

RTR Props., L.L.C. v Sagastume

2014 NY Slip Op 31857(U)

April 3, 2014

Supreme Court, Suffolk County

Docket Number: 10-27944

Judge: Joseph A. Santorelli

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 9-4-13 (#003)
MOTION DATE 10-30-13 (#004)
ADJ. DATE 1-21-14
Mot. Seq. # 002 - MD
 # 003 - XMG

-----X

RTR PROPERTIES, L.L.C.,

Plaintiff,

- against -

RENE R. SAGASTUME, LYNETTE LESLEY,
MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC., AS NOMINEE FOR IMPAC
FUNDING CORPORATION D/B/A IMPAC
LENDING GROUP, MARIA SANTOS
ALACIOS, STERLING RECOVERIES, INC.,
"JOHN DOE 1" TO "JOHN DOE 25", said
names being fictitious, the persons or parties
intended being the persons, parties, corporations
or entities, if any, having or claiming an interest
in or lien upon the mortgaged premises described
in the complaint,

Defendants,

DEUTSCHE BANK NATIONAL TRUST
COMPANY, AS TRUSTEE UNDER THE
POOLING AND SERVICING AGREEMENT
RELATING TO IMPAC SECURED ASSETS
CORP., MORTGAGE PASS-THROUGH
CERTIFICATES, SERIES 2006-3,

Intervenor-Defendant.

-----X

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COPY

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Upon the following papers numbered 1 to 39 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 26; Notice of Cross Motion and supporting papers 27 - 35; Answering Affidavits and supporting papers 36 - 37; Replying Affidavits and supporting papers 38 - 39; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the intervenor-defendant for partial summary judgment on its counterclaim for equitable subrogation is denied; and it is further

ORDERED that the cross motion by the plaintiff for summary judgment in its favor and against the non-answering non-appearing defendants and the intervenor-defendant, for leave to amend the caption of this action pursuant to CPLR 3025 (b) and for an order of reference appointing a referee to compute the sum due and owing plaintiff pursuant to Real Property Actions and Proceedings Law § 1321, is granted; and it is further

ORDERED that the caption is hereby amended by substituting defendants Andre Clark Milton and “Jane” Milton as “John Doe #1” and “John Doe #2” and by striking therefrom defendants named as “John Doe #3 - #25”; 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; and it is further

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

**SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF SUFFOLK**

-----X
 RTR PROPERTIES, L.L.C.,

Plaintiff,

- against -

RENE R. SAGASTUME, LYNETTE LESLEY,
 MORTGAGE ELECTRONIC REGISTRATION
 SYSTEMS, INC., AS NOMINEE FOR IMPAC
 FUNDING CORPORATION D/B/A IMPAC
 LENDING GROUP, MARIA SANTOS ALACIOS,
 STERLING RECOVERIES, INC., ANDRE CLARK
 MILTON and “JANE” MILTON,

Defendants,

DEUTSCHE BANK NATIONAL TRUST COMPANY,
 AS TRUSTEE UNDER THE POOLING AND

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SERVICING AGREEMENT RELATING TO IMPAC
 SECURED ASSETS CORP., MORTGAGE
 PASS-THROUGH CERTIFICATES, SERIES 2006-3,

Intervenor-Defendant.

-----X

In this residential foreclosure action, the plaintiff seeks to foreclose a mortgage on the premises known as 1166 Joselson Avenue, Bay Shore, New York. Defendant Rene Sagastume executed two separate notes and mortgages with two separate lenders to secure the sum of \$386,000.00. On March 9, 2005, Sagastume executed two promissory notes and deeded the property to Jose Lora. In the first promissory note, Sagastume agreed to pay the principal sum of \$308,800.00 together with interest in return for a loan received from Mortgage Electronic Registration Systems, Inc. (“MERS”). In the second promissory note, Sagastume agreed to pay the principal sum of \$77,200.00 together with interest in return for a loan received from America’s Wholesale Lender (“AWL”). To secure both notes, Sagastume executed two mortgages on the same date on the subject property. Both mortgages were recorded on April 1, 2005 in the Suffolk County Clerk’s Office. By assignment dated March 10, 2010, and recorded in the Suffolk County Clerk’s Office on July 28, 2010, AWL assigned its mortgage (to secure the repayment of the \$77,200.00 note) to the plaintiff. On July 24, 2006, Jose Lora deeded the property to defendant Lynette Lesley. On that same day, Lesley executed a note agreeing to pay the principal sum of \$360,000.00 together with interest in return for a loan received from Impac Funding Corporation d/b/a Impac Lending Group (“Impac”). To secure this note, Lesley executed a mortgage on the same date on the subject property. By assignment dated May 20, 2009, and recorded in the Suffolk County Clerk’s Office on March 22, 2010, Impac assigned its mortgage to the intervenor-defendant, Deutsche Bank National Trust Company, As Trustee Under the Pooling and Servicing Agreement Relating to Impac Secured Assets Corp., Mortgage Pass-Through Certificates, Series 2006-3 (“Deutsche Bank”). Defendant Sagastume defaulted on her monthly payments of principal and interest on August 1, 2005, and each month thereafter. The plaintiff sent Sagastume a letter of default dated April 22, 2010. Sagastume failed to cure her default.

The plaintiff commenced the instant action on July 30, 2010. The defendants have not served an answer. Thereafter, Deutsche Bank moved for leave to intervene. By so-ordered stipulation dated January 5, 2011, the Deutsche Bank was permitted to intervene in the action.

In its answer, Deutsche Bank counterclaimed for a declaration that plaintiff’s mortgage is subject to and subordinate to Deutsche Bank’s mortgage, equitable subrogation, and unjust enrichment.

Deutsche Bank now moves for partial summary judgment on its counterclaim for equitable subrogation and a declaration that it holds an equitable first mortgage against the premises superior to the plaintiff’s mortgage and interests of all other parties. The plaintiff cross-moves for summary judgment in its favor and against the non-answering non-appearing defendants and Deutsche Bank, for leave to amend the caption of this action pursuant to CPLR 3025 (b) and for an order of reference appointing a referee to compute the sum due and owing plaintiff pursuant to Real Property Actions and Proceedings Law § 1321.

In support of its motion, Deutsche Bank submits, among other things, an affidavit from Jennefer Bartholomew, assistant vice president of Bank of America, N.A., servicer for Deutsche Bank, an affidavit from Francine DiLeonardo, the title closer present at the closing on July 24, 2006, an affidavit from Stephen Wichmann, associate General Counsel for Impac, and copies of all of the aforementioned mortgages and assignments on the premises.

The doctrine of equitable subrogation applies “where the funds of a mortgagee are used to satisfy the lien of an existing, known incumbrance when, unbeknown to the mortgagee, another lien on the property exists which is senior to his but junior to the one satisfied with his funds. In order to avoid the unjust enrichment of the intervening, unknown lienor, the mortgagee is entitled to be subrogated to the rights of the senior incumbrance” (*King v Pelkofski*, 20 NY2d 326, 333-334, 282 NYS2d 753 [1967]; see *Arbor Commercial Mtge., LLC v Associates at the Palm, LLC*, 95 AD3d 1147, 1149, 945 NYS2d 694 [2d Dept 2012]). The doctrine operates to “erase[] the lender’s mistake in failing to discover intervening liens, and grants him the benefit of having obtained an assignment of the senior lien that he caused to be discharged” (*United States v Baran*, 996 F 2d 25, 29 [2d Cir 1993]; see *Arbor Commercial Mtge., LLC v Associates at the Palm, LLC*, *supra*). “In this manner, equitable subrogation preserves the proper priorities by keeping the first mortgage first and the second mortgage second and prevents a junior lienor from converting the mistake of the lender into a magical gift for himself” (see *Arbor Commercial Mtge., LLC v Associates at the Palm, LLC*, *supra* [internal citations and quotations omitted]).

The Court finds that the doctrine of equitable subrogation is inapplicable to the case at hand since here Impac was aware of the mortgage held by the plaintiff on July 24, 2006, the date of the closing, and merely assumed, before it assigned its mortgage to Deutsche Bank, that the proceeds from its mortgage had satisfied the plaintiff’s lien. It has been held that “actual notice of an intervening interest bars application of the doctrine of equitable subrogation” (*Arbor Commercial Mtge., LLC v Associates at the Palm, LLC*, 95 AD3d 1147, 1150, 945 NYS2d 694, 697). It is well settled that “[a]n assignee stands in the shoes of the assignor and takes the assignment subject to any preexisting liabilities” (*Arena Constr. Co. v Sackaris Sons*, 282 AD2d 489, 489, 722 NYS2d 884, 884 [2d Dept 2001]; see also *TPZ Corp. v Dabbs*, 25 AD3d 787, 808 NYS2d 746 [2d Dept 2006]). While Deutsche Bank asserts that it assumed that plaintiff’s lien had been satisfied at the time that it was assigned the mortgage by Impac, it has not proffered any evidence establishing that the proceeds of Impac’s loan actually satisfied the plaintiff’s lien, such as copies of the satisfaction of the plaintiff’s prior mortgage (compare *LaSalle Bank Natl. Assn. v Ally*, 39 AD3d 597, 600, 835 NYS2d 264 [2d Dept 2007]; *Federal Natl. Mtge. Assn. v Woodbury*, 254 AD2d 182, 679 NYS2d 116 [1st Dept 1998]; *Zeidel v Dunne*, 215 AD2d 472, 626 NYS2d 509 [2d Dept 1995]). In her affidavit, Ms. Bartholomew states that according to the closing instructions on July 24, 2006, plaintiff’s mortgage was not supposed to remain open and unpaid after the closing as the instructions specifically stated that Impac’s loan must be recorded in the first lien position. Ms. DiLeonardo states in her affidavit that her responsibilities at the July 24, 2006 closing included marking the “Schedule B”—exceptions from coverage—to the title insurance policy. When a prior mortgage is being paid off with the proceeds of the sale, she marks the prior mortgage, as she did here, “OMIT.” Mr. Wichmann states in his affidavit that Impac was aware of the prior mortgages on the property including the mortgage for the sum of \$77,200.00 at the closing date, and that Impac expected that its mortgage would have first lien priority on the premises as noted in the closing instructions.

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Thus, Deutsche Bank failed to demonstrate that its mortgage had priority over any interest in the subject property of plaintiff as a result of an equitable lien (*see Private Capital Group, LLC v Hosseinipour*, 86 AD3d 554, 927 NYS2d 665 [2d Dept 2011]). Accordingly, Deutsche Bank's motion for partial summary judgment on its counterclaim for equitable subrogation is denied.

Turning to the plaintiff's cross motion, in support of its cross motion, the plaintiff submits, among other things, the note and mortgage, the notice of default letter, the summons and complaint, notices pursuant to RPAPL §§ 1320 and 1304, affidavits of service for the summons and complaint, an affidavit of service for the instant summary judgment motion upon the defendants, an affidavit of merit, and a proposed order appointing a referee to compute.

"[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, 482, 764 NYS2d 635 [2d Dept 2003]; *see Argent Mtge. Co., LLC v Montesana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Here, the plaintiff produced the note and mortgage executed by the mortgagor, as well as evidence of nonpayment thereby establishing its prima facie entitlement to judgment as a matter of law (*see Argent Mtge. Co., LLC v Montesana, supra; Republic Natl. Bank of N.Y. v O'Kane, supra*).

Since the plaintiff made a prima facie showing of entitlement to judgment as a matter of law, it was incumbent on 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 Cochran Inv. Co., Inc. v Jackson*, 38 AD3d 704, 834 NYS2d 198, 199 [2d Dept 2007] *quoting Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 467, 664 NYS2d 345 [2d Dept 1997]).

In opposition, Deutsche Bank asserts that plaintiff failed to establish that it had standing to commence this action since it only stated in a conclusory fashion that it was in possession of the note at the time that the action was commenced. A plaintiff seeking foreclosure must establish that it was the owner or holder of the note and mortgage at the time that it commenced the foreclosure action (*see Mortgage Elec. Registration Sys. v Coakley*, 41 AD3d 674, 838 NYS2d 622 [2d Dept 2007]; *Federal Natl. Mtge. Assn. v Youkelsone*, 303 AD2d 546, 755 NYS2d 730 [2d Dept 2003]). A plaintiff may do so by demonstrating that it was the assignee of the mortgage and the underlying note or the assignee of the mortgage and by indorsement the holder of the note at the time that the action was commenced (*see Federal Natl. Mtge. Assn. v Youkelsone, supra; First Trust Natl. Assn v Meisels*, 234 AD2d 414, 651 NYS2d 121 [2d Dept 1996]; *Slutsky v Blooming Grove Inn, Inc.*, 147 AD2d 208, 542 NYS2d 721 [2d Dept 1989]). Here, a copy of the assignment of the mortgage and note from AWL to the plaintiff, dated March 10, 2010, is attached as an exhibit to the moving papers of Deutsche Bank. In addition, plaintiff submits together with its cross motion an affidavit from Shauna Boedeker, the chief financial officer of the plaintiff, in which she states that the note and mortgage was assigned to the plaintiff by AWL in March 2010 and that the plaintiff was in possession of the original note and mortgage when it commenced this action and is still the owner and holder of the note and mortgage.

Deutsche Bank’s further assertion that the plaintiff will be unjustly enriched if it is placed in the first lienor position is lacking in merit. The Court finds that there is no evidence that the plaintiff will be “reaping a windfall” as suggested by Deutsche Bank since Deutsche Bank has not established that the plaintiff’s mortgage was ever satisfied.

Furthermore, the Court finds that Deutsche Bank’s contention that the plaintiff has engaged in champerty is meritless as well. Deutsche Bank states in its opposition papers that “upon information and belief” the plaintiff is in the business of acquiring bad loans from lenders for the sole purpose of commencing litigation in violation of the doctrine of champerty. Pursuant to Judiciary Law § 489 (1), a corporation or association may not “solicit, buy or take an assignment of, or be in any manner interested in buying or taking an assignment of a bond, promissory note, bill of exchange, book debt, or other thing in action, or any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon.” In describing champerty in terms of an acquisition made with the purpose of bringing a lawsuit, the Court of Appeals distinguished “between one who acquires a right in order to make money from litigating it and one who acquires a right in order to enforce it” and has noted that New York cases agree that “if a party acquires a debt instrument for the purpose of enforcing it, that is not champerty simply because the party intends to do so by litigation (*Trust for Certificate Holders of Merrill Lynch Mtge. Invs., Inc. Mtge. Pass-Through Certificates, Series 1999-C1*, 13 NY3d 190, 200, 890 NYS2d 377, 382 [2009]). The Court stated that where, as here, the purpose of an assignment is the collection of a legitimate claim, the champerty statute does not apply. “What the statute prohibits, as the Appellate Division stated over a century ago, is the purchase of claims with the intent and for the purpose of bringing an action that [the purchaser] may involve parties in costs and annoyance, where such claims would not be prosecuted if not stirred up ... in [an] effort to secure costs” (*id.* at 201, 890 NYS2d at 383 [internal quotation marks omitted]).

In light of the foregoing, Deutsche Bank failed to establish the existence of a triable issue of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]).

Accordingly, Deutsche Bank’s motion is denied and the plaintiff’s cross motion is granted.

The proposed long form order appointing a referee to compute pursuant to RPAPL § 1321, as modified by the Court, has been signed concurrently herewith.

Dated: APR 03 2014



HON. JOSEPH A. SANTORELLI
J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION