

Deutsche Bank Natl. Trust Co. v McLean-Chance

2013 NY Slip Op 32606(U)

October 17, 2013

Supreme Court, Queens County

Docket Number: 11828/2012

Judge: Robert J. McDonald

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MEMORANDUM

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

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DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS TRUSTEE FOR FREMONT HOME LOAN TRUST
SERIES 2006-3,

Index No.: 11828/2012

Motion Date: 10/04/13

Plaintiff,

Motion No.: 22

- against -

Motion Seq.: 1

TANEIKA MCLEAN-CHANCE, MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, INC.,
AS NOMINEE FOR FREMONT INVESTMENT 7
LOAN, "JOHN DOE," said name 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.

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The following papers numbered 1 to 14 were read on this
motion by plaintiff for an order dismissing the answer and
counterclaims of the defendant Taneika McLean-Chance; granting
summary judgment in favor of the plaintiff; for an order pursuant
to RPAPL § 1321 appointing a referee to ascertain and compute the
amount due to the plaintiff; granting permission to treat
McLean's Answer as a limited notice of appearance; and
substituting a certain named defendant as a necessary party
defendants

in stead and place of John Doe:

Papers
Numbered

Notice of Motion Affidavits-Exhibits-Memo of Law.....1 - 7
Affirmation in Opposition-Affirmation.....8 - 9
Reply Affirmation.....10 - 14

In this mortgage foreclosure action, plaintiff moves for an order striking the answer with affirmative defenses and counterclaim of defendant Taneika McLean-Chance; granting summary judgment against said defendant on the ground that the answer contains no valid defense and no triable issue of fact exists; granting a default judgment against the remaining defendants who have not answered; appointing a referee to compute the sum due and owing to plaintiff, and amending the caption. Defendant McLean-Chance has submitted opposition to the motion.

This foreclosure action pertains to the property located at 225-07 108th Avenue, Queens Village, New York. Based upon the record before this court, the defendant entered into a mortgage with Fremont Investment & Loan on August 2, 2006 in the principal amount of \$398,560.00. The plaintiff asserts that defendant defaulted on her mortgage when she failed to make her monthly mortgage payments beginning September 1, 2010.

The plaintiff subsequently accelerated the defendant's mortgage and brought an action to foreclose its mortgage by filing a lis pendens and summons and complaint on June 5, 2012. The defendant was personally served on June 8, 2012 by serving a person of suitable age and discretion at the defendant's residence. Defendant, pro se, served an answer on June 20, 2012 containing a general denial and asserting that the bank did not respond to request for a loan modification. She also asserted a counterclaim of predatory lending and improper assignment of the note and mortgage to Deutsche Bank. The plaintiff served a verified reply to counterclaims dated July 12, 2012.

A foreclosure settlement conference was scheduled by the court for February 15, 2013, however, defendant, although duly notified of the conference date, failed to appear for the conference. The matter was referred for a preliminary conference on March 28, 2013 but the defendant again failed to appear. Referee Lazarus issued an order directing the plaintiff to file an application for an order of reference by July 18, 2013.

In support of the motion for summary judgment, the plaintiff submits the affirmation of counsel Robin L. Muir, Esq., the affidavit of Amanda Weatherly, Vice President, Loan Documentation for Wells Fargo Bank, N.A., the mortgage loan servicing agent of the plaintiff Deutsche Bank; a copy of the Note and Mortgage; copies of the affidavits of service on all the defendants; a copy of the pleadings; a copy of the mortgage assignment; 90 day notice of intent to foreclose; copy of the RPAPL 1304 notices sent to the defendant with the summons and complaint; and a copy of the attorney affidavit pursuant to the Administrative Order of

the Chief Administrative Judge dated July 16, 2013, under AO/548/10, executed by Robin L. Muir, Esq.

In her memorandum of law, plaintiff's counsel, Robin Muir, Esq., asserts that on August 2, 2006, defendant obtained a mortgage loan from Fremont Investment & Loan in the principal amount of \$398,560.00 in order to finance her purchase of the subject property. The mortgage loan was memorialized by an adjustable rate note and mortgage executed by Ms. McLean-Chance and recorded on November 9, 2006. Counsel asserts that the loan was subsequently transferred to Deutsche Bank pursuant to a Pooling and Servicing Agreement dated September 1, 2006. Counsel asserts that the original note, endorsed specifically to the plaintiff and the mortgage were physically delivered to the plaintiff prior to the date this action was commenced. Thus, counsel asserts that the plaintiff is the current holder of the Note and Mortgage and was the holder of the Note and Mortgage on the date the action was commenced. The written assignment of the mortgage was recorded on April 17, 2009. The record contains copies of the indorsed note, mortgage and assignment of mortgage.

Counsel further states that in January 2012 after the defendant fell behind on her loan payments the parties agreed on a loan modification reducing her interest rate to 4.00% from 8.875% and extended the term of the loan. However, despite the loan modification, the defendant defaulted beginning in September 2010. Notice of default was sent to defendant on February 1, 2012. Counsel also submits evidence that the plaintiff was served with a 90 day notice pursuant to RPAPL 1304 and with all notices in compliance with RPAPL 1303.

The affidavit of Amanda Weatherly, Vice President, Loan Documentation for Wells Fargo Bank, N.A. servicer for the plaintiff Deutsche Bank states that based upon her personal review of the bank records, the defendant failed to cure her default and as of the date the complaint was filed, \$455,286.08 in principal remained due and owing on defendant's loan plus interest and fees. Ms. Weatherly states that although the defendant has requested that the plaintiff review her file for further loss mitigation options, the plaintiff did not receive the documentation from her necessary to complete its review and on March 15, 2012 denied the defendant's application for loss mitigation.

Counsel states that based upon the evidence submitted the plaintiff has made a prima facie showing that it is entitled to a judgment of foreclosure and sale. Further, counsel asserts that

the plaintiff was lawfully served with a summons and complaint and that the court therefore has personal jurisdiction. In addition, the plaintiff asserts, contrary to the defendant's contention, that it had standing to bring the action by presenting sufficient evidence of the written assignment and transfer of the note and mortgage to the plaintiff prior to the commencement of the action.

Counsel contends that the defendant's counterclaim and affirmative defense, which refers to loss mitigation efforts, standing, and alleged predatory lending, should be dismissed as the defendant as failed to set forth any factual basis or factual assertions of wrongdoing for the vague and conclusory allegations. With respect to loss mitigation efforts, counsel contends that the bank modified the defendant's loan on one occasion and when she defaulted, defendant failed to submit the documents necessary for a further evaluation and modification. With respect to the defendant's claim of predatory lending, counsel claims that the pleading is insufficient as it does not specify any facts upon which the claim is based. Thus, plaintiff asserts that the counterclaim must be dismissed as it is not supported by a statutory or common law basis. With respect to the claim of lack of standing asserted in the answer, plaintiff contends that plaintiff has proven that it had standing by submitting proof that it was the holder of the note and mortgage at the time the action was commenced.

It is well settled that a plaintiff in a mortgage foreclosure action establishes a prima facie case of entitlement to summary judgment through submission of proof of the existence of the underlying note, mortgage and default in payment after due demand (see Witelson v Jamaica Estates Holding Corp. I, 40 AD3d 284 [1st Dept. 2007]; Marculescu v Ouanez, 27 AD3d 701 [2d Dept. 2006]; US. Bank Trust National Assoc. v Butti, 16 AD3d 408 [2d Dept. 2005]; Layden v Boccio, 253 AD2d 540 [2d Dept. 1998]; State Mortgage Agency v Lang, 250 AD2d 595 (2d Dept. 1998)). Upon such a showing, the burden shifts to the defendant to produce evidence in admissible form sufficient to raise a material issue of fact requiring a trial.

This Court finds that the plaintiff's submissions are sufficient to establish its entitlement to summary judgment against defendant mortgagor Taneika McLean-Chance. The moving papers demonstrate, prima facie, that none of the asserted defenses set forth in the answer of defendant are meritorious and plaintiff is entitled to summary judgment on its claims against Maclean-Chance (see EMC Mortg. Corp. v Riverdale Assocs., 291 AD2d 370 [2d Dept. 2002]; State of New York v Lang, 250 AD2d 595

[2d Dept. 1998]). As stated above, the complaint herein sufficiently sets forth a valid cause of action for foreclosure. Plaintiff has submitted a copy of the mortgage, note and affidavit from Ms. Weatherly establishing McLean-Chance's default in payment. The plaintiff demonstrated proper service of the summons and complaint and showed by admissible evidence that it had been properly assigned the note and mortgage as of the date of the commencement of the action. Plaintiff demonstrated when it became the lawful holder of the note pursuant to the valid assignment of the note to it. Therefore, the moving papers demonstrated, prima facie, that none of the asserted defenses set forth in the answer of defendant are meritorious and that plaintiff is entitled to summary judgment on its claims against Velasquez (see State of New York v Lang, 250 AD2d 595).

The burden then shifted to Defendant to establish the existence of a triable issue of fact (see State Bank of Albany v Fioravanti, 51 NY2d 638, 647 [1980]). In opposition to the motion, Kafi Harris, Esq. counsel for the defendant states that although a foreclosure conference was held on February 15, 2013, the defendant was not notified of same and as a result failed to appear. Counsel also alleges that plaintiff has not proven it has standing to bring the instant action as there is insufficient proof that the pooling agreement was correctly executed. The defendant has not submitted an affidavit from the defendant in support of the affirmation in opposition.

Here, although the defendant's counsel made several allegations regarding the invalidity of the mortgage assignment, and the fact that the plaintiff was not notified of a residential foreclosure conference, counsel has failed to provide any supporting documentation including an affidavit from defendant attesting to the fact that she was not notified of the foreclosure conference. Defendant has not disputed that she executed the Note and Mortgage, defaulted on her loan payments, received notice of the default or attempted to cure her default. The bank has provided the defendant with several opportunities to negotiate a further loan modification and the defendant does not dispute that she has failed to submit documents necessary for a further modification. This court finds, therefore, that the defendant's assertions in opposing the motion are without merit as the attorney's affirmation alone does not provide a sufficient evidentiary basis to raise a material issue of fact as to jurisdiction or the validity of the note, the mortgage or the assignment.

Accordingly, this court finds that the conclusory

allegations set forth in defendant's affirmative defenses and counterclaims are insufficient to defeat the motion for summary judgment. Therefore, the plaintiff's motion for summary judgment is granted and the affirmative defenses and counterclaims contained in the defendant's answer are stricken. The submissions further reflect that Plaintiff is entitled to amend the caption to substitute Virginia Francis in replacement of the John Doe defendant. That branch of the motion for a default judgment against the remaining defendants who have not answered or appeared herein is granted. Plaintiff's further application for the appointment of a referee to compute the amounts due under the subject mortgage is also granted.

Settle order on notice.

Dated: October 17, 2013
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.