

US Bank Natl. Assn. v Madero

2012 NY Slip Op 32781(U)

November 15, 2012

Supreme Court, Richmond County

Docket Number: 102965/08

Judge: Joseph J. Maltese

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND **DCM PART 3**
US BANK NATIONAL ASSOCIATION, as Trustee,
346 Stateview Boulevard
Ft. Mill, SC 29715,

Calendar Nos.: 1487-003
2084-004
Index No.: 102965/08

Plaintiff,

against

DECISION
HON. JOSEPH J. MALTESE

MIGUEL MADERO, MARTHA MADERO,
JP MORGAN CHASE BANK, N.A., NEW YORK
CITY ENVIRONMENTAL CONTROL BOARD,
NEW YORK CITY TRANSIT ADJUDICATION BUREAU,
JIMMY HUTTON JD #1, NICOLE HUTTON JD #2,

Defendants.

The following papers numbered 1 to 5 were fully submitted on the 3rd day of August, 2012.

	Papers Numbered
Plaintiff’s Notice of Motion for Summary Judgment, Striking the Answer and for the Appointment of a Referee, with Supporting Papers (dated May11, 2012).....	1
Notice of Cross Motion by Defendants Miguel Madero and Martha Madero to Dismiss the Complaint Pursuant to CPLR 3211 and 3212, with Supporting Papers (dated July 7, 2012).....	2
Plaintiff’s Reply Affirmation (dated August 22, 2012).....	3
Plaintiff’s Reply Memorandum of Law in Opposition to Defendants’ Cross Motion (dated August 22, 2012).....	4
Reply Affirmation by Defendants’ Miguel Madero and Martha Madero (dated August 31, 2012).....	5

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Upon the foregoing papers, plaintiff's motion (Seq. No. 003) for summary judgment striking the answer of defendants Miguel Madero and Martha Madero and appointing a referee to compute is granted; the cross motion (Seq. No. 004) of the above-named defendants to (1) dismiss the complaint pursuant to CPLR 3211 and 3212, (2) for a hearing to determine whether plaintiff has standing, or (3) for an immediate trial pursuant to CPLR 3212©, is denied.

This action was brought to foreclosure a certain mortgage on real property located at 11-25 Victory Boulevard, Staten Island, New York. Said mortgage was given by defendants Miguel and Martha Madero on October 20, 2005 to plaintiff's predecessor-in-interest, Mortgage Lenders Network USA, Inc., to secure a note executed by defendant Miguel Madero in the principal sum of \$570,000.00.

Plaintiff US Bank National Association, as Trustee (hereinafter, "plaintiff/trustee") moves, *inter alia*, to strike the answer of defendants Miguel and Martha Madero, and for summary judgment and the appointment of a referee. In support of the motion, plaintiff submits the affidavit of Kyle Campbell, Vice President of Loan Documentation for Wells Fargo Bank, N.A., d/b/a America's Servicing Company (hereinafter, "ASC"). Insofar as it appears on the papers before the Court, ASC is the plaintiff/trustee's servicing agent for Mr. Madero's mortgage loan. Mr. Campbell attests that he has reviewed the books and records maintained by ASC in the ordinary course of its business of servicing the subject loan, which includes the collection and posting of monthly installment payments, maintaining the escrow account and handling all aspects of customer service. He further attests that his review of these books and records reveals that the promissory note relating to Mr. Madero's loan was transferred to the plaintiff/trustee prior to his default in April of 2008. More specifically, Mr. Campbell attests that (1) as evidenced by the "Allonge to Note" dated November 11, 2005, Mr.

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Madero's note was endorsed to plaintiff U.S. Bank National Association in its capacity as trustee, and (2) both the subject note and mortgage were physically transferred to Wells Fargo "as custodian for the [plaintiff] Trust" on March 1, 2007. Mr. Campbell also attests that the records of ASC indicate that Wells Fargo, as custodian, had physical possession of the note and mortgage at the time this foreclosure action was commenced, although the transfer of the subject mortgage was not memorialized in a written assignment, *i.e.*, by MERS, as nominee for the original lender, to US Bank National Association, as Trustee, until July 7, 2008. Finally, Mr. Campbell attests that after Mr. Madero failed to make the contractually required payments to plaintiff beginning on April 1, 2008, ASC sent him a notice of default on or about May 18, 2008 informing him that a payment of \$15,111.49 was required by June 17, 2008 in order to cure the default and avoid acceleration of the loan.

It is well settled that on a motion for summary judgment in an action to foreclose a mortgage, a plaintiff/mortgagee establishes its prima facie right to judgment as a matter of law through the production of the relevant mortgage, the unpaid note and an affidavit attesting to the mortgagor's default (*see* Flagstar Bank v Bellafiore, 94 AD3d 1044, 1045 [2nd Dept 2012]; HSBC Bank USA, NA v Schwartz, 88 AD3d 961, 961 [2nd Dept 2011]; Coppa v Fabozzi, 5 AD3d 718 [2nd Dept 2004]). It is also well established that in such an action, "a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced" (U.S. Bank, N.A. v Collymore, 68 AD3d 752, 753 [2nd Dept 2009]). In this regard, "[e]ither a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident [of the note]" (*id.* at 754; *see* Bank of N.Y. v Silverberg, 86 AD3d 274, 279 [2nd Dept 2011]; US Bank N. A. v Madero, 80 AD3d 751, 752 [2nd Dept

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2011]; *see also* Mortgage Elec. Registration Sys., Inc. v Coakley, 41 AD3d 674 [2nd Dept 2007]).

Consonant with the foregoing principles, it is the opinion of this Court that the plaintiff/trustee has established its entitlement to judgment as a matter of law by tendering copies of the subject mortgage and the related note with its allonge and indorsements, along with proof of the default in the form of the affidavit of Kyle Campbell (*see* JP Morgan Chase Bank, N.A. v Agnello, 62 AD3d 662, 663 [2nd Dept 2009]; Chiarelli v Kotsifos, 5 AD3d 345, 345-346 [2nd Dept 2004]; Charter One Bank v Houston, 300 AD2d 429, 430 [2nd Dept 2002], *lv dismissed* 99 NY2d 651 [2003]).

In support of their cross motion to dismiss the complaint pursuant to CPLR 3211, 3212, defendants maintain, *inter alia*, that (1) the plaintiff/trustee improperly acquired the subject mortgage and note more than one year after the closing date of the Trust, (2) the affidavit submitted by plaintiff in support of summary judgment is neither based on personal knowledge nor in admissible form, and (3) the conflicting affidavits submitted by plaintiff as to the date the subject mortgage was received by the Trust raise a triable issue of fact which precludes summary judgment. In addition to the foregoing, by challenging the validity of the assignment of Mr. Madero's note and mortgage to the plaintiff/trustee, defendants seek to have the action dismissed based on plaintiff's alleged failure to establish standing, one of the affirmative defenses raised in their verified answer and counterclaim dated August 13, 2008.

Turning, first, to the legal sufficiency of the Campbell affidavit, it is the Court's opinion that the affiant has adequately established his basis for knowledge of the facts asserted therein (*cf.* HSBC Bank USA v Hernandez, 92 AD3d 843, 844 [2nd Dept 2012]), finding that the plaintiff/mortgagee had failed to sufficiently demonstrate

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standing because the affidavit of its servicing agent “did not give any factual details of a physical delivery of the note and, thus, failed to establish that the plaintiff had physical possession of the note prior to commencing [the] action”; *see also* Deutsche Bank Natl. Trust Co. v Barbett, 88 AD3d 636, 638 [2nd Dept 2011]).

Moreover, although said affidavit was notarized in the State of Maryland and was not accompanied by a certificate of conformity in compliance with CPLR 2309©, the foregoing failure does not warrant its exclusion from evidence based on well settled precedent that the absence of a certificate of conformity for an out-of-state affidavit does not constitute a fatal defect, as such certification may be provided *nunc pro tunc* (*see* CPLR 2001; Fredette v Town of Southhampton, 95 AD3d 940, 942 [2nd Dept 2012]; US Bank Natl. Assn. v Dellarmo, 94 AD3d 746, 748 [2nd Dept 2012]; Betz v Daniel Conti, Inc., 69 AD3d 545 [2nd Dept 2010]; Matapos Tech. Ltd. v Compania Andina de Comercio Ltda, 68 AD3d 672 [1st Dept 2009]).

Also unavailing is the contention that the transfer of Mr. Madero’s promissory note and mortgage to the plaintiff/trustee was “invalid” since it allegedly occurred on March 1, 2007, well beyond the “cut-off” date designated in the pooling and servicing agreement (January 20, 2006) for inclusion of assets into the Trust. Absent any citation of authority to the contrary, the present standing of the plaintiff/trustee is unaffected by any perceived violation of the pooling and service agreement. Rather, its standing is dependent solely upon the facts extant when the foreclosure action is commenced, *i.e.*, its physical possession of the note and mortgage. This is not in doubt. Furthermore, to the extent relevant, inasmuch as the cross-moving defendants are neither certificate holders nor third-party beneficiaries of the pooling and servicing agreement, they lack standing to enforce any claimed violation thereof (*see* 767 Third Ave. LLC v Orix Capital Markets, LLC, 26 AD3d 216, 218 [1st Dept 2006]; Aymes v Gateway Demolition Inc., 30 AD3d 196,196 [1st Dept 2006]).

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Finally, since it is well settled that an assignment of mortgage does not have to be in writing and can be effected, as here, through its physical delivery to the plaintiff/trustee (*see* LaSalle Bank Natl. Assn. v Ahearn, 59 AD3d 911, 912 [3rd Dept 2009]), no citation of controlling authority has been provided to this Court suggesting that the subsequent written assignment of the mortgage by MERS, although it may have been redundant, in any way invalidated the prior physical delivery of the original note and mortgage to the custodian for the plaintiff/trust on March 1, 2007 as attested to by Mr. Campbell. It is also worthy to note that Mr. Madero's mortgage specifically provides MERS with the requisite authority to exercise any of the lender's rights granted by said mortgage, or to take any action required by the lender with reference thereto (*cf.* Bank of N.Y. v Silverberg, 86 AD3d at 281). Thus, any challenge, *e.g.*, to the validity of the written assignment of mortgage by MERS is devoid of merit.

Defendants' remaining affirmative defenses claiming, *inter alia*, violations of the truth and lending laws, the duty of good faith or fair dealing, unjust enrichment, and/or unconscionability, as well as their counterclaim for relief based on the purported violation of 15 USCS §1639 and 12 CFR §226.34(a)(4) constitute bare legal conclusions, lacking in either evidentiary facts or documentary proof in support. Hence, they pose no bar to the relief sought by the plaintiff/trustee.

In view of the cross movants' failure to demonstrate the existence of a material issue of fact requiring a trial (*see* Aames Funding Corp. v Houston, 44 AD3d 692, 693 [2nd Dept 2007], *lv denied* 10 NY3d 704 [2008]; Charter Bank One, FSB v Houston, 300 AD2d at 430), their cross motion is denied in its entirety (*see also* Zuckerman v City of New York, 49 NY2d 557 [1980]).

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Accordingly, it is hereby:

ORDERED, that the branch of plaintiff's motion which is for summary judgment and to strike the verified answer interposed by defendants Miguel and Martha Madero is granted; and it is further

ORDERED, that the balance of plaintiff's motion, *i.e.*, an order appointing a referee to compute is granted; and it is further

ORDERED, the cross motion by defendants Miguel and Martha Madero is denied.

Submit order.

E N T E R,

Dated: November 15, 2012

Joseph J. Maltese
Justice of the Supreme Court