

TD Bank, N.A. v Mandia
2013 NY Slip Op 30337(U)
February 11, 2013
Supreme Court, Richmond County
Docket Number: 131003/10
Judge: Joseph J. Maltese
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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Index No. 131003/10
Motion No.: 003

TD BANK, N.A. f/k/a COMMERCE BANK, N.A.

Plaintiff,

DECISION & ORDER

- against-

HON. JOSEPH J. MALTESE

**ROBERT MANDIA,
CONNIE MANDIA,
COMMERCE BANK, N.A., and
“JOHN DOE #1” through “JOHN DOE #10”, the last
10 names being fictitious and unknown to the Plaintiff,
the persons or parties intended being the persons or
parties, if any, having an interest in or lien upon the
mortgaged premises described in the verified
complaint,**

Defendants.

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The following items were considered in the review of the following motion for leave to reargue

<u>Papers</u>	<u>Numbered</u>
Notice of Motion for Reargument and Affirmation	1
Affidavit in Opposition	2
Reply Affirmation	3

Upon the foregoing papers, plaintiff’s motion for leave to reargue is granted and, upon reargument, the decision and order of this Court, dated August 22, 2012 granting defendants’ motion for summary judgment and denying plaintiff’s motion for like relief is vacated; plaintiff’s motion for summary judgment is granted; and defendants’ cross motion is denied.

On November 15, 2005, the Mandia defendants entered into a lending transactions with plaintiff’s predecessor in interest, Commerce Bank N.A., relating to the premises situate at 262 Preston Avenue, Staten Island, New York (the “subject premises”). More particularly, defendants executed a note evincing a loan to them in the amount of \$359,000 and secured by mortgage on the subject premises. As early as July 2009, defendants found themselves in arrears

under the terms of the note and on June 18, 2010, plaintiff commenced this action to foreclose on the mortgage.

On the ensuing cross motions for summary judgment (Seq. Nos. 001 and 002), plaintiff's motion was denied, defendants' cross motion was granted, and the complaint dismissed. This decision and order (dated August 22, 2012) was entered on October 9, 2012, the same date upon which plaintiff filed the instant motion for leave to reargue.

CPLR 2221 pertinently provides as follows:

A motion for leave to reargue:

1. shall be identified specifically as such;
2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion;
3. shall be made within 30 days after service of a copy of the order determining the prior motion and written notice of its entry. This rule shall not apply to motions to reargue a decision made by the appellate division or the court of appeals.¹

Here, plaintiff's motion readily satisfies the first and third prongs of this analysis. Since plaintiff does not purport to rely upon any new facts or arguments, but rather argues that the court overlooked certain evidence contained within an affidavit of a bank officer, the second prong of the analysis is satisfied as well.² Therefore, the basis for plaintiff's motion for leave to reargue is appropriate.

Regarding the substance of plaintiff's motion, in reaching its initial decision, the Court noted that the Affidavit in Support of plaintiff's employee, Tonya Daigneault, dated January 16, 2012 (hereinafter the "January Affidavit"), while indicating her title and authority at the plaintiff bank, failed to indicate the specific actions taken by her in documenting the subject loan and

¹ CPLR 2221(d)

² See CPLR 2221(d); see also, Pryor v. Commonwealth Land Title Ins. Co., 17 AD3d 434 [2nd Dept. 2005].

defendants' default. Hence, the January Affidavit was deemed to provide neither sufficient proof of the alleged default nor plaintiff's standing: i.e., its possession of the note and mortgage at the time the action was commenced. What was not noted by the Court was plaintiff's submission of a *second* affidavit from Ms. Daigneault, dated February 3, 2012 (hereinafter the "February Affidavit"), which, in addition to attesting to the affiant's title and authority, provided the following details relating to the note, mortgage and defendants' default. More particularly, the February Affidavit:

- 1 Provided the details of non-payment and annexed a copy of the default notice sent to defendants;
- 2 Contained an affirmative statement that plaintiff had possession of the note at the time of the commencement, and supported this statement with proof that plaintiff was the successor by merger to the original lender, Commerce Bank, N.A.; and
- 3 Included a further affirmative statement that plaintiff had possession of, and was the owner of, the mortgage at the time of commencement, as well as providing a copy of the assignment of the mortgage to plaintiff, dated May 22, 2010, and recorded in Richmond County.

It is well settled that on a motion for summary judgment in a foreclosure action, plaintiff establishes its prima facie case for judgment as a matter of law by producing the unpaid note, mortgage and evidence of the default.³ As noted above, plaintiff did produce evidence of defendants' non-payment as well as its possession of the note and mortgage at the time the action was commenced. Thus, plaintiff sustained its initial burden of proof.

In opposition, it was incumbent upon defendants to lay bare their proof and demonstrate through evidence in admissible form the presence of material issues of fact - "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient".⁴ In this regard, defendants have failed to satisfy their evidentiary burden. Thus, the Mandia defendants dispute

³See, *U.S. Bank Natl Assn v. Denaro*, 98 AD3d 964, 965 [2nd Dept. 2012]; *Washington Mut Bank v. Valencia*, 92 AD3d 774 [2nd Dept. 2012]; *Garrison Special Opportunities Fund, L.P. v. Arthur Kill Hillside Dev, LLC*, 82 AD3d 1042, 1043 [2nd Dept. 2011]

⁴*Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]; see also, *Wolf v. Citibank*, 34 AD3d 574 [2nd Dept 2006]

neither the underlying loan transaction nor their pledge of subject premises as security in the mortgage. Additionally, while not expressly admitting their default, defendants effectively concede that payments were missed. Instead, defendants rely on two alleged defects in plaintiff's proof, (1) the insufficiency of the January Affidavit, and (2) plaintiff's lack of ownership of the note and mortgage when the notice of default was given.

With regard to the January Affidavit, this Court agrees. However, the "overlooked" February Affidavit and documentary evidence relating to the merger of plaintiff and Commerce Bank, N.A., have cured these deficiencies and are legally sufficient to make out a prima facie case for foreclosure.

As to the notice of default, defendants appear to confuse standing in the lawsuit with the authority to notify a borrower of his or her default. Contrary to defendants' assertion, the Real Property Actions and Proceedings Law does not require that the entity sending the "90 Day Notice" be the owner of the note and mortgage.⁵ Thus, the ownership requirement does not apply to the date of issuance of the default notice but solely to the date of commencement of the foreclosure action itself.⁶ There is simply no requirement that plaintiff possess both the note and mortgage at the time that the 90 Day Notice of default is given.⁷

Accordingly, it is hereby:

ORDERED, that plaintiff's motion for leave to reargue is granted; and it is further

ORDERED, that upon reargument plaintiff's motion for summary judgment is granted and defendants' cross motion for summary judgment is denied; and it is further

⁵See Real Property Actions and Proceedings Law §1304

⁶ See, *Bank of N.Y. v. Silverberg*, 86 AD3d 274, 279 [2 Dept. 2011]

⁷See Real Property Actions and Proceedings Law §1304

ORDERED, that plaintiff submit an order of reference consistent with this Decision and Order, within 60 days hereof; and it is further

ORDERED that the Clerk enter judgment in accordance herewith.

ENTER,

Dated: February 11, 2013

Joseph J. Maltese
Justice of the Supreme Court