

Onewest Bank, FSB v Cumberbatch
2012 NY Slip Op 30806(U)
March 29, 2012
Supreme Court, Queens County
Docket Number: 25519/2009
Judge: Allan B. Weiss
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE Allan B. Weiss IA Part 2
Justice

ONEWEST BANK, FSB as successor in	x
.Interest to INDYMAC BANK, FSB	

Index	
Number 25519	2009

Plaintiff,

Motion
Date January 4, 2012

-against-

KATHLEEN CUMBERBATCH.

Motion
Cal. Number 23

Defendant.

Motion Seq. No. 3

The following papers numbered 1 to 9 read on this motion by defendant Kathleen Cumberbatch to stay enforcement of the default judgment of foreclosure and sale, cancel the foreclosure sale of the property, set the matter down for a hearing and trial of all issues in the case, and dismiss the complaint.

Papers
Numbered

Order to Show Cause - Affidavits - Exhibits	1-3
Answering Affidavits - Exhibits	4-6
Reply Affidavits	7-9

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff OneWest Bank, FSB (OneWest), as successor in interest to IndyMac Bank, FSB, commenced this action by filing a copy of the summons and complaint on September 22, 2009. Plaintiff OneWest sought to foreclose on a consolidated mortgage on

the real property known as 131-27 230th Street, Springfield Gardens a/k/a Laurelton, New York (the mortgaged premises) given by defendant Cumberbatch, to secure repayment of a promissory note, evidencing a loan from IndyMac Bank, F.S.B. in the original principal amount of \$400,00.00, plus interest, and to reform the description of the mortgage in the consolidation agreement. Plaintiff OneWest alleged that defendant Cumberbatch defaulted under the terms of the mortgage and note, and as a consequence, it elected to accelerate the entire mortgage debt.

When defendant Cumberbatch failed to appear or serve an answer, plaintiff OneWest made an ex-parte motion for leave to appoint a referee to compute the sums due and owing it. The order of reference was issued on December 15, 2009, and a copy of it was served, along with notice of entry, upon plaintiff at the mortgaged premises by regular mail on December 29, 2009. After the Referee issued her report, plaintiff OneWest made an ex-parte application for a judgment of foreclosure and sale. By order dated February 9, 2010, the application was held in abeyance pending the completion of a conference to be held in the foreclosure settlement conference part. A residential foreclosure conference was held on April 12, 2011, wherein plaintiff OneWest and defendant Cumberbatch appeared by counsel,¹ and by order of the same date, the Court Attorney Referee granted plaintiff leave to proceed by order of reference or motion. The Court Attorney Referee noted that defendant Cumberbatch's submissions did not reflect "a viable ability to support modification of the subject loan." On April 14, 2011, the court issued the judgment of foreclosure and sale upon default against defendant Cumberbatch. Plaintiff served defendant Cumberbatch's counsel with a copy of the judgment with notice of entry by regular mail on October 5, 2011.

Defendant Cumberbatch obtained the order to show cause on November 2, 2011, staying any sale of the property pending the determination of the motion. Plaintiff OneWest opposes the motion.

Defendant Cumberbatch objects to the court's consideration of plaintiff's opposition papers on the ground that they were not timely served. Notwithstanding such objection, defendant Cumberbatch received a copy of the opposition papers, and had nearly one month thereafter to prepare and serve her reply papers. Moreover, the motion was not fully submitted until after she served her reply papers. Defendant Cumberbatch, therefore, has failed to show any prejudice to her as a result of plaintiff OneWest's delay in serving the opposition papers.

¹

Counsel for defendant served a notice of appearance by mail on October 23, 2010. The notice of appearance was filed on November 1, 2010.

To the extent defendant Cumberbatch asserts improper service of process, plaintiff OneWest offers an affidavit of service dated October 7, 2009, of a licensed process server, indicating attempts at personal delivery of the copy of the summons and complaint on September 30, 2009 at 10:30 A.M., October 1, 2009 at 6:15 P.M., and October 3, 2009 at 12:10 P.M., (Wednesday, Thursday and Saturday respectively), at the mortgaged premises, the alleged actual place of residence of defendant Cumberbatch. The affidavit also indicates that a copy of the summons and complaint was affixed to the door of that premises on October 5, 2009 at 7:50 P.M., and a copy of the process was mailed to defendant Cumberbatch at the same address “[w]ithin 20 days of such ... affixing....” The affidavit constitutes prima facie evidence that plaintiff OneWest exercised due diligence in attempting to effectuate personal delivery of process upon defendant Cumberbatch on three occasions and of proper service upon her pursuant to CPLR 308(4) (*see Manhattan Sav. Bank v Kohen*, 231 AD2d 499 [1996]; *Gross v Fruchter*, 230 AD2d 710 [1996]; *see also Friedman v Telesco*, 253 AD2d 846 [1998]).

Defendant Cumberbatch’s conclusory denial of service is insufficient to dispute the contents or veracity of the affidavit of service, or warrant a hearing to determine the validity of service of process (*see Countrywide Home Loans Servicing, LP v Albert*, 78 AD3d 983 [2010]; *Manhattan Sav. Bank v Kohen*, 231 AD2d 499 [1996], *supra*; *Gross v Fruchter*, 230 AD2d 710 [1996], *supra*).

To the extent defendant Cumberbatch otherwise seeks to vacate the judgment, “[a] person served with a summons other than by personal delivery ... may be allowed to defend the action within one year after [s]he obtains knowledge of entry of the judgment ... upon a finding ... that [s]he did not personally receive notice of the summons in time to defend and has a meritorious defense” (CPLR 317).

Defendant Cumberbatch avers that she first had knowledge of the pendency of this action on or about October 1, 2010, when she received a copy of a notice dated September 27, 2010, sent by the court, of the settlement conference, then scheduled for October 29, 2010, prompting her to retain counsel. She asserts that she has meritorious defenses, including lack of standing.

Plaintiff argues that defendant Cumberbatch has waived a defense based upon lack of standing because she failed to interpose an answer which asserted the defense or to file a timely pre-answer motion raising that defense, citing *HSBC Bank, USA v Dammond*, (59 AD3d 679 [2d Dept 2009]). In *Dammond*, the Appellate Division, Second Department held that a mortgagor, who failed to interpose an answer or file a timely pre-answer motion asserting the defense of standing, had waived such a defense, and could not raise it as a meritorious defense in support of his motion to vacate the judgment of foreclosure and sale.

The Appellate Court, however specifically noted therein that it was “undisputed that the [mortgagor] was personally served” (*id.* at 680).² Contrary to plaintiff’s argument, the holding in *Dammond* is not controlling here, where defendant Cumberbatch asserts she first learned of the pendency of the action after receipt of the conference notice. Thus, the court may consider whether defendant Cumberbatch has a potential meritorious defense based upon lack of standing.

A plaintiff establishes that it has standing where it demonstrates that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note (*see Bank of N.Y. v Silverberg*, 86 AD3d 274 [2011]; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752 [2011]).

The subject mortgage names IndyMac Bank, F.S.B. as the lender,³ and the note is made payable to IndyMac Bank, F.S.B. and does not bear any endorsement. Plaintiff OneWest alleged in its complaint, and when seeking the judgment, that it is the “holder” of the subject mortgage and underlying note. It makes no claim that it is a holder of the subject mortgage and note based upon the assignment⁴ offered by defendant Cumberbatch in support of her motion. Rather, plaintiff OneWest asserts that IndyMac Bank, F.S.B. went into receivership and the Federal Deposit Insurance Corporation (FDIC), as receiver, transferred the assets of IndyMac Bank, F.S.B. to IndyMac Federal Bank, FSB on July 11, 2008.

2

The Appellate Division, Second Department, in *Countrywide Home Loans Servicing, LP v Albert*, (78 AD3d 983 [2010]), had occasion to consider the issue of waiver of the defense of lack of standing in the context of an appeal from an order denying a motion to vacate a judgment of foreclosure and sale where jurisdiction was based upon service of process pursuant to CPLR 308(4). The Appellate Division determined therein that the defendant had waived the defense of standing, but notably, also determined that the defendant had waived any claim of lack of personal jurisdiction (*id.* at 984).

3

The subject mortgage also names Mortgage Electronic Registration Systems, Inc. (MERS) as the nominee for the lender and the lender’s successors and assigns, and as the mortgagee of record for the purpose of recording the mortgage.

4

The assignment purports to assign a mortgage dated January 7, 2000, made by defendant Cumberbatch to MERS as nominee for Fremont Investment and Loan, in the principal amount of \$132,000.00, and the notes described therein, from JPMorgan Chase Bank, NA f/k/a JPMorgan Chase Bank, as successor in interest to Bank One National Association as trustee, to MERS as nominee for IndyMac Bank, F.S.B., effective October 13, 2006. Defendant Cumberbatch has made no showing that such assignment relates to the subject mortgage.

Plaintiff OneWest also asserts that all assets of IndyMac Federal Bank, FSB, including the subject note, thereafter were sold on March 19, 2009 to OneWest.

Plaintiff OneWest, however, has failed to offer any evidence to demonstrate the establishment of a FDIC receivership in connection with IndyMac Bank, F.S.B., the note was part of the assets of such FDIC receivership, or the FDIC, as receiver, transferred such assets to IndyMac Federal Bank, FSB. Furthermore, the copy of the bill of sale presented by plaintiff OneWest indicates that the FDIC, as receiver of IndyMac Federal Bank, FSB, sold only those “Assets,” as defined in a “Servicing Business Asset Purchase Agreement” dated March 19, 2009, to OneWest. Plaintiff OneWest has not presented evidence of the establishment of an FDIC receivership in connection with IndyMac Federal Bank, FSB, or a copy of the March 19, 2009 agreement (or relevant parts thereof), to show the subject note was one of the assets sold to OneWest. Nor has plaintiff OneWest presented any evidence that it was in physical possession of the note at the time of the commencement of the action and the note was endorsed in its favor or in blank (*see* UCC § 1-201[20] [“ ‘[h]older’ means a person who is in possession of a document of title or an instrument or an investment certificated security drawn, issued or indorsed to him or to his order or to bearer or in blank”])). Under these circumstances, defendant Cumberbatch has presented a possible meritorious defense based upon lack of standing (*see generally Bank of N.Y. v Silverberg*, 86 AD3d 274 [2011]; *U.S. Bank, N.A. v Adrian Collymore*, 68 AD3d 752 [2009])).

Accordingly, the motion is granted only to the extent of vacating the judgment of foreclosure and sale (CPLR 317) and directing defendant Cumberbatch to serve an answer within 20 days of service of a copy of this order with notice of entry.

Dated: March 29, 2012

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J.S.C.