

Waterfall Victoria Master Fund, Ltd. v Hayle
2013 NY Slip Op 33106(U)
December 11, 2013
Supreme Court, Queens County
Docket Number: 242/11
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

WATERFALL VICTORIA MASTER FUND, LTD,

Plaintiff,

-against-

ALBERT HAYLE, VILMA PARKER a/k/a
VILMA HAYLE et al.,

Defendants.

HON. ALLAN B. WEISS

Index No.: 242/11

Motion Date: 9/26/13

Motion Seq. No.: 1

This is an action to foreclose a mortgage, dated December 1, 2006, encumbering the real property known as 119-38 Cross Island Park, Cambria Heights, N.Y. 11411 executed, acknowledged and delivered by defendants, ALBERT HAYLE and VILMA PARKER a/k/a VILMA HAYLE, (Parkers) to People's Choice Home Loan Inc. (People's Choice), to secure repayment of a note also dated December 1, 2006, evidencing a loan in the principal amount of \$384,000.00, with interest. Plaintiff alleges that the defendants defaulted by failing to make the monthly installment payments due and owing in accordance with the note and mortgage beginning on June 1, 2008, and each succeeding month and continuing to the present, and that as a consequence, it elected to accelerate the entire mortgage debt.

The Parkers appeared by service of their answer, dated February 8, 2011, containing general denials and four affirmative defenses, to wit lack of personal jurisdiction,

improper service of the summons and complaint, standing and prior action pending.

The plaintiff now moves for an Order striking the defendants' answer, granting summary judgment in its favor as against these defendants, a default judgment as against the remaining defendants, appointing a referee to ascertain and compute the amount due to the plaintiff and awarding the referee \$250.00 as his fee for these services, and amending the caption by, among other things, substituting Waterfall Victoria Master Fund 2008-1 Grantor Trust Series B as plaintiff in place of Waterfall Victoria Master Fund, Ltd.

Defendants, Parkers, oppose the plaintiff's motion and cross-move to dismiss the complaint pursuant to CPLR 3211(a)(3), asserting that plaintiff lacks standing to maintain this action.

To establish a prima facie case in an action to foreclose a mortgage, the plaintiff must establish the existence of the mortgage and mortgage note, ownership of the note and mortgage, and the defendant's default in payment (see 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]).

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's well documented motion which included a copy of the note endorsed in blank, the written assignment of the mortgage by MERS as Nominee for People's Choice to Waterfall Victoria Master Fund Ltd., dated August 10, 2009. The subsequent assignments of the mortgage and note to Waterfall Victoria Master Fund 2008-1 Grantor Trust Series A on July 27, 2011, and the assignment of the mortgage and note Waterfall Victoria Master Fund 2008-1 Grantor Trust Series B on September 25, 2012, established its entitlement to summary judgment, including its standing to commence the action on January 4, 2011 as the owner and holder of both the note and the mortgage, and the affidavit of David McDonnell, who is, among other things, Managing Director

of Statebridge Company, LLC, the servicing agent for plaintiff, attesting to, inter alia, the defendants' default (see Mortgage Electronic Registration Systems, Inc. v. Coakley, supra; Federal Natl. Mtge. Assn. v. Youkelsone, 303 AD2d 546 [2003]).

The plaintiff has also submitted sufficient evidence to demonstrate the lack of merit of the defendants' 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]).

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 his attorney's conclusory affirmation and the affidavit of Vilma Parker which are insufficient to raise a triable issue of fact (see CW Capital 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]).

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

The plaintiff's motion is granted, except the branch of plaintiff's motion to strike the defendant's answer, which 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.

The branch of the plaintiff's motion for entry of a default judgment as against the remaining defendants is granted to the extent of fixing and declaring their default.

Settle Order.

Dated: December 11, 2013
D# 48

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J. S. C.