

U.S. Bank Natl. Assoc. v Sakizada

2013 NY Slip Op 31029(U)

May 13, 2013

Sup Ct, Queens County

Docket Number: 5833/12

Judge: Bernice Daun Siegal

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Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

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U.S. Bank National Association as Trustee for the
Holders of the RBSGC Mortgage Loan Trust 2005-A,
Mortgage Loan Pass-Through Certificates, Series
2005-A,

Plaintiff,

Index No.: 5833/12
Motion Date: 2/19/13
Motion Cal. No.: 182
Motion Seq. No.: 1

-against-

Yaacov Sakizada,

New York City Department of Housing
Preservation & Development; and

“John Doe #1” to “John Doe # 10,” the last 10 names
being fictitious and unknown to plaintiff, the persons
or parties intended being the persons or parties, if any,
having or claiming an interest or lien upon the
mortgaged premises described in the verified complaint.

Defendants.

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The following papers numbered 1 to 15 read on this motion for an order awarding plaintiff summary judgment against answering defendant, and to strike the answer interposed by Defendant; awarding Plaintiff default judgment against the remaining defendants; appointing a Referee to compute the sum due and owing to Plaintiff; amending the caption.

| | PAPERS NUMBERED |
|------------------------------------------------|--------------------|
| Notice of Motion - Affidavits-Exhibits..... | 1 - 4 |
| Notice of Cross-Motion..... | 5 - 9 |
| Affirmation in opposition to Cross-motion..... | 10 - 12 |
| Reply Affirmation..... | 13 - 15 |

Upon the foregoing papers, it is hereby ordered that both the motion and cross motion are

denied as follows:

Plaintiff, U.S. Bank National Association (“US Bank”) moves for an order awarding plaintiff summary judgment against the answering defendants, Yaacov Sakizada (“Sakizada”) and New York City Department of Housing Preservation and Development, and to strike the answer interposed by the defendant Sakizada. In addition, plaintiff seeks a default judgment against the remaining defendants and appointing a referee to compute the sum due and owing to plaintiff and amending the caption.

Sakizada cross-moves for an order granting summary judgment with an award of legal fees or, in the alternative, an order dismissing plaintiff’s complaint for plaintiff’s failure to comply with defendant’s discovery demands or for an order referring the within action to the residential mortgage foreclosure part.

Facts

On January 24, 2005, Greenpoint Mortgage Funding Inc (“Greenpoint”) advanced to Sakizada \$650,000 and Sakizada executed and delivered to Greenpoint a first note and first mortgage. The mortgage was on the premises located at known as 138-03 78 Drive, Flushing New York 11367 (“premises”).

Plaintiff also contends that at the time of the recording, “the plaintiff enlisted the services of Mortgage Electronic Registration Systems (“MERS”) to record the mortgage as “Nominee” for the lender (Greenpoint), assigning the mortgage to a new lender, US Bank. “

Sakizada failed to make his monthly payments beginning on September 1, 2010. US Bank sent a Notice of Default on October 19, 2010. As the default was not cured, US Bank filed the within

summons and complaint on March 19, 2012.

Discussion

Summary Judgment

To prevail on a motion for summary judgment pursuant to CPLR §3212, the moving party must “make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853 [1985].) Once this showing has been made, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial, or an acceptable excuse for failing to do so. (See *Zuckerman v. City of New York*, 49 N.Y.2d 557, 560 [1980].)

Standing

Sakizada contends that plaintiff has never received a valid assignment of the note and mortgage. Sakizada contends that the MERS “officer” did not have authority to assign a Greenpoint mortgage to the plaintiff. When standing is put into issue by the defendant, the plaintiff must first prove its standing in order to be entitled to relief. (*US. Bank v. Sharif*, 89 A.D.3d 723 [2nd Dept. 2011]; *Wells Fargo Bank Minnesota, Nat. Ass'n v. Mastropaolo*, 42 A.D.3d 239 [2nd Dept 2007].) A plaintiff has standing in a mortgage foreclosure action where it is both (1) the holder or assignee of the subject mortgage and (2) the holder or assignee of the underlying note. (*Aurora Loan Services, LLC v. Weisblum*, 85 A.D.3d 95, 108 [2nd Dept. 2011]; *Wells Fargo Bank v. Marchione*, 69 A.D.3d 204, 208 [2nd 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, and the mortgage passes with the debt as an inseparable incident.” (*Bank of New York v. Silverberg*, 86 A.D.3d 274, 281 [2nd Dept. 2011]; *Aurora Loan Services*, 85 A.D.3d 95, 108.)

Plaintiff failed to demonstrate its prima facie entitlement to judgment as a matter of law because it did not submit sufficient evidence to demonstrate its standing as the lawful holder or assignee of the subject note on the date it commenced this action. US Bank submits an Affidavit from Karen Ann Duddy (“Duddy”), Assistant Vice President from Bank of America as an officer of BAC Home Loans Servicing, the servicing agent for plaintiff. Duddy states, upon a review of the business records, that US Bank is the holder of the note. However, while the Duddy affidavit avers that plaintiff is the holder of the note and that plaintiff was assigned the mortgage prior to the commencement of the within action the affidavit fails to state any factual details concerning when the plaintiff or its agents received physical possession of the note and, thus, does not establish that the plaintiff had physical possession of the note prior to commencing this action. (*Deutsche Bank Nat. Trust Co. v. Haller*, 100 A.D.3d 680 [2nd Dept 2012][holding that summary judgment was not appropriate when the affidavit from the plaintiff’s servicing agent did not give any factual details of a physical delivery of the note]; *Deutsche Bank Nat. Trust Co. v. Barnett*, 88 A.D.3d 636 [2nd Dept 2011]; *U.S. Bank, N.A. v. Adrian Collymore*, 68 A.D.3d 752 [2nd Dept 2009].)

In addition, plaintiff has failed to demonstrate that MERS initially physically possessed the note or had the authority from Greenpoint to assign the note. (*Aurora Loan Services, LLC v. Weisblum*, 85 A.D.3d 95 [2nd Dept 2011].)

Moreover, plaintiff failed to demonstrate that it was the holder of the note and mortgage

by virtue of the endorsement of the note as the endorsement was undated. Therefore, “it is not clear whether the endorsement was effectuated prior to the commencement of this action.”

(*Deutsche Bank Nat. Trust Co. v. Haller*, 100 A.D.3d 680, 683 [2nd Dept 2012].)

Accordingly, plaintiff’s motion for summary judgment against Sakizada and to strike his answer is denied.

Cross-Motion for Summary Judgment

As noted earlier, in order to grant summary judgment, there must be no issues of material and triable facts to be resolved at trial. (See *Suffolk County Dept. of Social Serv. on Behalf of Michael V. v. James M.*, 83 N.Y.2d 178, 182 [1994]; *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Lopez v. Beltre*, 59 AD3d 683, 683 [2d Dept 2009]; *Baker v. D.J. Stapleton, Inc.*, 43 AD3d 839, 839 [2d Dept 2007].)

In the within action, questions of fact exist as to whether the note was physically delivered to the plaintiff prior to the commencement of the action and when the note was endorsed. (*Deutsche Bank Nat. Trust Co. v. Haller*, 100 A.D.3d 680 [2nd Dept 2012].)

Furthermore, Sakizada’s contention that the mortgage assignment should not be recognized as an assignment because the assignment is not accompanied by a certificate of conformity is without merit. Plaintiff’s failure to provide a certificate of conformity is not a fatal defect as the certification may be provided nunc pro tunc. (*U.S. Bank Nat. Ass'n v. Dellarmo*, 94 A.D.3d 746 [2nd Dept 2012].)

Cross-Motion to Dismiss Pursuant to CPLR §3126

Sakizada contends that plaintiff has ignored various demands for proof but only provides

the original Demand for Interrogatories without proof that follow up requests were made and subsequently ignored. Dismissal for failure to comply with discovery is considered a drastic remedy available only upon a clear a showing of wilful and contumacious conduct. (*Rodriguez v. Big Ben Associates I*, 95 A.D.3d 1098 [2nd Dept 2012]; *Orgel v. Stewart Title Ins. Co.*, 91 A.D.3d 922 [2nd Dept 2012].) Dismissal is not appropriate in the within action because the defendant has failed to make a clear showing that the plaintiff has engaged in a willful and contumacious pattern of noncompliance with disclosure requests.¹

Residential Foreclosure Part

Defendant's motion for an Order referring the within action to the Residential Foreclosure Mortgage Foreclosure Part is denied. A foreclosure settlement conference was held on August 16, 2012 and it is undisputed that Sakizada defaulted on that date. Sakizada, in his affidavit, fails to set forth a reasonable excuse for his default.

Conclusion

For the reasons set forth above, plaintiff's motion is denied in its entirety; and defendant's motion is denied in its entirety.

Dated: May 13 , 2013

Bernice D. Siegal, J. S. C.

¹The court notes that Sakizada was only able to establish one discovery request prior to the within application.