Ditech Fin. LLC v Rector 70 LLC

2024 NY Slip Op 31546(U)

April 26, 2024

Supreme Court, New York County

Docket Number: Index No. 850330/2018

Judge: Francis A. Kahn III

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III **PART** 32

Justice

----------X

DITECH FINANCIAL LLC FKA GREEN TREE SERVICING LLC,

Plaintiff,

- v -

RECTOR 7O LLC,PEOPLE OF THE STATE OF NEW YORK, NEW YORK CITY DEPARTMENT OF FINANCE, BOARD OF MANAGERS OF THE COCOA EXCHANGE CONDOMINIUM, NEW YORK CITY PARKING VIOLATIONS BUREAU, JPMORGAN CHASE BANK, N.A., NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, JOHN DOE

Defendant.

----------X

INDEX NO. 850330/2018

MOTION DATE _____

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Upon the foregoing documents, the motion is determined as follows:

This is an action to foreclose on a mortgage encumbering real property located at 82 Beaver Street, Unit 1003, New York, New York. The mortgage, dated April 9, 2007, was given by former Defendants Scott Ross and Valerie Ross ("Ross") to non-party Mortgage Electronic Registration Systems ("MERS") as nominee for Countrywide Home Loans, Inc ("Countrywide"). The mortgage secures a loan with an original principal amount of $369,000.00 which is evidenced by a note of the same date as the mortgage.

Countrywide commenced an action to foreclose on the mortgage on January 17, 2008. The complaint contained an allegation that a default occurred on September 1, 2007. It also included an election to accelerate the indebtedness and declared the entire principal immediately due (*Countrywide v Ross*, NY Cty Index No 100802/2008). By order of Justice Saliann Scarpulla dated May 9, 2012, that action was "discontinued without prejudice". Defendant Rector 7O LLC ("Rector") obtained title to the premises by referee's deed dated May 2, 2016, after a public sale held pursuant to a judgment of foreclosure and sale issued in an action to foreclose on a lien for condominium common charges (*Board of Managers v Ross*, NY Cty Index No 810134/2012).

Plaintiff, Ditech Financial LLC FKA Green Tree Servicing LLC ("Ditech") and ("Green Tree"), commenced this action on November 30, 2018, by filing a summons and complaint containing many of the same allegations as those pled in the earlier action. Newly pled was a claim that the Ross default occurred some five years later on December 1, 2012. Ditech also pled that it "is the holder of the subject note and mortgage with delegated authority to institute this mortgage foreclosure action by the owner of the subject note and

mortgage and has the right to foreclose". The identity of the "owner" of the note and mortgage is not expressly pled. Plaintiff did aver that the "mortgage was . . . assigned to Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing, LP" as well as that the "mortgage was subsequently assigned to Green Tree Servicing LLC".

Defendant Rector moved pre-answer to dismiss the complaint pursuant to CPLR §3211[a][3] and [5]. By order dated June 3, 2019, Justice Arlene Bluth granted the motion finding, *inter alia*, that the statute of limitations accrued when Countrywide sent a letter dated October 17, 2007, thus making this action untimely. The Appellate Division, First Department unanimously reversed that decision reasoning that the "2007 letter did not accelerate the mortgage". Further, the First Department held that "while the subsequent filing in January 2008 of a foreclosure action did accelerate the mortgage, the May 2012 voluntary discontinuance of the 2008 foreclosure action constituted an 'affirmative act,' within six years, of revocation of the prior election to accelerate" (*Ditech Fin., LLC v Rector 70 LLC*, 193 AD3d 408 [1st Dept 2021]).

Defendant Rector answered, on April 27, 2021, and pled twenty-seven affirmative defenses, including lack of standing and expiration of the statute of limitations, as well as seven counterclaims. Plaintiff filed a reply to the counterclaims. Prior to joining issue, Rector deeded its entire interest in the premises to non-party Where the Heart Is LLC ("Heart") by instrument dated February 24, 2021. Thereafter, Plaintiff moved (Mot Seq No 3) for summary judgment against Defendant Rector, to strike its answer, affirmative defenses and counterclaims, for a default judgment against the non-appearing parties, for an order of reference and to amend the caption. Defendant Rector opposed the motion and cross-moved for "a re-construction hearing be held to re-construct a hearing that took place before the Honorable Saliann Scarpulla on May 9, 2012 [sic]". Plaintiff opposed the cross-motion. By order of this Court dated March 2, 2023, the motions were denied without prejudice for the parties to address any issues raised by the enactment of the Foreclosure Abuse Prevention Act (L 2022, ch 821; hereinafter FAPA) while the matters were *sub judice*.

Now, Plaintiff moves for summary judgment against Defendant Rector, to strike its answer, affirmative defenses and counterclaims, for a default judgment against the non-appearing parties, for an order of reference and to amend the caption. Defendant Rector opposes the motion.

In moving for summary judgment on its cause of action to foreclose the mortgage, Plaintiff was required to establish *prima facie* entitlement to judgment as a matter of law via proof of the mortgage, the note, and evidence of Defendants' default thereunder (*see eg U.S. Bank, N.A. v James,* 180 AD3d 594 [1st Dept 2020]; *Bank of NY v Knowles*, 151 AD3d 596 [1st Dept 2017]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1st Dept 2010]). Proof supporting a *prima facie* case on a motion for summary judgment must be in admissible form (*see* CPLR §3212[b]; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780 [1st Dept 2019]). A plaintiff may rely on evidence from persons with personal knowledge of the facts, documents in admissible form and/or persons with knowledge derived from produced admissible records (*see eg U.S. Bank N.A. v Moulton*, 179 AD3d 734, 738 [2d Dept 2020]). No particular set of business records must be proffered, as long as the admissibility requirements of CPLR 4518[a] are fulfilled and the records evince the facts for which they are relied upon (*see eg Citigroup v Kopelowitz*, 147 AD3d 1014, 1015 [2d Dept 2017]).

Plaintiff's motion was supported by an affidavit from Scheila Wright ("Wright"), a Paralegal/Case Manager at NewRez LLC d/b/a Shellpoint Mortgage Servicing ("Shellpoint"). Wright alleges that "Shellpoint is the mortgage servicing agent and attorney-in-fact for the beneficial owner of the subject mortgage loan, Federal National Mortgage Association ("FNMA"), having succeeded Plaintiff as servicer. Wright avers her affidavit is based on her review of Shellpoint's business records. Wright laid a proper foundation for the admission of Shellpoint's records into evidence under CPLR §4518 by demonstrating she was familiar with the

record keeping practices of Shellpoint and she sufficiently showed that the records "reflect[ed] a routine, regularly conducted business activity, and that it be needed and relied on in the performance of functions of the business", "that the record [was] made pursuant to established procedures for the routine, habitual, systematic making of such a record" and "that the record[s] were made at or about the time of the event being recorded" (*Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 204 [2d Dept 2019]; *see also Bank of Am v Brannon*, 156 AD3d 1 [1st Dept 2017]). The records of prior assignors and servicers were also admissible since Wright sufficiently established that those records were received from the makers and incorporated into the records Shellpoint kept and that it routinely relied upon such documents in its business (*see eg U.S. Bank N.A. v Kropp-Somoza,* 191 AD3d 918 [2d Dept 2021]).

As to the note and mortgage, these documents were referenced by Wright and annexed to her affidavit (*cf. 938 St. Nicholas Ave. Lender LLC v 936-938 Cliffcrest Hous. Dev. Fund Corp.*, 218 AD3d 417 [1st Dept 2023]). As such, proof of the loan documents was established in the first instance. As to Defendants' default, it "is established by (1) an admission made in response to a notice to admit, (2) an affidavit from a person having personal knowledge of the facts, or (3) other evidence in admissible form" (*Deutsche Bank Natl. Trust Co. v McGann*, 183 AD3d 700, 702 [2d Dept 2020]). Where, as here, proof of a default is based on records, the documents evidencing the default (ie. an account ledger or similar), must be proffered (*see eg US Bank v Rowe*, 194 AD3d 978 [2d Dept 2021]) and annexed to the affiants' affidavit (*see 938 St. Nicholas Ave. Lender LLC v 936-938 Cliffcrest Hous. Dev. Fund Corp.*, supra; *Nationstar Mortgage LLC v Konitz I, LLC*, 208 AD3d 500 [2d Dept 2022]). Default notices are, in and of themselves, insufficient to establish a default in repayment (*see Bank of N.Y. Mellon v Mannino*, 209 AD3d 707 [2d Dept 2022]). In this case, Plaintiff pled in the complaint, and Wright avers in her affidavit, that the original mortgagors defaulted on December 1, 2012, and annexed to Wright's affidavit were Shellpoint's account records. But these records are lacking as Plaintiff admits Shellpoint did not become the servicer until, at the earliest, February 27, 2020, when it was allegedly assigned the note and mortgage. As such, neither Wright nor Shellpoint could establish the payment history of the loan up to and including the claimed date of default (*see Fulton Holding Group, LLC v Lindoff*, 165 AD3d 1053, 1055 [2d Dept 2018]). Essentially, Shellpoint's account records are an inadmissible summary of other records, which, given the pendency of this action, were ostensibly created, at least in part, for this litigation (*see 76-82 St. Marks, LLC v Gluck,* 147 AD3d 1011 [2d Dept 2017]; *National States Elec. Corp. v LFO Constr. Corp.*, 203 AD2d 49 [1st Dept 1994])[1].

As to standing in a foreclosure action, it is established in one of three ways: [1] direct privity between mortgagor and mortgagee, [2] physical possession of the note prior to commencement of the action that contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff either on its face or by allonge, and [3] assignment of the note to Plaintiff prior to commencement of the action (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2d Dept 2020]; *Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375 [3d Dept 2015]). As the second circumstance, the note is the dispositive instrument (*Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361-362 [2015]). When the note is validly "the mortgage passes with the debt as an inseparable incident" (*U.S. Bank N.A. v Carnivale*, 138 AD3d 1220, 1221 [2d Dept 2016], *quoting Onewest Bank, F.S.B. v Mazzone*, 130 AD3d 1399, 1400 [2d Dept 2015]). However, "mere physical possession of a note at the commencement of a foreclosure action is insufficient to confer standing or to make a plaintiff the lawful holder of a negotiable instrument for the purposes of enforcing the note" (*U.S. Bank N.A. v Moulton*, 179 AD3d 734, 737 [2d Dept 2020]). "Holder status is established where the plaintiff possesses a note that, on its face or by allonge, contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff" (*Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375, 1376 [2d Dept 2015] [citations omitted]). The indorsement

[1] Parenthetically, the Court notes that Plaintiff also posits, via an affirmation from prior counsel with attached records, that it de-accelerated the loan by letter dated August 21, 2014, which belies its pled default date.

must be made either on the face of the note or on an allonge "so firmly affixed thereto as to become a part thereof" (UCC §3-202[2]). "The attachment of a properly endorsed note to the complaint may be sufficient to establish, prima facie, that the plaintiff is the holder of the note at the time of commencement" (*Deutsche Bank Natl. Trust Co. v Webster,* 142 AD3d 636, 638 [2d Dept 2016]; *cf. JPMorgan Chase Bank, N.A. v Grennan*, supra).

In this case, it is undisputed that Plaintiff was not the original lender. Regarding holder status, Defendant's assertion that Plaintiff was required to demonstrate that it "was both the owner and holder" of the note is incorrect (*see Wells Fargo Bank, NA v Burke*, 166 AD3d 1054 [2d Dept 2018]). A plaintiff relying on physical possession of the note is "not required to demonstrate that it was the owner of the note in order to establish its standing" (*Wells Fargo Bank v Moussa*, 201 AD3d 1010, 1011-1012 [2d Dept 2022]). Moreover, where an action is brought by a plaintiff only in its capacity as a serving agent, it is not required to be the owner or holder provided that the servicer's authority to act with respect to the subject mortgage is proven (*see CWCapital Asset Mgt. v Charney-FPG 114st St., LLC*, 84 AD3d 506, 507 [1st Dept 2011]; *see also CWCapital Asset Mgt., LLC v Great Neck Towers, LLC*, 99 AD3d 850, 851 [2d Dept 2012]; *Fairbanks Capital Corp. v Nagel*, 289 AD2d 99, 100 [1st Dept 2001]).

Plaintiff's assertion that it established its standing as a holder though annexation of a copy of the note, indorsed in blank, to the complaint is unavailing. "[I]t cannot be ascertained from the copy of the note provided by the plaintiff whether the separate page that bears the endorsement in blank was stamped on the back of the note, as alleged by the plaintiff, or on an allonge, and if on an allonge, whether the allonge was 'so firmly affixed . . . as to become a part thereof,' as required under UCC 3-202 (2)" (*Bayview Loan Servicing, LLC v Charleston*, 175 AD3d 1229, 1232 [2d Dept 2019]). Plaintiff also did not prove that it was acting solely as servicing agent for the owner of the note and mortgage. In the complaint, although Plaintiff pleads it was "delegated authority" from the "owner of the note and mortgage", it does not expressly name the owner, avers that it was the "holder" of these instruments, as well as that it was the assignee of the mortgage. None of the annexed affidavits or exhibits clarified any of these anomalies (*see Wells Fargo Bank, NA v Mitselmakher*, 216 AD3d 1056, 1058 [2d Dept 2023]). Any reliance on assignments made after the action was commenced, although valid for purposes of CPLR §1018, is futile in this analysis as such documents have no retroactive effect (*see U.S. Bank N.A. v Dellarmo*, 94 AD3d 746 [2d Dept 2012]).

In support of its claim that Ditech was the assignee of the note and mortgage when the action was commenced, Plaintiff relies on the affidavit of Wright and two assignments annexed thereto dated October 22, 2012, and July 9, 2013. For the reasons noted supra these assignments are presently admissible as business records. Nevertheless, these documents do not establish Plaintiff's standing. When relying on a series of transfers, including assignments, demonstrating the validity of each assignment in the chain is obligatory to prove standing (*see eg Aurora Loan Servs., LLC v Mercius*, 138 AD3d 650, 652 [2d Dept 2016]; *Citibank, N.A. v Herman*, 125 AD3d 587 [2d Dept 2015]). The October 22, 2012, assignment purports to transfer the mortgage from MERS as nominee for Countrywide to Bank of America, NA ("BOA"), the successor by merger to Countrywide Home Loans Servicing LP. That assignment is defective on its face as it only purports to convey all "right, title, and interest to a certain Mortgage" (*see generally U.S. Bank N.A. v Dellarmo*, supra). No mention is made therein of transfer of the note, or similar language (eg. loan, indebtedness, the moneys due and owing, etc.), which has been determined to be sufficient to transmit the note (*see eg Broome Lender LLC v Empire Broome LLC*, 220 AD3d 611 [1st Dept 2023]; *US Bank Natl. Assn. v Ezugwu*, 162 AD3d 613 [1st Dept 2018]; *Chase Home Fin., LLC v Miciotta*, 101 AD3d 1307 [3d Dept 2012]; *GRP Loan, LLC v Taylor,* 95 AD3d 1172 [2d Dept 2012]).

Even were the language in this assignment sufficient, unlike the mortgage, which is in MERS's name as nominee, the note is not so similarly held. As such, documentary corroboration that MERS had authority to transfer the note is necessary, but absent from Plaintiff's submissions (*see eg Bank of N.Y. v Silverberg*, 86 AD3d 274, 281 [2d Dept 2011]; *see also Wells Fargo Bank, N.A. v Walker*, 141 AD3d 986 [3d Dept 2016]). To the extent Plaintiff may claim that BOA obtained the note and mortgage via merger with Countrywide and its subsidiaries, that assertion is not supported by any evidence (*cf. Citimortgage v Goldberg*, 134 AD3d 880 [2d Dept 2015]; *PNC Bank, NA v Klein*, 125 AD3d 953 [2d Dept 2015]). The assignment dated July 9, 2013, constitutes sufficient admissible proof of the transfer of the note and mortgage from BOA to Green Tree *aka* Plaintiff. But without proof that BOA was the holder or assignee of the note on the date of the above assignment, it is presently insufficient (*see Citibank, N.A. v Herman*, supra; *Bank of N.Y. v Silverberg*, supra).

Accordingly, as Plaintiff failed to prove it standing to commence this action along with Defendant's default, the branch of its motion for summary judgment fails irrespective of the viability of Defendant's opposition papers[2] (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *see also Smalls v AJI Industries. Inc.*, 10 NY3d 733, 735 [2008]).

Parenthetically, the Court notes that Defendant's claim that this action should be dismissed as time-barred is procedurally defective without a cross-motion. In addition, since a motion for summary judgment based upon expiration of the statute of limitations was denied by the Appellate Division, First Department, that issue is law of the case and cannot be reviewed by this Court absent a motion to renew and/or reargue (*see generally Matter of Dondi v Jones*, 40 NY2d 8, 15 [1976]; *Martin v City of Cohoes*, 37 NY2d 162 [1975]).

Accordingly, it is

ORDERED that Plaintiff's motion is denied in its entirety, and it is

ORDERED that all parties shall appear for a status conference on **June 25, 2024 @ 2:15pm** via Microsoft Teams.

4/26/2024
DATE

FRANCIS KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III
J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE

[2] Plaintiff's argument that Defendant Rector lacks standing to defend this action is misplaced. CPLR §1018 provides that "[u]pon the transfer of any interest, the action may be continued by or against the original parties unless the unless the court directs the person to whom the interest is transferred to be substituted or joined in the action". Here, Rector's transfer of title to Heart occurred after the action was commenced and this Court has not directed its substitution herein. As such, Rector may continue defend this action (see *B & H Fla. Notes LLC v Ashkenazi*, 149 AD3d 401 [1st Dept 2017]; *Wells Fargo Bank, NA v McKenzie*, 183 AD3d 574 [2d Dept 2020]; *Equicredit Corp. of Am. v Campbell*, 73 AD3d 1119 [2d Dept 2010]; *Khanal v Sheldon*, 55 AD3d 684 [2d Dept 2008]; *Buywise Holding, LLC v Harris*, 31 AD3d 681 [2d Dept 2006]; *Pritzakis v Sbarra*, 201 AD2d 797 [3rd Dept 1994]).