

Deutsche Bank Natl. Trust Co. v Homan

2013 NY Slip Op 31022(U)

April 26, 2013

Supreme Court, Suffolk County

Docket Number: 35461-11

Judge: Hector D. LaSalle

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SUPREME COURT - STATE OF NEW YORK
IAS PART 48 - SUFFOLK COUNTYPRESENT: Hon. HECTOR D. LASALLE
Justice of the Supreme Court

Deutsche Bank National Trust Company, as
Indenture Trustee, for New Century Home
Equity Loan Trust 2005-2,

Plaintiff,

-against-

Newton Homan; Brett S. Battenberg; Alison
Battenberg a/k/a Allison L. Battenberg;
Centurion Capital Corporation assignee of
Providian National Bank; Rancho Santa Fe
Thrift & Loan Association; Unifund CCR
Partners; Americredit Financial Services Inc.;
Ford Motor Credit Co., and "JOHN DOE", said
names 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.

Motion Date: 9-27-12
Adj. Date: _____
Mot. Seq. # 001 MGSHAPIRO, DICARO & BARAK, LLC
Attorneys for Plaintiff
250 Mile Crossing Blvd.
Suite One
Rochester, N .Y. 14624NEWTON HOMAN
Defendant Pro Se
24 Railroad Avenue
Eastport, N .Y. 11941BRETT S. BATTENBERG
Defendant Pro Se
68 Lincoln Blvd.
East Moriches, N. Y. 11940ALISON BATTENBERG
Defendant Pro Se
68 Lincoln Blvd.
East Moriches, N. Y. 11940

Upon the following papers numbered 1 to 18 read on this motion for summary judgment and an order of reference ; Notice of Motion/ ~~Order to Show Cause~~ and supporting papers 1 - 14 ; ~~Notice of Cross Motion and supporting papers~~ _____; Answering Affidavits and supporting papers 15 - 16 ; Replying Affidavits and supporting papers 17 - 18 ; ~~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 by plaintiff Deutsche Bank National Trust Company, as Indenture Trustee, for New Century Home Equity Loan Trust 2005-2 (Deutsche Bank) pursuant to CPLR 3212 for summary judgment on its complaint, to strike the answer and defenses of the defendants Newton Homan (Homan), Brett S. Battenberg (B. Battenberg) and Alison Battenberg a/k/a

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Allison L. Battenberg (A. Battenberg) and for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, and for 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 striking from the caption the name of defendant "JOHN DOE"; 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 Indenture
 Trustee, for New Century Home Equity Loan Trust 2005-2,**

Plaintiff,

-against-

**Newton Homan; Brett S. Battenberg; Alison Battenberg
 a/k/a Allison L. Battenberg; Centurion Capital Corporation
 assignee of Providian National Bank; Rancho Santa Fe
 Thrift & Loan Association; Unifund CCR Partners;
 Americredit Financial Services Inc.; Ford Motor Credit Co.**

Defendants.

This is an action to foreclose a mortgage on premises known as 68 Lincoln Boulevard, East Moriches, New York. On January 11, 2005, defendant Homan executed an adjustable rate note in favor of US Mortgage Corporation dba Mortgage Concepts (US Mortgage) agreeing to pay \$370,500.00 at the yearly starting rate of 8.700 percent. On January 11, 2005, defendant Homan also executed a first mortgage in the principal sum of \$370,500.00 on his home, the subject property. The mortgage was recorded on January 20, 2005 in the Suffolk County Clerk's Office. Thereafter, the note and mortgage were transferred by assignment of mortgage dated October 13, 2011 from US Mortgage to New Century Mortgage Corporation (New Century). Subsequently, the note and mortgage were transferred by assignment of mortgage dated October 21, 2011 from New Century to plaintiff Deutsche Bank. Both assignments of mortgage were recorded on July 3, 2012 with the Suffolk County Clerk's Office. The note contains an indorsement in blank by Francesca A. Badolato, assistant secretary to US Mortgage and an allonge to the note containing an indorsement in blank by Magda Villanueva, assistant vice president to New Century.

Carrington Mortgage Services, LLC (Carrington) sent a notice of default dated February 9, 2010 to defendant stating that Homan had defaulted on his mortgage loan and that the amount past due was \$62,618.04. As a result of defendant Homan's continuing default, plaintiff commenced this foreclosure action on November 15, 2011. In its complaint, plaintiff alleges in pertinent part that defendant breached his obligations under the terms of the note and mortgage by failing to make monthly payments commencing on June 1, 2008 and thereafter. Defendants Homan, B. Battenberg and A. Battenberg answered by entering a general denial and asserting the affirmative defenses of standing and improper service.

The Court's computerized records indicate that a foreclosure settlement conference was held on March 9, 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 Homan failed to comply with the terms of the loan agreement and mortgage, that defendants' combined answer raised no issues of fact for trial and, that no valid affirmative defenses were raised by the defendants. In support of its motion, plaintiff submits among other things: the sworn affidavit of Betsy Ostermann, vice president of foreclosure to Carrington; the affirmation of Ellis M. Oster, Esq.; the summons and complaint; defendants' answer; the note, mortgage and assignments; a notice of default; notices pursuant to RPAPL §§ 1320, 1303 and 1304; the affirmation of Frank M. Cassara, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); affidavits of service for the summons and complaint; an affidavit of service for the instant summary judgment motion; and a proposed order appointing a referee to compute.

Defendant Homan opposes the summary judgment motion.

"[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]; *see also Argent Mtge. Co., LLC v Mentessana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). 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]; *see also Washington Mut. Bank v Valencia*, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]).

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 Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). In a mortgage foreclosure action "[a] plaintiff has standing where it is

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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 843).

In the matter at hand, plaintiff has establish, *prima facie*, that it had standing to commence this action. The evidence submitted by the plaintiff in support of its motion demonstrated that the note and mortgage were assigned to Deutsche Bank prior to the commencement of the action. In addition, the affidavit from Betsy Ostermann, vice president of foreclosure for Carrington, provided factual details of the assignment of the note and mortgage thus, establishing possession of the note prior to commencing this action. In addition to producing the note, mortgage and assignments of mortgage, plaintiff produced evidence of defendant Homan’s nonpayment. Betsy Ostermann averred that defendant Homan borrowed funds totaling \$370,500.00 from US Mortgage; that plaintiff is the assignee of the subject note and mortgage; that defendant Homan defaulted on the loan by failing to make his monthly payment due on June 1, 2008 and subsequent installments; that Carrington sent a default letter to defendant dated February 9, 2010; and that defendant Homan did not cure the default. Also, plaintiff submitted an affidavit of service upon defendant Homan pursuant to CPLR 308 [2] by delivery to A. Battenberg.

Once plaintiff has made a prima facie showing, it is incumbent on defendant “to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff” (*see Cochran Inv. Co., Inc. v Jackson*, 38 AD3d 704, 834 NYS2d 198, 199 [2d Dept 2007] quoting *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 467, 664 NYS2d 345 [2d Dept 1997]). Here, defendant Homan has failed to demonstrate, through the production of competent and admissible evidence, a viable defense which could raise a triable issue of fact (*see US Bank, Natl. Assoc. v Sharif*, 89 AD3d 723, 933 NYS2d 293 [2d Dept 2011]). “Motions for summary judgment may not be defeated merely by surmise, conjecture or suspicion” (*see Shaw v Time-Life Records*, 38 NY2d 201, 379 NYS2d 390 [1975]).

Accordingly, the plaintiff’s motion for summary judgment on its complaint is granted and the combined answer and defenses of defendants Homan, B. Battenberg and A. Battenberg are hereby stricken.

The Court grants plaintiff’s request to amend the caption of this action pursuant to CPLR 3025 (b) by striking from the caption the name of defendant “JOHN DOE”.

In addition, plaintiff’s request for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is granted (*see Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *Bank of East Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

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The proposed order appointing a referee to compute pursuant to RPAPL §1321 is signed simultaneously herewith as modified by the court.

Plaintiff is directed to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court.

The foregoing constitutes the Order of this Court.

Dated: April 26, 2013
Riverhead, NY


HON. HECTOR D. LASALLE, J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION