

HSBC Bank, USA, N.A. v Pascual

2013 NY Slip Op 33003(U)

November 26, 2013

Sup Ct, Queens County

Docket Number: 19515/12

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

HON. ALLAN B. WEISS

HSBC BANK, USA, NATIONAL ASSOCIATION as
Trustee for WELLS FARGO ASSET SECURITIES
CORP., MORTGAGE ASSET-BACKED PASS-THROUGH
CERTIFICATES SERIES 2007-PA6

Index No.: 19515/12

Motion Date: 9/16/13

Plaintiffs,

Motion Seq. No.: 1

-against-

AGUSTIN PASCUAL, et al.,

Defendants.

Plaintiff commenced this action on September 20, 2012 to foreclose a mortgage, dated, executed, acknowledged and delivered by defendant, Pascual on July 23, 2007 to Wells Fargo Bank, N.A., to secure repayment of a note, dated July 23, 2007 evincing a loan in the principal amount of \$552,000.00, with interest encumbering the premises known as 91-15 86th Dr., Woodhaven, N.Y. The mortgage was assigned by assignment dated December 22, 2009 to plaintiff, HSBC Bank, USA, National Association as Trustee for Wells Fargo Asset Securities Corp., Mortgage Asset-backed Pass-Through Certificates Series 2007-PA6,. A loan modification agreement was entered into between defendant Pascual and Wells Fargo Bank, N.A. under a limited power of attorney for plaintiff dated March 9, 2010 to modify the mortgage and capitalize interest resulting in a single lien in the amount of \$574,427.09. Plaintiff alleges that the defendant defaulted under the terms of

the mortgage and note by failing to make the monthly installment payment due and owing beginning on September 1, 2010, and continuing to the present, and that as a consequence, it elected to accelerate the entire mortgage debt.

The defendant appeared by service of his answer dated October 1, 2012 containing four affirmative defenses to wit, lack of standing, failure of the plaintiff's complaint to plead that plaintiff is the owner and holder of the note and/or mortgage or that it has authority to foreclose, that plaintiff's servicer failed to comply with HAMP and failure to file an RJI and Attorney's Affidavit required by AO/431/11.

The plaintiff now moves for an Order striking the Defendant's, Agustin Pascual's, answer and deeming it a limited notice of appearance, granting summary judgment in its favor against this defendant, declaring and fixing the remaining defendant's default, appointing a referee to ascertain and compute the amount due to the plaintiff and amending the caption.

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 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]).

A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it is both the holder or assignee of the subject mortgage and the holder or assignee of the note (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 or physical delivery of the note prior to the commencement of the action (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 established its entitlement to summary judgment submitting competent evidence including a copy of the note endorsed in blank and certified pursuant to CPLR 2105, a copy of the mortgage and Modification Agreement, the written Assignment of Mortgage acknowledged on December 22, 2009 (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 Tina Armour, Vice President of Loan Documentation for Wells Fargo Bank, N.A., the Servicer for the plaintiff, asserting that she has actual knowledge of the facts in this case including the defendant's 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, that plaintiff complied with all of the pre-foreclosure notices to wit, the Letter of Default required under the Mortgage and Note and the RPAPL § 1304 90-day notice, copies of which were annexed as exhibits, as well as the filing requirements with the superintendent of banks. She further avers that based upon defendant's default and failure to cure, the plaintiff elected to accelerate the entire debt.

In addition, plaintiff also demonstrated the lack of merit of the defendant's remaining affirmative defenses (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]).

Where, as here, the plaintiff has established its entitlement to summary judgment, the burden shifts to the defendant 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]).

Initially, it is noted that plaintiff objects to the court considering the defendant's opposition which plaintiff rejected and returned to defense counsel on the ground that it was not timely served. In this regard plaintiff's counsel asserts that on the return date of the plaintiff's motion and in accordance with the rules of CMP, the Court Attorney Referee set a schedule for the service and submission of opposition and reply papers. Defendant was directed to serve opposition on or before September 2, 2013, however, defendant did not serve his opposition until September 9, 2013.

Since that defendant did not serve his opposition in accordance with the schedule or provide any explanation for the lateness and because the plaintiff has not waive the untimely service the court may, in the exercise of its discretion, disregard the defendant's opposition (see Mosheyva v. Distefano, 288 AD2d 448 [2001]). However, to avoid any further delay of this action and a motion to reargue, and because plaintiff fully addressed the opposition, the court will consider the defendant's opposition (see Hsu v. Shields, --- AD3d --- [2013], 2013 WL

5989726).

In opposition, the defendant does not raise a personal jurisdictional defense or deny that he is now and has been in default in the payments due under the mortgage and note since September 1, 2010. Rather he opposes asserting that plaintiff lacks standing to maintain this action. More particularly defendant asserts that plaintiff has failed to demonstrate its standing to maintain this action in that the affidavit of Tina Armour is insufficient and because plaintiff cannot be the owner of the mortgage inasmuch as the assignment of the mortgage took place after the closing date of the Trust.

The defendant's claims are without merit and insufficient to raise a triable issue of fact.

Contrary to defendant's claim, the affidavit of Tina Armour, together with plaintiff's documentary submissions, is more than sufficient to demonstrate that plaintiff is and was the holder of the note prior to the commencement of the action. Ms. Armour has particularized the basis of her knowledge and affirmed that the plaintiff was in possession of the note on September 20, 2010 when the action was commenced. Moreover, because a copy of the note containing the endorsement in blank and the attorney's CPLR 2105 certification of its accuracy, was annexed to the complaint that was filed upon commencement of the action is further proof of plaintiff's standing.

Insofar as defendant asserts Ms. Armour's lack of authority to execute the affidavit, it is also without merit. In this regard plaintiff submitted a Limited Power of Attorney dated November 5, 2011, executed by the plaintiff appointing Wells Fargo Bank, N.A. as its attorney in fact and expressly authorizing it to act in place of the Plaintiff/Trustee to execute any "affidavits" in connection with foreclosures, and particularly the instant action.

Finally, the absence of a certificate of conformity in compliance with CPLR 2309(C), does not warrant disregarding the affidavit or denial of summary judgment inasmuch as the absence of a certificate of conformity for an out-of-state affidavit does not constitute a fatal defect and may be provided nunc pro tunc (see CPLR 2001; Fredette v Town of Southhampton, 95 AD3d 940, 942 [2nd Dept 2012]; US Bank Natl. Assn. v Dellarmo, 94 AD3d 746, 748 [2nd Dept 2012]; Betz v Daniel Conti, Inc., 69 AD3d 545 [2nd Dept 2010]; Matapos Tech. Ltd. v Compania Andina de Comercio Ltda, 68 AD3d 672 [1st Dept 2009]).

Insofar as defendant asserts violation of the Pooling and Servicing Agreement, the defendant has no standing to assert any such alleged violation since he is not a party to the contract (see 767 Third Ave. LLC v. Orix Capital Markets, LLC, 26 AD3d 216 [2006] lv denied 8 NY3d 803 [2007]; Decolator, Cohen & DiPrisco, LLP v. Lysaght, Lysaght & Kramer, P.C., 304 AD2d 86 [2003]; Cimerring v. Merrill Lynch Mortg. Investors, Inc., 35 Misc.3d 1242(A) at *9(Table) [2012]).

With respect to the defendant's remaining affirmative defenses asserted in his answer, it appears that he has abandoned them since he neither relied on these defenses to oppose the motion nor submit any evidence in support. In any event, the defenses are without merit and contradicted by the plaintiff's documentary evidence and the court records.

Accordingly the plaintiff's motion for an order granting summary judgment in its favor and against defendant, Agustin Pascual, fixing and declaring the default of the remaining defendants appointing of a referee to ascertain and compute and amendment of the caption is granted.

The branch of plaintiff's motion to strike the defendant's answer, however, is denied. Plaintiff has failed to submit any basis for striking the defendant's answer which is tantamount to a default in answering (see e.g. Rokina Optical Co., Inc. v. Camera King, Inc., 63 NY2d 728, 730 [1984]; Fappiano v. City of New York, 5 AD3d 627 [2004] lv denied 4 NY3d 702 [2004]). Granting summary judgment does not require striking the defendant's answer.

Settle Order.

Dated: November 26, 2013
D# 48

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J. S. C.