Bank of N.Y. Mellon Trust Co., N.A. v Murray
2013 NY Slip Op 30527(U)
March 4, 2013
Supreme Court, Suffolk County
Docket Number: 19496-09
Judge: Thomas F. Whelan
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SHORT FORM ORDER

INDEX No. 19496-09

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

EX-PARTE APPLIC. 11/15/12
ADJ. DATES 1/29/13
Mot. Seq. # 003 - MD
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THE BANK OF NEW YORK MELLON TRUST COMPANY, NATIONAL ASSOCIATION f/k/a THE BANK OF NEW YORK TRUST COMPANY NA, as successor to JPMORGAN CHASE BANK, NA, as Trustee for RAMP 2006RS1,

Plaintiff,

-against-

MICHAEL E. MURRAY, HOUSEHOLD FINANCE REALTY CORPORATION OF NEW YORK,

Defendants.

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Upon the following papers numbered 1 to 2 read on this ex-parte application by plaintiff ; Notice of Motion/Order to Show Cause and supporting papers 1 - 2 ; Notice of Cross Motion and supporting papers ____________; Answering Affidavits and supporting papers ______________; Replying Affidavits and supporting papers ___________; Other _________; and after hearing counsel for plaintiff in support of this ex-parte application on January 29, 2013, it is

ORDERED that this ex-parte application (#003) by plaintiff seeking an order pursuant to CPLR 3217 to expunge the recorded referee's deed, rescind sale, vacate orders of reference and final judgment of foreclosure and sale, cancel lis pendens, and to discontinue the action without prejudice is denied.

By note dated August 5, 2005, the defendant borrowed $288,320.00 to purchase the subject premises. A mortgage securing the obligation was recorded with the Suffolk County Clerk on October 14, 2005. On the date of default, July 5, 2008, the principal balance due and owing was $280,891.50. This foreclosure action was commenced by plaintiff, a subsequent holder of the note, by filing on May 20, 2009. The mortgagor-borrower failed to answer the complaint or appear in the action and by order dated November

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18, 2009, the default was fixed as against the mortgagor-borrower with the issuance of an order of reference. Said order noted the subject loan was not one within the purview of CPLR 3408, since the borrower did not reside at the premises. Thereafter, upon due deliberation, on April 22, 2010, a judgment of foreclosure and sale was granted and recorded on April 29, 2010.

A notice of sale was mailed to the mortgagor-borrower on May 14, 2010 and on June 24, 2010. On July 7, 2010, under the direction of the appointed referee, David Fowler, the premises was sold at auction, with plaintiff being the successful bidder. The bid was assigned and on August 24, 2010, a referee's deed was recorded in the Suffolk County Clerk's office. The property was placed on the open market and a buyer emerged. However, the buyer's title underwriter raised an exception to the assignment of the mortgage dated July 9, 2009, which is after the commencement of the action and an exception to the lack of personal service upon the mortgagor-borrower.

Plaintiff now seeks to, among other things, expunge the referee's deed, rescind the foreclosure sale, vacate the judgment of foreclosure and sale, and discontinue the action, claiming that "[p]laintiff's most prudent recourse is to re-commence foreclosure after the Deed is expunged." By order dated January 2, 2013, the matter was set down for a conference on January 29, 2013.

Upon review of the application and the relevant caselaw, this Court declines the invitation to vacate its judgment and the resulting sale on the facts presented herein.

"A judgment of foreclosure and sale entered against a defendant is final as to all questions at issue between the parties, and concludes all matters of defense which were or might have been litigated in the foreclosure action" (***Long Is. Sav. Bank v Mihalios***, 269 AD2d 502, 503, 704 NYS2d 483 [2d Dept 2000]; *see* ***New Horizons Inv., Inc. v Marine Midland Bank***, 248 AD2d 449, 669 NYS2d 666 [2d Dept 1998]; *see also* ***Signature Bank v Epstein***, 95 AD3d 1199, 945 NYS2d 347 [2d Dept 2012] [defendant waived lack of compliance with condition precedent in foreclosure action]).

Here, the application is premised upon a perceived but unsubstantiated claim of lack of standing. However, the defense of standing has been waived by the mortgagor-borrower due to the absence of any duly served answer raising such defense and his failure to timely move for dismissal under CPLR 3211 (*see* ***Countrywide Home Loans Serv., LP v Albert***, 78 AD3d 983, 912 NYS2d 96 [2d Dept 2010]; ***Deutsche Bank Trust Co., Am. v Stathakis,*** 90 AD3d 983, 935 NYS2d 651 [2d Dept 2011]; ***Holubar v Holubar***, 89 AD3d 802, 934 NYS2d 710 [2d Dept 2011]; ***McGee v Dunn***, 75 AD3d 624, 624, 906 NYS2d 74 [2d Dept 2010]; *see also* ***HSBC Bank USA, NA v Schwartz***, 88 AD3d 961, 931 NYS2d 528 [2d Dept 2011]; ***HSBC Bank, USA v Dammond***, 59 AD3d 679, 875 NYS2d 490 [2d Dept 2009]; ***Wells Fargo Bank Minn., NA v Mastropaolo***, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). Additionally, an alleged lack of standing is not a jurisdictional defect (*see* ***US Bank Natl. Ass'n. v Tate***, 102 AD3d 859, __NYS2d__ [2d Dept 2013]; ***Deutsche Bank Natl. Trust Co. v Hunter***, 100 AD3d 810, 954 NYS2d 181 [2d Dept 2012]; ***Wells Fargo Bank Minn., NA v Mastropaolo***, 42 AD3d 239, 244, *supra*).

Moreover, under the principal/incident rule[1] that controls New York caselaw on this issue, 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 vest standing in the plaintiff, since the mortgage passes with the debt that is evidenced by the note as an inseparable incident thereto (*see* ***US Bank Natl.***

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[1] The "principal-incident" rule is discussed at 35 NY Prac., Mortgage Liens in New York § 2:2 (2d ed.) (NYPRAC-MORTLIEN § 2:2).

Assn. v Cange, 96 AD3d 825, 947 NYS2d 522 [2d Dept 2012]; ***GRP Loan, LLC v Taylor***, 95 AD3d 1172, 945 NYS2d 336 [2d Dept 2012]; ***Deutsche Bank Natl. Trust Co. v Rivas***, 95 AD3d 1061, 945 NYS2d 328 [2d Dept 2012]; ***US Bank, Natl. Assn. v Dellarmo***, 94 AD3d 746, 942 NYS2d 122 [2d Dept 2012]; ***US Bank, Natl. Assn. v Sharif***, 89 AD3d 723, 933 NYS2d 293 [2d Dept 2011]; ***Bank of N.Y. v Silverberg***, 86 AD3d 274, 280, 926 NYS2d 532 [2d Dept 2011]; ***U.S. Bank, NA v Collymore***, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; ***Deutsche Bank Natl. Trust Co. v Pietranico***, 33 Misc3d 528, 928 NYS2d 818 [Sup Ct, Suffolk County, 2011], *affd* 102 AD3d 724, 957 NYS2d 868 [2d Dept 2013]; *see also* ***Everhome Mtge. Co. v Janssen***, 100 So.3d 1239 [Fla. 2d DCA 2012]; ***Taylor v Bayview Loan Serv., LLC***, 74 So.3d 1115 [Fla. 2d DCA 2011]).

Additionally, pursuant to RPAPL §1353(2), a mortgage only has to be filed with the clerk after the property has been sold in foreclosure and before a deed is executed to the purchaser.

Here, the record reveals that the original note, a copy of which is attached to the complaint, bears an indorsement on the face thereof in blank, without recourse. Such indorsement is sufficient evidence of an effective transfer of the note to plaintiff, which in turn, effected a concomitant transfer of the mortgage, all of which vests in the plaintiff the requisite holder status that is sufficient for standing purposes (*see* ***US Bank Natl. Assn. v Cange,*** 96 AD3d 825, *supra*; ***Deutsche Bank Natl. Trust Co. v Pietranico***, 33 Misc3d 528, *supra*; ***Mortgage Elec. Registration Sys., Inc. v Coakley***, 41 AD3d 674, 838 NYS2d 622 [2d Dept 2007]). Thus, the attachments to the complaint establish that plaintiff acquired all of the rights of the original lender, Decision One Mortgage Company, LLC, under both the note and mortgage before May 20, 2009, when it filed the underlying action. Therefore, as holder of the original note endorsed in blank, plaintiff has standing to foreclose, irrespective of the fact that the assignment of the mortgage was dated after the commencement of the action.

The other exception raised by the buyer's title underwriter was to the lack of personal service upon the mortgagor-borrower. However, for the same reasons as those set forth concerning the standing issue, the claimed lack of personal service does not necessitate the discontinuance of this action. Initially, the claim of lack of personal service is personal to the mortgagor-borrower and thus may be raised, if at all, only by him (*see* ***Wells Fargo Bank, NA v Bowie***, 89 AD3d 931, 932 NYS2d 702 [2d Dept 2011]). Moreover, it is well established that a process server's sworn affidavit of service constitutes prima facie evidence of proper service (*see* ***ACT Prop., LLC v Ana Garcia***, 102 AD3d 712, 957 NYS2d 884 [2d Dept 2013]; ***Deutsche Bank Natl. Trust Co. v Pietranico***, 102 AD3d 724, *supra*; ***Bank of N.Y. v Espejo***, 92 AD3d 707, 939 NYS2d 105 [2d Dept 2012]; ***Deutsche Bank Natl. Trust Co. v Hussain***, 78 AD3d 989, 912 NYS2d 595 [2d Dept 2010]; ***Wells Fargo Bank, NA v McGloster***, 48 AD3d 457, 849 NYS2d 784 [2d Dept 2008]). Finally, personal delivery pursuant to CPLR 308(1) is not mandatory in a foreclosure action and the possibility that one might seek to vacate the judgment of foreclosure pursuant to CPLR 317 does not render the title unmarketable or constitute reasonable doubt sufficient to affect the marketability of title (*see* ***Argent Mtge. Co., LLC v Leveau***, 46 AD3d 727, 848 NYS2d 691 [2d Dept 2007]; ***Bank of New York v Segui***, 91 AD3d 689, 937 NYS2d 95 [2d Dept 2012]).

As to the application for a discontinuance, while such a request may be appropriate in the early stages of the litigation (*see* ***Wells Fargo Bank v Fisch***, __AD3d__, 2013 WL 440975 [2d Dept 2013]), where the cause has been submitted to the court to determine the facts, a discontinuance in such an advanced litigation posture is not to be freely given (*see* CPLR 3217[b]; *see also* Siegel, New York Practice 5th Ed. § 297). "Once the case is submitted, a discontinuance can take place only upon a stipulation to which the court agrees, i.e., it requires both a stipulation and court order" (Siegel, Practice Commentary, McKinney's Cons Laws of NY, Book 7B, CPLR 3217:12). Here, the matter was previously submitted to the Court to determine the facts, resulting in the judgment of foreclosure and the actual sale of the premises at a public auction. Therefore, upon review of the instant application, the Court disagrees with the requested relief.

Moreover, as noted above, an actual foreclosure sale occurred on July 7, 2010. Pursuant to RPAPL §1353(3), upon the sale, "[t]he conveyance vests in the purchaser the same estate only that would have vested in the mortgagee if the equity of redemption had been foreclosed. Such a conveyance is as valid as if it were executed by the mortgagor and mortgagee, and, except as provided in section 1315 and subdivision 2 of section 1341, is an entire bar against each of them and against each party to the action who was duly summoned and every person claiming from, through or under a party by title accruing after the filing of the notice of the pendency of the action." Caselaw holds that title derived from a foreclosure sale is clear and absolute title that is beyond attack directly or collaterally (*see* ***Dorff v Bornstein***, 277 NY 236 [1938]; ***Dulberg v Ebenhart***, 68 AD2d 323, 417 NYS2d 71 [1st Dept 1979]). Upon the sale, the mortgagor-borrower is divested of his title and interest in the premises (*see* ***Forbes v Aaron***, 81 AD3d 876, 918 NYS2d 118 [2d Dept 2011]; ***Carnavalla v Ferraro***, 281 AD2d 443, 722 NYS2d 47 [2d Dept 2001]; ***Nutt v Cuming***, 155 NY 309, 313 [1898] ["The provision barring others of their interest in, or of their rights of equity of redemption in the mortgaged premises, of necessity relates to the final concluding act, that of a sale of the premises"]).

"As a general rule, a purchaser at a foreclosure sale is entitled to a good, marketable title" (***Jorgensen v Endicott Trust Co.***, 100 AD2d 647, 648, 473 NYS2d 275 [3d Dept 1984]; *see also* ***Rose Dev. Corp. v Einhorn***, 65 AD3d 1115, 886 NYS2d 59 [2d Dept 2009]). At the public auction, "the actual sale is made by the referee, as an officer of the court, and the contract is basically between the purchaser and the court" (***Jorgensen v Endicott Trust Co.***, 100 AD2d at 648, *supra*). To create an unmarketable title, something more than a mere assertion of a right is essential (*see* ***Argent Mtge. Co., LLC v Leveau***, 46 AD3d 727, *supra*).

Here, all that is offered to support the instant application are the exceptions raised by the subsequent purchaser's title underwriter. A policy of title insurance is a contract of indemnification concerning the marketability of title indemnifying the insured against loss or damage as a result of title being rendered unmarketable by reason of defect, lien, or encumbrance. As noted above, a judgment of foreclosure and sale is final as to all matters of defense which were or might have been litigated in the foreclosure action (*see* ***83-17 Broadway Corp. v Debcon Fin. Servs., Inc***., 39 AD3d 583, 835 NYS2d 602 [2d Dept 2007]). Under the circumstances as set forth above, it appears that the referee's deed conveyed marketable title and resulted in "an entire bar" against the defendant's interest (RPAPL §1353[3]).

"It is elementary that a final judgment or order represents a valid and conclusive adjudication of the parties' substantive rights..." (***Da Silva v Masso***, 76 NY2d 436, 440, 560 NYS2d 109 [1990]), and while, for several reasons under CPLR 5015(a), a court is empowered to vacate a default judgment (*see* ***Woodson v Mendon Leasing Corp***., 100 NY2d 62, 760 NYS2d 727 [2003]), that statute is not implicated in the instant application. "Absent the sort of circumstances mentioned in CPLR 5015 ... a determination of a court from which no appeal has been taken ought to remain inviolate" (***Matter of Huie***, 20 NY2d 568, 285 NYS2d 610 [1967]).

Continuity and predictability are important values for a court and should be stringently applied in cases involving contract and property rights (*see generally* ***Eastern Consol. Prop., Inc. v Adelaide Realty Corp***., 95 NY2d 785, 710 NYS2d 840 [2000]). "The stability of contract obligations must not be undermined by judicial sympathy" (***Emigrant Mtge. Co., Inc. v Fisher***, 90 AD3d 823, 935 NYS2d 313 [2d Dept. 2011], *quoting* ***First Natl. Stores v Yellowstone Shopping Ctr***., 21 NY2d 630, 638, 290 NYS2d 721 [1968], *quoting* ***Graf v Hope Bldg. Corp***., 254 NY 1, 4–5, *supra*). While the judiciary has recognized that the remedy of foreclosure may result in the loss of one's home, "[w]hen a default is undisputed, the court (cannot) abrogate the right of foreclosure and sale ... which is incorporated in the contract and on the strength of which (the creditor) lent his money" (***Home Loan Inv. Bank, F.S.B. v Goodness and Mercy***, 2011 WL 1701795 [ED NY 2011], *quoting* ***United States v Victory Hwy. Vil.,***

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Inc., 662 F2d 488, 494 [8th Cir 1981], *quoting* ***United States v Sylacauga Prop., Inc.***, 323 F2d 487, 491 [5th Cir 1963]; *see also* ***United States v Flaherty***, 172 F3d 39, 1999 WL 66153 [2d Cir 1999]).

It has long been understood that secure property rights provide the foundation for a free society. It should be the role of the courts to see that property rights are well defined, well enforced, and readily transferable. News reports of data from RealtyTrac, indicate that in New York, it took 1,089 days on average to foreclose in the fourth-quarter of 2012, the longest of any state in the nation (*see* Bloomberg.com, January 23, 2013). This instant matter has been pending since May 20, 2009, which is over 1,250 days from the date of filing. As noted by the Court of Appeals in ***Reilly v Reid***, 45 NY2d 24, 28, 407 NYS2d 645 (1978), "[c]onsiderations of judicial economy as well as fairness to the parties mandate, at some point, an end to litigation." That time has come.

The application is denied.

DATED: 3/4/13

THOMAS F. WHELAN, J.S.C.