

Castle Peak 2012-I Trust v Chaudhury

2013 NY Slip Op 32971(U)

November 18, 2013

Sup Ct, Queens County

Docket Number: 20255/2012

Judge: David Elliot

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MEMORANDUM

SUPREME COURT - QUEENS COUNTY
I.A.S. PART 14

CASTLE PEAK 2012-I TRUST,
Plaintiff,

Index No. 20255/2012

By: **ELLIOT, J.**

-against-

Date: November 18, 2013

SALIM CHOUDHURY, et al.,
Defendants.

Motion Cal. No. 18

Motion Seq. No. 1

Motion Date: August 8, 2013

Plaintiff commenced this action on October 1, 2012 to foreclose a mortgage encumbering the real property known as 69-30 44th Avenue, Woodside, New York given by defendant Salim Choudhury to BankUnited, FSB, as security for the payment of a note, evidencing an obligation in the principal amount of \$730,000.00 plus interest. Plaintiff alleged in the complaint that it is the holder of the note and mortgage by virtue of the negotiation of the note to it, and the assignment of the mortgage to it pursuant to an assignment (the original assignment) executed by John Mallaber, Assistant Secretary of Mortgage Electronic Registration Systems Inc. (MERS), as nominee for BankUnited, FSB. Plaintiff also alleged that because defendant Salim Choudhury defaulted in paying the mortgage installment due on June 1, 2011, it elected to accelerate the entire mortgage debt. On March 29, 2013 (after commencement of the action), a "Corrective Assignment of

Mortgage” (the corrective assignment) dated March 15, 2013, to Castle Peak 2012-1 Loan Trust Mortgage Backed Notes, Series 2012-1, by U.S. Bank National Association, as Indenture Trustee, was recorded for the purpose of “confirm[ing] the original Assignment of Mortgage” and “clarify[ing] the full name of the Assignee of said Assignment of Mortgage.”

Defendant Salim Choudhury served an answer with various affirmative defenses, including one based upon lack of standing, and interposing counterclaims based upon claims of predatory lending, violation of the Truth in Lending Act [TILA] (15 USC § 1601 *et seq.*) and the implementing regulations (found in Federal Reserve Board Regulation Z [12 CFR 226]), and General Business Law § 349, and seeking rescission, specific performance, a permanent injunction and an award of compensatory and punitive damages. Plaintiff served a reply to the counterclaims.

Plaintiff caused defendant City of New York Environmental Control Board to be served with process. Plaintiff also caused Nalini Kaur, Manu Kaur and Tarana Choudhury to be served with process as “John Doe” defendants but did not cause defendants “John Doe #4” through “John Doe #12” to be served with process because plaintiff determined that they are unnecessary party defendants.

Plaintiff moves for leave to amend the summons and complaint *nunc pro tunc* to reflect that plaintiff’s proper name is “Castle Peak 2012-1 Loan Trust Mortgage Backed Notes, Series 2012-1, by U.S. Bank National Association, as Indenture Trustee,” for leave

to amend the caption by deleting reference to the “John Doe” defendants and substituting in their place and stead Nalini Kaur, Manu Kaur and Tarana Choudhury, to strike the answer of defendant Salim Choudhury, including affirmative defenses and counterclaims, for summary judgment against defendant Salim Choudhury, for leave to enter a default judgment against defendants City of New York Environmental Control Board, Nalini Kaur, Manu Kaur and Tarana Choudhury and for leave to appoint a referee.

Defendant Salim Choudhury opposes the motion. The remaining defendants have not appeared in relation to the motion.

That branch of the motion by plaintiff for leave to amend the caption substituting Nalini Kaur, Manu Kaur and Tarana Choudhury in place and stead of defendant “John Doe #1” through “John Doe #3” respectively, and deleting reference to defendants “John Doe #4” through “John Doe #12” is granted.

That branch of the motion by plaintiff for leave to amend the caption to reflect its proper name, to wit, “Castle Peak 2012-1 Loan Trust Mortgage Backed Notes, Series 2012-1, by U.S. Bank National Association, as Indenture Trustee,” is granted. Plaintiff’s full or complete name is “Castle Peak 2012-1 Loan Trust Mortgage Backed Notes, Series 2012-1, by U.S. Bank National Association, as Indenture Trustee,” but in preparation of the caption on the summons and complaint the shortened version of the name, i.e. “Castle Peak 2012-1 Trust,” was used. The confusion regarding the proper name of plaintiff occurred as a consequence of the irregularity in the original assignment wherein plaintiff’s complete name

was shortened to “Castle Peak 2012-1 Trust” due to clerical error.

It is well established that the proponent of a summary judgment motion “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Where, as here, standing is put into issue by the defendant, the plaintiff must prove its standing in order to be entitled to relief (*see Deutsche Bank Nat. Trust Co. v Haller*, 100 AD3d 680 [2d Dept 2012]; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 753 [2d Dept 2009]; *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 242 [2d Dept 2007]). “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” (*Bank of N.Y. v Silverberg*, 86 AD3d 274, 279 [2d Dept 2011]; *see Homecomings Fin., LLC v Guldi*, 108 AD3d 506 [2d Dept 2013]; *US Bank N.A. v Cange*, 96 AD3d 825, 826 [2d Dept 2012]; *U.S. Bank, N.A. v Collymore*, 68 AD3d at 753-754 [2009]; *Countrywide Home Loans, Inc. v Gress*, 68 AD3d 709 [2d 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” (*U.S. Bank, N.A. v Collymore*, 68 AD3d at 754; *see HSBC Bank USA v Hernandez*, 92 AD3d 843 [2d Dept 2012]; *see*

Aurora Loan Servs., LLC v Weisblum, 85 AD3d 95, 108 [2d Dept 2011]).

In support of its motion, plaintiff offers, among other things, a copy of the pleadings, affidavits of service, an affirmation of regularity by its counsel, a copy of the subject mortgage, underlying note and original and corrective assignments, and an affidavit dated June 18, 2013 of John R. Mallaber, an assistant vice president AMS Servicing, LLC (AMS), the servicing agent and attorney-in-fact for plaintiff. Mr. Mallaber attests to the physical delivery of the note with the allonge with a blank endorsement to AMS on January 3, 2012, AMS's physical possession of the note when the action was commenced, and the default in payment of the monthly mortgage installment due under the mortgage. Plaintiff also offers a copy of the limited power of attorney appointing AMS as attorney-in-fact for plaintiff.

Plaintiff has established its prima facie entitlement to summary judgment as against defendant Salim Choudhury by producing the mortgage, the unpaid note, and evidence of default (*see GRP Loan, LLC v Taylor*, 95 AD3d 1172, 1173 [2d Dept 2012]; *Deutsche Bank Natl. Trust Co. v Posner*, 89 AD3d 674, 674-675 [2d Dept 2011]). The evidence submitted by plaintiff in support of its motion also demonstrates that it is a holder of the note by physical delivery of the note with the allonge with the blank endorsement to AMS, plaintiff's agent, prior to the commencement of the action (*see Deutsche Bank Natl. Trust Co. v Whalen*, 107 AD3d 931 [2d Dept 2013]; *U.S. Bank Natl. Assn. v Cange*, 96 AD3d 825, 827 [2d Dept 2012]; *cf. HSBC Bank USA v Hernandez*, 92 AD3d at 844). As such, the

mortgage passed to plaintiff on January 3, 2012 as an incident to the note (*see U.S. Bank Natl. Assn. v Cange*, 96 AD3d at 827). Because plaintiff has established its standing by physical delivery, the validity of the original assignment of the mortgage and note need not be addressed (*see Deutsche Bank Nat. Trust Co. v Whalen*, 107 AD3d at 932; *cf. Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909, 912 [2d Dept 2013]).

The burden shifts to defendant Salim Choudhury to raise a triable issue of fact (*see Cochran Inv. Co., Inc. v Jackson*, 38 AD3d 704 [2d Dept 2007]; *Barcov Holding Corp. v Bexin Realty Corp.*, 16 AD3d 282 [2005]; *EMC Mtge. Corp. v Riverdale Assoc.*, 291 AD2d 370 [2002]; *First Nationwide Bank, FSB v Goodman*, 272 AD2d 433 [2000]).

To the extent defendant Salim Choudhury claims plaintiff failed to serve the additional notice mandated pursuant to Real Property Actions and Proceedings Law § 1303 (1), which was enacted in July 2006 as part of the “Home Equity Theft Protection Act” (HEPTA) (*see First Natl. Bank of Chicago v Silver*, 73 AD3d 162, 164 [2d Dept 2012]), plaintiff offers an affidavit of service of Alan Feldman dated October 16, 2012, indicating a service of process with a copy of a notice pursuant to RPAPL § 1303 on blue colored paper by ordinary first class mail. Such affidavit raises a presumption that a proper mailing occurred (*see Engel v Lichterman*, 62 NY2d 943, 944 [1984]). “The burden then falls upon the addressee to present evidence sufficient to overcome the presumption and establish nonreceipt” (*Vita v Heller*, 97 AD2d 464 [2d Dept 1983]). Generally, “a mere denial of receipt is not enough to rebut this presumption” (*Kihl v Pfeffer*, 94 NY2d 118, 122

[1999]). In this instance, defendant Salim Choudhury has failed to produce either specific rebuttal evidence raising doubt about the underlying fact of mailing, or evidence of circumstances that corroborate the testimony of nonreceipt (*see* Thomas F. Gleason, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C:2103:3).

Defendant Salim Choudhury argues plaintiff failed to identify whether the loan is a "subprime home loan," "high cost home loan" or "non-traditional home loan," pursuant to RPAPL 1304, Banking Law § 6-1 or § 6-m in its pleadings. Plaintiff identified the loan as a "residential home loan," and a residential foreclosure settlement conference was held on January 28, 2013 and March 25, 2013. Thus, plaintiff's pleadings are not defective. To the extent defendant Salim Choudhury claims that plaintiff failed to serve the additional notice mandated pursuant to Real Property Actions and Proceedings Law § 1303(1), which was enacted in July 2006 as part of HEPTA (*see First Natl. Bank of Chicago v Silver*, 73 AD3d 162, 164 [2d Dept 2012]) with the summons and complaint, and, therefore, is not entitled to summary judgment. Plaintiff, however, has offered an affidavit of service dated October 11, 2012, indicating a service of process with a copy of a notice pursuant to RPAPL 1303 on blue colored paper by ordinary first class mail.

Insofar as defendant Salim Choudhury claims the subject mortgage loan was the result of predatory lending practices committed by plaintiff's predecessor in interest, and is unconscionable, he has failed to show an absence of meaningful choice on his part together with mortgage terms which are unreasonably favorable to plaintiff (*see Matter of State of*

New York v Avco Fin. Serv. of N.Y., 50 NY2d 383, 389 [1980]; *Baron Associates, LLC v Garcia Group Enterprises, Inc.*, 96 AD3d 793 [2d Dept 2012]; *see generally Matter of Friedman*, 64 AD2d 70, 84 [2d Dept 1978]). Defendant Salim Choudhury fails to raise a triable issue of fact as to whether the terms of the mortgage and note were unconscionable, or as to whether plaintiff's predecessor in interest acted unconscionably in the transaction (*see Zuckerman v City of New York*, 49 NY2d 557, 562; *Argent Mtge. Co., LLC v Montesana*, 79 AD3d 1079, 1081 [2d Dept 2010]; *Quest Commercial, LLC v Rovner*, 35 AD3d 576, 577 [2d Dept 2006]; *FGH Contr. Co. v Weiss*, 185 AD2d 969, 971 [2d Dept 1992]). To the degree defendant Salim Choudhury also asserts plaintiff's predecessor knew or should have known he could not afford the terms of the mortgage loan, and made the loan without due regard of his ability to repay it, in violation of Banking Law § 6-1, the version of that statute in effect at the time of the making of the subject mortgage loan was inapplicable to a loan transaction in which the principal amount exceeded \$300,000.00 (*see former Banking Law § 6-1[1][d] and [e][i][B][L 2002, c 626 § 1*). The original principal amount of the subject mortgage clearly exceeds that amount.

Defendant Salim Choudhury asserts that plaintiff's predecessor in interest engaged in deceptive business practices in violation of General Business Law § 349. To assert a viable claim under General Business Law § 349(a), a party must plead that (1) the challenged conduct was consumer-oriented, (2) the conduct or statement was materially misleading, and (3) [he or she sustained] damages' (*Lum v New Century Mtge. Corp.*, 19

AD3d 558, 559; *see Blue Cross & Blue Shield of N.J., Inc. v Philip Morris USA Inc.*, 3 NY3d 200, 205 [2004]; *Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]; *Gaidon v Guardian Life Ins. Am.*, 94 NY2d 330, 344 [1999])” (*Emigrant Mortg. Co., Inc. v Fitzpatrick*, 95 AD3d 1169 [2d Dept 2012]). Here, the loan documents fully set forth the terms of the subject mortgage loan and demonstrate that no deceptive act or practice occurred (*see Patterson v Somerset Investors Corp.*, 96 AD3d 817 [2d Dept 2012]). Defendant Salim Choudhury has failed to proffer evidence sufficient to establish a meritorious defense or claim as to whether plaintiff’s predecessor in interest made any materially misleading statements or committed any misconduct with respect to the subject loan (*see Emigrant Mortg. Co., Inc. v Fitzpatrick*, 95 AD3d 1169, 1172).

Furthermore, contrary to defendant Salim Choudhury’s contention, plaintiff’s motion is not premature as defendant Choudhury has failed to demonstrate how discovery may reveal or lead to relevant evidence, or that “facts essential to opposing the motion were exclusively within” another party’s “knowledge and control” (*Espada v City of New York*, 74 AD3d 1276, 1277 [2d Dept 2010]; *see CPLR 3212[f]*; *Seidman v Industrial Recycling Properties, Inc.*, 106 AD3d 983 [2d Dept 2013]; *Norero v 99–105 Third Ave. Realty, LLC*, 96 AD3d 727, 728 [2d Dept 2012]).

Defendant Salim Choudhury has failed to raise a triable issue of fact as to his defenses or in relation to his counterclaims. As a consequence, plaintiff is entitled to summary judgment in its favor as against him and dismissing the affirmative defenses and

counterclaims (*see Countrywide Home Loans, Inc. v Delphonse*, 64 AD3d 624 [2d Dept 2009; *Cochran Inv. Co., Inc. v Jackson*, 38 AD3d 704 [2d Dept 2007]). That branch of the motion by plaintiff for summary judgment against defendant Salim Choudhury and dismissing the affirmative defenses and counterclaims asserted by him is granted.

That branch of the motion by plaintiff for leave to enter a default judgment against defendants City of New York Environmental Control Board, Nalini Kaur, Manu Kaur and Tarana Choudhury is granted.

That branch of the motion by plaintiff for leave to appoint a referee is granted.

Settle order.

J.S.C.