

Deutsche Bank Natl. Trust Co. v Maio

2013 NY Slip Op 30858(U)

April 18, 2013

Supreme Court, Suffolk County

Docket Number: 14415-11

Judge: Denise F. Molia

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COPYINDEX
NO.: 14415-11SUPREME COURT - STATE OF NEW YORK
IAS PART 39 - SUFFOLK COUNTYPRESENT: Hon. DENISE F. MOLIA
Justice of the Supreme CourtMOTION DATE: 9-7-12
ADJ. DATE: _____
MOT. SEQ. #: 001 MotD
002 XMD_____
DEUTSCHE BANK NATIONAL TRUST COMPANY, AS
TRUSTEE OF THE RESIDENTIAL ASSET
SECURITIZATION TRUST 2007- A1, MORTGAGE PASS-
THROUGH CERTIFICATES, SERIES 2007-A UNDER THE
POOLING AND SERVICING AGREEMENT DATED
JANUARY 1, 2007.

Plaintiff,

-against-

SUSANNA MAIO; MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS INC AS NOMINEE FOR
MORTGAGEIT, INC.; TONI JEAN THORNTON; KEVIN
SAYER ; "JOHN DOE # 1-5" and "JANE DOE # 1-5" said
names being fictitious, it being the intention of Plaintiff to
designate any and all occupants, tenants, persons or corporations,
if any, having or claiming an interest in or lien upon the premises
being foreclosed herein.Defendants.
_____xRICHARD A. GERBINO, ESQ.
FEIN, SUCH & CRANE, LLP
Attorneys for Plaintiff
Office and P.O. Address
747 Chestnut Ridge Road, Suite 200
Chestnut Ridge, New York 10977-6216VINCENT M. LENTINI, ESQ.
Attorney for Defendant, SUSANNA MAIO
600 old Country Road, Suite 202
Garden City, N.Y. 11530

Upon the following papers numbered 1 to 1 - 21 read on this motion for summary judgment and order of reference; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; Notice of Cross Motion and supporting papers 14 - 18; Affirmation in Opposition and supporting papers 19 - 21; ~~Replying Affidavits and supporting papers~~ _____; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that this motion (001) by plaintiff Deutsche Bank National Trust Company, as Trustee of the Residential Asset Securitization Trust 2007- A1, Mortgage Pass-Through Certificates, Series 2007-A under the Pooling and Servicing Agreement Dated January 1, 2007 (Deutsche Bank) pursuant to CPLR 3212 for summary judgment on its verified complaint against defendant Susanna Maio (Maio), to strike the answer of the defendant Maio, for leave to amend the caption of this action pursuant to CPLR 3025 (b) by substituting the name of Chris Bresel as defendant "John Doe #1"

Deutsche Bank v Maio
 Index No. 11-14415
 Page No. 2

and striking from the caption the names of defendants "John Doe #2" through "John Doe #5" and "Jane Doe #1" through "Jane Doe #5", updating the date of default to March 1, 2009 and unpaid principal balance to \$412,332.57 and for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is hereby determined as follows; and it is hereby

ORDERED that the branch of the motion (001) by plaintiff Deutsche Bank pursuant to CPLR 3212 for summary judgment on its verified complaint against defendant Maio, to strike her answer and, for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is denied without prejudice to resubmit upon proper papers as set forth, including but not limited to a copy of the papers submitted with this application, a copy of this order and evidence of physical delivery of the note or written assignment of the note to plaintiff Deutsche Bank; and it is further

ORDERED that the branch of the motion (001) by plaintiff Deutsche Bank seeking to update the date of default to March 1, 2009 and unpaid principal balance to \$412,332.57 is granted; and it is further

ORDERED that the branch of plaintiff's motion (001) seeking leave to amend the caption of this action pursuant to CPLR 3025 (b), is granted; and it is further

ORDERED that the caption is hereby amended by substituting the name of defendant Chris Bresel as "John Doe #1" and striking from the caption the names of defendants "John Doe #2" through "John Doe #5" and "Jane Doe #1" through "Jane Doe #5"; and it is further

ORDERED that the caption of this action hereinafter appear as follows:

**SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF SUFFOLK**

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE
 OF THE RESIDENTIAL ASSET SECURITIZATION TRUST 2007- A1,
 MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-A
 UNDER THE POOLING AND SERVICING AGREEMENT DATED
 JANUARY 1, 2007,

Plaintiff,

-against-

SUSANNA MAIO; MORTGAGE ELECTRONIC REGISTRATION
 SYSTEMS INC AS NOMINEE FOR MORTGAGEIT, INC.; TONI
 JEAN THORNTON; KEVIN SAYER; CHRIS BRESEL

Defendants.

x

x

ORDERED that the branch of this cross motion (002) by defendant seeking an order and judgment dismissing the complaint pursuant to CPLR 3211 is denied as reflected herein.

ORDERED that the branch of this cross motion (002) by defendant seeking an order cancelling the lis pendens is denied; and it is further

ORDERED that the branch of this cross motion (002) by defendant seeking an award of counsel fees and costs is denied.

This is an action to foreclose a mortgage on premises known as 6 Margaret Avenue, Nesconset, New York. On October 26, 2006, defendant Maio executed a note in favor of MortgageIt, Inc. agreeing to pay the sum of \$461,850.00 at the yearly rate of 6.625 percent. On October 26, 2006, defendant Maio also executed a mortgage in the principal sum of \$461,850.00 on her home, the subject property. The mortgage indicated MortgageIt, Inc. to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of MortgageIt, Inc. as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded with the Suffolk County Clerk's Office on October 5, 2007. On June 8, 2009, the mortgage was transferred by assignment of mortgage from MERS to IndyMac Federal Bank, FSB and recorded on June 24, 2009 with the Suffolk County Clerk's Office. Subsequently, on December 22, 2009 the mortgage was transferred by assignment of mortgage from IndyMac Federal Bank, FSB to OneWest Bank FSB which was recorded on January 27, 2010 with the Suffolk County Clerk's Office. Thereafter, on May 21, 2010 the mortgage was transferred by assignment of mortgage from OneWest Bank FSB to plaintiff Deutsche Bank which was recorded on June 14, 2010 with the Suffolk County Clerk's Office. The subject note contains the following: an indorsement from MortgageIt Inc. to IndyMac Bank FSB and a blank indorsement by Brian Brouillard, first vice president of IndyMac Bank FSB.

IndyMac Federal Bank sent a notice of default dated February 3, 2009 to defendant Maio stating that she had defaulted on her mortgage loan and that the amount past due was \$37,400.70. As a result of defendant's continuing default, plaintiff commenced this foreclosure action on April 28, 2011. In its complaint, plaintiff alleges in pertinent part that defendant, on or about October 26, 2006, borrowed money from plaintiff's predecessor in the amount of \$461,850.00 and that defendant failed to comply with the conditions of the note and mortgage by failing to make the monthly payments commencing on September 1, 2008 and thereafter. On February 3, 2009 plaintiff notified defendant of her default and provided the necessary information to cure the default but, defendant failed to timely cure. Defendant interposed an answer with eight affirmative defenses.

The Court's computerized records indicate that a foreclosure settlement conference was held on May 30, 2012 at which time this matter was referred as an IAS case since a resolution or settlement had not been achieved. Thus, there has been compliance with CPLR 3408 and no further settlement conference is required.

Plaintiff now moves for summary judgment on its complaint contending that defendant Maio failed to comply with the terms of the loan agreement and mortgage by failing to make monthly

payments commencing with the September 1, 2008 payment; that notice of default was sent on February 3, 2009; that the default was not cured and as such, plaintiff elected to accelerate the mortgage; and that there are no meritorious defenses to the instant action. In support of its motion, plaintiff submits among other things: the sworn affidavit of Forrest McKnight, assistant secretary of OneWest, the servicer of the subject loan; the sworn affidavit of Caryn Edwards, assistant secretary of OneWest, the servicer of the subject loan; the affirmation in support for summary judgment of Richard A. Gerbino, Esq.; the summons and complaint; the defendant's answer; the note, mortgage and assignments; notice of default; notices pursuant to RPAPL §§ 1320, 1303 and 1304; affidavits of service for the summons and complaint; an affidavit of service of the instant summary judgment motion upon defendant's counsel; and a proposed order appointing a referee to compute.

Defendant Maio now cross-moves (002) seeking an order and judgment dismissing the complaint pursuant to CPLR 3211 for lack of standing, cancelling the *lis pendens* as of record, and awarding defendant attorney's fees and costs.

Plaintiff in reply opposes defendant's request.

"[I]n an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default" (see *Republic Natl. Bank of N.Y. v O'Kane*, 308 AD2d 482, 482, 764 NYS2d 635 [2d Dept 2003]; *Village Bank v Wild Oaks Holding*, 196 AD2d 812, 601 NYS2d 940 [2d Dept 1993]). Once a plaintiff has made this showing, the burden then shifts to defendant to produce evidentiary proof in admissible form sufficient to require a trial of their defenses (see *Aames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]; *Household Fin. Realty Corp. of New York v Winn*, 19 AD3d 545, 796 NYS2d 533 [2d Dept 2005]).

Where, as here, standing is put into issue by the defendant, the plaintiff is required to prove it has standing in order to be entitled to the relief requested (see *Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680, 954 NYS2d 551 [2d Dept 2011]; *US Bank, NA v Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; *Wells Fargo Bank Minn., NA v Mastropalo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). In a mortgage foreclosure action "[a] plaintiff has standing where it is the holder or assignee of both the subject mortgage and of the underlying note at the time the action is commenced" (*HSBC Bank USA v Hernandez*, 92 AD3d 843, 939 NYS2d 120 [2d Dept 2012]; *US Bank, NA v Collymore*, 68 AD3d at 753; *Countrywide Home Loans, Inc. v Gress*, 68 AD3d 709, 888 NYS2d 914 [2d Dept 2009]). "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 at 844).

In the matter at hand, plaintiff failed to establish, *prima facie*, that it had standing to commence this action. The evidence submitted by the plaintiff in support of its motion did not demonstrate that the note was physically delivered or assigned to it prior to the commencement of the action. The affidavit from OneWest Bank's assistant secretaries, Forrest McKnight and Caryn Edwards, failed to provide any factual details of a physical delivery or assignment of the note and thus, failed to establish possession of the note prior to commencing this action (*HSBC Bank USA v*

Deutsche Bank v Maio
 Index No. 11-14415
 Page No. 5

Hernandez, 92 AD3d 843; *Citimortgage, Inc. v Stosel*, 89 AD3d 887, 934 NYS2d 182 [2d Dept 2011]). Conclusory boiler plate statements such as “[p]laintiff is the holder and is in possession of the original note.”, or “[p]laintiff is the holder and is in possession, or is otherwise entitled to enforce the note...” will not suffice when standing is raised as a defense (*see Deutsche Bank Natl. Trust Co. v Barnett*, 88 AD3d 636, 931 NYS2d 630 [2d Dept 2011]; *Aurora Loan Services, LLC v Weisblum*, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]).

Based upon the foregoing, the motion for summary judgment (001) on plaintiff’s verified complaint against defendant Maio, to strike her answer and defenses, for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is denied without prejudice to resubmit upon proper papers as set forth, including but not limited to a copy of the papers submitted with this application, a copy of this order and evidence of physical delivery of the note or written assignment of the note to plaintiff Deutsche Bank.

Defendant Maio’s cross motion (002) seeking an order and judgment dismissing the complaint pursuant to CPLR 3211, seeking an order cancelling the lis pendens and seeking an award of counsel fees and costs is denied.

The plaintiff shall serve a copy of this order with notice of its entry upon the Calendar Clerk of this Court.

Dated: 4-18-13

Hon. Denise F. Molia

J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION