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_____AD3d_____ Argued - November 25, 2025

ANGELA G. IANNACCI, J.P.
LINDA CHRISTOPHER
CARL J. LANDICINO
PHILLIP HOM, JJ.

2021-07409 DECISION & ORDER

Apex Bank, etc., appellant, v Theresa D. Fasulo-Brancaleone, et al., respondents, et al., defendants.

(Index No. 614157/18)

Margolin, Weinreb, and Nierer, LLP, Syosset, NY (Alan Weinreb and Seth D. Weinberg of counsel), for appellant.

Forchelli Deegan Terrana LLP, Uniondale, NY (Adam L. Browser of counsel), for respondents.

In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Nassau County (David P. Sullivan, J.), entered September 29, 2021. The order, insofar as appealed from, denied those branches of the plaintiff's motion which were for summary judgment on the complaint and for an order of reference and granted those branches of the cross-motion of the defendants Theresa D. Fasulo-Brancaleone and Peter Brancaleone, Jr., which were for summary judgment dismissing the complaint insofar as asserted against them and for an award of attorneys' fees.

ORDERED that the appeal from so much of the order as granted that branch of the cross-motion of the defendants Theresa D. Fasulo-Brancaleone and Peter Brancaleone, Jr., which was for an award of attorneys' fees is dismissed; and it is further,

ORDERED that the order is reversed insofar as reviewed, on the law, those branches of the plaintiff's motion which were for summary judgment on the complaint and for an order of reference are granted, and that branch of the cross-motion of the defendants Theresa D. Fasulo-Brancaleone and Peter Brancaleone, Jr., which was for summary judgment dismissing the complaint insofar as asserted against them is denied; and it is further,

ORDERED that one bill of costs is awarded to the plaintiff.

The appeal from so much of the order as granted that branch of the cross-motion of the defendants Theresa D. Fasulo-Brancaleone and Peter Brancaleone, Jr., which was for an award of attorneys' fees must be dismissed, as that portion of the order was superseded by a judgment dated January 19, 2023. The issues raised on the appeal from that portion of the order are brought up for review and have been considered on the appeal from the judgment (*see Apex Bank v Fasulo-Brancaleone*, ____ AD3d ____ [Appellate Division Docket No. 2023-02870; decided herewith]).

In October 2005, the defendant Theresa D. Fasulo-Brancaleone executed a note in the sum of $513,000 in favor of The New York Mortgage Company, LLC. The note was secured by a mortgage on certain residential property located in Nassau County.

In October 2018, the plaintiff commenced this action to foreclose the mortgage. The defendants interposed an answer, which asserted lack of standing as an affirmative defense. In May 2020, the plaintiff moved, inter alia, for summary judgment on the complaint and for an order of reference. Theresa D. Fasulo-Brancaleone and the defendant Peter Brancaleone, Jr. (hereinafter together the defendants), cross-moved, among other things, for summary judgment dismissing the complaint insofar as asserted against them and for an award of attorneys' fees. In an order entered September 29, 2021, the Supreme Court, inter alia, denied those branches of the plaintiff's motion and granted those branches of the defendants' cross-motion. The plaintiff appeals.

"Generally, in a mortgage foreclosure action, a plaintiff demonstrates its prima facie entitlement to judgment as a matter of law by producing the mortgage, the unpaid note, and evidence of default" (*Deutsche Bank Natl. Trust Co. v Kingsbury*, 171 AD3d 871, 871; *see Wells Fargo Bank, N.A. v Mitselmakher*, 216 AD3d 1056, 1057). "Where, as here, the plaintiff's standing has been placed in issue by the defendant[s'] answer, the plaintiff must prove its standing as part of its prima facie showing on a motion for summary judgment" (*PennyMac Corp. v Arora*, 184 AD3d 652, 653). "A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it was either the holder or assignee of the underlying note at the time the action was commenced" (*HSBC Bank USA, N.A. v Gilbert*, 189 AD3d 1377, 1379).

Here, contrary to the Supreme Court's determination, the plaintiff established, prima facie, that it had standing to commence this action by demonstrating that a copy of the note bearing an endorsement in blank was annexed to a certificate of merit filed with the complaint (*see U.S. Bank Trust, N.A. v Atedgi*, 236 AD3d 707, 709; *Wilmington Sav. Fund Socy., FSB v Hershkowitz*, 189 AD3d 1126, 1127). In opposition, the defendants failed to raise a triable issue of fact.

Moreover, the plaintiff established, prima facie, its compliance with paragraph 22 of the mortgage agreement regarding a notice of default (*see Emigrant Bank v Cohen*, 205 AD3d 103, 110-111; *Nationstar Mtge., LLC v Jean-Baptiste*, 178 AD3d 883, 887). In opposition, the defendants failed to raise a triable issue of fact.

Accordingly, the Supreme Court should have granted those branches of the plaintiff's motion which were for summary judgment on the complaint and for an order of reference and denied that branch of the defendants' cross-motion which was for summary judgment dismissing the complaint insofar as asserted against them.

IANNACCI, J.P., CHRISTOPHER, LANDICINO and HOM, JJ., concur.

ENTER:

Darrell M. Joseph
Clerk of the Court