State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: December 31, 2020 529988

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee,
Respondent,
v

JEAN LeTENNIER, Also Known as JEAN MICHEL LeTENNIER and JEAN M. LeTENNIER,
Appellant,
et al.,
Defendants.

MEMORANDUM AND ORDER

Calendar Date: November 18, 2020

Before: Lynch, J.P., Clark, Mulvey and Colangelo, JJ.

Michael Kennedy Karlson, New York City, for appellant.

Parker Ibrahim & Berg LLP, New York City (Ben Z. Raindorf of counsel), for respondent.

Mulvey, J.

Appeal from an order of the Supreme Court (Northrup Jr., J.), entered July 29, 2019 in Delaware County, which, among other things, granted plaintiff's motion for summary judgment.

In August 2006, defendant Jean LeTennier (hereinafter defendant) executed a note to borrow $399,000 from Nexus Financial LLC, secured by a mortgage against his real property in Delaware County. Thereafter, the note and mortgage were

apparently transferred to plaintiff via physical delivery. In September 2012, defendant defaulted on the note and mortgage by failing to make his monthly payment. In March 2018, plaintiff commenced the present foreclosure action, alleging that plaintiff was the owner and holder of the subject mortgage and note and that defendant owed the entire unpaid principal plus interest as of August 1, 2012. Defendant answered and asserted numerous affirmative defenses and counterclaims, to which plaintiff replied. Plaintiff moved for summary judgment and an order of reference. Defendant cross-moved for summary judgment dismissing the complaint against him. Supreme Court granted plaintiff's motion and denied the cross motion, finding that plaintiff established its standing by physical delivery and defendant failed to demonstrate any bona fide defense to foreclosure. Defendant appeals.

We affirm. "A plaintiff establishes its entitlement to summary judgment in a mortgage foreclosure action by submitting the mortgage and unpaid note, along with evidence of default in payments" (JPMorgan Chase Bank, N.A. v Verderose, 154 AD3d 1198, 1199 [2017] [internal quotation marks and citations omitted]; see Deutsche Bank Natl. Trust Co. v Monica, 131 AD3d 737, 738 [2015]). Where a defendant raises standing as an affirmative defense, the plaintiff must establish standing by proving that it received a transfer of the rights and obligations under the note through "[e]ither a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action"; if the plaintiff demonstrates that it is the owner or holder of the note, "the mortgage passes with the debt as an inseparable incident" (Goldman Sachs Mtge. Co. v Mares, 166 AD3d 1126, 1129 [2018] [internal quotation marks and citations omitted]; see U.S. Bank Trust, N.A. v Moomey-Stevens, 168 AD3d 1169, 1171 [2019]; JPMorgan Chase Bank, N.A. v Verderose, 154 AD3d at 1199).

The complaint alleges that plaintiff is the current holder and owner of the note, and a copy of the note and mortgage are attached thereto. In support of its motion, plaintiff submitted an affidavit from a document control specialist employed by its servicer, who affirmed that she personally reviewed the

servicer's business records and has personal knowledge of its record-keeping practices. She further affirmed that plaintiff's agent is in possession of the original note and, a few days before this action was commenced, the servicer verified such possession. Plaintiff also submitted the affirmation of Brian Scibetta, plaintiff's prior counsel, who averred that, based on his personal review of records relating to this matter, his firm – acting as plaintiff's agent – was in physical possession of the original note at the time that this action was commenced. Scibetta's statements are supported by a bailee letter indicating that in 2015 his firm received from the servicer the original note, among other things. Other documentary evidence demonstrates that, as Scibetta averred, his firm sent the note and other documents to plaintiff's present counsel in September 2018, several months after the commencement of this action.

Moreover, in an April 2017 decision in an earlier action commenced by defendant, Supreme Court (Lambert, J.) noted that plaintiff's then-counsel (Scibetta's firm) had maintained custody of the original note since the 2015 date of the bailee letter and that counsel, during a deposition in January 2016, made the original note available to defendant's counsel for inspection and copying. Although the allonges and endorsements to the note appear to be somewhat out of order, the last apparent endorsement is in blank, so plaintiff was the lawful holder of the note and authorized to enforce it (see Bank of N.Y. Mellon v Gordon, 171 AD3d 197, 203 [2019]; Wells Fargo Bank, NA v Ostiguy, 127 AD3d 1375, 1376-1377 [2015]; compare McCormack v Maloney, 160 AD3d 1098, 1099-1100 [2018], lv dismissed 32 NY3d 1185 [2019]). "There is simply no requirement that an entity in possession of a negotiable instrument that has been endorsed in blank must establish how it came into possession of the instrument in order to be able to enforce it" (JPMorgan Chase Bank, N.A. v Weinberger, 142 AD3d 643, 645 [2016], citing UCC 3-204 [2]; accord Deutsche Bank Natl. Trust Co. v Logan, 146 AD3d 861, 863 [2017]). Plaintiff's submissions are sufficient to establish its standing through physical possession of the note at the time of commencement (see Bank of N.Y. Mellon v Gordon, 171 AD3d at 203; JPMorgan Chase Bank, N.A. v Verderose, 154 AD3d at 1200; JP Morgan Chase Bank, N.A. v

Venture, 148 AD3d 1269, 1270-1271 [2017]; U.S. Bank N.A. v Ehrenfeld, 144 AD3d 893, 894 [2016]; HSBC Bank USA, N.A. v Sage, 112 AD3d 1126, 1127-1128 [2013], lvs dismissed 22 NY3d 1172 [2014], 23 NY3d 1015 [2014]). Plaintiff also submitted notices of default and copies of business records, relied upon by the servicer, to establish defendant's default in payments. Thus, plaintiff demonstrated its prima facie entitlement to summary judgment.

The burden then shifted to defendant "to establish, through competent and admissible evidence, the existence of a viable defense to [his] alleged default or a material issue of fact" (JPMorgan Chase Bank, N.A. v Verderose, 154 AD3d at 1200). Defendant disputes the admissibility of Scibetta's affirmation, the affidavit of the servicer's employee and certain exhibits attached thereto. "The business record exception to the hearsay rule applies to a writing or record and it is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted" (Wells Fargo Bank, N.A. v Sesey, 183 AD3d 780, 782-783 [2020] [internal quotation marks, brackets, ellipsis and citations omitted]). Although "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 by the recipient in its business" (Deutsche Bank Natl. Trust Co. v Monica, 131 AD3d at 739 [internal quotation marks and citations omitted]; accord Goldman Sachs Mtge. Co. v Mares, 166 AD3d at 1127-1128; see CPLR 4518). Given the employee's position with the servicer, as well as her attestation that she is personally familiar with the servicer's record-keeping practices and that it incorporated and relied upon the records of prior servicers of defendant's loan, the challenged documents that are attached to her affidavit qualify as business records excepted from the hearsay rule (see Goldman Sachs Mtge. Co. v Mares, 166 AD3d at 1128; Citibank, NA v Abrams, 144 AD3d 1212, 1216 [2016]; Deutsche Bank Natl. Trust Co. v Monica, 131 AD3d at 739).

Further, Scibetta's affirmation relies on his personal knowledge as plaintiff's prior counsel, as well as a review of the records in his firm's possession, and he attached exhibits such as the bailee letter that he, as someone familiar with his firm's record-keeping practices, averred were kept in the regular course of business. Hence, defendant's challenges to these records are unavailing.

Supreme Court (Northrup Jr., J.) correctly determined that an affidavit from defendant's counsel lacked probative value and constituted hearsay, as he was not qualified as an expert and did not allege any personal knowledge of the relevant facts. Defendant's antitrust arguments are conclusory and unsupported. Many of defendant's remaining arguments are unpreserved for review. For example, although defendant raised the statute of limitations as a defense in his answer, he failed to provide any support for, or even address, that defense in his motion papers.

Although defendant failed to preserve his argument that the assigned judge was not properly appointed as an Acting Justice of the Supreme Court, to the extent that this argument may constitute a challenge to the court's jurisdiction to have decided this matter, we will address it. Defendant incorrectly assumes that the judge was appointed by the Governor to fill an unexpired term of an elected Supreme Court Justice, pursuant to NY Constitution, art VI, § 21. Rather, he is an elected County Judge who was temporarily assigned as an Acting Justice of the Supreme Court by the Chief Administrative Judge (see NY Const, art VI, § 26 [c]; 22 NYCRR 33.0, 121.1). As defendant does not assert that the Chief Administrative Judge's authority "has been put to an illegal or unconstitutional use, the exercise of that discretionary power is not subject to judicial review" (Schwartz v Williams, 124 AD2d 798, 799 [1986]). Defendant's remaining arguments are either academic or without merit. Because defendant failed to raise a bona fide defense or a triable question of fact, Supreme Court properly granted plaintiff's motion for summary judgment and properly denied defendant's cross motion (see Bank of Am., N.A. v Kennedy, 171 AD3d 1285, 1287 [2019]).

Lynch, J.P., Clark and Colangelo, JJ., concur.

ORDERED that the order is affirmed, with costs.

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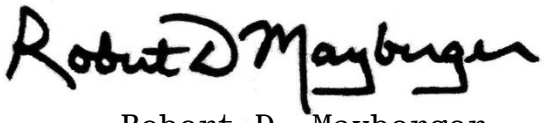

Robert D. Mayberger
Clerk of the Court