Eff Jan 14, 2020] Notwithstanding any other provision of law, with regard to a high-cost home loan, as such term is defined in section six-l of the banking law, a subprime home loan or a non-traditional home loan, at least ninety days before a lender or a mortgage loan servicer commences legal action against the borrower, including mortgage foreclosure, the lender or mortgage loan servicer shall give notice to the borrower(s) at the property address and any other address of record in at least fourteen-point type which shall include the following:

NY CLS RPAPL § 1304

"YOU MAY BE AT RISK OF FORECLOSURE.

PLEASE READ THE FOLLOWING NOTICE CAREFULLY"

"As of _____, your home loan is _____ days and _____ dollars in default. Under New York State Law, we are required to send you this notice to inform you that you are at risk of losing your home. There may be options available to you to keep your home. This may include applying for a loan modification of your mortgage, or reinstating your loan by making the payment.

Attached to this notice is a list of government approved housing counseling agencies in your area which provide free or very low-cost counseling.You can also call the NYS Office of the Attorney General's Homeowner Protection Program (HOPP) toll-free consumer hotline to be connected to free housing counseling services in your area at 1-855-HOME-456 (1-855-466-3456), or visit their website at http://www.aghomehelp.com/. A statewide listing by county is also available at http://www.dfs.ny.gov/consumer/mortg_nys_np_counseling_agencies.htm. Qualified free help is available; watch out for companies or people who charge a fee for these services.

Housing counselors from New York-based agencies listed on the website above are trained to help homeowners who are having problems making their mortgage payments and can help you find the best option for your situation. If you wish, you may also contact us directly at _____ and ask to discuss possible options.

While we cannot assure that a mutually agreeable resolution is possible, we encourage you to take immediate steps to try to achieve a resolution. The longer you wait, the fewer options you may have.

If you have not taken any actions to resolve this matter within 90 days from the date this notice was mailed, we may commence legal action against you (or sooner if you cease to live in the dwelling as your primary residence.)

If you need further information, please call the New York State Department of Financial Services' toll-free helpline at (show number) or visit the Department's website at (show web address)".

IMPORTANT: You have the right to remain in your home until you receive a court order telling you to leave the property. If a foreclosure action is filed against you in court, you still have the right to remain in the home until a court orders you to leave. You legally remain the owner of and are responsible for the property until the property is sold by you or by order of the court at the conclusion of any foreclosure proceedings. This notice is not an eviction notice, and a foreclosure action has not yet been commenced against you.

1-a. Notwithstanding any other provision of law, with regard to a reverse mortgage home loan, at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower or borrowers at the property address and any other addresses of record, including reverse mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower in at least fourteen-point type except for the heading which shall be in at least sixteen-point type which shall include the following:

"YOU COULD LOSE YOUR HOME TO FORECLOSURE.

PLEASE READ THE FOLLOWING NOTICE CAREFULLY.

Date

Borrower's address

Loan Number:

Property Address:

Dear Borrower(s):

As of _____, we as your lender or servicer claim that your reverse mortgage loan is _____ days in default. Under New York State Law, we are required to send you this notice to inform you that you may be at risk of losing your home.

NY CLS RPAPL § 1304

We, the lender or servicer of your loan, are claiming that your reverse mortgage loan is in default because you have not complied with the following conditions of your loan:

_____ You are not occupying your home as your principal residence
_____ You did not submit the required annual certificate of occupancy
_____ The named borrower on the reverse mortgage has died
_____ You did not pay property taxes
{Servicer name} paid your property taxes for the following time periods: _____
_____ {quarter/year}
_____ You did not maintain homeowner's insurance
{Servicer name} purchased homeowner's insurance for you on the following date(s) and for the following cost(s):
_____
_____ You did not pay water/sewer charges
{Servicer name} paid water/sewer charges for you on the following date(s) and for the following cost(s):
_____
_____ You did not make required repairs to your home

If the claim is based on your failure to pay property or water and sewer charges or maintain homeowner's insurance, you can cure this default by making the payment of $ _____ for the advancements we made towards these payments on your behalf.

You have the right to dispute the claims listed above by contacting us, by calling _____ or sending a letter to _____. This may include proof of payments made for property taxes or water and sewer charges or a current declaration page from your insurance company, or any other proof to dispute the servicer's claim.

If you are in default for failure to pay property charges (property taxes, homeowner's insurance and/or water/sewer charges) you may qualify for a grant, loan, or re-payment plan to cure the default balance owed.

If you are in default due to the death of your spouse, you may be considered an eligible "Non-Borrowing Spouse" under a HUD program which allows you to remain in your home for the rest of your life.

If you are over the age of 80 and have a long term illness, you may also qualify for the "At-Risk Extension," which allows you to remain in your home for one additional year and requires an annual re-certification.

Attached to this notice is a list of government-approved housing counseling agencies and legal services in your area which provide free counseling. You can also call the NYS Office of the Attorney General's Homeowner Protection Program (HOPP) toll-free consumer hotline to be connected to free housing counseling services in your area at 1-855-HOME-456 (1-855-466-3456), or visit their website at http://www.aghomehelp.com. A statewide listing by county is also available at http://www.dfs.ny.gov/consumer/mortg_nys_np_counseling_agencies.htm. You may also call your local Department of Aging for a referral or call 311 if you live in New York City.

Qualified free help is available; watch out for companies or people who charge a fee for these services.

You may also contact us directly at _____ and ask to discuss all possible options to allow you to cure your default and prevent the foreclosure of your home. While we cannot ensure that a resolution is possible, we encourage you to take immediate steps to try to achieve a resolution. The longer you wait, the fewer options you may have.

If you have not taken any actions to resolve this matter within 90 days from the date this notice was mailed, we may commence legal action against you (or sooner if you cease to live in the dwelling as your primary residence).

If you need further information, please call the New York State Department of Financial Services' toll-free helpline at 877-226-5697 or visit the Department's website at http://www.dfs.ny.gov.

IMPORTANT: You have the right to remain in your home until you receive a court order telling you to leave the property. If a foreclosure action is filed against you in court, you still have the right to remain in the home until a court orders you to leave. You legally remain the owner of and are responsible for the property until the property is sold by you or by order of the court at the conclusion of any foreclosure proceedings. This notice is not an eviction notice, and a foreclosure action has not yet been commenced against you."

A lender, assignee or mortgage loan servicer of a reverse mortgage home loan which provides notice to the borrower as required by this subdivision is not required to provide notice to such borrower with regard to such loan pursuant to subdivision one of this section.

2.[Eff until Jan 14, 2020] The notices required by this section shall be sent by such lender, assignee (including purchasing investor) or mortgage loan servicer to the borrower, by registered or certified mail and also by first-class mail to the last known address of the borrower, and to the residence that is the subject of the mortgage. The notices required by this section shall be sent by the lender, assignee or mortgage loan servicer in a separate envelope from any other mailing or notice. Notice is considered given as of the date it is mailed. The notices required by this section shall contain a current list of at least five housing counseling agencies serving the county where the property is located from the most recent listing available from department of financial services. The list shall include the counseling agencies' last known addresses and telephone numbers. The department of financial services shall make available on its websites a listing, by county, of such agencies. The lender, assignee or mortgage loan servicer shall use such lists to meet the requirements of this section.

2.[Eff Jan 14, 2020] The notices required by this section shall be sent by the lender or mortgage loan servicer to the borrower, by registered or certified mail and also by first-class mail to the last known address of the borrower, and to the residence which is the subject of the mortgage. Notice is considered given as of the date it is mailed. The notices required by this section shall contain a current list of United States department of housing and urban development approved housing counseling agencies, or other housing counseling agencies serving the county where the property is located from the most recent listing available from the department of financial services. The list shall include the counseling agencies' last known addresses and telephone numbers. The department of financial services shall make available a listing, by county, of such agencies which the lender or mortgage loan servicer may use to meet the requirements of this section.

3.The ninety day period specified in the notices contained in subdivisions one and one-a of this section shall not apply, or shall cease to apply, if the borrower has filed for bankruptcy protection under federal law, or if the borrower no longer occupies the residence as the borrower's principal dwelling. Nothing herein shall relieve the lender, assignee or mortgage loan servicer of the obligation to send such notices, which notices shall be a condition precedent to commencing a foreclosure proceeding.

4.The notices required by this section and the ninety day period required by subdivisions one and one-a of this section need only be provided once in a twelve month period to the same borrower in connection with the same loan and same delinquency. Should a borrower cure a delinquency but re-default in the same twelve month period, the lender shall provide a new notice pursuant to this section.

5.For any borrower known to have limited English proficiency, the notices required by subdivisions one and one-a of this section shall be in the borrower's native language (or a language in which the borrower is proficient), provided that the language is one of the six most common non-English languages spoken by individuals with limited English proficiency in the state of New York, based on United States census data. The department of financial services shall post the notices required by subdivisions one and one-a of this section on its website in the six most common non-English languages spoken by individuals with limited English proficiency in the state of New York, based on the United States census data.

6.[Eff until Jan 14, 2020]

(a)

(1)"Home loan" means a loan, including an open-end credit plan, in which:

(i) The borrower is a natural person;

(ii) The debt is incurred by the borrower primarily for personal, family, or household purposes;

(iii) The loan is secured by a mortgage or deed of trust on real estate improved by a one to four family dwelling, or a condominium unit, in either case, used or occupied, or intended to be used or occupied wholly or partly, as the home or residence of one or more persons and which is or will be occupied by the borrower as the borrower's principal dwelling; and

(iv) The property is located in this state.

(2)A home loan shall include a loan secured by a reverse mortgage that meets the requirements of clauses (i) through (iv) of subparagraph one of this paragraph.

(b)"Lender" means a mortgage banker as defined in paragraph (f) of subdivision one of section five hundred ninety of the banking law or an exempt organization as defined in paragraph (e) of subdivision one of section five hundred ninety of the banking law.

6.[Eff Jan 14, 2020]

(a)"Annual percentage rate" means the annual percentage rate for the loan calculated according to the provisions of the Federal Truth-in-Lending Act (*15 U.S.C. § 1601*, et seq.), and the regulations promulgated thereunder by the federal reserve board (as said act and regulations are amended from time to time).

(b)

(1)"Home loan" means a home loan, including an open-end credit plan, in which:

(i) The principal amount of the loan at origination did not exceed the conforming loan size that was in existence at the time of origination for a comparable dwelling as established by the federal housing administration or federal national mortgage association;

(ii) The borrower is a natural person;

(iii) The debt is incurred by the borrower primarily for personal, family, or household purposes;

(iv) The loan is secured by a mortgage or deed of trust on real estate upon which there is located or there is to be located a structure or structures intended principally for occupancy of from one to four families which is or will be occupied by the borrower as the borrower's principal dwelling; and

(v) The property is located in this state.

(2)A home loan shall include a loan secured by a reverse mortgage that meets the requirements of clauses (i) through (v) of subparagraph one of this paragraph.

(c)"Subprime home loan" for the purposes of this section, means a home loan consummated between January first, two thousand three and September first, two thousand eight in which the terms of the loan exceed the threshold as defined in paragraph (d) of this subdivision. A subprime home loan excludes a transaction to finance the initial construction of a dwelling, a temporary or "bridge" loan with a term of twelve months or less, such as a loan to purchase a new dwelling where the borrower plans to sell a current dwelling within twelve months, or a home equity line of credit.

(d)"Threshold" means, for a first lien mortgage loan, the annual percentage rate of the home loan at consummation of the transaction exceeds three percentage points over the yield on treasury securities having comparable periods of maturity to the loan maturity measured as of the fifteenth day of the month in which the loan was consummated; or for a subordinate mortgage lien, the annual percentage rate of the home loan at consummation of the transaction equals or exceeds five percentage points over the yield on treasury securities having comparable periods of maturity on the fifteenth day of the month in which the loan was consummated; as determined by the following rules: if the terms of the home loan offer any initial or introductory period, and the

annual percentage rate is less than that which will apply after the end of such initial or introductory period, then the annual percentage rate that shall be taken into account for purposes of this section shall be the rate which applies after the initial or introductory period.

(e)"Non-traditional home loan" shall mean a payment option adjustable rate mortgage or an interest only loan consummated between January first, two thousand three and September first, two thousand eight.

(f) For purposes of determining the threshold, the department of financial services shall publish on its website a listing of constant maturity yields for U.S. Treasury securities for each month between January first, two thousand three and September first, two thousand eight, as published in the Federal Reserve Statistical Release on selected interest rates, commonly referred to as the H.15 release, in the following maturities, to the extent available in such release: six month, one year, two year, three year, five year, seven year, ten year, thirty year.

(g)"Lender" means a mortgage banker as defined in paragraph (f) of subdivision one of section five hundred ninety of the banking law or an exempt organization as defined in paragraph (e) of subdivision one of section five hundred ninety of the banking law.

7.[Eff until Jan 14, 2020] The department of financial services shall prescribe the telephone number and web address to be included in the notice.

7.[Eff Jan 14, 2020] The department of financial services shall prescribe the telephone number and web address to be included in the notice.

History

Add, *L 2008, ch 472, § 2*, eff Sept 1, 2008; amd, *L 2009, ch 507, § 1*-a, eff Jan 14, 2010; *L 2011, ch 62, § 104* (Part A), eff Oct 3, 2011; *L 2012, ch 155, § 84*, eff July 18, 2012; *L 2012, ch 155, § 85*, eff Jan 14, 2020; *L 2016, ch 73, §§ 6*, 7 (Part Q), eff Dec 20, 2016; *L 2017, ch 58, § 1* (Part FF), eff Dec 20, 2016; *L 2018, ch 58, §§ 1*, 3-5 (Part HH), eff April 12, 2018.

Annotations

Notes

Editor's Notes

***Laws 2008, ch 472, § 28*, sub g,** eff Aug 5, 2008, provides as follows:

§ 28. This act shall take effect immediately; provided, however, that:

g. provided however, effective immediately the promulgation of any rules, regulations or actions necessary for timely implementation of the provisions of this act are hereby authorized.

***Laws 2009, ch 507, § 25*, sub a,** eff Jan 14, 2010, expires and repealed Jan 14, 2020, provides as follows:

§ 25. This act shall take effect immediately; provided, however, that:

□ a. Sections one, one-a, two and three of this act shall take effect on the thirtieth day after this act shall have become a law and shall apply to notices required on or after such date; provided, however, that section one-a of this act shall expire and be deemed repealed 10 years after such effective date; (Amd, *L 2014, ch 29, § 1*, eff June 19, 2014.)

Laws 2012, ch 155, § 93, eff July 18, 2012, provides as follows:

§ 93. This act shall take effect immediately provided, however, that the amendments to paragraph 3 of subdivision (e) of section 1120 of the insurance law made by section fifty-eight of this act shall be subject to the expiration and reversion of such

paragraph pursuant to chapter 2 of the laws of 1998, as amended, when upon such date the provisions of section fifty-nine of this act shall take effect; and provided, further, that the amendments to section 1304 of the real property actions and proceedings law made by section eighty-four of this act shall be subject to the expiration and reversion of such subdivision when upon such date the provisions of section eighty-five of this act shall take effect.

Laws 2016, ch 73, § 11 **(Part Q)**, eff December 20, 2016, provides:

§ 11. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however, that:

(a) The amendments to subdivision (a) of rule 3408 of the civil practice law and rules made by section two of this act shall be subject to the expiration and reversion of such subdivision pursuant to chapter 507 of the laws of 2009, as amended, when upon such date the provisions of section three of this act shall take effect; and

(b) The amendments to subdivisions 1, 2, 5 and 6 of section 1304 of the real property actions and proceedings law made by section six of this act shall be subject to the expiration and reversion of such subdivisions pursuant to chapter 507 of the laws of 2009, as amended, when upon such date the provisions of section seven of this act shall take effect.

Laws 2017, ch 58, § 3 **(Part FF),** eff April 20, 2017, provides:

§ 3. This act shall take effect immediately; provided, however, that:

(a) the amendments to paragraph (b) of subdivision 6 of section 1304 of the real property actions and proceedings law, made by section one of this act, shall take effect on the same date and in the same manner as section 7 of part Q of chapter 73 of the laws of 2016 takes effect; and

(b) the amendments to subdivision (a) of rule 3408 of the civil practice law and rules, made by section two of this act, shall be subject to the expiration and reversion of such subdivision pursuant to subdivision e of section 25 of chapter 507 of the laws of 2009, as amended.

Laws 2018, ch 58, § 6 (Part HH), eff April 12, 2018, provides:

§ 6. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after April 20, 2017; provided, however that sections three and four of this act shall take effect on the thirtieth day after it shall have become a law; provided, further, however that:

(a) the amendments to subdivision 6 of section 1304 of the real property actions and proceedings law, made by section one of this act, shall not affect the expiration and reversion of such subdivision pursuant to subdivision a of section 25 of chapter 507 of the laws of 2009, as amended, and shall be deemed repealed therewith;

(b) the amendments to subdivision (a) of rule 3408 of the civil practice law and rules, made by section two of this act, shall take effect on the same date and in the same manner as section 3 of part Q of chapter 73 of the laws of 2016 takes effect; and

(c) the amendments to subdivision 2 of section 1304 of the real property actions and proceedings law made by section four of this act shall be subject to the expiration and reversion of such subdivision pursuant to subdivision a of section 25 of chapter 507 of the laws of 2009, as amended, when upon such date the provisions of section five of this act shall take effect.

Amendment Notes

2012. Chapter 155, § 84 amended:

Sub 1, heading notice, fifth undesignated par [first setout] by deleting at fig 1 "1-877-BANK-NYS (1-877-226-5697)", at fig 2 "http://www.banking.state.ny.us" and adding the matter in italics.

By adding sub 6 [first setout].

2012. Chapter 155, § 85 amended:

Sub 1, heading notice, fifth undesignated par [second setout] by deleting at fig 1 "1-877-BANK-NYS (1-877-226-5697)", at fig 2 "http://www.banking.state.ny.us" and adding the matter in italics.

By adding sub 6 [second setout].

2011. Chapter 62, § 104 (Part A) amended:

Sub 2 at fig 1 by substituting "department of financial services" for "banking department".

2009. Chapter 507, § 1-a amended:

Sub 1, opening par by deleting at fig 1 "high-cost", at fig 2 ", as such term is defined in section six-l of the banking law, a subprime home loan or a non-traditional home loan", and at fig 3 "the" and adding the matter in italics.

Sub 2 by deleting at fig 1 "the", at fig 2 "which", at fig 3 "United States department of housing and urban development approved housing counseling agencies, or other", at fig 4 "and/or", at fig 5 "which the", at fig 6 "may" and adding the matter in italics.

By redesignating sub 5, par (b) as sub 5, par (a).

By deleting former sub 5, par (a).

By redesignating former sub 5, par (b), opening par as sub 5, par (a), opening par.

Sub 5, par (a), opening par by deleting at fig 1 "home".

By redesignating former sub 5, par (b), subpar (ii) as sub 5, par (a), subpar (i).

By redesignating former sub 5, par (b), subpar (iii) as sub 5, par (a), subpar (ii).

By redesignating former sub 5, par (b), subpar (iv) as sub 5, par (a), subpar (iii).

Sub 5, par (a), subpar (iii) by deleted at fig 1 "upon which there is located or there is to be located a structure or structures intended principally for occupancy of from one to four families which is or will be occupied by the borrower as the borrower's principal dwelling" and adding the matter in italics.

By redesignating former sub 5, par (b), subpar (v) as sub 5, par (a), subpar (iv).

By redesignating former sub 5, par (g) as sub 5, par (b).

By deleting sub 5, pars (c)–(f), repsectively.

The 2016 amendment by ch 73, § 6 (Part Q) rewrote 1 and 2; in 3, substituted "for 18 bankruptcy protection under federal law" for "an application for the adjustment of debts of the borrower or an order for relief from the payment of debts" in the first sentence and added the second sentence; in 4, added "and same delinquency" in the first sentence and added the second sentence; added 5; and redesignated former 5 and 6 as 6 and 7.

The 2016 amendment by ch 73, § 7 (Part Q), second setout, rewrote 1; in 2, deleted "if different" following "borrower, and" in the first sentence, in the third sentence, substituted "current list of" for "list of at least five" and "serving the county where the property is located from the most recent listing available from the department of financial services" for "as designated by the division of housing and community renewal, that serve the region where the borrower resides," and in the last sentence, deleted "and/or the division of housing and community renewal" following "financial services" and substituted "county" for "region"; and redesignated former 5 and 6 as 6 and 7.

The 2017 amendment by ch 58, § 1 (Part FF), redesignated former 6(b) as 6(b)(1); deleted "other than a reverse mortgage transaction" preceding "in which" in the opening paragraph of 6(b)(1); added "federal housing administration or" in 6(b)(1)(i); and added 6(b)(2).

The 2018 amendment by ch 58, §§ 1, 3-5 (Part HH), added 1-a; rewrote 2 through 5; substituted "The notices required by this section" for "Such notice" and variants in the first and third sentences of 2; in 6(a), added the 6(a)(1) designation, deleted "other than a reverse mortgage transaction" following "credit plan" in the introductory language of 6(a)(1); added 6(a)(2); and made stylistic changes.

Notes to Decisions

Absence of the foreclosure conditions precedent did not deprive the court of jurisdiction over a foreclosure suit under N.Y. *C.P.L.R. 5015(a)(4)* where the mortgagor did not argue that the failure to hold a settlement conference deprived the court of subject matter jurisdiction in a foreclosure suit; the conditions precedent of providing foreclosure notice requirements differed from the condition precedent related to a statutory notice of claim since a violation of *N.Y. Real Prop. Acts. Law § 1304* was a defense to a home loan mortgage foreclosure suit under *N.Y. Real Prop. Acts. Law § 1302(2)* and would not have been denominated as a defense if a violation of the notice provisions deprived the court of subject matter jurisdiction. *Pritchard v Curtis, 101 A.D.3d 1502, 957 N.Y.S.2d 440, 2012 N.Y. App. Div. LEXIS 9088 (N.Y. App. Div. 3d Dep't 2012)*.

Bank was not entitled to summary judgment dismissing the borrower's third affirmative defense in a foreclosure action because the bank failed to submit an affidavit of service evincing that it properly served the borrower pursuant to *N.Y. Real Prop. Acts. Law § 1304*, and thus failed to meet its prima facie burden of establishing entitlement to judgment as to this affirmative defense; however, the borrower's claim that the trial court should have granted her cross motion for summary judgment dismissing the complaint as asserted against her based on the bank's failure to comply with *N.Y. Real Prop. Acts. Law § 1304* was without merit. The bank alleged in the complaint that it complied with *N.Y. Real Prop. Acts. Law § 1304*, and the borrower failed to submit evidence which disproved this allegation. *Deutsche Bank Natl. Trust Co. v Spanos, 102 A.D.3d 909, 961 N.Y.S.2d 200, 2013 N.Y. App. Div. LEXIS 682 (N.Y. App. Div. 2d Dep't 2013)*.

Although there was no allegation that a mortgagor had a high-cost home loan or subprime home loan, and the foreclosure complaint did not plead compliance with this statue, the mortgagor was permitted to raise compliance in her opposition papers because failure to comply with this statute constituted a defense to the mortgage foreclosure action, which could be raised at any time. *Citimortgage, Inc. v Espinal, 134 A.D.3d 876, 23 N.Y.S.3d 251, 2015 N.Y. App. Div. LEXIS 9244 (N.Y. App. Div. 2d Dep't 2015)*.

Trial court erred in granting a lender's motion for summary judgment in its mortgage foreclosure action because the lender failed to establish, prima facie, that it served the borrowers with a proper notice of foreclosure where no affidavit of service was provided, and a "litigation specialist's" affidavit contained unsubstantiated and conclusory statements, and the lender itself submitted documents that contradicted the specialist's sworn averments. *Cenlar, FSB v Censor, 139 A.D.3d 781, 32 N.Y.S.3d 228, 2016 N.Y. App. Div. LEXIS 3553 (N.Y. App. Div. 2d Dep't 2016)*.

Trial court properly denied the assignees' motion for, inter alia, summary judgment on their foreclosure complaint because they failed to establish that the loan did not qualify as a "home loan" and triable issues of fact existed as to whether the debt was incurred primarily for personal, family, or household purposes, and whether the subject premises was the borrower's principal dwelling. *Flushing Sav. Bank v Chester Latham, 139 A.D.3d 663, 32 N.Y.S.3d 206, 2016 N.Y. App. Div. LEXIS 3346 (N.Y. App. Div. 2d Dep't 2016)*.

Trial court erred in granting an assignee's motion for summary judgment, for an order of reference, and to strike the borrower's affirmative defenses in its action to foreclose a mortgage because the assignee failed to establish its standing and to establish, prima facie, that it strictly complied with the statutory 90-day notice. *Deutsche Bank Natl. Trust Co. v Cunningham, 142 A.D.3d 634, 36 N.Y.S.3d 726, 2016 N.Y. App. Div. LEXIS 5726 (N.Y. App. Div. 2d Dep't 2016)*

In a bank's action to recover on a promissory note, the bank complied with the notice requirement of this statute, even though the notice was dated April 15, 2011, and the instant action was commenced in January 2014, because only one notice was required, and the statutory language did not state that the action had to be commenced within 12 months of the notice. *Deutsche Bank Natl. Trust Co. v Webster, 142 A.D.3d 636, 37 N.Y.S.3d 283, 2016 N.Y. App. Div. LEXIS 5723 (N.Y. App. Div. 2d Dep't 2016)*

NY CLS RPAPL § 1306

Current through 2018 Chapters 1-321

New York Consolidated Laws Service > Real Property Actions And Proceedings Law (Arts. 1 — 21) > Article 13 Action to Foreclose a Mortgage (§§ 1301 — 1391)

§ 1306. Filing with superintendent

1.Each lender, assignee or mortgage loan servicer shall file with the superintendent of financial services (superintendent) within three business days of the mailing of the notice required by subdivision one of section thirteen hundred four of this article or subsection (f) of section 9-611 of the uniform commercial code the information required by subdivision two of this section. Notwithstanding any other provision of the laws of this state, this filing shall be made electronically as provided for in subdivision three of this section. Any complaint served in a proceeding initiated pursuant to this article shall contain, as a condition precedent to such proceeding, an affirmative allegation that at the time the proceeding is commenced, the plaintiff has complied with the provisions of this section.

2.Each filing delivered to the superintendent shall be on such form as the superintendent shall prescribe, and shall include at a minimum, the name, address, last known telephone number of the borrower, and the amount claimed as due and owing on the mortgage, and such other information as will enable the superintendent to ascertain the type of loan at issue. The superintendent may subsequently request such readily available information as may be reasonably necessary to facilitate a review of whether the borrower might benefit from counseling or other foreclosure prevention services.

3.Within one hundred eighty days of the effective date of this section, or such later time as the superintendent may determine, the superintendent shall develop with the assistance of the commissioner of the division of housing and community renewal, an electronic database that shall be capable of receiving all filings required by this section.

4.The information provided to the superintendent pursuant to this section shall not be subject to article six of the public officers law or paragraphs (a), (c) and (d) of subdivision one or subdivision six of section ninety-four of the public officers law. All such information shall be used by the superintendent exclusively for the purposes of monitoring on a statewide basis the extent of foreclosure filings within this state, to perform an analysis of loan types which were the subject of a pre-foreclosure notice and directing as appropriate available public and private foreclosure prevention and counseling services to borrowers at risk of foreclosure. The superintendent may share information contained in the database with housing counseling agencies designated by the division of housing and community renewal as well as with other state agencies with jurisdiction over housing, for the purpose of coordinating or securing help for borrowers at risk of foreclosure.

5.The superintendent is hereby authorized to promulgate such rules and regulations as shall be necessary to implement the purposes of this section.

History

Add, *L 2009, ch 507, § 5*, eff Feb 13, 2010; amd, *L 2011, ch 62, § 104* (Part A), eff Oct 3, 2011; *L 2011, ch 182, § 9*, eff July 20, 2011.

Annotations

Notes

ADMINISTRATIVE ORDER OF THE
CHIEF ADMINISTRATIVE JUDGE OF THE COURTS

Pursuant to the authority vested in me, at the direction of the Chief Judge of the State of New York and with the consent of the Presiding Justices of the Appellate Divisions, I hereby order and direct that, effective immediately, plaintiff's counsel in residential mortgage foreclosure actions shall file with the court in each such action an affirmation, in the form attached hereto, at the following times:

- In cases commenced after the effective date of this Order, at the time of the filing of the Request for Judicial Intervention.
- In cases pending on such effective date, where no judgment of foreclosure has been entered, at the time of filing either the proposed order of reference or the proposed judgment of foreclosure.
- In cases where judgment of foreclosure has been entered but the property has not yet been sold as of such effective date, five business days before the scheduled auction, with a copy to be served on the referee.

Chief Administrative Judge of the Courts

Dated: October 20, 2010

AO/ 548/10

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

Plaintiff,

v.

Defendant(s)

AFFIRMATION

Index No.: _____

Mortgaged Premises:

_____

N.B.: ***During and after August 2010, numerous and widespread insufficiencies in foreclosure filings in various courts around the nation were reported by major mortgage lenders and other authorities. These insufficiencies include: failure of plaintiffs and their counsel to review documents and files to establish standing and other foreclosure requisites; filing of notarized affidavits which falsely attest to such review and to other critical facts in the foreclosure process; and "robosignature" of documents by parties and counsel. The wrongful filing and prosecution of foreclosure proceedings which are discovered to suffer from these defects may be cause for disciplinary and other sanctions upon participating counsel.***

* * *

[_____], Esq., pursuant to CPLR §2106 and under the penalties of perjury, affirms as follows:

1. I am an attorney at law duly licensed to practice in the state of New York and am affiliated with the Law Firm of _____, the attorneys of record for Plaintiff in the above-captioned mortgage foreclosure action. As such, I am fully aware of the underlying action, as well as the proceedings had herein.

2. On [date], I communicated with [name and title], a representative of Plaintiff, who informed me that he/she (a) has personally reviewed plaintiff's documents and records relating to this case; (b) has reviewed the Summons and Complaint, and all other papers filed in this matter in support of foreclosure; and (c) has confirmed both the factual accuracy of these court filings and the accuracy of the notarizations contained therein.

3. Based upon my communication with [person specified in ¶2], as well as upon my own inspection of the papers filed with the Court and other diligent inquiry, I certify that, to the best of my knowledge, information, and belief, the Summons and Complaint and all other documents filed in support of this action for foreclosure are complete and accurate in all relevant respects. I understand my

continuing obligation to amend this Affirmation in light of newly discovered facts following its filing.

4. I understand that the Court will rely on this Affirmation in considering the application.

_____

DATED:

ADMINISTRATIVE ORDER OF THE
CHIEF ADMINISTRATIVE JUDGE OF THE COURTS

Pursuant to the authority vested in me, at the direction of the Chief Judge of the State of New York and with the consent of the Presiding Justices of the Appellate Divisions, I hereby order and direct that, effective November 18, 2010, nunc pro tunc, plaintiffs' counsel in residential mortgage foreclosure actions shall file with the court in each such action an affirmation, in the revised Form A attached hereto, at the following times:

- In cases commenced after the effective date of this Order, at the time of the filing of the Request for Judicial Intervention.
- In cases pending on such effective date, where no judgment of foreclosure has been entered, at the time of filing either the proposed order of reference or the proposed judgment of foreclosure.
- In cases where judgment of foreclosure has been entered but the property has not yet been sold as of such effective date, five business days before the scheduled auction, with a copy to be served on the referee.

This revised form affirmation shall replace the affirmation previously required pursuant to AO/548/10. However, a filing by counsel of that earlier form affirmation shall satisfy the requirement of this order.

In conjunction with the filing of Form A, a representative of plaintiff may file a supporting affidavit as set forth in Form B attached hereto, in addition to such other information as the court may require.

Chief Administrative Judge of the Courts

Dated: March 2, 2011

AO/431/11

A D D E N D U M

A1

FORM A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

_____

Plaintiff,

v.

Defendant(s)

_____

AFFIRMATION

Index No.: _____

Mortgaged Premises:

_____

N.B.: During and after August 2010, numerous and widespread insufficiencies in foreclosure filings in various courts around the nation were reported by major mortgage lenders and other authorities, including failure to review documents and files to establish standing and other foreclosure requisites; filing of notarized affidavits which falsely attest to such review and to other critical facts in the foreclosure process; and "robosignature" of documents.

* * *

[_____], Esq., pursuant to CPLR §2106 and under the penalties of perjury, affirms as follows:

1. I am an attorney at law duly licensed to practice in the state of New York and am affiliated with the Law Firm of _____, the attorneys of record for Plaintiff in the above-captioned mortgage foreclosure action. As such, I am fully aware of the underlying action, as well as the proceedings had herein.

2. On [date], I communicated with the following representative or representatives of of Plaintiff, who informed me that he/she/they (a) personally reviewed plaintiff's documents and records relating to this case for factual accuracy; and (b) confirmed the factual accuracy of the allegations set forth in the Complaint and any supporting affidavits or affirmations filed with the Court, as well as the accuracy of the notarizations contained in the supporting documents filed therewith.

Name	Title
_____	_____
_____	_____
_____	_____

3. Based upon my communication with [person/s specified in ¶2], as well as upon my own inspection and other reasonable inquiry under the circumstances, I affirm that, to the best of my knowledge, information, and belief, the Summons, Complaint, and other papers filed or submitted to the Court in this matter contain no false statements of fact or law. I understand my continuing obligation to amend this Affirmation in light of newly discovered material facts following its filing.

4. I am aware of my obligations under New York Rules of Professional Conduct (22 NYCRR Part 1200) and 22 NYCRR Part 130.

_____

DATED:

N.B.: Counsel may augment this affirmation to provide explanatory details, and may file supplemental affirmations or affidavits for the same purpose.

[Revised 11/18/10]

FORM B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

Plaintiff,

v.

Defendant(s)

AFFIDAVIT

Index No.: _____

Mortgaged Premises:

_____

STATE OF NEW YORK)
) ss:
COUNTY OF_____)

_____, being duly sworn, deposes and says:

1. I am a _____, a representative of plaintiff in the above-captioned mortgage foreclosure action. I am authorized to execute this affidavit and am fully aware of the underlying action, as well as the papers and proceedings heretofore had herein.

2. This Affidavit is made in further support of plaintiff's counsel's affirmation pursuant to the October 2010 Administrative Order of the Chief Administrative Judge of the Courts of New York, as supplemented.

3. I have performed the following actions in order to confirm the truth and veracity of the statements made herein. This review is based upon my access to the books and records relating to this loan which are kept in the ordinary course of business.

Initial all that are applicable:

A____ Confirmed the notice of default, if required, was properly mailed prior to commencement of foreclosure.

B____ Reviewed the summons and complaint in this action to confirm the factual accuracy of the identity of the proper plaintiff, the defaults and the amounts claimed to be due to plaintiff as set forth therein.

C____ Confirmed the affidavit(s) executed and submitted by plaintiff together with this

application have been personally reviewed by the signatory; that the notary acknowledging the affiant's signature followed applicable law in notarizing the affiant's signature.

D____ I am unable to confirm or deny that the underlying documents previously filed with the Court have been properly reviewed or notarized.

E____ Inasmuch as the underlying mortgage loan has been transferred prior to commencement or during the pendency of this action, I am unable to confirm or deny that the underlying documents filed with the Court have been properly reviewed or notarized by the prior servicer.

F_____(other)_____

_____

_____

_____

N.B.: Affiants may augment this affidavit to provide explanatory details, and may file supplemental affirmations or affidavits for the same purpose.

WHEREFORE, it is respectfully requested that the Court grant the proposed relief requested herein together with such other relief as the Court deems just and proper

_____

(Affiant)

STATE OF _____) SS:
COUNTY OF _____)

On the _____ day of _____ in the year _____ before me, the undersigned, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is(are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), that by his/her/their signature(s) on the instrument, the individual(s), or the personal upon behalf of which the individual(s) acted, executed the instrument, and that such individual made such appearance before the undersigned in the .

_____

Notary Public

NY CLS CPLR § 3012-b

Current through 2018 Chapters 1-321

New York Consolidated Laws Service > Civil Practice Law And Rules (Arts. 1 — 100) > Article 30 Remedies and Pleading (§§ 3001 — 3045)

§ 3012-b. Certificate of merit in certain residential foreclosure actions

(a) In any residential foreclosure action involving a home loan, as such term is defined in section thirteen hundred four of the real property actions and proceedings law, in which the defendant is a resident of the property which is subject to foreclosure, the complaint shall be accompanied by a certificate, signed by the attorney for the plaintiff, certifying that the attorney has reviewed the facts of the case and that, based on consultation with representatives of the plaintiff identified in the certificate and the attorney's review of pertinent documents, including the mortgage, security agreement and note or bond underlying the mortgage executed by defendant and all instruments of assignment, if any, and any other instrument of indebtedness including any modification, extension, and consolidation, to the best of such attorney's knowledge, information and belief there is a reasonable basis for the commencement of such action and that the plaintiff is currently the creditor entitled to enforce rights under such documents. If not attached to the summons and complaint in the action, a copy of the mortgage, security agreement and note or bond underlying the mortgage executed by defendant and all instruments of assignment, if any, and any other instrument of indebtedness including any modification, extension, and consolidation shall be attached to the certificate.

(b) Where a certificate is required pursuant to this section, a single certificate shall be filed for each action even if more than one defendant has been named in the complaint or is subsequently named.

(c) Where the documents required under subdivision (a) are not attached to the summons and complaint or to the certificate, the attorney for the plaintiff shall attach to the certificate supplemental affidavits by such attorney or representative of plaintiff attesting that such documents are lost whether by destruction, theft or otherwise. Nothing herein shall replace or abrogate plaintiff's obligations as set forth in the New York uniform commercial code.

(d) The provisions of subdivision (d) of rule 3015 of this article shall not be applicable to a defendant who is not represented by an attorney.

(e) If a plaintiff willfully fails to provide copies of the papers and documents as required by subdivision (a) of this section and the court finds, upon the motion of any party or on its own motion on notice to the parties, that such papers and documents ought to have been provided, the court may dismiss the complaint or make such final or conditional order with regard to such failure as is just including but not limited to denial of the accrual of any interest, costs, attorneys' fees and other fees, relating to the underlying mortgage debt. Any such dismissal shall be without prejudice and shall not be on the merits.

History

Add, *L 2013, ch 306, § 1*, eff Aug 30, 2013.

Annotations

Notes

2012 New York Consolidated Laws CVP - Civil Practice Law & Rules Article 34 - (R3401 - R3409) CALENDAR PRACTICE; TRIAL PREFERENCES R3408 - Mandatory settlement conference in residential foreclosure actions.

Universal Citation: NY CPLR § R3408 (2012)

Rule 3408. Mandatory settlement conference in residential foreclosure actions. * (a) In any residential foreclosure action involving a home loan as such term is defined in section thirteen hundred four of the real property actions and proceedings law, in which the defendant is a resident of the property subject to foreclosure, the court shall hold a mandatory conference within sixty days after the date when proof of service is filed with the county clerk, or on such adjourned date as has been agreed to by the parties, for the purpose of holding settlement discussions pertaining to the relative rights and obligations of the parties under the mortgage loan documents, including, but not limited to determining whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home, and evaluating the potential for a resolution in which payment schedules or amounts may be modified or other workout options may be agreed to, and

for whatever other purposes the court deems appropriate.

* NB Effective until February 13, 2015

* (a) In any residential foreclosure action involving a high-cost home loan consummated between January first, two thousand three and September first, two thousand eight, or a subprime or nontraditional home loan, as those terms are defined under section thirteen hundred four of the real property actions and proceedings law, in which the defendant is a resident of the property subject to foreclosure, the court shall hold a mandatory conference within sixty days after the date when proof of service is filed with the county clerk, or on such adjourned date as has been agreed to by the parties, for the purpose of holding settlement discussions pertaining to the relative rights and obligations of the parties under the mortgage loan documents, including, but not limited to determining whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home, and evaluating the potential for a resolution in which payment schedules or amounts may be modified or other workout options may be agreed to, and for whatever other purposes the court deems appropriate.

* NB Effective February 13, 2015

(b) At the initial conference held pursuant to this section, any defendant currently appearing pro se, shall be deemed to have made a motion to proceed as a poor person under section eleven hundred one of this chapter. The court shall determine whether such permission shall be granted pursuant to standards set forth in section eleven hundred one of this chapter. If the court appoints defendant counsel pursuant to subdivision (a) of section eleven hundred two of this chapter, it shall adjourn the conference to a date certain for appearance of counsel and settlement discussions pursuant to subdivision (a) of this section, and otherwise shall proceed with the conference.

(c) At any conference held pursuant to this section, the plaintiff shall appear in person or by counsel, and if appearing by counsel, such counsel shall be fully authorized to dispose of the case. The defendant shall appear in person or by counsel. If the defendant is appearing pro se, the court shall advise the defendant of the nature of the action and his or her rights and responsibilities as a defendant. Where appropriate, the court may permit a representative of the plaintiff to attend the settlement conference telephonically or by video-conference.

(d) Upon the filing of a request for judicial intervention in any action pursuant to this section, the court shall send either a copy of such request or the defendant's name, address and telephone number (if available) to a housing counseling agency or agencies on a list designated by the division of housing and community renewal for the judicial district in which the defendant resides. Such information shall be used by the designated housing counseling agency or agencies exclusively for the purpose of making the homeowner aware of housing counseling and foreclosure prevention services and options available to them.

(e) The court shall promptly send a notice to parties advising them of the time and place of the settlement conference, the purpose of the conference and the requirements of this section. The notice shall be in a form prescribed by the office of court administration, or, at the discretion of the office of court administration, the administrative judge of the judicial district in which the action is pending, and shall advise the parties of the documents that they should bring to the conference. For the plaintiff, such documents should include, but are not limited to, the payment history, an itemization of the amounts needed to cure and pay off the loan, and the mortgage and note. If the plaintiff is not the owner of the mortgage and note, the plaintiff shall provide the name, address and telephone number of the legal owner of the mortgage and note. For the defendant, such documents should include, but are not limited to, proof of current income such as the two most recent pay stubs, most recent tax return and most recent property tax statements.

(f) Both the plaintiff and defendant shall negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible.

(g) The plaintiff must file a notice of discontinuance and vacatur of the lis pendens within one hundred fifty days after any settlement agreement or loan modification is fully executed.

(h) A party to a foreclosure action may not charge, impose, or otherwise require payment from the other party for any cost, including but not limited to attorneys' fees, for appearance at or participation in the settlement conference.

NY CLS CPLR R 3408

Current through 2018 Chapters 1-205

New York Consolidated Laws Service > Civil Practice Law And Rules (Arts. 1 — 100) > Article 34 Calendar Practice; Trial Preferences (§§ 3401 — 3409)

R 3408. Mandatory settlement conference in residential foreclosure actions

(a)[Eff until February 13, 2020]

1.Except as provided in paragraph two of this subdivision, in any residential foreclosure action involving a home loan as such term is defined in section thirteen hundred four of the real property actions and proceedings law, in which the defendant is a resident of the property subject to foreclosure, plaintiff shall file proof of service within twenty days of such service, however service is made, and the court shall hold a mandatory conference within sixty days after the date when proof of service upon such defendant is filed with the county clerk, or on such adjourned date as has been agreed to by the parties, for the purpose of holding settlement discussions pertaining to the relative rights and obligations of the parties under the mortgage loan documents, including, but not limited to: (i) determining whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home, and evaluating the potential for a resolution in which payment schedules or amounts may be modified or other workout options may be agreed to, including, but not limited to, a loan modification, short sale, deed in lieu of foreclosure, or any other loss mitigation option; or (ii) whatever other purposes the court deems appropriate.

2.

(i) Paragraph one of this subdivision shall not apply to a home loan secured by a reverse mortgage where the default was triggered by the death of the last surviving borrower unless:

(A)the last surviving borrower's spouse, if any, is a resident of the property subject to foreclosure; or

(B)the last surviving borrower's successor in interest, who, by bequest or through intestacy, owns, or has a claim to the ownership of the property subject to foreclosure, and who was a resident of such property at the time of the death of such last surviving borrower.

(ii) The superintendent of financial services may promulgate such rules and regulations as he or she shall deem necessary to implement the provisions of this paragraph.

(a)[Eff Feb 13, 2020]

1.Except as provided in paragraph two of this subdivision, in any residential foreclosure action involving a high-cost home loan consummated between January first, two thousand three and September first, two thousand eight, or a subprime or nontraditional home loan, as those terms are defined under section thirteen hundred four of the real property actions and proceedings law, in which the defendant is a resident of the property subject to foreclosure, the court shall hold a mandatory conference within sixty days after the date when proof of service is filed with the county clerk, or on such adjourned date as has been agreed to by the parties, for the purpose of holding settlement discussions pertaining to the relative rights and obligations of the parties under the mortgage loan documents, including, but not limited to: (i) determining whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home, and evaluating the potential for a resolution in which payment schedules or amounts may be modified or other workout options may be agreed to including, but not limited to, a loan modification, short sale, deed in lieu of foreclosure, or any other loss mitigation option; or (ii) whatever other purposes the court deems appropriate.

2.

(i)Paragraph one of this subdivision shall not apply to a home loan secured by a reverse mortgage where the default was triggered by the death of the last surviving borrower unless:

(A)the last surviving borrower's spouse, if any, is a resident of the property subject to foreclosure; or

(B)the last surviving borrower's successor in interest, who, by bequest or through intestacy, owns, or has a claim to the ownership of the property subject to foreclosure, and who was a resident of such property at the time of the death of such last surviving borrower.

(ii)The superintendent of financial services may promulgate such rules and regulations as he or she shall deem necessary to implement the provisions of this paragraph.

(b)At the initial conference held pursuant to this section, any defendant currently appearing pro se, shall be deemed to have made a motion to proceed as a poor person under section eleven hundred one of this chapter. The court shall determine whether such permission shall be granted pursuant to standards set forth in section eleven hundred one of this chapter. If the court appoints defendant counsel pursuant to subdivision (a) of section eleven hundred two of this chapter, it shall adjourn the conference to a date certain for appearance of counsel and settlement discussions pursuant to subdivision (a) of this section, and otherwise shall proceed with the conference.

(c)At any conference held pursuant to this section, the plaintiff and the defendant shall appear in person or by counsel, and each party's representative at the conference shall be fully authorized to dispose of the case. If the defendant is appearing pro se, the court shall advise the defendant of the nature of the action and his or her rights and responsibilities as a defendant. Where appropriate, the court may permit a representative of the plaintiff or the defendant to attend the settlement conference telephonically or by video-conference.

(d)Upon the filing of a request for judicial intervention in any action pursuant to this section, the court shall send either a copy of such request or the defendant's name, address and telephone number (if available) to a housing counseling agency or agencies on a list designated by the division of housing and community renewal for the judicial district in which the defendant resides. Such information shall be used by the designated housing counseling agency or agencies exclusively for the purpose of making the homeowner aware of housing counseling and foreclosure prevention services and options available to them.

(e)The court shall promptly send a notice to parties advising them of the time and place of the settlement conference, the purpose of the conference and the requirements of this section. The notice shall be in a form prescribed by the office of court administration, or, at the discretion of the office of court administration, the administrative judge of the judicial district in which the action is pending, and shall advise the parties of the documents that they shall bring to the conference.

1.For the plaintiff, such documents shall include, but are not limited to, (i) the payment history; (ii) an itemization of the amounts needed to cure and pay off the loan; (iii) the mortgage and note or copies of the same; (iv) standard application forms and a description of loss mitigation options, if any, which may be available to the defendant; and (v) any other documentation required by the presiding judge. If the plaintiff is not the owner of the mortgage and note, the plaintiff shall provide the name, address and telephone number of the legal owner of the mortgage and note. For cases in which the lender or its servicing agent has evaluated or is evaluating eligibility for home loan modification programs or other loss mitigation options, in addition to the documents listed above, the plaintiff shall bring a summary of the status of the lender's or servicing agent's evaluation for such modifications or other loss mitigation options, including, where applicable, a list of outstanding items required for the borrower to complete any modification application, an expected date of completion of the lender's or servicer agent's evaluation, and, if the modification(s) was denied, a denial letter or any other document explaining the reason(s) for denial and the data input fields and values used in the net present value evaluation. If the modification was denied on the basis of an investor restriction, the plaintiff shall bring the documentary evidence which provides the basis for the denial, such as a pooling and servicing agreement.

2.For the defendant, such documents shall include, but are not limited to, if applicable, information on current income tax returns, expenses, property taxes and previously submitted applications for loss mitigation; benefits information; rental agreements or proof of rental income; and any other documentation relevant to the proceeding required by the presiding judge.

(f) Both the plaintiff and defendant shall negotiate in good faith to reach a mutually agreeable resolution, including but not limited to a loan modification, short sale, deed in lieu of foreclosure, or any other loss mitigation, if possible. Compliance with the obligation to negotiate in good faith pursuant to this section shall be measured by the totality of the circumstances, including but not limited to the following factors:

1.Compliance with the requirements of this rule and applicable court rules, court orders, and directives by the court or its designee pertaining to the settlement conference process;

2.Compliance with applicable mortgage servicing laws, rules, regulations, investor directives, and loss mitigation standards or options concerning loan modifications, short sales, and deeds in lieu of foreclosure; and

3.Conduct consistent with efforts to reach a mutually agreeable resolution, including but not limited to, avoiding unreasonable delay, appearing at the settlement conference with authority to fully dispose of the case, avoiding prosecution of foreclosure proceedings while loss mitigation applications are pending, and providing accurate information to the court and parties.

Neither of the parties' failure to make the offer or accept the offer made by the other party is sufficient to establish a failure to negotiate in good faith.

(g) The plaintiff must file a notice of discontinuance and vacatur of the lis pendens within ninety days after any settlement agreement or loan modification is fully executed.

(h)A party to a foreclosure action may not charge, impose, or otherwise require payment from the other party for any cost, including but not limited to attorneys' fees, for appearance at or participation in the settlement conference.

(i) The court may determine whether either party fails to comply with the duty to negotiate in good faith pursuant to subdivision (f) of this section, and order remedies pursuant to subdivisions (j) and (k) of this section, either on motion of any party or sua sponte on notice to the parties, in accordance with such procedures as may be established by the court or the office of court administration. A referee, judicial hearing officer, or other staff designated by the court to oversee the settlement conference process may hear and report findings of fact and conclusions of law, and may make reports and recommendations for relief to the court concerning any party's failure to negotiate in good faith pursuant to subdivision (f) of this section.

(j) Upon a finding by the court that the plaintiff failed to negotiate in good faith pursuant to subdivision (f) of this section, and order remedies pursuant to this subdivision and subdivision (k) of this section the court shall, at a minimum, toll the accumulation and collection of interest, costs, and fees during any undue delay caused by the plaintiff, and where appropriate, the court may also impose one or more of the following:

1.Compel production of any documents requested by the court pursuant to subdivision (e) of this section or the court's designee during the settlement conference;

2.Impose a civil penalty payable to the state that is sufficient to deter repetition of the conduct and in an amount not to exceed twenty-five thousand dollars;

3.The court may award actual damages, fees, including attorney fees and expenses to the defendant as a result of plaintiff's failure to negotiate in good faith; or

4.Award any other relief that the court deems just and proper.

(k) Upon a finding by the court that the defendant failed to negotiate in good faith pursuant to subdivision (f) of this section, the court shall, at a minimum, remove the case from the conference calendar. In considering such a finding, the court shall take into account equitable factors including, but not limited to, whether the defendant was represented by counsel.

(l) At the first settlement conference held pursuant to this section, if the defendant has not filed an answer or made a pre-answer motion to dismiss, the court shall:

1.advise the defendant of the requirement to answer the complaint;

2.explain what is required to answer a complaint in court;

3.advise that if an answer is not interposed the ability to contest the foreclosure action and assert defenses may be lost; and

4.provide information about available resources for foreclosure prevention assistance.

At the first conference held pursuant to this section, the court shall also provide the defendant with a copy of the Consumer Bill of Rights provided for in section thirteen hundred three of the real property actions and proceedings law.

(m)A defendant who appears at the settlement conference but who failed to file a timely answer, pursuant to rule 320 of the civil practice law and rules, shall be presumed to have a reasonable excuse for the default and shall be permitted to serve and file an answer, without any substantive defenses deemed to have been waived within thirty days of initial appearance at the settlement conference. The default shall be deemed vacated upon service and filing of an answer.

(n) Any motions submitted by the plaintiff or defendant shall be held in abeyance while the settlement conference process is ongoing, except for motions concerning compliance with this rule and its implementing rules.

History

Add, *L 2008, ch 472, § 3*, eff Aug 5, 2008; amd, *L 2009, ch 507, § 9*, eff Feb 13, 2010; *L 2013, ch 306, § 2*, eff Aug 30, 2013; *L 2016, ch 73, §§ 2*, 3 (Part Q), eff Dec 20, 2016; *L 2017, ch 58, § 2* (Part FF), eff April 20, 2017; *L 2018, ch 58, § 2* (Part HH), eff April 12, 2018.

Annotations

Notes

Editor's Notes

***Laws 2008, ch 472, §§ 3*-a and 28, sub g,** eff Aug 5, 2008, provide as follows:

§ 3-a. For any foreclosure action on a residential mortgage loan, in which the action was initiated prior to September 1, 2008 but where the final order of judgment has not yet been issued, the court shall request each plaintiff to identify whether the loan in foreclosure is a subprime home loan as defined in *section 1304 of the real property actions and proceedings law* or is a high-cost home loan as defined in *section 6-l of the banking law*.

If the loan is a subprime home loan or high-cost home loan, the court shall notify the defendant that if he or she is a resident of such property, he or she may request a settlement conference.

If the defendant requests a conference, the court shall hold such conference as soon as practicable for the purpose of holding settlement discussions pertaining to the rights and obligations of the parties under the mortgage loan documents, including but not limited to, determining whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home, and evaluating the potential for a resolution in which payment schedules or amounts may be modified or other workout options may be agreed to, and for whatever other purposes the court deems appropriate.

At any conference held pursuant to this section, the plaintiff shall appear in person or by counsel, and if appearing by counsel, such counsel shall be fully authorized to dispose of the case. The defendant shall appear in person or by counsel. If the defendant is appearing pro se, the court shall advise the defendant of the nature of the action and his or her rights and responsibilities as a defendant. Where appropriate, the court may permit a representative of the plaintiff to attend the settlement conference telephonically or by video-conference.

§ 28. This act shall take effect immediately; provided, however, that:

Cited
As of: October 31, 2018 3:52 PM Z

BAC Home Loans Servicing, L.P. v Jackson

Supreme Court of New York, Appellate Division, Second Department

March 21, 2018, Decided

2015-10419

Reporter
159 A.D.3d 861 *; 74 N.Y.S.3d 59 **; 2018 N.Y. App. Div. LEXIS 1798 ***; 2018 NY Slip Op 01896 ****; 2018 WL 1404260

[****1] BAC Home Loans Servicing, L.P., etc., respondent, v Brian Jackson, appellant, et al., defendants. (Index No. 16265/10)

Notice: THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.
THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

Core Terms

mortgage, foreclosure, lack of standing, toll, affirmation, accrual, amend

Case Summary

Overview

HOLDINGS: [1]-In a foreclosure proceeding, the trial court erred by rejecting the request for judicial intervention (RJI) for failure to file an attorney affirmation with the RJI because the attorney affirmation did not have to be filed until the lender submitted either the proposed order of reference or the proposed judgment of foreclosure; [2]-Although the initial RJI was erroneously rejected, the interest on the loan should have been tolled from December 22, 2010 through the date that the lender filed the subsequent RJI on November 6, 2014, *CPLR 5001(a)*, because the lender failed to explain the ensuing four-year delay between the initial October 2010 filing and the subsequent filing on November 6, 2014, and, under the unusual circumstances of the case, the borrower was prejudiced by the unexplained delay, during which time interest had been accruing.

Outcome
Order modified, and, as so modified, order affirmed.

LexisNexis® Headnotes

Real Property Law > Financing > Foreclosures

HN1[] **Financing, Foreclosures**

While *22 NYCRR 202.12-a(b)(1)* states that at the time that proof of service of a summons and complaint is filed with the clerk, a plaintiff in a mortgage foreclosure action shall file a specialized request for judicial intervention applicable to such actions, it does not provide that the failure to do so will result in the dismissal of the action.

Civil Procedure > Remedies > Judgment Interest

HN2[] **Remedies, Judgment Interest**

In an action of an equitable nature, the recovery of interest is within the court's discretion. The exercise of that discretion will be governed by the particular facts in each case, including any wrongful conduct by either party. *CPLR 5001(a)*.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN3[] **Amendment of Pleadings, Leave of Court**

Leave to amend a pleading shall be freely given, provided that the amendment is not palpably insufficient as a matter of law, does not prejudice or surprise the opposing party, and is not patently devoid of merit. Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches

doctrine.

Counsel: [***1] Brian Jackson, Freeport, NY, appellant, Pro se.

Rosicki, Rosicki & Associates, P.C., Plainview, NY (William Knox of counsel), for respondent.

Judges: RUTH C. BALKIN, J.P., JOHN M. LEVENTHAL, LEONARD B. AUSTIN, ANGELA G. IANNACCI, JJ. BALKIN, J.P., LEVENTHAL, AUSTIN and IANNACCI, JJ., concur.

Opinion

[**60] [*861] DECISION & ORDER

In an action to foreclose a mortgage, the defendant Brian Jackson appeals, as limited by his brief, from so much of an order of the Supreme Court, Nassau County (Adams, J.), entered August 18, 2015, as denied those branches of his motion which were to dismiss the complaint insofar as asserted against him for failure to comply with *22 NYCRR 202.12-a(b)(1)* or, in the alternative, in effect, to toll the accrual of interest on the mortgage loan, and for leave to serve and file an amended answer to assert the defense of lack of standing.

ORDERED that the order is modified, on the law, on the facts, and in the exercise of discretion, (1) by deleting the provision thereof denying that branch of the motion of the defendant Brian Jackson which was, in effect, to toll the accrual of interest on the mortgage loan, and substituting therefor a provision granting that branch of the motion to the extent of tolling the accrual [***2] of interest between December 22, 2010, and November 6, 2014, and otherwise denying that branch of the motion, and (2) by deleting the provision thereof denying that branch of the motion which was for leave to serve and file an amended answer to assert the defense of lack of standing, and substituting therefor a provision granting that branch of the motion; as [*862] so modified, the order is affirmed insofar as appealed from, with costs to the defendant Brian Jackson.

On August 25, 2010, the plaintiff commenced this action to foreclose a mortgage against, among others, the defendant Brian Jackson. Jackson, acting pro se, served his answer on September 20, 2010. A request for judicial intervention (hereinafter RJI) was not filed in this action until November 10, 2014. Thereafter, Jackson moved, inter alia, to dismiss the complaint insofar as asserted against him for failure to comply with *22 NYCRR 202.12-a(b)(1)* based on the plaintiff's failure to timely file an RJI requesting a settlement conference or, in the alternative, in effect, to toll the accrual of interest on the mortgage loan following the filing of the summons and complaint. Jackson also sought leave to amend his answer to assert several affirmative [***3] defenses, including lack of standing. The Supreme Court, inter alia, denied those branches of his motion.

HN1[↑] While *22 NYCRR 202.12-a(b)(1)* states that at the time that proof of service of a summons and complaint is filed with the clerk, a plaintiff in a mortgage foreclosure action shall file [****2] a specialized RJI applicable to such actions, it does not provide that the failure to do so will result in the dismissal of the action. Accordingly, the Supreme Court properly denied that branch of Jackson's motion which was to dismiss the complaint for failure to comply insofar as asserted against him with *22 NYCRR 202.12-a(b)(1)*.

HN2[↑] "In an action of an equitable nature, the recovery of interest is within the court's discretion. The exercise of that [**61] discretion will be governed by the particular facts in each case, including any wrongful conduct by either party" (*Prompt Mtge. Providers of N. Am., LLC v Zarour, 155 AD3d 912, 915, 64 N.Y.S.3d 106* [internal quotation marks omitted]; *see CPLR 5001[a]*; *LaSalle Bank, N.A. v Dono, 135 AD3d 827, 829, 24 N.Y.S.3d 144*; *US Bank N.A. v Williams, 121 AD3d 1098, 1101-1102, 995 N.Y.S.2d 172*; *Dayan v York, 51 AD3d 964, 965, 859 N.Y.S.2d 673*; *Preferred Group of Manhattan, Inc. v Fabius Maximus, Inc., 51 AD3d 889, 890, 859 N.Y.S.2d 236*). Here, the plaintiff contends that it initially attempted to file an RJI on October 22, 2010, but that the RJI was rejected by the Supreme Court for failure to comply with Administrative Order 548/10. Administrative Order 548/10, which was promulgated on October 20, 2010, by the Chief Administrative Judge of the Courts, required [***4] that, " effective immediately,' . . . a plaintiff's attorney in certain mortgage foreclosure actions [had] to submit an affirmation confirming the factual accuracy and the accuracy of notarizations of all filings in support of foreclosure" (*Bank of N.Y. Mellon v Izmirligil, 144 AD3d 1063, 1064, [*863] 42 N.Y.S.3d 270* quoting Administrative Order 548/10). This Administrative Order provided that, in new cases, the affirmation had to accompany the RJI. However, where a residential mortgage foreclosure action was pending on the effective date of Administrative Order 548/10, and no judgment of foreclosure had been entered, such as in the instant case, Administrative Order 548/10 provided that the affirmation must be filed at the time of filing either the proposed order of reference or the proposed judgment of foreclosure. Since this was a pending case, the RJI should not have been rejected by the court for failure to file an attorney affirmation with the RJI. The attorney affirmation did not have to be filed until the plaintiff submitted either the

proposed order of reference or the proposed judgment of foreclosure (*see Bank of N.Y. Mellon v Izmirligil, 144 AD3d at 1064*; *U.S. Bank, N.A. v Ramjit, 125 AD3d 641, 642, 2 N.Y.S.3d 587*).

Although the initial October 2010 RJI may have been rejected erroneously, the plaintiff fails to explain the ensuing four-year delay between **[***5]** the initial October 2010 filing and the subsequent filing on November 6, 2014. Under the unusual circumstances of this case, since Jackson was prejudiced by this unexplained delay, during which time interest had been accruing, the interest on the loan should have been tolled from December 22, 2010 (that is, 60 days after the alleged initial October 2010 RJI was filed, the time period during which a settlement conference would be scheduled), through the date that the plaintiff filed the subsequent RJI on November 6, 2014 (*see* ***Greenpoint Mtge. Corp. v Lamberti, 155 AD3d 1004, 66 N.Y.S.3d 32***; *Citicorp Trust Bank, FSB v Vidaurre, 155 AD3d 934, 935, 65 N.Y.S.3d 237*; *Davan v York, 51 AD3d 964, 965, 859 N.Y.S.2d 673*; *Danielowich v PBL Dev., 292 AD2d 414, 739 N.Y.S.2d 408*; *Dollar Fed. Sav. & Loan Assn. v Herbert Kallen, Inc., 91 AD2d 601, 456 N.Y.S.2d 430*; *South Shore Fed. Sav. & Loan Assn. v Shore Club Holding Corp., 54 AD2d 978, 389 N.Y.S.2d 29*; *Wells Fargo Bank, N.A. v Lindo, 2013 NY Slip Op 30375[U], *12-13 [Sup Ct, NY County]*; *cf. U.S. Bank Nat. Ass'n v Williams, 121 AD3d 1098, 1102, 995 N.Y.S.2d 172*).

HN3[↑] "Leave to amend a pleading shall be freely given,' provided that the amendment is not palpably insufficient as a matter of law, does not prejudice or surprise the opposing party, and is not patently devoid of merit" (*HSBC Bank v Picarelli, 110 AD3d 1031, 1031, 974 [**62] N.Y.S.2d 90*, quoting *CPLR 3025 [b]* [citation omitted]). "Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine" (*HSBC Bank v Picarelli, 110 AD3d at 1032* [internal quotation marks omitted]). **[*864]** Here, Jackson sought to amend his answer after he was served with the November 2014 RJI to which the plaintiff had attached a copy of the subject note, executed by him in favor of Countrywide Bank, **[***6]** FSB, and which had not been endorsed to the plaintiff. Since Jackson's proposed amendment to include the defense of lack of standing did not result in any prejudice to the plaintiff and was not palpably insufficient or patently devoid of merit, the Supreme Court improvidently exercised its discretion in denying that branch of Jackson's motion which was for leave to amend his answer to assert the defense of lack of standing (*see US Bank, N.A. v Primiano, 140 AD3d 857, 858, 32 N.Y.S.3d 643*; *HSBC Bank v Picarelli, 110 AD3d at 1032*; *U.S. Bank, N.A. v Sharif, 89 AD3d 723, 724, 933 N.Y.S.2d 293*).

Accordingly, the Supreme Court should have granted those branches of Jackson's motion which were to toll the accrual of interest on the mortgage loan from December 22, 2010, through November 6, 2014, and for leave to amend his answer to assert the affirmative defense of lack of standing.

BALKIN, J.P., LEVENTHAL, AUSTIN and IANNACCI, JJ., concur.

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Neutral
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Greenpoint Mtge. Corp. v Lamberti

Supreme Court of New York, Appellate Division, Second Department

November 29, 2017, Decided

2015-07802

Reporter
155 A.D.3d 1004 *; 66 N.Y.S.3d 32 **; 2017 N.Y. App. Div. LEXIS 8406 ***; 2017 NY Slip Op 08353 ****; 2017 WL 5761773

[****1] Greenpoint Mortgage Corp., plaintiff, PE-NC, LLC, respondent, v Mary M. Lamberti, appellant, et al., defendants. (Index No. 12093/05)

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Prior History: *Greenpoint Mtge. Corp. v. Lamberti, 94 A.D.3d 815, 941 N.Y.S.2d 864, 2012 N.Y. App. Div. LEXIS 2654 (N.Y. App. Div. 2d Dep't, Apr. 10, 2012)*

Core Terms

mortgage, counsel fees, confirm, foreclosure judgment, predecessor in interest, cross motion, amount due, computation, action to foreclose, motion of plaintiff, lender's rights, advance money, inter alia, ambiguities, contractual, foreclosure, inclusive, recompute, appeals, remit

Case Summary

Overview

HOLDINGS: [1]-Plaintiff mortgagee was not entitled to recover interest, under *CPLR 5001(a)*, in a foreclosure because it could not benefit from the roughly three year delay of its predecessor in interest in seeking judicial intervention after filing suit; [2]-The mortgagee could not recover interest on counsel fees because an inconsistency in the mortgage on such a remedy was construed against it; [3]-Interest on money advanced to protect the lender's rights in the property should not have been awarded at the rate of 17% because the "note rate" was 7.25%; [4]-An attorney's fee award had to be recomputed because its reasonableness was not found pursuant to the time, effort, and skill required, the difficulty of the questions presented, counsel's experience, ability, and reputation, the fee customarily charged in the locality, and the contingency or certainty of compensation.

Outcome
Judgment reversed.

LexisNexis® Headnotes

Civil Procedure > Remedies > Judgment Interest

HN1[] **Remedies, Judgment Interest**

In an action of an equitable nature, the recovery of interest is within the court's discretion. The exercise of that discretion will be governed by the particular facts in each case, including any wrongful conduct by either party. *CPLR 5001(a)*.

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem

HN2[] **Contract Interpretation, Ambiguities & Contra Proferentem**

Ambiguities in a contractual instrument will be resolved contra proferentem, against the party who prepared or presented it.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN3[] **Attorney Fees & Expenses, Reasonable Fees**

An award of an attorney's fee pursuant to a contractual provision may only be enforced to the extent that the amount is reasonable and warranted for the services actually rendered. In determining reasonable compensation for an attorney, a court must consider such factors as the time, effort, and skill required, the difficulty of the questions presented, counsel's experience, ability, and reputation, the fee customarily charged in the locality, and the contingency or certainty of compensation.

Counsel: **[***1]** Michael T. Lamberti, New York, NY, for appellant.

Lawrence and Walsh, P.C., Hempstead, NY (Eric P. Wainer of counsel), for respondent.

Judges: WILLIAM F. MASTRO, J.P., JOHN M. LEVENTHAL, JOSEPH J. MALTESE, VALERIE BRATHWAITE NELSON, JJ. MASTRO, J.P., LEVENTHAL, MALTESE and BRATHWAITE NELSON, JJ., concur.

Opinion

[33]** **[*1004]** DECISION & ORDER

In an action to foreclose a mortgage, the defendant Mary M. Lamberti appeals, as limited by her brief, from so much of a judgment of foreclosure and sale of the Supreme Court, Nassau County (Adams, J.), entered July 13, 2015, as, upon an order of the same court entered February 26, 2015, inter alia, granting that branch of the motion of the plaintiff PE-NC, LLC, which was to confirm a Referee's report and denying her cross motion to reject the report, confirmed the report and awarded the plaintiff PE-NC, LLC, the sum of $1,134,630.81, inclusive of counsel fees and interest.

ORDERED that the judgment of foreclosure and sale is reversed insofar as appealed from, on the law and in the exercise of discretion, with costs, that branch of the motion of the plaintiff PE-NC, LLC, which was to confirm the Referee's report is denied, the cross motion of the defendant Mary M. Lamberti to **[*1005]** reject **[***2]** the report is granted, the order entered February 26, 2015, is modified accordingly, and the matter is remitted to the Supreme Court, Nassau County, for further proceedings in accordance herewith, and for the entry of an appropriate amended judgment of foreclosure and sale.

This is an action to foreclose a mortgage on real property owned by the defendant Mary M. Lamberti (hereinafter the defendant) in Woodbury. The Supreme Court **[**34]** granted the motion of the plaintiff PE-NC, LLC (hereinafter PE-NC), the current holder of the note and mortgage, for summary judgment on the complaint, and appointed a Referee to compute the amount due pursuant to the note and mortgage. Following a hearing, the Referee issued a report finding, inter alia, that $1,134,630.81 was due and owing to PE-NC, inclusive of counsel fees and interest on the unpaid balance, on counsel fees, and on money advanced to protect the lender's rights in the property. PE-NC moved to confirm the Referee's report and the computation contained therein and for leave to enter a judgment of foreclosure and sale. The defendant cross-moved to reject the report. In an order entered February 26, 2015, the court granted PE-NC's motion and **[***3]** denied the defendant's cross motion. Thereafter, in a judgment of foreclosure and sale entered July 13, 2015, the court, upon the order, confirmed the report, awarded PE-NC the sum of $1,134,630.81, and directed that the subject property be sold. The defendant appeals. We reverse the judgment insofar as appealed from and **[****2]** remit the matter to the Supreme Court, Nassau County, for the Referee to recompute the amount due and for the court to determine the reasonableness of the counsel fees included in the Referee's computation, following a hearing on the issue, if necessary.

The Referee must recompute the amount due. *HN1*[↑] "In an action of an equitable nature, the recovery of interest is within the court's discretion. The exercise of that discretion will be governed by the particular facts in each case, including any wrongful conduct by either party" (*Dayan v York, 51 AD3d 964, 965, 859 N.Y.S.2d 673* [citations omitted]; *see CPLR 5001[a]*). Here, in view of the lengthy delay by PE-NC's predecessors in interest in prosecuting this action, PE-NC should recover no interest for the roughly three-year period of time from when the action was commenced in 2005 to when the defendant filed a request for judicial intervention in 2008. While PE-NC did not cause this **[***4]** delay, it should not benefit financially, in the form of accrued interest, from this delay caused by its predecessors in interest. Furthermore, PE-NC should not recover interest on the counsel fees awarded to it. Paragraphs 7 and 21 of the **[*1006]** mortgage are inconsistent regarding whether interest could be recovered on counsel fees. Since *HN2*[↑] "ambiguities in a contractual instrument will be resolved *contra proferentem*, against the party who prepared or presented it" (*151 W. Assoc. v Printsiples Fabric Corp., 61 NY2d 732, 734, 460 N.E.2d 1344, 472 N.Y.S.2d 909*), this ambiguity must be resolved against PE-NC, whose predecessors in interest presented the mortgage. Moreover, interest awarded under paragraph 7 of the mortgage, on money advanced to protect the lender's rights in the property, should not have been awarded at the rate of 17%, but at the "Note rate," which, in this case, was 7.25%.

HN3[↑] "An award of an attorney's fee pursuant to a contractual provision may only be enforced to the extent that the amount is reasonable and warranted for the services actually rendered. In determining reasonable compensation for an attorney, the court must consider such factors as the time, effort, and skill required; the difficulty of the questions presented; counsel's experience, ability, and reputation; **[***5]** the fee customarily charged in the locality; and the contingency or certainty of compensation" (*Vigo v 501 Second St. Holding Corp., 121 AD3d 778, 779-780, 994 N.Y.S.2d 354* [citation omitted]; *see SO/Bluestar, LLC v Canarsie Hotel Corp., 33 AD3d 986, 988, 825 N.Y.S.2d 80*). In this case, a determination must be made **[**35]** on the reasonableness of the counsel fees, following a hearing on that issue, if necessary.

The defendants' remaining contentions, including those concerning an intermediate order dated June 13, 2014, which are brought up for review on this appeal from the judgment of foreclosure and sale (*see CPLR 5501[a][1]*; ***Greenpoint*** *Mortgage Corp. v* ***Lamberti****, 155 A.D.3d 1004, 63 N.Y.S.3d 866, 2017 N.Y. App. Div. LEXIS 8429 [Appellate Division Docket No. 2014-08300*; decided herewith]), are without merit.

MASTRO, J.P., LEVENTHAL, MALTESE and BRATHWAITE NELSON, JJ., concur.

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Citicorp Trust Bank, FSB v Vidaurre

Supreme Court of New York, Appellate Division, Second Department

November 22, 2017, Decided

2016-04388

Reporter
155 A.D.3d 934 *; 65 N.Y.S.3d 237 **; 2017 N.Y. App. Div. LEXIS 8334 ***; 2017 NY Slip Op 08256 ****

[****1] Citicorp Trust Bank, FSB, etc., respondent, v Elena C. Vidaurre, also known as Elena C. Vidaurre-Gilles, et al., defendants, Giftports, Inc., doing business as Jomashop, appellant. (Index No. 100603/07)

Prior History: *Citicorp Trust Bank,FSB v. Vidaurre, 2008 N.Y. Misc. LEXIS 8167 (N.Y. Sup. Ct., July 10, 2008)*

Core Terms

cross motion, services, cancel, toll, do business, affirmation, award of attorney's fees, render a service, quotation, expended, accrued, marks, amount of an attorney's fees, accrued interest, hourly rate, legal work, circumstances, foreclosure, prevailing, reputation, deleting, modified, remitted

Counsel: [***1] Ira Daniel Tokayer, New York, NY, for appellant.

Knuckles Komosinksi & Manfro LLP, Elmsford, NY (Christopher R. Mount of counsel), for respondent.

Judges: RANDALL T. ENG, P.J., REINALDO E. RIVERA, SHERI S. ROMAN, FRANCESCA E. CONNOLLY, JJ. ENG, P.J., RIVERA, ROMAN and CONNOLLY, JJ., concur.

Opinion

[*934] [**238] DECISION & ORDER

In an action to foreclose a mortgage, the defendant Giftports, Inc., doing business as Jomashop, appeals, as limited by its brief, from so much of an order of the Supreme Court, Richmond County (Troia, J.), dated February 22, 2016, as granted those branches of the plaintiff's motion which were for an award of interest on a judgment of foreclosure and sale and for an award of an attorney's fee, and directed an award of an attorney's fee in the sum of $2,500, and denied that branch of its cross motion which was to toll and cancel accrued interest.

ORDERED that the order is modified, on the law, (1) by deleting the provision thereof denying that branch of the cross motion of the defendant Giftports, Inc., doing business as Jomashop, which was to toll and cancel accrued interest, and substituting therefor a provision granting that [**239] branch of the cross motion to the extent of tolling and canceling [***2] interest that accrued between March 23, 2010, and November 26, 2014, and otherwise denying that branch of the cross motion, and (2) by deleting the provision thereof awarding the plaintiff an attorney's fee in the sum of $2,500; as so modified, the order is affirmed insofar as appealed from, with costs to the defendant Giftports, Inc., doing business as Jomashop, and the matter is remitted to the Supreme Court, Richmond County, for a new determination on the issue of the amount of the attorney's fee to be awarded, following the submission of a more detailed affirmation of services rendered, and, if necessary, for a hearing on that issue.

"In an action of an equitable nature, the recovery of interest is within the court's discretion. The exercise of that discretion will be governed by the particular facts in each case, including any wrongful conduct by either party" (*Prompt Mtge. Providers [*935] of N. Am., LLC v Zarour, 148 AD3d 849, 851, 50 N.Y.S.3d 79* [internal quotation marks omitted]; *see CPL 5001[a]; Davan v York, 51 AD3d 964, 965, 859 N.Y.S.2d 673)*. Here, the plaintiff failed to adequately explain its lengthy delay in prosecuting this foreclosure action. Under the circumstances, the Supreme Court should have granted that branch of the cross motion of the defendant Giftports,

Inc., doing business as Jomashop, which was to [***3] toll and cancel interest that accrued to the extent of tolling and canceling interest that accrued between March 23, 2010, the date of the decision of a prior appeal in this case, in which this Court affirmed the award of summary judgment to the plaintiff (*see Citicorp. Trust Bank, FSB v Vidaurre, 71 AD3d 942, 897 N.Y.S.2d 501*), and November 26, 2014, the date of the referee's report (*see Dollar Fed. Sav. & Loan Assn. v Herbert Kallen, Inc., 91 AD2d 601, 456 N.Y.S.2d 430* [****2] ; *South Shore Fed. Sav. & Loan Assn. v Shore Club Holding Corp., 54 AD2d 978, 389 N.Y.S.2d 29*; *see also Danielowich v PBL Dev., 292 AD2d 414, 415, 739 N.Y.S.2d 408*).

An award of an attorney's fee pursuant to a contractual provision may only be enforced to the extent that the amount is reasonable and warranted for the services actually rendered (*see People's United Bank v Patio Gardens III, LLC, 143 AD3d 689, 691, 38 N.Y.S.3d 262*). "In determining reasonable compensation for an attorney, the court must consider such factors as the time, effort, and skill required; the difficulty of the questions presented; counsel's experience, ability, and reputation; the fee customarily charged in the locality; and the contingency or certainty of compensation" (*id. at 691*; *see Vigo v 501 Second St. Holding Corp., 121 AD3d 778, 780, 994 N.Y.S.2d 354*). "While a hearing is not required in all circumstances, the court must possess sufficient information upon which to make an informed assessment of the reasonable value of the legal services rendered" (*People's United Bank v Patio Gardens III, LLC, 143 AD3d at 691* [internal quotation marks omitted]). "There must be a sufficient [***4] affidavit of services, detailing the hours reasonably expended . . . and the prevailing hourly rate for similar legal work in the community" (*SO/Bluestar, LLC v Canarsie Hotel Corp., 33 AD3d 986, 988, 825 N.Y.S.2d 80* [internal quotation marks omitted]).

In this case, the affirmation of services rendered submitted by the plaintiff's counsel did not set forth counsel's experience, ability, and reputation, and failed to detail the prevailing hourly rate for similar legal work in the community (*see People's United Bank v Patio Gardens III, LLC, [**240] 143 AD3d at 691*; *SO/Bluestar, LLC v Canarsie Hotel Corp., 33 AD3d at 988*). Moreover, the affirmation of services failed to indicate [*936] whether the hours listed were expended by the affirmant, rather than a predecessor firm, and listed "anticipatory services to be rendered" amounting to more than half of the hours purportedly expended. Accordingly, the matter must be remitted to the Supreme Court, Richmond County, for a new determination on the issue of the amount of an attorney's fee to be awarded, following the submission of a more detailed affirmation of services rendered, and, if necessary, for a hearing on that issue.

ENG, P.J., RIVERA, ROMAN and CONNOLLY, JJ., concur.

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NY CLS Gen Oblig § 17-105

Current through 2018 Chapters 1-321

New York Consolidated Laws Service > General Obligations Law (Arts. 1 — 19) > Article 17 Revival or Extension; Waiver of Defense or Bar (Title 1) > Title 1 Obligations Barred by Statutes of Limitation (§§ 17-101 — 17-107)

§ 17-105. Promises and waivers affecting the time limited for action to foreclose a mortgage

1.A waiver of the expiration of the time limited for commencement of an action to foreclose a mortgage of real property or a mortgage of a lease of real property, or a waiver of the time that has expired, or a promise not to plead the expiration of the time limited, or not to plead the time that has expired, or a promise to pay the mortgage debt, if made after the accrual of a right of action to foreclose the mortgage and made, either with or without consideration, by the express terms of a writing signed by the party to be charged is effective, subject to any conditions expressed in the writing, to make the time limited for commencement of the action run from the date of the waiver or promise. If the waiver or promise specifies a shorter period of limitation than that otherwise applicable, the time limited shall be the period specified.

2.

a.A statement by a grantee of real property or assignee of a lease of real property, effective under section 5-705 of this chapter as an assumption of or agreement to pay an indebtedness or other sum secured by a mortgage of such property or lease has also, to the extent of the amount specified therein, the same effect as provided in this section with respect to a waiver or promise described in subdivision one, unless it contains language disclaiming an intention to affect the statute of limitation.

b.A recital, in an instrument in which real property is conveyed or a lease is assigned, that the conveyance or assignment is made subject to a mortgage, or provision to that effect in a contract for purchase of real property or purchase of a lease, or an agreement or instrument by which another encumbrance or interest is subordinated to the lien of a mortgage, does not have the effect provided in this section with respect to a waiver or promise described in subdivision one.

3.A waiver or promise made as provided in this section is effective

a.against (1) the person who made it, to the extent of any interest held by him at the date thereof and (2) any person subsequently acquiring from him any such interest, without giving value or with actual notice of the making of the waiver or promise, to the extent of the interest so acquired; and

b.in favor of (1) the mortgagee or his assignee, (2) any other person to whom or for whose benefit it is expressed to be made, and (3) any person who, after the making of the waiver or promise, succeeds or is subrogated to the interest of either of them in the mortgage or otherwise acquires an interest in the enforcement of the mortgage.

4.Except as provided in subdivision five, no acknowledgment, waiver or promise has any effect to extend the time limited for commencement of an action to foreclose or mortgage for any greater time or in any other manner than that provided in this section, nor unless it is made as provided in this section.

5.This section does not change the requirements, or the effect with respect to the time limited for commencement of an action, of

a.a payment or part payment of the principal or interest secured by the mortgage, or

b.a stipulation made in an action or proceeding.

6.The term "real property" as used in this section is co-extensive in meaning with lands, tenements and hereditaments.

History

Add, L 1963, ch 576, § 1, eff Sept 27, 1964, with substance transferred from Real P §§ 2, 251–a.

Annotations

Notes to Decisions

Defendants, who had purchased an interest in realty at a bankruptcy sale with knowledge that the second mortgage indebtedness it secured was in default, but without actual notice that the original owner had made a payment on account of the defaulted indebtedness after the statute of limitations had run, (*CPLR 213*, subd. 4), could avail themselves of the time lapse to bar foreclosure of their acquired interest by plaintiffs-mortgagees, (Gen Oblig Law §§ 17-105, 17-107); although the debtor's payment renewed the statute of limitations on his obligation to plaintiffs, (Gen Oblig Law § 17-101), it did not extend the period of limitations of his former wife's joint obligation to plaintiffs, since she was unaware of the payment, nor did the payment revive plaintiffs' right to foreclose the underlying mortgage as against defendants. *Roth v Michelson, 55 N.Y.2d 278, 449 N.Y.S.2d 159, 434 N.E.2d 228, 1982 N.Y. LEXIS 3138 (N.Y. 1982)*.

Stipulation of settlement between mortgagor and mortgagee was not "promise to pay the mortgage debt," and consequently did not restart running of statute of limitations under CLS Gen Oblig § 17-105(1), where promise to pay sum that was contained in settlement agreement represented mortgagor's undertaking of new obligation in exchange for mortgagee's promises to terminate foreclosure action and assign mortgage to mortgagor's brother. *Petito v Piffath, 85 N.Y.2d 1, 623 N.Y.S.2d 520, 647 N.E.2d 732, 1994 N.Y. LEXIS 4127 (N.Y. 1994)*, reh'g denied, *85 N.Y.2d 858, 624 N.Y.S.2d 376, 648 N.E.2d 796, 1995 N.Y. LEXIS 306 (N.Y. 1995)*, cert. denied, *516 U.S. 864, 116 S. Ct. 177, 133 L. Ed. 2d 116, 1995 U.S. LEXIS 6107 (U.S. 1995)*.

In an action to foreclose a mortgage, defendant's motion to dismiss the complaint as barred by the statute of limitations was properly denied where the earliest of the writings on which the mortgagee relied in satisfaction of the requirements of Gen Oblig Law § 17-105, governing promises and waivers affecting the limitation period for such actions, was dated April 15, 1978 and the foreclosure action was instituted in April, 1982, which was well within the six-year period of limitations prescribed by *CPLR § 213(4)*. *Aleci v Virgie E. Tinsley's Enterprises, Inc., 102 A.D.2d 808, 476 N.Y.S.2d 595, 1984 N.Y. App. Div. LEXIS 18971 (N.Y. App. Div. 2d Dep't 1984)*.

In action under CLS RPAPL § 1501(4) to secure cancellation and discharge of record of mortgage on ground that 6-year statute of limitations for commencement of action to foreclose mortgage (*CPLR § 213(4)*) had expired, court properly granted defendant's summary judgment motion where plaintiff's promise in bankruptcy plan to pay mortgage at issue was made after accrual of right of action to foreclose on mortgage, was express, and was in writing signed by plaintiff, only condition precedent expressed in bankruptcy plan was that defendant's claim on mortgage be allowed, and it was uncontroverted that defendant's claim on mortgage was allowed by order of Bankruptcy Court. *Albin v Dallacqua, 254 A.D.2d 444, 679 N.Y.S.2d 402, 1998 N.Y. App. Div. LEXIS 11259 (N.Y. App. Div. 2d Dep't 1998)*.

Maker of a promissory note secured by a mortgage did not extend the time for a bank to file a foreclosure action by signing a mortgage document prepared by the bank that was backdated to a date outside the limitations period; the maker's signature only acknowledged the debt existed as of the date the note was backdated to, not as of the date she signed it. *Comerica Bank, N.A. v Benedict, 8 A.D.3d 221, 777 N.Y.S.2d 312, 2004 N.Y. App. Div. LEXIS 7445 (N.Y. App. Div. 2d Dep't 2004)*.

Even if the commencement of a foreclosure action against defendant was barred by the statute of limitations, defendant's bankruptcy filing, in which he acknowledged the mortgage debt and promised to repay it within six months, sufficed to extend the statute of limitations, *N.Y. Gen. Oblig. Law § 17-105(1)*. *Nat'l Loan Investors, L.P. v Piscitello, 21 A.D.3d 537, 801 N.Y.S.2d 331, 2005 N.Y. App. Div. LEXIS 8709 (N.Y. App. Div. 2d Dep't 2005)*.

Karpa Realty Group, LLC v Deutsche Bank Natl. Trust Co.

Supreme Court of New York, Appellate Division, Second Department

August 29, 2018, Decided

2016-05914

Reporter
164 A.D.3d 886 *; 2018 N.Y. App. Div. LEXIS 5867 **; 2018 NY Slip Op 05921 ***; 2018 WL 4101011

[***1] Karpa Realty Group, LLC, respondent, v Deutsche Bank National Trust Company, etc., appellant, et al., defendants. (Index No. 2565/15)

Core Terms

mortgage, summary judgment, statute of limitations, cancel, foreclosure action, real property, cross motion, acknowledgment, foreclose, commencement of the action, triable issue of fact, prima facie, accelerated, entitlement, time-barred, quotation, six-year, appeals, revived, marks

Case Summary

Overview

HOLDINGS: [1]-The realty company made a prima facie showing of its entitlement to judgment as a matter of law by establishing that the foreclosure action commenced by the bank in 2008 was dismissed pursuant to *CPLR 3216*, and that the commencement of a new foreclosure action would be time-barred by the applicable six-year statute of limitations; [2]-Contrary to the bank's contention, a letter written by the homeowner that accompanied his second short sale package submitted to the bank's loan servicer did not constitute an unqualified acknowledgment of the debt or manifest a promise to repay the debt sufficient to reset the running of the statute of limitations.

Outcome

Plaintiff's motion granted and defendant's cross-motion denied.

LexisNexis® Headnotes

Governments > Legislation > Statute of Limitations > Time Limitations

Real Property Law > Financing > Foreclosures

HN1[] **Statute of Limitations, Time Limitations**

Pursuant to *RPAPL 1501(4)*, a person having an estate or an interest in real property subject to a mortgage can seek to cancel and discharge that encumbrance where the period allowed by the applicable statute of limitations for the commencement of an action to foreclose the mortgage has expired, provided that the mortgagee or its successor is not in possession of the subject real property at the time the action to cancel and discharge the mortgage is commenced. An action to foreclose a mortgage has a six-year statute of limitations. *CPLR 213[4]*. Even if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt.

Governments > Legislation > Statute of Limitations > Extensions & Revivals

HN2[] **Statute of Limitations, Extensions & Revivals**

General Obligations Law § 17-101 effectively revives a time-barred claim when the debtor has signed a writing which validly acknowledges the debt. To constitute a valid acknowledgment, a writing must be signed and recognize an existing debt and must contain nothing inconsistent with an intention on the part of the debtor to pay it.

Counsel: [**1] Hinshaw & Culbertson LLP, New York, NY (Jason J. Oliveri and Schuyler B. Kraus of counsel), for

appellant.

Andrei A. Popescu, PLLC, Brooklyn, NY, for respondent.

Judges: ALAN D. SCHEINKMAN, P.J., REINALDO E. RIVERA, CHERYL E. CHAMBERS, HECTOR D. LASALLE, JJ. SCHEINKMAN, P.J., RIVERA, CHAMBERS and LASALLE, JJ., concur.

Opinion

[*886] DECISION & ORDER

In an action pursuant to *RPAPL 1501(4)* to cancel and discharge of record a mortgage, the defendant Deutsche Bank National Trust Company appeals from an order of the Supreme Court, Kings County (Johnny Lee Baynes, J.), dated April 21, 2016. The order, insofar as appealed from, granted that branch [*887] of the plaintiff's motion which was for summary judgment on the complaint insofar as asserted against that defendant and denied that defendant's cross motion for summary judgment dismissing the complaint insofar as asserted against it.

ORDERED that the order is affirmed insofar as appealed from, with costs.

In December 2006, Alister Aird obtained a loan from the defendant New Century Mortgage Corporation (hereinafter New Century Mortgage), which was secured by a mortgage on real property in Brooklyn. Aird defaulted on his mortgage payments, and in August 2008, the defendant Deutsche Bank [**2] National Trust Company (hereinafter Deutsche Bank), as New Century Mortgage's assignee, accelerated the debt by commencing an action to foreclose the mortgage. In December 2013, the foreclosure action was dismissed pursuant to *CPLR 3216* for failure to prosecute.

Subsequently, the plaintiff purchased the subject property from Aird and commenced this action pursuant to *RPAPL 1501(4)* to cancel and discharge of record the subject mortgage. The plaintiff moved, inter alia, for summary judgment on the complaint insofar as asserted against Deutsche Bank, and Deutsche Bank cross-moved for summary judgment dismissing the complaint insofar as asserted against it. In the order appealed from, the Supreme Court granted the plaintiff's motion and denied Deutsche Bank's cross motion. Deutsche Bank appeals.

HN1[↑] Pursuant to *RPAPL 1501(4)*, a person having an estate or an interest in real property subject to a mortgage can seek to cancel and discharge that encumbrance where the period allowed by the applicable statute of limitations for the commencement of an action to foreclose the mortgage has expired, provided that the mortgagee or its successor is not in possession of the subject real property at the time the action to cancel and discharge [**3] the mortgage is commenced (*see Lubonty v U.S. Bank N.A., 159 AD3d 962, 963, 74 N.Y.S.3d 279*). An action to foreclose a mortgage has a six-year statute of [***2] limitations (*see CPLR 213[4]*; *Lubonty v U.S. Bank N.A., 159 AD3d at 963*). "[E]ven if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt" (*Lubonty v U.S. Bank N.A., 159 AD3d at 963* [internal quotation marks omitted]).

Here, the plaintiff made a prima facie showing of its entitlement to judgment as a matter of law by establishing that the foreclosure action commenced by Deutsche Bank in 2008 was dismissed pursuant to *CPLR 3216*, and that the commencement [*888] of a new foreclosure action would be time-barred by the applicable six-year statute of limitations (*see U.S. Bank N.A. v Martin, 144 AD3d 891, 891, 41 N.Y.S.3d 550*; *JBR Constr. Corp. v Staples, 71 AD3d 952, 953, 897 N.Y.S.2d 223*). Thus, in opposition, Deutsche Bank was required to raise a triable issue of fact as to whether the statute of limitations was tolled or revived (*see JBR Constr. Corp. v Staples, 71 AD3d at 953*).

HN2[↑] "*General Obligations Law § 17-101* effectively revives a time-barred claim when the debtor has signed a writing which validly acknowledges the debt" (*Lynford v Williams, 34 AD3d 761, 762, 826 N.Y.S.2d 335*; *see Mosab Constr. Corp. v Prospect Park Yeshiva, Inc., 124 AD3d 732, 733, 2 N.Y.S.3d 197*). To constitute a valid acknowledgment, a "writing must be signed and recognize an existing debt and must contain nothing inconsistent with an intention on the part of the debtor to pay it" (*Sichol v Crocker, 177 AD2d 842, 843, 576 N.Y.S.2d 457* [internal quotation marks omitted]; *see U.S. Bank N.A. v Martin, 144 AD3d at 892-893*; *Mosab Constr. Corp. v Prospect Park Yeshiva, Inc., 124 AD3d at 733*). Contrary to Deutsche [**4] Bank's contention, a letter written by Aird that accompanied his second short sale package submitted to Deutsche Bank's loan servicer did not constitute an unqualified acknowledgment of the debt or manifest a promise to repay the debt sufficient to reset the running of the statute of limitations (*see **U.S. Bank, N.A. v Kess, 159 AD3d 767, 768-769, 71 N.Y.S.3d 635***; *U.S. Bank N.A. v Martin, 144 AD3d at 892-893*; *Hakim v Peckel Family Ltd. Partnership, 280 AD2d 645, 721 N.Y.S.2d 543*; *Sichol v Crocker, 177 AD2d at 843*).

Deutsche Bank's remaining contentions are without merit. Thus, Deutsche Bank failed to raise a triable issue of fact in opposition to the plaintiff's motion and failed to establish its

prima facie entitlement to summary judgment dismissing the complaint insofar as asserted against it.

Accordingly, we agree with the Supreme Court's determination to grant that branch of the plaintiff's motion which was for summary judgment on the complaint insofar as asserted against Deutsche Bank and to deny Deutsche Bank's cross motion for summary judgment dismissing the complaint insofar as asserted against it.

SCHEINKMAN, P.J., RIVERA, CHAMBERS and LASALLE, JJ., concur.

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U.S. Bank, N.A. v Kess

Supreme Court of New York, Appellate Division, Second Department

March 7, 2018, Decided

2016-06713

Reporter
159 A.D.3d 767 *; 71 N.Y.S.3d 635 **; 2018 N.Y. App. Div. LEXIS 1424 ***; 2018 NY Slip Op 01498 ****

[****1] U.S. Bank, National Association, etc., respondent, v Philip Kess, etc., appellant, et al., defendants. (Index No. 600988/15)

Core Terms

foreclosure action, mortgage, statute of limitations, individually, time-barred, raise a question, limitations, foreclose, six-year, tolled

Counsel: [***1] Westerman Ball Ederer Miller Zucker & Sharfstein, LLP, Uniondale, NY (David Gise of counsel), for appellant.

Shapiro DiCaro & Barak, LLC, Rochester, NY (Austin T. Shufelt of counsel), for respondent.

Judges: REINALDO E. RIVERA, J.P., JEFFREY A. COHEN, SYLVIA O. HINDS-RADIX, VALERIE BRATHWAITE NELSON, JJ. RIVERA, J.P., COHEN, HINDS-RADIX and BRATHWAITE NELSON, JJ., concur.

Opinion

[*767] [**636] DECISION & ORDER

In an action to foreclose a mortgage, the defendant Philip Kess appeals, as limited by his brief, from so much of an order of the Supreme Court, Suffolk County (Santorelli, J.), dated May 4, 2016, as denied that branch of his motion which was pursuant to CPLR 3211(a)(5) to dismiss the complaint insofar as asserted against him as time-barred.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, and that branch of the motion of the defendant Philip Kess which was pursuant to CPLR 3211(a)(5) to dismiss the complaint insofar as asserted against him as time-barred is granted.

The plaintiff commenced this mortgage foreclosure action on February 2, 2015, against, among others, the defendant Philip Kess, individually and on behalf of the estate of Winifred Kess. Kess moved, inter alia, pursuant to CPLR 3211(a)(5) to dismiss the complaint [***2] insofar as asserted against him, individually and in his representative capacity, on the ground that the six-year statute of limitations had run. In support of the motion, he submitted, among other things, the complaint in a prior action commenced by the plaintiff in May 2008 to foreclose the same mortgage (hereinafter the 2008 foreclosure action), in which the plaintiff elected to call due the entire amount secured by the mortgage, and proof that the 2008 foreclosure action was voluntarily discontinued by the plaintiff in October 2014. The plaintiff opposed the motion, arguing that the statute of limitations was tolled for 18 months pursuant to [*768] CPLR 210(b) by the June 4, 2013 death of Kess's wife, who was named as a [**637] defendant in the 2008 foreclosure action. In the order appealed from, the Supreme Court denied that branch of Kess's motion, finding that the death of Kess's wife tolled the statute of limitations for 18 months, thereby making the instant action timely.

In support of his motion, Kess demonstrated that the six-year statute of limitations (*see* CPLR 213[4]) began to run on May 6, 2008, when the plaintiff accelerated the mortgage debt and commenced the 2008 foreclosure action (*see* Albertina Realty Co. v Rosbro Realty Corp., 258 NY 472, 476, 180 N.E. 176; Deutsche Bank Natl. Trust Co. v Gambino, 153 AD3d 1232, 1233, 61 N.Y.S.3d 299; U.S. Bank N.A. v Martin, 144 AD3d 891, 892, 41 N.Y.S.3d 550; EMC Mtge. Corp. v Smith, 18 AD3d 602, 603, 796 N.Y.S.2d 364). Since [***3] the plaintiff did not commence the instant foreclosure action until more than six years later, Kess sustained his initial burden of demonstrating, prima facie, that this action was untimely (*see*

U.S. Bank N.A. v Martin, 144 AD3d at 892; *Lessoff v 26 Ct. St. Assoc., LLC, 58 AD3d 610, 611, 872 N.Y.S.2d 144)*. The burden then shifted to the plaintiff to present admissible evidence establishing that the action was timely or to raise a **[****2]** question of fact as to whether the action was timely (*see U.S. Bank N.A. v Martin, 144 AD3d at 892*; *Lessoff v 26 Ct. St. Assoc., LLC, 58 AD3d at 611*).

Contrary to the Supreme Court's determination, the plaintiff failed to establish that the action was timely or to raise a question of fact with respect thereto. *CPLR 210(b)* provides that "[t]he period of eighteen months after the death . . . of a person against whom a cause of action exists is not a part of the time within which the action must be commenced against his [or her] executor or administrator." The statute plainly is limited in scope to the executor or administrator of the decedent's estate and does not extend to other defendants in the same action (*see Laurenti v Teatom, 210 AD2d 300, 301, 619 N.Y.S.2d 754*; *Anselmo v Copertino 134 Misc 2d 956, 513 N.Y.S.2d 596 [Sup Ct, Suffolk County]*). Consequently, *CPLR 210(b)* could not extend the statute of limitations period as to Kess individually. Furthermore, the plaintiff failed to establish that Kess was the administrator or executor of his deceased wife's estate, a point which Kess denied in reply **[***4]** to the plaintiff's opposition. Thus, the Supreme Court erred in finding that the action was timely pursuant to *CPLR 210(b)*.

In addition, the purported loan modification application submitted by the plaintiff in opposition to the motion was not an acknowledgment of the debt and an unconditional promise **[*769]** to repay the debt sufficient to reset the running of the statute of limitations (*see Sichol v Crocker, 177 AD2d 842, 843, 576 N.Y.S.2d 457*; *see also* ***National Loan Invs., L.P. v Piscitello, 21 A.D.3d 537, 538, 801 N.Y.S.2d 331***; *Albin v Dallacqua, 254 AD2d 444, 445, 679 N.Y.S.2d 402*; *see generally Petito v Piffath, 85 NY2d 1, 8, 647 N.E.2d 732, 623 N.Y.S.2d 520)*.

The plaintiff's remaining contentions are improperly raised for the first time on appeal (*see Hudson City Sav. Bank v 59 Sands Point, LLC, 153 AD3d 611, 613, 57 N.Y.S.3d 398*; *Beneficial Homeowner Serv. Corp. v Tovar, 150 AD3d 657, 659, 55 N.Y.S.3d 59)*.

Accordingly, the Supreme Court should have granted that branch of Kess's motion which was to dismiss the complaint insofar as asserted against him as time-barred.

[638]** RIVERA, J.P., COHEN, HINDS-RADIX and BRATHWAITE NELSON, JJ., concur.

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Cited
As of: November 8, 2018 8:03 PM Z

Yadegar v Deutsche Bank Natl. Trust Co.

Supreme Court of New York, Appellate Division, Second Department

August 29, 2018, Decided

2016-05931, 2016-05940, 2016-08253

Reporter
164 A.D.3d 945 *; 2018 N.Y. App. Div. LEXIS 5884 **; 2018 NY Slip Op 05957 ***; 2018 WL 4100824

Judgment affirmed.

[***1] Sharona Yadegar, respondent, v Deutsche Bank National Trust Company, etc., appellant, et al., defendant. (Index No. 607556/15)

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THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

Core Terms

mortgage, summary judgment, cross motion, statute of limitations, leave to renew, cancel, foreclosure action, defense motion, orders

Case Summary

Overview

HOLDINGS: [1]-In a borrower's action pursuant to *RPAPL 1501(4)* to cancel and discharge of record a mortgage, the borrower met her prima facie burden for summary judgment on her complaint by establishing that the lender's commencement of a new foreclosure action would be time-barred by the six-year statute of limitations in *CPLR 213(4)*; [2]-The lender failed to raise a triable issue of fact as to whether the statute of limitations was tolled or revived by the borrower's acknowledgement of the debt pursuant to *General Obligations Law § 17-101* because the borrower's letter seeking authorization for a short sale of the property and other documents did not constitute an unqualified acknowledgment of the debt sufficient to reset the statute of limitations; [3]-The letter, while arguably acknowledging the existence of the mortgage, disclaimed any intent to pay it with her own funds.

Outcome

LexisNexis® Headnotes

Governments > Legislation > Statute of Limitations > Time Limitations

Real Property Law > Financing > Foreclosures > Defenses

Real Property Law > ... > Mortgages & Other Security Instruments > Satisfaction & Termination > Statute of Limitations

HN1[] **Statute of Limitations, Time Limitations**

Pursuant to *RPAPL 1501(4)*, a person having an estate or an interest in real property subject to a mortgage can seek to cancel and discharge that encumbrance where the period allowed by the applicable statute of limitations for the commencement of an action to foreclose the mortgage has expired, provided that the mortgagee or its successor is not in possession of the subject real property at the time the action to cancel and discharge the mortgage is commenced. An action to foreclose a mortgage is governed by a six-year statute of limitations. *CPLR 213(4)*. Even if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt.

Governments > Legislation > Statute of Limitations > Extensions & Revivals

Real Property Law > ... > Mortgages & Other Security Instruments > Satisfaction & Termination > Statute of Limitations

HN2[] **Statute of Limitations, Extensions & Revivals**

General Obligations Law § 17-101 effectively revives a time-barred claim when the debtor has signed a writing which validly acknowledges the debt. To constitute a valid acknowledgment, a writing must be signed and recognize an existing debt and must contain nothing inconsistent with an intention on the part of the debtor to pay it.

Counsel: [**1] McGlinchey Stafford, New York, NY (Brian S. McGrath of counsel), for appellant.

Rivkin Radler LLP, Uniondale, NY (David M. Grill, Evan R. Schieber, and Cheryl Korman of counsel), for respondent.

Judges: RUTH C. BALKIN, J.P., LEONARD B. AUSTIN, SYLVIA O. HINDS-RADIX, FRANCESCA E. CONNOLLY, JJ. BALKIN, J.P., AUSTIN, HINDS-RADIX and CONNOLLY, JJ., concur.

Opinion

[*945] DECISION & ORDER

In an action pursuant to *RPAPL 1501(4)* to cancel and discharge of record a mortgage, the defendant Deutsche Bank National Trust Company appeals from three orders of the Supreme Court, Nassau County (Julianne T. Capetola, J.), dated April 12, 2016, May 16, 2016, and June 22, 2016. The orders dated April 12, 2016, and May 16, 2016, each granted the plaintiff's motion for summary judgment on the complaint, [*946] denied that defendant's cross motion for summary judgment dismissing the complaint insofar as asserted against it, and directed the Nassau County Clerk to cancel and discharge of record the subject mortgage. The order dated June 22, 2016, denied that defendant's motion for leave to renew with respect to the plaintiff's motion and its cross motion.

ORDERED that the appeal from the order dated April 12, 2016, is dismissed, as that order was superseded [**2] by the order dated May 16, 2016; and it is further,

ORDERED that the orders dated May 16, 2016, and June 22, 2016, are affirmed; and it is further,

ORDERED that one bill of costs is awarded to the plaintiff. In October 2004, the plaintiff obtained a loan from Washington Mutual Bank, FA, which was secured by a mortgage on real property located in Old Westbury. In March 2008, the defendant Deutsche Bank National Trust Company (hereinafter the defendant), as Washington Mutual Bank, FA's assignee, accelerated the debt by commencing an action to foreclose the mortgage (hereinafter the 2008 foreclosure action). In April 2009, the defendant commenced a second action to foreclose the same mortgage (hereinafter the 2009 foreclosure action). The 2008 foreclosure action was discontinued in January 2012, and the 2009 foreclosure action was dismissed as abandoned pursuant to *CPLR 3215* in September 2012.

On November 19, 2015, the plaintiff commenced this action pursuant to *RPAPL 1501(4)* to cancel and discharge of record the subject mortgage. The plaintiff moved for summary judgment on the complaint, and the defendant cross-moved for summary judgment dismissing the complaint insofar as asserted against it. In orders dated [**3] April 12, 2016, and May 16, 2016, the [***2] Supreme Court, in both orders, granted the plaintiff's motion for summary judgment, denied the defendant's cross motion, and directed the Nassau County Clerk to cancel and discharge of the record the mortgage.

The defendant moved for leave to renew with respect to the plaintiff's motion and its cross motion. In an order dated June 22, 2016, the Supreme Court denied the defendant's motion for leave to renew.

HN1[] Pursuant to *RPAPL 1501(4)*, a person having an estate or an interest in real property subject to a mortgage can seek to cancel and discharge that encumbrance where the period allowed by the applicable statute of limitations for the commencement of an action to foreclose the mortgage has expired, provided that the mortgagee or its successor is not in possession [*947] of the subject real property at the time the action to cancel and discharge the mortgage is commenced (*see RPAPL 1501[4]*; *Lubonty v U.S. Bank N.A., 159 AD3d 962, 963, 74 N.Y.S.3d 279*). An action to foreclose a mortgage is governed by a six-year statute of limitations (*see CPLR 213[4]*; *Lubonty v U.S. Bank N.A., 159 AD3d at 963*). "[E]ven if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt" (*Lubonty v U.S. Bank N.A., 159 AD3d at 963* [internal quotation [**4] marks omitted]).

Here, the plaintiff met her prima facie burden for summary judgment on her complaint by establishing that the commencement of a new foreclosure action would be time-barred by the applicable six-year statute of limitations (*see U.S. Bank N.A. v Martin, 144 AD3d 891, 891, 41 N.Y.S.3d 550*; *JBR Constr. Corp. v Staples, 71 AD3d 952, 953, 897 N.Y.S.2d 223*). Thus, the burden shifted to the defendant to raise a triable issue of fact as to whether the statute of limitations was tolled or revived (*see JBR Constr. Corp. v Staples, 71 AD3d at 953*).

HN2[↑] "General Obligations Law § 17-101 effectively revives a time-barred claim when the debtor has signed a writing which validly acknowledges the debt" (Lynford v Williams, 34 AD3d 761, 762, 826 N.Y.S.2d 335; see Mosab Constr. Corp. v Prospect Park Yeshiva, Inc., 124 AD3d 732, 733, 2 N.Y.S.3d 197). To constitute a valid acknowledgment, a "writing must be signed and recognize an existing debt and must contain nothing inconsistent with an intention on the part of the debtor to pay it" (Sichol v Crocker, 177 AD2d 842, 843, 576 N.Y.S.2d 457 [internal quotation marks omitted]; see U.S. Bank N.A. v Martin, 144 AD3d at 892-893; Mosab Constr. Corp. v Prospect Park Yeshiva, Inc., 124 AD3d at 733).

Contrary to the defendant's contention, the plaintiff's letter accompanying her request for the defendant to authorize a short sale of the property, and the other documents relied on by the defendant, did not constitute an unqualified acknowledgment of the debt sufficient to reset the statute of limitations (see **U.S. Bank, N.A. v Kess, 159 AD3d 767, 768, 71 N.Y.S.3d 635**; U.S. Bank N.A. v Martin, 144 AD3d at 892-893; Hakim v Peckel Family Ltd. Partnership., 280 AD2d 645, 721 N.Y.S.2d 543; Sichol v Crocker, 177 AD2d at 843). The plaintiff's letter, while arguably acknowledging the existence of the mortgage, disclaimed any intent to pay it with the plaintiff's **[**5]** own funds (see Lew Morris Demolition Co. v Board of Educ. of City of N.Y., 40 NY2d 516, 520-521, 355 N.E.2d 369, 387 N.Y.S.2d 409; **U.S. Bank, N.A. v Kess, 159 AD3d at 768-769**; Sichol v Crocker, 177 AD2d at 843). Thus, the defendant failed to raise a triable issue of fact in opposition to the **[*948]** plaintiff's motion for summary judgment and, with respect to its cross motion, the defendant failed to establish its prima facie entitlement to summary judgment dismissing the complaint insofar as asserted against it.

We agree with the Supreme Court's denial of the defendant's motion for leave to renew with respect to the plaintiff's motion and its cross motion. The defendant did not provide a reasonable justification for the failure to present the new facts in opposition to the plaintiff's motion and in support of its cross motion (see CPLR 2221[e][3]; Flagstar Bank, FSB v Damaro, 145 AD3d 858, 859, 44 N.Y.S.3d 128; Matter of Kopicel v Schnaier, 145 AD3d 599, 599, 42 N.Y.S.3d 789; Cioffi v S.M. Foods, Inc., 142 AD3d 526, 530, 36 N.Y.S.3d 664; Fardin v 61st Woodside Assoc., 125 AD3d 593, 3 N.Y.S.3d 101; Jovanovic v Jovanovic, 96 AD3d 1019, 1020, 947 N.Y.S.2d 554; Rowe v NYCPD, 85 AD3d 1001, 1003, 926 N.Y.S.2d 121; Foley v Roche, 68 AD2d 558, 568, 418 N.Y.S.2d 588). In any event, the new evidence submitted by the defendant would not have changed the prior determination (see Deutsche Bank Natl. Trust Co. v Adrian, 157 AD3d 934, 935, 69 N.Y.S.3d 706; Wells Fargo Bank, N.A., v Eisler, 118 AD3d 982, 983, 988 N.Y.S.2d 682; EMC Mtge. Corp. v Patella, 279 AD2d 604, 720 N.Y.S.2d 161). Contrary to the defendant's contention, the court providently exercised its discretion in considering the plaintiff's untimely **[***3]** opposition papers to the defendant's motion for leave to renew (see CPLR 2004, 2214; Fernandez v City of Yonkers, 139 AD3d 895, 896, 31 N.Y.S.3d 595).

Accordingly, we agree with the Supreme Court's determination to grant the plaintiff's motion for summary judgment on the complaint, deny the defendant's cross motion for summary judgment dismissing the complaint **[**6]** insofar as asserted against it, and deny the defendant's motion for leave to renew.

BALKIN, J.P., AUSTIN, HINDS-RADIX and CONNOLLY, JJ., concur.

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PSP-NC, LLC v Raudkivi

Supreme Court of New York, Appellate Division, Second Department

April 6, 2016

2015-00044, 2015-00045

Reporter
138 A.D.3d 709 *; 29 N.Y.S.3d 51 **; 2016 N.Y. App. Div. LEXIS 2512 ***; 2016 NY Slip Op 02632 ****

[**1]** PSP-NC, LLC, Respondent, v Paavo Raudkivi, Appellant, et al., Defendants. (Index No. 8675/12)

Core Terms

mortgage, limitations period, reference order, discharge in bankruptcy, statute of limitations, summary judgment, bankruptcy stay, cross motion, prima facie, renewed, entitlement to judgment, summary judgment motion, action to foreclose, mortgage payment, court properly, matter of law, Obligations, accelerated, appointed, automatic, foreclose, contends, appeals, default, tolled

Case Summary

Overview

HOLDINGS: [1]-The trial court properly granted an assignee's motion for summary judgment in its action to foreclose a mortgage and appointed a referee to compute the amount due to the assignee because the assignee produced the mortgage, the unpaid note, and evidence of the default and the borrower failed to raise a triable issue of fact and action was not time-barred where, pursuant to *General Obligations Law § 17-105(1)*, the borrower's bankruptcy plan, in which he acknowledged the mortgage debt and promised to repay it, renewed the limitations period in *CPLR 213(4)* and the automatic bankruptcy stay tolled the renewed limitations period pursuant to *CPLR 204(a)*.

Outcome
Orders affirmed.

Headnotes/Syllabus

Headnotes

Limitation of Actions—Acknowledgment of Debt—Acknowledgment of Mortgage Debt in Bankruptcy Plan Renewed Limitations Period—Foreclosure Action Not Time-Barred

Counsel: **[***1]** Richard C. Ebeling, Putnam Valley, NY, for appellant.

Lawrence & Walsh, P.C., Hempstead, NY (Eric P. Wainer of counsel), for respondent.

Judges: WILLIAM F. MASTRO, J.P., L. PRISCILLA HALL, JOSEPH J. MALTESE, HECTOR D. LASALLE, JJ. MASTRO, J.P., HALL, MALTESE and LASALLE, JJ., concur.

Opinion

[51]** **[*709]** In an action to foreclose a mortgage, the defendant Paavo Raudkivi appeals from (1) an order of the Supreme Court, Nassau County (Adams, J.), entered May 29, 2014, which granted the plaintiff's motion for summary judgment on the complaint insofar as asserted against him and for an order of reference, and denied his cross motion for summary judgment dismissing **[*710]** the complaint insofar as asserted against **[**52]** him, and (2) an order of the same court, also entered May 29, 2014, which, among other things, upon the granting of that branch of the plaintiff's motion which was for an order of reference, appointed a referee.

Ordered that the orders are affirmed, with one bill of costs.

In 1998, the defendant Paavo Raudkivi executed and delivered a mortgage to the plaintiff's predecessor-in-interest, Greenpoint Bank (hereinafter Greenpoint), as security for a note. Raudkivi defaulted on his payment obligations, and in **[***2]** October 2001 Greenpoint accelerated the debt and commenced an action to foreclose the mortgage. In October 2002 Raudkivi commenced a Chapter 13 bankruptcy proceeding, and on April 4, 2003, he executed a Chapter 13

bankruptcy plan. In the plan, Raudkivi agreed to pay Greenpoint $22,201 in pre-petition arrears, and agreed to make all of his post-petition mortgage payments outside of the plan. On April 23, 2003, the Bankruptcy Court confirmed the plan.

Raudkivi made his mortgage payments as agreed through July 2005, when he stopped making payments. He was granted a discharge in bankruptcy on October 19, 2006. The note and mortgage were assigned to the plaintiff in July 2011, and in July 2012 the plaintiff commenced this action to foreclose the mortgage. The plaintiff moved for summary judgment on the complaint insofar as asserted against Raudkivi and for an order of reference, and Raudkivi cross-moved for summary judgment dismissing the complaint insofar as asserted against him on the ground that it was barred by the statute of limitations. The Supreme Court granted the plaintiff's motion, denied Raudkivi's cross motion, and appointed a referee to compute the amount due to the plaintiff **[***3]** on the note and mortgage. Raudkivi appeals.

The plaintiff established its prima facie entitlement to judgment as a matter of law **[****2]** by producing the mortgage, the unpaid note, and evidence of the default (*see Woori America Bank v Global Universal Group Ltd., 134 AD3d 699, 20 NYS3d 597 [2015]; Deutsche Bank Natl. Trust Co. v Abdan, 131 AD3d 1001, 1002, 16 NYS3d 459 [2015]; JP Morgan Chase Bank v Schott, 130 AD3d 875, 876, 15 NYS3d 359 [2015]; Nationstar Mtge., LLC v Catizone, 127 AD3d 1151, 1152, 9 NYS3d 315 [2015]*). In opposition to that prima facie showing, Raudkivi failed to raise a triable issue of fact.

Raudkivi contends that this mortgage foreclosure action is barred by the applicable six-year statute of limitations (*see CPLR 213 [4]*). He notes that the statute of limitations began to run in October 2001, when Greenpoint accelerated the debt and commenced the first action to foreclose the mortgage (*see* **[*711]** *EMC Mtge. Corp. v Smith, 18 AD3d 602, 603, 796 NYS2d 364 [2005]; Clayton Nat'l, Inc. v Guldi, 307 AD2d 982, 982, 763 NYS2d 493 [2003]*), and that the limitations period was tolled by the automatic bankruptcy stay when he filed his bankruptcy petition in October 2002 (*see 11 USC § 362 [a]; Manufacturers & Traders Trust Co. v Foy, 43 AD3d 1005, 1007, 843 NYS2d 637 [2007]; Homeside Lending, Inc. v Watts, 16 AD3d 551, 552, 792 NYS2d 513 [2005]*). He contends that the limitations period began to run again when he was granted his discharge in bankruptcy in October of 2006 (*see 11 USC § 362 [c] [2] [C]*), and ended in October 2011, by virtue of the one-year period between accrual of the claim in 2001 and the beginning of the bankruptcy stay in 2002.

However, Raudkivi's Chapter 13 bankruptcy plan, in which he acknowledged the mortgage debt and promised to repay it, renewed the limitations period **[**53]** (*see General Obligations Law § 17-105 [1]; Nat'l Loan Investors, L.P. v Piscitello, 21 AD3d 537, 538, 801 NYS2d 331 [2005]; Albin v Dallacqua, 254 AD2d 444, 445, 679 NYS2d 402 [1998]; see e.g. Lew Morris Demolition Co. v Board of Educ. of City of N.Y., 40 NY2d 516, 520-521, 355 NE2d 369, 387 NYS2d 409 [1976]*). The automatic **[***4]** bankruptcy stay, which was in effect when Raudkivi executed his Chapter 13 bankruptcy plan, tolled the renewed limitations period (*see CPLR 204 [a]; Zuckerman v 234-6 W. 22 St. Corp., 267 AD2d 130, 699 NYS2d 284 [1999]; cf. Saini v Cinelli Enterprises Inc., 289 AD2d 770, 771, 733 NYS2d 824 [2001]*), so the renewed limitations period did not begin to run until Raudkivi was granted his discharge in bankruptcy in October of 2006 (*see 11 USC § 362 [c] [2] [C]*). Since this action was commenced less than six years later, in July of 2012, this action is not time-barred.

Raudkivi's remaining contentions are without merit.

Accordingly, the Supreme Court properly granted the plaintiff's motion for summary judgment on the complaint insofar as asserted against Raudkivi and for an order of reference. For the same reasons, Raudkivi failed to demonstrate his prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against him, and therefore, the court properly denied his cross motion (*see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853, 476 NE2d 642, 487 NYS2d 316 [1985]*). Mastro, J.P., Hall, Maltese and LaSalle, JJ., concur.

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Nat'l Loan Investors, L.P. v. Piscitello

Supreme Court of New York, Appellate Division, Second Department

June 17, 2005, Argued ; August 22, 2005, Decided

2005-00438

Reporter
21 A.D.3d 537 *; 801 N.Y.S.2d 331 **; 2005 N.Y. App. Div. LEXIS 8709 ***

National Loan Investors, L.P., Respondent, v Philip Piscitello, Jr., Appellant, et al., Defendants. (Index No. 14583/03)

Core Terms

appearance, lack of personal jurisdiction, statute of limitations, foreclosure action, conferring, correctly, mortgage, summons

Case Summary

Procedural Posture

In an action to foreclose a mortgage, defendant appealed from an order of the Supreme Court, Suffolk County (New York), which denied his motion, in effect, to vacate his default in answering and to dismiss the complaint pursuant to *N.Y. C.P.L.R. 3211(a)(8)* on the ground of lack of personal jurisdiction.

Overview

Contrary to defendant's claims, he failed to show that his attorney's appearance on his behalf was unauthorized. The documentary evidence established that the attorney was retained to provide representation in both a bankruptcy matter and the instant foreclosure action. The trial court correctly determined that defendant was properly served pursuant to *N.Y. C.P.L.R. 308(4)*. Therefore, that branch of the appellant's motion which was to dismiss the action pursuant to *N.Y. C.P.L.R. 3211(a)(8)* on the ground of lack of personal jurisdiction was properly denied. The trial court likewise correctly determined that defendant's defense to foreclosure was without merit. Even if commencement of the action was barred by the statute of limitations, defendant's bankruptcy filing, in which he acknowledged the mortgage debt and promised to repay it within six months, sufficed to extend the statute of limitations. *N.Y. Gen. Oblig. Law § 17-105(1)*. There was no evidence properly establishing that plaintiff limited partnership rejected defendant's bankruptcy plan, as this matter was raised for the first time in defendant's reply papers on the motion.

Outcome
The order was affirmed, with costs.

LexisNexis® Headnotes

Administrative Law > Separation of Powers > Jurisdiction

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Challenges

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN1[] **Separation of Powers, Jurisdiction**

Generally, an appearance by a defendant in an action is deemed to be the equivalent of personal service of a summons upon him, and therefore confers personal jurisdiction over him, unless he asserts an objection to jurisdiction either by way of motion or in his answer. By statute, a party may appear in an action by attorney, according to *N.Y. C.P.L.R. 321*, and such an appearance constitutes an appearance by the party for purposes of conferring jurisdiction.

Headnotes/Syllabus

Headnotes

[***1] Appearances--Appearance by Attorney.--Appellant failed to demonstrate that appearance of his attorney on his

behalf in action to foreclose mortgage was unauthorized; attorney was retained to provide representation in both bankruptcy matter and foreclosure action.

Limitation of Actions--Acknowledgment of Debt.--Even if commencement of mortgage foreclosure action was barred by statute of limitations, appellant's bankruptcy filing, in which he acknowledged mortgage debt and promised to repay it within six months, sufficed to extend statute of limitations (*see* General Obligations Law § 17-105 [1]).

Counsel: Joseph A. Piscitello, Smithtown, N.Y., for appellant.

Delbello Donnellan Weingarten Tartaglia Wise & Wiederkeher, LLP, White Plains, N.Y. (Frank J. Haupel of counsel), for respondent.

Judges: Robert W. Schmidt, J.P., Sondra Miller, Fred T. Santucci, Peter B. Skelos, JJ. Schmidt, J.P., S. Miller, Santucci and Skelos, JJ., concur.

Opinion

[*537] **[**332]** In an action to foreclose a mortgage, the defendant Philip Piscitello, Jr., appeals from an order of the Supreme Court, Suffolk County (Mullen, J.), dated December 8, 2004, which denied his motion, in effect, to vacate his default in answering and to dismiss the complaint pursuant to CPLR 3211 (a) (8) on the ground of lack of personal jurisdiction.

Ordered that the order is affirmed, with costs.

HN1[↑] Generally, "[a]n appearance by a defendant in an action is deemed to be the equivalent of personal service of a summons upon him, and therefore confers personal jurisdiction over him, unless he asserts an objection to jurisdiction either by way of motion or in his answer . . . By statute, a party may appear **[***2]** in an action by attorney (CPLR 321), and such an appearance constitutes an appearance by the party for purposes of conferring **[*538]** jurisdiction" (*Skyline Agency v Coppotelli, Inc., 117 AD2d 135, 140, 502 NYS2d 479 [1986]*). Contrary to the appellant's contentions, he failed to demonstrate that the appearance of his attorney, Leif Rubenstein, on his behalf in this action, was unauthorized. The documentary evidence established that Rubenstein was retained to provide representation in both a bankruptcy matter and this foreclosure action (*cf. New Is. Investors v Wynne, 251 AD2d 560, 674 NYS2d 593 [1998]*; *Greenpoint Sav. Bank v Mione, 213 AD2d 375, 623 NYS2d 317 [1995]*). Indeed, the appellant failed to explain how Rubenstein knew to file a notice of appearance in the foreclosure action other than as a result of the appellant having provided Rubenstein with a copy of the summons and complaint (*see Simmons First Natl. [**333] Bank v Mandracchia, 248 AD2d 375, 669 NYS2d 646 [1998]*). In any event, the Supreme Court correctly determined that the appellant was properly served pursuant to CPLR 308 (4) (*see 96 Pierrepont v Mauro, 304 AD2d 631, 757 NYS2d 468 [2003]*; *Matrix Fin. Servs. Corp. v McKiernan, 295 AD2d 579, 580, 744 NYS2d 706 [2002]*; **[***3]** *Simmons First Natl. Bank v Mandracchia, supra*; *Gross v Fruchter, 230 AD2d 710, 711, 646 NYS2d 53 [1996]*). Therefore, that branch of the appellant's motion which was to dismiss the action pursuant to CPLR 3211 (a) (8) on the ground of lack of personal jurisdiction was properly denied.

The Supreme Court likewise correctly determined that the appellant's defense to foreclosure was without merit. Even if the commencement of this action was barred by the statute of limitations (*see EMC Mtge. Corp. v Patella, 279 AD2d 604, 605-606, 720 NYS2d 161 [2001]*), the appellant's bankruptcy filing, in which he acknowledged the mortgage debt and promised to repay it within six months, sufficed to extend the statute of limitations (*see* General Obligations Law § 17-105 [1]; *Albin v Dallacqua, 254 AD2d 444, 679 NYS2d 402 [1998]*). We note that there is no evidence properly in the record establishing that the plaintiff rejected the appellant's bankruptcy plan as this matter was raised for the first time in the appellant's reply papers on the motion (*see Dobin v Town of Islip, 11 AD3d 577, 579, 783 NYS2d 64 [2004]*; *Sanz v Discount Auto, 10 AD3d 395, 780 NYS2d 763 [2004]*; **[***4]** *Rengifo v City of New York, 7 AD3d 773, 776 NYS2d 865 [2004]*; *Martin v New York Hosp., 295 AD2d 485, 486, 745 NYS2d 32 [2002]*).

The appellant's remaining contentions are without merit. Schmidt, J.P., S. Miller, Santucci and Skelos, JJ., concur.

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156 A.D.3d 1
Supreme Court, Appellate Division,
First Department, New York.

BANK OF AMERICA, NATIONAL ASSOCIATION, Plaintiff–Appellant,
v.
Sarah BRANNON, Defendant–Respondent.
[And Other Actions].

Oct. 31, 2017.

Synopsis

Background: Plaintiff, who had assigned the home mortgage after summary judgment had been granted to plaintiff in foreclosure action, filed motion to vacate order granting summary judgment, asserting that affidavits of merit might not have been properly notarized, and filed new motion for summary judgment, based on new affidavit of merit by **assignee's** employee. The Supreme Court, Bronx County, granted the motion to vacate but denied the new motion for summary judgment. Plaintiff filed another motion for summary. The Supreme Court, Mark Friedlander, J., denied the motion. Plaintiff appealed.

Holdings: The Supreme Court, Appellate Division, Andrias, J., held that:

[1] failings in notarizations for affidavits of merit for plaintiff's original motion for summary judgment could be corrected;

[2] alleged flaw in notarization for a later affidavit of merit could be disregarded;

[3] plaintiff made prima facie showing of entitlement to judgment as a matter of law; and

[4] allegations in affidavit of merit submitted by employee of plaintiff's **assignee** sufficed to establish mortgagor's default and the basis of employee's knowledge.

Reversed and remanded.

Gesmer, J., filed an opinion dissenting in part.

West Headnotes (9)

[1] **Judgment**
Execution of affidavit

Failings in notarizations for affidavits of merit for plaintiff's original motion for summary judgment, in action for foreclosure of home mortgage, affected only the ability of trial court to grant that motion, not the viability of the action as a whole, and thus, the subsequent substitution, nunc pro tunc, of newly-signed affidavits of merit, which were provided in an effort to bring plaintiff in compliance with an administrative order governing affidavits of merit, was permitted.

Cases that cite this headnote

[2] **Judgment**
Execution of affidavit

Alleged flaw in notarization for affidavit of merit, i.e., notarization allegedly failed to indicate the state or county in which notarization took place, was not fatal to plaintiff's summary judgment motion in action for foreclosure of home mortgage, where the trial court could disregard the alleged flaw because home mortgagor did not show that a substantial right of hers had been prejudiced. McKinney's CPLR 2101(f); McKinney's Executive Law § 142–a(2)(f).

Cases that cite this headnote

[3] **Mortgages and Deeds of Trust**
Holders of obligations secured and their agents;non-holders in possession

Plaintiff had standing to bring action for foreclosure of home mortgage, by virtue of its possession of indorsed-in-blank note at commencement of action.

3 Cases that cite this headnote

[4] **Judgment**

Liens and mortgages

Plaintiff, as movant for summary judgment in action for foreclosure of home mortgage, made prima facie showing of entitlement to judgment as a matter of law, by providing evidence of note and mortgage and proof of home mortgagor's default, including affidavit of facts from employee of plaintiff's **assignee**, as well as mortgagor's answer, in which she admitted that as of date of complaint she owed plaintiff $359,809.63 with interest, and in which she denied knowledge or information sufficient to form a belief as to plaintiff's allegations that she had failed to comply with conditions of mortgage and note by failing to pay principal and interest and/or taxes, assessments, water rates, insurance premiums, escrow and/or other charges that came due and payable.

2 Cases that cite this headnote

[5] **Judgment**

Matters Affecting Right to Judgment

Facts appearing in the summary judgment movant's papers which the opposing party does not controvert may be deemed to be admitted.

Cases that cite this headnote

[6] **Judgment**

Liens and mortgages

Home mortgagor waived any defenses, on plaintiff's motion for summary judgment in mortgage foreclosure action, that were based on plaintiff's lack of standing or plaintiff's failure to comply with a condition precedent, where mortgagor did not raise those defenses in her answer, and she did not bring a motion to dismiss the complaint on those grounds.

Cases that cite this headnote

[7] **Judgment**

Liens and mortgages

Home mortgagor's mere denial of receipt of service, as to motion for summary judgment in mortgage foreclosure action, was insufficient to rebut the presumption of service.

Cases that cite this headnote

[8] **Evidence**

Unofficial or **business records** in general

The affiant for an affidavit of merit in an action for foreclosure of a home mortgage, which is put before the court as evidence of mortgagor's default in payment, need not have personal knowledge of each of the facts asserted in the affidavit, and thus, in seeking to enforce a home mortgage loan, an **assignee** of an original lender or of an intermediary predecessor may use an original loan file prepared by its **assignor**, where it relies upon those **records** in the regular course of its **business**. McKinney's CPLR 4518(a).

Cases that cite this headnote

[9] **Mortgages and Deeds of Trust**

Weight and sufficiency

Allegations in affidavit of merit submitted by employee of plaintiff's **assignee**, which plaintiff was itself an **assignee** of original lender, sufficed to establish home mortgagor's default and the basis of employee's knowledge, in action for foreclosure of home mortgage, though employee did not state that he was familiar with **records** of original lender, where notice of default was sent to mortgagor by plaintiff's loan servicer, and employee indicated that he was personally familiar with the recordkeeping systems used by **assignee**, plaintiff, and plaintiff's loan servicer, and employee indicated that the **records** he relied on were made in the regular course of **business** and that he personally reviewed them.

1 Cases that cite this headnote

Attorneys and Law Firms

**354 Fein, Such & Crane, LLP, Syracuse (John A. Cirando, D.J. Cirando, Bradley E. Keem and Elizabeth deV. Moeller of counsel), for appellant.

Sarah Brannon, respondent pro se.

ROLANDO T. ACOSTA, P.J., ROSALYN H. RICHTER, RICHARD T. ANDRIAS, MARCY L. KAHN, ELLEN GESMER, JJ.

Opinion

ANDRIAS, J.

*3 On January 18, 2007, defendant Sarah Brannon obtained a $360,000 loan from GE Money Bank (GE), secured by a mortgage on her home in the Bronx. GE indorsed the mortgage note in blank, making it a bearer instrument.

*4 On September 17, 2007, plaintiff's agent, Litton Loan Servicing, LP, sent defendant a "Notice of Default and Intent to Accelerate" stating that defendant was in default for failing to pay amounts due and that the total amount needed to bring the loan current was $5,482.40 as of that date. On November 14, 2007, plaintiff commenced this foreclosure action alleging that defendant defaulted by failing to make the payment due on August 1, 2007. The mortgage was assigned to plaintiff by assignment dated November 29, 2007. In her answer, defendant, pro se, admitted that as of the date of the complaint she owed plaintiff $359,809.63 with interest from July 1, 2007 and did not raise any affirmative defenses.

In March 2008, plaintiff moved for summary judgment, supported, inter alia, by **355 an affidavit of Denise Bailey, Assistant Secretary of Litton, and an Affidavit of Merit and Amount due of Diane Dixon, Assistant Vice President of Litton. In opposition, defendant asserted that she had been in contact with Litton regarding a loan modification and was awaiting a complete review. She did not dispute her default.

By order dated April 24, 2008, plaintiff was granted summary judgment and a referee was appointed to compute the amount due. On November 2, 2009, plaintiff assigned the mortgage to IFS Properties, LLC. On February 16, 2011, a settlement conference was held and the matter was released to the Foreclosure Part.

In April 2014, plaintiff, by new counsel, moved to vacate the April 24, 2008 order because the Bailey and Dixon affidavits may not have been correctly notarized under New York law, and counsel could not comply with the requirements of Administrative Orders 548/10 and 431/11 of the Chief Administrative Judge of the Courts. Plaintiff also moved for summary judgment anew, based upon an affidavit, sworn to April 18, 2014, of Matthew Mattera, a managing member of IFS, and an affirmation of counsel certifying the accuracy of Mattera's affidavit. In opposition, defendant asserted that Mattera could not affirm the relevant facts because he was an employee of IFS, not plaintiff, and his affidavit did not describe the **records** upon which he relied. Defendant also asserted that she had no notice of the assignment to IFS.

By order dated September 15, 2014, the court granted plaintiff's motion to vacate the April 29, 2008 order. However, the court denied summary judgment on the ground that the defects in the affidavits in support of the original summary *5 judgment motion were not mistakes, omissions or mere irregularities that could be cured by a new affidavit.

In November 2014, plaintiff again moved for summary judgment based on an affidavit of Mattera dated November 3, 2014. In opposition, defendant questioned the validity of the assignment of the loan by plaintiff to IFS and complained that IFS had not given her the opportunity to get a loan modification. Defendant no longer alleged that Mattera failed to establish that he could affirm the facts necessary to establish her default. By order dated December 22, 2014, the court denied plaintiff's motion for the reasons stated in its September 15, 2014 order.

In February 2015, plaintiff moved for summary judgment for a third time. In support, plaintiff submitted the indorsed in blank note, the mortgage, and the default notice. Plaintiff also submitted an affidavit of Mattera dated January 31, 2015 and an affirmation of counsel asserting that plaintiff had demonstrated a prima facie case for foreclosure and that defendant had failed to plead any affirmative defenses.

In opposition, defendant alleged that she was not properly notified that the note had been transferred to IFS and that she was improperly served with the motion. Defendant did not challenge the sufficiency of Mattera's affidavit or refute his allegations concerning her default. Plaintiff's counsel replied that the mortgage did not require notice of a sale or transfer be given to defendant; that defendant had waived the defense of standing when she failed to raise it in her answer; that, in any case, plaintiff had standing because it was the holder of the indorsed-in-blank note when the action was commenced; and that defendant was properly served.

By order dated March 10, 2015, the court denied the motion, stating that it did not believe that plaintiff understood that **356 an action initiated on the basis of a false affidavit suffers from a fatal defect, which cannot be overcome with a subsequent affidavit. The court also stated that even if the error could be corrected in a new affidavit, the January 31, 2015 affidavit of Mattera was defective because it failed to indicate the state or county where the notarization took place.

[1] We now reverse to grant plaintiff's third motion for summary judgment. The failings in the supporting affidavits to the original motion for summary judgment only affected the ability of the court to grant that motion, not the viability of the action as a whole. The substitution, nunc pro tunc, of newly-signed affidavits of merit in a mortgage foreclosure action, provided in *6 an effort to bring a plaintiff in compliance with Administrative Order 431/11, is permitted (*see U.S. Bank N.A. v. Eaddy,* 109 A.D.3d 908, 971 N.Y.S.2d 336 [2d Dept.2013]).

[2] Furthermore, under the circumstances before us, the flaws in the notarization of Mattera's affidavit are not fatal to plaintiff's summary judgment motion (*see Matter of Cubisino v. Cohen,* 47 N.Y.S.2d 952, 953–954 [Sup.Ct., N.Y. County 1944], *affd.* 267 App.Div. 891, 48 N.Y.S.2d 798 [1st Dept.1944]; *Fisher v. Bloomberg,* 74 App.Div. 368, 369, 77 N.Y.S. 541 [1st Dept.1902]; *see also Sirico v. F.G.G. Prods., Inc.,* 71 A.D.3d 429, 434, 896 N.Y.S.2d 61 [1st Dept.2010]; *Todd v. Green,* 122 A.D.3d 831, 832, 997 N.Y.S.2d 155 [2d Dept.2014]). Pursuant to CPLR 2101(f) the court can disregard a defect in the Uniform Certificate of Acknowledgment unless a defendant has demonstrated that a substantial right of hers has been prejudiced. As no prejudice has been shown by defendant, the alleged defect should have been disregarded (*see Bank of N.Y. Mellon v. Vytalingam,* 144 A.D.3d 1070, 42 N.Y.S.3d 274 [2d Dept.2016]; *see also* Executive Law § 142–a [2] [f] [official certificate of notary public shall not be deemed invalid due to "the fact that the action was taken outside the jurisdiction where the notary public or commissioner of deeds was authorized to act"]).

[3] [4] Plaintiff established standing by virtue of its possession of the indorsed-in-blank note at the commencement of this action (*see Aurora Loan Servs., LLC v. Taylor,* 25 N.Y.3d 355, 361–362, 12 N.Y.S.3d 612, 34 N.E.3d 363 [2015]). It demonstrated its prima facie entitlement to judgment as a matter of law by providing evidence of the note and mortgage, and proof of defendant's default (*see Horizons Invs. Corp. v. Brecevich,* 104 A.D.3d 475, 961 N.Y.S.2d 112 [1st Dept.2013]). This included Mattera's affidavit of facts and defendant's answer in which she admitted that as of the date of the complaint she owed plaintiff $359,809.63 with interest from July 1, 2007, and denied knowledge or information sufficient to form a belief as to plaintiff's allegations that she "has/have failed to comply with the conditions of the mortgage and note by failing to pay principal and interest and/or taxes, assessments, water rates, insurance premiums, escrow and/or other charges that came due and payable on the 1st day of August 2007...."

[5] [6] [7] In opposition, defendant failed to provide evidence sufficient to raise an issue of fact as to an available defense. "Facts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted" (*Kuehne & Nagel v. Baiden,* 36 N.Y.2d 539, 544, 369 N.Y.S.2d 667, 330 N.E.2d 624 [1975]). Defendant did not deny receiving the notice of default or that she had defaulted *7 in her obligations under the note and mortgage. Defendant also waived any standing defense, or defense based on **357 plaintiff's alleged failure to comply with a condition precedent, since she did not raise those defenses in her answer, and did not bring a motion to dismiss the complaint on those grounds (see *Security Pac. Natl. Bank v. Evans,* 31 A.D.3d 278, 280–281, 820 N.Y.S.2d 2 [1st Dept.2006], *appeal dismissed* 8 N.Y.3d 837, 830 N.Y.S.2d 8, 862 N.E.2d 86 [2007]; *1199 Hous. Corp. v. International Fid. Ins. Co.,* 14 A.D.3d 383, 384, 788 N.Y.S.2d 88 [1st Dept.2005]). Defendant's mere denial of receipt of service of the motion is insufficient to rebut the presumption of service (*Kihl v. Pfeffer,* 94 N.Y.2d 118, 122, 700 N.Y.S.2d 87, 722 N.E.2d 55 [1999]).

The dissent agrees that the motion court should have granted plaintiff summary judgment on its foreclosure claim based on defendant's answer, in which she admitted the amount she owed plaintiff and waived any challenge to plaintiff's standing. However, the dissent would hold, sua sponte, that plaintiff is not entitled to an order of reference because its counsel could not affirm the facts necessary to satisfy his obligations under Administrative Order 431/11.

Administrative Order 431/11, which amends Administrative Order 548/10, requires the plaintiff's counsel in a residential mortgage foreclosure action to file an affirmation confirming that he or she communicated with a representative of the plaintiff who confirmed the factual accuracy of the plaintiff's pleadings, supporting documentation and submissions to the court (*see Wells Fargo Bank, N.A. v. Pabon,* 138 A.D.3d 1217, 1217–1218, 31 N.Y.S.3d 221 [3d Dept.2016]). "The order **incorporated** two forms for this purpose-an affirmation to be filed by the plaintiff's counsel ('shall file'), and an affidavit to be filed by the plaintiff's representative ('may file')" (*Bank of N.Y. Mellon v. Izmirligil,* 144 A.D.3d 1063, 1065, 42 N.Y.S.3d 270 [2d Dept.2016]).

To fulfill his obligations under Administrative Order 431/11, plaintiff's counsel submitted an affidavit that comported with the form provided in Administrative Order 431/11. Counsel stated that on April 21, 2014 he had communicated with Mattera,

> "who informed me that he/she/they (a) personally reviewed Plaintiff's documents and **records** relating to this case for factual accuracy; and (b) confirmed the factual accuracy of the allegations set forth in the Complaint and any supporting affidavits or affirmations filed with the Court, as well as the accuracy of the notarization contained in the supporting documents filed therewith."

*8 Counsel further stated:

> "Based upon my communication with Matthew Mattera as well as upon my own inspection and other reasonable inquiry under the circumstances, I affirm that, to the best of my knowledge, information, and belief, the Summons, Complaint, and other papers filed or submitted to this Court in this matter contain no false statements of fact or law. I understand my continuing obligation to amend this [a]ffirmation in light of newly discovered material facts following its filing."

The dissent finds this affidavit deficient, stating that "because Mattera's affidavits do not establish a complete review of, or the indicia of reliability necessary to lay a **business records** foundation for, the **records** pre-dating IFS's acquisition of defendant's mortgage, counsel may not rely upon alleged communications with Mattera to comply with the requirements of the Administrative Order." However, defendant, who has continued to reside on the premises for the last 10 years without paying her mortgage, did not dispute her default or challenge the accuracy or sufficiency ****358** of Mattera's affidavit on the third summary judgment motion.

[8] Furthermore, CLPR 4518(a) does not require a person to have personal knowledge of each of the facts asserted in the affidavit of merit put before the court as evidence of a defendant's default in payment (*see Citigroup v. Kopelowitz,* 147 A.D.3d 1014, 1015, 48 N.Y.S.3d 223 [2d Dept.2017] ["There is no requirement that a plaintiff in a foreclosure action rely on any particular set of **business records** to establish a prima facie case, so long as the plaintiff satisfies the admissibility requirements of CPLR 4518(a), and the **records** themselves actually evince the facts for which they are relied upon"]; *Citibank, NA v. Abrams,* 144 A.D.3d 1212, 40 N.Y.S.3d 653 [3d Dept.2016]). Thus, in seeking to enforce a loan, an **assignee** of an original lender or intermediary predecessor may use an original loan file prepared by its **assignor,** when it relies upon those **records** in the regular course of its **business** (*see Landmark Capital Invs., Inc. v. Li–Shan Wang,* 94 A.D.3d 418, 941 N.Y.S.2d 144 [1st Dept.2012]; *see also State of New York v. 158th St. & Riverside Dr. Hous. Co., Inc.,* 100 A.D.3d 1293, 1296, 956 N.Y.S.2d 196 [3d Dept.2012], *lv. denied* 20 N.Y.3d 858, 2013 WL 452396 [2013] [**records** admissible "if the recipient can establish personal knowledge of the maker's **business** practices and procedures, or that the **records** provided by the maker

were **incorporated into** the recipient's own **records** or routinely relied upon by the recipient in its **business**"]).

*9 Here, Mattera, a representative of IFS, which has held the note and mortgage since November 2009, satisfied these standards, stating that

"I make this affidavit with personal knowledge of the facts and circumstances herein which are derived from personal knowledge and/or an independent examination of the financial books and **business records** made in the ordinary course of **business** maintained by or on behalf of Plaintiff to be an accurate and fair representation of the occurrences with which the **record** purports to represent as well as **business records** relative to the within litigation. I am familiar with the **record** keeping systems that Plaintiff and/or its loan servicer uses to **record** and create information related to the residential mortgage loans that it services, including the processes by which Plaintiff and/or its loan servicer obtains the loan information in those systems. While many of those processes are automated, where the employees of the Plaintiff and/or its servicer manually enter data relating to loans on those systems, they have personal knowledge of that information and enter it into the system at or near the time they acquired that knowledge. The **records** relied upon are made in the regular course of **business** made at or about the time the event is being **recorded**, systematically made for the conduct of **business** and are relied upon as the accurate routine reflections of the day-to-day regularly conducted **business** activity and so they may be relied upon as being truthful and accurate. In connection with making this affidavit, I have personally examined these **business records** reflecting data and information as of January 31, 2015....

* * *

"I have also reviewed Plaintiffs books and **records**, and the payments of principal and interest made by Defendant(s) to Plaintiff. Any allegation of either full or timely payment after default is simply not substantiated by these **records**. All notices of default as required in the Note have been sent as prescribed in the **359 Mortgage.... All time frames set forth in the notice and / or notices, as required by the Mortgage have elapsed and the Defendant(s) *10 have not taken the necessary action to correct the default and or defaults as specified herein and in the Complaint....

* * *

"The simple uncontroverted fact is that Defendant, SARAH BRANNON, was loaned and did receive $360,000.00, as is confirmed by the Mortgage and Note. Defendant did not uphold this obligation, to the detriment of Plaintiff. Defendant breached his/her obligations under the Mortgage by failing to successfully tender funds for the August 1, 2007 payment and all successive payments thereafter."

[9] These allegations sufficed to establish plaintiff's default and the basis of Mattera's knowledge. Mattera indicated that he was personally familiar with the recordkeeping systems of IFS and plaintiff and the loan servicer it used, that the **records** he relied on were made in the regular course of **business** and that he personally reviewed them on January 31, 2015 (*see JP Morgan Chase Bank, N.A. v. Shapiro,* 104 A.D.3d 411, 412, 959 N.Y.S.2d 918 [1st Dept.2013] ["Plaintiff submitted the affidavit of an employee who identified herself as having personal knowledge of, inter alia, plaintiff's status as successor-in-interest to WAMU and defendant Saadia Shapiro's default .... based upon her review of plaintiff's books and **records** and its account **records** regarding Shapiro's delinquent account"]; *Deutsche Bank Natl. Trust Co. v. Naughton,* 137 A.D.3d 1199, 1200, 28 N.Y.S.3d 444 [2d Dept.2016]). While the dissent finds the affidavit deficient because Mattera did not state that he was familiar with the **records** of GE, the Default Notice was sent by Litton, plaintiff's agent, and Mattera stated that he was familiar with the recordkeeping systems that plaintiff and/or its loan servicer used. He also stated that he personally reviewed plaintiff's books and **records**, and the payments made by defendant. [1]

*11 Accordingly, the order of the Supreme Court, Bronx County (Mark Friedlander, J.), entered March 17, 2015, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment and an order of reference, should be reversed, on the law, without costs, plaintiff's motion granted, and the matter remanded for appointment of a referee, to compute ans ascertain the amount due plaintiff on the subject mortgage. The appeals from the orders of the same court and Justice, entered September 18, 2014 and December 24, 2014, which denied

plaintiff's motions for summary judgment and related relief, should be dismissed, without costs, as academic.

All concur except GESMER, J. who dissents in part in an Opinion.

**360 GESMER, J. (dissenting in part).
I respectfully dissent in part.

In my view, the affidavit that BOA submitted in support of its motion was deficient and failed to comply with Administrative Order 431/11 of the Chief Administrative Judge of the Court. Nonetheless, I agree with the majority that the motion court should have granted BOA summary judgment on its foreclosure claim, since this is the rare case where a foreclosure plaintiff was able to establish its prima facie case without reference to its own affidavit. Instead, BOA could rely solely on defendant's answer, in which she admitted the amount she owed to BOA and waived any challenge to BOA's standing (*see Bank of N. Y. Mellon v. Arthur,* 125 A.D.3d 492, 493, 5 N.Y.S.3d 3 [1st Dept.2015]; *Security Pac. Nat. Bank v. Evans,* 31 A.D.3d 278, 281, 820 N.Y.S.2d 2 [1st Dept.2006], *appeal dismissed* 8 N.Y.3d 837, 830 N.Y.S.2d 8, 862 N.E.2d 86 [2007]).

However, since the deficiencies in the affidavit submitted by BOA are substantial, I believe that we should follow the approach taken by our colleagues in the Second Department and hold that BOA was not entitled to an order of reference because the affidavit it submitted failed to establish that the affiant could affirm the facts necessary to satisfy BOA's and its counsel's obligations under Administrative Order 431/11 (*Bank of N. Y. Mellon v. Izmirligil,* 144 A.D.3d 1063, 1065, 42 N.Y.S.3d 270 [2d Dept.2016]). This result is necessary to accomplish the purposes which that Administrative Order was intended to achieve.

In October 2010, Chief Judge Jonathan Lippman instituted a rule requiring plaintiffs in foreclosure actions to certify the *12 accuracy of the documents they present to the court. This requirement, embodied in Administrative Order 548/10, later amended by Administrative Order 431/11, was intended to prevent the practice of "robo-signing" (2014 Report of the Chief Administrator of the Courts, available at https:// www.nycourts.gov/ publications/pdfs/2014–Foreclosure–Report–ofthe–CAJ.pdf, at 5–6 [accessed September 14, 2017]). "Robo-signing" refers to "the robotic affixation of signatures on key papers in the case by those with no first-hand knowledge of the information contained in the papers they're signing" (252 Siegel's Practice Review 2 [Dec. 2012]).

Specifically, the Administrative Order requires counsel for a foreclosure plaintiff to file an affirmation confirming that he or she communicated with a representative of the plaintiff who personally reviewed the plaintiff's books and **records**, personally reviewed the summons, complaint and other submissions in the case, and confirmed the factual accuracy of the plaintiff's submissions as well as the accuracy of the notarization of those submissions (Administrative Order of the Chief Administrative Judge of the Courts, available at https:/ /www.nycourts.gov/ attorneys/pdfs/AdminOrder_ 2010_ 10_20.pdfat Exhibit A [accessed August 28, 2017] [Administrative Order]; *see also Izmirligil,* 144 A.D.3d at 1065, 42 N.Y.S.3d 270; *Wells Fargo Bank, N.A. v. Jones,* 139 A.D.3d 520, 521 n. 1, 32 N.Y.S.3d 95 [1st Dept.2016]). The Administrative Order prescribes the required form of the attorney affirmation and a sample affidavit of merit that may be used by the representative of the plaintiff (Administrative Order, Forms A and B). For cases pending at the time of the order's effective date, where no judgment of foreclosure has been entered, this affirmation must be filed "at the time of filing either the proposed order of reference or the proposed judgment of foreclosure" (*Izmirligil,* 144 A.D.3d at 1065, 42 N.Y.S.3d 270 **361 [internal quotation marks omitted]). [1]

Our colleagues in the Second Department have refused to issue an order of reference and judgment of foreclosure and sale, when the plaintiff failed to submit the required affirmation *13 (*see Bank of N.Y. Mellon v. Izmirligil,* 144 A.D.3d 1067, 1070, 44 N.Y.S.3d 44 [2d Dept.2016]; *Wells Fargo Bank, N.A. v. Hudson,* 98 A.D.3d 576, 577–578, 949 N.Y.S.2d 703 [2d Dept. 2012]), or submitted an affirmation which was not "in compliance" with the Administrative Order (*see Downey Sav. Loan Assn., F.A. v. Trujillo,* 142 A.D.3d 1040, 1042, 37 N.Y.S.3d 609 [2d Dept.2016]), even where the application was otherwise sufficient.

I submit that this is an appropriate case to follow the Second Department. In this case, counsel relies on the affidavit of Matthew Mattera, a "Member" of BOA's

successor-in-interest, IFS. Mattera alleges, in each of his affidavits, as follows:

> "I make this affidavit with personal knowledge of the facts and circumstances herein which are derived from personal knowledge and/or an independent examination of the financial books and **business records** made in the ordinary course of **business** maintained by or on behalf of Plaintiff to be an accurate and fair representation of the occurrences with which the **record** purports to represent as well as **business records** relative to the within litigation. I am familiar with the **record** keeping systems that Plaintiff and/or its loan servicer uses to **record** and create information related to the residential mortgage loans that it services, including the processes by which Plaintiff and/or its loan servicer obtains the loan information in those systems. While many of those processes are automated, where the employees of the Plaintiff and/or its servicer manually enter data relating to loans on those systems, they have personal knowledge of that information and enter it into the system at or near the time they acquired that knowledge. The **records** relied upon are made in the regular course of **business** made at or about the time the event is being **recorded**, systematically made for the conduct of **business** and are relied upon as the accurate routine reflections of the day-to-day regularly conducted **business** activity and so they may be relied upon as being truthful and accurate. In connection with making this affidavit, I have personally examined these **business records**...."

Mattera also alleges that he reviewed "[p]laintiff's books and **records**" and that "[a]ny allegation of either full or timely payment ***14** after default is simply not substantiated...." In addition, Mattera alleges that defendant breached "his/her obligations" to tender the August 1, 2007 payment and all successive payments. These statements do not comply with the Administrative Order (*see Wells Fargo, N.A. v. Jones*, 139 A.D.3d at 521 n. 1, 32 N.Y.S.3d 95). [2]

****362** In fact, Mr. Mattera's affidavit differs in two critical respects from the proposed principal's affidavit in the Administrative Order. First, that affidavit is written as if the affiant were a representative of the plaintiff. However, Mr. Mattera does not claim to have any relationship to plaintiff, BOA; rather, he claims to be a managing member of IFS, plaintiff's **assignee**.

Second, the proposed affidavit in the Administrative Order assumes that the mortgage has not been transferred, as demonstrated by this alternative language: "Inasmuch as the underlying mortgage loan has been transferred prior to commencement or during the pendency of this action, I am unable to confirm or deny that the underlying documents filed with the Court have been properly reviewed or notarized by the prior servicer" (Administrative Order 431/11 Form B). In contrast, although Mr. Mattera acknowledges that the mortgage has been transferred, he does not explain his source of knowledge about the **records** maintained by plaintiff and its predecessor, GE Money Bank (GE), which was the original lender and mortgagee, and remained the mortgagee until after the date of defendant's default. Mr. Mattera does not claim to have reviewed the **records** of GE or to be familiar with GE's **record**-keeping practices. Instead, Mr. Mattera's affidavits only refer to his alleged review of the **records** of "plaintiff," i.e., BOA. Indeed, while the majority highlights that "in seeking to enforce a loan, an **assignee** of an original lender or intermediary predecessor may use an original loan file prepared by its **assignor**," there is no indication in the **record** that Mr. Mattera ***15** reviewed GE's original loan file (*see Jones* 139 A.D.3d at 521–522, 32 N.Y.S.3d 95).

Mattera has also failed to allege facts sufficient to establish a **business records** foundation under CPLR 4518(a) for the **records** of BOA, and its loan servicer, Litton, which he claims to have reviewed. Mattera is a member of IFS, which was assigned the mortgage on November 2, 2009. Mattera has not explained how he acquired personal knowledge of the **record**-keeping practices of BOA, or its loan servicer (*see Jones* at 521–522, 32 N.Y.S.3d 95).

Furthermore, Mattera does not provide the court with any assurances that the unidentified employees to whom he refers actually followed the practices he describes. Accordingly, Mattera's affidavits are bereft of the " 'indicia of reliability' " necessary for a representative of one entity to lay a **business records** foundation for the **records** of another entity (*see Jones,* 139 A.D.3d at 521, 32 N.Y.S.3d 95, quoting *One Step Up, Ltd., v. Webster Bus. Credit Corp.*, 87 A.D.3d 1, 11, 925 N.Y.S.2d 61 [1st Dept.2011]; *see also People v. Cratsley,* 86 N.Y.2d 81, 90, 629 N.Y.S.2d 992, 653 N.E.2d 1162 [1995]).[3] Since Mattera cannot lay a **business records** foundation for the **records** of BOA or Litton that he claims to have reviewed, this Court "cannot rely on any statements in the [Mattera ****363** affidavits] concerning events before the date of [IFS's] acquisition of the mortgage" (*Jones,* 139 A.D.3d at 522, 32 N.Y.S.3d 95).

Indeed, Mr. Mattera's lack of knowledge of events before 2009 is underscored by the discrepancy between his statement in the first of his three affidavits that BSI Financial was the loan servicer from the inception of the loan, and the 2007 notice of default in which Litton Loan Servicing claims to be the loan servicer.

The majority cites a number of cases in an effort to suggest that Mattera can lay a **business records** foundation for the **records** pre-dating IFS's acquisition of the mortgage. However, in the majority's cases, the witness was able to provide the court with the necessary "indicia of reliability" that Mattera's affidavits lack (*id.* at 521, 32 N.Y.S.3d 95 [internal quotation marks omitted]).

In each of *Citibank, NA v. Abrams*, 144 A.D.3d 1212, 1216, 40 N.Y.S.3d 653 (3d Dept.2016) and *Deutsche Bank Natl. Trust Co. v. Naughton*, 137 A.D.3d 1199, 1200, 28 N.Y.S.3d 444 (2d Dept.2016), the foreclosure plaintiff's ***16** agent was found to have sufficient knowledge of the plaintiff's **record**-keeping procedure to provide the "indicia of reliability" necessary to lay a proper **business records** foundation. Here, Mattera is a member of IFS which is merely BOA's successor-in-interest; he has not claimed that IFS has any agency relationship with GE, BOA, or BOA's agent, Litton.

In *State of New York v. 158th St. & Riverside Dr. Hous. Co., **Inc.***, 100 A.D.3d 1293, 1296, 956 N.Y.S.2d 196 (3d Dept.2012), *lv. denied* 20 N.Y.3d 858, 2013 WL 452396 (2013), a representative of the Department of Environmental Conservation (DEC) laid a proper **business records** foundation for the **records** of an outside contractor when, inter alia, the **records** were generated at the DEC's direction and the DEC was the **records**' primary custodian. Mattera's affidavits lack any comparable factual details or indicia of reliability.

In *Landmark Capital Invs., **Inc.** v. Li–Shan Wang*, 94 A.D.3d 418, 419, 941 N.Y.S.2d 144 (1st Dept.2012), the foreclosure plaintiff relied upon an original loan file prepared by its **assignor**, a **record** that the plaintiff "[r]elied on ... in its regular course of **business**." In this case, Mattera does not allege that IFS has **incorporated** BOA's **records into** its own **records**, or that IFS relies upon the **records** of BOA in the regular course of its own **business** or that he relied on or reviewed GE's **records**.[4]

Accordingly, because Mattera's affidavits do not establish a complete review of, or the indicia of reliability necessary to lay a **business records** foundation for, the **records** predating IFS's acquisition of defendant's mortgage, counsel may not rely upon alleged communications with Mattera to comply with the requirements of the Administrative Order.

Moreover, the accuracy of BOA's **records** remains relevant to the computations that a referee will have to undertake in this case. Denying an order of reference at this juncture, in order to ensure the ****364** accuracy of the **records** upon which those computations will be based, is our obligation under the Administrative Order.

***17** For all these reasons, I would follow the procedure prescribed by our colleagues in the Second Department and deny BOA's application for an order of reference (*Izmirligil,* 144 A.D.3d at 1070, 44 N.Y.S.3d 44; *Trujillo,* 142 A.D.3d at 1042, 37 N.Y.S.3d 609; *Hudson,* 98 A.D.3d at 577–578, 949 N.Y.S.2d 703).

All Citations

156 A.D.3d 1, 63 N.Y.S.3d 352, 2017 N.Y. Slip Op. 07578

Footnotes

1 In any event, where an action was pending on the effective date of Administrative Order 431/11, and no judgment of foreclosure has been entered, the order provides that the affirmation must be filed "at the time of filing either the proposed order of reference or the proposed judgment of foreclosure" (*U.S. Bank N.A. v. Polanco*, 126 A.D.3d 883, 884–885, 7 N.Y.S.3d 156 [2d Dept.2015][internal quotation marks omitted]). Accordingly, even if Mattera's affidavit did not sufficiently set forth the basis for his knowledge, under the circumstances of this case, where defendant's default is not disputed and plaintiff has established its entitlement to summary judgment, the appropriate remedy would be to direct counsel to file a revised affirmation and affidavit pursuant to Administrative Order 431/11 with the proposed order of reference (*see Wilmington Trust Co. v. Walker*, 149 A.D.3d 409, 51 N.Y.S.3d 64 [1st Dept.2017]). This would address the dissent's concerns that the referee have all necessary information relevant to the computations that he or she will have to undertake.

1 On August 30, 2013, CPLR 3012–b, which requires that a certificate of merit be filed with the complaint in a mortgage foreclosure action, became effective. On that date, the Chief Administrative Judge of the Court issued Administrative Order 208/13, which directs, as relevant here, that counsel representing a plaintiff in a mortgage foreclosure action commenced prior to August 30, 2013 may comply with either Administrative Order 431/11 or CPLR 3012–b.

2 The majority notes that defendant did not challenge the sufficiency of Mattera's affidavit in opposition to BOA's third summary judgment motion. However, defendant did raise such a challenge in opposition to BOA's first summary judgment motion. Defendant was a pro se litigant who could not be expected to know that she should have repeated her argument in opposition to each of BOA's successive summary judgment motions. Furthermore, "multiple summary judgment motions in the same action should be discouraged in the absence of newly discovered evidence or sufficient cause" (*Public Serv. Mut. Ins. Co. v. Windsor Place Corp.*, 238 A.D.2d 142, 143, 655 N.Y.S.2d 947 [1st Dept.1997]). Since BOA submitted what was substantively the same summary judgment motion three times over, defendant raised her argument in opposition to the only one of BOA's motions that was properly submitted.

3 Mattera also cannot rely on the Bailey and Dixon affidavits for any of this information, both because BOA has conceded their impropriety, and because documents prepared in connection with litigation do not qualify for the **business records** exception to the rule against hearsay (*Jones*, 139 A.D.3d at 522, 32 N.Y.S.3d 95).

4 *JP Morgan Chase Bank, N.A. v. Shapiro*, 104 A.D.3d 411, 959 N.Y.S.2d 918 (1st Dept.2013), also cited by the majority, does not address the issue of whether Mattera can lay a **business records** foundation for the **records** of BOA, because that case involved an affidavit by an employee of a foreclosure plaintiff, which stated that she reviewed the foreclosure plaintiff's books and **records**. The majority's reliance on *Citigroup v. Kopelowitz*, 147 A.D.3d 1014, 48 N.Y.S.3d 223 (2d Dept.2017) is similarly misplaced, since that case involved an affidavit from an employee of the plaintiff's loan servicer, who attested to reviewing **records** kept in the regular course of the loan servicer's **business**.

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131 A.D.3d 737
Supreme Court, Appellate Division,
Third Department, New York.

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee (Not in its Individual Capacity but Solely as Trustee) in Trust for Registered Holders of VCM Series 2009–1, Respondent,
v.
Timothy MONICA, also Known as Timothy I. Monica, et al., Appellants, et al., Defendants.

Aug. 6, 2015.

Synopsis

Background: **Assignee** of mortgage brought action against borrowers, seeking to foreclose upon a mortgage. The Supreme Court, Saratoga County, Chauvin, J., entered summary judgment for **assignee**. Borrowers appealed.

[Holding:] The Supreme Court, Appellate Division, Lynch, J., held that **assignee** had standing to bring action.

Affirmed.

West Headnotes (7)

[1] **Judgment**
Liens and mortgages

In a foreclosure action, a plaintiff producing evidence of the mortgage, unpaid note and the mortgagor's default will be entitled to summary judgment.

9 Cases that cite this headnote

[2] **Mortgages and Deeds of Trust**
Persons Entitled to Foreclose;Plaintiffs

Where the issue of standing is raised as an affirmative defense in mortgage foreclosure action, the plaintiff must also prove its standing in order to be entitled to relief.

10 Cases that cite this headnote

[3] **Mortgages and Deeds of Trust**
Holders of obligations secured and their agents;non-holders in possession

Standing in a mortgage foreclosure action is established by proof that the plaintiff, at the time the action was commenced, was the holder or **assignee** of the mortgage and the holder or **assignee** of the underlying note.

20 Cases that cite this headnote

[4] **Mortgages and Deeds of Trust**
Persons Entitled to Foreclose;Plaintiffs

The note, and not the mortgage, is the dispositive instrument that conveys standing to foreclose under New York law.

5 Cases that cite this headnote

[5] **Evidence**
Unofficial or **business records** in general

While the mere filing of papers received from other entities, even if they are retained in the regular course of **business**, is insufficient to qualify the documents as **business records**, such **records** are nonetheless admissible if the recipient can establish personal knowledge of the maker's **business** practices and procedures, or that the **records** provided by the maker were **incorporated into** the recipient's own **records** or routinely relied upon the recipient in its **business**. McKinney's CPLR 4518(a).

8 Cases that cite this headnote

[6] **Mortgages and Deeds of Trust**
Holders of obligations secured and their agents;non-holders in possession

Assignee of mortgage had standing to bring foreclosure action against borrowers, where it also possessed underlying note indorsed in blank by holder of note prior to initiating action.

10 Cases that cite this headnote

[7] **Bills and Notes**
Indorsement in blank
Bills and Notes
Title to Sustain Action

Where a plaintiff possesses a note that, on its face or by allonge, contains an indorsement in blank or bears special indorsement payable to the order of the plaintiff, such party is a holder of the note and entitled to enforce the instrument.

3 Cases that cite this headnote

Attorneys and Law Firms

**864 Law Offices of Ronald J. Kim, P.C., Saratoga Springs (Ronald J. Kim of counsel), for appellants.

Doonan, Graves & Longoria, LLC, Beverly, Massachusetts (Stephen M. Valente of counsel), for respondent.

Before: GARRY, J.P., EGAN JR., ROSE and LYNCH, JJ.

Opinion

LYNCH, J.

*737 Appeal from an order of the Supreme Court (Chauvin, J.), entered February 13, 2013 in Saratoga County, which, among other things, granted plaintiff's motion for summary judgment.

In 2006, defendants Timothy Monica and Kathy Monica (hereinafter collectively referred to as defendants) executed a note in favor of American Home Mortgage Acceptance, **Inc**. (hereinafter AHMA) that was secured by a mortgage on real property located in Saratoga County. For **recording** purposes, the mortgage names Mortgage Electronic Registration Systems, **Inc**. (hereinafter MERS) as nominee and mortgagee. MERS assigned the mortgage to plaintiff in 2009. Plaintiff then commenced the instant foreclosure action in 2011, four years after *738 defendants defaulted on the loan.[1] Following joinder of issue, plaintiff moved for summary judgment striking defendants' answer and appointing a referee to compute the amount owed. Defendants cross-moved for, among other things, summary judgment dismissing the complaint against them for lack of standing. Supreme Court granted plaintiff's motion and denied defendants' cross motion. Defendants appeal.

[1] [2] [3] [4] "In a foreclosure action, a [plaintiff] producing evidence of the mortgage, unpaid note and the mortgagor's default will be entitled to summary judgment" (*HSBC Bank USA, N.A. v. Sage*, 112 A.D.3d 1126, 1127, 977 N.Y.S.2d 446 [2013], *lvs. dismissed* 22 N.Y.3d 1172, 985 N.Y.S.2d 472, 8 N.E.3d 849 [2014], 23 N.Y.3d 1015 [2014], 992 N.Y.S.2d 774, 16 N.E.3d 1253 [citations omitted]; *see PHH Mtge. Corp. v. Davis*, 111 A.D.3d 1110, 1111, 975 N.Y.S.2d 480 [2013], *lv. dismissed* 23 N.Y.3d 940, 987 N.Y.S.2d 593, 10 N.E.3d 1148 [2014]). "Where, as here, the issue of standing is raised as an affirmative defense, the plaintiff must also prove its standing in order to be entitled to relief" (*Wells Fargo Bank, NA v. Ostiguy*, 127 A.D.3d 1375, 1376, 8 N.Y.S.3d 669 [2015] [citations omitted]; *see Nationstar Mtge., LLC v. Catizone*, 127 A.D.3d 1151, 1152, 9 N.Y.S.3d 315 [2015]). Standing in a mortgage foreclosure action is established by proof that the plaintiff, at the time the action was commenced, was the **865 holder or **assignee** of the mortgage and the holder or **assignee** of the underlying note (*see Chase Home Fin., LLC v. Miciotta*, 101 A.D.3d 1307, 1307, 956 N.Y.S.2d 271 [2012]; *Wells Fargo Bank, N.A. v. Wine*, 90 A.D.3d 1216, 1217, 935 N.Y.S.2d 664 [2011]). That said, the note, and not the mortgage, is the dispositive instrument that conveys standing to foreclose under New York law (*see Aurora Loan Servs., LLC v. Taylor*, 25 N.Y.3d 355, 361–362, 12 N.Y.S.3d 612, 34 N.E.3d 363 [2015]).

Here, plaintiff produced the mortgage, the unpaid note, the notice of default that was sent to defendants by Acqura Loan Services—plaintiff's loan servicing company —and an affidavit by Doug Battin, a senior vice-president of Acqura, who confirmed defendants' default. While this documentation was sufficient to satisfy plaintiff's entitlement to an award of summary judgment, the core question here is whether plaintiff proved that it has standing to obtain such relief. There is no dispute that plaintiff received an assignment of the mortgage through MERS, but the **assignee** of only a mortgage has no standing (*see Bank of Am., N.A. v. Paulsen*, 125

A.D.3d 909, 911, 6 N.Y.S.3d 68 [2015]; *Citibank, N.A. v. Herman,* 125 A.D.3d 587, 588, 3 N.Y.S.3d 379 [2015]). Here, plaintiff maintains that it has standing through its physical possession of the note at the time that the action was commenced. Since the note has only an undated indorsement in blank from the original lender, it does not evidence plaintiff's *739 possessory interest (*see Bank of Am., N.A. v. Kyle,* 129 A.D.3d 1168, 1169, 13 N.Y.S.3d 253 [2015]). To establish physical possession, plaintiff produced the affidavit of Battin and another Acqura employee recounting that Acqura acquired the underlying loan documentation from plaintiff in June 2009, imaged the documentation into its own **records** system and returned the original documentation to plaintiff. Based on this documentation, Battin averred that the note was transferred to plaintiff "by way of an allonge and/or endorsement."

[5] Defendants dispute the admissibility of Battin's affidavit on the ground that the **business records** about which he attested were neither made in Acqura's regular course of **business** nor within his personal knowledge. While "the mere filing of papers received from other entities, even if they are retained in the regular course of **business**, is insufficient to qualify the documents as **business records**" (*People v. Cratsley,* 86 N.Y.2d 81, 90, 629 N.Y.S.2d 992, 653 N.E.2d 1162 [1995] [internal quotation marks and citation omitted]), such **records** are nonetheless admissible "if the recipient can establish personal knowledge of the maker's **business** practices and procedures, or that the **records** provided by the maker were **incorporated into** the recipient's own **records** or routinely relied upon the recipient in its **business**" (*State of New York v. 158th St. & Riverside Dr. Hous. Co., Inc.,* 100 A.D.3d 1293, 1296, 956 N.Y.S.2d 196 [2012], *lv. denied* 20 N.Y.3d 858, 2013 WL 452396 [2013]). To be admissible, these documents should carry the indicia of reliability ordinarily associated with **business records** (*see People v. Cratsley,* 86 N.Y.2d at 91, 629 N.Y.S.2d 992, 653 N.E.2d 1162; *One Step Up, Ltd. v. Webster Bus. Credit Corp.,* 87 A.D.3d 1, 11, 925 N.Y.S.2d 61 [2011]; *Corsi v. Town of Bedford,* 58 A.D.3d 225, 231–232, 868 N.Y.S.2d 258 [2008], *lv. denied* 12 N.Y.3d 714, 2009 WL 1770158 [2009]). Given Acqura's agency status as servicer of the loan for plaintiff, we agree with plaintiff that the Acqura **records** qualify as **business records** (*see* CPLR 4518[a]; *People v. Cratsley,* 86 N.Y.2d at 90, 629 N.Y.S.2d 992, 653 N.E.2d 1162; *Merrill Lynch Bus. Fin. Servs. Inc. v. Trataros Constr., Inc.,* 30 A.D.3d 336, 337, 819 N.Y.S.2d 223 [2006], **866 *lv. denied* 7 N.Y.3d 715, 826 N.Y.S.2d 180, 859 N.E.2d 920 [2006]).

[6] [7] "[W]here [a] plaintiff possesses a note that, on its face or by allonge, contains an indorsement in blank or bears special indorsement payable to the order of the plaintiff," such party is a holder of the note and entitled to enforce the instrument (*Wells Fargo Bank, NA v. Ostiguy,* 127 A.D.3d at 1376, 8 N.Y.S.3d 669; *see Nationstar Mtge., LLC v. Davidson,* 116 A.D.3d 1294, 1296, 983 N.Y.S.2d 705 [2014], *lv. denied* 24 N.Y.3d 905, 2014 WL 4637016 [2014]; *see also Hartford Acc. & Indem. Co. v. American Express Co.,* 74 N.Y.2d 153, 159, 544 N.Y.S.2d 573, 542 N.E.2d 1090 [1989]). Here, Battin's affidavit established that, prior to the commencement of the action, plaintiff possessed the underlying note indorsed in blank by AHMA (*compare* *740 *Bank of Am., N.A. v. Kyle,* 129 A.D.3d at 1169, 13 N.Y.S.3d 253). Defendants, in turn, have failed to raise any question of fact as to whether plaintiff continued to retain possession. As such, we conclude that Supreme Court properly found that plaintiff had standing to bring the instant foreclosure action (*see Aurora Loan Servs., LLC v. Taylor,* 25 N.Y.3d at 361–362, 12 N.Y.S.3d 612, 34 N.E.3d 363; *Nationstar Mtge., LLC v. Davidson,* 116 A.D.3d at 1296, 983 N.Y.S.2d 705; *HSBC Bank USA, N.A. v. Sage,* 112 A.D.3d at 1127–1128, 977 N.Y.S.2d 446).

ORDERED that the order is affirmed, with costs.

GARRY, J.P., EGAN JR. and ROSE, JJ., concur.

All Citations

131 A.D.3d 737, 15 N.Y.S.3d 863, 2015 N.Y. Slip Op. 06453

Footnotes

1 The **record** shows that two prior foreclosure actions were voluntarily discontinued.

Matter of Carothers v GEICO Indem. Co.

Supreme Court of New York, Appellate Division, Second Department

December 14, 2010, Decided

2009-08300

Reporter
79 A.D.3d 864 *; 914 N.Y.S.2d 199 **; 2010 N.Y. App. Div. LEXIS 9349 ***; 2010 NY Slip Op 9256 ****

[****1] In the Matter of Andrew ***Carothers***, M.D., P.C., Appellant, v ***GEICO*** Indemnity Company, Respondent. (Index No. 88907/05)

Prior History: *Andrew **Carothers**, M.D., P.C. v. **GEICO** Indem. Co., 24 Misc 3d 19, 882 NYS2d 802, 2009 N.Y. Misc. LEXIS 840 (2009)*

Core Terms

records, documents, billing, reverse a judgment, inadmissible, procedures, recipient

Headnotes/Syllabus

Headnotes

Evidence--Business Records

Counsel: [***1] Smith Valliere PLLC, New York, N.Y. (Mark W. Smith and Timothy A. Valliere of counsel), for appellant.

Teresa M. Spina, Woodbury, N.Y. (P. Stephanie Estevez of counsel), for respondent.

Judges: Concur--REINALDO E. RIVERA, J.P., MARK C. DILLON, DANIEL D. ANGIOLILLO and LEONARD B. AUSTIN, JJ. RIVERA, J.P., DILLON, ANGIOLILLO and AUSTIN, JJ., concur.

Opinion

[*864] [**199] In an action to recover no-fault medical payments under certain insurance contracts, the plaintiff appeals, by permission, from an order of the Appellate Term of the Supreme Court for the Second, Eleventh, and Thirteenth Judicial Districts, dated [**200] April 14, 2009, which reversed a judgment of the Civil Court of the City of New York, Kings County (Graham, J.), entered August 2, 2007, which, after a nonjury trial, awarded the plaintiff the principal sum of $4,463.17, and dismissed the complaint.

Ordered that the order dated April 14, 2009, is affirmed, with costs.

The testimony of an employee of the company that handled the plaintiff's medical billing was insufficient to lay a foundation for the admission of the claim forms under the business records exception of the hearsay rule (*see Art of Healing Medicine, P.C. v Travelers Home & Mar. Ins. Co., 55 AD3d 644, 864 NYS2d 792 [2008]*). [***2] Such records were inadmissible because the billing company did not create the records and there was no showing that its employee was familiar with the particular record- keeping procedures of the plaintiff (*see West Val. Fire Dist. No. 1 v Village of Springville, 294 AD2d 949, 950, 743 NYS2d 215 [2002]*). Further, although a [*865] proper foundation can be established by a recipient of records who does not have personal knowledge of the maker's business practices and procedures, there must still be a showing that the recipient either incorporated the records into its own records or relied upon the records in its day-to-day operations (*see People v A & S DiSalvo, Co., 284 AD2d 547, 548, 727 NYS2d 146 [2001]*; *Plymouth Rock Fuel Corp. v Leucadia, Inc., 117 AD2d 727, 498 NYS2d 453 [1986]*). Here, the billing company's mere printing and mailing of the documents to the insurer did not establish that the documents were incorporated into its records or that it relied upon the records in its regular course of business (*see Lodato v Greyhawk N. Am., LLC, 39 AD3d 494, 495, 834 NYS2d 239 [2007]*). Since the subject documents were inadmissible, the plaintiff failed to establish its prima facie case, and the Appellate Term properly reversed the judgment in the plaintiff's favor.

The plaintiff's [***3] remaining contention is unpreserved for appellate review. [****2] Rivera, J.P., Dillon, Angiolillo and Austin, JJ., concur.

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Neutral
As of: November 8, 2018 6:06 PM Z

Goldman Sachs Mtge. Co. v Mares

Supreme Court of New York, Appellate Division, Third Department

November 1, 2018, Decided; November 1, 2018, Entered

526161

Reporter
2018 N.Y. App. Div. LEXIS 7376 *; 2018 NY Slip Op 07389 **; 2018 WL 5659731

[**1] GOLDMAN SACHS MORTGAGE COMPANY, Respondent, v JOHN F. MARES et al., Appellants.

Notice: THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.
THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

Prior History: *Goldman Sachs Mtge. Co. v. Mares, 55 Misc. 3d 1205(A), 55 N.Y.S.3d 692, 2017 N.Y. Misc. LEXIS 1095 (Mar. 28, 2017)*

Core Terms

mortgage, records, assigned, servicer, allonges, foreclosure action, commencement, documents

Case Summary

Overview

HOLDINGS: [1]-The trial court properly determined that an assignee established its standing to commence a foreclosure action because the testimony of a quality assurance specialist for the loan servicing company responsible for the loan at issue was admissible under the business records exception to the hearsay rule to establish that the assignee's standing, an attorney bailee letter documented that the three assignments of mortgage and the allonges all existed prior to commencement of the foreclosure action, the signatures on the assignments were statutorily presumed genuine and authorized under *UCC 3-307(1)(b)*, the borrowers only speculated that signatories may not have been authorized to sign the allonges, and the borrowers did not dispute their default.

Outcome

Orders affirmed.

LexisNexis® Headnotes

Evidence > ... > Exceptions > Business Records > Normal Course of Business

HN1[] **Business Records, Normal Course of Business**

While the mere filing of papers received from other entities, even if they are retained in the regular course of business, is insufficient to qualify the documents as business records, such records are nonetheless admissible if the recipient can establish that the records provided by the maker were incorporated into the recipient's own records or routinely relied upon by the recipient in its business. To be admissible, these documents should carry the indicia of reliability ordinarily associated with business records.

Civil Procedure > Preliminary Considerations > Justiciability > Standing

HN2[] **Justiciability, Standing**

Where standing is contested, the plaintiff cannot obtain relief until it proves its standing.

Civil Procedure > Preliminary Considerations > Justiciability > Standing

Real Property Law > Financing > Foreclosures

HN3[] **Justiciability, Standing**

A plaintiff's standing is established in a mortgage foreclosure

action 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. Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident.

Civil Procedure > Preliminary Considerations > Justiciability > Standing

Real Property Law > Financing > Foreclosures

HN4[] **Justiciability, Standing**

The note, and not the mortgage, is the dispositive instrument that conveys standing to foreclose.

Counsel: **[*1]** Levene Gouldin & Thompson, LLP, Ithaca (Richard P. Ruswick of counsel), for appellants.

Friedman Vartolo LLP, New York City (Henry P. DiStefano of counsel), for respondent.

Judges: Before: Garry, P.J., McCarthy, Lynch, Aarons and Rumsey, JJ. Garry, P.J., Lynch, Aarons and Rumsey, JJ., concur.

Opinion by: McCarthy

Opinion

MEMORANDUM AND ORDER

McCarthy, J.

Appeals (1) from an order of the Supreme Court (Faughnan, J.), entered March 28, 2017 in Tompkins County, upon a decision of the court in favor of plaintiff, and (2) from that part of an order of said court, entered October 19, 2017 in Tompkins County, which struck defendants' answer, counterclaim and affirmative defenses.

In 2005, defendants executed a promissory note in favor of Freestone Enterprises, Inc., secured by a mortgage on their residence. Defendants defaulted under the terms of the note and mortgage in 2007. In 2014, plaintiff — alleging that it had been assigned the mortgage in 2012 and possessed the note — commenced this mortgage foreclosure action. In their answer, defendants asserted, among other things, that plaintiff lacked standing. As a result of motion practice related to discovery, Supreme Court (Mulvey, J.) precluded plaintiff from submitting evidence **[*2]** that it was in possession of the original note on the date that this action was commenced[1] . Following a nonjury trial, Supreme Court (Faughnan, J.) determined that plaintiff established its standing to commence the foreclosure action, as well as its entitlement to the relief sought in the complaint. Defendants appeal from that order and from that part of a subsequent order striking the answer, counterclaim and affirmative defenses.[2]

Supreme Court did not err in admitting into evidence plaintiff's exhibit No. 2. That exhibit is a certificate of merit as required by *CPLR 3012-b (a)*, with attachments consisting of copies of the mortgage, assignments of mortgage, and note with allonges. Defendants did not **[**2]** object to admission of the portion of the exhibit containing the mortgage and assignments of mortgage, as the originals of those documents had been filed in the County Clerk's office, but they objected to the remainder of the exhibit as hearsay.*HN1*[] "While the mere filing of papers received from other entities, even if they are retained in the regular course of business, is insufficient to qualify the documents as business records, such records are nonetheless admissible if the recipient can establish . **[*3]** . . that the records provided by the maker were incorporated into the recipient's own records or routinely relied upon by the recipient in its business" (***Deutsche Bank Natl. Trust Co. v Monica, 131 AD3d 737, 739, 15 N.Y.S.3d 863 [2015]*** [internal quotation marks and citations omitted]; *see State of New York v 158th St. & Riverside Dr. Hous. Co., Inc., 100 AD3d 1293, 1296, 956 N.Y.S.2d 196 [2012], lv denied 20 N.Y.3d 858, 984 N.E.2d 325, 960 N.Y.S.2d 350 [2013]*). "To be admissible, these documents should carry the indicia of reliability ordinarily associated with business records" (***Deutsche Bank Natl. Trust Co. v Monica, 131 AD3d at 739*** [citations omitted]).

The sole witness at trial was Eric Hughes, a quality assurance specialist for Fay Servicing, the loan servicing company responsible for the loan at issue[3] . It was not necessary for Hughes to have personal knowledge of the creation of the account records; he could testify from his review of Fay's business records (*see Citibank, NA v Abrams, 144 AD3d 1212, 1216, 40 N.Y.S.3d 653 [2016]*).

[1] Other motions, not relevant here, were also decided (*see 135 AD3d 1121, 23 N.Y.S.3d 444 [2016]*).

[2] Defendants have abandoned any arguments concerning the latter order, as no such arguments have been raised on appeal.

[3] After commencement of this action, plaintiff transferred the note and mortgage to another entity, which transfer is not at issue. Fay became the servicer for that entity but had not been the servicer for plaintiff or any prior holder of the note or mortgage.

Hughes testified that when it receives a loan, Fay engages in a vetting process and conducts due diligence to make sure the information it receives appears accurate. He testified that the certificate of merit was likely created by an attorney retained to represent the prior servicer, so it was part of the servicer's records. According to Hughes, the allonges are not separately stored by Fay, but are affixed to the note. Although Fay became the servicer of this loan after commencement **[*4]** of this action, Hughes testified that Fay's business records include the records created and maintained by prior servicers and their agents, which are incorporated into Fay's records and routinely relied upon by Fay in its business. Therefore, Supreme Court did not err in determining that plaintiff's exhibit No. 2, including all documents contained therein, was admissible under the business records exception to the hearsay rule (*see* ***Deutsche Bank Natl. Trust Co. v Monica, 131 AD3d at 739***; *see also HSBC Bank USA, N.A. v Corazzini, 148 AD3d 1314, 1316, 49 N.Y.S.3d 202 [2017], lv dismissed 29 N.Y.3d 1040, 56 N.Y.S.3d 502, 78 N.E.3d 1186 [2017])*.

Supreme Court properly determined that plaintiff had standing to bring the foreclosure action. ***HN2***[↑] Where standing is contested, the plaintiff cannot obtain relief until it proves its standing (*see Onewest Bank, F.S.B. v Mazzone, 130 AD3d 1399, 1400, 15 N.Y.S.3d 505 [2015]*). ***HN3***[↑] "A plaintiff's standing is established in a mortgage foreclosure action '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'" (*Everhome Mtge. Co. v Pettit, 135 AD3d 1054, 1055, 23 N.Y.S.3d 408 [2016]*, quoting *Chase Home Fin., LLC v Miciotta, 101 AD3d 1307, 1307-1308, 956 N.Y.S.2d 271 [2012]*). "'Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident'" (*U.S. Bank N.A. v Carnivale, 138 AD3d 1220, 1221, 29 N.Y.S.3d 643 [2016]*, quoting *Onewest Bank, F.S.B. v Mazzone, 130 AD3d at 1400*; *see Aurora Loan Servs., LLC v Taylor, 25 NY3d 355, 361, 12 N.Y.S.3d 612, 34 N.E.3d 363 [2015]* [***HN4***[↑] "the note, and not the mortgage, **[*5]** is the dispositive instrument that conveys standing to foreclose"]). Because plaintiff had been precluded from submitting evidence regarding its physical possession of the note, plaintiff could only establish standing by proving that it had been assigned the note before the action was commenced.

At trial, plaintiff produced three assignments of mortgage: from Freestone Enterprises (the original mortgagor) to AmTrust Bank, formerly known as Ohio Savings Bank; from AmTrust Bank to MTGLQ Investor, LP; and from MTGLQ Investors to plaintiff. Each of those documents stated that it assigned the mortgage at issue together with the note described in the mortgage, thereby effecting an assignment of both the note and mortgage (*see Wells Fargo Bank, N.A. v Walker, 141 AD3d 986, 988, 35 N.Y.S.3d 591 [2016]*; *see also DLJ Mtge. Capital, Inc. v. Pittman, 150 AD3d 818, 820, 56 N.Y.S.3d 120 [2017]*) **[**3]** . Plaintiff also produced a 2013 attorney bailee letter documenting that plaintiff's then-servicer delivered the original note and three specified allonges to a law firm for purposes of prosecuting a foreclosure action in relation to defendants' mortgage loan. The letter verifies that the allonges — transferring the note from Freestone Enterprises to Ohio Savings Bank, from Ohio Savings Bank to MTGLQ **[*6]** Investors and from MTGLQ Investors to plaintiff — all existed prior to commencement of the foreclosure action. Those allonges were also contained in plaintiff's exhibit No. 2, further establishing that they existed prior to commencement (*compare Deutsche Bank Natl. Trust Co. v Haller, 100 AD3d 680, 682-683, 954 N.Y.S.2d 551 [2012]*).

Defendants argue that plaintiff failed to prove that it was validly assigned the note because the record lacks evidence of authority for certain individuals to sign the assignments. Particularly, the allonge embodying the transfer from Ohio Savings Bank is signed by Robert P. Maxwell, "Authorized Agent," and the allonge transferring the note from MTGLQ Investors to plaintiff is signed by Richard Williams, as vice-president of Litton Loan Servicing LP, "Attorney in Fact for MTGLQ Investors, L.P." The record does not contain any power of attorney or other document demonstrating that either of these individuals or Litton Loan Servicing was authorized to transfer the note on behalf of its then-holder. Contrary to defendants' argument that plaintiff has thus failed to prove the validity of the assignment of the note and, concomitantly, its standing, the cases relied upon are distinguishable because they address whether a foreclosing entity has **[*7]** standing as a matter of law — in the context of a motion to dismiss or for summary judgment — where the defendant questioned a signatory's authority to transfer the note (*see e.g. JP Morgan Chase Bank, N.A. v Venture, 148 AD3d 1269, 1270, 48 N.Y.S.3d 824 [2017]*; *Filan v Dellaria, 144 AD3d 967, 975, 43 N.Y.S.3d 353 [2016]*; *Deutsche Bank Natl. Trust Co. v Haller, 100 AD3d at 682-683*; *Bank of N.Y. v Silverberg, 86 AD3d 274, 281-282, 926 N.Y.S.2d 532 [2011]*). Although, at trial, plaintiff bore the burden of establishing the effectiveness of those signatures after defendants put them in issue (*see UCC 3-307 [1] [a]*; *Wells Fargo Bank, N.A. v Walker, 141 AD3d 986, 988, 35 N.Y.S.3d 591 [2016]*), the signatures were statutorily presumed genuine and authorized (*see UCC 3-307 [1] [b]*; *CitiMortgage, Inc. v McKinney, 144 AD3d 1073, 1074, 42 N.Y.S.3d 302 [2016]*; *see also UCC 3-104 [2]* [stating that UCC art 3 applies to notes]), meaning that the trier of fact was required to find them authorized unless and

until defendants introduced evidence supporting a finding that they were not authorized (*see* UCC 1-206; McKinney's Cons Law of NY, Book 621/2, UCC 3-307, Official Comment at 227-228 [2013 ed]). As defendants only speculated that Maxwell and Williams may not have been authorized to sign the allonges, their signatures are presumed authorized and plaintiff was not required to submit any proof of authorization (*see CitiMortgage, Inc. v McKinney, 144 AD3d at 1074*).

Considering the assignments of mortgage, bailee letter, allonges and Hughes's testimony, plaintiff demonstrated that it had been assigned the note in writing prior to commencement of the foreclosure action. Accordingly, plaintiff established that it had standing to prosecute this action. As defendants did not **[*8]** dispute their default, Supreme Court properly granted plaintiff the relief it sought (*see Everhome Mtge. Co. v Pettit, 135 AD3d at 1055*).

Garry, P.J., Lynch, Aarons and Rumsey, JJ., concur.

ORDERED that the orders are affirmed, with costs.

End of Document

Deutsche Bank Natl. Trust Co. v Monica

Supreme Court of New York, Appellate Division, Third Department

August 6, 2015, Decided; August 6, 2015, Entered

519460

Reporter
131 A.D.3d 737 *; 15 N.Y.S.3d 863 **; 2015 N.Y. App. Div. LEXIS 6319 ***; 2015 NY Slip Op 06453 ****

[****1] *Deutsche Bank* National Trust Company, as Trustee in Trust for Registered Holders of VCM Series 2009-1, Respondent, v Timothy *Monica*, Also Known as Timothy I. *Monica*, et al., Appellants, et al., Defendants.

Core Terms

mortgage, records, documentation, foreclosure action, summary judgment

Case Summary

Overview

HOLDINGS: [1]-Given an entity's agency status as servicer of the loan for plaintiff, its records qualified as business records under *CPLR 4518(a)*; [2]-Because an affidavit established that prior to the commencement of the action, plaintiff possessed the underlying note indorsed in blank, and defendants failed to raise any question of fact as to whether plaintiff continued to retain possession, plaintiff had standing to bring the foreclosure action.

Outcome
Order affirmed.

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Real Property Law > Financing > Foreclosures > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

HN1[] **Summary Judgment, Entitlement as Matter of Law**

In a foreclosure action, a plaintiff producing evidence of the mortgage, unpaid note and the mortgagor's default will be entitled to summary judgment. Where the issue of standing is raised as an affirmative defense, the plaintiff must also prove its standing in order to be entitled to relief. Standing in a mortgage foreclosure action is established by proof that the plaintiff, at the time the action was commenced, was the holder or assignee of the mortgage and the holder or assignee of the underlying note. That said, the note, and not the mortgage, is the dispositive instrument that conveys standing to foreclose under New York law.

Civil Procedure > ... > Justiciability > Standing > General Overview

Real Property Law > Financing > Foreclosures > General Overview

Real Property Law > ... > Mortgages & Other Security Instruments > Transfers > Transfers by Mortgagees

HN2[] **Justiciability, Standing**

The assignee of only a mortgage has no standing to foreclose.

Evidence > Types of Evidence > Documentary Evidence > General Overview

HN3[] **Types of Evidence, Documentary Evidence**

While the mere filing of papers received from other entities, even if they are retained in the regular course of business, is

insufficient to qualify the documents as business records, such records are nonetheless admissible if the recipient can establish personal knowledge of the maker's business practices and procedures, or that the records provided by the maker were incorporated into the recipient's own records or routinely relied upon the recipient in its business. To be admissible, these documents should carry the indicia of reliability ordinarily associated with business records.

Business & Corporate Compliance > ... > Types of Parties > Holders in Due Course > Rights

Contracts Law > ... > Negotiable Instruments > Indorsements > Blank Indorsements

Contracts Law > ... > Negotiable Instruments > Indorsements > Special Indorsements

Contracts Law > ... > Negotiable Instruments > Enforcement > General Overview

HN4[] **Holders in Due Course, Rights**

Where a plaintiff possesses a note that, on its face or by allonge, contains an indorsement in blank or bears special indorsement payable to the order of the plaintiff, such party is a holder of the note and entitled to enforce the instrument.

Headnotes/Syllabus

Headnotes

Mortgages—Foreclosure—Standing as Holder of Note—Affidavit of Loan Servicer Agency Employee Established That Prior to Commencement of Action Assignee of Mortgage Possessed Note Indorsed in Blank by Original Lender

Evidence—Business Records—Documentation of Mortgage Default—Agency Status as Servicer of Loan for Assignee of Mortgage

Counsel: **[***1]** Law Offices of Ronald J. Kim, PC, Saratoga Springs (Ronald J. Kim of counsel), for appellants.

Doonan, Graves & Longoria, LLC, Beverly, Massachusetts (Stephen M. Valente of counsel), for respondent.

Judges: Before: Garry, J.P., Egan Jr., Rose and Lynch, JJ. Garry, J.P., Egan Jr. and Rose, JJ., concur.

Opinion by: Lynch

Opinion

[*737] **[**864]** Lynch, J. Appeal from an order of the Supreme Court (Chauvin, J.), entered February 13, 2013 in Saratoga County, which, among other things, granted plaintiff's motion for summary judgment.

In 2006, defendants Timothy Monica and Kathy Monica (hereinafter collectively referred to as defendants) executed a note in favor of American Home Mortgage Acceptance, Inc. (hereinafter AHMA) that was secured by a mortgage on real property located in Saratoga County. For recording purposes, the mortgage names Mortgage Electronic Registration Systems, Inc. (hereinafter MERS) as nominee and mortgagee. MERS assigned the mortgage to plaintiff in 2009. Plaintiff then commenced the **[****2]** instant foreclosure action in 2011, four years after **[*738]** defendants defaulted on the loan.*

Following joinder of issue, plaintiff moved for summary judgment striking defendants' answer and appointing a referee to compute **[***2]** the amount owed. Defendants cross-moved for, among other things, summary judgment dismissing the complaint against them for lack of standing. Supreme Court granted plaintiff's motion and denied defendants' cross motion. Defendants appeal.

HN1[] "In a foreclosure action, a [plaintiff] producing evidence of the mortgage, unpaid note and the mortgagor's default will be entitled to summary judgment" (*HSBC Bank USA, N.A. v Sage, 112 AD3d 1126, 1127, 977 NYS2d 446 [2013], lvs dismissed 22 NY3d 1172, 985 NYS2d 472, 8 NE3d 849 [2014], 23 NY3d 1015, 992 NYS2d 774, 16 NE3d 1253 [2014]* [citations omitted]; *see PHH Mtge. Corp. v Davis, 111 AD3d 1110, 1111, 975 NYS2d 480 [2013], lv dismissed 23 NY3d 940, 987 NYS2d 593, 10 NE3d 1148 [2014]*). "Where, as here, the issue of standing is raised as an affirmative defense, the plaintiff must also prove its standing in order to be entitled to relief" (*Wells Fargo Bank, NA v Ostiguy, 127 AD3d 1375, 1376, 8 NYS3d 669 [2015]* [citations omitted]; *see Nationstar Mtge., LLC v Catizone, 127 AD3d 1151, 1152, 9 NYS3d 315 [2015]*). Standing in a mortgage foreclosure action is established by proof that the plaintiff, at the time the action was commenced, was the **[**865]** holder or assignee of the mortgage and the holder or assignee of the underlying note (*see Chase Home Fin., LLC v Miciotta, 101 AD3d 1307,*

*The record shows that two prior foreclosure actions were voluntarily discontinued.

1307, 956 NYS2d 271 [2012]; *Wells Fargo Bank, N.A. v Wine, 90 AD3d 1216, 1217, 935 NYS2d 664 [2011]*). That said, the note, and not the mortgage, is the dispositive instrument that conveys standing to foreclose under New York law (*see Aurora Loan Servs., LLC v Taylor, 25 NY3d 355, 361-362, 12 NYS3d 612, 34 NE3d 363 [2015]*).

Here, plaintiff produced the mortgage, the unpaid note, the notice of default that was sent to defendants by Acqura Loan Services **[***3]** —plaintiff's loan servicing company—and an affidavit by Doug Battin, a senior vice-president of Acqura, who confirmed defendants' default. While this documentation was sufficient to satisfy plaintiff's entitlement to an award of summary judgment, the core question here is whether plaintiff proved that it has standing to obtain such relief. There is no dispute that plaintiff received an assignment of the mortgage through MERS, but ***HN2***[↑] the assignee of only a mortgage has no standing (*see Bank of Am., N.A. v Paulsen, 125 AD3d 909, 911, 6 NYS3d 68 [2015]*; *Citibank, N.A. v Herman, 125 AD3d 587, 588, 3 NYS3d 379 [2015]*). Here, plaintiff maintains that it has standing through its physical possession of the note at the time that the action was commenced. Since the note has only an undated indorsement in blank from the original lender, it does not evidence plaintiff's **[*739]** possessory interest (*see Bank of Am., N.A. v Kyle, 129 AD3d 1168, 1169, 13 NYS3d 253, 2015 N.Y. App. Div. LEXIS 4628, *2 [2015]*). To establish physical possession, plaintiff produced the affidavit of Battin and another Acqura employee recounting that Acqura acquired the underlying loan documentation from plaintiff in June 2009, imaged the documentation into its own records system and returned the original documentation to plaintiff. Based on this documentation, Battin averred that the note was transferred to plaintiff "by way of an allonge and/or endorsement." **[***4]**

Defendants dispute the admissibility of Battin's affidavit on the ground that the business records about which he attested were neither made in Acqura's regular course of business nor within his personal knowledge. ***HN3***[↑] While "the mere filing of papers received from other entities, even if they are retained in the regular course of business, is insufficient to qualify the documents as business records" (*People v Cratsley, 86 NY2d 81, 90, 653 NE2d 1162, 629 NYS2d 992 [1995]* [internal quotation marks and citation omitted]), such records are nonetheless admissible "if the recipient can establish personal knowledge of the maker's business practices and procedures, or that the records provided by the maker were incorporated into the recipient's own records or routinely relied upon by the recipient in its business" (*State of New York v 158th St. & Riverside Dr. Hous. Co., Inc., 100 AD3d 1293, 1296, 956 NYS2d 196 [2012]* **[****3]** , *lv denied 20 NY3d 858, 984 NE2d 325, 960 NYS2d 350 [2013]*). To be admissible, these documents should carry the indicia of reliability ordinarily associated with business records (*see People v Cratsley, 86 NY2d at 91*; *One Step Up, Ltd. v Webster Bus. Credit Corp., 87 AD3d 1, 11, 925 NYS2d 61 [2011]*; *Corsi v Town of Bedford, 58 AD3d 225, 231-232, 868 NYS2d 258 [2008]*, *lv denied 12 NY3d 714, 911 NE2d 860, 883 NYS2d 797 [2009]*). Given Acqura's agency status as servicer of the loan for plaintiff, we agree with plaintiff that the Acqura records qualify as business records (*see CPLR 4518 [a]*; *People v Cratsley, 86 NY2d at 90*; *Merrill Lynch Bus. Fin. Servs. Inc. v Trataros Constr., Inc., 30 AD3d 336, 337, 819 NYS2d 223 [2006]*, **[**866]** *lv denied 7 NY3d 715, 859 NE2d 920, 826 NYS2d 180 [2006]*).

HN4[↑] "[W]here [a] plaintiff possesses a note that, on its face or by allonge, contains an indorsement in blank **[***5]** or bears special indorsement payable to the order of the plaintiff," such party is a holder of the note and entitled to enforce the instrument (*Wells Fargo Bank, NA v Ostiguy, 127 AD3d at 1376*; *see Nationstar Mtge., LLC v Davidson, 116 AD3d 1294, 1296, 983 NYS2d 705 [2014]*, *lv denied 24 NY3d 905, 995 NYS2d 713, 20 NE3d 659 [2014]*; *see also Hartford Acc. & Indem. Co. v American Express Co., 74 NY2d 153, 159, 542 NE2d 1090, 544 NYS2d 573 [1989]*). Here, Battin's affidavit established that, prior to the commencement of the action, plaintiff possessed the underlying note indorsed in blank by AHMA (*compare Bank of Am., N.A. v Kyle, 129 AD3d at 1169*). **[*740]** Defendants, in turn, have failed to raise any question of fact as to whether plaintiff continued to retain possession. As such, we conclude that Supreme Court properly found that plaintiff had standing to bring the instant foreclosure action (*see Aurora Loan Servs., LLC v Taylor, 25 NY3d at 361-362*; *Nationstar Mtge., LLC v Davidson, 116 AD3d at 1296*; *HSBC Bank USA, N.A. v Sage, 112 AD3d at 1127-1128*).

Garry, J.P., Egan Jr. and Rose, JJ., concur. Ordered that the order is affirmed, with costs.

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Bank of N.Y. Mellon v. Cutler

Supreme Court of New York, Appellate Division, Second Department

October 25, 2017, Decided

2014-10415, 2016-00435

Reporter
154 A.D.3d 910 *; 62 N.Y.S.3d 532 **; 2017 N.Y. App. Div. LEXIS 7495 ***; 2017 NY Slip Op 07424 ****

[**1]** ***Bank of New York*** Mellon, formerly known as ***Bank of New York***, as trustee for the certificate holders of CWABS, Inc., asset backed certificates, series 2007-12, respondent, v Gregg E. ***Cutler***, et al., appellants, et al., defendants. (Index No. 17552/11)

Core Terms

cross motion, summary judgment, defendants', discovery, appointment of a referee, mortgage, mortgage foreclosure action, foreclosure action, subject property, inter alia, commence, parties, records, remit

Counsel: **[***1]** R. David Marquez, P.C., Mineola, NY, for appellants.

Bryan Cave LLP, New York, NY (Suzanne M. Berger, Carolyn K. Brooks Rincon, and Courtney Peterson of counsel), for respondent.

Judges: WILLIAM F. MASTRO, J.P., L. PRISCILLA HALL, LEONARD B. AUSTIN, SANDRA L. SGROI, JJ. MASTRO, J.P., HALL, AUSTIN and SGROI, JJ., concur.

Opinion

[533]** **[*910]** DECISION & ORDER

In an action to foreclose a mortgage, the defendants Gregg E. Cutler and Mirela S. Cutler, also known as Mirela Cutler, appeal (1) from a decision of the Supreme Court, Nassau County (Adams, J.), dated July 18, 2014, and (2), as limited by their brief, from so much of an order of the same court entered January 2, 2015, as, upon the decision, granted those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against them and for the appointment of a referee to facilitate the sale of the subject property, and denied their cross motion to compel further discovery.

[*911] ORDERED that the appeal from the decision is dismissed, as no appeal lies from a decision (*see Schicchi v J.A. Green Constr. Corp., 100 AD2d 509, 472 N.Y.S.2d 718*); and it is further,

ORDERED that the order is reversed insofar as appealed from, on the law, those branches of the plaintiff's motion which were for summary judgment **[***2]** on the complaint insofar as asserted against the appellants and for the appointment of a referee to facilitate the sale of the subject property are denied, and the matter is remitted to the Supreme Court, Nassau County, for a new determination of the appellants' cross motion to compel further discovery; and it is further,

ORDERED that one bill of costs is awarded to the appellants.

The plaintiff commenced this mortgage foreclosure action following the default of the defendants Gregg E. Cutler and Mirela S. Cutler, also known as Mirela Cutler (hereinafter together the defendants), on a note executed by them in the principal amount of $372,000 and issued in favor of Countrywide Home Loans, Inc., the plaintiff's predecessor in interest. The defendants asserted, inter alia, the defense of lack of standing in their answer. The parties engaged in pretrial disclosure, and the plaintiff subsequently moved, among other things, for summary judgment on the complaint insofar as asserted against the defendants and for the appointment of a referee to facilitate the sale of the property mortgaged by the defendants as security for the debt. The defendants **[****2]** opposed the motion, inter alia, on the ground **[***3]** that the plaintiff lacked standing to maintain the action, and cross-moved to compel further discovery. The

Supreme Court granted those branches of the plaintiff's motion and, apparently in light of that determination, denied the defendants' cross motion. The defendants appeal.

Where, as here, a plaintiff's standing to commence a foreclosure action is placed in issue by the defendant, it is incumbent upon the plaintiff to prove its standing to be entitled to relief (*see Bank of N.Y. v Willis, 150 AD3d 652, 652, 55 N.Y.S.3d 63*; *Citimortgage, Inc. v Klein, 140 AD3d 913, 914, 33 N.Y.S.3d 432*; *Bank of N.Y. Mellon v Visconti, 136 AD3d 950, 950, 25 N.Y.S.3d 630*). A plaintiff has standing in a mortgage foreclosure action where it is the holder or assignee of the underlying note at the time the action is commenced (*see Aurora Loan Servs., LLC v Taylor, 25 NY3d 355, 361, 12 N.Y.S.3d 612, 34 N.E.3d 363*; *Wells Fargo Bank, N.A. v Marchione, 69 AD3d 204, 207-209, 887 N.Y.S.2d 615*; *U.S. Bank, N.A. v Collymore, 68 AD3d 752, 754, 890 N.Y.S.2d 578*). "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, **[*912]** and the mortgage passes with the debt as an inseparable incident" (*U.S. Bank, N.A. v Collymore, 68 AD3d at 754*; **[**534]** *see Aurora Loan Servs., LLC v Taylor, 25 NY3d at 361-362*).

Here, the plaintiff attempted to establish its standing by submitting the affidavit of Katherine Cacho, a vice president at Bank of America, N.A., which serviced the defendants' loan on behalf of the plaintiff. Cacho averred, in relevant part, that her affidavit was based upon her review of unspecified **[***4]** records indicating that the note was physically transferred to the plaintiff on August 16, 2007. The plaintiff failed to demonstrate that the records relied upon by Cacho were admissible under the business records exception to the hearsay rule (*see CPLR 4518[a]*) because Cacho did not attest that she was personally familiar with the plaintiff's record-keeping practices and procedures (*see Bank of N.Y. v Willis, 150 AD3d at 652*; *Arch Bay Holdings, LLC v Albanese, 146 AD3d 849, 45 N.Y.S.3d 506*; *Deutsche Bank Natl. Trust Co. v Brewton, 142 AD3d 683, 685, 37 N.Y.S.3d 25*; *Aurora Loan Servs., LLC v Mercius, 138 AD3d 650, 652, 29 N.Y.S.3d 462*).

Since the plaintiff failed to establish its prima facie entitlement to judgment as a matter of law on the issue of standing, we need not consider the sufficiency of the defendants' opposition papers (*see Alvarez v Prospect Hosp., 68 NY2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923*).

Inasmuch as the Supreme Court's denial of the defendants' cross motion to compel further discovery appears to have been premised on its granting of the plaintiff's motion for summary judgment, we remit the matter to that court for a new determination of the cross motion.

In view of the foregoing, we need not reach the parties' remaining contentions.

MASTRO, J.P., HALL, AUSTIN and SGROI, JJ., concur.

End of Document

Citimortgage, Inc. v Kidd

Supreme Court of New York, Appellate Division, Second Department

March 8, 2017, Decided

2014-07397

Reporter
148 A.D.3d 767 *; 49 N.Y.S.3d 482 **; 2017 N.Y. App. Div. LEXIS 1656 ***; 2017 NY Slip Op 01668 ****; 2017 WL 902529

[****1] *Citimortgage*, Inc., Respondent, v William B.F. *Kidd* et al., Defendants, and Yuko *Kidd*, Appellant. (Index No. 7749/10)

Core Terms

referee's report, confirmed, parcel, further proceedings, mortgaged premises, referee's findings, subject premises, summary judgment, computation, mortgage, perfect, issues, remit

Headnotes/Syllabus

Headnotes

Mortgages—Foreclosure—Confirmation of Referee's Report

Counsel: [***1] Clair & Gjertsen, Scarsdale, NY (Mary Aufrecht and Lance Colquitt of counsel), for appellant.

Duane Morris LLP, New York, NY (Stephanie Sgambati and Steven T. Knipfelberg of counsel), for respondent.

Judges: CHERYL E. CHAMBERS, J.P., L. PRISCILLA HALL, LEONARD B. AUSTIN, HECTOR D. LASALLE, JJ. CHAMBERS, J.P., HALL, AUSTIN and LASALLE, JJ., concur.

Opinion

[**483] [*767] In an action to foreclose a mortgage, the defendant Yuko Kidd appeals from a judgment of foreclosure and sale of the Supreme Court, Westchester County (Giacomo, J.), dated [*768] March 31, 2014, which, upon an order of the same court entered March 15, 2012, confirmed a referee's report and directed the sale of the subject premises in one parcel.

Ordered that the judgment is reversed, on the law, with costs, the referee's report is rejected, and the matter is remitted to the Supreme Court, Westchester County, for further proceedings in accordance herewith.

In an order entered March 15, 2012, the Supreme Court, inter alia, awarded the plaintiff summary judgment on the complaint and denied the cross motion of the defendant Yuko Kidd (hereinafter the defendant) for summary judgment dismissing the complaint. The defendant's appeal from that order was [***2] dismissed by a decision and order on motion of this Court dated May 3, 2013, for failure to perfect (*see* 22 NYCRR 670.8 [e]). As a general rule, we do not consider any issue raised on a subsequent appeal that could have been raised in an earlier appeal which was dismissed for failure to perfect, although this Court has the inherent jurisdiction to do so (*see Bray v Cox*, 38 NY2d 350, 342 NE2d 575, 379 NYS2d 803 [1976]; *Green Tree Credit, LLC v Jelks*, 120 AD3d 1299, 991 NYS2d 903 [2014]; *Madison Realty Capital, L.P. v Broken Angel, LLC*, 107 AD3d 766, 966 NYS2d 682 [2013]; *Spiritis v Village of Hempstead Community Dev. Agency*, 63 AD3d 907, 880 NYS2d 543 [2009]). We decline to exercise our jurisdiction to determine [**484] the merits of the present appeal to the extent that it raises issues that could have been raised on the appeal from the order dated March 15, 2012 (*see Bray v Cox*, 38 NY2d 350, 342 NE2d 575, 379 NYS2d 803 [1976]; *Green Tree Credit, LLC v Jelks*, 120 AD3d 1299, 991 NYS2d 903 [2014]; *Kapsis v Peragine*, 96 AD3d 804, 946 NYS2d 234 [2012]; *Spiritis v Village of Hempstead Community Dev. Agency*, 63 AD3d 907, 880 NYS2d 543 [2009]).

However, as the defendant correctly contends, the Supreme Court erred in confirming the referee's report. The report of a referee should be confirmed whenever the findings are substantially supported by the record, and the referee has clearly defined the issues and resolved matters of credibility (*see Matter of Cincotta*, 139 AD3d 1058, 32 NYS3d 610 [2016]; *Hudson v Smith*, 127 AD3d 816, 4 NYS3d 894 [2015]; [****2] *Matter of County Conduit Corp.*, 49 AD3d

641, 852 NYS2d 788 [2008]; *Thomas v Thomas, 21 AD3d 949, 800 NYS2d 768 [2005]*; *Matter of Smiros v Lopez, 251 AD2d 587, 675 NYS2d 95 [1998]*). The referee's findings and recommendations are advisory only and have no binding effect on the court, which remains the ultimate arbiter of the dispute (*see Shultis v Woodstock Land Dev. Assoc., 195 AD2d 677, 599 NYS2d 340 [1993]*). Here, as the defendant contended in opposition to the plaintiff's submissions, the referee's findings with respect to the total amount due upon the mortgage were **[***3]** not substantially supported by the record inasmuch as the computation **[*769]** was premised upon unproduced business records (*see Republic Natl. Bank of N.Y. v Luis Winston, Inc., 107 AD2d 581, 483 NYS2d 311 [1985]*; *cf. Galasso, Langione & Botter, LLP v Galasso, 89 AD3d 897, 933 NYS2d 73 [2011]*; *see generally Shen v Shen, 21 AD3d 1078, 803 NYS2d 579 [2005]*). Moreover, the referee's report also failed to identify the documents or other sources upon which the referee based his finding that the mortgaged premises should be sold in one parcel, and failed to answer the court's specific question of whether the mortgaged premises could be sold in parcels. In confirming the report, the Supreme Court improperly relied on the referee's inadequately supported findings.

Accordingly, we remit the matter to the Supreme Court, Westchester County, for a new report computing the amount due to the plaintiff in accordance herewith, and determining whether the subject premises can be sold in parcels, followed by further proceedings in accordance with *CPLR 4403* and the entry of an appropriate amended judgment thereafter. Chambers, J.P., Hall, Austin and LaSalle, JJ., concur.

End of Document

Aurora Loan Servs., LLC v Taylor

Court of Appeals of New York

April 30, 2015, Argued; June 11, 2015, Decided

No. 83

Reporter
25 N.Y.3d 355 *; 34 N.E.3d 363 **; 12 N.Y.S.3d 612 ***; 2015 N.Y. LEXIS 1393 ****; 2015 NY Slip Op 04872

[1] *Aurora* Loan Services, LLC, Respondent, v Monique *Taylor*, Also Known as Monique Pujol *Taylor*, et al., Appellants, et al., Defendants.

Prior History: Appeal, by permission of the Appellate Division of the Supreme Court in the Second Judicial Department, from an order of that Court, entered February 5, 2014. The Appellate Division order, insofar as appealed from, affirmed an order of the Supreme Court, Westchester County (Sam D. Walker, J.), upon which a judgment of foreclosure had been entered, which had (1) denied the motion by defendants Monique Taylor and Leonard Taylor for summary judgment dismissing the complaint insofar as asserted against them, (2) granted that branch of plaintiff's cross motion for summary judgment on the complaint insofar as asserted against those defendants, and (3) appointed a referee. The following question was certified by the Appellate Division: "Was the decision and order of this Court dated February 5, 2014, properly made?"

Aurora Loan Servs., LLC v Taylor, 114 AD3d 627, 980 NYS2d 475, affirmed.

Aurora Loan Servs., LLC v Taylor, 114 AD3d 627, 980 NYS2d 475, 2014 N.Y. App. Div. LEXIS 617 (N.Y. App. Div. 2d Dep't, 2014)

Disposition: Order, insofar as appealed from, affirmed, with costs, and certified question answered in the affirmative.

Core Terms

mortgage, commencement, foreclosure action, summary judgment, original note, Services, possession of a note, foreclosure, transferred, foreclose

Case Summary

Overview

HOLDINGS: [1]-The trial court properly granted plaintiff loan servicer summary judgment in a mortgage foreclosure action; it had standing to commence the action as the evidence established it was the owner of the note and had physical possession of the note before commencement of the action; it did not need to also possess the mortgage at the time the action was commenced.

Outcome
The judgment was affirmed.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Negotiable Instruments > Types of Negotiable Instruments > Promissory Notes

Real Property Law > Financing > Foreclosures > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

HN1[] **Negotiable Instruments, Promissory Notes**

The physical delivery of the note to the plaintiff from its owner prior to commencement of a foreclosure action may, in certain circumstances, be sufficient to transfer the mortgage obligation and create standing to foreclose.

Business & Corporate Compliance > ... > Negotiable Instruments > Types of Negotiable Instruments > Promissory Notes

Real Property Law > Financing > Mortgages & Other Security Instruments > General Overview

Services, LLC possessed standing to commence this foreclosure action. (*Baron Assoc., LLC v Garcia Group Enters., Inc., 96 AD3d 793, 946 NYS2d 611*; *Barclay's Bank of N.Y. v Smitty's Ranch, 122 AD2d 323, 504 NYS2d 295*; *Deutsche Bank Natl. Trust Co. v Pietranico, 33 Misc 3d 528, 928 NYS2d 818*; *Mortgage Elec. Registration Sys., Inc. v Coakley, 41 AD3d 674, 838 NYS2d 622*; *Slutsky v Blooming Grove Inn, 147 AD2d 208, 542 NYS2d 721*; *Bank of N.Y. Mellon v Deane, 41 Misc 3d 494, 970 NYS2d 427*; *State Bank v Central Mercantile Bank, 248 NY 428, 162 NE 475*; *Carlin v Jemal, 68 AD3d 655, 891 NYS2d 391*; *Bank of N.Y. v Silverberg, 86 AD3d 274, 926 NYS2d 532*; *Bank of N.Y. Mellon Trust Co. NA v Sachar, 95 AD3d 695, 943 NYS2d 893*.) II. Under New York law, Aurora Loan Services, LLC was not required to produce the original note to establish standing; rather, uncontroverted affidavit testimony demonstrating Aurora's possession of the note prior to commencement of the foreclosure proceedings was sufficient to establish standing. (*Barclay's Bank of N.Y. v Smitty's Ranch, 122 AD2d 323, 504 NYS2d 295*; *Sam v Town of Rotterdam, 248 AD2d 850, 670 NYS2d 62*.) III. Although assignment of the mortgage was not required to confer standing to foreclose under New York law, Mortgage Electronic Registration Systems, Inc. had authority to, and did, effect a valid assignment of the mortgage to Aurora Loan Services, LLC. (*Bank of N.Y. Mellon Trust Co. NA v Sachar, 95 AD3d 695, 943 NYS2d 893*; *Bank of N.Y. v Silverberg, 86 AD3d 274, 926 NYS2d 532*; *Shultis v Woodstock Land Dev. Assoc., 195 AD2d 677, 599 NYS2d 340*; *Federal Deposit Ins. Corp. v 65 Lenox Rd. Owners Corp., 270 AD2d 303, 704 NYS2d 613*; *Adelman v Fremd, 234 AD2d 488, 651 NYS2d 604*; *Stein v American Mtge. Banking, 216 AD2d 458, 628 NYS2d 162*.)

Hiscock & Barclay, LLP, Buffalo (*Charles C. Martorana* and *Kimberly A. Colaiacovo* of counsel), for MERSCORP Holdings, Inc. and another, amici curiae. I. Appellants lack standing to challenge Mortgage Electronic Registration Systems, Inc.'s assignment of their mortgage. (*Matter of Holden, 271 NY 212, 2 NE2d 631*; *Jennings v Foremost Dairies, 37 Misc 2d 328, 235 NYS2d 566*; *Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 944 NE2d 1104, 919 NYS2d 465*; *Strauss v Belle Realty Co., 98 AD2d 424, 469 NYS2d 948*.) II. The Mortgage Electronic Registration Systems, Inc.® system. (*Horvath v Bank of N.Y., N.A., 641 F3d 617*; *In re Security Capital Assur. Ltd. Sec. Litig., 729 F Supp 2d 569*; *Matter of MERSCORP, Inc. v Romaine, 8 NY3d 90, 861 NE2d 81, 828 NYS2d 266*; *Deerman v Federal Home Loan Mtge. Corp., 955 F Supp 1393*.) III. Aurora Loan Services, LLC possessed standing to commence the foreclosure action. (*Mortgage Elec. Registration Sys., Inc. v Coakley, 41 AD3d 674, 838 NYS2d 622*; *Slutsky v Blooming Grove Inn, 147 AD2d 208, 542 NYS2d 721*; *GRP Loan, LLC v Taylor, 95 AD3d 1172, 945 NYS2d 336*; *Kondaur Capital Corp. v McCary, 115 AD3d 649, 981 NYS2d 547*; *First Trust Natl. Assn. v Meisels, 234 AD2d 414, 651 NYS2d 121*; *Weaver Hardware Co. v Solomovitz, 235 NY 321, 139 NE 353*; *Fryer v Rockefeller, 63 NY 268*; *Matter of Falls, 31 Misc 658, 66 NYS 47, 1 Mills 558, 66 App Div 616, 73 NYS 1134*; *Becker v Wells, 297 NY 275, 78 NE2d 609*; *Flyer v Sullivan, 284 App Div 697, 134 NYS2d 521*.) IV. Mortgage Electronic Registration Systems, Inc., as nominee, has authority to assign the mortgage. (*Matter of Doniger v Rye Psychiatric Hosp. Ctr., 122 AD2d 873, 505 NYS2d 920*; *Red Hook Cold Stor. Co. v Department of Labor of State of N.Y., 295 NY 1, 64 NE2d 265*; *Matter of Johnsen v ACP Distrib., Inc., 31 AD3d 172, 814 NYS2d 142*; *Matter of El-Roh Realty Corp., 48 AD3d 1190, 851 NYS2d 777*; *Zurich Am. Ins. Co. v ABM Indus., Inc., 397 F3d 158*; *Standard Bldrs. Supplies v Gush, 206 AD2d 720, 614 NYS2d 632*; *Matter of Stralem, 303 AD2d 120, 758 NYS2d 345*; *Allhusen v Caristo Constr. Corp., 303 NY 446, 103 NE2d 891*; *Sullivan v International Fid. Ins. Co., 96 AD2d 555, 465 NYS2d 235*; *US Bank N.A. v Flynn, 27 Misc 3d 802, 897 NYS2d 855*.) V. The Taylor mortgage is valid. (*Gibson v Thomas, 180 NY 483, 73 NE 484*; *Finn v Wells, 135 Misc 53, 237 NYS 580*; *W.L. Dev. Corp. v Trifort Realty, 44 NY2d 489, 377 NE2d 969, 406 NYS2d 437*; *People v Prince, 110 Misc 2d 55, 441 NYS2d 586*; *Williams v Wisner Bldg. Co., Inc., 121 Misc 32, 200 NYS 802, 208 App Div 783, 203 NYS 959*; *Munoz v Wilson, 111 NY 295, 18 NE 855, 19 NY St 372*; *Wood v Travis, 231 App Div 331, 248 NYS 22*; *In re Cushman Bakery, 526 F2d 23*; *Deutsche Bank Natl. Trust Co. v Pietranico, 33 Misc 3d 528, 928 NYS2d 818*; *Wechsler v Hunt Health Sys., Ltd., 216 F Supp 2d 347*.)

Judges: LIPPMAN, Chief Judge. Opinion by Chief Judge Lippman. Judges Read, Pigott, Rivera, Abdus-Salaam, Stein and Fahey concur.

Opinion by: LIPPMAN

Opinion

[*613] [*358] [**364]** Chief Judge Lippman.

The issue presented by this appeal is whether plaintiff Aurora Loan Services, LLC had standing to commence this mortgage foreclosure action. We now affirm that part of the Appellate Division order *(114 AD3d 627, 980 NYS2d 475 [2d Dept 2014])* upholding Supreme Court's grant of **[2]** summary judgment in favor of plaintiff, and hold that ***Aurora*** did have standing.

Defendant Monique ***Taylor*** executed and delivered an

adjustable rate note dated July 5, 2006 to First National Bank of Arizona, wherein she agreed to repay the bank $600,000, with interest. To secure the payment, Monique and Leonard Taylor **[*359]** (the Taylors) executed a mortgage with the bank, granting Mortgage Electronic Registration Systems, Inc. (MERS), as nominee, a mortgage lien on the property located in Fleetwood, New York. The note, however, was not transferred to MERS with the mortgage.

Subsequent to the note's execution, pursuant to a March 2006 pooling and servicing agreement (PSA), the loan was made part of a residential **[****2]** mortgage-backed securitization trust. Deutsche Bank Trust Company Americas, as trustee, became the owner of the note through an allonge indorsing the note to Deutsche, as required under the PSA. The allonge shows the chain of ownership of the note through indorsements from First National Bank of Arizona, to First National Bank of Nevada, to Residential Funding Company, LLC, to Deutsche.

On April 1, 2008, Aurora assumed servicer obligations under the PSA pursuant to a March 10, 2008 master servicing assignment and assumption agreement (MSAAA). The mortgage was subsequently assigned by MERS to Aurora on August 13, 2009, and recorded with the County Clerk on October 29, 2009.

Thereafter, the Taylors defaulted under the note and mortgage by failing to make the payment due on January 1, 2010, and each month thereafter. The Taylors have never disputed their obligation to make the payments or their default. Multiple notices of default were mailed to the Taylors through May of 2010.

On May 14, 2010, Deutsche, by limited power of attorney, granted Aurora the right to perform certain acts in the trustee's name, including the execution of documents related to loan modification and foreclosure. **[****3]** Aurora, through its agents, asserts it took physical custody of the original note on May 20, 2010. Aurora commenced this foreclosure action by filing a summons and complaint with the Westchester County Clerk on May 24, 2010. These were personally served upon the Taylors on May 29, 2010. The Taylors filed an answer on June 29, 2010.

[365]** **[***614]** The Taylors filed a motion for summary judgment, asserting that Aurora did not have standing to bring this foreclosure action. Aurora cross-moved for summary judgment. In support of its cross motion, Aurora submitted the affidavit of Sara Holland (Holland affidavit), Aurora's legal liaison, who stated that based on her "personal knowledge" of the facts as well as her "review of the note, mortgage and other loan documents" and "related business records . . . kept in the ordinary course of **[*360]** the regularly conducted business activity," the "original Note has been in the custody of Plaintiff Aurora Loan Services, LLC and in its present condition since May 20, 2010." Holland also stated that, "prior to the commencement of the action, Aurora Loan **[3]** Services, LLC, has been in exclusive possession of the original note and allonge affixed thereto, indorsed to Deutsche **[****4]** Bank Trust Company Americas as Trustee, and has not transferred same to any other person or entity." A copy of the note and allonge were attached to the affidavit.

Supreme Court denied the Taylors' motion for summary judgment, granted Aurora's cross motion for summary judgment, and appointed a referee to determine the amount due under the note. Aurora then filed a motion for summary judgment of foreclosure and sale, which the Taylors opposed. The court granted that motion on April 29, 2013, adopting the referee's recommendation without a hearing. The Taylors appealed both orders.

The Appellate Division affirmed the first order, concluding that Aurora had proven its standing as a matter of law. The Court concluded that, under New York law, the Holland affidavit demonstrated that Aurora had obtained physical possession of the original note prior to commencement of this foreclosure action, and that such was legally sufficient to establish standing. The Court specifically noted that the Taylors "offered no evidence to contradict those factual averments and, therefore, failed to raise a triable issue of fact with respect to [Aurora's] standing" (*114 AD3d at 629*). However, the Court reversed the judgment **[****5]** of foreclosure and sale and remitted the matter to Supreme Court for further proceedings, concluding that Supreme Court erred in confirming the referee's report because the referee had computed the amount due to Aurora without holding a hearing on notice to the Taylors (*see id. at 629-630*). One Justice dissented, arguing that the Holland affidavit was insufficient to confer standing on Aurora because it did not give sufficient "factual details" regarding the physical delivery of the note to Aurora (*id. at 631*, citing *HSBC Bank USA v Hernandez, 92 AD3d 843, 844, 939 NYS2d 120 [2d Dept 2012]*). Thereafter, the Appellate Division granted the Taylors' motion for leave to appeal, certifying the following question: "Was the decision and order of this Court . . . properly made?" (2014 NY Slip Op 70548[U] [2d Dept 2014].)

The critical issue we must resolve is whether the record demonstrates a basis for finding that Aurora had standing to **[*361]** commence this mortgage foreclosure action. *HN1*[↑] The physical delivery of the note to the plaintiff from its owner prior to commencement of a foreclosure action may, in certain circumstances, be sufficient to transfer the mortgage obligation and create standing to foreclose (*see e.g. Bank of*

N.Y. Mellon Trust Co. NA v Sachar, 95 AD3d 695, 943 NYS2d 893 [1st Dept 2012]; *Deutsche Bank Natl. Trust Co. v Pietranico, 33 Misc 3d 528, 535, 928 NYS2d 818 [Sup Ct, Suffolk County 2011]*; *In re Escobar, 457 BR 229, 240 [ED NY 2011]*).

[366]** **[***615]** Applying these principles of New York law, Aurora was vested with standing to foreclose. The evidence established **[****6]** that, as of 2006, Deutsche, as trustee under the PSA, became the lawful owner of the note. The Holland affidavit establishes that Aurora came into possession of the note on May 20, 2010, prior to the May 24, 2010 commencement of the foreclosure action. From these specific statements, together with proof of Aurora's authority pursuant to the MSAAA and the limited power of attorney, the Appellate Division held, "[i]t can **[4]** reasonably be inferred . . . that physical delivery of the note was made to the plaintiff" before the action was commenced (*114 AD3d at 629*).

Contrary to the Taylors' assertions, to have standing, it is not necessary to have possession of the mortgage at the time the action is commenced. This conclusion follows from the fact that the note, and not the mortgage, is the dispositive instrument that conveys standing to foreclose under New York law. In the current case, the note was transferred to Aurora before the commencement of the foreclosure action—that is what matters.

HN2[↑] A transfer in full of the obligation automatically transfers the mortgage as well unless the parties agree that the transferor is to retain the mortgage (Restatement [Third] of Property [Mortgages] § 5.4, Reporter's Note, Comment **[****7]** *b*). The Taylors misconstrue the legal principle that "an entity with a mortgage but no note lack[s] standing to foreclose" (*Knox v Countrywide Bank, 4 F Supp 3d 499, 508 [ED NY 2014]*) to also mean the opposite—that an entity with a note but no mortgage lacks standing. Once a note is transferred, however, "the mortgage passes as an incident to the note" (*Bank of N.Y. v Silverberg, 86 AD3d 274, 280, 926 NYS2d 532 [2d Dept 2011]*).

> *HN3*[↑] "[A]ny disparity between the holder of the note and the mortgagee of record does not stand as a bar to **[*362]** a foreclosure action because the mortgage is not the dispositive document of title as to the mortgage loan; the holder of the note is deemed the owner of the underlying mortgage loan with standing to foreclose" (14A Carmody-Wait 2d § 92:79 [2012] [citation omitted]).

Accordingly, the Taylors' argument that Aurora lacked standing because it did not possess a valid and enforceable mortgage as of the commencement of this action is simply incorrect. The validity of the August 2009 assignment of the mortgage is irrelevant to Aurora's standing.

The question that follows this analysis is whether Aurora adequately proved that it did, indeed, have possession of the note prior to commencement of this action. The Taylors argue that to demonstrate possession of the note Aurora had to produce the original mortgage note **[****8]** for examination, and that the Holland affidavit does not suffice. Additionally, the dissent at the Appellate Division concluded that the affidavit was lacking details regarding Aurora's possession of the note.

As to production of the original note, there is no indication in the record that the Taylors ever requested such production in discovery or moved Supreme Court to compel such production. Although the Taylors assert that the best evidence rule should require production of the original, they fail to cite any authority holding that such is required in this context. Second, Ms. Holland asserts in her affidavit that she examined the original note herself, and the adjustable rate note attachments submitted with the moving papers clearly show the note's chain of ownership through Deutsche.

Although the better practice would have been for Aurora to state how it came into **[5]** possession of the note in its affidavit in **[**367]** **[***616]** order to clarify the situation completely, we conclude that, under the circumstances of this case, the court did not err in granting summary judgment to Aurora.

Insofar as Aurora argues that the Appellate Division erred in reversing the judgment of foreclosure, the issue is not **[****9]** properly before us because Aurora never obtained permission from the Appellate Division to appeal to this Court from the Appellate Division order (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151, 773 NE2d 496, 746 NYS2d 131 n 3 [2002]*).

Accordingly, the order of the Appellate Division, insofar as appealed from, should be affirmed, with costs, and the certified question answered in the affirmative.

Judges Read, Pigott, Rivera, Abdus-Salaam, Stein and Fahey concur.

[*363] Order, insofar as appealed from, affirmed, with costs, and certified question answered in the affirmative.

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Countrywide Home Loans, Inc. v Campbell

Supreme Court of New York, Appellate Division, Second Department

August 15, 2018, Decided

2016-06550

Reporter
164 A.D.3d 646 *; 2018 N.Y. App. Div. LEXIS 5715 **; 2018 NY Slip Op 05749 ***

[*1]** ***Countrywide*** Home Loans, Inc., appellant, v ***Khalid*** Campbell, respondent, et al., defendants. (Index No. 7715/08)

Core Terms

sua sponte, reference order, mortgage, default judgment, caption, default, merits, amend, extraordinary circumstances, action to foreclose, lack of standing, motion for leave, appealed order, remitted, appeals, notice

Counsel: **[**1]** Sandelands Eyet, LLP, New York, NY (Laurence P. Chirch of counsel), for appellant.

Abraham Hoschander, Brooklyn, NY, for respondent.

Judges: CHERYL E. CHAMBERS, J.P., JEFFREY A. COHEN, COLLEEN D. DUFFY, FRANCESCA E. CONNOLLY, JJ. CHAMBERS, J.P., COHEN, DUFFY and CONNOLLY, JJ., concur.

Opinion

[*646] DECISION & ORDER

In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Kings County (Richard Velasquez, J.), dated January 28, 2016. The order, in effect, denied the plaintiff's motion for leave to enter a default judgment, for an order of reference, and to amend the caption, and, sua sponte, directed dismissal of the complaint.

ORDERED that on the Court's own motion, the notice of appeal from so much of the order as, sua sponte, directed dismissal of the complaint is deemed to be an application for leave to appeal from that portion of the order, and leave to appeal is granted (*see* CPLR 5701[c]); and it is further,

ORDERED that the order is reversed, on the law, and the matter is remitted to the Supreme Court, Kings County, for a determination **[*647]** on the merits of the plaintiff's motion for leave to enter a default judgment, for an order of reference, and to amend the caption; and it is further, **[**2]**

ORDERED that one bill of costs is awarded to the plaintiff.

In March 2008, the plaintiff commenced this action to foreclose a mortgage against the defendant Khalid Campbell (hereinafter the defendant), among others. The defendant failed to appear or answer the complaint. In July 2008, the plaintiff moved, inter alia, for an order of reference, and the Supreme Court denied that motion with leave to renew. In January 2015, the plaintiff moved for leave to enter a default judgment, for an order of reference, and to amend the caption. In the order appealed from, the court, in effect, denied the motion and, sua sponte, directed dismissal of the complaint. The plaintiff appeals.

"A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal" (*Deutsche Bank Natl. Trust Co. v Martin, 134 AD3d 665, 665, 19 N.Y.S.3d 777* [internal quotation marks omitted]). Here, the Supreme Court was not presented with any extraordinary circumstances warranting a sua sponte dismissal of the complaint (*see id. at 665*; *HSBC Bank USA, N.A. v Taher, 104 AD3d 815, 817, 962 N.Y.S.2d 301*; *NYCTL 2008-A Trust v. Estate of Holas, 93 AD3d 650, 651, 939 N.Y.S.2d 715*). The plaintiff's alleged failure to satisfy a condition precedent in the mortgage by failing to provide the defendant with 30 days' written notice of his default in making mortgage payments, **[**3]** even if true, did not deprive the court of jurisdiction to enter **[***2]** a judgment of foreclosure and sale (*see Deutsche Bank Trust Co. Ams. v Shields, 116 AD3d 653, 654, 983 N.Y.S.2d 286*; *Signature Bank v Epstein, 95 AD3d 1199, 1201, 945 N.Y.S.2d 347*; *see also PHH Mtge. Corp. v Muricy, 135 AD3d 725,*

727, 24 N.Y.S.3d 137).

To the extent that the Supreme Court addressed the issue of the plaintiff's standing in the order appealed from, a party's lack of standing does not constitute a jurisdictional defect and does not warrant a sua sponte dismissal of the complaint by the court (*see U.S. Bank, N.A. v Emmanuel, 83 AD3d 1047, 1048-1049, 921 N.Y.S.2d 320)*. Moreover, since the defendant defaulted in appearing or answering the complaint, and failed to move to vacate his default, he is precluded from asserting lack of standing as a defense (*see First Franklin Fin. Corp. v Alfau, 157 AD3d 863, 70 N.Y.S.3d 518*).

Since the Supreme Court did not consider the merits of the plaintiff's motion, the matter must be remitted to the Supreme Court, Kings County, for a determination of the plaintiff's motion **[*648]** on the merits (*see Deutsche Bank Natl. Trust Co. v Martin, 134 AD3d at 665*).

CHAMBERS, J.P., COHEN, DUFFY and CONNOLLY, JJ., concur.

End of Document

Record and Return To:
Wilshire Credit Corporation
14523 SW Millikan Way, #200
Beaverton, OR 97005

ORIGINAL

ASSIGNMENT OF MORTGAGE

Date of Assignment: 09/24/2004

Assignor: Washington Mutual Bank FA; 1120 W Holland Avenue, Milwaukee, WI 53224

Assignee: Homecomings Financial network, Inc.
Located at: c/o Wilshire Credit Corporation, 14523 SW Millikan Way, #200
Beaverton, OR 97005

Executed By SIGMOND WINTER [redacted] Smithtown, NY 11787

To: Washington Mutual Bank, FA

Mortgage Dated: 01/08/2003 and Recorded on April 29, 2003 as ~~Instrument No.~~
Book/Liber 20377 Page 408 In Suffolk County NY

Property Address: 136 LANDING MEADOW RD
SMITHTOWN, NY 11787 Dist: 0800 Sect: 051.00 Block 07.00 Lots: 82, 83

KNOW ALL MEN BY THESE PRESENTS that in consideration of the sum of TEN and no /100ths DOLLARS and other good and valuable consideration, paid to the above named Assignor, the receipt and sufficiency of which is hereby acknowledged, the said Assignor hereby assigns unto the above-named Assignee, the said Mortgage together with the Note or other evidence of indebtedness (the "Note"), said Note having an original principal sum of $918,000.00 with interest, secured thereby, together with all moneys now owing or that may hereafter become due or owing in respect thereof, and the full benefit of all the powers and of all the covenants and provisos therein contained, and the said Assignor hereby grants and conveys unto the said Assignee, the Assignor's beneficial interest under the Mortgage.

TO HAVE AND TO HOLD the said Mortgage and Note, and also the said property unto the said Assignee forever, subject to the terms contained in said Mortgage and Note.

Washington Mutual Bank, FA

*This assignment is not subject to the requirements of section 275 of the Real Property Law because it is an assignment within the secondary mortgage market.

ON 09/24/2004

BY: M P Eyles
M. P. Eyles
Asst Vice President

STATE OF FLORIDA]
COUNTY OF DUVAL] SS

ON 09/24/2004 BEFORE ME, Scott Raymond Bledsoe, A NOTARY PUBLIC, PERSONALLY APPEARED M. P. Eyles, PERSONALLY KNOWN TO ME (OR PROVED TO ME ON THE BASIS OF SATISFACTORY EVIDENCE) TO BE THE PERSON WHOSE NAME IS SUBSCRIBED TO THE WITHIN INSTRUMENT AND ACKNOWLEDGED TO ME THAT HE EXECUTED THE SAME IN HIS AUTHORIZED CAPACITY, AND THAT BY HIS SIGNATURE ON THE INSTRUMENT THE PERSONS, OR THE ENTITY UPON BEHALF OF WHICH THE PERSON ACTED, EXECUTED THIS INSTRUMENT.

WITNESS MY HAND AND OFFICIAL SEAL.

Scott Raymond Bledsoe

Scott Raymond Bledsoe
Commission # DD325356
Expires June 2, 2008
Bonded Troy Fain-Insurance, Inc. 800-385-7019

Schedule A

Title Number: 06-039961

ALL THAT CERTAIN PLOT, PIECE, OR PARCEL OF LAND, with the buildings and improvements thereon erected, situate, lying, and being in the Town of Smithtown, County of Suffolk, known and designated as Lot 1, as shown on a certain map entitled, "Map of Crocker Estates" and filed in the Office of the Clerk of the County of Suffolk on July 1, 1999 as Map Number 10300, being more particularly bounded and described as follows:

BEGINNING at a point on the Northeasterly side of Landing Meadow Road where the same is intersected by the Easterly boundary line of Map of Nissequogue overlook – section three (Map Number 7194), said point or place of beginning being distant 290.00 feet southeasterly as measured along the Northeasterly side of Landing Meadow Road from the Southeasterly end of a curve having a radius of 25.00 feet and a length of 39.27 feet which said curve connects the Southeasterly side of Riverview Terrace with the Northeasterly side of Landing Meadow Road;

RUNNING THENCE from said point or place of beginning along said last mentioned boundary line the following 2 courses and distances:

1. North 15 degrees, 59 minutes, 00 seconds East, 102.78 feet;
2. North 13 degrees, 09 minutes, 50 seconds East, 332.01 feet to Land now or formerly of the County of Suffolk;

RUNNING THENCE along said Land, the following 3 courses and distances:

1. South 80 degrees, 15 minutes, 50 seconds East, 97.73 feet;
2. South 77 degrees, 48 minutes, 00 seconds East, 209.79 feet;
3. South 77 degrees, 15 minutes, 00 seconds East, 60.00 feet to the division line between Lot 1 and Lot 2 on the Map first above mentioned.

THENCE along said division line South 49 degrees, 43 minutes, 00 seconds West, 573.63 feet to the new Easterly side of Landing Meadow Road as widened;

THENCE along the new Easterly side of Landing Meadow Road as widened, North 15 degrees, 59 minutes, 00 seconds East, 8.58 feet to the Northeasterly side of Landing Meadow Road;

THENCE along the Northeasterly side of Landing Meadow Road, North 62 degrees, 50 minutes, 10 seconds West, 32.11 feet to the point or place of BEGINNING.

District: 0800 Section: 051.00 Block: 07.00 Lot: 002.003

4001011755

Prepared By/Record & Return To:
Karalee Hirschfield
Home Loan Services, Inc.
P. O Box1838 – Locator #23-531
Pittsburgh, PA 15230-9500

This Assignment is Not Subject to the Requirements of Section 275 of the Real Property Law because it is an Assignment within the Secondary Mortgage Market.

Loan No. [redacted]

Assignment of Mortgage

Date of Assignment: March 1, 2008

County of Nassau, State of New York

Assignor: **(MERS), Mortgage Electronic Registration Systems, Inc. as Nominee for First Franklin, a Division of National City Bank**
1595 Spring Hill Road
Vienna, VA 22182
2150 N. First Street, San Jose CA 95131

Assignee: LaSalle Bank National Association as Trustee for First Franklin Mortgage Loan Trust 2006-FF8 Mortgage Loan Asset-Backed Certificates, Series 2006-FF8
150 Allegheny Center Mall
Pittsburgh, Pennsylvania 15212

Executed by: [redacted]

Original Lender: First Franklin, a division of Nat. City Bank of IN
2150 N. FIRST ST. SAN JOSE, CA 95131

Mortgage dated October 2, 2006 in the amount of $454,750.00 and recorded on October 19, 2006 as
Li Ber /Book: [redacted]

Property Address: [redacted]
SIB/L.

Legal Description: See Attached.

Know All Men By These Presents that in consideration of the sum of Ten and No/100ths Dollars and other good valuable consideration, paid to the above Named assignor, the receipt and sufficiency of which is hereby acknowledged the Said Assignor hereby assigns unto the above named Assignee, the said Deed Having an original principal sum of $454,750.00 interest thereby, Together with all moneys now owing or that may hereafter become due or owing in Respect thereof, and the full benefit of all the powers and of all the covenants and Provisions therein contained, and the said Assignor hereby grants and conveys Unto the said Assignee, the Assignor's beneficial interest under the Mortgage

To Have and to Hold the said Mortgage and Note, and also the said property unto the said Assignee forever, subject to the terms contained in said Mortgage and Note.

Signed on this day: March 1, 2008

Witness _____

Karalee Hirschfield

Witness _____

Matthew Coffman

(MERS), Mortgage Electronic Registration Systems, Inc. as Nominee for First Franklin, a Division of National City Bank

By _____

Eileen J. Gonzales
Assistant Vice President

State of: Pennsylvania
County of: Allegheny

On March 1, 2008, before the undersigned, Karen Duddy, a Notary Public in and for said County and State, on this day personally appeared, Eileen J. Gonzales, Assistant Vice President of **(MERS), Mortgage Electronic Registration Systems, Inc. as Nominee for First Franklin, a Division of National City Bank**, known to be the person and officer whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by her signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

Notary Public

COMMONWEALTH OF PENNSYLVANIA
Notarial Seal
Karen Duddy, Notary Public
City of Pittsburgh, Allegheny County
My Commission Expires Aug. 21, 2011
Member, Pennsylvania Association of Notaries

Neutral
As of: October 31, 2018 4:39 PM Z

OneWest Bank, N.A. v FMCDH Realty, Inc.

Supreme Court of New York, Appellate Division, Second Department

September 19, 2018, Decided

2016-00039

Reporter
2018 N.Y. App. Div. LEXIS 6066 *; 2018 NY Slip Op 06101 **; 2018 WL 4472948

[**1] OneWest Bank, N.A., etc., respondent, v FMCDH Realty, Inc., appellant, et al., defendants. (Index No. 8050/14)

Notice: THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.
THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

Prior History: *OneWest Bank, N.A. v. FMCDH Realty, 2015 N.Y. Misc. LEXIS 5421 (N.Y. Sup. Ct., Nov. 9, 2015)*

Core Terms

borrower, ***negotiable instrument***, mortgage, lender, indorsed, blank, obligations, promise, summary judgment motion, foreclose, holder

Case Summary

Overview

HOLDINGS: [1]-In a foreclosure action brought by the assignee of a ***reverse mortgage***, the trial court erred in granting summary judgment to the assignee because the assignee lacked standing where it was not a holder in due course of the cash account agreement underlying the mortgage; [2]-The assignee was not a holder in due course because the agreement was not a ***negotiable instrument*** contemplated by *UCC § 3-104*; [3]-Even though the agreement was an unconditional promise to pay signed by the borrower, *UCC 3-104[1]*, it was not a ***negotiable instrument*** because it contained provisions that went well beyond definitions under *UCC 3-104* and *3-112*, and the terms of the agreement showed that it was not intended to be a ***negotiable instrument***; [3]-Defendants were not entitled to summary judgment either because they did not eliminate triable issues of fact as to standing.

Outcome
Order affirmed, as modified.

LexisNexis® Headnotes

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

Real Property Law > Financing > Foreclosures > Judicial Foreclosures

Civil Procedure > Judgments > Summary Judgment > Burdens of Proof

HN1[] **Standing, Burdens of Proof**

Generally, in the context of a motion for summary judgment in an action to foreclose a mortgage, a plaintiff establishes its prima facie case through the production of the mortgage, the unpaid note, and evidence of default. When standing is at issue, the plaintiff must also prove its standing in order to be entitled to relief.

Civil Procedure > ... > Justiciability > Standing > Personal Stake

Commercial Law (UCC) > General Provisions (Article 1) > Definitions & Interpretation > Holders

HN2[] **Standing, Personal Stake**

A plaintiff has standing in a mortgage foreclosure action

when it is the holder or assignee of the underlying note at the time the action is commenced. A holder is the person in possession of a ***negotiable instrument*** that is payable either to bearer or to an identified person that is the person in possession. *UCC 1-201(b)(21)*. Where the note has been indorsed in blank, the holder must establish its standing by demonstrating that the original note was physically in its possession at the time of the commencement of the action.

Commercial Law (UCC) > General Provisions (Article 1) > Definitions & Interpretation

Commercial Law (UCC) > ... > Definitions & General Provisions > Definitions > Negotiable & Nonnegotiable Instruments

HN3[] **General Provisions (Article 1), Definitions & Interpretation**

To qualify as a ***negotiable instrument*** under the Uniform Commercial Code (UCC), a document must (a) be signed by the maker or drawer; and (b) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by Article 3 of the UCC.; and (c) be payable on demand or at a definite time; and (d) be payable to order or to bearer. *UCC 3-104(1)*.

Commercial Law (UCC) > ... > Definitions & General Provisions > Definitions > Negotiable & Nonnegotiable Instruments

HN4[] **Definitions, Negotiable & Nonnegotiable Instruments**

UCC 3-104(1)(b), when read in conjunction with *UCC 3-112*, covers the various promises, orders, obligations, or powers which, in addition to the maker's or drawer's unconditional promise of payment, may be included in a ***negotiable instrument***.

Counsel: [*1] Miller, Rosado & Algios, LLP, Garden City, NY (Christopher Rosado and Neil A. Miller of counsel), and David Bolton, P.C., Garden City, NY, for appellant (one brief filed).

Hogan Lovells US LLP, New York, NY (Allison J. Schoenthal, Chava Brandriss, and Heather R. Gushue of counsel), for respondent.

Judges: WILLIAM F. MASTRO, J.P., CHERYL E. CHAMBERS, HECTOR D. LASALLE, VALERIE BRATHWAITE NELSON, JJ. MASTRO, J.P., LASALLE and BRATHWAITE NELSON, JJ., concur.

Opinion by: CHERYL E. CHAMBERS

Opinion

APPEAL by the defendant FMCDH Realty, Inc., in an action to foreclose a mortgage, from an order of the Supreme Court (Daniel Palmieri, J.), entered in Nassau County on November 10, 2015. The order, insofar as appealed from, granted the plaintiff's motion for summary judgment on the complaint insofar as asserted against the defendant FMCDH Realty, Inc., and for an order of reference, and denied that branch of that defendant's cross motion which was for summary judgment dismissing the complaint insofar as asserted against it.

CHAMBERS, J.

OPINION & ORDER

The primary issue presented on this appeal is whether a bank can establish its standing to foreclose on a ***reverse mortgage*** securing the repayment of a home equity line of credit [*2] by demonstrating that it was in possession of the original line of credit agreement, indorsed in blank, at the time this action was commenced. In particular, we consider whether such a line of credit agreement constitutes a ***negotiable instrument*** as defined in section 3-104 of the Uniform Commercial Code.

I.

The essential facts are briefly summarized. On or about September 9, 2005, Maxine Minicozzi (hereinafter the borrower) entered into a ***reverse mortgage*** transaction with Financial Freedom Senior Funding Corporation (hereinafter Financial Freedom). The transaction was memorialized in two main documents: a Cash Account Adjustable Rate ***Reverse Mortgage*** Loan Account Disclosure Statement and Agreement (hereinafter the Cash Account Agreement), which allowed the borrower, from time to time, to obtain cash advances up to a limit of $806,152, and an Adjustable Rate Home Equity Conversion Deed of Trust (hereinafter the mortgage), which created a security interest on the borrower's home in Locust Valley to guarantee the payment of up to twice the stated advance limit under the Cash Account Agreement, i.e., a maximum principal sum of $1,612,304. Additional information regarding the terms and conditions of the Cash Account Agreement is presented [*3] in section III,

infra.

The borrower died on May 31, 2010.

On February 18, 2011, Freedom Financial assigned the mortgage to Mortgage Electronic Registration Systems, Inc. The record also contains a second assignment of the mortgage, dated March 13, 2014, from an entity called Financial Freedom Acquisition, LLC, to the plaintiff.

Meanwhile, on June 9, 2011, the subject property was transferred by the executors of the borrower's estate to NMNT Realty Corp., which, in turn, transferred the property to the defendant FMCDH Realty, Inc. (hereinafter the defendant), by deed dated March 25, 2014.

In August 2014, the plaintiff commenced this action against several parties, including the defendant, to foreclose the mortgage. The defendant filed an answer asserting various affirmative defenses, including that the plaintiff lacked standing to bring this foreclosure action. The plaintiff thereafter moved for summary judgment on the complaint and an order of reference. The defendant opposed the motion and cross-moved, inter alia, for summary judgment dismissing the complaint insofar as asserted against it for lack of standing. By order entered November 10, 2015, the Supreme Court granted the plaintiff's **[*4]** motion and denied the cross motion.

II.

HN1[↑] Generally, in the context of a motion for summary judgment in an action to foreclose a mortgage, " a plaintiff establishes its prima facie case through the production of the mortgage, the unpaid note, and evidence of default'" (*Deutsche Bank Natl. Trust Co. v Brewton, 142 AD3d 683, 684, 37 N.Y.S.3d 25*, quoting *Plaza Equities, LLC v Lamberti, 118 AD3d 688, 689, 986 N.Y.S.2d 843*; *see U.S. Bank N.A. v Cruz, 147 AD3d 1103, 1103, 47 N.Y.S.3d 459*). When standing is at issue, the plaintiff must also prove its standing in order to be entitled to relief (*see Deutsche Bank Natl. Trust Co. v Brewton, 142 AD3d at 684*; *Aurora Loan Servs., LLC v Taylor, 114 A.D.3d 627, 628, 980 N.Y.S.2d 475, affd 25 NY3d 355, 12 N.Y.S.3d 612, 34 N.E.3d 363*; *Wells Fargo Bank Minn., N.A. v Mastropaolo, 42 AD3d 239, 242, 837 N.Y.S.2d 247*). ***HN2***[↑] A plaintiff has standing in a mortgage foreclosure action when it is the holder or assignee of the underlying note at the time the action is commenced (*see Aurora Loan Servs., LLC v Taylor, 25 NY3d at 631*; *Deutsche Bank Natl. Trust Co. v Brewton, 142 AD3d at 684*). "A holder' is the person in possession of a ***negotiable instrument*** that is payable either to bearer or to an identified person that is the person in possession'" (*Deutsche Bank Natl. Trust Co. v Brewton, 142 AD3d at 684*, quoting *UCC 1-201[b][21]*; *see Deutsche Bank Natl. Trust Co. v Webster, 142 AD3d 636, 638, 37 N.Y.S.3d 283*; *Wells Fargo Bank, NA v Ostigny, 127 AD3d 1375, 1376, 8 N.Y.S.3d 669*). Where the note has been indorsed in blank, the holder must establish its standing by demonstrating that the original note was physically in its possession at the time of the commencement of the action (*see Deutsche Bank Natl. Trust Co. v Brewton, 142 AD3d at 685*; *U.S. Bank, N.A. v Collymore, 68 AD3d 752, 754, 890 N.Y.S.2d 578*).

Here, the document referred to by the plaintiff as the note is in fact the 14-page Cash Account Agreement. In support of its motion, the plaintiff, seeking to establish its standing, submitted the affidavit of its assistant secretary, who averred, **[*5]** based upon his review of the plaintiff's business records, that the plaintiff received the original Cash Account Agreement, indorsed in blank, on May 5, 2011, and had it in its possession at the time of the commencement of this action. The plaintiff also submitted proof of the borrower's death, and the default of her estate in repaying the underlying debt (*see JPMorgan Chase Bank, N.A. v Weinberger, 142 AD3d 643, 645, 37 N.Y.S.3d 286*; *Deutsche Bank Natl. Trust Co. v Naughton, 137 AD3d 1199, 1200, 28 N.Y.S.3d 444*; *HSBC Bank USA, N.A. v Spitzer, 131 AD3d 1206, 1206-1207, 18 N.Y.S.3d 67*; *Emigrant Mtge. Co., Inc. v Beckerman, 105 AD3d 895, 895, 964 N.Y.S.2d 548*).

In opposition, the defendant argued that, in a prior foreclosure action commenced in the Supreme Court, Nassau County, by Financial Freedom Acquisition, LLC, the lender had attempted to establish its standing based on the physical delivery of the Cash Account Agreement, to which an undated allonge, indorsed in blank by an unidentified representative of Freedom Financial and referring specifically to the borrower and the address of the subject premises, was affixed. In support of the instant motion, by contrast, the Cash Account Agreement submitted by the plaintiff did not include the previous allonge, but instead bore a different, undated indorsement in blank signed by Judith Clements, a vice president of Freedom Financial, which referred neither to the subject premises nor to the name of the borrower.

The Supreme Court **[*6]** accepted the prima facie showing made by the plaintiff, disregarding the absence of the prior allonge relied upon by the plaintiff's predecessor in interest in the prior action, and accepting the new indorsement in blank by Judith Clements. Because the plaintiff is seeking to establish standing on the basis that it is a valid holder in due course of the Cash Account Agreement, this Court requested a postargument submission on the threshold question of whether the Cash Account Agreement falls within the definition of a ***negotiable instrument*** as **[**2]** contemplated

by section 3-104 of the Uniform Commercial Code.

Upon our review of the record, including the additional postargument submissions received from both sides, we conclude that the Cash Account Agreement does not constitute a ***negotiable instrument*** within the meaning of *UCC 3-104*. Therefore, the plaintiff cannot establish its standing merely by demonstrating that it was in possession of the original Cash Account Agreement, indorsed in blank, at the time the instant action was commenced.

III.

In 1846, a ***negotiable instrument*** was famously compared, by Justice Gibson of the Supreme Court of Pennsylvania, to a "courier without luggage" (*Overton v Tyler, 3 Pa 346, 347*), in recognition of the fact that such instruments must be **[*7]** "framed in the fewest possible words, and those importing the most certain and precise contract" (*id. at 347*).

Negotiable instruments have changed considerably in the intervening 172 years. While they are no longer spare as they once were (*see* Grant Gilmore, *Formalism and the Law of Negotiable Instruments*, 13 Creighton L Rev 441, 453 [1979]), Justice Gibson's description has proved to be remarkably resilient—though it may be more accurate to describe the modern ***negotiable instrument*** as a courier with a personal item and one carry-on bag.

HN3[↑] Specifically, to qualify as a ***negotiable instrument*** under the UCC, a document must "(a) be signed by the maker or drawer; and (b) contain an unconditional promise or order to pay a sum certain in money *and no other promise, order, obligation or power given by the maker or drawer except as authorized by this Article*; and (c) be payable on demand or at a definite time; and (d) be payable to order or to bearer" (*UCC 3-104[1]* [emphasis added]).

Further, as pertinent here, *UCC 3-112* provides:

"(1) The negotiability of an instrument is not affected by

"(a) the omission of a statement of any consideration or of the place where the instrument is drawn or payable; or

"(b) a statement that collateral has been given to secure obligations **[*8]** either on the instrument or otherwise of an obligor on the instrument or that in the case of default on those obligations the holder may realize on or dispose of the collateral; or

"(c) a promise or power to maintain or protect collateral or to give additional collateral; or

"(d) a term authorizing a confession of judgment on the instrument if it is not paid when due; or

"(e) a term purporting to waive the benefit of any law intended for the advantage or protection of any obligor; or

"(f) a term in a draft providing that the payee by indorsing or cashing it acknowledges full satisfaction of an obligation of the drawer; or

"(g) a statement in a draft drawn in a set of parts (Section 3-801) to the effect that the order is effective only if no other part has been honored.

"(2) Nothing in this section shall validate any term which is otherwise illegal."

HN4[↑] *UCC 3-104(1)(b)*, when read in conjunction with *UCC 3-112*, covers the various promises, orders, obligations, or powers which, in addition to the maker's or drawer's unconditional promise of payment, may be included in a ***negotiable instrument***.

Here, as correctly noted by the plaintiff, the Cash Account Agreement is signed by the borrower and contains an unconditional promise to pay. **[*9]** In addition to this, however, the Cash Account Agreement also contains provisions that go well beyond what is permitted under the UCC. Most significantly, the Cash Account Agreement creates an open-end (i.e., revolving) line of credit upon which the borrower could draw a maximum of $806,152. Since the initial advance in this case was only $366,152, the borrower potentially could have drawn down as much as $440,000 more from the lender. Consistent with these terms, the borrower promised to pay when due "all amounts advanced" under the Cash Account Agreement. Although the plaintiff contends that such an agreement constitutes a ***negotiable instrument***, we have found no New York case directly on point. In other jurisdictions, however, similar line of credit agreements have been held to be distinct from an agreement to pay a sum certain (*see Resolution Trust Corp. v Oaks Apts. Joint Venture, 966 F2d 995, 1001-1002 [5th Cir]*; *Heritage Bank v Bruha, 283 Neb 263, 269-270, 812 NW2d 260, 268*; *Yin v Society Natl. Bank Indiana, 665 NE2d 58, 62-63 [Ind Ct App]*; *Cadle Co. v Richardson, 597 So2d 1052, 1055-1056 [La Ct App]*; *Farmers Prod. Credit Assn. v Arena, 145 Vt 20, 22-23, 481 A2d 1064, 1065*).

Beyond this, however, the Cash Account Agreement also provides for the periodic adjustment of the advance limit, and allows the lender, inter alia, to suspend, terminate, or reduce the borrower's right to obtain future advances under certain circumstances. Section 17.2 of the Cash Account Agreement specifically allows the lender to sell, transfer, or **[*10]** assign

its rights thereunder to third parties, with the understanding that the purchaser, transferee, or assignee will have no obligation to cure any of the lender's failures to perform, and that the lender will continue to be obligated to the borrower under the Cash Account Agreement unless the sale, transfer, or assignment is made to a financially responsible person who unconditionally assumes all of the lender's obligations thereunder. Moreover, section 18 requires all disputes arising out of or relating to the Cash Account Agreement—other than an action to foreclose—to be submitted to binding arbitration. On its face, the Cash Account Agreement does much more than memorialize the borrower's unconditional promise to pay a sum of money. It creates a banking relationship between the lender and the borrower, provides terms and conditions under which the borrower may, from time to time, obtain additional cash advances from the lender, and even contains an arbitration clause. Although the Cash Account Agreement appears to have been signed only by the borrower, section 17.2 specifically acknowledges that it imposes obligations on both the borrower and the lender. The specific language of several provisions **[*11]** of the Cash Account Agreement, read in context of the agreement as a whole, provides compelling evidence that the Cash Account Agreement is not, and was never intended to be, a ***negotiable instrument*** (*cf. General Motors Acceptance Corp. v Honest Air Conditioning & Heating, Inc., 933 So2d 34 [Fla Dist Ct App]*).

Therefore, the plaintiff cannot establish its standing merely by showing that it possessed the original Cash Account Agreement, indorsed in blank, on the date this action was commenced, and the plaintiff's motion for summary judgment on the complaint should have been denied.

We agree with the Supreme Court's determination to deny that branch of the defendant's cross motion which was for summary judgment dismissing the complaint insofar as asserted against it, as the defendant failed to eliminate triable issues of fact as to whether the plaintiff had standing (*see MLCFC 2007-9 Mixed Astoria, LLC v 36-02 35th Ave. Dev., LLC, 116 AD3d 745, 747, 983 N.Y.S.2d 604; cf. Financial Freedom Acquisition, LLC v Griffin, 176 Conn App 314, 170 A3d 41*).

The parties' remaining contentions either are without merit or need not be reached in light of our determination.

Accordingly, the order is modified, on the law, by deleting the provision thereof granting the plaintiff's motion for summary judgment on the complaint insofar as asserted against the defendant FMCOH Realty, Inc., and for an order of reference, and substituting therefor **[*12]** a provision denying the motion; as so modified, the order is affirmed insofar as appealed from.

MASTRO, J.P., LASALLE and BRATHWAITE NELSON, JJ., concur.

ORDERED that the order is modified, on the law, by deleting the provision thereof granting the plaintiff's motion for summary judgment on the complaint insofar as asserted against the defendant FMCDH Realty, Inc., and for an order of reference, and substituting therefor a provision denying the motion; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements.

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1. *NY CLS UCC § 3-804*
Client/Matter: -None-
Search Terms: NY CLS UCC 3-804
Search Type: Natural Language
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Content Type	Narrowed by
Statutes and Legislation	All Jurisdictions: New York

Deutsche Bank Natl. Trust Co. v Anderson

Supreme Court of New York, Appellate Division, Second Department

May 23, 2018, Decided

2016-07546

Reporter
161 A.D.3d 1043 *; 79 N.Y.S.3d 42 **; 2018 N.Y. App. Div. LEXIS 3682 ***; 2018 NY Slip Op 03661 ****; 2018 WL 2325915

[****1] Deutsche Bank National Trust Company, etc., appellant, v Sandra Anderson, etc., respondent, et al., defendants. (Index No. 21435/13)

Prior History: *Deutsche Bank Natl. Trust Co. v. Anderson, 2015 N.Y. Misc. LEXIS 2717 (N.Y. Sup. Ct., July 22, 2015)*

Core Terms

servicer, summary judgment, mortgage, appoint, action to foreclose, possession of a note, promissory note, inter alia, destroyed, ownership, appeals, compute, default, terms

Counsel: [***1] Eckert Seamans Cherin & Mellott, LLC, White Plains, NY (Sarah J. Greenberg of counsel), for appellant.

Sandra Anderson, Jamaica, NY, respondent, Pro se.

Judges: MARK C. DILLON, J.P., LEONARD B. AUSTIN, ROBERT J. MILLER, SYLVIA O. HINDS-RADIX, JJ. DILLON, J.P., AUSTIN, MILLER and HINDS-RADIX, JJ., concur.

Opinion

[**43] [*1043] DECISION & ORDER

In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Queens County (David Elliot, J.), dated July 22, 2015. The order, insofar as appealed from, denied those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendant Sandra Anderson and for leave to appoint a referee to compute the sums due the plaintiff.

ORDERED that the order is affirmed insofar as appealed from, with costs.

On July 26, 2006, Floyd Bailey executed a promissory note in the principal sum of $470,250 in favor of IMPAC Funding Corporation, doing business as IMPAC Lending Group (hereinafter IMPAC), which was secured by a mortgage on residential property located in South Ozone Park. Bailey defaulted on the loan by failing to make the monthly installment payment due on December 1, 2007. Thereafter, Bailey died [***2] and, by a decree [*1044] of the Surrogate's Court dated August 23, 2012, the defendant Sandra Anderson was appointed as executrix of his estate. On November 21, 2013, the plaintiff commenced this action to foreclose the mortgage against, among others, Anderson, as executrix of Bailey's estate. After issue was joined, the plaintiff moved, inter alia, for summary [**44] judgment on the complaint and for leave to appoint a referee. In support of the motion, the plaintiff asserted, inter alia, that the note had been lost or destroyed and it would seek to prove the promissory note using a lost note affidavit along with a copy of the original note. Anderson opposed the motion. The Supreme Court denied those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against Anderson and for leave to appoint a referee. The plaintiff appeals.

"Generally, in moving for summary judgment in an action to foreclose a mortgage, a plaintiff establishes its prima facie case through the production of the mortgage, the unpaid note, and evidence of default" (*Deutsche Bank Natl. Trust Co. v Abdan, 131 AD3d 1001, 1001, 16 N.Y.S.3d 459*; *see Hudson City Sav. Bank v Genuth, 148 AD3d 687, 48 N.Y.S.3d 706*). Pursuant to *UCC 3-804*, which is intended to provide a method of recovery on instruments that are lost, destroyed, or [***3] stolen, a plaintiff is required to submit "due proof of [the plaintiff's] ownership, the facts which prevent [its]

production of [the note,] and its terms" (*UCC 3-804*; *see Weiss v Phillips, 157 AD3d 1, 65 N.Y.S.3d 147*; *US Bank N.A. v Richards, 155 AD3d 522, 65 N.Y.S.3d 178*). **[****2]**

Here, the Supreme Court properly concluded that, although the plaintiff was unable to produce the note, a copy of the note submitted by the plaintiff provided sufficient evidence of its terms (*see* ***NY Community Bank v Jennings, 2015 NY Slip Op 31591[U], *4 [Sup Ct, NY County]***). However, the lost note affidavit of Michael Matz and the affidavit of Debra Lee Wojciechowski, both officers of Bank of America, N.A., the purported servicer of the subject loan, are inconsistent with each other and contain vague and conclusory statements. Matz's affidavit states that the loan servicer "or its predecessor (as servicer or by merger) or the custodian" acquired possession of the note on or before August 4, 2006, and the loss of the note was not due to transfer or seizure. Wojciechowski's affidavit claimed that the loan servicer acquired possession of the lost note affidavit on or before December 28, 2012, and maintained continuous physical possession of the note until the loss occurred. It was not clear when the loan servicer or its agent acquired possession of the note, **[***4]** or whether the loan **[*1045]** servicer or an agent of the loan servicer acquired the note. Moreover, Matz's affidavit fails to provide sufficient facts as to when the search for the note occurred, who conducted the search, the steps taken in the search for the note, or when or how the note was lost (*see US Bank N.A. v Richards, 155 AD3d 522, 65 N.Y.S.3d 178*; *Ventricelli v DeGennaro, 221 AD2d 231, 232, 633 N.Y.S.2d 315*; *Marrazzo v Piccolo, 163 AD2d 369, 558 N.Y.S.2d 103*; *cf. Citibank, N.A. v Benedict, 2000 US Dist LEXIS 3815, 2000 WL 322785 [SD NY, Mar. 28, 2000, No. 95-CIV-9541(AGS)]*). Thus, the affidavits failed to sufficiently establish the plaintiff's ownership of the note.

Accordingly, the Supreme Court properly denied those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against Anderson and for leave to appoint a referee to compute the sums due the plaintiff.

DILLON, J.P., AUSTIN, MILLER and HINDS-RADIX, JJ., concur.

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Cited
As of: November 8, 2018 2:14 PM Z

U.S. Bank N.A. v Richards

Supreme Court of New York, Appellate Division, First Department

November 28, 2017, Decided; November 28, 2017, Entered

4589, 380053/14

Reporter
155 A.D.3d 522 *; 65 N.Y.S.3d 178 **; 2017 N.Y. App. Div. LEXIS 8381 ***; 2017 NY Slip Op 08299 ****; 2017 WL 5707601

[****1] U.S. Bank National Association, etc., Plaintiff-Respondent, v Glenwall Richards also known as Glenwall H. Richards, Defendant-Appellant, Consolidated Edison Company, et al., Defendants.

Notice: THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.
THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

Core Terms

borrower, mortgage, default, notice, summary judgment

Case Summary

Overview

HOLDINGS: [1]-The trial court erred by not vacating the default judgment entered against a borrower in a foreclosure action because, inter alia, counsel's failure to submit opposition to the bank's motion for summary judgment was excusable default, the borrower raised a colorable notice defense regarding the bank's service of the mortgage's 30-day default notice and the requisite 90-day notice, *RPAPL 1304*, there was no proof of the mortgage being assigned to the bank, and the lost note affidavit did not indicate when the note was lost.

Outcome
Order reversed; motion granted; and matter remanded.

LexisNexis® Headnotes

Civil Procedure > ... > Justiciability > Standing > Personal Stake

Real Property Law > Financing > Foreclosures

Real Property Law > ... > Mortgages & Other Security Instruments > Transfers > Transfers by Mortgagees

HN1[] **Standing, Personal Stake**

A plaintiff proves that it has standing to commence a mortgage foreclosure action by showing that it was both the holder or assignee of the mortgage and the note when the action was commenced. A written assignment of the note or physical delivery of the note is sufficient to establish standing. It is the note, and not the mortgage, that is the dispositive instrument that conveys standing to foreclose. Conclusory boilerplate statements, such as a bald assertion that the plaintiff is the holder of the note, will not suffice.

Commercial Law (UCC) > Negotiable Instruments (Article 3) > Enforcement > Lost, Destroyed & Stolen Instruments

HN2[] **Enforcement, Lost, Destroyed & Stolen Instruments**

UCC 3-804 provides that a suit may be brought by the owner of a lost instrument, upon due proof of its ownership, the facts which prevent the production of the instrument and its terms.

Counsel: [***1] Petroff Amshen LLP, Brooklyn (James Tierney of counsel), for appellant.

Gross Polowy, LLC, Westbury (Stephen J. Vargas of counsel), for respondent.

Judges: Acosta, P.J., Renwick, Webber, Oing, Moulton, JJ.

Opinion

[*522] **[**179]** Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered December 16, 2015, which denied defendant Glenwall Richards's motion to vacate an order granting summary judgment in plaintiff's favor, unanimously reversed, on the law, without costs, the motion granted, and the case remanded to Supreme Court for further proceedings.

In this mortgage foreclosure action, Supreme Court granted summary judgment to plaintiff on default and subsequently denied Glenwall Richards's (borrower) motion to vacate the default. This was error as the borrower demonstrated both an excusable default and meritorious defenses under CPLR 5015(a)(1).

The borrower's prior counsel acknowledged that he failed to submit opposition to the summary judgment motion after stipulating to adjourn that motion. **[**180]** However, counsel moved to vacate the default less than one month after Supreme Court's decision was entered. Absent a pattern of dilatory behavior, the **[*523]** default was an excusable, one-time oversight, resulting in no prejudice (*see e.g. Price v Polisner, 172 AD2d 422, 423, 568 N.Y.S.2d 796 [1st Dept 1991]* **[***2]**; Matter of Rivera v New York City Dept. of Sanitation, 142 AD3d 463, 464, 36 N.Y.S.3d 464 [1st Dept 2016]; Cheri Rest. Inc. v Eoche, 144 AD3d 578, 580, 42 N.Y.S.3d 113 [1st Dept 2016]).

This State also has a strong public policy for deciding cases on the merits (*see e.g.* Bobet v Rockefeller Ctr., N., Inc., 78 AD3d 475, 475, 911 N.Y.S.2d 43 [1st Dept 2010]). While Supreme Court stated that it reviewed all evidence submitted in denying the borrower's motion to vacate his default, it did not discuss any evidence or articulate its reasoning. Additionally, Supreme Court initially granted summary judgment in accordance with a boilerplate order.

The borrower raised a colorable notice defense regarding plaintiff's service of the mortgage's 30-day default notice and the requisite 90-day notice under RPAPL 1304[1]. While copies of both notices were attached to the summary judgment motion, including a copy of the **[****2]** 90-day notice bearing a certified mailing number and bar code, the affidavit of plaintiff's servicing agent failed to indicate that she had familiarity with standard office mailing procedures (*see e.g.* U.S. Bank N.A. v Brijmohan, 153 AD3d 1164, 1165-1166, 62 N.Y.S.3d 43 [1st Dept 2017]).

The borrower also raised a meritorious standing defense. HN1[↑] A plaintiff proves that it has standing to commence a mortgage foreclosure action by showing that it was both the holder or assignee of the mortgage and the note when the action was commenced (*see* Wells Fargo Bank, N.A. v Jones, 139 AD3d 520, 523, 32 N.Y.S.3d 95 [1st Dept 2016]). A written assignment of the note or physical delivery of the note is sufficient to establish standing (*see **[***3]*** U.S. Bank N.A. v Madero, 80 AD3d 751, 753, 915 N.Y.S.2d 612 [2d Dept 2011]). It is the note, and not the mortgage, that is the dispositive instrument that conveys standing to foreclose (*see* Aurora Loan Servs., LLC v Taylor, 25 NY3d 355, 361, 12 N.Y.S.3d 612, 34 N.E.3d 363 [2015]). Conclusory boilerplate statements, such as a bald assertion that the plaintiff is the holder of the note, will not suffice (*Wells Fargo Bank, N.A., 139 AD3d at 524*).

Plaintiff seeks to foreclose the principal sum of $327,828.34, **[*524]** but there are gaps in its proof. According to the affidavit of plaintiff's servicing agent, plaintiff is the mortgagee of a consolidated and/or modified mortgage dated January 13, 2009, in the original principal amount of $327,828.34, made by the borrower in favor of Countrywide Home Loans Servicing LP. Plaintiff also asserts that the original note, dated March 26, 2004, made by the borrower in favor of Argent Mortgage Company, LLC in the amount of $289,000.00, was assigned to it, but was lost. There is no proof of such assignment. Nor does the mortgage assignment **[**181]** to plaintiff contain language stating that the note was endorsed to the assignee, which language was contained in the prior mortgage assignments from Argent to Ameriquest Mortgage Company and from Ameriquest to WM Specialty Mortgage LLC. There is also no evidence that the loan modification agreement, securing the higher amount **[***4]** of $327,828.34, was assigned to plaintiff.

There is also a question as to the sufficiency of the content of the lost note affidavit submitted on summary judgment. The affidavit is made by a vice president of JPMorgan Chase Bank National Association, based on HN2[↑] UCC 3-804, which provides that a suit may be brought by the owner of a lost instrument, "upon due proof of its ownership, the facts which prevent [the] production of the instrument and its terms." The affidavit states, in conclusory language, that based on a review of Chase's and JPMorgan Chase Custody Services,

[1] When the action was commenced, plaintiff's process server was informed by a tenant at the premises that the borrower did not reside there and that the borrower is the landlord and collects rent on a monthly basis. This decision is without prejudice to plaintiff's argument that the borrower was not entitled to any notice under RPAPL 1304 because he never occupied the premises as his principal dwelling and, therefore, the loan was not incurred by the borrower "primarily for personal, family, or household purposes" (RPAPL 1304[6][a][iii]).

Inc.'s business records, a thorough and diligent search was made; the note was lost but not cancelled or transferred to another party; and Chase is the owner of the note. It does not state when the search was made or by whom, and does not indicate approximately when the note was lost. Therefore, the borrower has demonstrated a potentially meritorious standing defense (see e.g. *U.S. Bank N.A., 80 AD3d 751, 915 N.Y.S.2d 612* [summary judgment relating to certain borrowers should have been denied because the bank failed to demonstrate, prima facie, that it had standing as the lawful holder or assignee of the note when it commenced the action]).

THIS CONSTITUTES THE DECISION AND **[***5]** ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 28, 2017

End of Document

• Pamela Bethea Affidavit of Lost Note [p. 52]

[redacted] [redacted]

AFFIDAVIT OF LOST NOTE

STATE OF South Carolina
COUNTY OF Florence

After first being duly sworn, I, Pamela Bethea do hereby depose and say.

That I am an employee of Washington Mutual Bank, FA , and I am responsible for the delivery of promissory notes.

On December 27,2006 , I made a due and diligent search through all of our files for the original promissory note under loan number [redacted] dated August 04,2006 executed by [redacted] resides at [redacted], NY 11545 in the principal sum of $1,722,500.00 and secured by security instrument recorded in [redacted] , as Instrument No. [redacted] County, State of New York

Said search was conducted at the undersigned offices located at 2210 Enterprise Drive, Florence, SC 29501 and consisted of the following specific steps:

*Conducted a thorough audit of the customary filing locations, inclusive of the original credit file

*All applicable departments are required to conduct an audit of their areas to locate said

Said due and diligent search failed to locate said promissory note, and said promissory note is deemed lost.

Dated: December 27,2006

Pamela Bethea
Assistant Vice President

Subscribed and sworn before me, Matthew Hedgepeth, a Notary Public in and for said County and State,

Matthew Hedgepeth
My Commission Expires: 7/19/2014

• Lost Note Agreement and Indemnity [p. 53]

LOST NOTE AGREEMENT AND INDEMNITY

In consideration of the purchase of the certain security instrument, dated August 04,2006 , in the principal sum of $1,722,500.00 executed by [redacted] in favor of the undersigned, the original of which has been lost, the undersigned hereby agrees with any successor owner of said Note, that it shall:

1. Deliver said original Note, if found to such owner,
2. Execute any documents or assurances, and take any other action with respect to said Note, as such owner shall reasonably require;
3. Deliver to successor a certified copy of said lost note; and,
4. If possible, obtain from said Borrower a fully executed duplicate original of said Note and submit same to successor as soon as it is available.

The undersigned further agrees to hold harmless and indemnify any successor owner from any and all damages, liability, expenses, losses, claims or suits of any nature whatsoever (including reasonable attorney's fees) incurred or suffered directly or indirectly by reason of the loss of said Note.
Executed at 2210 Enterprise Drive, Florence, SC 29501 on the December 27,2006.

Washington Mutual Bank, FA

Pamela Bethea
Assistant Vice President

Milone v US Bank Natl. Assn.

Supreme Court of New York, Appellate Division, Second Department

August 15, 2018, Decided

2016-02068

Reporter
164 A.D.3d 145 *; 2018 N.Y. App. Div. LEXIS 5697 **; 2018 NY Slip Op 05760 ***

[***1] Diane *Milone*, appellant, v *US Bank* National Association, etc., respondent. (Index No. 100268/15)

Core Terms

acceleration, de-acceleration, mortgage, foreclosure action, statute of limitations, summary judgment, cross motion, lender, notice, motion to dismiss, cause of action, six years, borrower, commence, revoke, substantial prejudice, documentary evidence, monthly payment, original note, modified, six-year, default, cancel

Case Summary

Overview

HOLDINGS: [1]-A borrower could not obtain summary judgment on a cause of action to cancel and discharge a mortgage and note under RPAPL 1501(4) after expiration of the limitations period in *CPLR 213(4)* although that period, as measured from the commencement of a foreclosure action and not from a letter indicating intent to accelerate, had expired; it was unclear whether the lender had standing to accelerate the debt in light of the foreclosure action's dismissal based on failure to produce the original note; [2]-A timely de-acceleration letter did not entitle the lender to dismissal because standing, when raised, was a necessary element of both a valid acceleration and a valid de-acceleration; [3]-Because the acceleration clause was discretionary rather than mandatory, an election to accelerate could be revoked; [4]-Allowing de-acceleration would not substantially prejudice the borrower.

Outcome
Affirmed as modified.

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN1[] **Defenses, Demurrers & Objections, Motions to Dismiss**

A motion to dismiss pursuant to *CPLR 3211(a)(1)* on the ground of documentary evidence may only be granted where the documentary evidence utterly refutes the plaintiff's allegations, conclusively establishing a defense as a matter of law.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN2[] **Motions to Dismiss, Failure to State Claim**

On a motion to dismiss a complaint pursuant to *CPLR 3211(a)(7)* for failure to state a cause of action, the court must accept the facts alleged in the complaint as true and afford the plaintiff the benefit of every favorable inference, and determine only whether the facts alleged fit within any cognizable legal theory.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement

as Matter of Law > Need for Trial

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

HN3[] **Burdens of Proof, Movant Persuasion & Proof**

A motion for summary judgment may be granted only if the movant tenders sufficient evidence in admissible form demonstrating, prima facie, the absence of triable issues of fact. If that burden is met, the burden shifts to the party opposing the motion to produce evidentiary proof in an admissible form establishing the existence of material issues of fact requiring trial.

Real Property Law > ... > Mortgages & Other Security Instruments > Transfers > Due on Sale Clauses

Real Property Law > ... > Mortgages & Other Security Instruments > Satisfaction & Termination > Statute of Limitations

HN4[] **Transfers, Due on Sale Clauses**

RPAPL 1501(4) provides that a person with an estate or interest in real property subject to an encumbrance may maintain an action to secure the cancellation and discharge of the encumbrance, and to adjudge the estate or interest free of it, if the applicable statute of limitations for commencing a foreclosure action has expired. Actions to foreclose upon a mortgage are governed by a six-year statute of limitations. *CPLR 213(4)*. When a mortgage is payable in installments, which is the typical practice, an acceleration of the entire amount due begins the running of the statute of limitations on the entire debt. Determining precisely when a mortgage is accelerated is therefore a key aspect in any action or proceeding commenced pursuant to RPAPL 1501(4).

Real Property Law > ... > Mortgages & Other Security Instruments > Transfers > Due on Sale Clauses

HN5[] **Transfers, Due on Sale Clauses**

An acceleration of a mortgage debt may occur in different ways. One way is in the form of an acceleration notice transmitted to the borrower by the creditor or the creditor's servicer. To be effective, the acceleration notice to the borrower must be clear and unequivocal. A second form of acceleration, which is self-executing, is the obligation of certain borrowers to make a balloon payment under the terms of the note at the end of the pay-back period. A third form of acceleration exists when a creditor commences an action to foreclose upon a note and mortgage and seeks, in the complaint, payment of the full balance due.

Civil Procedure > Preliminary Considerations > Justiciability > Standing

Real Property Law > ... > Mortgages & Other Security Instruments > Transfers > Due on Sale Clauses

HN6[] **Justiciability, Standing**

An acceleration of a mortgaged debt, by either written notice or the commencement of an action, is only valid if the party making the acceleration had standing at that time to do so.

Real Property Law > ... > Mortgages & Other Security Instruments > Transfers > Due on Sale Clauses

Real Property Law > ... > Mortgages & Other Security Instruments > Satisfaction & Termination > Statute of Limitations

HN7[] **Transfers, Due on Sale Clauses**

To the extent the cases have held that acceleration notices must be clear and unambiguous to be valid and enforceable, de-acceleration notices must also be clear and unambiguous to be valid and enforceable. Courts must, of course, be mindful of the circumstance where a bank may issue a de-acceleration letter as a pretext to avoid the onerous effect of an approaching statute of limitations and to defeat the property owner's right pursuant to RPAPL 1501 to cancel and discharge a mortgage and note. A de-acceleration letter is not pretextual if it contains an express demand for monthly payments on the note, or, in the absence of such express demand, it is accompanied by copies of monthly invoices transmitted to the homeowner for installment payments, or, is supported by other forms of evidence demonstrating that the lender was truly seeking to de-accelerate and not attempting to achieve another purpose under the guise of de-acceleration. In contrast, a bare and conclusory de-acceleration letter, without a demand for monthly payments toward the note, or copies of invoices, or other evidence, may raise legitimate questions about whether or not the letter was sent as a mere pretext to avoid the statute of limitations.

Civil Procedure > Preliminary

Considerations > Justiciability > Standing

Real Property Law > ... > Mortgages & Other Security Instruments > Transfers > Due on Sale Clauses

HN8[] **Justiciability, Standing**

Just as standing, when raised, is a necessary element to a valid acceleration, it is a necessary element, when raised, to a valid de-acceleration as well.

Real Property Law > ... > Mortgages & Other Security Instruments > Transfers > Due on Sale Clauses

HN9[] **Transfers, Due on Sale Clauses**

Where the plain language setting forth the contractual right of the lender to accelerate the entire debt is discretionary rather than mandatory, the lender maintains the right to later revoke the acceleration.

Civil Procedure > Preliminary Considerations > Equity > Relief

Real Property Law > ... > Mortgages & Other Security Instruments > Transfers > Due on Sale Clauses

HN10[] **Equity, Relief**

Only if a borrower can demonstrate substantial prejudice may a court, in the exercise of its equity jurisdiction, restrain a lender from revoking its election to accelerate.

Counsel: **[**1]** DeSocio & Fuccio, P.C., Oyster Bay, NY (James B. Fuccio of counsel), for appellant.

Reed Smith LLP, New York, NY (Diane A. Bettino and Siobhan A. Nolan of counsel), for respondent.

Judges: MARK C. DILLON, J.P., CHERYL E. CHAMBERS, SANDRA L. SGROI, FRANCESCA E. CONNOLLY, JJ. CHAMBERS, SGROI and CONNOLLY, JJ., concur.

Opinion by: DILLON

Opinion

[*148] APPEAL by the plaintiff, in an action pursuant to RPAPL 1501(4) to cancel and discharge a mortgage and note, from an order of the Supreme Court (Philip G. Minardo, J.), dated November 25, 2015, and entered in Richmond County. The order granted the defendant's motion pursuant to *CPLR 3211(a)* to dismiss the complaint with prejudice, and denied the plaintiff's cross motion for summary judgment on the complaint.

DILLON, J.P.

OPINION & ORDER

The instant appeal provides us with an occasion to address the timeliness and required proofs for the valid de-acceleration of note obligations underlying residential mortgage foreclosure actions.

I. *Facts*

On September 20, 2004, the plaintiff purchased residential real estate in Staten Island. The transaction included the plaintiff's execution of a note in the sum of $1,235,000, which was secured by a mortgage upon the premises. The lender listed on the note was "Wall Street **[**2]** Mortgage Bankers Ltd. d/b/a Power Express" (hereinafter WSMB). The note provided for, inter alia, interest-only payments due and owing the first of each month for 120 months, with full maturity of the obligation on April 1, 2036. On December 28, 2007, Mortgage Electronic Registration Systems, Inc. (hereinafter MERS), as nominee of WSMB, assigned the mortgage to the defendant, US Bank National Association (hereinafter US Bank).

The plaintiff defaulted on her obligations under the note beginning with the payment due on October 1, 2008, and **[*149]** continuing each month thereafter. By letter dated November 16, 2008, an entity known as America's Servicing Co. (hereinafter ASC) advised the plaintiff that her account was in default, and that if a stated amount of delinquency and fees was not paid within 30 days, the circumstances "will result in the acceleration of your Mortgage Note . . . [and that o]nce acceleration has occurred, a foreclosure action, or any other remedy permitted under the terms of your Mortgage or Deed of Trust, may be initiated." The plaintiff did not pay the delinquency and fees, and on January 13, 2009, US Bank commenced a foreclosure action against her in the Supreme Court, **[**3]** Richmond County, by the filing of a summons and complaint with the Richmond County Clerk.

The standing of US Bank, which was not named on the note, must have been an issue between the parties in the foreclosure action, since the Supreme Court executed a preliminary conference order on September 20, 2011, directing US Bank to produce the original note by October 5, 2011. No original note was thereafter produced, and on February 29, 2012, the

foreclosure action [***2] was dismissed.

Matters lay dormant until October 21, 2014. By letter of that date sent to the plaintiff, Wells Fargo Bank N.A. (hereinafter Wells Fargo), which represented itself as US Bank's loan servicer, noted the plaintiff's continued default on the note. It also stated that Wells Fargo "hereby de-accelerates the maturity of the Loan, withdraws its prior demand for immediate payment of all sums secured by the Security Instrument and re-institutes the loan as an installment loan."

More than four months later, on March 10, 2015, the plaintiff commenced this action pursuant to RPAPL 1501 to cancel and discharge the mortgage and note. The plaintiff specifically alleged that more than six years had passed from ASC's letter of November 16, [**4] 2008, by which the note associated with the mortgage was accelerated; that US Bank's foreclosure action had been dismissed; and that no new foreclosure action had been timely commenced.

US Bank moved pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint in its entirety. US Bank argued, through an affidavit of Wells Fargo's vice president of loan documentation and annexed documentary evidence, that payment of the note, which had previously been accelerated, was de-accelerated by Wells Fargo's letter to the plaintiff dated October 21, 2014. Counsel for US Bank reasoned that since the de-acceleration [*150] was communicated within six years of the earlier acceleration, no violation of the statute of limitations occurred, and a new six-year limitations period would begin to run if US Bank were to accelerate the note in the future.

The plaintiff cross-moved for summary judgment on the complaint. In support of her cross motion, and in opposition to US Bank's dismissal motion, the plaintiff argued that no right of de-acceleration was contained in the note or mortgage; that US Bank's decision to de-accelerate rather than to commence a new action within the original six years is a tacit admission that it does [**5] not possess the original note; that once an acceleration option is exercised, it cannot be revoked; that construing the note and mortgage as allowing a de-acceleration and extending the statute of limitations would violate public policy; and that the purported de-acceleration was per se prejudicial to the borrower.

In the order appealed from, the Supreme Court, without analysis, granted US Bank's motion to dismiss the complaint with prejudice, and denied the plaintiff's cross motion for summary judgment on the complaint.

For reasons set forth below, we modify the order appealed from. While we agree with the Supreme Court's determination to deny the plaintiff's cross motion for summary judgment on the complaint, we conclude that the court also should have denied US Bank's motion to dismiss the complaint.

II. *Legal Analysis*

US Bank's motion to dismiss and the plaintiff's cross motion for summary judgment are governed by different standards of proof. Therefore, if one party loses its motion, that result does not necessarily require that the other party prevails, since each motion must be measured by its own discrete standard of proof.

The required forms of proof are well established. HN1[↑] A motion [**6] to dismiss pursuant to CPLR 3211(a)(1) on the ground of documentary evidence may only be granted where the documentary evidence utterly refutes the plaintiff's allegations, conclusively establishing a defense as a matter of law (*see* Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326, 774 N.E.2d 1190, 746 N.Y.S.2d 858; Hutton Group, Inc. v Cameo Owners Corp., 160 AD3d 676, 75 N.Y.S.3d 193; Hershco v Gordon & Gordon, 155 AD3d 1007, 1008, 66 N.Y.S.3d 37). HN2[↑] On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must [*151] accept the facts alleged in the complaint as true and afford the plaintiff the benefit of every favorable inference, and determine only whether the facts alleged fit within any cognizable legal theory (*see* Leon v Martinez, 84 NY2d 83, 87, 638 N.E.2d 511, 614 N.Y.S.2d 972; Hershco v Gordon & Gordon, 155 AD3d at 1008; Cruciata v O'Donnell & McLaughlin, Esqs., 149 AD3d 1034, 1034-1035, 53 N.Y.S.3d 328). HN3[↑] A motion for summary judgment, by contrast, may be granted only if the movant tenders sufficient evidence in admissible form demonstrating, prima facie, the absence of triable issues of fact (*see* Alvarez v Prospect Hosp., 68 NY2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853, 476 N.E.2d 642, 487 N.Y.S.2d 316; Zuckerman v City of New York, 49 NY2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595). If that burden is met, the burden shifts to the party opposing the motion to produce evidentiary proof in an admissible form establishing the existence of material issues of fact requiring trial (*see* Zuckerman v City of New York, 49 NY2d at 562).

A. *The Statute of Limitations for Mortgage Debt Accelerations*

The cause of action in the complaint to cancel and discharge the mortgage and note [***3] is governed by RPAPL 1501(4). HN4[↑] The statute provides that a person with an estate or interest in real property subject to an encumbrance [**7] may maintain an action to secure the cancellation and discharge of the encumbrance, and to adjudge the estate or interest free of it, if the applicable statute

of limitations for commencing a foreclosure action has expired (*see* RPAPL 1501[4]; *Lubonty v U.S. Bank N.A., 159 AD3d 962, 74 N.Y.S.3d 279*; *53 PL Realty, LLC v US Bank N.A., 153 A.D.3d 894, 61 N.Y.S.3d 120*; *Kashipour v Wilmington Sav. Fund Socy., FSB, 144 AD3d 985, 986, 41 N.Y.S.3d 738*). Actions to foreclose upon a mortgage are governed by a six-year statute of limitations (*see CPLR 213[4]*; *Wells Fargo Bank, N.A. v Eitani, 148 AD3d 193, 197, 47 N.Y.S.3d 80*; *Kashipour v Wilmington Sav. Fund Socy., FSB, 144 AD3d at 986*; *Wells Fargo Bank, N.A. v Burke, 94 AD3d 980, 943 N.Y.S.2d 540*). When a mortgage is payable in installments, which is the typical practice, an acceleration of the entire amount due begins the running of the statute of limitations on the entire debt (*see U.S. Bank N.A. v Joseph, 159 AD3d 968, 73 N.Y.S.3d 238*; *Stewart Tit. Ins. Co. v Bank of N.Y. Mellon, 154 AD3d 656, 659, 61 N.Y.S.3d 634*; *53 PL Realty, LLC v US Bank N.A., 153 AD3d at 89*; *NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d 1068, 1069; *Nationstar Mtge., LLC v Weisblum, 143 AD3d 866, 867, 39 N.Y.S.3d 491*; *EMC Mtge. Corp. v Patella, 279 AD2d 604, 605, 720 N.Y.S.2d 161*). Determining precisely when a mortgage is accelerated **[*152]** is therefore a key aspect in any action or proceeding commenced pursuant to RPAPL 1501(4).

HN5[↑] An acceleration of a mortgage debt may occur in different ways. One way is in the form of an acceleration notice transmitted to the borrower by the creditor or the creditor's servicer. To be effective, the acceleration notice to the borrower must be clear and unequivocal (*see Nationstar Mtge., LLC v Weisblum, 143 AD3d at 867*; *Wells Fargo Bank, N.A. v Burke, 94 AD3d at 983*; *Sarva v Chakravorty, 34 AD3d 438, 439, 826 N.Y.S.2d 74*). A second form of acceleration, which is self-executing, is the obligation of certain borrowers to make a balloon payment under the terms of the note at the end of the pay-back period (*see **[**8]** Trustco Bank N.Y. v 37 Clark St., 157 Misc 2d 843, 844, 599 N.Y.S.2d 404 [Sup Ct, Saratoga County]*). A third form of acceleration exists when a creditor commences an action to foreclose upon a note and mortgage and seeks, in the complaint, payment of the full balance due (*see Albertina Realty Co. v Rosbro Realty Corp., 258 NY 472, 476, 180 N.E. 176*; *Clayton Nat'l, Inc. v Guldi, 307 A.D.2d 982, 763 N.Y.S.2d 493*; *City Sts. Realty Corp. v Jan Jay Constr. Enters. Corp., 88 AD2d 558, 559, 450 N.Y.S.2d 492*).

Here, we find that both parties have been under a mistaken impression that the letter sent to the plaintiff by ASC dated November 16, 2008, fixed the date of the acceleration for statute of limitations purposes. It did not. The language in the letter, that the plaintiff's failure to cure her delinquency within 30 days "will result in the acceleration" of the note, was merely an expression of future intent that fell short of an actual acceleration (*see Bank of Am., N.A. v Luma, 157 AD3d 1106, 69 N.Y.S.3d 170*; *21st Mtge. Corp. v Adames, 153 AD3d 474, 60 N.Y.S.3d 198*). The notice to the plaintiff was not clear and unequivocal, as future intentions may always be changed in the interim. In making this finding, we respectfully disagree with our colleagues in the Appellate Division, First Department, who addressed similar language and held otherwise in *Deutsche Bank Natl. Trust Co. v Royal Blue Realty Holdings, Inc. (148 AD3d 529, 48 N.Y.S.3d 597)*.

Nevertheless, when US Bank commenced its foreclosure action against the plaintiff on January 13, 2009, paragraph "Fifth" of its complaint expressly "elect[ed] to call due the entire amount secured by the mortgage." An acceleration of the full amount of the debt occurred **[**9]** in this instance upon the filing of the summons and complaint in the foreclosure action. We therefore measure the applicable six-year statute of limitations from the date the foreclosure action was commenced, January **[*153]** 13, 2009. Since US Bank withdrew its original foreclosure action and did not commence a new action before Tuesday, January 13, 2015, the plaintiff, in support of her cross motion, submitted evidence establishing, prima facie, that the six-year statute of limitations had expired and that she was entitled to summary judgment on the RPAPL 1501(4) cause of action (*see Deutsche Bank Natl. Trust Co. v Gambino, 153 AD3d 1232, 1234, 61 N.Y.S.3d 299*).

Of course, we have held, and it is now well settled, that *HN6*[↑] an acceleration of a mortgaged debt, by either written notice or the commencement of an action, is only valid if the party making the acceleration had standing at that time to do so (*see U.S. Bank N.A. v Gordon, 158 AD3d 832, 72 N.Y.S.3d 156*; *Stewart Tit. Ins. Co. v Bank of N.Y. Mellon, 154 AD3d at 663*; *DLJ Mtge. Capital, Inc. v Pittman, 150 AD3d 818, 819, 56 N.Y.S.3d 120*; *Wells Fargo Bank, N.A. v Burke, 94 AD3d at 983-984*; *EMC Mtge. Corp. v Suarez, 49 AD3d 592, 852 N.Y.S.2d 791*; *Deutsche Bank Natl. Trust Co. Ams. v Bernal, 56 Misc 3d 915, 919, 59 N.Y.S.3d 267 [Sup Ct, Westchester County]*). Here, conceivably, US Bank could have attempted to defeat the plaintiff's action by arguing that it did not have standing to accelerate the full amount of the plaintiff's debt, which would explain its failure to produce the original note resulting in the dismissal of the foreclosure action on February 29, 2012. The absence of a valid acceleration would mean that **[***4]** the statute **[**10]** of limitations had never even begun to run on the full debt, and thereby defeat the plaintiff's RPAPL 1501(4) cause of action in its entirety. However, any such argument would have the additional and perhaps unpalatable effect of rendering untimely any claim of US Bank for missed mortgage payments older than six years and counting.

B. *De-acceleration*

In support of its motion to dismiss and in opposition to the plaintiff's cross motion for summary judgment, US Bank relies upon Wells Fargo's de-acceleration letter to the plaintiff dated October 21, 2014. *HN7*[↑] To the extent this Court has held that acceleration notices must be clear and unambiguous to be valid and enforceable (*see Nationstar Mtge., LLC v Weisblum, 143 AD3d at 867*; *Wells Fargo Bank, N.A. v Burke, 94 AD3d at 983*; *Sarva v Chakravorty, 34 AD3d at 439*), we likewise hold here that de-acceleration notices must also be clear and unambiguous to be valid and enforceable. The de-acceleration language used in this instance meets that criteria.

[*154] Courts must, of course, be mindful of the circumstance where a bank may issue a de-acceleration letter as a pretext to avoid the onerous effect of an approaching statute of limitations and to defeat the property owner's right pursuant to RPAPL 1501 to cancel and discharge a mortgage and note. Here, however, the de-acceleration letter containing a clear **[**11]** and unequivocal demand that the homeowner meet her prospective monthly payment obligations constitutes a de-acceleration in fact and cannot be viewed as pretextual in any way. Specifically, a de-acceleration letter is not pretextual if, as here, it contains an express demand for monthly payments on the note, or, in the absence of such express demand, it is accompanied by copies of monthly invoices transmitted to the homeowner for installment payments, or, is supported by other forms of evidence demonstrating that the lender was truly seeking to de-accelerate and not attempting to achieve another purpose under the guise of de-acceleration (*cf. Deutsche Bank Natl. Trust Co. Ams. v Bernal, 56 Misc 3d at 923-924*). In contrast, a "bare" and conclusory de-acceleration letter, without a demand for monthly payments toward the note, or copies of invoices, or other evidence, may raise legitimate questions about whether or not the letter was sent as a mere pretext to avoid the statute of limitations.

Contrary to the plaintiff's arguments, "[a] lender may revoke its election to accelerate the mortgage, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure **[**12]** action" (*NMNT Realty Corp. v. Knoxville 2012 Trust, 151 AD3d at 1069-1070*; *see Deutsche Bank Natl. Trust Co. v Adrian, 157 AD3d 934, 935, 69 N.Y.S.3d 706*; *MSMJ Realty, LLC v DLJ Mtge. Capital, Inc., 157 AD3d 885, 887, 69 N.Y.S.3d 870*; *U.S. Bank N.A. v Barnett, 151 AD3d 791, 793, 56 N.Y.S.3d 255*; *Kashipour v Wilmington Sav. Fund Socy., FSB, 144 AD3d at 987*; *UMLIC VP, LLC v Mellace, 19 AD3d 684, 799 N.Y.S.2d 61*; *Clayton Natl. v Guldi, 307 AD2d at 982*; *EMC Mtge. Corp. v Patella, 279 AD2d at 606*).

Here, US Bank's de-acceleration occurred on October 21, 2014, within six years measured from the commencement of its foreclosure action on January 13, 2009. Accordingly, while the plaintiff, in support of her cross motion, established her prima facie entitlement to summary judgment on her RPAPL 1501(4) cause of action, US Bank's timely de-acceleration notice raises a triable issue of fact requiring the denial of the plaintiff's cross motion.

[*155] As previously noted, the burden of proof governing a motion pursuant to *CPLR 3211(a)* is different from the burden of proof governing a motion pursuant to *CPLR 3212*. Therefore, US Bank's de-acceleration notice, which raises a triable issue of fact sufficient to defeat the plaintiff's cross motion for summary judgment, does not necessarily mandate dismissal of the complaint on the basis of that documentary evidence, because it fails to "utterly refute" the plaintiff's allegations as a matter of law.

We hold for the first time in the Appellate Division, Second Department, that *HN8*[↑] just as standing, when raised, is a necessary element to a valid acceleration, it is a necessary element, when raised, **[**13]** to a valid de-acceleration as well.

Here, the de-acceleration notice dated October 21, 2014, does not establish that US Bank had standing to de-accelerate the earlier demand that the plaintiff's mortgage debt be paid in its entirety, and no other evidence submitted in support of US Bank's *CPLR 3211(a)(1)* motion to dismiss the complaint demonstrates that it had standing. This issue is particularly germane on this record, where US Bank had been directed to provide the original note under the terms of the preliminary conference order dated September 20, 2011, and the foreclosure action was thereafter dismissed on February 29, 2012. Had US Bank provided documentary evidence in support of its *CPLR 3211(a)(1)* motion establishing, inter alia, its standing to accelerate and de-accelerate the plaintiff's mortgage debt, it might have been entitled to dismissal of the complaint. Failing that, the motion to dismiss was not accompanied by documents utterly refuting the allegation in the plaintiff's **[***5]** complaint that US Bank's efforts to collect on the debt were time-barred.

C. *The Lender's Right to De-Accelerate*

The plaintiff argues that while paragraph 6 of the note permits the lender to accelerate the full amount of the principal **[**14]** and interest upon the borrower's default, the note contains no provision permitting the lender to revoke any such acceleration, and that a de-acceleration is therefore not contractually permitted. We disagree. *HN9*[↑] Since the plain language setting forth the contractual right of the lender to accelerate the entire debt is discretionary rather than

mandatory, US Bank maintained the right to later revoke the acceleration (*see Federal Natl. Mtge. Assn. v Mebane, 208 AD2d 892, 894, 618 N.Y.S.2d 88*; *Golden v Ramapo Improvement Corp., 78 AD2d 648, 650, 432 N.Y.S.2d 238*).

[*156] D. *Substantial Prejudice*

Assuming arguendo, that the lender could revoke an earlier election to accelerate the debt, the plaintiff maintains that this Court should not permit US Bank to do so since she will be substantially prejudiced as a result.

HN10[↑] Only if a borrower can demonstrate substantial prejudice may a court, in the exercise of its equity jurisdiction, restrain the lender from revoking its election to accelerate (*see Kilpatrick v Germania Life Ins. Co., 183 NY 163, 169-170, 75 N.E. 1124*; *Golden v Ramapo Improvement Corp., 78 AD2d at 650*). Here, the plaintiff complains that the dismissal of US Bank's foreclosure action without a finding on the merits of its standing, coupled with a de-acceleration of the entire debt, causes her prejudice by leaving a lien on her home. She argues that she is further prejudiced by the effect of a de-acceleration that revives her obligation to make **[**15]** monthly payments on the underlying note to a party that arguably lacks provable standing.

The plaintiff is not substantially prejudiced as to warrant the exercise of equity jurisdiction in her favor. In September 2004, she executed a 30-year note in the sum of $1,235,000 subject to a mortgage securing the property, and made monthly payments for approximately four years before defaulting on her obligation in October 2008. Since that time, the plaintiff, without paying the mortgage or rent and without paying property taxes, has been residing at premises likely valued at more than $1 million. Moreover, with each passing month that the plaintiff remains in possession of the premises, the statute of limitations continues to expire as to missed payments due more than six years ago on a rolling monthly basis. Contrary to the plaintiff's contentions, she is not substantially prejudiced by the course of the litigation and its attendant contractual provisions, procedures, and substantive law.

E. *Miscellaneous*

Accepting the allegations in the plaintiff's complaint as true and affording the plaintiff all favorable inferences, as we must, we conclude that US Bank is not entitled to dismissal of the **[**16]** complaint under *CPLR 3211(a)(7)* for failure to state a cause of action.

The parties' remaining contentions either are without merit or have been rendered academic.

[*157] III. *Conclusion*

For the reasons set forth, we agree with the Supreme Court's determination to deny the plaintiff's cross motion for summary judgment on the complaint, and disagree with the court's determination to grant the defendant's motion pursuant to *CPLR 3211(a)* to dismiss the complaint. Accordingly, the order is modified, on the law, by deleting the provision thereof granting the defendant's motion pursuant to *CPLR 3211(a)* to dismiss the complaint with prejudice, and substituting therefor a provision denying the motion; as so modified, the order is affirmed.

CHAMBERS, SGROI and CONNOLLY, JJ., concur.

ORDERED that the order is modified, on the law, by deleting the provision thereof granting the defendant's motion pursuant to *CPLR 3211(a)* to dismiss the complaint with prejudice, and substituting therefor a provision denying the motion; as so modified, the order is affirmed, without costs or disbursements.

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Deutsche Bank Natl. Trust Co. v Royal Blue Realty Holdings, Inc.

Supreme Court of New York, Appellate Division, First Department

March 16, 2017, Decided ; March 16, 2017, Entered

850179/15 -850119/15, 3431, 850120/15, 3430, 3429

Reporter
148 A.D.3d 529 *; 48 N.Y.S.3d 597 **; 2017 N.Y. App. Div. LEXIS 1933 ***; 2017 NY Slip Op 01979 ****; 2017 WL 1013457

[**1]** Deutsche Bank National Trust Company, as Trustee for American Home Mortgage Asset Trust 2006-6, Mortgage-Backed Pass-Through Certificates Series 2006-6, Appellant, v Royal Blue Realty Holdings, Inc., Respondent, et al., Defendants. Deutsche Bank National Trust Company, as Trustee for American Home Mortgage Asset Trust 2007-1, Mortgage-Backed Pass-Through Certificates 2007-1, Appellant, v Unknown Heirs of the Estate of Serge Souto et al., Defendants, and Royal Blue Realty Holdings, Inc., Respondent. Deutsche Bank National Trust Company, as Trustee for American Home Mortgage Asset Trust 2006-6, Mortgage-Backed Pass-Through Certificates Series 2006-6, Appellant, v Unknown Heirs of the Estate of Serge Souto et al., Defendants, and Royal Blue Realty Holdings, Inc., Respondent.

Subsequent History: Leave to appeal denied by, Motion dismissed by *Deutsche Bank Nat'l Trust Co. v Royal Blue Realty Holdings, Inc., 30 NY3d 959, 2017 N.Y. LEXIS 3085, 86 NE3d 553 (N.Y., Oct. 17, 2017)*

Leave to appeal denied by, Motion dismissed by *Deutsche Bank Nat'l Trust Co. v Unknown Heirs of Estate of Souto, 30 NY3d 960, 2017 N.Y. LEXIS 3108 (N.Y., Oct. 17, 2017)*

Prior History: *Deutsche Bank Natl. Trust Co. v Unknown Heirs of the Estate of Souto, 52 Misc 3d 1210[A], 2016 NY Slip Op 51102[U], 2016 N.Y. Misc. LEXIS 2641 [2016]*
Deutsche Bank Natl. Trust Co. v Royal Blue Realty Holdings, Inc., 2016 N.Y. Misc. LEXIS 2511 (N.Y. Sup. Ct., July 5, 2016)
Deutsche Bank Natl. Trust Co. v Unknown Heirs of the Estate of Souto, 2016 N.Y. Misc. LEXIS 2513 (N.Y. Sup. Ct., July 5, 2016)
Deutsche Bank Natl. Trust Co. v Unknown Heirs of the Estate of Souto, 2016 N.Y. Misc. LEXIS 2510 (N.Y. Sup. Ct., July 5, 2016)

Core Terms

mortgages, summary judgment, time-barred, accelerate, borrower, defaults, letters, cure, days

Headnotes/Syllabus

Headnotes

Mortgages—Foreclosure—Accrual of Action

Counsel: **[***1]** Houser & Allison, APC, New York (Jacqueline Aiello of counsel), for appellant.

Shaw & Associates, New York (Martin Shaw of counsel), for respondent.

Judges: Concur—Tom, J.P., Acosta, Kapnick, Kahn, Gesmer, JJ.

Opinion

[*530] **[**597]** Orders, Supreme Court, New York County (Arlene P. Bluth, J.), entered on or about July 6, 2016, which granted the motions of defendant Royal Blue Realty Holdings, Inc. for summary judgment dismissing the complaints as time-barred, and denied plaintiff's cross motions for **[****2]** summary judgment, unanimously affirmed, with costs.

The motion court properly determined that the actions are time-barred since they were commenced more than six years from the date that all of the debt on the mortgages was accelerated (*CPLR 213 [4]*). The letters from plaintiff's predecessor-in-interest provided clear and unequivocal notice that it "will" accelerate the loan balance and proceed with a foreclosure sale, unless the borrower cured his defaults within 30 days of the letter. When the borrower did not cure his defaults within 30 days, all sums became immediately due and payable and plaintiff had the right to foreclose on the mortgages pursuant to the letters. At that point, the statute of

limitations began to run on the entire mortgage **[***2]** debt (*see CDR Créances S.A. v Euro-American Lodging Corp., 43 AD3d 45, 51, 837 NYS2d 33 [1st Dept 2007]*). Concur—Tom, J.P., Acosta, Kapnick, Kahn and Gesmer, JJ. **[Prior Case History: *2016 NY Slip Op 31259(U)*.]**

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Freedom Mtge. Corp. v Engel

Supreme Court of New York, Appellate Division, Second Department

July 11, 2018, Decided

2016-02581

Reporter
163 A.D.3d 631 *; 2018 N.Y. App. Div. LEXIS 5138 **; 2018 NY Slip Op 05140 ***; 2018 WL 3371696

[***1] Freedom Mortgage Corporation, respondent, v Herschel Engel, appellant, et al., defendants. (Index No. 1139/15)

Core Terms

mortgage, summary judgment, accelerate, statute of limitations, affirmative defense, defense motion, installment

Case Summary

Overview

HOLDINGS: [1]-A lender's foreclosure action was time-barred, *CPLR 213(4)*, because the statute of limitations began to run on the entire debt on July 16, 2008, when the lender accelerated the mortgage debt by commencing the prior foreclosure action, and the lender did not commence the instant action until February 19, 2015, and failed to raise a triable issue of fact as to whether it revoked its election to accelerate the mortgage within the six-year limitations period; the lender's execution of the January 23, 2013, stipulation did not, in itself, constitute an affirmative act to revoke its election to accelerate because inter alia, the stipulation was silent on the issue of the revocation of the election to accelerate, and did not otherwise indicate that the lender would accept installment payments from the borrower.

Outcome

Order reversed; motion for summary judgment granted; and cross-motions denied.

LexisNexis® Headnotes

Governments > Legislation > Statute of Limitations > Time Limitations

Real Property Law > Financing > Foreclosures

HN1[] **Statute of Limitations, Time Limitations**

An action to foreclose a mortgage is subject to a six-year statute of limitations. *CPLR 213(4)*. With respect to a mortgage payable in installments, separate causes of action accrue for each installment that is not paid, and the statute of limitations begins to run on the date each installment becomes due. However, even if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt. A lender may revoke its election to accelerate the mortgage, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action.

Counsel: [**1] Solomon Rosengarten, Brooklyn, NY, for appellant.

Cohn & Roth, Mineola, NY (Michael C. Nayar of counsel), for respondent.

Judges: CHERYL E. CHAMBERS, J.P., JOSEPH J. MALTESE, COLLEEN D. DUFFY, BETSY BARROS, JJ. CHAMBERS, J.P., MALTESE, DUFFY and BARROS, JJ., concur.

Opinion

[*631] DECISION & ORDER

In an action to foreclose a mortgage, the defendant Herschel Engel appeals from an order of the Supreme Court, Orange County (Sandra B. Sciortino, J.), dated November 12, 2015. The order, insofar as appealed from, denied that defendant's motion for summary judgment dismissing the complaint insofar as asserted against him and granted those branches of the plaintiff's cross motion which were for summary judgment on the complaint insofar as asserted against that defendant, to strike his answer and affirmative defenses, and to appoint a referee.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, the motion of the defendant Herschel Engel for summary judgment dismissing the complaint insofar as asserted against him is granted, and those branches of the plaintiff's cross motion which were for summary judgment on the complaint insofar as asserted against the defendant Herschel Engel, to strike [**2] his answer and affirmative defenses, and to appoint a referee are denied.

In May 2005, Herschel Engel (hereinafter the defendant) borrowed the sum of $225,000 from Fairmont Funding, Ltd. (hereinafter Fairmont). The loan was memorialized by a note and secured by a mortgage in favor of Mortgage Electronic Registration Systems, Inc., as nominee for Fairmont. On July 22, 2005, the defendant executed an extension and modification agreement (hereinafter EMA) and a consolidated note, which created a new loan with a total unpaid principal balance of $224,806. The defendant allegedly defaulted on the loan by failing to make the payment due on March 1, 2008.

In July 2008, the plaintiff commenced an action to foreclose the mortgage against the defendant, among others. In that action, the defendant moved to dismiss the complaint insofar as asserted against him for lack of personal jurisdiction due to improper service of process upon him. In a stipulation dated [*632] January 23, 2013, which was so-ordered by the Supreme Court, the parties agreed, inter alia, that: (1) the defendant was served with a copy of the summons and complaint; (2) the defendant would withdraw his motion; (3) the action would be [**3] discontinued without prejudice and the notice of pendency would be cancelled; and (4) they "desire to amicably resolve this dispute and the issues raised in the [defendant's motion] without further delay, expense or uncertainty."

More than two years later, on February 19, 2015, the plaintiff commenced this action to foreclose the mortgage. The defendant joined issue by serving an answer with various affirmative [***2] defenses, including that the action was time-barred. Thereafter, the defendant moved for summary judgment dismissing the complaint insofar as asserted against him on the ground that the action was time-barred. The plaintiff opposed the motion and cross-moved, inter alia, for summary judgment on the complaint insofar as asserted against the defendant, to strike his answer and affirmative defenses, and to appoint a referee. The Supreme Court denied the defendant's motion and granted the plaintiff's cross motion. The defendant appeals.

HN1[↑] An action to foreclose a mortgage is subject to a six-year statute of limitations (*see* CPLR 213[4]). With respect to a mortgage payable in installments, separate causes of action accrue for each installment that is not paid, and the statute of limitations begins [**4] to run on the date each installment becomes due (*see Nationstar Mtge., LLC v Weisblum, 143 AD3d 866, 867, 39 N.Y.S.3d 491; Wells Fargo Bank, N.A. v Burke, 94 AD3d 980, 982, 943 N.Y.S.2d 540; Wells Fargo Bank, N.A. v Cohen, 80 AD3d 753, 754, 915 N.Y.S.2d 569; Loiacono v Goldberg, 240 AD2d 476, 477, 658 N.Y.S.2d 138*). However, "even if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt" (*EMC Mtge. Corp. v Patella, 279 AD2d 604, 605, 720 N.Y.S.2d 161; see Kashipour v Wilmington Sav. Fund Socy., FSB, 144 AD3d 985, 986, 41 N.Y.S.3d 738; Nationstar Mtge., LLC v Weisblum, 143 AD3d at 867; Wells Fargo Bank, N.A. v Burke, 94 AD3d at 982*). "A lender may revoke its election to accelerate the mortgage, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action" (*NMNT Realty Corp. v Knoxville 2012 Trust, 151 AD3d 1068, 1069-1070; see Deutsche Bank Natl. Trust Co. v Adrian, 157 AD3d 934, 935, 69 N.Y.S.3d 706; EMC Mtge. Corp. v Patella, 279 AD2d at 606*).

Here, the defendant established that the six-year statute of limitations began to run on the entire debt on July 16, 2008, [*633] when the plaintiff accelerated the mortgage debt by commencing the prior foreclosure action (*see NMNT Realty Corp. v Knoxville 2012 Trust, 151 AD3d at 1070; EMC Mtge Corp. v Smith, 18 AD3d 602, 603, 796 N.Y.S.2d 364; EMC Mtge. Corp. v Patella, 279 AD2d at 605*). Since the plaintiff did not commence this action until February 19, 2015, the defendant sustained his prima facie burden on his motion (*see NMNT Realty Corp. v Knoxville 2012 Trust, 151 AD3d at 1070; U.S. Bank N.A. v Martin, 144 AD3d 891, 892, 41 N.Y.S.3d 550*).

In opposition, the plaintiff failed to raise a triable issue of fact as to whether it revoked its election to accelerate the mortgage within [**5] the six-year limitations period. Contrary to the Supreme Court's determination, the plaintiff's execution of the

January 23, 2013, stipulation did not, in itself, constitute an affirmative act to revoke its election to accelerate, since, inter alia, the stipulation was silent on the issue of the revocation of the election to accelerate, and did not otherwise indicate that the plaintiff would accept installment payments from the defendant (*see Federal Natl. Mtge. Assn. v Mebane, 208 AD2d 892, 894, 618 N.Y.S.2d 88*; *cf. NMNT Realty Corp. v Knoxville 2012 Trust, 151 AD3d at 1070*).

The plaintiff's alternate contention that the loan had never been accelerated since the defendant had not been served with the summons and complaint in the prior action is belied by the terms of the January 23, 2013, stipulation, which provide that the defendant was, in fact, served with the summons and complaint.

Accordingly, the Supreme Court should have granted the defendant's motion for summary judgment dismissing the complaint insofar as asserted against him, and denied those branches of the plaintiff's cross motion which were for summary judgment on the complaint insofar as asserted against the defendant, to strike his answer and affirmative defenses, and to appoint a referee. **[**6]**

In light of our determination, we need not consider the parties' remaining contentions.

CHAMBERS, J.P., MALTESE, DUFFY and BARROS, JJ., concur.

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HSBC Bank USA v Kirschenbaum

Supreme Court of New York, Appellate Division, First Department

March 15, 2018, Decided; March 15, 2018, Entered

5994, 850258/15, 400

Reporter
159 A.D.3d 506 *; 73 N.Y.S.3d 41 **; 2018 N.Y. App. Div. LEXIS 1636 ***; 2018 NY Slip Op 01644 ****; 2018 WL 1320306

[****1] *HSBC* Bank USA, etc., Plaintiff-Appellant, v Joshua *Kirschenbaum*, Defendant-Respondent, Board of Managers of the Central Park West Condominium, et al., Defendants.

Core Terms

statute of limitations, mortgage, notice, condition precedent, expiration, days, statutory prohibition, foreclosure action, complete control, tolling statute, commencement, foreclosure, limitations

Counsel: [***1] Blank Rome LLP, New York (Timothy W. Salter of counsel), for appellant.

Richland & Falkowski, PLLC, Washingtonville (Daniel H. Richland of counsel), for respondent.

Judges: Acosta, P.J., Richter, Kapnick, Kahn, Gesmer, JJ.

Opinion

[**41] [*506] Order and judgment (one paper), Supreme Court, New York County (Shlomo S. Hagler, J.), entered November 29, 2016, which granted defendant Joshua Kirschenbaum's motion to dismiss the complaint in this mortgage foreclosure proceeding, unanimously affirmed, with costs.

Defendant borrower Kirschenbaum made a prima facie showing that this action [**42] was untimely. The mortgage was accelerated on August 3, 2009 when plaintiff commenced the first foreclosure action, the statute of limitations expired on August 3, 2015 (*see* *CPLR 213[4]*), and plaintiff did not file this action until August 27, 2015.

In opposition, plaintiff failed to raise a question of fact as to whether the statute of limitations had been tolled (*Quinn v McCabe, Collins, McGeough & Fowler, LLP, 138 AD3d 1085, 1085-1086, 30 N.Y.S.3d 288 [2d Dept 2016]*). We reject plaintiff's argument that the 90-day notice under Real Property Actions and Proceedings Law (RPAPL) *§ 1304* tolled the statute of limitations for 90 days.

CPLR 204(a) authorizes tolling of a statute of limitations and provides that "[w]here the commencement of an action has been stayed by a court [***2] or by a statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced." Proper service of the *RPAPL 1304* notice is a condition precedent to the commencement of a foreclosure action (*HSBC Bank USA v Rice, 155 AD3d 443, 443, 63 N.Y.S.3d 382 [1st Dept [*507] 2017]*). A statutory prohibition and a condition precedent are separate concepts, and a plaintiff has complete control over the acts necessary to effectuate compliance with a condition precedent (*Barchet v New York City Tr. Auth., 20 NY2d 1, 6, 228 N.E.2d 361, 281 N.Y.S.2d 289 [1967]*).

Here, plaintiff had complete control over when to serve the *RPAPL 1304* notice, and could have done so at least 90 days prior to the expiration of the statute of limitations. Plaintiff did not serve the notice until May 26, 2015, less than 90 days before the expiration of the statute of limitations. In addition, there is nothing in *RPAPL 1302* or *1304* that proscribes the prosecution of the action.

Andersen v Long Is. R.R. (59 NY2d 657, 450 N.E.2d 213, 463 N.Y.S.2d 407 [1983]) and *Burgess v Long Is. R.R. Auth. (79 NY2d 777, 587 N.E.2d 269, 579 N.Y.S.2d 631 [1991])*, cases upon which plaintiff relies, do not involve *RPAPL 1304*.

Plaintiff's argument that the mortgage loan was de-accelerated when it moved to discontinue the first mortgage foreclosure proceeding is improperly raised for the first time on appeal

(*see Lutin v SAP V/A Atlas 845 WEA Assoc. NF LLC, 157 A.D.3d 466, 66 N.Y.S.3d 439, 2018 NY Slip Op 00103 [1st Dept 2018]*). In any event, the argument is unavailing (*see EMC Mtge. Corp. v Patella, 279 AD2d 604, 606, 720 N.Y.S.2d 161 [2d Dept 2001]*; *Federal Natl. Mtge. Assn. v Mebane, 208 AD2d 892, 894, 618 N.Y.S.2d 88 [2d Dept 1994]*).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME **[***3]** COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2018

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Wells Fargo Bank, N.A. v Pietro A. Cafasso

Supreme Court of New York, Appellate Division, Second Department

February 28, 2018, Decided

2016-02848, 2016-07539

Reporter
158 A.D.3d 848 *; 72 N.Y.S.3d 526 **; 2018 N.Y. App. Div. LEXIS 1294 ***; 2018 NY Slip Op 01351 ****

[****1] *Wells Fargo* Bank, National Association, etc., respondent, v Pietro A. *Cafasso*, appellant, et al., defendants. (Index No. 678/11)

Core Terms

amount due, appoint, compute, default judgment, default, failure to answer, second order, first order, reasonable excuse, answering, mortgage, Appeals, orders

Counsel: [***1] Miller, Rosado & Algios, LLP, Garden City, NY (Christopher Rosado and Neil A. Miller of counsel), for appellant.

Blank Rome LLP, New York, NY (Jill E. Alward and Andrea M. Roberts of counsel), for respondent.

Judges: WILLIAM F. MASTRO, J.P., CHERYL E. CHAMBERS, HECTOR D. LASALLE, VALERIE BRATHWAITE NELSON, JJ. MASTRO, J.P., CHAMBERS, LASALLE and BRATHWAITE NELSON, JJ., concur.

Opinion

[**526] [*848] DECISION & ORDER

Appeals from two orders of the Supreme Court, Nassau County (Thomas A. Adams, J.), both entered February 9, 2016. The first order, insofar as appealed from, granted those branches of the plaintiff's [**527] motion which were for leave to enter a default judgment against the defendant Pietro A. Cafasso upon his failure to answer the complaint, and to appoint a referee to compute the amount due to the plaintiff. The second order, insofar as appealed from, granted those branches of the plaintiff's motion which were for leave to enter a default judgment against the defendant Pietro A. Cafasso upon his failure to answer the complaint, and to appoint a referee to compute the amount due to the plaintiff, and appointed a referee to compute the amount due to the plaintiff.

ORDERED that the appeal from so much of the first [***2] order entered February 9, 2016, as granted those branches of the plaintiff's motion which were for leave to enter a default judgment against the defendant Pietro A. Cafasso upon his failure to answer the complaint, and to appoint a referee to compute the amount due to the plaintiff is dismissed, as that portion of the order was superseded by the second order entered February 9, 2016; and it is further,

ORDERED that the second order entered February 9, 2016, is reversed insofar as appealed from, on the law and in the exercise of discretion, those branches of the plaintiff's motion which were for leave to enter a default judgment against the defendant Pietro A. Cafasso and to appoint a referee to compute the amount due to the plaintiff are denied, the first order [*849] entered February 9, 2016, is modified accordingly, and the complaint is dismissed; and it is further,

ORDERED that one bill of costs is awarded to the defendant Pietro A. Cafasso.

The plaintiff commenced this mortgage foreclosure action against the defendant Pietro A. Cafasso, among others, in January 2011. Cafasso defaulted in answering the complaint, and thereafter failed to appear at a settlement conference in August of 2011. [***3] On or about October 8, 2015, the plaintiff moved for leave to enter a default judgment against, among others, Cafasso, and to appoint a referee to compute the amount due to the plaintiff. Cafasso opposed the motion, arguing that inasmuch as more than four years had elapsed since his default in answering, the complaint should be dismissed pursuant to *CPLR 3215(c)*. In two orders, both

entered February 9, 2016, the Supreme Court, inter alia, granted the plaintiff's motion and appointed a referee to **[****2]** compute the amount due under the mortgage. Cafasso appeals.

Cafasso correctly contends that the Supreme Court improperly granted those branches of the plaintiff's motion which were for leave to enter a default judgment against him and to appoint a referee to compute the amount due to the plaintiff, and that the complaint should be dismissed. *CPLR 3215(c)* generally provides that where a plaintiff fails to take proceedings for the entry of judgment within one year after a default, the court shall dismiss the complaint as abandoned. "The one exception to the otherwise mandatory language of *CPLR 3215(c)* is that the failure to timely seek a default on an unanswered complaint or counterclaim may be excused if sufficient cause is shown **[***4]** why the complaint should not be dismissed'" (*Giglio v NTIMP, Inc., 86 AD3d 301, 308, 926 N.Y.S.2d 546*, quoting *CPLR 3215[c]*). "This Court has interpreted this language as requiring both a reasonable excuse for the delay in timely moving for a default judgment, plus a demonstration that the cause of action is potentially meritorious" (*Giglio v NTIMP, Inc., 86 AD3d at 308*; *see Pipinias v J. Sackaris & Sons, Inc., 116 AD3d 749, 751-752, 983 N.Y.S.2d 587*). " The determination of whether an excuse is reasonable in any given instance **[**528]** is committed to the sound discretion of the motion court'" (*Pipinias v J. Sackaris & Sons, Inc., 116 AD3d at 752*, quoting *Giglio v NTIMP, Inc., 86 AD3d at 308*; *see Park Lane North Owners, Inc. v Gengo, 151 AD3d 874, 58 N.Y.S.3d 81*). Under the circumstances at bar, the Supreme Court improvidently exercised its discretion in finding that the plaintiff proffered a reasonable excuse for the delay, since the plaintiff's conclusory and unsubstantiated assertions that unspecified **[*850]** periods of delay were attributable to the effects of Hurricane Sandy, compliance with a then newly enacted administrative order, and changes in loan servicers and counsel were insufficient for this purpose (*see HSBC Bank USA, N.A. v Grella, 145 AD3d 669, 672, 44 N.Y.S.3d 56*; *U.S. Bank, N.A. v Dorvelus, 140 AD3d 850, 852, 32 N.Y.S.3d 631*).

The parties' remaining contentions either are without merit or need not be reached in view of the foregoing.

MASTRO, J.P., CHAMBERS, LASALLE and BRATHWAITE NELSON, JJ., concur.

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Lopez v. Imperial Delivery Serv.

Supreme Court of New York, Appellate Division, Second Department

November 15, 2000, Submitted ; May 14, 2001, Decided

1999-09550, 2000-05281, 2000-06637

Reporter
282 A.D.2d 190 *; 725 N.Y.S.2d 57 **; 2001 N.Y. App. Div. LEXIS 5038 ***

Miguel Lopez et al., Appellants, v. Imperial Delivery Service, Inc., et al., Respondents.

Prior History: [*1]** Appeal from (1) an order of the Supreme Court (Lester E. Gerard, J.), entered September 2, 1999 in Suffolk County, which, in an action to recover damages for personal injuries, denied plaintiffs' motion to restore the action, (2) a judgment of the same court and justice, entered September 28, 1999, dismissing the complaint, and (3) so much of an order of the same court and justice, entered February 15, 2000, which granted plaintiffs' motion to reargue and then adhered to the prior determination.

Core Terms

calendar, discovery, cases, restored, marked, trial calendar, one year, default, plaintiffs', appears, parties, note of issue, pre-note, trial court, completion, reargument, inactive, meritorious, scheduled

Case Summary

Procedural Posture
Plaintiff victims appealed an order of the Supreme Court, Suffolk County (New York), denying their motion to restore the action, dismissing the complaint, and granting their motion to reargue, in their underlying automobile personal injury action against defendant vehicle owner.

Overview

Victim was injured in an automobile accident and sued owner for damages. Discovery was begun, but not concluded. The trial court dismissed the action for failure to prosecute. When victim failed to restore the action pursuant to a stipulation, it was deemed abandoned and dismissed by the court. Victim moved to restore the action, but the trial court denied the motion. His motion for reargument was granted, but the trial court held to its prior decision. The appeal followed. The appellate court reviewed the legislative history of *N.Y. C.P.L.R. §§ 3404*, *3216* and *N.Y. Comp. Codes R. & Regs. tit. 22, § 202.27* to determine which applied. It held that *§ 3404* should not apply to pre-note of issue cases. Dismissal should have been pursuant to § 202.27(c) or *§ 3216*. The appeal from the intermediate order had to be dismissed because the right of direct appeal terminated with the entry of judgment.

Outcome
The judgment and the order were vacated.

LexisNexis® Headnotes

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

***HN1*[] Dismissal, Involuntary Dismissals**

See *N.Y. C.P.L.R. § 3404*.

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to Prosecute

Civil Procedure > Parties > Joinder of Parties > General Overview

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

***HN2*[] Involuntary Dismissals, Failure to Prosecute**

N.Y. C.P.L.R. § 3216 requires three conditions precedent before a case can be dismissed for want of prosecution (1) issue has been joined; (2) one year has elapsed from the joinder of issue; and (3) the court or a party has served a written demand that the plaintiff file a note of issue within 90 days.

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

HN3[] **Dismissal, Involuntary Dismissals**

N.Y. C.P.L.R. § 3216 is clearly intended to apply to cases that have not yet reached the trial calendar.

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

HN4[] **Dismissal, Involuntary Dismissals**

See *N.Y. Comp. Codes R. & Regs. tit. 22, § 202.27.*

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

HN5[] **Dismissal, Involuntary Dismissals**

Marking a case off or striking a case before the filing of a note of issue is not consistent with the purpose of the New York Individual Assignment System.

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

HN6[] **Dismissal, Involuntary Dismissals**

Marking a case off before it has even reached the trial calendar is contrary to the New York Supreme Court's role under the Individual Assignment System.

Civil Procedure > ... > Default & Default Judgments > Default Judgments > Entry of Default Judgments

Civil Procedure > Pleading & Practice > Motion Practice > General Overview

Civil Procedure > Pleading & Practice > Motion Practice > Time Limitations

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

Civil Procedure > ... > Pretrial Judgments > Default & Default Judgments > General Overview

Civil Procedure > ... > Pretrial Judgments > Default & Default Judgments > Relief From Default

HN7[] **Default Judgments, Entry of Default Judgments**

A case dismissed pursuant to *N.Y. C.P.L.R. § 3216* or *N.Y. Comp. Codes R. & Regs. tit. 22, § 202.27* may be restored only if the plaintiff can demonstrate both a reasonable excuse for the default in complying with the 90-day notice or in failing to appear at a conference, respectively, and that a meritorious action exists. *N.Y. C.P.L.R. § 5015(a)(1)*. Such a motion must be made within one year after service of the order or judgment entered upon the default. *N.Y. C.P.L.R. § 5015(a)(1)*. The plaintiff must establish a reasonable excuse and a meritorious cause of action assuming that he or she moves to vacate the default within one year. Failure to move within one year bars restoration regardless of the excuse or merits of the case. This is consistent with the procedural posture of a case still in discovery because time is of the essence and any delay is inappropriate.

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

Civil Procedure > Discovery & Disclosure > General Overview

HN8[] **Dismissal, Involuntary Dismissals**

N.Y. C.P.L.R. § 3404 should not be applied to pre-note of issue cases. The more prudent approach would be for the court to employ either *N.Y. C.P.L.R § 3216* or *N.Y. Comp. Codes R. & Regs. tit. 22, § 202.27* to expeditiously complete discovery, or at the very least assign control dates for the completion of outstanding discovery.

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

Civil Procedure > ... > Pretrial Judgments > Default & Default Judgments > Relief From Default

HN9[] **Dismissal, Involuntary Dismissals**

N.Y. C.P.L.R. § 3404 should be reserved strictly for cases that have reached the trial calendar. If a case is marked off pursuant to *§ 3404* and is then restored, the trial should

immediately follow. If *§ 3404* is properly employed there should be no further delay in the disposition of the case upon its restoration.

Headnotes/Syllabus

Headnotes

Dismissal and Nonsuit - Abandoned Cases - Improper Application of *CPLR 3404* to Pre-Note of Issue Cases

CPLR 3404, which provides that a case marked off or struck from the calendar and not restored within one year shall be deemed abandoned and shall be dismissed, should not be applied to cases where no note of issue has been filed. Marking a case off or striking a case before the filing of a note of issue during the discovery phase of litigation is contrary to the trial court's role of expeditiously moving the case to the trial calendar. The court's obligation is to keep a close rein on its assigned cases by giving dates for completion of discovery and, if discovery is not completed timely, to impose appropriate sanctions, including dismissal for want of prosecution (*see, CPLR 3126, 3216; 22 NYCRR 202.27*). *CPLR 3404* should be reserved strictly for cases that have reached the trial calendar. A pre-note of issue case could be marked off pursuant to *CPLR 3404*, remain inactive for years and then be revived by a ***motion to restore*** before it had even reached the trial calendar. Such a practice would ultimately lead to unnecessary motion practice, loss of valuable time for discovery, and a waste of judicial resources. Here, Supreme Court should not have marked plaintiffs' personal injury action "off" and placed it on a special "***purge" calendar*** based solely upon plaintiffs' failure to appear at a discovery conference. Rather, the court should have issued an order pursuant to *22 NYCRR 202.27 (c)* dismissing the action in its entirety or directing the payment of a sanction by the plaintiffs and scheduling a final date for the completion of discovery.

Counsel: *Pulvers, Pulvers, Thompson & Kutner, L. L. P.*, New York City (*Marc R. Thompson* of counsel), for appellants.

L'Abbate, Balkan, Colavita & Contini, L. L. P., Garden City (*Domingo R. Gallardo* and *Matthew P. Levy* of counsel), for respondents.

Judges: DAVID S. RITTER, J.P., WILLIAM D. FRIEDMANN, HOWARD MILLER, SANDRA J. FEUERSTEIN, JJ. RITTER, J.P., FRIEDMANN and H. MILLER, JJ., concur.

Opinion by: Feuerstein

Opinion

[*191] **[**58]** Feuerstein, J.

The issue presented in this case is whether *CPLR 3404*, which provides that a case marked " 'off' or struck from the calendar ... and not restored within one year thereafter, shall be deemed abandoned **[***2]** and shall be dismissed," should be applied to cases where no note of issue has been filed, i.e., cases which have not yet reached the trial calendar. It has become an all too common practice in the trial courts to mark a case off during the discovery phase of litigation by deeming it to be on the court's "calendar" or by creating a special "purge" calendar for the purpose of marking the case off and then automatically dismissing it pursuant to *CPLR 3404*. For the reasons that follow, we hold that this practice is improper.

Resolution of the issue before us necessarily involves the interplay among three case management devices: *CPLR 3404*, *CPLR 3216*, and Uniform Rules for Trial Courts (22 NYCRR) § 202.27. Additionally, we must consider the intent underlying the creation of the Individual Assignment System.

I. FACTS OF THIS CASE

On May 10, 1992, the injured plaintiff, Miguel Lopez, was involved in a motor vehicle accident with a vehicle owned by the defendant Imperial Delivery Service, Inc., and operated by the defendant "John Doe." Miguel Lopez and his wife, Gloria Lopez, commenced the instant action **[***3]** on March 9, 1993. Partial discovery was conducted but there was some delay due to the **[*192]** substitution of counsel for both sides. A conference was held on March 21, 1997. **[**59]** Counsel for the defendants appeared, but the plaintiffs' counsel did not. Consequently, the matter was marked "off the calendar."

On June 2, 1997, the parties entered into a stipulation wherein they agreed that the action "may be restored subject to renewed discovery demands and independent medical examination of the plaintiff." In addition, the stipulation provided that either party could seek to have the stipulation "so ordered." When the plaintiffs failed to restore the action to the calendar within one year after it had been marked off, it was deemed abandoned, and dismissed by the Clerk of the Supreme Court, Suffolk County, on July 6, 1998, pursuant to *CPLR 3404*.

Approximately eight months later, by notice of motion dated March 29, 1999, the plaintiffs moved to restore the action.

The plaintiffs' counsel submitted an affirmation stating that the stipulation dated June 2, 1997, was a good faith effort to allow the defendants to conduct additional discovery and [***4] to allow the plaintiffs to restore the action after the defendants conducted this additional discovery. The defendants, however, never conducted the additional discovery, although the plaintiffs' counsel tried to ascertain the discovery that the defendants required.

In opposition, the defendants' counsel agreed that the purpose of the June 2, 1997, stipulation was to allow the plaintiffs to restore the action subject to the condition that the defendants were allowed to complete certain discovery. However, the defendants' counsel refused to consent to restoration of the action claiming that the plaintiffs failed to have the stipulation "so ordered."

In reply, the plaintiffs' counsel submitted an affidavit stating that he did not appear at the March 21, 1997, conference because he was unaware of the conference, apparently because the plaintiffs' former counsel failed to inform him of the conference date.

By order dated September 2, 1999, the Supreme Court, Suffolk County, denied the plaintiffs' motion concluding that they had failed to meet their burden on a motion to restore after dismissal pursuant to *CPLR 3404*, of demonstrating a reasonable excuse, [***5] a meritorious cause of action, and lack of prejudice to the defendants. A judgment dismissing the action was entered September 28, 1999.

On or about October 13, 1999, the plaintiffs moved, in effect, for reargument. The defendants submitted opposition. After [*193] the return date of the motion, by letter dated November 22, 1999, the plaintiffs advised the Supreme Court of a then-recent decision of this Court, *Cubed Enters. v Roach (265 AD2d 537)*. The plaintiffs argued that our decision in *Cubed* stood for the proposition that a case could not be dismissed pursuant to *CPLR 3404* where no note of issue had been filed. Accordingly, since a note of issue was not filed in the instant case, the dismissal of the action was improper. By order dated February 15, 2000, the Supreme Court, in effect, granted reargument and adhered to its prior determination.

The Supreme Court recognized that the decision in *Cubed Enters. v Roach (supra)* was contrary to its determination but concluded that our decision was "misguided." The court noted that nothing in *CPLR 3404* requires that the case be on the trial [***6] calendar and that *22 NYCRR 202.27* (hereinafter section 202.27) allows a court to dismiss a complaint based upon the failure to appear at a scheduled conference. Further, the instant action was "marked off a purge calendar which was set up specifically to ferret out cases which [**60] were lingering in the courts without any action."

II. LEGISLATIVE HISTORY AND RELEVANT STATUTES

A. *HN1*[↑] *CPLR 3404*

This section provides:

"A case in the supreme court or a county court marked 'off' or struck from the calendar or unanswered on a clerk's calendar call, and not restored within one year thereafter, shall be deemed abandoned and shall be dismissed without costs for neglect to prosecute. The clerk shall make an appropriate entry without the necessity of an order."

This rule was derived from Rules of Civil Practice rule 302 (2) (hereinafter Rule 302 [2]). The original version of Rule 302 (2) was essentially the same as the present *CPLR 3404* except in Rule 302 (2) there was a specific reference to cases marked off or struck from the [***7] "trial term" or "special term" calendar. When Rule 302 (2) was adopted as *CPLR 3404*, the specific reference to the trial and special term calendars was changed to a generic reference to the "calendar." The purpose of this revision was apparently to make *CPLR 3404* consistent with other calendar practice rules. 1958 Second Preliminary Report of the Advisory Committee on Practice and Procedure title 36 indicates that the reason for the new calendar control rules [*194] was to address problems in *trial calendar* delay. Nowhere is there a reference to discovery, motion, or pretrial calendars (*see,* 2d Prelim Report of Advisory Comm on Practice and Procedure title 36 [1958] [hereinafter Second Preliminary Report]; *see also,* 4th Prelim Report of Advisory Comm on Practice and Procedure tits 31, 36 [1960]). Indeed, the introduction and notes for proposed rule 36.1 to the Second Preliminary Report repeatedly refers to the trial calendar when discussing the purpose of the new rules. These reports ultimately led to the legislation creating *CPLR 3404* and authorizing the Chief Administrator of the Courts [***8] to adopt rules for calendar control. Further proof of the legislative intent can be found by referring to the sections of the CPLR immediately preceding *CPLR 3404*. For example, *CPLR 3402* relates to the procedure for filing a note of issue to place a case on the trial calendar, and *CPLR 3403* relates to special trial preferences.

B. *CPLR 3216HN2*[↑]

CPLR 3216 requires three conditions precedent before a case can be dismissed for want of prosecution: (1) issue has been joined; (2) one year has elapsed from the joinder of issue; and (3) the court or a party has served a written demand that the plaintiff file a note of issue within 90 days.

CPLR 3216 is derived from Civil Practice Act § 181. That

section merely set forth the court's inherent discretionary authority to dismiss a case for neglect to prosecute. When trial courts began dismissing cases pursuant to *CPLR 3216*, in response to pressure from **[***9]** the plaintiffs' Bar, the Legislature revised *CPLR 3216* to limit a court's ability to dismiss for lack of prosecution (*see,* L 1964, ch 974; *see also,* L 1967, ch 770). The current language of *CPLR 3216* requiring the service of a 90-day demand to file a note of issue is to give a plaintiff's attorney an opportunity to complete the discovery phase of the case before the drastic sanction of dismissal is imposed. Accordingly, *HN3*[↑] *CPLR 3216* is clearly intended to apply to cases which have not yet reached the trial calendar.

C. Uniform Rules for Trial Courts (22 NYCRR) § 202.27*HN4*[↑]

This rule currently provides:

[61]** "Defaults.

"At any scheduled call of a calendar or at any conference, if all parties do not appear and proceed or announce their readiness to proceed immediately or subject to the engagement of counsel, the judge **[*195]** may note the default on the record and enter an order as follows:

"(a) If the plaintiff **[***10]** appears but the defendant does not, the judge may grant judgment by default or order an inquest.

"(b) If the defendant appears but the plaintiff does not, the judge may dismiss the action and may order a severance of counterclaims or cross-claims.

"(c) If no party appears, the judge may make such order as appears just."

The January 1984 draft of section 202.27 provided:

"Calendar default; restoration; dismissal.

"(a) Applicability. This section governs calendar defaults, restorations and dismissals, other than striking a case from the calendar pursuant to a motion under section 202.21 relating to the note of issue and certificate of readiness.

"(b) At any scheduled call of a calendar or at a pretrial conference, if all parties do not appear and proceed or announce their readiness to proceed immediately or subject to the engagement of counsel, the judge presiding shall note the default on the record and enter an order as follows:

"(1) if the plaintiff appears but the defendant does not, the judge shall grant judgment by default or order an inquest;

"(2) if the defendant appears but the plaintiff does not, the justice shall dismiss the action and may order a severance **[***11]** of counterclaims or cross-claims;

"(3) if no party appears, the judge shall strike the action from the calendar.

"(c) Actions stricken from a calendar pursuant to subdivision (b) (3) may be restored to the calendar only upon stipulation of all parties so ordered by the court, or by motion on notice to all other parties, made within one year after the action is stricken. A motion must be supported by affidavit by a person having firsthand knowledge, satisfactorily explaining the reasons for the action having **[*196]** been stricken, stating meritorious reasons for its restoration, including that there are meritorious claims, and showing that it is presently ready for trial."

It appears that the original version of section 202.27 contemplated that the court could strike a case from the calendar for failure to appear at a pretrial conference. However, in 1986 the Individual Assignment System (hereinafter IAS) was implemented for the purpose of controlling Supreme Court cases. As a result, then-Chief Judge Wachtler requested that the original version of section 202.27 be rescinded. The language regarding the striking and restoration of cases was removed and section 202.27 in **[***12]** its present form was adopted on January 1, 1986. It is significant that the original version of section 202.27 was rescinded as a result of the implementation of the IAS. Two of the objectives of the IAS were to encourage efficient trial court control of cases and to promote the disposition of cases within reasonable periods of time (*see,* Report of Comm Designated to Plan Implementation of Individual Assignment Sys for New York State Unified Ct Sys, Sept. 3, 1985, at 1). Therefore, it can be inferred that *HN5*[↑] marking a case off or striking a case before the filing of a note of issue is not consistent with the purpose of the IAS. This conclusion is buttressed by other sections of the Uniform Rules for Trial Courts providing time **[**62]** frames within which all discovery must be completed (*see, 22 NYCRR 202.19*).

It is important to note that Supreme Court justices also have *CPLR 3126* at their disposal, which provides the court with discretion to impose various sanctions for willful failure to comply with disclosure orders (*see also,* Rules of Chief Administrator **[***13]** of Cts [*22 NYCRR § 130-2.1*).

The above legislative history demonstrates that *HN6*[↑] marking a case off before it has even reached the trial calendar is contrary to the Supreme Court's role under the IAS. The court's obligation is to keep a close rein on its assigned cases by giving dates for completion of discovery

and, if discovery is not completed timely, to impose sanctions pursuant to CPLR 3216 and 3126, 22 NYCRR 130-2.1 or 202.27. Additionally, it is difficult to imagine from what "calendar" the case would be marked off during discovery. While there are motion and conference calendars to indicate the date upon which a matter is to be heard by the Supreme Court justice assigned, marking the case off such a calendar does not and should not dispose of the case from the justice's inventory of cases. Further, as noted **[*197]** above, motion and conference calendars were not contemplated when CPLR 3404 was enacted.

III. APPLICABLE STANDARDS FOR RESTORATION

HN7[↑] **[***14]** A case dismissed pursuant to CPLR 3216 or section 202.27 may be restored only if the plaintiff can demonstrate both a reasonable excuse for the default in complying with the 90-day notice or in failing to appear at a conference, respectively, and that a meritorious action exists (*see, CPLR 5015 [a] [1]; Traore v Nelson, 277 AD2d 443*; Putney v Pearlman, 203 AD2d 333). Such a motion must be made within one year after service of the order or judgment entered upon the default (*see, CPLR 5015 [a] [1]*). The plaintiff must establish a reasonable excuse and a meritorious cause of action assuming that he or she moves to vacate the default within one year. Failure to move within one year bars restoration regardless of the excuse or merits of the case (*see, Nahmani v Town of Ramapo, 262 AD2d 291*). This is consistent with the procedural posture of a case still in discovery because time is of the essence and any delay is inappropriate.

Restoration pursuant to CPLR 3404 is far more liberal and causes much **[***15]** more delay. It is possible that a case marked off pursuant to CPLR 3404, and subsequently dismissed after one year, could be restored even after several years of inactivity, assuming the plaintiff could demonstrate the merit of the action, a reasonable excuse for the delay, lack of intent to abandon the action, and a lack of prejudice to the nonmoving party (*see, Enax v New York Tel. Co., 280 AD2d 294; Cippitelli v Town of Niskayuna, 277 AD2d 540; Nisselson v Hercules Constr. Corp., 269 AD2d 507*). Consequently, were we to hold that a pre-note of issue case could be marked off pursuant to CPLR 3404, the case could remain inactive for years and then be revived by a motion to restore before it had even reached the trial calendar. Further, a case restored during the discovery phase will generally require the completion of outstanding discovery which could include the exchange of documents, depositions, and physical examinations. This result is contrary to the trial court's role of expeditiously moving the case to the trial calendar. However, the utilization of CPLR 3404 **[***16]** is entirely appropriate when the case is already on the trial calendar because in that situation there should be no further **[**63]** delay. Indeed, the purpose of marking a case off the trial calendar is generally to allow the parties to complete needed discovery.

In sum, the delay in a case dismissed pursuant to CPLR 3216 or section 202.27 will be at most one year, assuming the **[*198]** case is eventually restored. The delay in a pre-note of issue case marked off pursuant to CPLR 3404 could be several years.

IV. APPLICABLE CASE LAW

There are two lines of cases in this Court applying CPLR 3404 to pre-note of issue cases. In the first line of cases, this Court has properly held that CPLR 3404 is inapplicable to pre-note of issue cases (*see, Cubed Enters. v Roach, 265 AD2d 537, supra; Davila v Galarza, 221 AD2d 308*).

The second line of cases in this Court and in the other Appellate Divisions, however, have applied CPLR 3404 to pre-note of issue situations such as failure to appear at a **[***17]** preliminary conference and a pretrial conference (*see, Lieber v Vitelli, 270 AD2d 396; Cyrus v Dorazio, 269 AD2d 419*; Soto v Ortiz, 254 AD2d 347; *Stonehill Publ. v Clancy-Cullen Stor. Co., 251 AD2d 25*; *Boger v City of New York, 233 AD2d 182*; Marine Midland Bank-E. Natl. Assn. v Safari Animal Country, 110 AD2d 1024). Indeed, the Appellate Division, First Department, in *Stonehill Publ. v Clancy-Cullen Stor. Co. (supra)* stated that the Supreme Court should not have dismissed an inactive case because there was no appearance by either side at a status conference. The First Department stated that "it would be more prudent to mark cases 'off' pursuant to CPLR 3404 when such cases are unanswered at a clerk's calendar call" (*Stonehill Publ. v Clancy-Cullen Stor. Co., supra, at 26*).

Contrary to the conclusion of the Appellate Division, First Department, and this Court's decisions applying CPLR 3404 to pre-note of issue cases, based upon the history and legislative intent of the relevant case management statutes **[***18]** set forth herein, and the Supreme Court's overriding obligation to keep close rein on cases assigned to it, HN8[↑] CPLR 3404 should not be applied to pre-note of issue cases. The more prudent approach would be for the court to employ either CPLR 3216 or section 202.27 to expeditiously complete discovery, or at the very least assign control dates for the completion of outstanding discovery. The use of CPLR 3404 to obtain these goals is contrary to the purpose of the statute.

The need to goad inactive parties to complete discovery and difficulties beyond the control of both practitioners and the court, such as the illness of a party, which make compliance with discovery deadlines impossible, are understandably

frustrating to the court charged with efficient disposition of matters before it. Nevertheless, the trial court's responsibility remains the same as it always has been: to fashion an order consistent with its obligation to bring discovery to an end as **[*199]** quickly as possible. Marking **[***19]** a case off or striking a case during the discovery phase does not further that obligation because it only encourages inaction by the parties and counsel in completing discovery. Ultimately, marking a case off during discovery leads to unnecessary motion practice, loss of valuable time for discovery, and a waste of judicial resources.

In fact, many of the problems encountered by the trial courts and attorneys could be greatly reduced by the issuance of a scheduling order at the inception of the case and by requiring strict compliance **[**64]** with the dates for completion of discovery in order to avoid sanctions pursuant to *CPLR 3126*. For those cases that unfortunately get lost in the system, the so-called "purge calendar" is a useful tool to dispose of stagnant cases by issuing an order pursuant to section 202.27.

HN9[↑] *CPLR 3404* should be reserved strictly for cases that have reached the trial calendar. If a case is marked off pursuant to *CPLR 3404* and is then restored, the trial should immediately **[***20]** follow. If *CPLR 3404* is properly employed there should be no further delay in the disposition of the case upon its restoration.

Therefore, to the extent that this Court's prior decisions have applied *CPLR 3404* to pre-note of issue cases, they should no longer be followed.

V. APPLICATION TO THIS CASE

Here, the Supreme Court should not have marked the case "off" based upon the failure of the plaintiffs to appear at the conference on March 21, 1997. Rather, the court should have issued an order pursuant to section 202.27 (c) dismissing the action in its entirety or directing the payment of a sanction by the plaintiffs and scheduling a final date for the completion of discovery. Further, the case was certified as ready for trial long before it was marked off. Under that circumstance, the Supreme Court could have dismissed the case pursuant to *CPLR 3216*, since the certification order was essentially a 90-day notice (*see, Safina v Queens-Long Is. Med. Group, 238 AD2d 395*; *Longacre Corp. v Better Hosp. Equip. Corp., 228 AD2d 653*). A dismissal pursuant to either of those **[***21]** sections would have required the plaintiffs to move to vacate their default within one year or be barred from restoring the case (*see, CPLR 5015 [a] [1]*). The problem with marking the case off as discussed above, is precisely what occurred here. The case languished until the parties realized the problem and began motion practice. In the almost four years since the case was marked off there have been two motions, two orders by the Supreme Court, and an appeal. Had the Supreme Court **[*200]** properly dismissed the case or directed the completion of the outstanding discovery, the case would have been concluded by now. While we approve of the Supreme Court's use of a "***purge calendar***" to "ferret out" inactive cases, we disapprove of the action taken in this case based upon the plaintiffs' failure to appear at a conference.

Accordingly, because this action was never properly dismissed there was no need for a ***motion to restore***. The case was, while perhaps comatose, still alive. Although we recognize that this decision may revive some rather old cases, such a result may be mandated under the circumstances and, in the long run, the proper disposition **[***22]** of cases will benefit the Bench and Bar.

The appeal from the intermediate order dated September 2, 1999, must be dismissed because the right of direct appeal therefrom terminated with the entry of judgment in the action (*see, Matter of Aho, 39 NY2d 241, 248)*. The issues raised on the appeal from that order are brought up for review and have been considered on the appeal from the judgment (*see, CPLR 5501 [a] [1]*). The appeal from the judgment must be dismissed, as the judgment was superseded by the order dated February 15, 2000, made upon reargument. Therefore, the appeals from the order dated September 2, 1999, and the judgment are dismissed, the order dated February 15, 2000, is reversed insofar as appealed from, on the law, and upon reargument, the plaintiffs' motion is granted, and the judgment and the order dated September 2, 1999, are vacated.

Ritter, J. P., Friedmann and H. Miller, JJ., concur.

Ordered that the appeal from the order dated September 2, 1999, is dismissed; and it is further,

[65]** Ordered that the appeal from the judgment is dismissed, as that judgment was superseded by the order dated February 15, 2000, made **[***23]** upon reargument; and it is further,

Ordered that the order dated February 15, 2000, is reversed insofar as appealed from, on the law, upon reargument, the plaintiffs' motion is granted, the judgment and the order dated September 2, 1999, are vacated, and the matter is remitted to the Supreme Court for further proceedings; and it is further,

Ordered that the appellants are awarded one bill of costs.

End of Document

Bilkho v Roosevelt Sq., LLC

Supreme Court of New York, Appellate Division, Second Department

January 24, 2018, Decided

2016-10128

Reporter
157 A.D.3d 849 *; 70 N.Y.S.3d 584 **; 2018 N.Y. App. Div. LEXIS 435 ***; 2018 NY Slip Op 00400 ****

[****1] Davinder Bilkho, appellant, v Roosevelt Square, LLC, respondent. (Index No. 703196/12)

Core Terms

note of issue, restore, disposed, marking, vacate, active status, pre-note, inter alia

Counsel: [***1] Subin Associates, LLP (Pollack, Pollack, Isaac & De Cicco, LLP, New York, NY [Brian J. Isaac, Jillian Rosen, and Brianna Walsh], of counsel), for appellant.

Marin Goodman, LLP, Harrison, NY (William K. Kerrigan of counsel), for respondent.

Judges: CHERYL E. CHAMBERS, J.P., L. PRISCILLA HALL, COLLEEN D. DUFFY, BETSY BARROS, JJ. CHAMBERS, J.P., HALL, DUFFY and BARROS, JJ., concur.

Opinion

[**584] [*849] DECISION & ORDER

Appeal from an order of the Supreme Court, Queens County (Frederick D.R. Sampson, J.), entered September 15, 2016. The order denied the plaintiff's motion to restore the action to active status, in effect, to vacate the "disposed" marking, and to extend his time to serve and file a note of issue.

ORDERED that the order is reversed, on the law, with costs, those branches of the plaintiff's motion which were to restore the action to active status and, in effect, to vacate the "disposed" marking are granted, and that branch of the plaintiff's motion which was to extend his time to serve and file a note of issue is denied as unnecessary.

On November 27, 2011, the plaintiff allegedly was injured when he fell in an interior stairwell within the defendant's premises. On December 13, 2012, the plaintiff commenced [***2] this action against the defendant to recover damages for personal injuries. By order dated October 28, 2013, following a compliance conference, the plaintiff was directed, inter alia, to file a note of issue on or before April 11, 2014.

On April 10, 2014, the plaintiff filed a note of issue and certificate of readiness. However, by order dated June 10, 2015, the Supreme Court vacated the note of issue after it was reported that significant discovery remained outstanding, and the action was "restored to pre-note of issue status before the initially assigned IAS justice." However, the action was subsequently marked "disposed."

By notice of motion dated May 11, 2016, the plaintiff, represented by new counsel, [**585] moved to restore the action to active status, in effect, to vacate the "disposed" marking, and to extend his time to serve and file a note of issue. In an order entered September 15, 2016, the Supreme Court denied the motion, and the plaintiff appeals.

The defendant erroneously characterizes the plaintiff's motion as seeking to reinstate the note of issue and restore the action to the trial calendar (*see* 22 NYCRR 202.21[f]). Rather, the plaintiff moved, inter alia, to restore the action to active [*850] status [***3] and, in effect, to vacate the "disposed" [****2] marking. In light of the Supreme Court's order dated June 10, 2015, vacating the note of issue and restoring the action to pre-note of issue status, the subsequent "disposed" marking was tantamount to a purge or mark off of a pre-note of issue case (*see Khaolaead v Leisure Video, 18 AD3d 820, 821, 796 N.Y.S.2d 637)*, which is not permitted (*see Florexile-Victor v Douglas, 135 AD3d 903, 22 N.Y.S.3d 912*; Arroyo v

Board of Educ. of City of N.Y., 110 AD3d 17, 19, 970 N.Y.S.2d 229; *Rakha v Pinnacle Bus Servs., 98 AD3d 657, 949 N.Y.S.2d 769*; *Casavecchia v Mizrahi, 62 AD3d 741, 742, 877 N.Y.S.2d 906*; ***Lopez v Imperial Delivery Serv., 282 AD2d 190, 193-194, 725 N.Y.S.2d 57***). Therefore, those branches of the plaintiff's motion which were to restore the action to active status and, in effect, vacate the "disposed" marking should have been granted (*see Khaolaead v Leisure Video, 18 AD3d at 821*).

By restoring the action to pre-note of issue status, the order dated June 10, 2015, also, in effect, extended the plaintiff's time to file a note of issue. Accordingly, that branch of the plaintiff's motion which was to extend the time to serve and file the note of issue should have been denied as unnecessary.

CHAMBERS, J.P., HALL, DUFFY and BARROS, JJ., concur.

End of Document

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

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In re:

Adoption of Modified Loss Mitigation Program Procedures

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General Order #582
Amending General Order #543

WHEREAS, by resolution of the Board of Judges of the United States Bankruptcy Court for the Eastern District of New York, General Order #543, dated December 8, 2009, instituted a uniform, comprehensive, court-supervised loss mitigation program in order to facilitate consensual resolutions for individual debtors whose residential real property is at risk of loss to foreclosure; and

WHEREAS, the loss mitigation program has helped avoid the need for various types of bankruptcy litigation, reduced costs to debtors and secured creditors, and enabled debtors to reorganize or otherwise address their most significant debts and assets under the United States Bankruptcy Code; and

WHEREAS, the Loss Mitigation Program Procedures were adopted, pursuant to 11 U.S.C. § 105(a), and shall apply in all individual cases assigned under Chapter 7, 11, 12 or 13 of the Bankruptcy Code, to Chief Judge Carla E. Craig, Judge Dorothy T. Eisenberg, Judge Elizabeth S. Stong and Judge Joel B. Rosenthal, and any other Judge of this Court who may elect to participate in the Loss Mitigation Program; and

WHEREAS, General Order #543 also provided that the Court may modify the Loss Mitigation Program Procedures from time to time by duly adopted General Order; and

WHEREAS, after further review of the Loss Mitigation Program, the Board of Judges has agreed to certain modifications to the procedures and forms; now therefor,

IT IS HEREBY ORDERED that the revised Loss Mitigation Program Procedures and forms are adopted effective immediately and shall be available in the Clerk's office and on the Court's web site.

Dated: Brooklyn, New York
September 9, 2011

/s/Carla E. Craig
Carla E. Craig,
Chief United States Bankruptcy Judge

LOSS MITIGATION PROGRAM PROCEDURES

I. PURPOSE

The Loss Mitigation Program is designed to function as a forum in individual bankruptcy cases for debtors and lenders to reach consensual resolution whenever a debtor's residential property is at risk of foreclosure. The Loss Mitigation Program aims to facilitate resolution by opening the lines of communication between the debtors' and lenders' decision-makers. While the Loss Mitigation Program stays certain bankruptcy deadlines that might interfere with the negotiations or increase costs to the loss mitigation parties, the Loss Mitigation Program also encourages the parties to finalize any Settlement (as defined below) under bankruptcy court protection, instead of seeking dismissal of the bankruptcy case.

II. LOSS MITIGATION DEFINED

The term "loss mitigation" is intended to describe the full range of solutions that may avert the loss of a debtor's property to foreclosure, increased costs to the lender, or both. Loss mitigation commonly consists of the following general types of agreements, or a combination of them: loan modification, loan refinance, forbearance, short sale, or surrender of the property in full satisfaction. The terms of a loss mitigation solution will vary in each case according to the particular needs, interests, and goals of the parties.

III. ELIGIBILITY

The following definitions are used to describe the types of parties, properties, and loans that are eligible for participation in the Loss Mitigation Program:

A. DEBTOR

The term "Debtor" means any individual debtor in a case filed under Chapter 7, 11, 12, or 13 of the Bankruptcy Code, including joint debtors, whose case is assigned to Chief Judge Carla E. Craig, Judge Dorothy T. Eisenberg, Judge Elizabeth S. Stong, or Judge Joel B. Rosenthal, or any other judge who elects to participate in the Loss Mitigation Program.

B. PROPERTY

The term "Property" means any real property, including condominiums or cooperative apartments, used as the Debtor's principal residence, in which the Debtor holds an interest.

C. LOAN

The term "Loan" means any mortgage, lien, or extension of money or credit secured by eligible Property or stock shares in a residential cooperative, regardless of whether the Loan (1) is considered to be "subprime" or "non-traditional;" (2) was in foreclosure prior to the bankruptcy filing; (3) is the first or junior mortgage or lien on the Property; or (4) has been "pooled," "securitized," or assigned to a servicer or to a trustee.

D. CREDITOR

The term "Creditor" means any holder, mortgage servicer, or trustee of an eligible Loan.

IV. ADDITIONAL PARTIES

A. OTHER CREDITORS

Any party may request, or the bankruptcy court may direct, more than one Creditor to participate in the Loss Mitigation Program, where it may be of assistance to obtain a global resolution.

B. CO-DEBTORS AND THIRD PARTIES

Any party may request, or the bankruptcy court may direct, a co-debtor or other third party to participate in the Loss Mitigation Program, where the participation of such party may be of assistance, to the extent that the bankruptcy court has jurisdiction over the party or the party consents.

C. CHAPTER 13 TRUSTEE

Any party may request, or the bankruptcy court may direct, the Chapter 13 Trustee to participate in the Loss Mitigation Program to the extent that such participation is consistent with the Chapter 13 Trustee's duty under Bankruptcy Code Section 1302(b)(4) to "advise, other than on legal matters, and assist the debtor in performance under the Chapter 13 plan."

D. MEDIATOR

Any party may request, or the bankruptcy court may direct, a mediator from the Mediation Register maintained by the United States Bankruptcy Court for the Eastern District of New York to participate in the Loss Mitigation Program.

V. COMMENCEMENT OF LOSS MITIGATION

Parties are encouraged to request to enter into the Loss Mitigation Program as early in the case as possible, but a request may be made at any time as follows.

A. BY THE DEBTOR (click here for printable form)

1. In a case under Chapter 13, the Debtor may request to enter into the Loss Mitigation Program with a particular Creditor in the Chapter 13 plan, and shall note the making of the request in the docket entry for the plan. The Creditor shall have 21 days to object. If no objection is filed, the bankruptcy court may enter an order referring the parties to the Loss Mitigation Program (a "Loss Mitigation Order").

2. A Debtor may serve and file a request to enter into the Loss Mitigation Program with a particular Creditor. The Creditor shall have 14 days to object. If no objection is filed, the bankruptcy court may enter a Loss Mitigation Order.

3. If a Creditor has filed a motion for relief from the automatic stay pursuant to Bankruptcy Code Section 362 (a "Lift-Stay Motion"), the Debtor may serve and file a request to enter into the Loss Mitigation Program at any time before the conclusion of the hearing on the Lift-Stay Motion. The bankruptcy court will consider the Debtor's request and any opposition by the Creditor at the hearing on the Lift-Stay Motion.

B. BY A CREDITOR (click here for printable form)

A Creditor may serve and file a request to enter into the Loss Mitigation Program. The Debtor shall have 14 days to object. If no objection is filed, the bankruptcy court may enter a Loss Mitigation Order.

C. BY THE BANKRUPTCY COURT

The bankruptcy court may enter a Loss Mitigation Order at any time after notice to the parties to be bound (the "Loss Mitigation Parties") and an opportunity to object.

D. HEARING ON OBJECTION

If any party files an objection, the bankruptcy court shall hold a hearing on the request to enter the Loss Mitigation Program and the objection, and shall not enter a Loss Mitigation Order until the objection has been heard.

VI. LOSS MITIGATION ORDER (click here for printable form)

A. DEADLINES

A Loss Mitigation Order shall contain:

1. The date by which contact persons and telephone contact information shall be provided by the Loss Mitigation Parties.

2. The date by which each Creditor shall initially contact the Debtor.

3. The date by which each Creditor shall transmit any request for information or documents to the Debtor.

4. The date by which the Debtor shall transmit any request for information or documents to each Creditor.

5. The date by which a written status report shall be filed, or the date and time for a status conference and oral status report (whether written or oral, a "Status Report"). In a Chapter 13 case, the status conference shall coincide, if possible, with a hearing on confirmation of the Chapter 13 plan. A date to file a written report shall be, if possible, not later than 7 days after the initial loss mitigation session.

6. The date when the loss mitigation process (the "Loss Mitigation Period") shall terminate, unless extended.

B. EFFECT

During the Loss Mitigation Period:

1. A Creditor may contact the Debtor directly, and it shall be presumed that such contact does not violate the automatic stay.

2. A Creditor may not file a Lift-Stay Motion, except where necessary to prevent irreparable injury. A Lift-Stay Motion filed by the Creditor before the entry of the Loss Mitigation Order shall be adjourned to a date following the Loss Mitigation Period, and the stay shall be extended pursuant to Bankruptcy Code Section 362(e).

3. In a Chapter 13 case, the date by which a Creditor must object to confirmation of the Chapter 13 plan shall be extended to a date that is at least 14 days following the Loss Mitigation Period.

4. Federal Rule of Evidence 408 shall apply to communications, information and documents exchanged by the Loss Mitigation Parties in connection with the Loss Mitigation Program.

VII. DUTIES UPON COMMENCEMENT OF LOSS MITIGATION

A. GOOD FAITH

The Loss Mitigation Parties shall negotiate in good faith. A party that does not participate in the Loss Mitigation Program in good faith may be subject to sanctions.

B. CONTACT INFORMATION

1. The Debtor: The Debtor shall provide written notice to each Loss Mitigation Party of the manner in which the Creditor shall contact the Debtor or the Debtor's attorney. This may be done in the request to enter the Loss Mitigation Program.

2. The Creditor: Each Creditor shall provide written notice to the Debtor of the name, address and direct telephone number of the contact person with authority to act on the Creditor's behalf. This may be done in the request to enter the Loss Mitigation Program.

C. STATUS REPORT

The Loss Mitigation Parties shall provide a written or oral Status Report to the bankruptcy court within the period set in the Loss Mitigation Order. The Status Report shall indicate how many loss mitigation sessions have occurred, whether a resolution has been reached, and whether a Loss Mitigation Party believes that additional sessions may result in partial or complete resolution. A Status Report may include a request for an extension of the Loss Mitigation Period.

D. BANKRUPTCY COURT APPROVAL

The Loss Mitigation Parties shall seek bankruptcy court approval of any Settlement reached during loss mitigation.

VIII. LOSS MITIGATION PROCESS

A. INITIAL CONTACT

Following entry of a Loss Mitigation Order, the contact person designated by each Creditor shall contact the Debtor and any other Loss Mitigation Party within the time set by the bankruptcy court. The Debtor may contact any Loss Mitigation Party at any time. The purpose of the initial contact is to create a framework for the loss mitigation session and to ensure that the Loss Mitigation Parties are prepared. The initial contact is not intended to limit the issues or proposals that may arise during the loss mitigation session.

During the initial contact, the Loss Mitigation Parties shall discuss:

1. The time and method for conducting the loss mitigation sessions.

2. The loss mitigation alternatives that each party is considering.

3. The exchange of information and documents before the loss mitigation session, including the date by when the Creditor shall request information and documents from the Debtor and the date by when the Debtor shall respond. All information and documents shall be provided at least seven days before the first loss mitigation session.

B. LOSS MITIGATION SESSIONS

Loss mitigation sessions may be conducted in person, by telephone, or by video conference. At the conclusion of each loss mitigation session, the Loss Mitigation Parties shall discuss whether and when to hold a further session, and whether any additional information or documents should be exchanged.

C. BANKRUPTCY COURT ASSISTANCE

At any time during the Loss Mitigation Period, a Loss Mitigation Party may request a settlement conference or status conference with the bankruptcy judge.

D. SETTLEMENT AUTHORITY

At a loss mitigation session, each Loss Mitigation Party shall have a person with full settlement authority present. At a status conference or settlement conference with the bankruptcy court, each Loss Mitigation Party shall have a person with full settlement authority present. If a Loss Mitigation Party is appearing by telephone or video conference, that party shall be available beginning thirty minutes before the conference.

IX. DURATION, EXTENSION AND EARLY TERMINATION

A. INITIAL PERIOD

The initial Loss Mitigation Period shall be set by the bankruptcy court in the Loss Mitigation Order.

B. EXTENSION

1. By Agreement: The Loss Mitigation Parties may agree to extend the Loss Mitigation Period by stipulation to be filed not less than one business day before the Loss Mitigation Period ends.

2. In the Absence of Agreement: A Loss Mitigation Party may request to extend the Loss Mitigation Period in the absence of agreement by filing and serving a request to extend the Loss Mitigation Period on the other Loss Mitigation Parties, who shall have seven days to object. If the request to extend the Loss Mitigation Period is opposed, then the bankruptcy court shall schedule a hearing on the request. The bankruptcy court may consider whether (1) an extension of the Loss Mitigation Period may result in a complete or partial resolution that provides a substantial benefit to a Loss Mitigation Party; (2) the party opposing the extension has participated in good faith and complied with these Loss Mitigation Procedures; and (3) the party opposing the extension will be prejudiced.

C. EARLY TERMINATION

1. Upon Request of a Loss Mitigation Party: A Loss Mitigation Party may request to terminate the Loss Mitigation Period by filing and serving a request to terminate the Loss Mitigation Period on the other Loss Mitigation Parties, who shall have seven days to object. If the request to terminate the Loss Mitigation Period is opposed, then the bankruptcy court shall schedule a hearing on the request. Notice may be modified for cause if necessary to prevent irreparable injury.

2. Dismissal of the Bankruptcy Case: A Chapter 13 bankruptcy case shall not be dismissed during the pendency of a Loss Mitigation Period, except (1) upon motion of the Chapter 13 Trustee or the United States Trustee for failure to comply with the requirements of the Bankruptcy Code; or (2) upon the voluntary request of the Chapter 13 Debtor. **A Chapter 13 Debtor may not be required to request dismissal of the bankruptcy case as part of a Settlement during the Loss Mitigation Period.** If a Chapter 13 Debtor requests voluntary dismissal during the Loss Mitigation Period, the Debtor shall indicate whether the Debtor agreed or intends to enter into a Settlement with a Loss Mitigation Party.

D. DISCHARGE

The Clerk of the Court shall not enter a discharge during the pendency of a Loss Mitigation Period.

X. SETTLEMENT

The bankruptcy court shall consider any agreement or resolution (a "Settlement") reached during loss mitigation and may approve the Settlement, subject to the following provisions:

1. Implementation: A Settlement may be noticed and implemented in any manner permitted by the Bankruptcy Code and Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), including but not limited to a stipulation, sale, Chapter 11 plan of reorganization, or Chapter 13 plan.

2. Fees, Costs, or Charges: If a Settlement provides for a Creditor to receive payment or reimbursement of any expense arising from the Creditor's participation in the Loss Mitigation Program, that expense shall be disclosed to the Debtor and the bankruptcy court before the Settlement is approved.

3. Signatures: Consent to the Settlement shall be acknowledged in writing by the Creditor representative who participated in the loss mitigation session, the Debtor, and the Debtor's attorney, if applicable.

4. Hearing: Where a Debtor is represented by an attorney, a Settlement may be approved by the bankruptcy court without further notice, or upon such notice as the bankruptcy court directs, unless additional notice or a hearing is required by the Bankruptcy Code or Bankruptcy Rules. Where a Debtor is not represented by counsel, a Settlement shall not be approved until the bankruptcy court conducts a hearing at which the Debtor shall appear in person.

5. Dismissal Not Required: **A Debtor shall not be required to request dismissal of the bankruptcy case in order to effectuate a Settlement.** In order to ensure that the Settlement is enforceable, the Loss Mitigation Parties shall seek bankruptcy court approval of the Settlement. Where the Debtor requests or consents to dismissal of the bankruptcy case as part of the Settlement, the bankruptcy court may approve the Settlement as a "structured dismissal," if such relief complies with the Bankruptcy Code and Bankruptcy Rules.

XI. LOSS MITIGATION FINAL REPORT

Debtor's counsel (or the Debtor, if the Debtor is proceeding without attorney representation) shall file with the Court a Loss Mitigation Final Report. The form of Loss Mitigation Final Report is on the Court's website (**click here for printable form**). The Loss Mitigation Final Report shall be filed no later than 14 days after termination of the Loss Mitigation Period. Termination occurs:

1. when the Court enters an order terminating the Loss Mitigation Period;

2. when the Court approves a stipulated agreement that has been presented to the Court, which provides for settlement or resolution of the Loss Mitigation; or

3. upon expiration of the Loss Mitigation Period.

Where two or more requests for Loss Mitigation have been made in a case, for different properties or different mortgages on a property, a separate Loss Mitigation Final Report must be filed with respect to each request.

XII. COORDINATION WITH OTHER PROGRAMS

[Provision may be added in the future to provide for coordination with other loss mitigation programs, including programs in the New York State Unified Court System.]

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

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In re: Chapter

Case No.

Debtor(s)

----------x

LOSS-MITIGATION ORDER

☐ A Loss Mitigation Request was filed by the debtor on *[Date]* _____, 20____.

☐ A Loss Mitigation Request was filed by a creditor on *[Date]* _____, 20____.

☐ The Court raised the possibility of loss mitigation, and the parties have had notice and an opportunity to object.

Upon the foregoing, it is hereby

ORDERED, that the following parties (the "Loss Mitigation Parties") are directed to participate in the Loss Mitigation Program:

1. The Debtor

2. _____, the Creditor with respect to _____ *[describe Loan and/or Property]*.

3. *[Additional parties, if any]* _____

It is further **ORDERED,** that the Loss Mitigation Parties shall comply with the Loss Mitigation Procedures annexed to this Order; and it is further

ORDERED, that the Loss Mitigation Parties shall observe the following deadlines:

1. Each Loss Mitigation Party shall designate contact persons and disclose contact information by *[suggested time is 7 days]*, unless this information has been previously provided. As part of this obligation, **a Creditor shall furnish each Loss Mitigation Party with written notice of the name, address and direct telephone number of the person who has full settlement authority.**

2. Each Creditor that is a Loss Mitigation Party shall contact the Debtor within **14 days of the date of this Order.**

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1. All capitalized terms have the meaning defined in the Loss Mitigation Procedures

3. Each Loss Mitigation Party shall make its request for information and documents, if any, within **14 days of the date of this Order.**

4. Each Loss Mitigation Party shall respond to a request for information and documents within **14 days after a request is made, or 7 days prior to the Loss Mitigation Session, whichever is earlier.**

5. The Loss Mitigation Session shall be scheduled not later than _____ *[suggested time is within 35 days of the date of the order].*

6. The Loss Mitigation Period shall terminate on _____ [suggested time is within 42 days of the date of the date of the order], unless extended as provided in the Loss Mitigation Procedures.

It is further **ORDERED**, that a status conference will be held in this case on _____ *[suggested time is within 42 days of the date of the order]* (the "Status Conference"). The Loss Mitigation Parties shall appear at the Status Conference and provide the Court with an oral Status Report unless a written Status Report that is satisfactory to the Court has been filed not later than 7 days prior to the date of the Status Conference and requests that the Status Conference be adjourned or cancelled; and it is further

ORDERED, that at the Status Conference, the Court may consider a Settlement reached by the Loss Mitigation Parties, or may adjourn the Status Conference if necessary to allow for adequate notice of a request for approval of a Settlement; and it is further

ORDERED, that any matters that are currently pending between the Loss Mitigation Parties (such as motions or applications, and any objection, opposition or response thereto) are hereby adjourned to the date of the Status Conference to the extent those matters concern (1) relief from the automatic stay, (2) objection to the allowance of a proof of claim, (3) reduction, reclassification or avoidance of a lien, (4) valuation of a Loan or Property, or (5) objection to confirmation of a plan of reorganization; and it is further.

ORDERED, that the time for each Creditor that is a Loss Mitigation Party in this case to file an objection to a plan of reorganization in this case shall be extended until 14 days after the termination of the Loss Mitigation Period, including any extension of the Loss Mitigation Period.

Dated:

BY THE COURT

_____

United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

----------x

In re:

Case No.
Chapter

Debtor(s)

----------x

LOSS MITIGATION FINAL REPORT

Name of Lender: _____

Property Address: _____

Last Four Digits of Account Number of Loan: _____

File Date of Request for Loss Mitigation: ____/____/_____

Date of Entry of Order Granting Loss Mitigation: _____

Date of Entry of Order Approving Settlement *(if any):* _____

Other Requests for Loss Mitigation in this Case: _____Yes _____No

The use of the Court's Loss Mitigation Procedures has resulted in the following (please check the appropriate box below):

☐ Loan modification.

☐ Loan refinance.

☐ Forbearance.

☐ Short sale.

☐ Surrender of property.

☐ No agreement has been reached.

☐ Other: _____
_____
_____
_____

Dated: _____ Signature: _____

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12 CFR 1024.41

Copy Citation

This document is current through the October 31, 2018 issue of the Federal Register. Title 3 is current through October 5, 2018.

Code of Federal Regulations TITLE 12 -- BANKS AND BANKING CHAPTER X--BUREAU OF CONSUMER FINANCIAL PROTECTION PART 1024--REAL ESTATE SETTLEMENT PROCEDURES ACT (REGULATION X) SUBPART C--MORTGAGE SERVICING

§ 1024.41 Loss mitigation procedures.

(a) Enforcement and limitations. A borrower may enforce the provisions of this section pursuant to section 6(f) of RESPA (12 U.S.C. 2605(f)). Nothing in § 1024.41 imposes a duty on a servicer to provide any borrower with any specific loss mitigation option. Nothing in § 1024.41 should be construed to create a right for a borrower to enforce the terms of any agreement between a servicer and the owner or assignee of a mortgage loan, including with respect to the evaluation for, or offer of, any loss mitigation option or to eliminate any such right that may exist pursuant to applicable law.

(b) Receipt of a loss mitigation application.

(1) Complete loss mitigation application. A complete loss mitigation application means an application in connection with which a servicer has received all the information that the servicer requires from a borrower in evaluating applications for the loss mitigation options available to the borrower. A servicer shall exercise reasonable diligence in obtaining documents and information to complete a loss mitigation application.

(2) Review of loss mitigation application submission. (i) Requirements. If a servicer receives a loss mitigation application 45 days or more before a foreclosure sale, a servicer shall:

(A) Promptly upon receipt of a loss mitigation application, review the loss mitigation application to determine if the loss mitigation application is complete; and

(B) Notify the borrower in writing within 5 days (excluding legal public holidays, Saturdays, and Sundays) after receiving the loss mitigation application that the servicer acknowledges receipt of the loss mitigation application and that the servicer has determined that the loss mitigation application is either complete or incomplete. If a loss mitigation application is incomplete, the notice shall state the additional documents and information the borrower must submit to make the loss mitigation application complete and the applicable date pursuant to paragraph (b)(2)(ii) of this section. The notice to the borrower shall include a statement that the borrower should consider contacting servicers of any other mortgage loans secured by the same property to discuss available loss mitigation options.

(ii) Time period disclosure. The notice required pursuant to paragraph (b)(2)(i)(B) of this section must include a reasonable date by which the borrower should submit the documents and information necessary to make the loss mitigation application complete.

(3) Determining Protections. To the extent a determination of whether protections under this section apply to a borrower is made on the basis of the number of days between when a complete loss mitigation application is received and when a foreclosure sale occurs, such determination shall be made as of the date a complete loss mitigation application is received.

(c) Evaluation of loss mitigation applications.

(1) Complete loss mitigation application. Except as provided in paragraph (c)(4)(ii) of this section, if a servicer receives a complete loss mitigation application more than 37 days before a foreclosure sale, then, within 30 days of receiving the complete loss mitigation application, a servicer shall:

(i) Evaluate the borrower for all loss mitigation options available to the borrower; and

(ii) Provide the borrower with a notice in writing stating the servicer's determination of which loss mitigation options, if any, it will offer to the borrower on behalf of the owner or assignee of the mortgage. The servicer shall include in this notice the amount of time the borrower has to accept or reject an offer of a loss mitigation program as provided for in paragraph (e) of this section, if applicable, and a notification, if applicable, that the borrower has the right to appeal the denial of any loan modification option as well as the amount of time the borrower has to file such an appeal and any requirements for making an appeal, as provided for in paragraph (h) of this section.

(2) Incomplete loss mitigation application evaluation.

(i) In general. Except as set forth in paragraphs (c)(2)(ii) and (iii) of this section, a servicer shall not evade the requirement to evaluate a complete loss mitigation application for all loss mitigation options available to the borrower by offering a loss mitigation option based upon an

evaluation of any information provided by a borrower in connection with an incomplete loss mitigation application.

(ii) Reasonable time. Notwithstanding paragraph (c)(2)(i) of this section, if a servicer has exercised reasonable diligence in obtaining documents and information to complete a loss mitigation application, but a loss mitigation application remains incomplete for a significant period of time under the circumstances without further progress by a borrower to make the loss mitigation application complete, a servicer may, in its discretion, evaluate an incomplete loss mitigation application and offer a borrower a loss mitigation option. Any such evaluation and offer is not subject to the requirements of this section and shall not constitute an evaluation of a single complete loss mitigation application for purposes of paragraph (i) of this section.

(iii) Short-term loss mitigation options. Notwithstanding paragraph (c)(2)(i) of this section, a servicer may offer a short-term payment forbearance program or a short-term repayment plan to a borrower based upon an evaluation of an incomplete loss mitigation application. Promptly after offering a payment forbearance program or a repayment plan under this paragraph (c)(2)(iii), unless the borrower has rejected the offer, the servicer must provide the borrower a written notice stating the specific payment terms and duration of the program or plan, that the servicer offered the program or plan based on an evaluation of an incomplete application, that other loss mitigation options may be available, and that the borrower has the option to submit a complete loss mitigation application to receive an evaluation for all loss mitigation options available to the borrower regardless of whether the borrower accepts the program or plan. A servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, and shall not move for foreclosure judgment or order of sale or conduct a foreclosure sale, if a borrower is performing pursuant to the terms of a payment forbearance program or repayment plan offered pursuant to this paragraph (c)(2)(iii). A servicer may offer a short-term payment forbearance program in conjunction with a short-term repayment plan pursuant to this paragraph (c)(2)(iii).

(iv) Facially complete application. A loss mitigation application shall be considered facially complete when a borrower submits all the missing documents and information as stated in the notice required under paragraph (b)(2)(i)(B) of this section, when no additional information is requested in such notice, or once the servicer is required to provide the borrower a written notice pursuant to paragraph (c)(3)(i) of this section. If the servicer later discovers that additional information or corrections to a previously submitted document are required to complete the application, the servicer must promptly request the missing information or corrected documents and treat the application as complete for the purposes of paragraphs (f)(2) and (g) of this section until the borrower is given a reasonable opportunity to complete the application. If the borrower completes the application within this period, the application shall be considered complete as of the date it first became facially complete, for the purposes of

paragraphs (d), (e), (f)(2), (g), and (h) of this section, and as of the date the application was actually complete for the purposes of this paragraph (c). A servicer that complies with this paragraph (c)(2)(iv) will be deemed to have fulfilled its obligation to provide an accurate notice under paragraph (b)(2)(i)(B) of this section.

(3) Notice of complete application. (i) Except as provided in paragraph (c)(3)(ii) of this section, within 5 days (excluding legal public holidays, Saturdays, and Sundays) after receiving a borrower's complete loss mitigation application, a servicer shall provide the borrower a written notice that sets forth the following information:

(A) That the loss mitigation application is complete;

(B) The date the servicer received the complete application;

(C) That the servicer expects to complete its evaluation within 30 days of the date it received the complete application;

(D) That the borrower is entitled to certain foreclosure protections because the servicer has received the complete application, and, as applicable, either:

(1) If the servicer has not made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, that the servicer cannot make the first notice or filing required to commence or initiate the foreclosure process under applicable law before evaluating the borrower's complete application; or

(2) If the servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, that the servicer has begun the foreclosure process, and that the servicer cannot conduct a foreclosure sale before evaluating the borrower's complete application;

(E) That the servicer may need additional information at a later date to evaluate the application, in which case the servicer will request that information from the borrower and give the borrower a reasonable opportunity to submit it, the evaluation process may take longer, and the foreclosure protections could end if the servicer does not receive the information as requested; and

(F) That the borrower may be entitled to additional protections under State or Federal law.

(ii) A servicer is not required to provide a notice pursuant to paragraph (c)(3)(i) of this section if:

(A) The servicer has already provided the borrower a notice under paragraph (b)(2)(i)(B) of this section informing the borrower that the application is complete and the servicer has not subsequently requested additional information or a corrected version of a previously submitted document from the borrower pursuant to paragraph (c)(2)(iv) of this section;

(B) The application was not complete or facially complete more than 37 days before a foreclosure sale; or

(C) The servicer has already provided the borrower a notice regarding the application under paragraph (c)(1)(ii) of this section.

(4) Information not in the borrower's control --(i) Reasonable diligence. If a servicer requires documents or information not in the borrower's control to determine which loss mitigation options, if any, it will offer to the borrower, the servicer must exercise reasonable diligence in obtaining such documents or information.

(ii) Effect in case of delay. (A)(1) Except as provided in paragraph (c)(4)(ii)(A)(2) of this section, a servicer must not deny a complete loss mitigation application solely because the servicer lacks required documents or information not in the borrower's control.

(2) If a servicer has exercised reasonable diligence to obtain required documents or information from a party other than the borrower or the servicer, but the servicer has been unable to obtain such documents or information for a significant period of time following the 30-day period identified in paragraph (c)(1) of this section, and the servicer, in accordance with applicable requirements established by the owner or assignee of the borrower's mortgage loan, is unable to determine which loss mitigation options, if any, it will offer the borrower without such documents or information, the servicer may deny the application and provide the borrower with a written notice in accordance with paragraph (c)(1)(ii) of this section. When providing the written notice in accordance with paragraph (c)(1)(ii) of this section, the servicer must also provide the borrower with a copy of the written notice required by paragraph (c)(4)(ii)(B) of this section.

(B) If a servicer is unable to make a determination within the 30-day period identified in paragraph (c)(1) of this section as to which loss mitigation options, if any, it will offer to the borrower because the servicer lacks required documents or information from a party other than the borrower or the servicer, the servicer must, within such 30-day period or promptly thereafter, provide the borrower a written notice, informing the borrower:

(1) That the servicer has not received documents or information not in the borrower's control that the servicer requires to determine which loss mitigation options, if any, it will offer to the borrower on behalf of the owner or assignee of the mortgage;

(2) Of the specific documents or information that the servicer lacks;

(3) That the servicer has requested such documents or information; and

(4) That the servicer will complete its evaluation of the borrower for all available loss mitigation options promptly upon receiving the documents or information.

(C) If a servicer must provide a notice required by paragraph (c)(4)(ii)(B) of this section, the servicer must not provide the borrower a written notice pursuant to paragraph (c)(1)(ii) of this section until the servicer receives the required documents or information referenced in paragraph (c)(4)(ii)(B)(2) of this section, except as provided in paragraph (c)(4)(ii)(A)(2) of this section. Upon receiving such required documents or information, the servicer must

promptly provide the borrower with the written notice pursuant to paragraph (c)(1)(ii) of this section.

(d) Denial of loan modification options. If a borrower's complete loss mitigation application is denied for any trial or permanent loan modification option available to the borrower pursuant to paragraph (c) of this section, a servicer shall state in the notice sent to the borrower pursuant to paragraph (c)(1)(ii) of this section the specific reason or reasons for the servicer's determination for each such trial or permanent loan modification option and, if applicable, that the borrower was not evaluated on other criteria.

(e) Borrower response.

(1) In general. Subject to paragraphs (e)(2)(ii) and (iii) of this section, if a complete loss mitigation application is received 90 days or more before a foreclosure sale, a servicer may require that a borrower accept or reject an offer of a loss mitigation option no earlier than 14 days after the servicer provides the offer of a loss mitigation option to the borrower. If a complete loss mitigation application is received less than 90 days before a foreclosure sale, but more than 37 days before a foreclosure sale, a servicer may require that a borrower accept or reject an offer of a loss mitigation option no earlier than 7 days after the servicer provides the offer of a loss mitigation option to the borrower.

(2) Rejection.

(i) In general. Except as set forth in paragraphs (e)(2)(ii) and (iii) of this section, a servicer may deem a borrower that has not accepted an offer of a loss mitigation option within the deadline established pursuant to paragraph (e)(1) of this section to have rejected the offer of a loss mitigation option.

(ii) Trial Loan Modification Plan. A borrower who does not satisfy the servicer's requirements for accepting a trial loan modification plan, but submits the payments that would be owed pursuant to any such plan within the deadline established pursuant to paragraph (e)(1) of this section, shall be provided a reasonable period of time to fulfill any remaining requirements of the servicer for acceptance of the trial loan modification plan beyond the deadline established pursuant to paragraph (e)(1) of this section.

(iii) Interaction with appeal process. If a borrower makes an appeal pursuant to paragraph (h) of this section, the borrower's deadline for accepting a loss mitigation option offered pursuant to paragraph (c)(1)(ii) of this section shall be extended until 14 days after the servicer provides the notice required pursuant to paragraph (h)(4) of this section.

(f) Prohibition on foreclosure referral. (1) Pre-foreclosure review period. A servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process unless:

(i) A borrower's mortgage loan obligation is more than 120 days delinquent;

(ii) The foreclosure is based on a borrower's violation of a due-on-sale clause; or

(iii) The servicer is joining the foreclosure action of a superior or subordinate lienholder.

(2) Application received before foreclosure referral. If a borrower submits a complete loss mitigation application during the pre-foreclosure review period set forth in paragraph (f)(1) of this section or before a servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, a servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process unless:

(i) The servicer has sent the borrower a notice pursuant to paragraph (c)(1)(ii) of this section that the borrower is not eligible for any loss mitigation option and the appeal process in paragraph (h) of this section is not applicable, the borrower has not requested an appeal within the applicable time period for requesting an appeal, or the borrower's appeal has been denied;

(ii) The borrower rejects all loss mitigation options offered by the servicer; or

(iii) The borrower fails to perform under an agreement on a loss mitigation option.

(g) Prohibition on foreclosure sale. If a borrower submits a complete loss mitigation application after a servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process but more than 37 days before a foreclosure sale, a servicer shall not move for foreclosure judgment or order of sale, or conduct a foreclosure sale, unless:

(1) The servicer has sent the borrower a notice pursuant to paragraph (c)(1)(ii) of this section that the borrower is not eligible for any loss mitigation option and the appeal process in paragraph (h) of this section is not applicable, the borrower has not requested an appeal within the applicable time period for requesting an appeal, or the borrower's appeal has been denied;

(2) The borrower rejects all loss mitigation options offered by the servicer; or

(3) The borrower fails to perform under an agreement on a loss mitigation option.

(h) Appeal process.

(1) Appeal process required for loan modification denials. If a servicer receives a complete loss mitigation application 90 days or more before a foreclosure sale or during the period set forth in paragraph (f) of this section, a servicer shall permit a borrower to appeal the servicer's determination to deny a borrower's loss mitigation application for any trial or permanent loan modification program available to the borrower.

(2) Deadlines. A servicer shall permit a borrower to make an appeal within 14 days after the servicer provides the offer of a loss mitigation option to the borrower pursuant to paragraph (c)(1)(ii) of this section.

(3) Independent evaluation. An appeal shall be reviewed by different personnel than those responsible for evaluating the borrower's complete loss mitigation application.

(4) Appeal determination. Within 30 days of a borrower making an appeal, the servicer shall provide a notice to the borrower stating the servicer's determination of whether the servicer will offer the borrower a loss mitigation option based upon the appeal and, if applicable, how long the borrower has to accept or reject such an offer or a prior offer of a loss mitigation option. A

servicer may require that a borrower accept or reject an offer of a loss mitigation option after an appeal no earlier than 14 days after the servicer provides the notice to a borrower. A servicer's determination under this paragraph is not subject to any further appeal.

(i) Duplicative requests. A servicer must comply with the requirements of this section for a borrower's loss mitigation application, unless the servicer has previously complied with the requirements of this section for a complete loss mitigation application submitted by the borrower and the borrower has been delinquent at all times since submitting the prior complete application.

(j) Small servicer requirements. A small servicer shall be subject to the prohibition on foreclosure referral in paragraph (f)(1) of this section. A small servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process and shall not move for foreclosure judgment or order of sale, or conduct a foreclosure sale, if a borrower is performing pursuant to the terms of an agreement on a loss mitigation option.

(k) Servicing transfers --(1) In general --(i) Timing of compliance. Except as provided in paragraphs (k)(2) through (4) of this section, if a transferee servicer acquires the servicing of a mortgage loan for which a loss mitigation application is pending as of the transfer date, the transferee servicer must comply with the requirements of this section for that loss mitigation application within the timeframes that were applicable to the transferor servicer based on the date the transferor servicer received the loss mitigation application. All rights and protections under paragraphs (c) through (h) of this section to which a borrower was entitled before a transfer continue to apply notwithstanding the transfer.

(ii) Transfer date defined. For purposes of this paragraph (k), the transfer date is the date on which the transferee servicer will begin accepting payments relating to the mortgage loan, as disclosed on the notice of transfer of loan servicing pursuant to § 1024.33(b)(4)(iv).

(2) Acknowledgment notices --(i) Transferee servicer timeframes. If a transferee servicer acquires the servicing of a mortgage loan for which the period to provide the notice required by paragraph (b)(2)(i)(B) of this section has not expired as of the transfer date and the transferor servicer has not provided such notice, the transferee servicer must provide the notice within 10 days (excluding legal public holidays, Saturdays, and Sundays) of the transfer date.

(ii) Prohibitions. A transferee servicer that must provide the notice required by paragraph (b)(2)(i)(B) of this section under this paragraph (k)(2):

(A) Shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process until a date that is after the reasonable date disclosed to the borrower pursuant to paragraph (b)(2)(ii) of this section, notwithstanding paragraph (f)(1) of this section. For purposes of paragraph (f)(2) of this section, a borrower who submits a complete loss mitigation application on or before the reasonable date disclosed to the borrower

pursuant to paragraph (b)(2)(ii) of this section shall be treated as having done so during the pre-foreclosure review period set forth in paragraph (f)(1) of this section.

(B) Shall comply with paragraphs (c), (d), and (g) of this section if the borrower submits a complete loss mitigation application to the transferee or transferor servicer 37 or fewer days before the foreclosure sale but on or before the reasonable date disclosed to the borrower pursuant to paragraph (b)(2)(ii) of this section.

(3) Complete loss mitigation applications pending at transfer. If a transferee servicer acquires the servicing of a mortgage loan for which a complete loss mitigation application is pending as of the transfer date, the transferee servicer must comply with the applicable requirements of paragraphs (c)(1) and (4) of this section within 30 days of the transfer date.

(4) Applications subject to appeal process. If a transferee servicer acquires the servicing of a mortgage loan for which an appeal of a transferor servicer's determination pursuant to paragraph (h) of this section has not been resolved by the transferor servicer as of the transfer date or is timely filed after the transfer date, the transferee servicer must make a determination on the appeal if it is able to do so or, if it is unable to do so, must treat the appeal as a pending complete loss mitigation application.

(i) Determining appeal. If a transferee servicer is required under this paragraph (k)(4) to make a determination on an appeal, the transferee servicer must complete the determination and provide the notice required by paragraph (h)(4) of this section within 30 days of the transfer date or 30 days of the date the borrower made the appeal, whichever is later.

(ii) Servicer unable to determine appeal. A transferee servicer that is required to treat a borrower's appeal as a pending complete loss mitigation application under this paragraph (k)(4) must comply with the requirements of this section for such application, including evaluating the borrower for all loss mitigation options available to the borrower from the transferee servicer. For purposes of paragraph (c) or (k)(3) of this section, as applicable, such a pending complete loss mitigation application shall be considered complete as of the date the appeal was received by the transferor servicer or the transferee servicer, whichever occurs first. For purposes of paragraphs (e) through (h) of this section, the transferee servicer must treat such a pending complete loss mitigation application as facially complete under paragraph (c)(2)(iv) as of the date it was first facially complete or complete, as applicable, with respect to the transferor servicer.

(5) Pending loss mitigation offers. A transfer does not affect a borrower's ability to accept or reject a loss mitigation option offered under paragraph (c) or (h) of this section. If a transferee servicer acquires the servicing of a mortgage loan for which the borrower's time period under paragraph (e) or (h) of this section for accepting or rejecting a loss mitigation option offered by the transferor servicer has not expired as of the transfer date, the transferee servicer must

allow the borrower to accept or reject the offer during the unexpired balance of the applicable time period.

(Approved by the Office of Management and Budget under control number 3170-0027.)

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

12 U.S.C. 2603-2605, 2607, 2609, 2617, 5512, 5532, 5581.

History

[78 FR 10696, 10876, Feb. 14, 2013; 78 FR 60382, 60437, Oct. 1, 2013; 78 FR 69753, Nov. 21, 2013; 81 FR 72160, 72373, Oct. 19, 2016]

▼ Annotations

Notes

[EFFECTIVE DATE NOTE:

78 FR 10696, 10876, Feb. 14, 2013, added Subpart C, effective Jan. 10, 2014; 78 FR 60382, 60437, Oct. 1, 2013, amended this section, effective Jan. 10, 2014; 81 FR 72160, 72373, Oct. 19, 2016, amended this section, effective Oct. 19, 2017.]

Case Notes

LexisNexis® Notes

Case Notes Applicable to Entire Part

Document:Wenegieme v. Bayview Loan Servicing, 2015 U.S. Dist....

Wenegieme v. Bayview Loan Servicing, 2015 U.S. Dist. LEXIS 59950

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14 Civ. 9137(RWS)

Reporter

2015 U.S. Dist. LEXIS 59950 * | 2015 WL 2151822

CELESTE WENEGIEME and CELESTINE WENEGIEME, JR, Plaintiffs, - against - BAYVIEW LOAN SERVICING, JOHN E. DRISCOLL, III, and MERS, Defendants.

Subsequent History: Motion denied by Wenegieme v. Bayview Loan Servicing, 2015 U.S. Dist. LEXIS 96292 (S.D.N.Y., July 18, 2015)

Core Terms

tracking, venue, dual, district court, Servicing, foreclosure proceeding, exercise jurisdiction, foreclosure, damages, preliminary injunction, foreclosure action, federal court, state court, weigh

Counsel: **[*1]** Celeste Wenegieme, 2855 W. Lafayette Avenue, Baltimore MD 21216, Plaintiff, Pro se, Bronx, NY.

Celestine Wenegieme, Jr., 2855 W. Lafayette Avenue, Baltimore MD 21216, Plaintiff, Pro se,

Bronx, NY.

For Bayview Loan Servicing, MERS - 1901 E. Voorhees Street Suite C, Danville IL, 61834,

Defendants: Jonathan M. Robbin ▾, Schulte Roth & Zabel LLP ▾ (NY ▾), New York, NY.

Judges: ROBERT W. SWEET ▾, UNITED STATES DISTRICT JUDGE.

Opinion by: ROBERT W. SWEET ▾

Opinion

OPINION

Plaintiffs Celeste Wenegieme and Celestine Wenegieme, Jr. (the "Wenegiemes" or the "Plaintiffs"), proceeding pro se, have moved pursuant to Rule 65 of the Federal Rules of Civil Procedure to enjoin Defendants Bayview Loan Servicing ("BLS"), John E. Driscoll, III ("Driscoll"), and MERS, (collectively, the "Defendants") from prosecuting foreclosure proceedings currently taking place in Maryland state court. Defendants have moved pursuant to Rule 12(b) (6) to dismiss the Plaintiffs' Complaint. For the reasons stated below, the motion to dismiss is granted and the motion for a preliminary injunction is denied.

Prior Proceedings

The Wenegiemes filed their Complaint on November 17, 2014. According to the Complaint, they own a property at 2855 West Lafayette Avenue, in Baltimore, Maryland, subject to a mortgage. In July of 2014, BLS **[*2]** contacted the Wenegiemes to inform them that it was now servicing the mortgage and that the Wenegiemes were in default. BLS then told the Wenegiemes that unless they agreed to a loan modification it would bring foreclosure proceedings on the property. Although the Wenegiemes sent in paperwork seeking a modification, Driscoll and BLS instead brought a civil action in Maryland state court seeking foreclosure.

Construing the pleadings liberally, as required in pro se cases by "well-established" precedent, see Hemphill v. New York, 380 F.3d 680, 687 (2d. Cir. 2004), the Plaintiffs appear to make two claims: first, that the defendants lack standing to bring the foreclosure action because they cannot prove that they own the mortgage on the Wenegiemes' property, and second, that the foreclosure action is barred by the Dodd-Frank Act's ban on "dual tracking."

On April 6, 2015, the Wenegiemes filed an Order to Show Cause seeking a preliminary injunction barring the Defendants from selling their Baltimore property during the pendency of the litigation, any related attempts at mediation, and their efforts to modify the loan's terms.

Applicable Standard

In deciding a motion to dismiss, the Court accepts all factual allegations in the Complaint as true **[*3]** and draws all reasonable inferences in favor of the Plaintiffs, as the non-moving party. See In re Elevator Antitrust Litig., 502 F.3d 47, 50 (2d Cir. 2007). The Court then

determines whether the Complaint contains "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 663, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quotation omitted). The issue "is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims." Todd v. Exxon Corp., 275 F.3d 191, 198 (2d Cir. 2001) (quoting Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974).

A preliminary injunction is used to prevent irreparable injury to the moving party during the pendency of a case, in order to preserve the Court's ability to render a meaningful decision on the merits. WarnerVision Entertainment Inc. v. Empire of Carolina, Inc., 101 F.3d 259, 261-62 (2d Cir. 1996). To obtain a preliminary injunction, the moving party must demonstrate that he or she would suffer irreparable harm in the absence of the injunction and either 1) a likelihood of success on the merits or 2) questions regarding the merits that are sufficiently serious to make them fair grounds for litigation, plus a balance of hardships decidedly in his or her favor. Oneida Nation of N.Y. v. Cuomo, 645 F.3d 154, 164 (2d Cir. 2011). The district court has "wide discretion" in determining whether to grant or deny such an injunction. Wells Fargo Secs. LLC v. Senkowsky, 512 Fed. Appx. 57, 59 (2d Cir. 2013).

Analysis

A. The Plaintiffs' Dual Tracking Claim is Not Yet Ripe.

The Wenegiemes argue that by **[*4]** bringing a foreclosure action against them after they had submitted paperwork seeking a loan modification, the Defendants violated the Dodd-Frank Act and rules implemented by the Consumer Financial Protection Bureau ("CFPB").[1] According to the CFPB, dual tracking is where a servicer moves forward with foreclosure proceedings while simultaneously working with the borrower to avoid foreclosure. See Press Release, Consumer Financial Protection Bureau, CFPB Rules Establish Strong Protections for Homeowners Facing Foreclosure (Jan. 17, 2013), *available at* http://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-rules-establish-strong-protection-for-homeowners-facing-foreclosure/. Construing the Complaint liberally, as required in pro se cases, see McEachin v. McGuinnis, 357 F.3d 197, 200 (2d Cir. 2004), the Court takes the Wenegiemes' claim to be one under 12 C.F.R. § 1024.41(f). That regulation prohibits a servicer from beginning a foreclosure proceeding if a borrower has submitted a complete loss mitigation application within 120 days of delinquency, subject to certain exceptions not relevant here. The Wenegiemes attached to their Complaint a copy of a September 25, 2014 letter from Defendant BLS, acknowledging the receipt of a loss mitigation application from Celeste Wenegieme. (Complaint at 10.)

Although the record is silent regarding the length of the Wenegiemes' delinquency or the completeness of their loss mitigation application, all reasonable inferences will be taken in the Plaintiffs' favor when deciding a motion to dismiss. In re Elevator Antitrust Litig., 502 F.3d at 50. The Wenegiemes thus appear to state a claim under § 1024.41's dual tracking provision.

Defendants assert, without citing to any specific case, statute, or regulatory provision, that there is no federal cause of action against a servicer for dual tracking. 12 C.F.R. § 1024.41(a), however, allows a borrower to enforce the provisions of that section, including § 1024.41(f)'s prohibition on dual tracking, under section 6(f) of the Real Estate Settlement Procedure Act ("RESPA"), 12 U.S.C. § 2605(f), which includes a private right of action for damages. Houle v. Green Tree Servicing, No. 14-cv-14654, 2015 U.S. Dist. LEXIS 53414, 2015 WL 1867526, at *3 (E.D. Mich. Apr. 23, 2015) ("Borrowers have a private right of action against lenders who evaluate a loss mitigation application while at the same time pursuing foreclosure."); see also Kilgore v. Orwen Loan Servicing, LLC, No. 13-cv-5473(JFB)(SIL), 89 F. Supp. 3d 526, 2015 U.S. Dist. LEXIS 29756, 2015 WL 698108, at *9 (E.D.N.Y. Mar. 6, 2015) (noting that the private right of action is available for violations of 12 C.F.R. § 1024.41(c)).

Such a claim, however, is not yet ripe.[2] The Wenegiemes seek $200,000 in damages for illegal foreclosure and emotional stress, but the record indicates **[*6]** that foreclosure

proceedings are still pending and that the Wenegiemes have not yet lost their property.[3] Since their claim for damages is contingent on a negative outcome in a proceeding that is currently ongoing — and that they may yet win — the Wenegiemes' dual tracking claim under 12 C.F.R. § 1024.41(f) is premature. See In re Drexel Burnham Lambert Group Inc., 995 F.2d 1138, 1146 (2d Cir. 1993).[4] The Court therefore dismisses the dual tracking claim without prejudice. The Wenegiemes may re-file it in Maryland in the event that they lose the property.

B. The Court Declines to Exercise Jurisdiction over the Plaintiffs' Standing Claim.

The Wenegiemes' Complaint states that the Note on their property has gone through several new Trustees and at least one assignment, which according to them makes it "highly unclear **[*7]** who owns the actual 'Note.'" (Complaint at 3.) The Complaint questions whether the assignment of the note was "proper" and whether the Defendants have the legal right to foreclose on the property.[5]

Defendants argue that the Plaintiffs' claim should be dismissed under the prior pending action doctrine, which confers discretionary authority on a federal court to stay or dismiss a suit in order to avoid duplicative litigation. See Curtis v. Citibank, N.A., 226 F.3d 133, 138 (2d Cir. 2000). However, the prior pending action doctrine is limited to situations where two overlapping lawsuits are both pending in federal court, while the foreclosure action against the Wenegiemes is taking place in Maryland state court. See Id. ("As part of its general power to administer its docket, a district court may stay or dismiss a suit that is duplicative of another federal court suit."); Bradley v. Kelly, 479 F.Supp.2d 281, 284 (D. Conn. 2007) (discussing the differing procedures for duplicative actions in federal versus state courts). Between state and federal court cases, on the other hand, the general rule is **[*8]** that "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the federal court having jurisdiction." Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976).

However, a district court may abstain from exercising jurisdiction over an action that is duplicative of a state court proceeding, but only in the rare circumstances discussed by the Supreme Court in Colorado River. That test requires a district court to weigh six factors, "with the balance heavily weighted in favor of the exercise of jurisdiction." Village of Westfield v. Welch's, 170 F.3d 116, 121 (2d Cir. 1999). Those factors are:

> (1) the assumption of jurisdiction by either court over any res or property,
>
> (2) the inconvenience of the federal forum,
>
> (3) the avoidance of piecemeal litigation,
>
> (4) the order in which jurisdiction was obtained,
>
> (5) whether state or federal law supplies the rule of decision, and
>
> (6) whether the state court proceeding will adequately protect the rights of the party seeking to invoke federal jurisdiction.

Id. No single factor is necessarily decisive, and the weight given to any one factor may vary greatly from case to case, depending on the circumstances. See Id.

Although the court's obligation to exercise jurisdiction is "virtually unflagging," Colo. River, 424 U.S. at 817, all six of the factors in the analysis **[*9]** weigh in favor of abstention, rendering this one of the "exceptional" circumstances in which a federal court should decline to hear a claim. See id. At 818. The Maryland court has already exercised jurisdiction over the res in question, the Wenegiemes' Baltimore property, when the foreclosure proceeding began. (See Complaint at 3, 12.) A federal forum in New York is inconvenient, since most of the relevant documents and witnesses will be based in the Baltimore area. Avoidance of piecemeal litigation also weighs in favor of abstention, since the Maryland action includes claims and defenses not

present in this one, while the issue of the ownership of the Note can be dealt with as a defense to foreclosure. The Maryland court obtained jurisdiction in July 2014, well before the instant case was filed. (Complaint at 3.) The ownership and validity of the Note on the Plaintiffs' property is an issue of state, rather than federal, law.[6] None of the Plaintiffs' submissions raise any question regarding the adequacy of their ability to enforce their rights in the Maryland courts.

The court therefore **[*10]** declines to exercise jurisdiction over the Plaintiffs' standing claim.

C. Venue is Improper in this District.

This lawsuit, which concerns the ownership and disposition of a property in Baltimore, does not belong in a New York court. 28 U.S.C. § 1406 requires a district court hearing a case where venue is inappropriate to "dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." Even where venue is appropriate, 28 U.S.C. § 1404(a) allows a district court to transfer any civil action to another district where it might have been brought if it is in the interest of justice or more convenient for parties and witnesses. A district court may dismiss a case on its own motion when venue is improper. See, e.g., Richards v. W2005 Wyn Hotels, LP, No. 11 Civ. 8880 KBF, 2011 U.S. Dist. LEXIS 144799, 2011 WL 7006505, at *1 (S.D.N.Y. Dec. 13, 2011); Johnson v. J.P. Morgan Chase Bank, N.A., No. 11 Civ. 662 (DLC), 2011 U.S. Dist. LEXIS 14027, 2011 WL 497923, at *2 (S.D.N.Y. Feb. 10, 2011). Such a sua sponte dismissal is only appropriate in extraordinary circumstances, however. See Stich v. Rehnquist, 982 F.2d 88, 89 (2d Cir. 1992).

Venue is not proper in this district. Pursuant to 28 U.S.C. § 1391(b), a party may bring a civil action in:

> (1) a judicial district in which any defendant resides, if all defendants are residents of the State in **[*11]** which the district is located;
>
> (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or
>
> (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

In the instant case, the Defendants are not concentrated within a single state. The Wenegiemes list BLS as being located in Florida, Driscoll in Maryland, and MERS in either Illinois or Michigan. (Complaint at 1-2.) Since the property at issue in this case is located in Maryland, venue is appropriate in this district only if a substantial part of the events giving rise to the claim occurred here.

The Complaint demonstrates little connection between this case and the Southern District of New York. The Wenegiemes claim to be Bronx County residents (although the Defendants contend that their primary residence is the Baltimore property in dispute). Celeste Wenegieme signed the deed to the property in New York, but she did so in the Eastern District. **[*12]** (Complaint at 8.) The only notable contact between this district and the events at issue in this case is a letter from BLS regarding the Wenegiemes' loan modification, which was sent to an address in Manhattan. (Complaint at 10.) This fails to meet § 1391(b) (2)'s substantiality threshold, which requires a "close nexus" between the events at issue and the forum district. See Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 433 (2d Cir. 2005). Indeed, when prompted for the location where the events giving rise to the claim occurred, the Wenegiemes listed Maryland alone. (Complaint at 3.)[7]

Based on the foregoing, venue is inappropriate in this District under 28 U.S.C. § 1391. This leaves the discretionary decision to either transfer the action to an appropriate district or to dismiss it entirely. 28 U.S.C. § 1406(a); Minnette v. Time Warner, 997 F.2d 1023, 1026 (2d Cir. 1993). Since transfer would be futile because dismissal is also warranted on other grounds, see Sections A and B, supra, a dismissal without prejudice is the proper outcome here.

Conclusion

The Plaintiffs' dual tracking claim is dismissed for lack of ripeness and improper venue. The Plaintiffs' standing claim is dismissed under the Colorado River abstention doctrine and due to improper venue. The Plaintiffs' motion for a preliminary injunction is denied.

It is so ordered.

New York, NY

May 6, 2015

/s/ Robert W. Sweet

ROBERT W. SWEET

U.S.D.J.

Footnotes

[1] Since this claim is based on federal law, the Court has subject matter jurisdiction under **[*5]** 28 U.S.C. § 1331.

[2] A court may consider the issue of ripeness sua sponte. Nat'l Park Hospitality Ass'n v. Dept. of the Interior, 538 U.S. 803, 808, 123 S. Ct. 2026, 155 L. Ed. 2d 1017 (2003).

[3] The Plaintiffs cannot recover for emotional stress, as RESPA is limited by its terms to "actual damages" plus up to $2,000 in additional damages in the case of "a pattern or practice of noncompliance." 12 U.S.C. § 2605(f)(1). Costs and attorneys' fees are also obtainable. Id. § (f)(3).

[4] The Plaintiffs also seek an injunction preventing any sale of their property, but the RESPA statute at issue only authorizes a claim for money damages. See 12 U.S.C. § 2605(f)(1).

[5] Defendants argue that this standing-based claim is not a valid cause of action under New York law. Since the Court declines to exercise jurisdiction over the claim, this opinion does not reach that argument.

[6] The Plaintiffs' dual tracking claim is based on federal law, but is dismissed on other grounds. (See Section A, supra.)

[7] If venue were appropriate in New York and the Plaintiffs properly stated a claim, the interests of justice would weigh in favor of a discretionary transfer under 28 U.S.C. § 1404(a). Although the Wenegiemes' interest in litigating in their chosen forum is an important consideration, they would suffer little inconvenience litigating in Maryland, where they are already a party to the state foreclosure action. Maryland is also the location of many of the relevant documents and witnesses and the locus of operative facts. Additionally, the Maryland federal court's superior understanding of Maryland property law weighs in favor of the case being adjudicated there. See Herbert L.P. v. Elec. Arts Inc., 325 F. Supp. 2d 282, 285 (S.D.N.Y. 2004) (listing the relevant factors in deciding **[*13]** whether to transfer under § 1404(a)).

Content Type: Cases

Terms: 2015 U.S. Dist. LEXIS 59950

Narrow By: -None-

Date and Time: Nov 05, 2018 04:30:39 p.m. EST

THE USE OF THE REAL ESTATE SETTLEMENT AND PROCEDURES ACT OF 1974, AS AMENDED ("RESPA") IN CONNECTION WITH THE FORECLOSURE PROCESS

By: Robert L. Pryor, Esq.

I. RESPA

A. RESPA is a consumer protection statute that was enacted by Congress to "insure that consumers throughout the nation are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by abusive practices that have developed in some areas of the country." 12 U.S.C. § 2601 (a).

B. Under RESPA, The Consumer Financial Protection Bureau was delegated the responsibility to create rules and regulations necessary to achieve the statute's objectives. *See* 12 U.S.C. § 2617(a): Regulations implementing RESPA are codified at 12 C.F.R. § 1024.1 to § 1024.41 which are known as Regulation X.

C. Two subsections of 12 C.F.R. § 1024 are especially relevant in the context of foreclosure actions. They are 12 C.F.R. § 1024.35 and § 1024.41.

II. 12 C.F.R. § 1024.35

A. § 1024.35 is titled "Error resolution procedures" and provides, in relevant part:

> (a) Notice of error. A servicer shall comply with the requirements [*18] of this section for any written notice from the borrower that asserts an error and that includes the name of the borrower, information that enables the servicer to identify the borrower's mortgage loan account, and the error the borrower believes has occurred. A notice on a payment coupon or other payment form supplied by the servicer need not Be treated by the servicer as a notice of error. A qualified written request that asserts an error relating to the servicing of a mortgage loan is a notice of error for purposes of this section, and a servicer must comply with all requirements applicable to a notice of error with respect to such qualified written request.
>
> (b) Scope of any error resolution. For purposes of this section, the term "error" refers to the following categories of covered errors:
>
> (1) Failure to accept a payment that conforms to the servicer's written requirements for the borrower to follow in making payments.
>
> (2) Failure to apply an accepted payment to principal, interest, escrow, or other charges under the terms of the mortgage loan and applicable law.

(3) Failure to credit a payment to a borrower's mortgage loan account as of the date of receipt in violation of 12 C.F.R. § 1026.36(c)(1)

(4) Failure to pay taxes, insurance premiums, or other charges, including charges that the borrower and servicer have voluntarily agreed that the servicer should collect and pay, in a timely manner as required by § 1024.34(b), or to refund an escrow account balance as required by § 1024.34 (b).

(5) Imposition of a fee or charge that the servicer lacks a reasonable basis to impose upon the borrower.

(6) Failure to provide an accurate payoff balance amount upon a borrower's request in violation of section 12 C.F.R. § 1026.36(c)(3).

(7) Failure to provide accurate information to a borrower regarding loss mitigation options and foreclosure, as required by § 1024.39.

(8) Failure to transfer accurately and timely information relating to the servicing of a borrower's mortgage loan account to a transferee servicer.

(9) Making the first notice of filing required by applicable law for any judicial or non-judicial foreclosure process in violation of § 1024.41(f) or (j).

(10) Moving for foreclosure judgment or order of sale, or conducting a foreclosure sale in violation of § 1024.41(g) or (j).

(11) Any other error relating to the servicing of a borrower's mortgage loan.

...

(e) Response to notice of error.

(i) Investigation and response requirements. (i) In general. Except as provided in paragraphs (f) and (g) of this [*20] section, a servicer must respond to a notice of error by either:

(A) Correcting the error or errors identified by the borrower and providing the borrower with a written notification of the correction, the effective date of the correction, and contact information, including a telephone number, for further assistance; or

(B) Conducting a reasonable investigation and providing the borrower with a written notification that includes a statement that the servicer has determined that no error occurred, a statement of the reason or reasons for this determination, a statement of the borrower's right to request documents relied upon the servicer in reaching the determination, information regarding how the borrower can request such documents, and contact information, including a telephone number, for further assistance.

B. In response to a notice of error, a servicer, defined in 12 U.S.C. § 2605(i)(2) must "within five days (excluding legal public holidays, Saturdays and Sundays)" 'provide to the borrower a written response acknowledging receipt of the notice of error.' 12. C.F.R. § 1024.35 (e)(B)(3)(A).

C. Additionally, except for special rules which apply to notices under (b)(9) and (10), the servicer must respond "not later than thirty days (excluding legal public holidays, Saturdays and Sundays) after the servicer receives the applicable notice of error." 12 C.F.R. § 1024.35 (c)(B)(3)(C).

D. Particularly relevant the foreclosure and loss mitigation process is 12 C.F.R. § 1024.35(b)(7) "Failure to provide accurate information to a borrower regarding loss mitigation options and foreclosure, as required by § 1024.39.

E. Under 12 U.S.C. 2601 et seq. a servicer may liable for damages if it does not adequately respond to a qualified written request. ("QWR").

F. A servicer that fails to comply with § 2605 (e) is liable for actual damages and upon a finding of a pattern or practice of non-compliance by the servicer, up to $2,000.00 in statutory damages. 12 U.S.C. § 2605 (f). It is critical to note that a notice of error must focus upon "the servicing" of a mortgage.

G. Courts have consistently held that request for information related to loan modifications do not pertain to the "servicing" and therefore are not QWRs. *See Nash v. PNC Bank, N.A.*, 2017 U.S. Dist. LEXIS 60697 (D. MD. 2017); *Sirote v. BBVA Compass Bank*, 857 F. Supp., 2d. 1213, 1221-22 (N.D. Ala. 2010); *Gates v. Wachovia Mortg , FSB*, 2010 U.S. Dist. LEXIS 64268, at *3 (E.D. Cal.), *affirmed*, 462 F. App'x 888 (11th Cir. 2012); *Hudgins v. Seterus, Inc.* 192 F. Supp. 3d 1343, 1349-51 (S.D. Fla. 2016); *Bullock v. Ocwen Loan Servicing, LLC*, 2015 U.S. Dist. LEXIS 110622 (D. Md. 2015); *Mbakpuo v. Wells Fargo Bank, N.A.*, 2015 U.S. Dist. LEXIS 94414 (D. Md. 2015); *Van Egmond v. Wells Fargo Home Mortg.*, 2012 U.S. Dist. LEXIS 42061, at *4 (C.D. Cal. 2012); *Martin v. JP Morgan Chase Bank*, 634 F. App'x 159, 164 (6th Cir. 2015).

H. It is quite common for lenders in responding to request for loss mitigation to respond by providing only the loss mitigation alternatives to which it believes the buyer is entitled. Thus, it may be

productive to couch a Notice of Error in terms of the lender's failure to provide all options as opposed to criticizing the loss mitigation process itself which is not the proper subject of a notice of error.

III. 12 CFR § 1024.41

A. 12 CFR § 1024.41 requires the servicer within five days excluding legal public holidays, Saturdays and Sundays after receiving a complete loss mitigation application *inter alia* acknowledge that the loss mitigation application is complete.

B. If the servicer receives a complete loss mitigation application more than thirty-seven days before a foreclosure sale, then within thirty days of receiving the complete loss mitigation application provide the borrower with a notice of determination as to which loss mitigation options, if any are available. Under certain circumstances, the servicer may seek an extension of time.

C. Significantly, Section 1024.41(c) requires that upon the receipt of a complete application, "the servicer may not conduct a foreclosure sale before evaluating the borrower's application." Thus the servicer may not continue the foreclosure action while the loss mitigation application is pending.

D. Pursuant to 12 U.S.C. § 2605 (f) borrowers have a private right of action against RESPA against lenders who evaluate a loss mitigation application while at the same time pursuing foreclosure. *Zhan He v. Ocwen Loan Servicing, LLC,* 2016 U.S. Dist. LEXIS 91655 (E.D.N.Y 2016); *Kilgore v. Ocwen Loan Servicing, LLC,* 89 F. Supp. 3d 526, (E.D.N.Y. 2015); *Wenegieme v. Bayview Loan Servicing*, 2015 U.S. Dist. LEXIS 59950, p. 4 (S.D.N.Y. 2015). This concept is known as Dual Tracking. "(Dual Tracking is where a servicer moves forward with foreclosure proceedings while simultaneously working with the borrower to avoid foreclosure.")

E. *Caveat* – A mortgage servicer need not consider a loss mitigation application received less than thirty-seven days before a foreclosure sale. 12 C.F.R. § 1024.41 (c)(1), (g)(1).

F. In the event the servicer denies loss mitigation or provides an alternative unsuitable to the borrower, a borrower may file an appeal of the adverse decision. *See* Section 1024.41(h)(2), requiring the borrower to file an appeal within 14 days of the determination on the application for loss mitigation.

G. 12 C.F.R. § 1024.41(g) enables the servicer to continue the foreclosure process only after certain steps have been taken. This section provided:

(1) The servicer has sent the borrower a notice pursuant to paragraph (c)(1)(ii) of this section that the borrower is not eligible for any loss mitigation option, and the appeal process in paragraph (h) is inapplicable, the borrower has not requested an appeal within the applicable time period for requesting an appeal, or the borrower's appeal has been denied;

(2) The borrower rejects all loss mitigation options offered by the servicer; or

(3) The borrower fails to perform under an agreement on a loss mitigation option.

H. Thus a fair reading of this rule would indicate that the servicer continues to be stayed in continuing the foreclosure to the extent that there is a timely appeal (as long as the appeal process is applicable).

I. Under 12 CFR 1024.41 (h)(4), the servicer must decide the appeal within 30 days.

J. The servicer may require a borrower to accept or reject a loss mitigation option after appeal no earlier than 14 days after notice. 12 C.F.R. §1024.41(h)(4)

IV. DAMAGES

A. To recover under 12 U.S.C.§2605, Plaintiff must approve actual damages (conclusory allegations will not suffice) and must allege that damages were approximately caused by the Defendant's violation of RESPA and conclusive reallegations will not suffice. *Kilgore v.Ocwen Loan Servicing, LLC,* 89 F. Supp. 3d 526, (E.D.N.Y. 2015).

B. While 12 U.S.C. §2605 is silent as to the right to injunctive relief, there is some authority for

the proposition that equitable relief is available to enjoin an improper sale. *See Mathews v. PHH Mortg. Corp.*, 283 Va. 723 (S.Ct. Va. 2012) and authorities cited therein. In re *Monica P. McGinley*, case 12-00745 (Bankr. D. Md. 2012).

C. A claim under RESPA may not challenge the foreclosure process itself. It may however seek damages for violation of RESPA. *Tanasi v. CitiMortgage, Inc.*, 257 F. Supp. 3d 232 (D. Conn. 2017).

D. Damages are available for RESPA violations for a) any actual damage, and b) additional damages, in the case of a pattern or practice of noncompliance in an amount not to exceed $2,000.00, 12 U.S.C. §2605(f). *McCann v. Rushmore Loan Mgmt. Services, LLC*, 2017 U.S. Dist. LEXIS 38949 (E.D.N.Y. 2017) (Wexler, J.)

E. However, to recover on a claim for actual damages, a plaintiff must plead with specific proximity and cause how they were by the RESPA violation. An allegation that a plaintiff "suffered financial loss and severe mental anguish and emotional distress of facing the loss or possible loss of his home through foreclosure," was held to fail as a matter of law. *Kilgore v. Ocwen Loan Servicing, LLC.*, 89 F. Supp. 3d 526 (E.D.N.Y. 2015) (Bianco, J.)

F. Significantly, a plaintiff may recover costs including attorney's fees incurred in connection with a successful action. 12 U.S.C. §2605(f)(3)

NY CLS RPAPL § 1307

Current through 2018 Chapters 1-321

New York Consolidated Laws Service > Real Property Actions And Proceedings Law (Arts. 1 — 21) > Article 13 Action to Foreclose a Mortgage (§§ 1301 — 1391)

§ 1307. Duty to maintain foreclosed property

1.A plaintiff in a mortgage foreclosure action who obtains a judgment of foreclosure and sale pursuant to section thirteen hundred fifty-one of this article, involving residential real property, as defined in section thirteen hundred five of this article, that is vacant, or becomes vacant after the issuance of such judgment, or is abandoned by the mortgagor but occupied by a tenant, as defined under section thirteen hundred five of this article, shall maintain such property until such time as ownership has been transferred through the closing of title in foreclosure, or other disposition, and the deed for such property has been duly recorded; provided, however, that if a municipality or governmental entity holds a mortgage subordinate to one or more mortgages on the residential real property, the municipality or governmental entity shall not be subject to the requirements of this section.

2.Such plaintiff shall have the right to peaceably enter upon such property, or to cause others to peaceably enter upon the property for the limited purpose of inspections, repairs and maintenance as required by this section, or as otherwise ordered by court; provided, however, that if the property is occupied by a tenant, at least seven days notice must be given to such tenant, unless emergency repairs are required in which case reasonable notice shall be provided to the tenant.

3.The municipality in which such residential real property is located, any tenant lawfully in possession, and a board of managers of a condominium in which the premises are located or a homeowners association if said premises are subject to the rules and regulations of such an association, shall have the right to enforce the obligations described in this section in any court of competent jurisdiction after at least seven days notice to the plaintiff in the foreclosure action unless emergency repairs are required. Any entity acting pursuant to this subdivision shall have a cause of action in any court of competent jurisdiction against the plaintiff in the foreclosure action to recover costs incurred as a result of maintaining the property. The authority provided by this subdivision shall be in addition to, and shall not be deemed to diminish or reduce, any rights of the parties described in this section under existing law against the mortgagor of such property for failure to maintain such property.

4.In the event the mortgagor of the property commences a proceeding in bankruptcy court prior to the completion of the public auction ordered in the judgment of sale, the duties created by this section shall be suspended during the pendency of the bankruptcy proceeding or until such time as an order has been entered in that proceeding lifting or removing the automatic stay of the foreclosure sale.

5.For the purposes of this section "maintain" shall mean keeping the subject property in a manner that is consistent with the standards set forth in the New York property maintenance code chapter 3 sections 301, 302 (excluding 302.2, 302.6 and 302.8), 304.1, 304.3, 304.7, 304.10, 304.12, 304.13, 304.15, 304.16, 307.1, and 308.1; provided, however, that if the property is occupied by a tenant, then such property must also be maintained in a safe and habitable condition.

6.A plaintiff shall be relieved of its responsibilities to maintain the residential real property that is the subject of a foreclosure action for the period that a receiver of such property is serving.

7.Nothing contained in this section shall diminish in any way the obligations pursuant to any state or local law of the mortgagor of the property or a receiver of rents and profits appointed in an action to foreclose a mortgage to maintain the property prior to the closing of title pursuant to a foreclosure sale.

8.This section shall not preempt, reduce or limit any rights or obligations imposed by any local laws with respect to property maintenance and the locality's ability to enforce those laws.

History

Add, *L 2009, ch 507, § 6*, eff April 14, 2010.

Annotations

Research References & Practice Aids

Jurisprudences:

125 Am Jur Trials 541, Litigation Concerning Mortgage Foreclosures.

State Notes

Research References & Practice Aids

Hierarchy Notes:

NY CLS RPAPL

NY CLS RPAPL, Art. 13

End of Document

NY CLS RPAPL § 1309

Current through 2018 Chapters 1-321

New York Consolidated Laws Service > Real Property Actions And Proceedings Law (Arts. 1 — 21) > Article 13 Action to Foreclose a Mortgage (§§ 1301 — 1391)

§ 1309. Expedited application for judgment of foreclosure and sale for vacant and abandoned property

1.The plaintiff in any foreclosure proceeding may make an application by notice of motion or order to show cause for a judgment of foreclosure and sale on the grounds that the subject property is vacant and abandoned. The motion or order to show cause shall include the last known address of the borrower and the property address. Notwithstanding subdivision (m) of rule thirty-four hundred eight of the civil practice law and rules no such application may be made until the defendant's time to answer the complaint in the foreclosure proceeding shall have expired. Such application shall be served on defendant, regardless of whether a defendant has filed an answer or appeared in the case. Such application shall: (a) state in bold letters, on the first page of the notice of motion or order to show cause: (i) "The plaintiff in this lawsuit has applied for an expedited judgment of foreclosure and sale of your property on the ground that it is vacant and abandoned"; (ii) "Your property may be foreclosed upon and sold without any further proceedings if you do not respond to this motion by or on the return date, which is _____"; (iii) "You have the right to stay in your property until a court orders you to leave"; and (iv) "You may respond to this motion by either submitting a written document or by appearing in court on the return date."; (b) be supported by affidavit and other proof, including but not limited to: (i) proof of ownership of the mortgage and the note, (ii) photographs evidencing that the subject property is vacant and abandoned as provided for under subdivision two of this section, and (iii) if available, utility company records or other documentation evidencing the vacant and abandoned status of the premises; (c) set forth, supported by documentary evidence, the sums alleged to be due and owing upon the subject mortgage and note, including the current principal balance and a detailed and itemized account of each fee, each cost, and a calculation of interest accrued; and (d) request that the court confirm the sums due and owing upon the subject mortgage and note without appointment of a referee. The court shall promptly send a notice to the defendant of the plaintiff's notice of motion or order to show cause for a judgement of foreclosure and sale on the grounds that the subject property is vacant and abandoned. The notice shall advise the defendant that the lender is asking the court to expedite a judgement of foreclosure and sale of his or her property on the ground that it is vacant and abandoned and about the time and place of the court date. The notice shall be in a form prescribed by the courts, or, at the discretion of the courts.

2.

(a) As used in this section, "vacant and abandoned residential property" means residential real property, as defined in section thirteen hundred five of this article, with respect to which the plaintiff has proven, by preponderance of the evidence, that it has conducted at least three consecutive inspections of such property, with each inspection conducted twenty-five to thirty-five days apart and at different times of the day, and at each inspection (i) no occupant was present and there was no evidence of occupancy on the property to indicate that any persons are residing there; and (ii) the residential real property was not being maintained in a manner consistent with the standards set forth in New York property maintenance code chapter 3 sections 301, 302 (excluding 302.2, 302.6, 302.8), 304.1, 304.3, 304.7, 304.10, 304.12, 304.13, 304.15, 304.16, 307.1 and 308.1.

(b) Residential real property will also be deemed vacant and abandoned if:

(i)A court or other appropriate state or local governmental entity has formally determined, following due notice to the borrower at the property address and any other known addresses, that such residential real property is vacant and abandoned; or

(ii) Each borrower and owner has separately issued a sworn written statement, expressing his or her intent to vacate and abandon the property and an inspection of the property shows no evidence of occupancy to indicate that any persons are residing there.

(c) Evidence of lack of occupancy shall include but not be limited to the following conditions: (i) overgrown or dead vegetation; (ii) accumulation of newspapers, circulars, flyer or mail; (iii) past due utility notices, disconnected utilities, or utilities not in use; (iv) accumulation of trash, refuse or other debris; (v) absence of window coverings such as curtains, blinds, or shutters; (vi) one or more boarded, missing or broken windows; (vii) the property is open to casual entry or trespass; or (viii) the property has a building or structure that is or appears structurally unsound or has any other condition that presents a potential hazard or danger to the safety of persons.

(d) Residential real property will not be deemed vacant and abandoned if, on the property:

(i) There is an unoccupied building that is undergoing construction, renovation, or rehabilitation that is proceeding diligently to completion;

(ii) There is a building occupied on a seasonal basis, but otherwise secure;

(iii) There is a building that is secure, but is the subject of a probate action, action to quiet title, or other ownership dispute of which the servicer has actual notice;

(iv) There is a building damaged by a natural disaster and one or more owner intends to repair and reoccupy the property; or

(v) There is a building occupied by the mortgagor, a relative of the mortgagor or a tenant lawfully in possession.

3.In connection with an application for a judgment of foreclosure and sale on the ground that the subject property is vacant and abandoned, the court may require the plaintiff or an agent to appear to provide testimony in support of the application.

4.The court shall make a written finding as soon as practicable as to whether the plaintiff has proved that the property to be foreclosed upon pursuant to this section is vacant and abandoned pursuant to subdivision two of this section and, if the court determines that the property is vacant and abandoned, it shall set forth: (a) the evidence relied upon by the court in finding that the property is vacant and abandoned; (b) the evidence showing that the plaintiff is the owner and holder of the subject mortgage and note, or has been delegated the authority to institute a mortgage foreclosure action by the owner of same; and (c) the sums due and owing upon the subject mortgage and note after a review of the detailed and itemized account of each fee, each cost, and a calculation of interest accrued.

5.With respect to foreclosure actions brought pursuant to this section:

(a)A judgment of foreclosure and sale shall not be entered pursuant to this section if the mortgagor or any other defendant has filed an answer, appearance, other written objection that is not withdrawn, or has otherwise demonstrated an intention to contest the foreclosure action.

(b)A denial of a judgment of foreclosure and sale pursuant to this section where the court does not find that the mortgaged property is vacant and abandoned shall not be deemed to be on the merits for purposes of any other proceeding with respect to such real property.

6.It shall be unlawful for a lender, assignee, mortgage loan servicer, or a third party agent or other person acting on behalf of a lender, assignee or mortgage loan servicer to enter residential real property that is not vacant and abandoned for the purpose of forcing, intimidating, harassing or coercing a lawful occupant of such residential property to vacate that property in order to render the property vacant and abandoned, or to otherwise force, intimidate, harass, or coerce a lawful occupant of residential real property to vacate that property so that it may be deemed vacant and abandoned, provided however, a lender, assignee, mortgage loan servicer, or a third party agent or other person acting on behalf of a lender, assignee or mortgage loan servicer who peacefully enters a vacant and abandoned property in order to render the property vacant and abandoned shall be immune from liability when such lender, assignee, mortgage loan servicer, third party agent or other person acting on behalf of a lender, assignee or mortgage loan servicer is making reasonable efforts to comply with this section.

7.The chief administrative judge of the courts shall adopt such rules as he or she deems necessary to expeditiously implement the provisions of this section.

History

L 2016, ch 73, § 4 (Part Q), eff Dec 20, 2016.

Annotations

Notes

Editor's Notes

Laws 2016, ch 73, § 10 **(Part Q)**, eff December 20, 2016, provides:

§ 10. No local law, ordinance, or resolution shall impose a duty to maintain or register vacant and abandoned property as defined in *section 1309 of the real property actions and proceedings law* in a manner inconsistent with the provisions of this act that are related to maintenance as provided under subdivision 3, 4, 5, 6 and 7 of *section 1308 of the real property actions and proceedings law*, or registration as provided under *section 1310 of the real property actions and proceedings law*, or establish related penalties or other monetary obligation, with respect to a state or federally chartered bank, savings bank, savings and loan association or credit union that originates, owns, services or maintains mortgages related to such property. No local law, ordinance, or resolution shall impose a duty to maintain vacant and abandoned property upon any state or federally chartered bank, savings bank, savings and loan association or credit union that originates, owns, services or maintains mortgages related to such property for which the provisions of this act, pursuant to the opening paragraph of *section 1308 of the real property actions and proceedings law* as added by section one of this act, do not apply.

State Notes

Research References & Practice Aids

Hierarchy Notes:

NY CLS RPAPL

NY CLS RPAPL, Art. 13

End of Document

NY CLS RPAPL § 1310

Current through 2018 Chapters 1-321

New York Consolidated Laws Service > Real Property Actions And Proceedings Law (Arts. 1 — 21) > Article 13 Action to Foreclose a Mortgage (§§ 1301 — 1391)

§ 1310. Vacant and abandoned property; statewide vacant and abandoned property electronic registry

1.The department of financial services shall maintain a statewide vacant and abandoned property registry in the form of an electronic database. The department of financial services may, in accordance with the applicable provisions of the state finance law, retain a private contractor to administer such database for the purposes of satisfying this requirement. The information provided to the department of financial services pursuant to this section shall be deemed and treated confidential, provided however, the superintendent of financial services, in her or his sole discretion, may release the information if it is in the best interest of the public. Any such released information shall continue to be treated confidentially by the parties. The department of financial services shall, upon written request, provide public officials of any state district, county, city, town or village with access to information specific to such public official's district, county, city, town or village maintained on such database to further the purposes of this section, section thirteen hundred seven of this article or article nineteen-A of this chapter, or any other related law, code, rule, regulation or ordinance.

2.A lender, assignee or mortgage loan servicer shall submit or cause to be submitted to the department of financial services information required by the superintendent of financial services about any vacant and abandoned residential real property, as that term is defined in subdivision two of section thirteen hundred nine of this article, or as the superintendent of financial services may otherwise define that term, within twenty-one business days of when the lender, assignee or mortgage loan servicer learns, or should have learned, that such property is vacant and abandoned. Such information shall, at a minimum, include: (a) the current name, address and contact information for the lender, assignee or mortgage loan servicer responsible for maintaining the vacant property; (b) whether a foreclosure action has been filed for the property in question, and, if so, the date on which the foreclosure action was commenced; and (c) the last known address and contact information for the mortgagor(s) of record.

3.Where any of the information contained in a lender's, assignee's or mortgage loan servicer's initial submission to the registry has materially changed since such submission, such lender, assignee or mortgage loan servicer shall make an amended submission to the registry not later than thirty days after the lender, assignee or mortgage loan servicer learns, or reasonably should have learned, of the new or changed information.

4.The department of financial services is authorized and empowered to adopt such rules and regulations as may in the judgment of the superintendent of financial services necessary for the effective administration and operation of such registry, including but not limited to rules and regulations governing access to the registry and specifying the manner and frequency of registration and the information that must be provided. The superintendent of financial services may amend such regulations from time to time as necessary to effectuate the purpose of this section and section thirteen hundred seven of this article.

5.The department of financial services shall establish and maintain a toll-free hotline that neighbors of real property that is, or appears to be, vacant and abandoned residential real property, as such term is defined in subdivision two of section thirteen hundred nine of this article, and other community residents can use to report to the superintendent of financial services any hazards, blight or other concerns related to such property. The department of financial services shall include on its official public website information about such toll-free hotline.

No local law, ordinance, or resolution shall impose a duty to register vacant and abandoned property as defined in section thirteen hundred nine of the article in a manner inconsistent with the provisions of this section that are related to registration as provided under section thirteen hundred ten of this article or establish related penalties or other

monetary obligation, with respect to a state or federally chartered bank, savings bank, savings and loan association or credit union that originates, owns, services or maintains a mortgage related to such property.

No local law, ordinance, or resolution shall impose a duty to maintain vacant and abandoned property upon any state or federally chartered bank, savings bank, savings and loan association or credit union that originates, owns, services or maintains a mortgage related to such property for which the provisions of this section, pursuant to the opening paragraph of section thirteen hundred eight of this article, do not apply.

History

L 2016, ch 73, § 4 (Part Q), eff Dec 20, 2016.

Annotations

Notes

Editor's Notes

***Laws 2016, ch 73, § 10* (Part Q)**, eff December 20, 2016, provides:

§ 10. No local law, ordinance, or resolution shall impose a duty to maintain or register vacant and abandoned property as defined in *section 1309 of the real property actions and proceedings law* in a manner inconsistent with the provisions of this act that are related to maintenance as provided under subdivision 3, 4, 5, 6 and 7 of *section 1308 of the real property actions and proceedings law*, or registration as provided under *section 1310 of the real property actions and proceedings law*, or establish related penalties or other monetary obligation, with respect to a state or federally chartered bank, savings bank, savings and loan association or credit union that originates, owns, services or maintains mortgages related to such property. No local law, ordinance, or resolution shall impose a duty to maintain vacant and abandoned property upon any state or federally chartered bank, savings bank, savings and loan association or credit union that originates, owns, services or maintains mortgages related to such property for which the provisions of this act, pursuant to the opening paragraph of *section 1308 of the real property actions and proceedings law* as added by section one of this act, do not apply.

State Notes

Research References & Practice Aids

Hierarchy Notes:

NY CLS RPAPL

NY CLS RPAPL, Art. 13