

US Bank Natl. Assoc. v Mosquera

2013 NY Slip Op 31720(U)

July 29, 2013

Sup Ct, Queens County

Docket Number: 31177/09

Judge: Allan B. Weiss

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M E M O R A N D U M

SUPREME COURT QUEENS COUNTY
CIVIL TERM PART 2

US BANK NATIONAL ASSOCIATION, as Trustee
for the STRUCTURED ASSET INVESTMENT LOAN
TRUST, 2005-9

Plaintiff,

-against-

JOHN MOSQUERA, ANNABELLE MOSQUERA,
et al.,

Defendants.

ALLAN B. WEISS

Index No.: 31177/09

Motion Date: 5/16/13

Motion Seq. No.: 3

On November 19, 2009 plaintiff commenced this to foreclose a mortgage, dated July 25, 2005, encumbering the real property known as 75-23 60th Place, Ridgewood, N.Y, executed, acknowledged and delivered by defendants, John Mosquera and Annabelle Mosquera, (Mosqueras) to New Century Mortgage Corporation (New Century), to secure repayment of a note, evidencing a loan in the principal amount of \$352,000.00, with interest. Plaintiff alleges that the defendants defaulted under the terms of the mortgage and note by failing to make the monthly installment payment due and owing in accordance with the note and mortgage beginning on November 1, 2008, and continuing to the present, and that as a consequence, it elected to accelerate the entire mortgage debt.

The Mosqueras appeared by service of their answer, dated September 10, 2007, containing thirteen affirmative defenses, various counterclaims and setoffs.

The plaintiff now moves for an Order dismissing the defendants' MOSQUERAS' affirmative defenses, counterclaims and

set-offs and granting leave to treat the defendats' answer as a limited appearance, granting summary judgment in its favor, appointing a referee to ascertain and compute the amount due to the plaintiff and amending the caption to, inter alia, reflect the correct name of the plaintiff.

Defendant, JOHN MOSQUERA¹, opposes the plaintiff's motion and cross-moves to dismiss the complaint together with costs and fees pursuant to CPLR 3211(a)(3), asserting that plaintiff lacks standing, or, in the alternative, to refer the action back to the Foreclosure Settlement Part and to compel plaintiff to produce the original note and mortgage.

The plaintiff in an action to foreclose a mortgage establishes, prima facie, its entitlement to summary judgment, by production of the note and the mortgage and evidence of the defendant's default in payment (see HSBC Bank USA v. Hernandez, 92 AD3d 843, 843 [2012]; Capstone Bus. Credit, LLC v. Imperia Family Realty, LLC, 70 AD3d 882 [2010]; U.S. Bank Natl. Assn. TR U/S 6/01/98 [Home Equity Loan Trust 1998-2] v. Alvarez, 49 AD3d 711, 712 [2008]).

When the defendant in a foreclosure action raises the defense of lack of standing in his answer, the plaintiff must establish standing in order to succeed on a motion for summary judgment (see Deutsche Bank Natl. Trust Co v. Haller, 100 AD3d 680, 682 [2012]; GRP Loan, LLC v. Taylor, 95 AD3d 1172, 1173 [2012]; US Bank N.A. v. Collymore, 68 AD3d 752, 753 [2009]).

¹Although JOHN MOSQUERA and ANNABELLE MOSQUERA interposed a joint answer, the motion specifically states it is made by JOHN MOSQUERA.

A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it is both the holder or assignee of the note and the holder or assignee of the subject mortgage (see Deutsche Bank National Trust Company v. Rivas, 95 AD3d 1061 [2012]; Bank of New York v. Silverberg, 86 AD3d 274, 279 [2011]; Aurora Loan Servs., LLC v. Weisblum, 85 AD3d 95, 108 [2011]) either by a written assignment of the note or physical delivery of the note prior to the commencement of the action is sufficient (see US Bank N.A. v. Cange, 96 AD3d 825, 947 [2012]; Aurora Loan Servs., LLC v. Weisblum, supra; U.S. Bank, N.A. v. Adrian Collymore, supra 754; Mortgage Elec. Registration Sys., Inc. v. Coakley, 41 AD3d 674 [2007]).

The plaintiff in this case has established its entitlement to summary judgment, including that it has standing, by submitting a copy of the Note with a special endorsement (UCC § 3-204[1]) from New Century to the plaintiff, US Bank National Association, as Trustee, and the written assignment of both the mortgage and note, acknowledged on October 10, 2009, demonstrating that when the action was commenced on November 19, 2009, the plaintiff owned both the note and the mortgage (see Mortgage Electronic Registration Systems, Inc. v. Coakley, supra; Federal Natl. Mtge. Assn. v. Youkelsone, 303 AD2d 546 [2003]). Plaintiff also submitted the affidavit of Kimberly Mueggenberg, Vice President of Loan Documentation for Wells Fargo Bank, N.A. d/b/a America's Servicing Company, the servicer for the instant loan pursuant to the terms of the Trust Agreement, asserting that she has actual knowledge of the facts in this case, including the

defendants' default, based upon her review of Wells Fargo's business records and files kept and maintained by Wells Fargo in the ordinary course of business, and that based upon those records, the note was delivered to the plaintiff prior to the commencement of this action, in accordance with the Trust Agreement, dated October 1, 2005, of which relevant portions were also submitted, (e.g. Article II, Section 2.01) and attesting to the defendants' default thereon.

The plaintiff has also submitted sufficient evidence to demonstrate the lack of merit of the defendants' remaining affirmative defenses, counterclaims and set-offs (see State Bank of Albany v. Fioravanti, 51 NY2d 638 [1980]; Jo-Ann Homes v Dworetz, 25 NY2d 112 [1969]; Signature Bank v. Epstein, 95 AD3d 1199 [2012]).

Thus, the burden shifts to the defendants 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 Mahopac Natl. Bank v. Baisley, 244 AD2d 466, 467 [1997]); Nassau Trust Co. v. Montrose Concrete Prods. Corp., 56 NY2d 175, 183 [1982]).

In support of his cross-motion to dismiss, and in opposition to the plaintiff's detailed evidentiary showing, defendant submitted only his attorney's conclusory affirmation and unsupported by any facts applicable to this case, is insufficient to raise a triable issue of fact. Contrary to defense counsel's claim, the Mueggenberg affidavit contains

sufficient factual allegations regarding the delivery of the note to establish that the plaintiff is, and was prior to the commencement of this action, the "holder" of the note and has standing to bring this action (see CWCapital Asset Mgt., LLC v. Great Neck, 99 AD3d 850 [2012]; Wells Fargo Bank, NA v. Edwards, 95 AD3d 692 [2012]) and (see Deutsche Bank National Trust Company, v. Whalen, 107 AD3d 931 [2013]).

Insofar as defendant contends that plaintiff should be estopped from alleging ownership of the note and mortgage inasmuch as the manner of conveyance of the subject note and mortgage is in violation of the terms of the Pooling and Service Agreement (the documents plaintiff submitted and denominated the Trust Agreement) this too is without merit. The defendants who are neither parties to nor third-party beneficiary of the Trust Agreement do not have standing to challenge the Trust Agreement (see P.A. Building Co. v. City of New York, 217 AD2d 417 [1995], lv. denied 86 NY2d 708 [1995]; see also Aymes v. Gateway Demolition Inc., 30 AD3d 196,196 [2006]; 767 Third Ave. LLC v. Orix Capital Markets, LLC, 26 AD3d 216, 218 [2006]; Rajamin v. Deutsche Bank Nat. Trust Co., 2013 WL 1285160 at *3 [S.D.N.Y., 2013]).

With respect to the defendants' counterclaims and set offs, they have failed to submit any evidence in support of these claims and affirmative defenses which merely plead conclusions of law without any supporting facts are insufficient to raise a triable issue of fact (see Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]; Fogarty v. Jordan, 57 AD3d 723 [2008]; Wolf v.

Citibank, N.A., 34 AD3d 574 [2006]).

Nor is defendant entitled to have this action referred back to the Foreclosure Settlement Conference Part for the purpose of plaintiff presenting the Note since plaintiff properly provided a copy in accordance with CPLR 4518(a).

Accordingly, the defendant's, JOHN MOSQUERA's cross-motion to dismiss the complaint based upon the plaintiff's lack of standing is denied.

The plaintiff's motion for, inter alia, summary judgment is granted in all respects.

Settle Order.

Dated: July 29, 2013
D# 48

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J. S. C.