U.S. Bank N.A. v Dellilo
2016 NY Slip Op 32208(U)
September 12, 2016
Supreme Court, Suffolk County
Docket Number: 29076/2012
Judge: Howard H. Heckman, Jr.
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

Short Form Order

SUPREME COURT - STATE OF NEW YORK
CALENDAR CONTROL PART 18 - SUFFOLK COUNTY

COPY

PRESENT:
HON. HOWARD H. HECKMAN JR., J.S.C.

INDEX NO.: 29076/2012
MOTION DATE: 12/12/2014
MOTION SEQ. NO.: 001 MG
002 MD

----------X

U.S.BANK NATIONAL ASSOCIATION,

Plaintiffs,

-against-

JOSEPH A. DELLILO, DONNA M. DELLILO,

Defendants.

----------X

PLAINTIFFS' ATTORNEY:
STEIN, WEINER & ROTH, LLP
1 OLD COUNTRY RD., STE. 113
CARLE PLACE, NY 11514

DEFENDANTS' PRO SE:
JOSEPH & DONNA DELLILO
521BELLMORE STREET
WEST ISLIP, NY 11795

Upon the following papers numbered 1 to 29 read on this motion ____: Notice of Motion/ Order to Show Cause and supporting papers 1-17 ; Notice of Cross Motion and supporting papers 18-24 ; Answering Affidavits and supporting papers___; Replying Affidavits and supporting papers 25-29 ; Other___ ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff U.S. Bank, N.A., seeking an order: 1) granting summary judgment striking the answer of the defendants Joseph Dellilo and Donna Dellilo; 2) substituting Daryn Dellilo as a named party defendant in place and stead of "John Doe" and discontinuing the action against defendants identified as "Richard Roe", "Jane Doe", "Cora Coe", "Dick Moe" and "Ruby Poe"; 3) deeming all appearing and non-appearing defendants in default; 4) amending the caption; and 5) appointing a referee to compute the sums due and owing to the plaintiff in this mortgage foreclosure action is granted; and it is further

ORDERED that the cross motion by defendants Joseph A. Dellilo and Donna M. Dellilo seeking an order dismissing plaintiff's complaint or, in the alternative, referring this action for another CPLR 3408 court settlement conference or, in the alternative, denying plaintiff's motion and compelling additional discovery and imposing sanctions in the form of an award for attorneys' fees, costs and disbursements related to this motion is denied; and it is further

ORDERED that plaintiff is directed to serve a copy of this order amending the caption upon the Calendar Clerk of the Court; and it is further

ORDERED that plaintiff is directed to serve a copy of this order with notice of entry upon all parties who have appeared and not waived further notice pursuant to CPLR 2103(b)(1),(2) or (3) within thirty days of the date of this order and to promptly file the affidavits of service with the Clerk of the Court.

Plaintiff's action seeks to foreclose a mortgage in the original sum of $333,700.00 executed

by the defendants Joseph A. Dellilo and Donna M. Dellilo on November 10, 2004 in favor of Saxon Equity Mortgage Bankers, LTD. On the same date the defendants executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. The Dellilo defendants executed a HAMP modification, consolidation agreement dated November 3, 2010 in the sum of $314,447.70 in favor of U.S. Bank, N.A. By assignment dated February 15, 2012 Mortgage Electronic Registration Systems, Inc. as nominee for Saxon Equity Mortgage Bankers, LTD. assigned the mortgage to plaintiff U.S. Bank,N.A. A second duplicate assignment from Mortgage Electronic Registration Systems, Inc. as nominee for Saxon Equity Mortgage Bankers, LTD dated July 17, 2012 assigned the mortgage to plaintiff U.S. Bank, N.A. Plaintiff claims that the defendants have defaulted in making timely monthly mortgage payments since November 1, 2011. Plaintiff's motion seeks an order granting summary judgment striking defendants' answer and for the appointment of a referee.

In opposition and in support of the cross motion, the defendants submit an affidavit from defendant Donna M. Dellilo and an affirmation of counsel, and claim that they are entitled to conduct discovery to obtain original documents and that plaintiff's failure to provide adequate responses to their discovery demands mandates that plaintiff's summary judgment motion be denied. Defendants claim that plaintiff does not have standing to maintain this action since there is no relevant, admissible evidence submitted to establish when, where, how or why the plaintiff came into physical possession of the note and since the assignment of the mortgage by MERS was invalid since MERS did not have authority to assign the mortgage. Defendants also claim that the court lacks subject matter jurisdiction of this foreclosure action because the mortgage (with MERS as the mortgagee of record) and the promissory note (owned by Saxon Equities) were separated and therefore the mortgage is void and of no legal consequence. Defendants also claim that the mortgage lender failed to negotiate a second modification of the loan in good faith and argue that if the complaint is not dismissed the borrowers should be entitled to another court settlement conference. Finally defendants argue that the plaintiff has failed to provide sufficient evidence of compliance with the 90 day notice provision set forth pursuant to RPAPL 1304.

In reply, the plaintiff submits an attorney's affirmation and argues that no further discovery is required since the evidentiary proof submitted in support of the motion proves the bank's entitlement to foreclose the mortgage. Plaintiff claims that, in addition to the undisputed evidence showing that the defendants have defaulted in making required payments under the terms of the note and mortgage, sufficient proof is submitted to prove that plaintiff was the actual owner of the note, which was specially indorsed from Saxon Equities to U.S. Bank, N.A., and was in plaintiff's physical possession since December 3, 2004 which was prior to commencement of the action thereby establishing plaintiff's standing. Plaintiff claims that the affidavit submitted from a Vice President employed by U.S. Bank, N.A., which is based upon records maintained in the ordinary course of business by the mortgage servicer, provides sufficient proof to show that U.S. Bank, N.A,. had standing to maintain this action as the holder of the note and mortgage by demonstrating that the note was in the bank's possession prior to September 19, 2012, which was the date the summons and complaint were filed with the County Clerk's Office. Plaintiff argues that no further details are required once proof has been submitted that the lender was in physical possession of the specifically endorsed note and therefore plaintiff is entitled to an award of summary judgment based upon the defendants' continuing default in making timely monthly mortgage payments. Plaintiff claims that defendants' contentions concerning the validity of the mortgage assignment by MERS are irrelevant and incorrect, since proof of possession of the promissory note prior to commencement of the action

proves that U.S Bank, N.A. has standing to prosecute this foreclosure action. Plaintiff also argues that there is no credible evidence submitted to support defendants' claims related to invalid mortgage assignments and the bank's alleged failure to negotiate in good faith since the defendants were afforded three days of court settlement conferences prior to this action being remanded for prosection. Finally plaintiff claims that sufficient proof is submitted to prove that the 90 day notices were served in compliance with RPAPL 1304.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material question of fact from the case. The grant of summary judgment is appropriate only when it is clear that no material and triable issues of fact have been presented (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957)). The moving party bears the initial burden of proving entitlement to summary judgment (*Winegrad v. NYU Medical Center*, 64 NY2d 851 (1985)). Once such proof has been proffered, the burden shifts to the opposing party who, to defeat the motion, must offer evidence in admissible form, and must set forth facts sufficient to require a trial of any issue of fact (CPLR 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557 (1980)). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v. Associated Fur Manufacturers*, 46 NY2d 1065 (1979)).

Entitlement to summary judgment in favor of the foreclosing plaintiff is established, prima facie by the plaintiff's production of the mortgage and the unpaid note, and evidence of default in payment (*see Wells Fargo Bank N.A. v. Eraboba*, 127 AD3d 1176, 9 NYS3d 312 (2nd Dept., 2015); *Wells Fargo Bank, N.A. v. Ali*, 122 AD3d 726, 995 NYS2d 735 (2nd Dept., 2014)). Where the plaintiff's standing is placed in issue by the defendant's answer, the plaintiff must also establish its standing as part of its prima facie showing (*Aurora Loan Services v. Taylor*, 25 NY3d 355, 12 NYS3d 612 (2015); *Loancare v. Firshing*, 130 AD3d 787, 14 NYS3d 410 (2nd Dept., 2015); *HSBC Bank USA, N.A. v. Baptiste*, 128 AD3d 77, 10 NYS3d 255 (2nd Dept., 2015)). In a foreclosure action, a plaintiff has standing if it is either the holder of, or the assignee of, the underlying note at the time that the action is commenced (*Aurora Loan Services v. Taylor, supra.; Emigrant Bank v. Larizza*, 129 AD3d 94, 13 NYS3d 129 (2nd Dept., 2015)). Either a written assignment of the note or the physical transfer of the note to the plaintiff prior to commencement of the action is sufficient to transfer the obligation and to provide standing (*Wells Fargo Bank, N.A. v. Parker*, 125 AD3d 848, 5 NYS3d 130 (2nd Dept., 2015); *U.S. Bank v. Guy*, 125 AD3d 845, 5 NYS3d 116 (2nd Dept., 2015)).

Proof that the plaintiff was in possession of the note on a day certain or an "on or before" date (*Wells Fargo Bank, N.A. v. Joseph,* 137 AD3d 896, 2016 NY Slip Op 01661 (2nd Dept., 2016)) prior to the commencement of the action is sufficient to establish, prima facie, the plaintiff's possession of the requisite standing to prosecute its claims for foreclosure and sale (*Aurora Loan Servs., LLC v. Taylor, supra.; Loancare v. Firshing, supra.; Emigrant Bank v. Larizza, supra.*). Delivery of the note to a custodial agent of the plaintiff on a date prior to the commencement of the action will suffice to establish the standing of a foreclosing plaintiff under the foregoing rule (*Deutsche Bank National Trust Co. v. Whalen,* 107 AD3d 91, 969 NYS2d 82 (2nd Dept., 2013); *HSBC Bank USA, N.A. v. Sage,* 112 AD3d 1126, 977 NYS2d 446 (3rd Dept., 2013)). A plaintiff's attachment of a duly indorsed mortgage note to its complaint or to the certificate of merit required pursuant to CPLR 3012-b, coupled with an affidavit in which it alleges that it had possession of the note prior to commencement of the action, constitutes due proof of the plaintiff's standing (*Deutsche*

Bank National Trust Company v. Leigh, 137 AD3d 841, 28 NYS3d 86 (2nd Dept., 2016); *FNMA v. Yakaputz II, Inc.*, 141 AD3d 506, 2016 NY Slip Op 05358 (2nd Dept., 2016); *Nationstar Mortgage, LLC v. Catizone,* 127 AD3d 1151, 9 NYS3d 315 (2nd Dept., 2015)).

A review of the evidence submitted by the plaintiff, in the form of the affidavit from the plaintiff's vice president responsible for reviewing mortgage servicing records (satisfying the business records exception to the hearsay rule) together with the documentary proof, provides sufficient proof to confirm that the bank had standing, as the holder of the promissory note prior to commencement of the action. Plaintiff's proof confirms that the original promissory note, specially indorsed to U.S. Bank, N.A. by the president of Saxon Equity Mortgage Bankers, LTD, was in the bank's possession prior September 19, 2012– which is the date this action was commenced . U.S. Bank, N.A. has therefore established proof of standing to maintain this foreclosure action through possession and ownership of the note (*see Aurora Loan Services av. Taylor, supra.; CitiMortgage v. Klein,* NY Slip Op 04687 (2nd Dept., 2016)).

Proper service of an RPAPL 1304 notice on the borrower(s) is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing compliance with this condition (*Aurora Loan Services, LLC v. Weisblum*, 85 AD3d 95, 923 NYS2d 609 (2nd Dept., 2011); *First National Bank of Chicago v. Silver*, 73 AD3d 162, 899 NYS2d 256 (2nd Dept., 2010)). RPAPL 1304(2) provides that notice be sent by registered or certified mail and by first-class mail to the last known address of the borrower(s), and if different, to the residence that is the subject of the mortgage. The notice is considered given as of the date it is mailed and must be sent in a separate envelope from any other mailing or notice and the notice must be in 14-point type.

Plaintiff has submitted sufficient proof to establish that notice was given to the defendants in compliance with the requirements of RPAPL 1304. The plaintiff's proof consists of the affidavit submitted by the bank's representative stating that service was made in compliance with statutory requirements on October 19, 2011, which was more than 90 days prior to commencing this action, together with copies of the 90 day notices and a copy the "Proof of Filing Statement" filed with New York State Banking Department pursuant to RPAPL 1306 to confirm within three days of mailing that the 90 pre-foreclosure notice was served upon these defendants.

The defendants' remaining series of contentions concerning the defendants' right to conduct additional discovery, plaintiff's failure to negotiate in good faith, recording of invalid MERS's assignments and defendants' entitlement to additional court settlement conferences are equally without merit and fail to raise issues of fact sufficient to defeat plaintiff's summary judgment motion (*see Seaway Capital Corp. v. 500 Sterling Realty Corp.*, 94 AD3d 856, 941 NYS2d 871 (2nd Dept., 2012); *Sasson v. Setina Mfg. Co., Inc.*, 26 AD3d 487, 810 NYS2d 500 (2nd Dept., 2006); (*Citibank, N.A. v. Barclay,* 124 AD3d 174, 999 NYS2d 375 (1st Dept., 2014); *U.S. Bank , N.A. v. Sarmiento,* 121 AD3d 187, 991 NYS2d 68 (2nd Dept., 2014); *MERS v. Coakley,* 41 AD3d 674, 838 NYS2d 622 (2nd Dept., 2007); *Saxon Mortgage Services, Inc. v. Coakley,* 83 AD3d 1038, 921 NYS2d 552 (2nd Dept., 2011); *MERS v. Korolizky,* 54 AD3d 737, 862 NYS2d 917 (2nd Dept., 2008)).

Finally, the bank has shown that the defendants have defaulted under the terms of the original November 10, 2004 mortgage agreement by failing to make timely monthly mortgage payments since November 1, 2011. The bank, having proven entitlement to summary judgment, it is incumbent upon the defendants to submit relevant, evidentiary proof sufficiently substantive to raise

genuine issues of fact concerning why the lender is not entitled to foreclose the mortgage. Defendants have wholly failed to do so. Accordingly, the defendants' cross motion is denied and the plaintiff's motion seeking an order granting summary judgment and for the appointment of a referee must be granted. The proposed order for the appointment of a referee has been signed simultaneously with the execution of this order.

Dated: September 12, 2016

J.S.C.

Hon. Howard H. Heckman Jr.