

Deutsche Bank Natl. Trust Co. v Cook

2013 NY Slip Op 30650(U)

March 25, 2013

Supreme Court, Queens County

Docket Number: 12810/11

Judge: Howard G. Lane

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MEMORANDUM

SUPREME COURT - QUEENS COUNTY
IA PART 6

DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS TRUSTEE OF THE RESIDENTIAL ASSET
SECURITIZATION TRUST 2006,
Plaintiff,

BY: **LANE, J.**

DATED: March 25, 2013

INDEX NO.: 12810/11

-against-

MOTION DATE:
November 20, 2012

GEORGE COOK, JR., et al.,
Defendants.

MOTION CAL. NO.: 5

MOTION SEQUENCE NO.: 1

Plaintiff's motion for an order granting summary judgment in favor of plaintiff pursuant to CPLR 3212 and striking the answer and affirmative defenses by defendants, George Cook, Jr., Roseina Cook, Robert T. Thomas, and Antoinette Thomas, the appointment of a referee to compute the amount due and owing to plaintiff, amendment of the caption herein to substitute Alexandria Thomas in place of "John Doe #1" and delete "John Doe #2-10", and granting a default judgment against the remaining defendants is hereby determined as follows:

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (Andre v. Pomeroy, 32 NY2d 361 [1974]; Kwong On Bank, Ltd. v. Montrose Knitwear Corp., 74 AD2d 768 [2d Dept 1980]; Crowley Milk Co. v. Klein, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (Newin Corp. v. Hartford Acc & Indem. Co., 62 NY2d 916 [1984]). The evidence will be

construed in a light most favorable to the one moved against (Bennicasa v. Garrubo, 141 AD2d 636 [2d Dept 1988]; Weiss v. Gaifield, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]; Pizzi by Pizzi v. Bradley's Div. of Stop & Shop, Inc., 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (Gervasio v. DiNapoli, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (Knepka v. Tallman, 278 AD2d 811 [4th Dept 2000]).

Plaintiff established a prima facie entitlement to foreclose on a mortgage, by demonstrating the existence of the mortgage and note, ownership of the mortgage, and the defendants' default in payment (see, Campaign v. Barbra, 23 AD3d 327 [2d Dept 2005]; First Trust National Association v. Pinter, 264 AD2d 464 [2d Dept 1999]).

In opposition, defendants raise a triable issue of fact as to, inter alia, whether the plaintiff complied with RPAPL 1304, which section states in relevant part:

Notwithstanding any other provision of law with regard to a home loan, at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower, including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower in at least fourteen-point type which shall include the following:

It is well-established law that: "proper service of the RPAPL 1304 notice containing the statutorily-mandated content is a condition precedent to the commencement of the foreclosure action. The plaintiff's failure to show strict compliance requires dismissal" (Aurora Loan Services, LLC v. Wesiblum, 85 AD3d 95 [2d Dept 2011]).

In the instant case, defendants raise a triable issue of fact as to whether or not they were properly served with the requisite notice pursuant to RPAPL via, inter alia, the assertion that the required notices pre-date Mr. Cook's default as alleged in the complaint.

As such, this affirmative defense shall not be dismissed.

Plaintiff established a prima facie case that

defendants' first affirmative defense should be dismissed. The first affirmative defense is that plaintiff failed to properly serve defendants. Plaintiff presented prima facie proof that the defendants were properly served via affidavits of service. A properly executed affidavit of service created a presumption of mailing by plaintiff and of receipt by defendant (see, Kihl v. Pfeffer, 94 NY2d 118 [NY 1999] [stating that a mere denial of receipt is not enough to rebut the presumption]).

As defendants do not present any opposition on this point, this defense shall be dismissed.

Plaintiff established a prima facie case that defendants' second and third affirmative defenses should be dismissed. Defendants' second and third affirmative defenses are that the plaintiff is not the legal holder of the note and mortgage because MERS does not have the authority to assign the mortgage and that the plaintiff did not truthfully allege in the complaint that it is the legal owner and holder of the note and mortgage or that it has the authority to foreclose, and that it did not hold the note and mortgage at the outset of the action.

Plaintiff presents prima facie evidence via the affidavit of Caryn Edwards, an assistant vice president of OneWest Bank FSB, the servicer of the mortgage loan for plaintiff, wherein she avers that OneWest Bank FSB is holder and servicer of the note given by George Cook, Jr. to secure the sum of \$420,000.00 against the mortgaged premises.

Defendants failed to establish a triable issue of fact as it has been established that plaintiff has been in continuous possession of the note and mortgage since before the action was commenced.

As such, this affirmative defense shall be dismissed.

Plaintiff established a prima facie case that defendants' fourth affirmative defense should be dismissed. Defendants' fourth affirmative defense is that the note was made payable to a party other than plaintiff and there is no endorsement of the note to the plaintiff or its assignor. With the blank endorsement and ultimate transfer to plaintiff, plaintiff became the proper holder of the promissory note (MERS, Inc. v. Coakley, 41 AD3d 674 [2d Dept 2007]). Therefore, plaintiff possesses a security interest and may maintain the foreclosure action.

Defendants fail to raise a triable issue of fact on this point, and as such, this defense shall be dismissed.

Plaintiff established a prima facie case that defendants' fifth affirmative defense should be dismissed. Defendants' fifth affirmative defense is that the Complaint lacks a truthful allegation of compliance with RPAPL 1302 and 1304, and that the plaintiff failed to comply with RPAPL 1304.

Plaintiff presents a prima facie case via the affidavit of Caryn Edwards wherein she affirms that the plaintiff mailed a notice to the defendants in compliance with RPAPL 1304 and,

within three days of so mailing, filed a copy with the office of the superintendent of banks in compliance with RPAPL 1302. Ms. Edwards provides the confirmation number for said filing was NYS2238026.

Defendants established a triable issue of fact regarding whether the 90-day notices were properly served pursuant to 1304.

Plaintiff established a prima facie case that defendants' sixth affirmative defense should be dismissed. The sixth affirmative defense is that a defense is founded upon documentary evidence. Plaintiff established a prima facie case that no documentary evidence whatsoever has been supplied by defendants.

Defendants failed to oppose this point, and as such, this affirmative defense shall be dismissed.

Plaintiff established a prima facie case that defendants' seventh affirmative defense should be dismissed. Defendants' seventh affirmative defense is that the subject loan is not part of the plaintiff's trust and the plaintiff has knowledge of the whereabouts of the original note and mortgage. Plaintiff establishes a prima facie case via the affidavit of Caryn Edwards, that the servicer is the holder of the note and mortgage in the instant action.

Plaintiff established a prima facie case that defendants' eighth affirmative defense should be dismissed. The eighth affirmative defense is that the plaintiff failed to join

necessary parties. Plaintiff established a prima facie case that after a title search and review, all necessary parties in accordance with RPAPL 1311 have been named in this action.

Defendants failed to oppose this point, and as such, this affirmative defense shall be dismissed.

Plaintiff established a prima facie case that defendants' ninth affirmative defense should be dismissed. The ninth affirmative defense is failure to state a cause of action upon which relief may be granted. This defense fails to satisfy the requirements of CPLR 3013 in that no facts are pled at all. As such, the defense shall be dismissed.

Plaintiff established a prima facie case that defendants' tenth affirmative defense should be dismissed. The tenth affirmative defense is that plaintiff failed to credit all collateral source payments that plaintiff has allegedly received. Plaintiff established a prima facie case via the affidavit of Caryn Edwards who avers that the account is in default for the payment due on January 1, 2011 with interest due from December 1, 2010. Defendants have not established that payments were submitted by the defendants, accepted by the plaintiff, and applied by the plaintiff.

Defendants failed to oppose this point, and as such, this affirmative defense shall be dismissed.

Plaintiff established a prima facie case that defendants' eleventh affirmative defense should be dismissed.

Defendants' eleventh affirmative defense is that the plaintiff has added illegal charges to the debt owed to the plaintiff as a result of plaintiff's lack of standing, lack of capacity to sue and ultra vires action in foreclosure. Plaintiff has established that the only charges which the plaintiff seeks to include are those called for under the note and mortgage. The plaintiff has proven its standing and capacity to sue via its ownership of the note and mortgage.

Plaintiff established a prima facie case that defendants' twelfth affirmative defense should be dismissed.

Defendants' twelfth affirmative defense is that the plaintiff failed to provide proper notice of default. Plaintiff established that it mailed notices of default to Rosiena Cook and George Cook Jr., the obligors on the note and mortgage, on March 16, 2011.

Plaintiff established a prima facie case that defendants' thirteenth affirmative defense should be dismissed. Defendants' thirteenth affirmative defense is that the plaintiff, its servicer or its agents violated RPAPL sections 1301, 1302, 1303 and 1304. Plaintiff submitted evidence which demonstrates that it has complied with each of the provisions of the Real Property Actions and Proceedings Law cited herein. The plaintiff has established that it mailed Rosiena Cook and George Cook, Jr. 90-day pre-foreclosure notices in compliance with section 1304; the complaint clearly complies with the pleading requirements of

section 1302, and the summons and complaint were served along with notices on colored paper in compliance with 1303. Finally, plaintiff has commenced no other action to collect on the instant note and mortgage, thus establishing compliance with section 1301.

Defendants established a triable issue of fact as to whether 1304 has been complied with, via, inter alia, the assertion that the required notices pre-date Mr. Cook's default as alleged in the complaint.

As such, this affirmative defense shall not be dismissed.

Plaintiff established a prima facie case that defendants' fourteenth affirmative defense should be dismissed. The court finds that plaintiff has established that the fourteenth affirmative defense that the subject mortgage loan was given in violation of New York's Banking Law should be dismissed. This defense fails to satisfy the requirements of CPLR 3013 in that no facts are pled at all.

Defendants failed to oppose this point, and as such, this affirmative defense shall be dismissed.

Plaintiff established a prima facie case that defendants' fifteenth affirmative defense should be dismissed. The court finds that plaintiff has established that the affirmative defense of unclean hands should be dismissed. It is well-established law that, generally, unclean hands is not

recognized as a defense to a foreclosure. "New York law ordinarily permits an unclean hands defense only when plaintiff's reprehensible conduct is "directly related to the subject matter in litigation and the party seeking to invoke the (unclean hands) doctrine was injured by such conduct" (Mallis v. Bankers Trust Co., 615 F2d 68 [2d Cir 1980] [internal citations omitted]). In the instant case, there is no claim of resulting damages by defendants.

Defendants failed to oppose this point, and as such, this affirmative defense shall be dismissed.

Plaintiff established a prima facie case that defendants' sixteenth affirmative defense should be dismissed. The defendants' sixteenth affirmative defense is that plaintiff violated the Truth in Lending Act, 15 U.S.C. 1683(a)(3) by failing to disclose the finance charge, its direct and indirect charges incident to the extension of credit. Plaintiff established a prima facie case that the HUD-1 statement provides all required information regarding the loan.

Defendants failed to oppose this point, and as such, this affirmative defense shall be dismissed.

Plaintiff established a prima facie case that defendants' seventeenth affirmative defense should be dismissed. Defendants' seventeenth affirmative defense is that the originating lender, its investors, brokers, assignees and purported assignees failed to provide material information and

intentionally withheld material information in violation of the Real Estate Settlement Procedures Act, 12 U.S.C. 2601. Plaintiff established a prima facie case that Rosiena Cook and George Cook, Jr. were provided with all necessary information with regard to the loan transaction.

Defendants failed to oppose this point, and as such, this affirmative defense shall be dismissed.

Plaintiff established a prima facie case that defendants' eighteenth affirmative defense should be dismissed. Defendants' eighteenth affirmative defense is that the subject loan was made on the basis of reverse redlining in violation of the Fair Housing Act, 42 U.S.C. 3604, 3605. New York courts have defined "reverse redlining" as "a lending scheme that targets low-income minorities, offering them exorbitantly high interest rate loans in large amounts, even though they do not have the ability to repay, thereby approving a loan designed to fail, and resulting in loss of the home through foreclosure" (Equicredit Corp. of NY v. Turcios, 300 AD2d 344 [2nd Dept 2002]). As such, the burden is on the defendants to establish that they fall into the criteria established by the Second Department for the protection of the law with regard to redlining. Plaintiff established that the defendants have introduced no evidence to support their contention.

Defendants failed to oppose this point, and as such, this affirmative defense shall be dismissed.

Plaintiff established a prima facie case that defendants' nineteenth affirmative defense should be dismissed. Defendant's ninth affirmative defense is that the court lacks subject matter jurisdiction because the plaintiff is not the real party in interest. Plaintiff has established a prima facie case that it has possession of the note and mortgage and as such, that is it indeed the real party in interest.

Defendants failed to oppose this point, and as such, this affirmative defense shall be dismissed.

Plaintiff established a prima facie case that defendants' twentieth affirmative defense should be dismissed. Defendants twentieth affirmative defense is that the note and mortgage are unconscionable. Plaintiff presented a prima facie case that ratification is a defense to unconscionability, in that ratification results when a party entering into an agreement under duress accepts the benefits from it and remains silent. In the instant case, defendants Rosiena and George Cook accepted the benefits of money loaned and did not complaint until five years after the execution of the mortgage.

Defendants failed to oppose this point, and as such, this affirmative defense shall be dismissed.

Plaintiff established a prima facie case that defendants' twenty-first affirmative defense should be dismissed. Defendants fail to state a twenty-first defense, but rather there is no heading stating a twenty-first affirmative defense.

Defendants failed to oppose this point, and as such,

this affirmative defense shall be dismissed.

Plaintiff established a prima facie case that defendants' twenty-second affirmative defense should be dismissed. The court finds that plaintiff has established that the affirmative defense of unclean hands should be dismissed. It is well-established law that, generally, unclean hands is not recognized as a defense to a foreclosure. "New York law ordinarily permits an unclean hands defense only when plaintiff's reprehensible conduct is "directly related to the subject matter in litigation and the party seeking to invoke the (unclean hands) doctrine was injured by such conduct" (Mallis v. Bankers Trust Co., 615 F2d 68 [2d Cir 1980][internal citations omitted]). In the instant case, there is no claim of resulting damages by defendants.

Defendants failed to oppose this point, and as such, this affirmative defense shall be dismissed.

That branch of the motion seeking to amend the caption is granted. Plaintiff demonstrated that the amendment of the caption is warranted and that defendants would not be prejudiced (see, Alaska Seaboard Partners, LP v. Low, 294 AD2d 318 [2d Dept 2002]).

The amended caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS TRUSTEE OF THE RESIDENTIAL ASSET
SECURITIZATION TRUST 2006-A16,

Index No. 12810/11

MORTGAGE PASS-THROUGH CERTIFICATES,
SERIES 2006-P UNDER THE POOLING AND
SERVICING AGREEMENT DATED DECEMBER 1,
2006,

Plaintiff,

-against-

GEORGE COOK JR., ROSIENA COOK, NEW
YORK STATE DEPARTMENT OF TAXATION
AND FINANCE, NEW YORK CITY TRANSIT
ADJUDICATION BUREAU, UNITED STATES
OF AMERICA, NEW YORK CITY CRIMINAL
COURT, STEIN, RISO, MANTEL, LLP,
NEW YORK CITY ENVIRONMENTAL CONTROL
BOARD, NEW YORK CITY DEPARTMENT OF
FINANCE-PARKING VIOLATIONS BUREAU,
ROBERT T. THOMAS, ANTOINETTE THOMAS
and ALEXANDRIA THOMAS,

Defendants.

Settle order.

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HOWARD G. LANE, J.S.C.