

Onewest Bank, FSB v Wright
2013 NY Slip Op 30763(U)
April 8, 2013
Sup Ct, Queens County
Docket Number: 2311/2011
Judge: John Elliott
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M E M O R A N D U M

SUPREME COURT - QUEENS COUNTY
I.A.S. PART 14

ONEWEST BANK, FSB,
Plaintiff,

Index No. 2311/2011

By: **ELLIOT, J.**

-against-

Date: April 8, 2013

Motion Cal. No. 100

PAULINE WRIGHT, et al.,
Defendants.

Motion Seq. No. 1

Motion Date: March 20, 2013

In this action to foreclose a mortgage, plaintiff moves for an order, inter alia:

(1) striking the answer and affirmative defenses of defendant Pauline Wright (defendant);

(2) granting it summary judgment against defendant; (3) amending the caption; and (4) appointing a referee to compute.

On a motion for summary judgment in an action to foreclose a mortgage, plaintiff must present the mortgage, the unpaid note, and evidence of default (*see Baron Assoc., LLC v Garcia Group Enters., Inc.*, 96 AD3d 793 [2012]; *Citibank, N.A. v Van Brunt Props., LLC*, 95 AD3d 1158 [2012]; *Rossrock Fund II, L.P. v Osborne*, 82 AD3d 737 [2011]; *Argent Mtge. Co., LLC v Montesana*, 79 AD3d 1079 [2010]).

On July 25, 2007, defendant duly executed and delivered a note to IndyMac Bank, F.S.B., a federally chartered savings bank, in the amount of \$533,850.00; defendant

also executed a mortgage on the same date to secure the payment of the sum represented by the note. Per the affidavit of Terri Taylor, Assistant Secretary of plaintiff herein, “[o]n March 19, 2009 the original note and mortgage were assigned to Plaintiff by physical delivery of the original note and mortgage to Plaintiff with the intent to transfer all the rights and privileges appertaining thereto to Plaintiff.” It is further noted that: (1) the note had imprinted on it an endorsement in blank signed by the original mortgagee; (2) the physical delivery of the loan documents were memorialized by assignment dated January 24, 2011. Ms. Taylor also stated that defendant failed to comply with the terms and conditions of the note and mortgage by failing to pay the monthly mortgage payment which became due on July 1, 2009, and continuously thereafter. The requisite 30-day notice (per the mortgage document) and 90-day notice (per Real Property Actions and Proceedings Law § 1304) were sent to defendant. Thereafter, plaintiff elected to declare the entire principal and all amounts due and owing. The within action ensued.

Plaintiff has made a prima facie showing of its entitlement to judgment as a matter of law by submission of, inter alia, a copy of the pleadings, the loan documents, and proof of default (*see GRP Loan, LLC v Taylor*, 95 AD3d 1172 [2012]; *Capstone Business Credit, LLC v Imperia Family Realty, LLC*, 70 AD3d 882 [2010]; *EMC Mtge. Corp. v Riverdale Assoc.*, 291 AD2d 370 [2002]). Moreover, plaintiff has further demonstrated that defendant’s affirmative defenses and counterclaims are/have been waived (i.e., jurisdictional defenses pursuant CPLR 3211 [e]), disproved by documentary evidence, or conclusory in

nature (i.e., in violation of CPLR 3013).

Defendant cross moves for an order dismissing the complaint or, in the alternative, referring the matter to the Foreclosure Conference Part pursuant to CPLR 3408. The latter branch of the motion must be denied as moot, as the matter has appeared before, and since been released from, the Foreclosure Settlement Part.

As to the first branch of the motion, it appears that defendant moves to dismiss on two grounds: (1) the affidavit of merit submitted on plaintiff's motion fails to comply with CPLR 2309; (2) plaintiff has not demonstrated standing to commence this action.

Though Ms. Taylor's affidavit is not accompanied by a certificate of conformity per CPLR 2309, contrary to defendant's contentions, Real Property Law § 299-a does not require it in this instance. RPL § 299-a (1) states the following

“An acknowledgment or proof made pursuant to the provisions of section two hundred ninety-nine of this chapter may be taken in the manner prescribed either by the laws of the state of New York or by the laws of the state, District of Columbia, territory, possession, dependency, or other place where the acknowledgment or proof is taken. The acknowledgment or proof, *if taken in the manner prescribed by such state, District of Columbia, territory, possession, dependency, or other place*, must be accompanied by a certificate to the effect that it conforms with such laws [emphasis supplied].”

Under this court's reading of the statute, a certificate of conformity is required only

if the acknowledgment or proof is taken in a manner prescribed by a state other than New York. Because Ms. Taylor's acknowledgment conforms substantially with that of this state (*see* RPL § 309-b), a certificate of conformity is not required under RPL § 299-a (1). Moreover, "[i]t is well settled law that the absence of a certificate of conformity for oaths taken out of this state but in sister states, is a mere irregularity, not a fatal defect, which can be ignored in the absence of a showing of actual prejudice" (*LaSalle Bank, N.A. v Pace*, 31 Misc 3d 627 [2011]). No such showing has been made here.

To the extent that defendant challenges standing, plaintiff has already demonstrated its authority to commence this action. Defendant has not come forth with any evidence to suggest otherwise.¹ It is further noted that any questions regarding standing are, in any event, resolved by plaintiff having provided proof demonstrating that it purchased IndeyMac on March 19, 2009 (the same day the loan documents were physically delivered to plaintiff).

Accordingly, defendant's cross motion is denied. Plaintiff's motion is granted. Plaintiff is awarded summary judgment in its favor against defendant. Defendant's answer, affirmative defenses, and counterclaims are stricken and deemed a notice of appearance. Plaintiff is awarded default judgment against the non-appearing defendants. The caption is amended to delete the respective "Does" therefrom and substitute "Karen Smith" therewith.

1. It is noted that counsel's affirmation is insufficient to rebut plaintiff's prima facie showing; it is further noted that defendant's answer – and more specifically, with respect to the issue of standing – simply sets forth assertions "upon information and belief." Further, the answer is not verified by defendant but, rather, by her attorney and, thus, has no factual basis.

Plaintiff is granted leave to submit an order of reference.

Submit Order on notice.

J.S.C.