Deutsche Bank Trust Co. Ams. v Thanhauser
2013 NY Slip Op 30565(U)
February 27, 2013
Supreme Court, Suffolk County
Docket Number: 08-15365
Judge: W. Gerard Asher
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SHORT FORM ORDER

INDEX No. 08-15365

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 11-16-12 (#005)
MOTION DATE 11-15-12 (#006)
ADJ. DATE 10-2-12
Mot. Seq. # 005 - MG
006 - XMD

DEUTSCHE BANK TRUST COMPANY AMERICAS, as Trustee for the Registered Holders of Residential Accredit Loans, Inc., Mortgage Asset-Backed Pass-Through Certificates, Series 2006-QA10,

Plaintiff,

- against -

ROGER THANHAUSER, NULA THANHAUSER, NATIONAL CITY BANK and JOHN DOE (Said name being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises.),

Defendants.

ZEICHNER ELLMAN & KRAUSE LLP
Attorney for Plaintiff
575 Lexington Avenue
New York, New York 10022

TWOMEY, LATHAM, SHEA, KELLEY, DUBIN & QUARTARARO, LLP
Attorney for Defendants Thanhauser
33 West Second Street, P.O. Box 9898
Riverhead, New York 11901

FEIN, SUCH & CRANE, LLP
Attorney for Defendant National City Bank
747 Chestnut Ridge Road, Suite 200
Chestnut Ridge, New York 10977-6219

Upon the following papers numbered 1 to 32 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers with Memorandum of Law 1 - 7; Notice of Cross Motion and supporting papers with Memorandum of Law 8 - 17 ; Answering Affidavits and supporting papers with Memorandum of Law 18 - 26 ; Replying Affidavits and supporting papers 27 - 29; Other Sur-Reply 30 - 32 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff for summary judgment on its foreclosure complaint, to amend the caption deleting the "John Doe" defendants, and for the appointment of a referee to compute is granted; and it is further

ORDERED that the cross motion by defendants Roger and Nula Thanhauser for summary judgment dismissing the complaint on the ground that the plaintiff lacks standing and for rescission of the loan based on a violation of the Truth in Lending Act (15 USC § 1601, *et seq*), is denied.

On October 25, 2006, defendants Roger and Nula Thanhauser (collectively the "Thanhausers"), who at the time lived in Philadelphia, Pennsylvania, borrowed $2,000,000 from Homecomings Financial LLC ("Homecomings") to refinance the mortgage on their second home located at 173 Main Street in East Hampton, New York (the "Property"), executing a note secured by a mortgage on the Property. The mortgage, recorded on November 6, 2006 in the Suffolk County Clerk's office, indicates that Mortgage Electronic Registration Systems, Inc. ("MERS"), is the nominee for Homecoming.

The Thanhausers defaulted on the note by failing to make the monthly installments due January 1, 2008 and thereafter. The plaintiff commenced this action in April 2008 to foreclose the mortgage on the Property. The Thanhausers interposed an answer with affirmative defenses, including lack of standing, and asserted a counterclaim for recession alleging violation of the Truth in Lending Act, 15 USC § 1601, *et seq* ("TILA"), based on inaccurate disclosure.

The plaintiff now moves for summary judgment on its complaint against the Thanhausers and defendant National City Bank ("National"), to delete the "John Doe" defendants, and for the appointment of a referee. The Thanhausers cross-move for summary dismissal of the complaint based on their second affirmative defense that the plaintiff lacks standing to bring this action. Although not set forth in their notice of motion, the Thanhausers also seek rescission of the loan based on their sixth affirmative defense and counterclaim alleging TILA violations by Homecoming.

In support of the motion, plaintiff has proffered, *inter alia*, the note and mortgage, an Assignment of Mortgage dated April 15, 2008 from MERS to plaintiff (the "Assignment"), and relies upon the affidavit dated October 13, 2011 of Scott Zeitz ("Zeitz"), a senior litigation analyst with GMAC Mortgage, LLC, the plaintiff's mortgage servicer. Zeitz asserts that he derived the source of his knowledge from the plaintiff's books and records which are in his possession or subject to his control. Zeitz states that the Thanhausers have not made a payment since January 1, 2008, were notified by letter dated March 3, 2008 of their default, and given an opportunity to cure. When they failed to cure the defect, the loan was accelerated, and the instant action commenced. According to Zeitz, as of the date of his affidavit, the Thanhausers owe the principal sum of $1,999,994.98.

It is well settled that a mortgagee establishes a prima facie case entitling it to summary judgment to foreclose a mortgage by presenting the subject mortgage, the unpaid note and due evidence of a default under the terms thereof (*see* CPLR 3212; RPAPL § 1321; ***Baron Assoc., LLC v Garcia Group Enter.***, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; ***Citibank, NA v Van Brunt Prop., LLC***, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]; ***Campaign v Barba***, 23 AD3d 827, 805 NYS2d 86 [2d Dept 2005]; ***Ocwen Federal Bank FSB v Miller***, 18 AD3d 527, 794 NYS2d 650 [2d Dept 2005]). Here, the plaintiff has demonstrated entitlement to summary judgment on its complaint as the moving papers include a copy of the note, mortgage and evidence of the Thanhausers' default in making payments as agreed. It is thus incumbent upon the Thanhausers to submit proof sufficient to raise a genuine question of fact as to a bona fide defense to their default (***Citibank, NA v Van Brunt Prop.,***

LLC, *supra*; ***Grogg Assocs. v South Rd. Assocs.***, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]). They have failed to do so.

The opposition submitted by the Thanhausers is set forth in their cross-moving papers. Of the six affirmative defenses and one counterclaim in their answer, only the second affirmative defense, which challenges the plaintiff's standing, and the sixth affirmative defense and counterclaim for a TILA violation are asserted in opposition to the plaintiff's motion; they have not addressed the other defenses. Instead, the Thanhausers argue that plaintiff's motion should be denied in order to allow them to conduct discovery (CPLR 3212[f]). The Thanhausers also attack the validity of the proof and argue that the motion should be denied because the affidavit by Zeitz does not comply with CPLR 2309 and Real Property Law § 299 and § 299-a.

The plaintiff's failure to comply with CPLR 2309 and the Real Property Law in submitting the Zeitz affidavit, which was notarized outside the state but not accompanied with a certificate of conformity, is not a fatal defect, as such certification may be provided nunc pro tunc (CPLR 2001; ***U.S. Bank Nat. Assn. v Dellarmo***, 94 AD3d 746, 942 NYS2d 122 [2d Dept 2012]). Moreover, in opposition to the cross motion, plaintiff has annexed the requisite certificate to Zeitz's affirmation.

Addressing the Thanhausers' discovery argument, pursuant to CPLR 3212(f), if it appears from affidavits submitted in opposition to the motion for summary judgment "that facts essential to justify opposition may exist but cannot be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just." However, "[a] determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence" (***Wyllie v District Attorney of Count of Kings***, 2 AD3d 714, 770 NYS2d 110 [2d Dept 2003]). Mere hope based on speculation and surmise that discovery will reveal the existence of triable issues of fact is insufficient to forestall the grant of summary judgment (*see id.*). Here, the Thanhausers' have failed to offer any evidentiary basis to suggest that discovery may lead to relevant evidence. Consequently, there is no need to delay the determination of the remainder of the plaintiff's motion by virtue of CPLR 3212(f) (*see* ***Freiman v JM Motor Holdings NR 125-139, LLC***, 82 AD3d 1154, 920 NYS2d 189 [2d Dept 2011]).

Turning to the substantive arguments challenging plaintiff's standing, the Thanhausers maintain that MERS, as the nominee for Homecomings, assigned the mortgage to plaintiff, but was never the holder, in possession of, or the assignee of the underlying note. Therefore, the Thanhausers argue, the Assignment by MERS to the plaintiff was not an assignment of the note, and thus, did not confer standing upon the plaintiff to commence the instant foreclosure action. In opposition, the plaintiff argues it has standing as the note was indorsed and delivered to it prior to commencement of the action.

Standing is not an element of a mortgagee's claim for foreclosure and sale, but when challenged in a pre-answer motion or by an affirmative defense set forth in an answer, standing must be established by the plaintiff to be entitled to any relief requested in the complaint (*see* ***U.S. Bank Nat. Assn. v Dellarmo***, *supra*; ***Bank of New York v Silverberg***, 86 AD3d 280, 926 NYS2d 532 [2d Dept 2011] ; ***Wells Fargo Bank Minnesota v Mastropaolo***, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). "A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it is both the

holder or assignee of the subject mortgage and the holder or assignee of the underlying note, "either by physical delivery or execution of a written assignment prior to the commencement of the action" (***Deutsche Bank Nat. Trust Co. v Rivas***, 95 AD3d 1061, 1061-1062, 945 NYS2d 328 [2d Dept 2012], quoting ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 108, 923 NYS2d 609 [2d Dept 2011]; *see* ***HSBC Bank USA v Hernandez***, 92 AD3d 843, 939 NYS2d 120 [2d Dept 2012]). "An assignment of the mortgage without an assignment of the underlying note or bond is a nullity, and no interest is acquired by it" (***HSBC Bank USA v Hernandez***, *supra* at 843; *see* ***Bank of New York v Silverberg***, *supra*). However, a written assignment of the underlying note or the physical delivery of the note prior to 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* ***U.S. Bank, NA v Sharif***, 89 AD3d 723, 933 NYS2d 293 [2d Dept 2011]; ***Bank of New York v Silverberg***, *supra*; ***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, 753, 890 NYS2d 578 [2d Dept 2009]).

Where a note is payable to order, it is negotiated by delivery with any necessary indorsement (McKinney's Cons Laws of NY, Book 62½, UCC § 3-202[1]). The indorsement must be written on the note "or on a paper so firmly affixed thereto as to become a part thereof" (*id.* at § 3-202[2]).

Here, the note contains two endoresements and two indorsing signatures. Zeitz explains that the note was indorsed by Homecoming to Residential Funding Company, LLC ("Residential Funding"), and thereafter by Residential Funding to the plaintiff. Zeitz asserts that the note, together with the mortgage, was physically delivered by Residential Funding to the plaintiff. Zeitz further asserts that at the time the instant action was commenced, the mortgage and the original note were in the possession of plaintiff's custodian of records, Wells Fargo Bank, N.A. ("Wells Fargo").

Plaintiff has also proffered the affidavit of Steve Naasz ("Naasz"), a vice president of Wells Fargo. Naasz asserts that pursuant to a Custodial Agreement dated November 29, 2009, the plaintiff designated Wells Fargo as its agent and custodian of records. According to Naasz, on November 17, 2006, GMAC, as plaintiff's servicer, delivered to Wells Fargo the collateral files for the loans assigned into the Trust, including the original note and loan documents related to the subject loan. Naasz asserts that since being delivered, the loan documents have remained in Wells Fargo's records vault. Thus, "[a]s holder of the note, with a proper endorsement, plaintiff has standing to commence this action" (***Deutsche Bank Nat. Trust Co. v Pietranico***, 33 Misc 3d 528, 535, 928 NYS2d 818 [Sup Ct, Suffolk County, Whelan, J.], *affd* ___AD3d___, 2013 WL 163762, 2013 Slip Op. 00171; *see* UCC 3-202; 3-204[1]; ***Mortgage Electronic Registration Sys., Inc. v Coakley***, 41 AD3d 674, 838 NYS2d 622 [2d Dept 2007]).

In their reply the Thanhausers now allege that "[i]t is likely that a fraud is being perpetrated upon this Court...." The Thanhausers maintain that the convoluted chain of title of the note and mortgage demonstrates that the plaintiff cannot make out its prima facie case for foreclosure or that it has standing. On a motion for summary judgment, arguments advanced for the first time in reply papers are not considered (*see* ***Clearwater Realty Co. v Hernandez***, 256 AD2d 100, 681 NYS2d 270 [1st Dept 1998]). Thus, the Thanhausers' allegations of fraud will not be entertained.

The Thanhausers also attack the validity of the Assignment. "As a general matter, once a promissory note is tendered and accepted by an assignee, the mortgage passes as an incident to the note" [citations omitted] (***U.S. Bank Nat. Assn. v Cange***, 96 AD3d 825, 826, 947 NYS2d 522 [2d Dept 2012]). Therefore, since the note was indorsed, delivered to, and accepted by the plaintiff, the Assignment is of no consequence.

The Thanhausers also focus on the plaintiff's attorney's affirmation executed by Theodora D. Vasilatos who states the law firm in which she is an associate represents plaintiff GMAC Mortgage, LLC, acting as servicer for the plaintiff. Since GMAC is not a named plaintiff, the Thanhausers question what entity the law firm actually represents. Under settled principles, in light of the traditional status of attorneys as officers of the court, "'when an attorney***takes it upon himself to appear [in court] for a party, the court will not inquire [as to] whether he ha[s] sufficient authority' to do so" (***Siegel v Kentucky Fried Chicken of Long Is., Inc.***, 108 AD2d 218, 221, 488 NYS2d 744 [2d Dept 1985] quoting ***Acker v Ledyard***, 8 NY2d 62 [1853]; *see* ***Buxbaum v Assicurazioni Generali***, 34 NYS2d 480 [Sup Ct, NY County 1942, Cohalan, J.], *affd* 264 App. Div. 855, 36 NYS2d 191 [1st Dept 1942]; *see also* 64 NY Jur 2d, Attorneys at Law § 118). The presumption cannot be overcome by the "mere suggestion" of the attorney for the adversary that such authority is lacking (***Buxbaum v Assicurazioni Generali***, *supra* at 482; *see* 64 NY Jur 2d, Attorneys at Law § 118). Here, the court's records indicate that the current law firm was substituted for another law firm on consent of the plaintiff. Further, the Thanhausers' only offer a mere suggestion, thus, the presumption that counsel represents plaintiff has not been defeated.

The remainder of the plaintiff's motion is decided as follows. First, as noted above, other than the standing issue (second affirmative defense) and the TILA violation set forth in the sixth affirmative defense and related counterclaim for rescission (discussed below), the Thanhausers have not addressed their other five affirmative defenses. Thus, the first, third, fourth and fifth affirmative defenses are treated as abandoned (*see* ***US Bank, N.A. v Flynn***, 27 Misc 3d 802, 897 NYS2d 855 [Sup Ct, Suffolk County 2010, Whelan, J.]).

In the sixth affirmative defense and counterclaim, the Thanhausers seek rescission of the loan and statutory damages alleging that the plaintiff's assignor, Homecoming, violated the Truth-In-Lending Act, 15 USC § 1601, *et seq.* ("TILA") and 12 C.F.R. §226.6, by failing to accurately disclose the finance charges. It is alleged that Homecoming understated the amount of the finance charges, which can be a defense in a mortgage foreclosure action (*see* ***JP Morgan Chase Bank v Tercl***, 24 AD3d 1001, 1103, 808 NYS2d 422 [3d Dept 2005], citing 12 CFR 226.23[h][2][i]). Nevertheless, as plaintiff is an assignee, a civil action under TILA may be maintained against it for a violation which is "apparent on the face of the disclosure statement" (15 USC §1641[e][1]). The Thanhausers have failed to demonstrate such apparency. Further, contrary to the plaintiff's argument, the statute of limitations has not expired on the Thanhausers' right of rescission (*see* 15 USC § 1635[f] ["An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first..."]). The right to rescind under 15 USC § 1635, however, is not applicable to "a residential mortgage transaction" *** or "a transaction which constitutes a refinancing...of the principal balance then due...." (15 USC § 1635[e][1] and [e][2]). Both of these exemptions apply here. Therefore, the Thanhausers have failed to satisfy their burden of establishing a

TILA violation applicable to the plaintiff or their right to rescind the loan (*see* ***US Bank Nat. Assn. v Pia***, 73 AD3d 752, 752, 901 NYS2d 104 [2d Dept 2010]). Hence, the Thanhausers have failed to raise a genuine issue of fact to overcome the plaintiff's prima facie showing of entitlement to summary judgment. Therefore, the plaintiff is awarded summary judgment on its complaint against Roger and Nula Thanhauser.

National is named as a defendant in the action as it purportedly is a holder of a mortgage. The court is without receipt of opposition from National, therefore, no question of fact has been raised by it (*see* ***Flagstar Bank v Bellafiort***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]). Summary judgment is thus also awarded to the plaintiff on its complaint against defendant National City Bank.

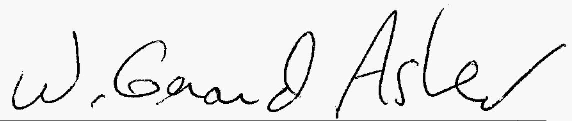
The portion of the instant motion wherein the plaintiff seeks an order dropping "John Doe" as a party defendant is also granted, as is an amendment of the caption to reflect same.

Plaintiff, having been awarded summary judgment against the Thanhausers, is entitled to an order appointing a referee to compute the amounts due under the subject note and mortgage (*see* RPAPL § 1321). The proposed order appointing a referee to compute, as modified by the court, has been signed simultaneously herewith.

Any arguments by the parties not explicitly addressed herein have been reviewed and deemed to be without merit.

Accordingly, the motion is granted in its entirety and the cross motion is denied.

Dated: February 27, 2013



J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**