

HSBC Bank USA v 2052 Madison LLC

2016 NY Slip Op 31875(U)

October 6, 2016

Supreme Court, New York County

Docket Number: 850022/2015

Judge: Manuel J. Mendez

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

HSBC BANK USA, NATIONAL ASSOCIATION AS TRUSTEE
FOR WELLS FARGO ASSET SECURITIES CORPORATION,
MORTGAGE ASSET-BACKED PASS THROUGH CERTIFICATES,
SERIES 2008-1,

-against- Plaintiff,

INDEX NO. 850022/2015
MOTION DATE 08-24-2016
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

2052 MADISON LLC, BRIAN J. MACNISH, NEW YORK
CITY PARKING VIOLATIONS BUREAU, NEW YORK
CITY TRANSIT ADJUDICATION BUREAU, NEW YORK
CITY ENVIRONMENTAL CONTROL BOARD, WELLS FARGO
BANK, N.A., "JOHN DOES" AND "JANE DOES" said names
being fictitious parties intended being possible tenants or
occupants of premises and corporations, other entities or
persons who claim, or may claim, a lien against the
premises ,

Defendants.

The following papers, numbered 1 to 22 were read on this motion to/for Summary Judgment and Cross-Motion to Amend the Answer:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 6</u>
Answering Affidavits — Exhibits _____	<u>7 - 12,</u>
Replying Affidavits _____	<u>13- 16, 17 -22</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered, that plaintiff's motion pursuant to CPLR §3212 for summary judgment, is granted as stated herein. 2052 Madison LLC and Brian J. Macnish's cross-motion pursuant to CPLR §3025 to amend their answer is denied.

2052 Madison LLC, is a limited liability corporation created by Brian J. Macnish, for the ownership of an apartment building located at 349 West 121st Street, New York, New York, Block 1754, Lot 57 (hereinafter referred to as "the property"). On December 1, 2005, 2052 Madison LLC, entered into a mortgage and accepted a note for \$700,000.00 with Circle S Funding LLC, Mr. Macnish was guarantor of the loan. On May 8, 2007, Circle S Funding LLC transferred and assigned the December 1, 2005 mortgage to Circle S Capital Corp. (Mot. Exh. 1).

On October 26, 2007, after transferring title to himself, Brian J. Macnish, personally accepted a note and fixed rate mortgage with Wells Fargo Bank, N.A. for \$900,000.00. On October 26, 2007, Brian J. Macnish also accepted a consolidated mortgage and consolidated note with Wells Fargo Bank, N.A. adjusting the principal balance of the mortgage debt to incorporate the remaining balance on the December 1, 2005 mortgage and note for the property, for a total of \$1,200,000.00. On May 29, 2012, Wells Fargo Bank, N.A. formally transferred and assigned Mr. Macnish's consolidated mortgage and consolidated note to the plaintiff. The transfer and assignment was recorded in the Office of the New York City Register of the City of New York on June 19, 2012 under File No. 2012000239993 (Mot. Exh. 1).

It is alleged that effective September 1, 2010, Mr. Macnish defaulted on the consolidated mortgage and note by failing to tender the full amount of the monthly payment that was due, and failing to tender timely payments thereafter. On May 19,

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

2014 and October 3, 2014, plaintiff through Wells Fargo Bank N.A. alleges that 90 day notices of default were sent to Brian J. Macnish, stating the amount needed to cure the default (Mot. Exh. 7 and Smit. Aff. Exh. S). On January 30, 2015, plaintiff commenced this foreclosure action and filed a Notice of Pendency on the property. On February 6, 2015, 2052 Madison LLC was served with the summons and complaint through service on the New York State Secretary of State. On February 7, 2015, Brian J. Macnish was served through service on "Desirie Doe," a person of suitable age and discretion (Mot. Exh. 2).

On February 26, 2015, Brian J. Macnish and 2052 Madison LLC (hereinafter referred to collectively as "defendants") served and filed an Answer to the Complaint asserting seventeen affirmative defenses and "Counterclaims" with eleven (11) numbered paragraphs (Mot. Exh. 3). None of the other named co-defendants appeared or answered in this action.

Plaintiff seeks summary judgment pursuant to CPLR §3212 against the defendants. Plaintiff argues that there was compliance with all the relevant notice requirements and statutes, that defendants have defaulted in payments and that it is entitled to foreclosure as the possessor of the consolidated note and consolidated mortgage.

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v. City of New York*, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence in admissible form, requiring a trial of material factual issues (*Amatulli v. Delhi Constr. Corp.*, 77 N.Y. 2d 525, 571 N.E. 2d 645; 569 N.Y.S. 2d 337 [1999]).

In a foreclosure action plaintiff establishes prima facie entitlement to summary judgment by providing the mortgage, unpaid note, and proof of the default in payment (*U.S. Nat. Ass'n. v. Akande*, 136 A.D. 3d 887, 26 N.Y.S. 2d 887 [2nd Dept., 2016]). Plaintiff is also required to prima facie establish standing, when the defendant raises the issue (*U.S. Bank, N.A. v. Collymore*, 68 A.D. 3d 752, 890 N.Y.S. 2d 578 [2nd Dept., 2009]). In opposition to the motion for summary judgment defendants argue that plaintiff is not an appropriate party to bring this action and lacks standing.

Standing is established in a foreclosure action by proof of physical delivery of the note, or assignment of the note to the plaintiff prior to commencement of the action. The note and not the mortgage is the instrument that conveys standing (*Aurora Loan Servs. LLC v. Taylor*, 25 N.Y. 3d 355, 34 N.E. 3d 363, 12 N.Y.S. 3d 612 [2015]). A note endorsed in blank does not act as an impediment to plaintiff's standing (*Bernabel*, 125 A.D. 3d 541, 5 N.Y.S. 3d 372 [1st Dept., 2015]). Assignment or possession of the note prior to the commencement of the foreclosure action is sufficient to establish standing (*Bank of New York Mellon Trust Co, N.A. v. Sachar*, 95 A.D. 3d 695, 943 N.Y.S. 2d 893 [1st Dept., 2012]). Plaintiff may rely on the original loan file prepared by the assignor in the regular course of business to establish standing (*Wells Fargo Bank, N.A. v. Jones*, 139 A.D. 3d 520, 32 N.Y.S. 3d 95 [1st Dept., 2016] citing to *Landmark Cap. Invs., Inc. V. Li-Shan Wang*, 94 A.D. 3d 418, 941 N.Y.S. 2d 144 [1st Dept., 2012]).

Plaintiff annexed a copy of the consolidated mortgage and consolidated note to the motion papers to establish possession (Mot. Seq. 001). The affidavit of Shae Smith the Vice President of Loan Documentation, Wells Fargo Bank, N.A., a person with knowledge, relies on internal records and familiarity with how they are compiled, stating that Wells Fargo Bank, N.A. pursuant to the PSA and Servicer Agreement (Smith Aff. Exh. P), was custodian and servicer of the consolidated mortgage and consolidated note (Mot. Exh. 1), having possession of both (Smith Aff. Exh. Q). Ms. Smith states that the formal assignment and transfer of the consolidated mortgage and consolidated note took place

on May 28, 2012 and was recorded on June 19, 2012 (Mot. Exh. 1). The consolidated note endorsed in blank and the consolidated mortgage were in plaintiff's possession and assigned as of January 1, 2015, the date of commencement of this action, and plaintiff has established standing to bring this action.

Defendants have not established that as non-parties to the PSA agreement they have standing to assert claims related to contractual duty to challenge the validity of the PSA (Barton v. 270 St. Nicholas Ave. Housing Development Fund Corp., 84 A.D. 3d 696, 925 N.Y.S. 2d 433 [1st Dept., 1995] and Wells Fargo Bank N.A. v. Charlaff, 134 A.D.3 d 1099, 24 N.Y.S. 3d 317 [2nd Dept., 2015]).

Defendants in opposing summary judgment argue that plaintiff has not provided sufficient evidence of compliance with RPAPL §1304. Compliance with RPAPL §1304 is a mandatory condition precedent to the commencement of a foreclosure action (Aurora Loan Servs., LLC v. Weisblum, 85 A.D. 3d 95, 923 N.Y.S. 2d 609 [2nd Dept., 2011]). The notices of default sent by plaintiff were properly sent by plaintiff (See affidavit of Shae Smith) the notices establishing a business record and the attorney's affirmation together with printouts from the U.S. Postal Service showing the tracking records (Mot. Exh. 7 and Smith Aff. Exhs. S & T) (See Flagstar Bank, FSB v. Mendoza, 139 A.D. 3d 898, 32 N.Y.S. 3d 278 [2nd Dept., 2016]).

Defendants cross-move pursuant to CPLR §3025 to amend their answer to assert more specific affirmative defenses and counterclaims. The proposed amended answer asserts twenty affirmative defenses and eight counterclaims. Defendants argue that there is no prejudice to plaintiff by the proposed amendments and that the summary relief sought in plaintiff's motion for summary judgment should be denied as premature pending the amendment of the pleadings.

Pursuant to CPLR §3025, leave to amend pleadings, "shall be freely granted upon such terms as may be just..." the decision to disallow the amendment is at the Court's discretion (McCaskey, Davies & Associates, Inc. v. New York City, 59 N.Y. 2d 755, 450 N.E. 2d 240, 463 N.Y.S. 2d 434 [1983]). Leave to amend is granted as long as there is no surprise or prejudice to the opposing party. Leave to amend a pleading will be denied where the proposed pleading fails to state a cause of action or is patently insufficient as a matter of law (Kocourek v. Booz Allen Hamilton, Inc., 85 A.D. 3d 502, 925 N.Y.S. 2d 51 [1st Dept., 2011] and Bishop v. Maurer, 83 A.D. 3d 483, 921 N.Y.S. 2d 224 [1st Dept. 2011]).

Defendants claim that pursuant to CPLR §203 and the doctrine of equitable recoupment, they can proceed on the proposed asserted defenses and counterclaims that plaintiff alleges are time-barred, and seek to further expand on the claims of fraud and to establish that the consolidated mortgage and consolidated note violate Federal and State Statutes including the Truth in Lending Act, Consumer Fraud Act, RPAPL §1302 et seq., New York Banking Law §6-L and 6-M, New York General Obligations Law (GOL) §349 et seq., New York Banking Law §690-b, and loan violation of public policy.

CPLR §203[d] permits revival as an affirmative defense or counterclaim but to apply, the allegations must arise from the same transaction or series of transactions and be sufficiently related to plaintiff's causes of action. Claims asserting false representation and warranties on the date the loan was entered into are not capable of being revived (182 Franklin Street Holding Corp. v. Franklin Pierrepoint Associates, 217 A.D. 2d 508, 630 N.Y.S. 2d 64 [1995], Deutsche Bank Nat. Trust Co. v. Flagstar Capital Markets Corp., 36 N.Y.S. 3d 135 [1st Dept., 2016] and Manufacturers and Traders Trust Co. v. Snow, 27 A.D. 3d 929, 812 N.Y.S. 2d 148 [3rd Dept., 2006]).

Defendants are alleging fraud occurring in 2007 by Severian St. Hilein, the mortgage broker acting on behalf of Wells Fargo. The statute of limitations on those claims has expired and cannot be revived. Defendants have not substantiated the claims that Mr. Macnish was advised foreclosure is necessary to

modify the mortgage payments. There is no entitlement to loan modification. Unsubstantiated and conclusory assertions of promises to forebear in foreclosing on a defaulted mortgage results in no valid basis for modification (CrossLand Sav. v. Loguidice-Chatwal Real Estate Inv. Co., 171 A.D. 2d 457, 567 N.Y.S. 2d 29 [1st Dept., 1991]).

The proposed amended answer provided more details, but it has not provided a basis to proceed under either the affirmative defenses and the counterclaims pursuant to CPLR §203[d], or the doctrine of equitable recoupment. Defendants have not established that the remaining proposed amendments have merit sufficient to grant the relief sought. The cross-motion does not state a basis to deny the plaintiff summary judgment.

Accordingly, it is ORDERED, that plaintiff's motion pursuant to CPLR §3212 for summary judgment against the defendants: granting dismissal of the February 26, 2015, Verified Answer, affirmative defenses and counterclaims with prejudice; granting permission to treat defendants' Verified Answer as a limited Notice of Appearance providing defendants without prior notice a copy of the Notice of Sale, Notice of Discontinuance, and Notice of Surplus Monies if any; deleting "John Does" and "Jane Does" as party defendants to this action and substituting "Desirie Doe," the individual served with process at the property; granting the appointment of a referee to determine and compute the amount due to plaintiff and whether the premises being foreclosed can be sold in parcels; have the non-appearing and non-answering defendants be deemed in default, and that said defaults be fixed and determined, is granted as stated herein, and it is further,

ORDERED that defendants, 2052 MADISON LLC and BRIAN J. MACNISH's Verified Answer asserting affirmative defenses and counterclaims, is dismissed with prejudice, and it is further,

ORDERED that the non-appearing and non-answering defendants are deemed in default, and it is further,

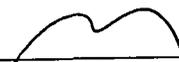
ORDERED, that plaintiff is directed to settle order on notice, by serving all named parties and the General Clerk's Office (Room 119 - Order Section), with a copy of the proposed order for their review, to be forwarded to this Court, and it is further,

ORDERED, that the proposed order to be settled shall include, the proposed amended caption, reference to a Referee designated by this Court, to ascertain and compute the amount due to plaintiff, whether the premises being foreclosed can be sold in parcels, and whether the defaults can be fixed and determined, and it is further,

ORDERED, that the relief sought by plaintiff, to treat defendants' Verified Answer as a limited Notice of Appearance providing defendants without prior notice a copy of the Notice of Sale, Notice of Discontinuance, and Notice of Surplus Monies, if any is denied, and it is further,

ORDERED that defendants 2052 MADISON LLC and BRIAN J. MACNISH's cross-motion pursuant to CPLR §3025 to amend their answer is denied, and it is further,

ORDERED that the Clerk of the Court shall enter judgment accordingly.

ENTER:  MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ,
J.S.C.

Dated: October 6, 2016

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE