JP Morgan Chase Bank v Holcomb
2014 NY Slip Op 30972(U)
March 28, 2014
Sup Ct, Suffolk County
Docket Number: 13-11330
Judge: Daniel Martin

[* 1]

SHORT FORM ORDER

INDEX No. 13-11330

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN
Justice of the Supreme Court

MOTION DATE 6-14-13
ADJ. DATE 10-22-13
Mot. Seq. # 001 - MD; CASEDISP

JP MORGAN CHASE BANK, NATIONAL ASSOCIATION,

Plaintiff,

- against -

MICHAEL E. HOLCOMB, CHASE BANK USA, NA; PETRO INC. WASHINGTON MUTUAL BANK, FA "JOHN DOES" AND "JANE DOES", said names being fictitious, parties intended being possible tenants or occupants of premises, and corporations, other entities or persons who claim, or may claim, a lien against the premises,

Defendants.

ROSICKI, ROSICKI & ASSOCIATES, PC
Attorney for Plaintiff
51 East Bethpage Road
Plainview, New York 11803

THE RANALLI LAW GROUP PLLC
Attorney for Defendant Michael E. Holcomb
742 Veterans Memorial Highway
Hauppauge, New York 11788

Upon the following papers numbered 1 to 78 read on this motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1 - 36; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 37 - 65; Replying Affidavits and supporting papers 66 - 73; Other 74 - 78 (plaintiff's sur-reply); (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this pre-answer motion by defendant Michael E. Holcomb for an order pursuant to CPLR 3211 (a)(1), (a)(3), (a)(5), (a)(7), (a)(8) and (a)(10) dismissing the complaint is converted to a motion for summary judgment pursuant to CPLR 3211 (c) and is denied; and it is further

ORDERED that the Court searches the record pursuant to CPLR 3212 (b) and grants summary judgment to plaintiff, JP Morgan Chase Bank, National Association, on its complaint; and it is further

ORDERED that the Suffolk County Clerk expunge the satisfaction dated October 24, 2007 and erroneously recorded in the Suffolk County Clerk's records on November 21, 2007 in Liber M00021636 of Mortgages, Page 910, and reinstate the first mortgage dated September 1, 2005 in the original sum of $1,120,000.00, with a negative amortization not to exceed $1,232,000.00, and recorded on October 5, 2005

in Liber M00021144 of Mortgages, Page 376, as an open mortgage in the Suffolk County Clerk's records; and it is further

ORDERED that plaintiff is entitled to the entry of judgment declaring, pursuant to RPAPL article 15, that the first mortgage dated September 1, 2005 and recorded in the Suffolk County Clerk's Office on October 5, 2005 in Liber M00021144 of Mortgages, Page 376, is a valid lien and encumbrance against the subject premises, known as 82 Powell Avenue, Southampton, New York, nunc pro tunc from October 5, 2005.

This is a declaratory judgment action pursuant to RPAPL article 15. Defendant Michael E. Holcomb (Holcomb) obtained a loan from non-party American Home Mortgage Acceptance, Inc. (American Home) and executed a note dated September 1, 2005 agreeing to pay American Home the sum of $1,120,000.00 with a negative amortization not to exceed $1,232,000.00. As security for said loan, defendant Holcomb executed a mortgage dated September 1, 2005 on premises known as 82 Powell Avenue, Southampton, New York. The mortgage indicated that Mortgage Electronic Registration Systems (MERS) was the mortgagee of record for the purposes of recording the mortgage. Said mortgage was recorded on October 5, 2005 in the Suffolk County Clerk's Office. The mortgage was subsequently assigned by MERS as nominee for American Home to Washington Mutual Bank by assignment dated August 8, 2007. Said assignment was recorded on October 10, 2007 at the Suffolk County Clerk's Office. Then, defendant Holcomb executed a note dated September 21, 2007 agreeing to pay Washington Mutual Bank, FA the sum of $479,158.42. As security for said note, defendant Holcomb executed a mortgage dated September 21, 2007 on the subject property. Said mortgage was recorded on October 10, 2007 in the Suffolk County Clerk's Office. The notes and mortgages were subsequently consolidated to form a single lien in the sum of $1,650,000.00 by consolidation, extension and modification agreement (CEMA) dated September 21, 2007 and recorded on October 10, 2007 in the Suffolk County Clerk's Office. Shortly thereafter, MERS as nominee for American Home recorded on November 21, 2007 in the Suffolk County Clerk's Office a discharge of mortgage (satisfaction of mortgage) dated October 24, 2007 for the first mortgage in the sum of $1,120,000.00. The satisfaction of mortgage indicated that the mortgage had not been assigned.

Plaintiff, JP Morgan Chase Bank, National Association, commenced the instant action on April 24, 2013 alleging that a satisfaction of mortgage dated October 24, 2007 for the first mortgage in the sum of $1,120,000.00 was erroneously recorded on November 21, 2007, that said first mortgage remains open and unpaid based on plaintiff's records, and that it is the current holder of said mortgage. By its first cause of action, plaintiff seeks an order pursuant to RPAPL article 15 declaring that the first mortgage dated September 1, 2005 and recorded in the Suffolk County Clerk's Office on October 5, 2005 is a valid lien and encumbrance against the subject premises nunc pro tunc from October 5, 2005. By its second cause of action, plaintiff seeks an order directing the Suffolk County Clerk expunge the satisfaction dated October 24, 2007 and erroneously recorded on November 21, 2007 and to reinstate the first mortgage dated September 1, 2005 and recorded on October 5, 2005 as an open mortgage in the Suffolk County Clerk's records.

Defendant Holcomb now moves for dismissal of the complaint pursuant to CPLR 3211 (a)(1), (a)(3), (a)(5), (a)(7), (a)(8) and (a)(10). Defendant asserts that he is entitled to dismissal pursuant to CPLR 3211 (a)(8) as he did not receive a copy of the notice of pendency and thus was not properly served with all

of the papers in this action such that the Court does not have jurisdiction over him. In addition, defendant asserts that he is entitled to dismissal pursuant to CPLR 3211 (a)(3) for plaintiff's lack of standing based on an invalid assignment of mortgage from MERS to Washington Mutual Bank. Defendant also asserts that improper parties are prosecuting this matter, that the original lender and the individual who signed the satisfaction of mortgage are necessary parties pursuant to CPLR 3211 (a)(10), and that the pleadings on their face fail to state a cause of action such that the action must be dismissed pursuant to CPLR 3211 (a)(7). Finally, defendant asserts that he has a defense based on documentary evidence pursuant to CPLR 3211 (a)(1) in the form of the discharge of mortgage. Defendant's submissions in support of his motion include the complaint and the mortgages, assignment, CEMA, and the satisfaction of mortgage. Defendant Holcomb did not submit an affidavit in support of his motion.

In opposition to the motion, plaintiff contends that as a result of the CEMA, an erroneous satisfaction of mortgage was recorded, which is voidable inasmuch as no one innocently or detrimentally relied on the satisfaction and defendant Holcomb is not a bona fide purchaser or lender for value. In addition, plaintiff contends that defendant offers no proof that he paid the entire $1,120,000.00 loan in full and explains that the CEMA consolidated the two loans and provided new repayment terms but did not replace the existing loans, which must remain open. Plaintiff also contends that defendant failed to submit an affidavit disputing the contents of the process server's affidavit, which constitutes prima facie evidence of proper service, to establish lack of personal jurisdiction; and that plaintiff owns the note and mortgage and thus has standing. With respect to defendant's assertions of res judicata and collateral estoppel, plaintiff informs that a prior action entitled *JP Morgan Chase Bank v Michael E. Holcomb, New York State Department of Taxation and Finance, Washington Mutual Bank FA* under Index number 23589/2009[1] was voluntarily discontinued and no final judgment was rendered on the merits and defendant never received a discharge in bankruptcy for the mortgage debt. Plaintiff further contends that the six-year statute of limitations under CPLR 213 has not yet run such that defendant has no statute of limitations defense; that the complaint sufficiently states the parties, the erroneous satisfaction, and the relief sought; that all necessary parties were named in the action and that neither MERS nor the original lender need be added as neither have an interest or rights after the CEMA loan. Plaintiff requests that the Court exercise its discretion in converting the motion to dismiss to a summary judgment motion pursuant to CPLR 3211 (c).

Plaintiff's submissions include an affidavit of the Federal Deposit Insurance Corporation (FDIC) indicating that on September 25, 2008, JP Morgan Chase became the owner of the loans of Washington Mutual Bank; the affidavit of service of the summons and complaint on defendant Holcomb pursuant to CPLR 308 (1); and the affidavit of John Koss, a vice president for plaintiff, who states that the first mortgage was not satisfied but was instead modified by the CEMA to form a single lien in the sum of $1,650,000.00 and that as of May 31, 2013 the unpaid principal balance is $1,649,950.00.

Initially, the Court informs that it will treat the motion to dismiss by defendant Holcomb as a motion for summary judgment pursuant to CPLR 3211 (c), having provided notice to the parties by prior order dated September 5, 2013 of this Court's intention to do so.

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[1] The Court's computerized records indicate that said action before the Honorable Joseph C. Pastoressa was discontinued on January 17, 2013.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v Prospect Hosp.***, 68 NY2d at 324, 508 NYS2d 923, citing to ***Zuckerman v City of New York***, 49 NY2d at 562, 427 NYS2d 595).

"A consolidation of outstanding loans is a device intended for the convenience of only the contracting parties" and "cannot impair liens in favor of parties that are not the contracting parties, which retain their independent force and effect" (***Federal Deposit Ins. Corp. v Five Star Mgt.***, 258 AD2d 15, 22, 692 NYS2d 69 [1st Dept 1999]). "Where, as here, ... CEMA's are executed to consolidate the mortgages into single liens, the first notes and mortgages still exist and may be assigned to other lenders" (***Benson v Deutsche Bank Natl. Trust, Inc.***, 109 AD3d 495, 498, 970 NYS2d 794 [2d Dept 2013]; *see* ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 109, 923 NYS2d 609 [2d Dept 2011]).

"A mortgagee may have an erroneous discharge of mortgage, without concomitant satisfaction of the underlying mortgage debt, set aside, and have the mortgage reinstated where there has not been detrimental reliance on the erroneous recording" (*see* ***New York Community Bank v Vermonty***, 68 AD3d 1074, 1076, 892 NYS2d 137 [2d Dept 2009], *lv to appeal dismissed* 15 NY3d 906, 912 NYS2d 573 [2010]; *see also* ***Citibank, N.A. v Kenney***, 17 AD3d 305, 793 NYS2d 84 [2d Dept 2005]). The inadvertent discharge of a mortgage, without concomitant satisfaction of the underlying debt, does not extinguish plaintiff's security interest; rather, it leaves plaintiff with an unrecorded, equitable lien, that plaintiff can enforce by way of foreclosure (*see* ***Citibank, N.A. v Kenney***, 17 AD3d 305, 793 NYS2d 84).

Here, the allegations contained in the complaint and supported by the affidavit of John Koss, a vice president for plaintiff, that the satisfaction of the first mortgage was erroneously executed and sent for recording, that the first mortgage had not been satisfied, and that the balance due under the $1,120,000.00 loan remains outstanding, are sufficient to set forth a viable cause of action to cancel and vacate the satisfaction of the first mortgage (*see* ***Mortgage Elec. Registration Sys., Inc. v Smith***, 111 AD3d 804, 975 NYS2d 121 [2d Dept 2013]). Therefore, defendant Holcomb has failed to demonstrate that the complaint fails to state a cause of action. In addition, defendant Holcomb has failed to demonstrate that res judicata or collateral estoppel applies to this action, that he received a discharge in bankruptcy, that he paid the outstanding loan amount for the first loan, or that the statute of limitations has expired such that the branch of defendant Holcomb's motion for summary judgment dismissing the action based on the grounds raised in CPLR 3211(a)(5) is denied.

Also, plaintiff's lack of service of the notice of pendency did not render the Court without personal jurisdiction over defendant Holcomb. There is no requirement that defendant be served a notice of pendency to commence a foreclosure action (*see* CPLR 6511, 6512). Plaintiff's submissions contain the process server's affidavit of service indicating that defendant Holcomb was personally served with the summons and complaint, which constitutes prima facie evidence of proper service (*see* ***Deutsche Bank***

Natl. Trust Co. v Quinones, 114 AD3d 719, 981 NYS2d 107 [2d Dept 2014][a second affidavit of service constituted prima facie evidence of proper service of the summons and complaint pursuant to CPLR 308 (1)]; ***Reich v Redley***, 96 AD3d 1038, 947 NYS2d 564 [2d Dept 2012]). Notably, plaintiff adequately described the property in its complaint for the purposes of RPAPL § 1515 (2) (*see* ***Mandel v Estate of Tiffany***, 263 AD2d 827, 693 NYS2d 759 [3d Dept 1999]). Therefore, that branch of defendant Holcomb's motion for summary judgment dismissing the complaint based on lack of personal jurisdiction is denied. Moreover, the mere existence of the "discharge of mortgage" document does not constitute evidence of payment or satisfaction pursuant to CPLR 3211 (a)(1) (*see* ***New York Community Bank v Vermonty***, 68 AD3d 1074, 1076, 892 NYS2d 137). Defendant Holcomb was required to provide proof of actual payment of the first loan, which he failed to do. Thus, that branch of defendant Holcomb's motion for summary judgment dismissing the complaint based on documentary evidence is denied.

Finally, "[a] plaintiff has standing where it is the holder or assignee of both the subject mortgage and of the underlying note at the time the action is commenced" (***HSBC Bank USA v Hernandez***, 92 AD3d 843, 939 NYS2d 120 [2d Dept 2012]; ***US Bank, NA v Collymore***, 68 AD3d 752, 753, 890 NYS2d 578 [2d Dept 2009]; ***Countrywide Home Loans, Inc. v Gress***, 68 AD3d 709, 888 NYS2d 914 [2d Dept 2009]). Here, plaintiff submitted an "allonge to note," for the first note which established that plaintiff is the transferee of the subject mortgage note. Said submission by plaintiff warrants denial of that branch of defendant's motion for summary judgment dismissing the complaint based on plaintiff's alleged lack of standing (*see* ***Deutsche Bank Trust Co. Americas v Codio***, 94 AD3d 1040, 943 NYS2d 545 [2d Dept 2012]).

The Court notes that defendant Holcomb raises a new allegation in his reply papers, that he was not served with notice pursuant to RPAPL § 1304, and submits an affidavit with the reply papers to that effect. Said allegation is improperly raised for the first time in his reply papers and cannot be considered by this Court (*see* ***Guzzello v Steinberg, Finneo, Berger, Barone & Fischoff, P.C.***, 68 AD3d 926, 892 NYS2d 423 [2d Dept 2009]). The prior order of this Court dated September 5, 2013 allowed defendant Holcomb to submit further information in support of his motion, not to raise new allegations.

Based on the foregoing, the motion by defendant Holcomb for summary judgment dismissing the complaint is denied. Plaintiff has established through its submissions that the satisfaction of mortgage for the first note was erroneously and inadvertently filed (*see* ***Deutsche Bank Trust Co., Americas v Stathakis***, 90 AD3d 983, 935 NYS2d 651 [2d Dept 2011]). Therefore, the Court searches the record and grants plaintiff summary judgment on its complaint (*see* CPLR 3212 [b]).

Plaintiff is directed to serve a copy of this order upon the Suffolk County Clerk. Submit judgment.

Dated: MARCH 28, 2014

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION