

Onewest Bank FSB v Donde
2013 NY Slip Op 30478(U)
March 5, 2013
Supreme Court, Queens County
Docket Number: 31320/2009
Judge: Robert J. McDonald
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MEMORANDUM

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

ONEWEST BANK FSB,

Index No.: 31320/2009

Plaintiff,

Motion Date: 11//29/12

- against -

Motion No.: 8

ABOU CONDE; JULIETTE DEVONISH; CITY OF
NEW YORK ENVIRONMENTAL CONTROL BOARD;
CITY OF NEW YORK NYC DEPARTMENT OF
FINANCE-PARKING VIOLATIONS BUREAU
PAYMENT AND ADJUDICATION CENTER OF
QUEENS; "JOHN DOE" and "JANE DOE,"
said names being fictitious, it being
the intention of Plaintiff to
designate any and all occupants of the
premises being foreclosed herein,

Motion Seq.: 1

Defendants.

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The following papers numbered 1 to 21 were read on this motion by the plaintiff for an order striking the answer with affirmative defenses of defendants, Abou Conde and Juliette Devonish; granting summary judgment in favor of the plaintiff for the relief demanded in the verified complaint pursuant to CPLR 3212; substituting certain named defendants as necessary party defendants in stead and place of "John Doe " and "Jane Doe"; and pursuant to RPAPL § 1321 appointing a referee to ascertain and compute the amount due to the plaintiff; and the cross-motion of defendant Abou Conde for an order dismissing the plaintiff's complaint pursuant to CPLR 3211(a) (8) on the ground of lack of personal jurisdiction:

Papers
Numbered

Plaintiff's Notice of Motion-Affidavits-Exhibits.....	1 - 7
Conde Cross-Motion.....	8 - 13
Plaintiff's Affirmation in Opposition-Affidavits	14 - 18
Conde Reply Affirmation.....	19 - 21

In this mortgage foreclosure action, plaintiff moves for an order striking the answer with affirmative defenses of defendants Abou Conde and Juliette Devonish; granting summary judgment against defendant Conde and Devonish on the grounds that the answer contains no valid defense and that no triable issue of fact exists; granting a default judgment against the remaining defendants who have not answered; appointing a referee to compute the sums due and owing to plaintiff; and amending the caption.

This foreclosure action pertains to the property located at 94-22 125TH Street, South Richmond Hill, New York, 11419. Based upon the record before this court defendant Abou Conde entered into a mortgage with IndyMac Bank, FSB on December 12, 2002 to secure a loan in the principal amount of \$417,000.00. Defendant also executed and delivered a note to IndyMac Bank, FSB acknowledging the loan, the rate of interest, and the monthly installments. The plaintiff asserts that defendant defaulted on his mortgage when he failed to make his monthly mortgage payments beginning in May 2009. The complaint states that the unpaid principal as of July 2012 is \$411,397.33.

The plaintiff subsequently accelerated the defendant's mortgage and brought an action to foreclose by filing a lis pendens and summons and complaint on November 20, 2009. Counsel asserts that all of the defendants have been duly served with a copy of the summons and verified complaint. Plaintiff also asserts that it is the holder of the note and the mortgage and has complied with RPAPL§1304 by serving a 90 day pre-foreclosure notice and has also served notices in compliance with RPAPL § 1306.

Defendants Abou Conde and Juliette Devonish served a verified answer on January 5, 2010 containing a general denial and asserting five affirmative defenses including lack of standing to sue, improper service of the summons and complaint, partial or full payment, failure to serve notices pursuant to RPAPL 1303 and failure to serve a 90 day Pre-Foreclosure Notice pursuant to RPAPL 1304. Defendants also assert that the plaintiff failed to provide a loan modification program.

In support of the motion for summary judgment, the plaintiff submits the affirmation of counsel, Craig K. Beiderman, Esq., the affidavit of Steve Irwin, Asst. Secretary of OneWest Bank the holder and servicer of the subject loan; the affidavit of Forest McKnight, also Asst. Secretary of OneWest Bank FSB; a copy of the note and mortgage, copies of the affidavits of service on all the defendants; a copy of the pleadings; copies of the assignments of the note and mortgage; a copy of the 90 day notice of intent to foreclose dated June 17, 2009; copy of the RPAPL 1304 notices sent to the defendant with the summons and complaint; and a mortgage loan history.

In his affirmation, plaintiff's counsel asserts that at the time the action was commenced plaintiff was in possession of a note and purchase money mortgage which was assigned to Onewest Bank by virtue of an Assignment of Mortgage from IndyMac Bank, FSB. The mortgage was assigned to the plaintiff on October 19, 2009. The record contains a copy of the mortgage, the assignment of the mortgage and the note with the allonge on the note indorsed in blank. Counsel asserts that the endorsement of the note in blank made the instrument payable to plaintiff as bearer. Defendant Abou Conde is named as the mortgagor and payor on the note. Counsel asserts that the plaintiff was served with a 90 day notice pursuant to RPAPL 1304 and with all notices in compliance with RPAPL 1303. Counsel asserts that the defendant is in default in his monthly installment payments since May 2009. In addition, counsel states that all defendant have been properly served with a copy of the summons and complaint and that only defendants Abou Conde and Juliette Devonish have served a timely answer to the complaint.

In his affidavit in support of the motion, Forest McKnight, Asst. Secretary of Onewest Bank states that On March 19, 2009 OneWest bank acquired the assets of IndyMac Bank through FDIC Conservatorship. At that time plaintiff acquired its interest in the defendant's mortgage. Steve Irwin, also an Assistant Secretary of Onewest Bank, states that defendant defaulted on May 1, 2009 and plaintiff elected to accelerate the loan. He states that a 90 day pre-foreclosure notice was sent to the defendant on June 16, 2008. Counsel also asserts that the defendant's answer contains only a general denial but does not affirmatively assert that the delinquent payments required by the note and mortgage have been made. In addition, counsel contends that defendant's defense of improper service has been waived as the defendant failed to move to dismiss the complaint for lack of personal jurisdiction within 60 days from service of his answer pursuant to CPLR 3211(e).

Counsel states that based upon the evidence submitted, the plaintiff has made a prima facie showing that it is entitled to a judgment of foreclosure and sale. Further counsel asserts that the plaintiff was lawfully served with a summons and complaint and that the court therefore has personal jurisdiction. In addition, the plaintiff asserts, contrary to the defendant's contention, that it had standing to bring the action by presenting sufficient evidence of its possession of the note and mortgage prior to the commencement of the action.

It is well settled that a Plaintiff in a mortgage foreclosure action establishes a prima facie case of entitlement to summary judgment through submission of proof of the existence of the underlying note, mortgage and default in payment after due demand (see Witelson v Jamaica Estates Holding Corp. I, 40 AD3d 284 [1st Dept. 2007]; Marculescu v Ouanez, 27 AD3d 701 [2d Dept. 2006]; US. Bank Trust National Assoc. v Butti, 16 AD3d 408 [2d Dept. 2005]; Layden v Boccio, 253 AD2d 540 [2d Dept.1998]; State Mortgage Agency v Lang, 250 AD2d 595 (2d Dept.1998)). Upon such a showing, the burden shifts to the defendant to produce evidence in admissible form sufficient to raise a material issue of fact requiring a trial.

Here, the plaintiff's submissions are sufficient to establish its entitlement to summary judgment against defendant mortgagor Abou Conde and his mother, Juliette Devonish. The moving papers demonstrate, prima facie, that none of the asserted defenses set forth in the answer of defendant are meritorious and that plaintiff is entitled to summary judgment on its claims against Conde (see EMC Mortg. Corp. v Riverdale Assocs., 291 AD2d 370 [2d Dept. 2002]; State of New York v Lang, 250 AD2d 595 [2d Dept. 1998]). As stated above, the complaint herein sufficiently sets forth a valid cause of action for foreclosure. The affidavit of service of the process server constitutes prima facie evidence that Conde and Devonish were validly served pursuant to CPLR 308(1) and CPLR 308 (2) (see Bank of N.Y. v Sequi, 68 AD3d 908 [2d Dept. 2009]; Cavalry Portfolio Servs., LLC v Reisman, 55 AD3d 524 [2d Dept. 2008]; Jefferson v Netusil, 44 AD3d 621 [2d Dept. 2007]). Moreover, the defense of lack of personal jurisdiction was waived by the defendant's failure to move for dismissal on this ground within 60 days of interposing the answer (see CPLR 3211(e)).

Plaintiff has submitted a copy of the mortgage, note and affidavit establishing Conde's default in payment. The plaintiff demonstrated proper service of the summons and complaint and showed by admissible evidence that it had been properly been

assigned the note and mortgage as of the date of the commencement of the action. Plaintiff also demonstrated when it became the lawful holder of the note by valid assignment of the note. The defendants have failed to submit evidence that the amount of \$2,724.65 was not properly credited. In addition, the plaintiff has submitted sufficient proof to show that notices were served on the defendants in compliance with RPAPL 1303 and 1304. Counsel also asserts that the borrower does not reside in the mortgaged premises and is using it as rental property. With respect to settlement or loan modification, a conference was scheduled in the mortgage foreclosure part for July 19, 2011, however, the defendants failed to appear. Therefore, the moving papers demonstrated, prima facie, that none of the asserted defenses set forth in the answer of defendants are meritorious and that plaintiff is entitled to summary judgment on its claims against Devonshire and Conde (see State of New York v Lang, 250 AD2d 595).

The burden then shifted to defendants to establish the existence of a triable issue of fact (see State Bank of Albany v Fioravanti, 51 NY2d 638, 647 [1980]). Defendant Devonish has not submitted papers in opposition to the motion.

Defendant Conde, however, submits a cross motion in which he asserts that he is the owner of the subject premises and has resided there since 2008. In his affidavit he states that he has a business in Brooklyn but does not live there. Conde states that he was never served with a copy of the summons and complaint. Conde also states that he has not filed an answer in this action. He states that Juliette Devonish who verified the answer is his mother but that she is not his attorney and does not represent him. Conde disaffirms the answer submitted in his name and he is therefore in default for failing to serve a timely answer.

Counsel for Conde states that as Conde has unequivocally stated that he was not personally served by the process server that a traverse hearing is required and that the defendant may not be held in default until there is a determination of personal jurisdiction. However, with respect to personal jurisdiction, the affidavit of a process server constitutes prima facie evidence of proper service. The unsubstantiated denial of receipt of service is insufficient to rebut the presumption of proper service created by a properly-executed affidavit of service or to require a hearing (see Deutsche Bank Natl. Trust Co. v Hussain, 78 AD3d 989 [2d Dept. 2010]; Beneficial Homeowner Serv. Corp. v. Girault, 60 AD3d 984 [2d Dept. 2009]; Hamlet on Olde Oyster Bay Homeowners Assn., Inc. v. Ellner, 57 AD3d 732 [2d Dept. 2008]). Here, Conde's affidavit contains simply conclusory denials, which are insufficient to rebut the presumption of proper service

Therefore, this Court finds that the evidence submitted by the plaintiff including a copy of the note and allonge endorsed in blank and an affidavit stating that plaintiff was in possession of the note and mortgage at the time the action was commenced was sufficient to confer standing to commence the action (see Bank of N.Y. v Silverberg, 86 AD3d 274 [2d Dept. 2011] ["In a mortgage foreclosure 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 [2d Dept. 2009]). "Where a note is transferred, a mortgage securing the debt passes as an incident to the note" (Deutsche Bank Natl. Trust Co. v Spanos, 2013 NY Slip Op 451 [2d Dept. 2013]). Therefore, "either 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" (HSBC Bank USA v Hernandez, 92 AD3d 843 [2d Dept. 2012]). Since the mortgage passes with the debt that is evidenced by the note as an inseparable incident thereto, the plaintiff established its standing to commence the within action (see US Bank Natl. Assn. v Cange, 96 AD3d 825 [2d Dept. 2012]; U.S. Bank, NA v Sharif, 89 AD3d 723 [2d Dept 2011]; Bank of New York v Silverberg, supra).

Accordingly, the affirmative defenses set forth in defendant's answer are insufficient to defeat the motion for summary judgment. Therefore, the motion for summary judgment is granted and the affirmative defenses contained in the defendant's answer are stricken. Plaintiff is entitled to a default judgment against the non-answering defendants. The submissions further reflect that plaintiff is entitled to amend the caption to substitute SHANE MAYERS, JULIETTE MAYERS, RUBY MAYERS, and TROY MAYERS as party-defendants. Plaintiff's further application for the appointment of a referee to compute the amounts due under the subject mortgage is also granted.

Settle Order on Notice.

Dated: March 5, 2013
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.