

Tribeca Lending Corp. v Valdez
2013 NY Slip Op 31496(U)
July 9, 2013
Supreme Court, Suffolk County
Docket Number: 06-17624
Judge: Peter H. Mayer
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

P R E S E N T :

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 9-18-12 (#003)
MOTION DATE 9-25-12 (#004)
ADJ. DATE 11-20-12
Mot. Seq. # 003 - MD
 # 004 - XMotD

-----X	
TRIBECA LENDING CORPORATION,	SHELDON MAY & ASSOCIATES, P.C.
	Attorney for Plaintiff
Plaintiff,	255 Merrick Road
	Rockville Centre, New York 11570
- against -	
LEON L. VALDEZ and ROSARIO G. VALDEZ,	BRIAN P. NEARY, P.C.
	Attorney for Defendants
Defendants.	50 Elm Street
	Huntington, New York 11743
-----X	

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the plaintiff, dated August 24, 2012, and supporting papers (including Memorandum of Law dated__); (2) Notice of Cross Motion by the defendants, dated September 14, 2012, supporting papers; (3) Affirmation in Opposition by the plaintiff, dated October 26, 2012, and supporting papers; (4) Reply Affirmation by the defendants, dated November 19, 2012, and supporting papers; (5) Other ____ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

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

ORDERED that the motion by the plaintiff Tribeca Lending Corporation for summary judgment striking the answer of defendants Leon L. and Rosario G. Valdez, amending the caption and for an order of reference is denied; and it is further

ORDERED that a representative of the plaintiff Tribeca Lending Corporation is directed to comply with the requirements of CPLR 321(b) and sign and acknowledge a consent to change attorney form; and it is further

ORDERED that the branch of the cross motion by defendants Leon L. and Rosario G. Valdez to amend their answer to assert standing as an affirmative defense is granted, and the answer deemed served in the form annexed to their papers; the cross motion is otherwise denied.

Tribeca Lending v Valdez
Index No. 06-17624
Page No. 2

On July 17, 2006, plaintiff Tribeca Lending Corporation (“Tribeca”) commenced this action to foreclose a mortgage on 2 Watersedge Court in Babylon, New York 11702, executed on February 18, 2005 by defendants Leon L. and Rosario G. Valdez (hereinafter the “Valdezes” when referred to collectively), as husband and wife, to secure a loan for \$611,000. The Valdezes interposed an answer with general denials and several affirmative defenses. After issue was joined, Tribeca moved for summary judgment and an order of reference, which by order dated October 10, 2008, the undersigned denied without prejudice with leave to resubmit upon proper papers (the “Order”). The instant motion is the resubmission.

First, the court will address the threshold issue raised by the defendants regarding the standing of Sheldon May & Associates, P.C. (“Sheldon May”), to bring the instant motion. The defendants argue that Sheldon May was not properly substituted for Solferino and Solferino, LLP, plaintiff’s previous attorney, as the change of attorney form was filed after this motion was made, the form was not filed with the clerk, and the form is not signed by the plaintiff but by Acqura Loan Services (“Acqura”), the servicing agent for Wells Fargo Bank, N.A. as certificate trustee, in trust for registered Holders of VNT Trust Series 2010-2 (“Wells Fargo”), the purported assignee and successor in interest to Tribeca.

Although it appears that the change of counsel was not done precisely as CPLR 321(b) requires, there is no reason to deem this motion a nullity as there has been no showing of prejudice (*see Eifs, Inc. v The Morie Co., Inc.*, 298 AD2d 548, 749 NYS2d 43 [2d Dept 2002]; *see also Bevilacqua v Bloomberg, L.P.*, 70 AD3d 411, 895 NYS2d 347 [1st Dept 2010]). The consent to change attorney form was filed with the Calendar Part in Suffolk County Supreme Court. Once the information on the form was entered into the Court’s database, as is the policy of the Calendar Part, the form was forwarded to the County Clerk’s office. Nonetheless, a representative of Tribeca is directed to comply with the requirements of CPLR 321(b) and sign and acknowledge a consent to change attorney form (*see Eifs, Inc. v The Morie Co., Inc.*, *supra*).

As directed by the Order, the mortgage loan being foreclosed has been identified as a subprime loan and foreclosure settlement conferences have been held as required by CPLR 3408. Additionally, as directed by the Order, proof of service of the summons and complaint pursuant to CPLR 308(1) and 308(2) has been provided by submission of the affidavits of service. Evidentiary proof of compliance with the default notice provisions set forth in the mortgage has been provided by submission of the default letters and the affidavit of service of Tribeca’s previous attorney. The foreclosure notices in RPAPL § 1303 (L 2008, c 472, § 1, eff. September 1, 2008), RPAPL § 1304 (L 2008, c 472, § 2, eff. September 1, 2008), and RPAPL § 1320 (L 2007, c 458, § 1, eff. August 1, 2007), are not required as the instant action was commenced prior to the effective date of these statutes.

However, with regard to the directive to submit evidentiary proof of any assignment(s) to establish the plaintiff’s ownership of the note and mortgage, the affidavits proffered contain conflicting information, prompting the defendants to cross-move for leave to amend their answer under CPLR 3025(d) to assert lack of standing as an affirmative defense, and upon assertion of such defense, for dismissal of the complaint insofar as asserted against them. “[A]n argument that a plaintiff lacks standing, if not asserted in the defendants’ answer or in a pre-answer motion to dismiss the complaint, is waived pursuant to CPLR 3211(e)” (*U.S. Bank, N.A. v Sharif*, 89 AD3d 723, 724, 933 NYS2d 293 [2d

Tribeca Lending v Valdez
 Index No. 06-17624
 Page No. 3

Dept 2011], quoting *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 242, 837 NYS2d 247 [2d Dept 2007]). Nevertheless, a waived defense can be interposed in an answer amended by leave of court pursuant to CPLR 3025(b) as long as the amendment does not cause the other party prejudice or surprise resulting from the delay, and is not palpably insufficient or patently devoid of merit (*U.S. Bank, N.A. v Sharif*, *supra*; *Aurora Loan Servs., LLC v Thomas*, 80 AD3d 986, 897 NYS2d 140 [2d Dept 2010]).

In support of their cross motion to amend their answer, the defendants point out that conflicting affidavits have been submitted in support of the plaintiff's motion for summary judgment. Doug Battin, a Senior Vice President for Acqura, the servicing agent for Wells Fargo, asserts in his August 13, 2012 affidavit in support of the motion that he reviewed the business records for the subject property. Battin provides a convoluted recitation of the assignment and ownership of the note and mortgage, which verbatim, reads at paragraph 2 as follows:

A. Plaintiff s [sic] ownership of the note and mortgage at the time the action was commenced. The business records of Acqura Loan Services reflect the following: Leon L. Valdez and Rosario G. Valdez delivered to Tribeca Lending Corporation a note dated February 18, 2005. Plaintiff was the holder and owner of the subject note and mortgage; the Note was negotiated to and the mortgage was assigned to the assignee and successor in interest to Plaintiff on July 20, 2010. The servicing agent for the assignee and successor in interest to the plaintiff is in physical possession of the original note and affixed allonge. (*See* Exhibit "A."). As security for the note, dated February 18, 2005 which was recorded in the Clerk s [sic] Office where the property is located on March 30, 2005, in Liber/Reel/Book/Instrument 21011 of Mortgages at page 965. Said mortgage was then assigned from Tribeca Lending Corporation to Wells Fargo Bank, N.A., as certificate trustee (not in its individual capacity but solely as certificate trustee), in trust for registered Holder of VNT Trust Series 2010-2, and the Assignment of Mortgage was dated March 2, 2005 and same was sent for recording on June 12, 2012. Since the filing of the notice of pendency, summons and verified complaint, the note and mortgage have been further assigned/transferred as stated above, therefore relief is requested that the caption be amended by removing the name of Tribeca Lending Corporation and by amending the caption to add Wells Fargo, N.A., as certificate trustee (not in its individual capacity but solely as certificate trustee), in trust for registered Holders of VNT Trust Series 2010-2 instead of an in place of the Plaintiff as listed in the caption. *See* Exhibits A & B.¹

Based on the court's deciphering of this convoluted affidavit, on March 2, 2005, Tribeca assigned the mortgage together with the note to Wells Fargo and recorded it on June 12, 2012. According to what the undersigned can glean from Battin's affidavit, the note and mortgage which were assigned to Wells Fargo in March 2005, were again assigned and negotiated to Wells Fargo on July 20,

¹An almost identical recitation of the ownership of the note and mortgage appears in the affirmation in support of the motion by Ted Eric May, Esq.

Tribeca Lending v Valdez
 Index No. 06-17624
 Page No. 4

2010. Battin does not state when, or if the July 20, 2010 transaction was recorded. In the complaint, however, it is alleged that at the time the action was commenced in July 2006, Tribeca was the holder of the note and mortgage, when according to Battin's review of Acqura's records as of March 2005, the note and mortgage had already been assigned to Wells Fargo. It is also noted that the allonge to which Battin refers, is not annexed to the moving papers.

Further confusing matters, Amber Paxton, a Vice President at Acqura asserts in her October 26, 2012 supplemental affidavit in support of the motion annexed to the affirmation in opposition to the cross motion, that she reviewed the business records for the subject property. The assertions in Paxton's affidavit as to the assignment and possession of the mortgage and note differ from that of Battin's. Paragraph 6 of Paxton's affidavit reads as follows:

The mortgage was assigned by Franklin Credit Management Corporation on behalf of its wholly owned subsidiary Tribeca Lending Corporation to Deutsche Bank National Trust Company as Trustee for Tribeca Lending Trust Series I, and the Assignment of Mortgage was dated February 12, 2009 and recorded in the Clerk's Office where the property is located on March 9, 2009 in Liber/Reel/Book/Instrument/CRFN 21795 of Mortgages. *See Exhibit "A"*. Said mortgage was further assigned from Deutsche Bank National Trust Company as Trustee for Tribeca Lending Trust Series I to Wells Fargo Bank, N.A. as certificate trustee (not in its individual capacity but solely as certificate trustee), in trust for registered holders of VNT Trust Series 2010-2, and the Assignment of Mortgage was dated October 19, 2012; and sent for recording in the Clerk's Office where the property is located on October 24, 2012. *See Exhibit "B"*.

Based on Paxton's version of the assignments and possession of the subject documents, on February 12, 2009, Franklin Credit Management Corporation on behalf of Tribeca assigned the mortgage to Deutsche Bank National Trust Company as trustee. However, as already discussed, according to Battin, by February 12, 2009, the note and mortgage had already been assigned to Wells Fargo.

"In a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced" (*U.S. Bank, N.A. v Madero*, 80 AD3d 751, 915 NYS2d 612 [2d Dept 2011]; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 753, 890 NYS2d 578 [2d Dept 2009]; *see Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674 [2007]). Based on the conflicting affidavits submitted in support of the motion, an issue of fact exists as to whether Tribeca assigned the note and mortgage prior to the commencement of the instant action, and thus, it has failed to establish prima facie that it had standing. Therefore, Tribeca is not entitled to summary judgment on the complaint or an order of reference (*see U.S. Bank, N.A. v Madero, supra*; *see also generally Weber, Inc. v Capra*, 212 AD2d 594, 696, 622 NYS2d 585 [2d Dept 1995] [summary judgment "should not be granted where triable issues of fact are raised that cannot be resolved on conflicting affidavits"]). Therefore, the motion is denied.

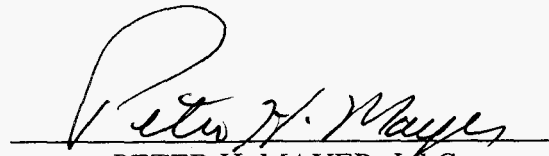
Tribeca Lending v Valdez
Index No. 06-17624
Page No. 5

Furthermore, based on the conflicting affidavits, the defendants have adequately demonstrated that they have a potential viable defense based upon lack of standing. Since the affidavits upon which the Valdezes rely were not made available to them prior to the time plaintiff made the instant motion, there is no showing of prejudice or surprise resulting directly from the delay in seeking leave (*see Aurora Loan Servs., LLC v Thomas, supra*). However, as an issue of fact exists with regard to Tribeca's standing, the branch of the defendants' cross motion to dismiss the complaint based on lack of standing, is denied.

Accordingly, the motion for summary judgment and for an order of reference is denied and the cross motion is granted only to the extent that the Valdezes are granted leave to amend their complaint to assert standing as an affirmative defense, and the answer is deemed served in the form annexed to their papers.

Dated: _____

7/9/13


PETER H. MAYER, J.S.C.