

One W. Bank, FSB v Mohring

2013 NY Slip Op 31956(U)

July 26, 2013

Sup Ct, Suffolk County

Docket Number: 09-36804

Judge: Joseph C. Pastorella

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

P R E S E N T :

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 9-27-12
ADJ. DATE 2-13-13
Mot. Seq. # 001 - MG
002 - XMD

-----X		
ONE WEST BANK, FSB,	:	STEIN, WEINER & ROTH, L.L.P.
	:	Attorney for Plaintiff
Plaintiff,	:	One Old Country Road, Suite 113
	:	Carle Place, New York 11514
- against -	:	
	:	GATHMAN & BENNETT, L.L.P.
PAUL J. MOHRING, MEGAN CURRY,	:	Attorney for Defendants
MORTGAGE ELECTRONIC REGISTRATION	:	191 New York Avenue, Suite 202
SYSTEMS, INC., as nominee for AEGIS	:	Huntington, New York 11743
FUNDING d/b/a AEGIS HOME EQUITY,	:	
SHARYN JESBERGER,	:	
	:	
“JOHN DOE”, “RICHARD DOE”, “JANE DOE”,	:	
“CORA DOE”, “DICK MOE” and RUBY POE”,	:	
the six defendants last named in quotation marks	:	
being intended to designate tenants or occupants in	:	
possession of the herein described premises or	:	
portions thereof, if any there be, said names being	:	
fictitious, their true name being unknown to	:	
plaintiff,	:	
	:	
Defendants.	:	
-----X		

Upon the following papers numbered 1 to 17 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 6; Notice of Cross Motion and supporting papers 8 - 11; Answering Affidavits and supporting papers 12 - 15; Replying Affidavits and supporting papers 16 - 17; Other Pltf's Memo of Law - 7; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff for summary judgment on the complaint, striking the answer of the defendants, amending the caption, fixing the default of the non-appearing, non-answering defendants and appointing a referee to compute the sums due and owing in this mortgage foreclosure action is granted; and it is further

ORDERED that the cross motion by defendant Peter Robson for summary judgment dismissing the complaint on the ground that the plaintiff lacks standing is denied.

Defendants Paul J. Mohring and Megan Curry, husband and wife, (hereinafter the “mortgagor defendants” when referred to collectively), executed a purchase money mortgage dated July 13, 2007 on the property known as 15 Dena Drive in Blue Point, New York, in favor of non-party IndyMac Bank, F.S.B. (“IndyMac”). The mortgage was security for the payment of the \$313,600 note executed on the same date by Paul J. Mohring (“Mohring”). The mortgage names Mortgage Electronic Registration Systems, Inc. (“MERS”) as IndyMac’s nominee and the mortgagee of record for purposes of recording, and confers upon it the right take any action required of IndyMac. The mortgage was recorded by MERS, as nominee, on August 8, 2007 in the Suffolk County Clerk’s Office. MERS assigned the mortgage to the plaintiff by an assignment of mortgage dated September 4, 2009.

Mohring defaulted on the note and mortgage by failing to make the monthly installments due May 1, 2009 and thereafter. On June 16, 2009, a 30-day default notice was sent to Mohring; upon his failure to cure the default, plaintiff elected to accelerate the total amount due by commencing the instant action in September 2009 to foreclose the mortgage on the property. All of the defendants were served with the summons and complaint. The mortgagor defendants interposed an answer with general denials raising as affirmative defenses that the complaint fails to state a cause of action (first affirmative defense), and that the plaintiff lacks standing to prosecute the action (second affirmative defense). The other defendants having failed to answer or otherwise appear in the action, were subsequently served with the additional notices pursuant to CPLR 3215, and remain in default.

The plaintiff now moves for summary judgment on its complaint, to strike the mortgagor defendants’ answer and for an order of reference pursuant to RPAPL 1321 fixing the defaults of the non-answering defendants and for the appointment of a referee to compute. The mortgagor defendants cross-move for summary dismissal of the complaint based on their second affirmative defense that the plaintiff lacks standing to prosecution this action.

The Court’s computerized records indicate that several foreclosure settlement conferences were held, thus, there has been compliance with CPLR 3408. There has also been compliance with the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11), as before the court is the affirmation of Gerald Roth, Esq. Additionally, the summonses served upon the mortgagor defendants contain the language required by RPAPL § 1320, and the affidavits of service proffered indicate that the mortgagor defendants were served with the notice pursuant to RPAPL § 1303. The affidavit of Sheena M. Gordon, an assistant secretary of the plaintiff, asserts that the 90-day foreclosure notice required by RPAPL § 1304 was complied with on May 23, 2009. Therefore, the foreclosure notice requirements have been satisfied.

“Entitlement to a judgment of foreclosure may be established, as a matter of law, where a mortgagee produces both the mortgage and unpaid note, together with evidence of the mortgagor’s default, thereby shifting the burden to the mortgagor to demonstrate, through both competent and admissible evidence, any defense which could raise a question of fact” (*Zanfini v Chandler*, 79 AD3d 1031, 1031-1032 [2nd Dept 2010], quoting *HSBC Bank USA v Merrill*, 37AD3d 899, 900 [2nd Dept

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2010]; see U.S. Bank Natl. Assn. v Denaro, 98 AD3d 964 [2nd Dept 2012]; Citibank, N.A. v. Van Brunt Prop., LLC, 95 AD3d 1158 [2nd Dept 2012]). Where, as here, an answer includes the defense of standing or lack of capacity to sue, the plaintiff must further establish its standing to succeed on a motion for summary judgment and to prevail on the relief requested in the complaint (see U.S. Bank Nat. Assn. v Dellarmo, 94 AD3d 746 [2nd Dept 2012]; Bank of New York v Silverberg, 86 AD3d 280, 926 NYS2d 532 [2nd Dept 2011]; U.S. Bank, N.A. v Collymore, 68 AD3d 752 [2nd Dept 2009]; Wells Fargo Bank Minnesota v Mastropaolo, 42 AD3d 239, 837 NYS2d 247 [2nd Dept 2007]).

The plaintiff has established its entitlement to summary judgment against the mortgagor defendants by including copies of the mortgage and the unpaid note, together with due evidence of their defaults in payment under the terms thereof (see CPLR 3212; RPAPL § 1321; Neighborhood Hous. Serv. of New York City v Hawkins, 97 AD3d 554 [2nd Dept 2012]; Baron Assoc., LLC v Garcia Group Enter., 96 AD3d 793 [2nd Dept 2012]; Citibank, N.A. v. Van Brunt Prop., LLC, *supra*). The plaintiff further established, prima facie, it has standing to prosecute its pleaded claims for foreclosure and sale by demonstrating that prior to the commencement of this action, it took possession of, and was the holder of the note indorsed in blank by IndyMac, a copy of which was attached to its complaint (see Bank of N.Y. v Silverberg, *supra*; Mortgage Elec. Registration Sys., Inc. v Coakley, 41 AD3d 674 [2nd Dept.2007]; Kondaur Capital Corp. v Argyros, 38 Misc 3d 1230[A] [Sup Ct Queens County 2013]; Deutsche Bank Natl. Trust Co. v Pietranico, 33 Misc. 3d 528 [Sup Ct Suffolk County 2011], *aff'd*, 102 AD3d 724 [2nd Dept 2013]; see also UCC § 3-202; § 3-204; § 9-203[g]). “The mere possession of a promissory note endorsed in blank (just like a check) provides presumptive ownership of that note by the current holder” (Deutsche Bank National Trust Co. v Pietranico, *supra* at 545). The holder of the note is deemed the owner thereof with standing to foreclose (*id.*, citing see, e.g., Mortgage Elec. Registration Sys., Inc. v Coakley, *supra*). Since the mortgage follows as an incident of the note, when the note changed hands, the mortgage interest automatically followed (see Deutsche Bank Nat. Trust Co. v Spanos, 102 AD3d 909 [2nd Dept 2013]; U.S. Bank Natl. Assn. v Cange, 96 AD3d 825 [2nd Dept 2012]; U.S. Bank, NA v Sharif, 89 AD3d 723 [2nd Dept 2011]; Bank of New York v Silverberg, *supra*; U.S. Bank, N.A. v Collymore, *supra*). Thus, based on the evidence before the court, the plaintiff was in possession of the note on the date the instant action was commenced, and therefore is deemed the presumptive owner of the note and mortgage with standing to prosecute its claim for foreclosure and sale (see U.S. Bank Natl. Assn. v Cange, *supra*; U.S. Bank, NA v Sharif, *supra*).

In addition, the record contains evidence that in July 2008, IndyMac failed and its assets were seized and placed with a receiver by the FDIC. In March 2009, the assets of the receivership were acquired by and merged into the plaintiff, a new entity formed for that purpose under the terms of the Purchase and Assumption Agreement. “Since such agreements have been found to confer upon the purchaser the right to foreclose on a defaulting borrower (see JP Morgan Chase Bank Natl. Assn. v Miodownik, 91 AD3d 546 [1st Dept 2012], *lv dismissed* 19 NY3d 1017 [2012]), these circumstances also give rise to a prima facie case of standing on the part of the plaintiff” (OneWest Bank, FSB v Davies, 38 Misc 3d 1230[A], *2, 2013 NY Slip Op. 50341[U]; 2013 WL 846573 [Sup Ct Suffolk County 2013]). Thus, the burden shifts to the mortgagor defendants to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff’s prima facie showing or in support of the affirmative defenses asserted in their answer. They have failed to do so.

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The opposition by the mortgagor defendants is set forth in their cross-moving papers. The mortgagor defendants argue that MERS, as nominee for IndyMac, did not have the authority to assign the mortgage and note, thus, the action should be dismissed for lack of standing. They also argue that the assignment was not recorded until October 28, 2009, after the action was commenced, and thus was not valid to confer standing upon the plaintiff.

The mortgagor defendants' attack as to the authority of MERS to assign the mortgage is unavailing. There is no question that MERS had the authority to assign the mortgage under the terms thereof (see CW Capital Asset Mgt. v. Charney-FPG 114 41st St., LLC., 84 AD3d 506 [1st Dept 2011] [maintained in plaintiff's capacity as servicing agent]; Fairbanks Capital Corp. v Nagel, 289 AD2d 99 [1st Dept 2001] [delegation of mortgage to servicing agent by mortgagee was sufficient to give servicing agent standing to sue]; US Bank, NA v. Flynn, 27 Misc 3d 802 [Sup Ct Suffolk County 2010] [language conferring broad authority to act in all ways that original lender could act was sufficient to confer authority to MERS as nominee to assign mortgage]). Further, the mortgagor defendants' argument that the assignment was not recorded prior to commencement of the action is of no consequence as the plaintiff established its standing by physical delivery of the note (see Deutsche Bank Natl. Trust Co. v Whalen, 107 AD3d 931 [2nd Dept 2013]).

Hence, the mortgagor defendants have failed to raise a genuine issue of fact to overcome the plaintiff's prima facie showing of entitlement to summary judgment. Therefore, the plaintiff is awarded summary judgment on its complaint against the mortgagor defendants.

MERS, as nominee for Aegis Funding d/b/a Aegis Home Equity is named as a defendant in the action as it is purportedly a holder of a subordinate mortgage. Sharyn Jesberger has been named as a defendant as she is a judgment creditor. The court is without receipt of opposition from either of these defendants, who are also in default for failure to interpose an answer, therefore, no question of fact has been raised by them (see Flagstar Bank v Bellafiort, 94 AD3d 1044 [2nd Dept 2012]). Therefore summary judgment is also awarded to the plaintiff on its complaint against defendant MERS, as nominee for Aegis Funding d/b/a Aegis Home Equity, and against defendant Sharyn Jesberger.

The portion of the instant motion wherein the plaintiff seeks an order dropping John Doe, Richard Roe, Jane Doe, Cora Coe, Dick Moe, and Ruby Poe as a party defendants is also granted, as is an amendment of the caption to reflect same.

Plaintiff, having been awarded summary judgment is entitled to an order appointing a referee to compute the amounts due under the subject note and mortgage (see RPAPL § 1321). The proposed order appointing a referee to compute, as modified by the court, has been signed simultaneously herewith.

Any arguments by the parties not explicitly addressed herein have been reviewed and deemed to be without merit.

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Accordingly, the motion is granted and the cross motion is denied.

Dated: July 26, 2013



HON. JOSEPH C. PASTORESSA, J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION