



Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR J.P. MORGAN MORTGAGE ACQUISITION TRUST 2006-WMC4, ASSET BACKED PASS-THROUGH CERTIFICATES, SERIES 2006-WMC4,

Index
No.

Motion
Date December 20, 2016

Plaintiff,
-against-

Motion
Cal. No. 167

., et. al.,

Motion
Seq. No. 1

Defendants.

The following numbered papers read on this motion by plaintiff pursuant to CPLR 3212 granting summary judgment in favor of the plaintiff against defendant striking his answer and dismissing the counterclaims, amending the caption by excising the defendants named "John Doe" and "Jane Doe," entering default judgment against the non-answering defendants, and appointing a referee to ascertain and compute the amount due to the plaintiff.

	Papers <u>Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	EF 30-52
Answering Affidavits - Exhibits.....	EF 53-63
Reply Affidavits.....	EF 66-67

Upon the foregoing papers it is ordered that this motion is determined as follows:

Plaintiff commenced this action by filing the notice of pendency and the summons and complaint on December 22, 2014. Plaintiff seeks to foreclose on a mortgage given by the defendant , as record owner, of subject real property, known as

to secure a note given by the defendant evidencing a loan in the principal amount of \$406,000. On or about June 28, 2006, the defendant entered into a loan modification agreement. The plaintiff alleges that it is the holder of the mortgage and underlying obligation and that the defendants defaulted under the terms of the note and mortgage by failing to make the monthly installment payment due on March 1, 2010, and as a consequence, it elected to accelerate the entire mortgage debt. The plaintiff has moved for summary judgment, a default judgment, to amend the caption and for an order of reference.

The branch of the motion to amend the caption by excising the defendants named herein as "John Doe" and "Jane Doe" is granted. It is ordered that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF QUEENS

U.S. BANK NATIONAL ASSOCIATION, AS
 TRUSTEE FOR J.P. MORGAN MORTGAGE
 ACQUISITION TRUST 2006-WMC4, ASSET
 BACKED PASS-THROUGH CERTIFICATES,
 SERIES 2006-WMC4,

Index
 No.

Plaintiff,

-against-

HOUSEHOLD FINANCE CORPORATION III,
 ARROW FINANCIAL SERVICES, LLC APO
 HSBC CARD SERVICES, NY STATE
 DEPARTMENT OF TAXATION AND FINANCE,

Defendants.

A party moving for summary judgment must show by admissible evidence that there are no material issues of fact in controversy and that they are entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). On a motion for summary judgment in a foreclosure action, a plaintiff must make a prima facie showing by producing the mortgage, the unpaid note, bond or obligation and the evidence of default and the assignment of the mortgage documents to it (*see EMC Mtge. Corp. v Riverdale Assoc.*, 291 AD2d 370 [2d Dept 2002]; *IMC Mtge. Co. v Griggs*, 289 AD2d 294 [2d Dept 2001]; *Paterson v Rodney*, 285 AD2d 453 [2d Dept 2001]; *see also Bercy Investors, Inc. v Sun*, 239 AD2d 161 [2d Dept 1997]). Once a plaintiff's standing is placed in issue by the defendant, it is incumbent upon the plaintiff to prove its standing to be entitled to relief (*see U.S. Bank N.A. v Sharif*, 89 AD3d 723 [2d Dept 2011]). A plaintiff establishes that it has standing where it demonstrates that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note (*Bank of N.Y. v Silverberg*, 86 AD3d 274 [2d Dept 2011]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95 [2d Dept 2011]). An assignment of the mortgage without assignment of the underlying note or bond is a nullity (*Deutsche Bank Natl. Trust Co. v Barnett*, 88 AD3d 636 [2011]). 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 (*U.S. Bank, N.A. v Collymore*, 68 AD3d 752 [2d Dept 2009]).

Further, RPAPL 1304 provides that with regard to a home loan at least ninety days before a lender begins an action against a borrower to foreclose on a mortgage, the lender must provide notice to the borrower that the loan is in default and his or her home is at risk (*Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95 [2d Dept 2011]). “[P]roper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of the foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition” (*Aurora Loan Servs., LLC* 85 AD3d at 107). The plaintiff did not provide any affidavit that attests to any details concerning the service of the RPAPL 1304 notice. The affidavit of the Document Control Officer of plaintiff's servicer does not state that she served the RPAPL 1304 notice or identify the individual who did so, nor does she refer to standard office practice by the plaintiff to ensure that items are properly addressed and mailed. While the affidavit states it is based upon her review of business records, there is no discussion of the office procedures that were in place to ensure that the mailed items were properly addressed and mailed (*see CitiMortgage, Inc. v Pappas*, 147 AD3d 900 [2d Dept 2017]; *Frankel v Citicorp Ins. Services, Inc.*, 80 AD3d 280 [2d Dept 2010]; *Residential Holding Corp. v Scottsdale Ins. Co.*, 286 AD2d 679 [2d Dept 2001]; *Smith v Palmeri*, 103 AD2d 739 [2d Dept 1984]). Thus, this affidavit is not sufficient to establish that a RPAPL 1304 notice was properly sent by registered or certified mail and also by first-class to the borrower (*see JPMorgan Chase Bank, N.A. v Kutch*, 142 AD3d 536 [2d Dept 2016]; *Deutsche Bank Nat. Trust Co. v Spanos*, 102 AD3d 909 [2d Dept 2013]).

In view of the open question of whether the plaintiff had standing to commence this action and complied with the contractual condition precedent and RPAPL 1304, the branches of the motion by plaintiff to strike the remaining affirmative defenses, for a default judgment and to appoint a referee are denied at this juncture.

Accordingly, the branches of the plaintiff's motion for summary judgment, a default judgment and for an order of reference are denied.

Dated: March 28, 2017



J.S.C.

FILED
APR 10 2017
COUNTY CLERK
QUEENS COUNTY