

Wells Fargo Bank, N.A. v Coulsting

2014 NY Slip Op 31637(U)

March 27, 2014

Supreme Court, Suffolk County

Docket Number: 11-25330

Judge: Joseph C. Pastoressa

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SUPREME COURT - STATE OF NEW YORK
IAS PART 34 - SUFFOLK COUNTY

PRESENT: Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 2-6-13

ADJ. DATE _____

Mot. Seq. #001 MotD
#002 XMD

Wells Fargo Bank, N.A., as certificate trustee
(not in its individual capacity but solely as
certificate trustee), in trust for registered Holders
of VNT Trust Series 2010-2

Plaintiff,

SHELDON MAY & ASSOCIATES, P.C.
Attorneys for Plaintiff
255 Merrick Road
Rockville Centre, N. Y. 11570

-against-

KEVIN G. COULSTING
8 Massey Court
Huntington, N. Y. 11743

Kevin G. Coulsting a/k/a Kevin Coulsting, Lisa
Coulsting a/k/a Lisa M. Coulsting a/k/a Lisa
Gambella Coulsting, Scott Savino, Clerk of the
Suffolk County Court Criminal Court Building,
Internal Revenue Service United States of
America, New York State Department of Taxation
& Finance and "JOHN DOE #1" though "JOHN
DOE #12", the last twelve names being fictitious
and unknown to plaintiff, the persons or parties
intended being the tenants, occupants, persons or
corporations, if any, having or claiming an
interest, in or lien upon the premises being
foreclosed herein,

Defendants.

LISA COULSTING
8 Massey Court
Huntington, N. Y. 11743

SCOTT SAVINO
6 Massey Court
Huntington, N. Y. 11743

CLERK OF THE SUFFOLK COUNTY
COURT
CRIMINAL COURT BUILDING
210 Center Drive
Riverhead, N. Y. 11901

CARL E. PERSON, ESQ.
325 W. 45th Street-Suite 201
New York, N. Y. 10036

NYS DEPARTMENT OF TAXATION
AND FINANCE
250 Veterans Memorial Highway
Hauppauge, N. Y. 11788

Upon the following papers numbered 1 to 40 read on this motion for summary judgment and an order of reference;
Notice of Motion/ Order to Show Cause and supporting papers 1 - 17; Notice of Cross Motion and supporting papers 18 - 33;
Answering Affidavits and supporting papers 34 - 38; Replying Affidavits and supporting papers 39 -40; ~~Other _____~~
: (and after hearing counsel in support and opposed to the motion) it is,

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the

motion is decided as follows: it is

ORDERED that this motion (001) by plaintiff Wells Fargo Bank, N.A., as certificate trustee (not in its individual capacity but solely as certificate trustee), in trust for registered Holders of VNT Trust Series 2010-2 (Wells Fargo) pursuant to CPLR 3212 for summary judgment on its complaint, to strike the combined answer of defendants Kevin G. Coulsting a/k/a Kevin Coulsting and Lisa Coulsting a/k/a Lisa M. Coulsting a/k/a Lisa Gambella Coulsting (collectively Coulsting), to fix the default of the non-answering, non-appearing defendants and, for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321 is denied; and it is further

ORDERED that the branch of plaintiff's motion (001) seeking leave to amend the caption of this action pursuant to CPLR 3025 (b) is granted; and it is further

ORDERED that the caption is hereby amended by striking therefrom the names of defendants "John Doe 1" to "John Doe 12"; and it is further

ORDERED that plaintiff is directed to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court.

ORDERED that the caption of this action hereinafter appear as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

Wells Fargo Bank, N.A., as certificate trustee
(not in its individual capacity but solely as
certificate trustee), in trust for registered Holders
of VNT Trust Series 2010-2

Plaintiff,

-against-

Kevin G. Coulsting a/k/a Kevin Coulsting, Lisa
Coulsting a/k/a Lisa M. Coulsting a/k/a Lisa
Gambella Coulsting, Scott Savino, Clerk of the
Suffolk County Court Criminal Court Building,
Internal Revenue Service United States of
America, New York State Department of Taxation
& Finance,

Defendants.

ORDERED that the cross motion (002) by defendants Coulsting for an order pursuant to CPLR 3211 dismissing the action on the grounds that defendants have a defense founded upon documentary evidence. plaintiff has no legal capacity to sue, the pleadings fail to state a cause of action and that the

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court should not proceed in the absence of a person who is not a party, is denied.

This is an action to foreclose a mortgage on premises known as 8 Massey Court, Huntington, New York. On December 1, 2006, defendant Kevin G. Coulsting executed an adjustable rate note in favor of Tribeca Lending Corporation (Tribeca) agreeing to pay \$360,000.00 at the starting yearly rate of 9.990 percent. On December 1, 2006, defendants Coulsting executed a first mortgage in the principal sum of \$360,000.00 on their home, the subject property. The mortgage indicated Tribeca to be the lender and MERS to be the nominee of Tribeca as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on December 14, 2006 in the Suffolk County Clerk's Office. Thereafter, the mortgage and note were transferred by assignment of mortgage dated October 29, 2010 from MERS, solely as nominee for Tribeca, to The Huntington National Bank, as certificate trustee of Franklin Mortgage Asset Trust 2009-A. The assignment of mortgage was recorded on November 18, 2010 with the Suffolk County Clerk's Office. Thereafter, the mortgage and note were transferred by assignment of mortgage dated October 29, 2010 from The Huntington National Bank, as certificate trustee of Franklin Mortgage Asset Trust 2009-A to plaintiff Wells Fargo. The assignment of mortgage was recorded on November 18, 2010 with the Suffolk County Clerk's Office. The subject note contains an undated allonge with an indorsement in blank by Joseph Caiazzo, president of Tribeca.

Sheldon May & Associates, P.C. sent a notice of default dated May 12, 2011 to defendants Coulsting stating that their loan was in default and that the amount past due was \$109,597.29. As a result of defendants' continuing default, plaintiff commenced this foreclosure action on August 9, 2011. In its complaint, plaintiff alleges in pertinent part that defendants breached their obligations under the terms of the note and mortgage by failing to make monthly payments commencing with their February 1, 2009 payment and subsequent payments thereafter. Defendants Coulsting interposed a combined answer with affirmative defenses and counter claims.

The Court's computerized records indicate that a foreclosure settlement conference was held on May 23, 2012 at which time this matter was referred as an IAS case since a resolution or settlement had not been achieved. Thus, there has been compliance with CPLR 3408 and no further settlement conference is required.

Plaintiff now moves for summary judgment on its complaint contending that defendants defaulted under the terms of the loan agreement and mortgage for failure to pay the February 1, 2009 payment and subsequent payments thereafter and that defendants' answer is without merit. In support of its motion, plaintiff submits among other things: the acknowledged statements of Amber Paxton, vice president of Acqura Loan Services, the self-proclaimed servicer for plaintiff, and Brady Hannan, agent of Home Servicing, LLC; the affirmation of Ted Eric May, Esq.; the affirmation in reply of Nicole Milone, Esq.; the summons and complaint; defendants' answer; defendants' amended answer, the note, mortgage and assignments of mortgage; a notice of default; notices pursuant to RPAPL §§ 1320, 1303 and 1304; the affirmation of Ted Eric May, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); affidavits of service for the summons and complaint; an affidavit of service for the instant summary judgment motion; and a proposed order appointing a referee to compute.

Defendants Coulsting cross-move seeking, *inter alia*, an order dismissing the action pursuant to

CPLR 3211 or in the alternative, an order requiring an evidentiary hearing pursuant to CPLR 409. Plaintiff in reply opposes defendant's cross-motion. Plaintiff has submitted an affirmation in opposition to the cross motion and reply.

Here, plaintiff has submitted two conflicting "affidavits" in support of its application. Plaintiff's motion in chief, which is submitted by the law firm of Sheldon May & Associates, P.C., states that they are the attorneys for plaintiff in this action. In support of its motion, plaintiff submits the acknowledged statement of Amber Paxton, Acqura Loan Services' vice president. In pertinent part, Ms. Paxton claims that Acqura is the servicing agent for Wells Fargo Bank, N.A. and that as servicing agent, Acqura is authorized to perform certain acts which include matters involving foreclosure actions. Paxton further states that the business records of Acqura Loan Services reflect that plaintiff is the holder and owner of the note and mortgage and that the note was negotiated to plaintiff on July 20, 2010. Plaintiff, in opposition to defendant's cross motion and in support of its own motion has submitted an affirmation in opposition to the cross motion and reply. The reply affirmation was submitted by Nicole Milone, Esq., an associate with Berkman, Henoch, Peterson, Peddy & Fenchel, P.C., the attorneys for Home Servicing, LLC, attorney-in-fact to plaintiff. Plaintiff's reply contains the affidavit of Brady Hannan, an agent of Home Servicing, LLC. Mr. Hannan states in relevant part that due to a scrivener's error, the affidavit in support of plaintiff's motion by Amber Paxton states that the note was negotiated to Wells Fargo on July 20, 2010 but that upon further review of the records, it has been determined that note was physically delivered, surrendered and conveyed to Wells Fargo on July 16, 2010.

"[I]n an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default" (Republic Natl. Bank of N.Y. v O'Kane, 308 AD2d 482 [2d Dept 2003]; see also Argent Mtge. Co., LLC v Mentasana, 79 AD3d 1079 [2d Dept 2010]; Village Bank v Wild Oaks Holding, 196 AD2d 812 [2d Dept 1993]). Where, as here, standing is put into issue by the defendant, the plaintiff is required to prove it has standing in order to be entitled to the relief requested (see Deutsche Bank Natl. Trust Co. v Haller, 100 AD3d 680 [2d Dept 2011]; US Bank, NA v Collymore, 68 AD3d 752 [2d Dept 2009]; Wells Fargo Bank Minn., NA v Mastropaolo, 42 AD3d 239 [2d Dept 2007]). In a mortgage foreclosure action "[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 [2d Dept 2012]; US Bank, NA v Collymore, 68 AD3d at 753; 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" (HSBC Bank USA v Hernandez, 92 AD3d 843).

In the instant matter, the sharply conflicting affidavits and affirmations submitted by plaintiff and its attorneys, together with those issues raised in defendant's cross motion, present triable issues of fact precluding summary judgment on plaintiff's causes of action and defendant's cross motion. Plaintiff's submissions, which include affidavits from an agent of Acqura Loan Services, the "Administrator of the Trust" and, Home Servicing, LLC, attorney-in-fact to Wells Fargo Bank, N.A., render it impossible for this court to determine which portrayal of plaintiff's ambiguous facts should be considered. Since Acqura Loan Services and Home Servicing, LLC both claim to have authority in their roles to submit affidavits in this matter, and since both entities through their respective agents claim that their affidavits are based

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upon personal knowledge, any purported error in the affidavit of Amber Paxton, vice president of Acqura Loan Services, should have been corrected through an affidavit of Amber Paxton and not through the affidavit of Brady Hannan, agent to Home Servicing, LLC.

Furthermore, plaintiff has failed to submit a properly sworn affidavits in support of its application. CPLR 2309 (b) requires that an “oath or affirmation shall be administered in a form calculated to awaken the conscience and impress the mind of the person taking it in accordance with his religious or ethical beliefs.” As such, for affidavits to have sufficient validity, a notary public witnessing signatures must take the oaths of the signatories or obtain statements from them as to the truth of the statements to which they subscribe their names (see Matter of Helfand v Meisser, 22 NY2d 762 [1968]; Matter of Imre v Johnson, 54 AD3d 427 [2d Dept 2008]; Matter of Leahy v O’Rourke, 307 AD2d 1008 [2d Dept 2003]).

The acknowledged statements from Amber Paxton, vice president of Acqura and Brady Hannan, agent of Home Servicing, LLC, attorney-in-fact to Wells Fargo Bank, N.A., contain no showing that the notaries who witnessed their signatures, took oaths from Mr. Hannon or Ms. Paxton. This is particularly pertinent here as defendants raise questions as to the reliability of statements proffered by plaintiff. Since both affidavits of plaintiff are fatally defective and inadmissible into evidence, plaintiff has failed to establish that there are no triable issues of material fact and that the plaintiff is entitled to summary judgment as a matter of law.

Accordingly, the plaintiff’s motion for summary judgment on its complaint and to strike the combined answer of defendants Coulsting is denied. Defendant’s cross-motion seeking, *inter alia*, dismissal of the complaint, is denied in its entirety.

To the extent that either plaintiff or defendant have requested other forms of relief but have not supported such noticed forms of relief with any allegations of law or fact, the court denies such applications.

The foregoing constitutes the decision and order of the court.

Dated: March 27, 2014



 HON. JOSEPH C. PASTORELLA, J.S.C..

____ FINAL DISPOSITION X NON-FINAL DISPOSITION