

BAC Home Loans Servicing, LP v Bovich

2014 NY Slip Op 32435(U)

September 9, 2014

Sup Ct, Suffolk County

Docket Number: 10083-2010

Judge: C. Randall Hinrichs

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SUPREME COURT - STATE OF NEW YORK
PART 49 - SUFFOLK COUNTY

P R E S E N T :

Hon. C. RANDALL HINRICHS
Justice of the Supreme Court

MOTION DATE 8-27-13
ADJ. DATE 8-28-14
Mot. Seq. # 002 - MD
Mot. Seq. # 003 - XMD

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**BAC HOME LOANS SERVICING, LP F/K/A
COUNTRYWIDE HOME LOANS
SERVICING, LP,**

Plaintiff,

- against -

**RICHARD C. BOVICH, JR., JOHANNA V.
BOVICH, BOARD OF MANAGERS OF THE
PARK PLACE AT NORTH SAYVILLE
CONDOMINIUM, BANK OF AMERICA,
N.A., "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.

**DRUCKMAN LAW GROUP PLLC
Attorneys for Plaintiff
242 Drexel Avenue
Suite 2
Westbury, New York 11590**

**LIEB AT LAW, P.C.
Attorney for Defendants Bovich
376A Main Street
Center Moriches, New York 11934**

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Upon the following papers numbered 1 to 26 read on this motion for summary judgment and order of reference; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers 13 - 26; ~~Answering Affidavits and supporting papers _____~~; ~~Replying Affidavits and supporting papers _____~~; ~~Other _____~~; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by plaintiff BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing, LP pursuant to CPLR 3212 for summary judgment on its complaint against defendants Richard C. Bovich, Jr. and Johanna V. Bovich, fixing the defaults as against the non-appearing, non-answering defendants, for leave to amend the caption of this action pursuant to CPLR 3025 (b) and, to appoint a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is denied; and it is further

ORDERED that the cross motion by defendants Richard C. Bovich, Jr. and Johanna V. Bovich for an order pursuant to CPLR 3211(a)(3) and (a)(7) dismissing the action based upon, *inter alia*, plaintiff's lack of standing, failure to comply with the requirements of RPAPL §§ 1303, 1304 and 1306 and champerty, as well as for counsel fees, is denied.

This is an action to foreclose a mortgage on property known as 24 Yosemite Circle, Unit 16, Bohemia, Suffolk County, New York ("the property"). On May 24, 2006, defendants Richard C. Bovich, Jr. and Johanna V. Bovich ("defendants") executed a fixed rate note in favor of Columbia Home Loans, LLC ("Columbia") agreeing to repay the sum of \$360,200.00 at the yearly rate of 6.625 percent; at the same time defendants also executed a mortgage in the principal sum of \$360,200.00 on the property to secure the note. The mortgage indicated Columbia to be the lender and Mortgage Electronic Registration Systems, Inc. ("MERS") to be the nominee of Columbia as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on June 28, 2006 in the Suffolk County Clerk's Office. Thereafter, by assignment dated November 23, 2009, MERS, as nominee for Columbia, allegedly assigned the note and mortgage to plaintiff BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing, LP BAC ("plaintiff"). The assignment of mortgage was recorded on January 27, 2010 with the Suffolk County Clerk's Office.

Plaintiff sent a notice of default dated June 22, 2009 to defendants stating that they had defaulted on their mortgage loan and that the amount past due was \$5,711.54. As a result of defendant's continuing default, plaintiff commenced this foreclosure action on March 16, 2010. In its complaint, plaintiff alleges that defendants breached their obligations under the terms of the note and mortgage by failing to make their monthly payments commencing with the May 1, 2009 payment and subsequent payments. Defendants interposed a verified answer with five affirmative defenses, including plaintiff's lack of standing.

The Court's computerized records indicate that a foreclosure settlement conference was held on November 17, 2010, at which time this matter was referred as an IAS case as a resolution or settlement had not been achieved. Thus, there has been compliance with CPLR 3408.

Plaintiff now moves for summary judgment on its complaint contending that defendants breached their obligations under the terms of the loan agreement and mortgage by failing to tender monthly payments commencing with their May 1, 2009 payment. In support of its motion, plaintiff submits among other things: the sworn affidavit of an officer of Bank of America, N.A. ("BANA"), servicing agent for the proposed substitute plaintiff, Hudson City Savings Bank, FSB ("Hudson"); the affirmation of counsel in support of the motion; the pleadings; the affirmation of counsel pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the note, mortgage and assignments of mortgage; a notice of default; notices pursuant to RPAPL §§ 1320, 1304 and 1303; affidavits of service for the summons and complaint; and, a proposed order appointing a referee to compute. Defendants oppose the summary judgment motion.

"[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 Argent Mtge. Co., LLC v Mentasana*, 79 AD3d 1079 [2d Dept 2010]). Once plaintiff has made this showing, the burden then shifts to defendant to produce evidentiary

proof in admissible form sufficient to require a trial of their defenses (*see Ames Funding Corp. v Houston*, 44 AD3d 692 [2d Dept 2007]; *Household Fin. Realty Corp. of New York v Winn*, 19 AD3d 545 [2d Dept 2005]; *see also Washington Mut. Bank v Valencia*, 92 AD3d 774 [2d Dept 2012]).

Here, plaintiff made the prima facie establishing its case by providing a copy of the mortgage, copies of the assignments of mortgage, the unpaid note together with due evidence of their default in payment under the terms of the loan documents (*see CPLR 3212; RPAPL §1321; Neighborhood Hous. Serv. of New York City v Hawkins*, 97 AD3d 554 [2d Dept 2012]; *Baron Assoc., LLC v Garcia Group Enter.*, 96 AD3d 793 [2d Dept 2012]; *Citibank, N.A. v Van Brunt Prop., LLC*, 95 AD3d 1158 [2d Dept 2012]). However, as standing was put into issue by defendants, plaintiff is required to prove it has standing in order to be entitled to the relief requested (*see 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]). Plaintiff establishes its lawful status as assignee, either by written assignment or physical delivery, prior to the filing of the complaint (*see Aurora Loan Services, LLC v Weisblum*, 85 AD3d 95 [2d Dept 2011]). Holder’s status is established where plaintiff is the special indorsee of the note or takes possession of a mortgage note that contains an indorsement in blank on the face thereof as the mortgage follows as incident thereto (*see UCC § 3–202; § 3–204; § 9–203[g]*).

Here, although plaintiff has established the written assignment of the mortgage to it prior to the commencement of the action, it has failed to establish a written assignment of the note and/or plaintiff’s physical possession of the note containing an indorsement in blank prior to that time. The broad language in the purported assignment of the note and mortgage by MERS to plaintiff transferred only the mortgage, as there is no proof that Columbia ever transferred or assigned the note to MERS, the assignment of the mortgage does not overcome that requirement (*see Bank of New York v. Silverberg*, 86 AD3d 274 [2d Dept 2011]). “Where a mortgage is represented by a bond or other instrument, an assignment of the mortgage without assignment of the underlying note or bond is a nullity” (*US Bank, NA v Collymore*, 68 AD3d at 754; *see Merritt v. Bartholick*, 36 NY 44. 45 [1867]; *Kluge v. Fugazy*, 145 AD2d 537,538 [2d Dept, 1988]). The transfer of the mortgage without the note is a nullity and no interest is acquired by it, because the mortgage is merely a security for the debt and cannot exist independent of it (*see Bank of N.Y. Mellon v. Gales*, 116 AD3d 723 [2d Dept 2014]; *U.S. Bank National Association v. Farque*, __AD3d__, 2014 WL 3928918, 2014 N.Y. Slip Op. 05785 [2d Dept, 2014]).

Plaintiff has provided copies of the note which contain indorsements from Columbia to Countrywide Bank, N.A., from Countrywide Bank, N.A. to Countrywide Home Loans, Inc. and a blank indorsement from Countrywide Home Loans, Inc.; all of the indorsements are undated. There is no proof as to when the blank indorsement came into physical possession of plaintiff. An affidavit by a representative of BANA, the proposed substitute plaintiff Hudson’s servicing agent, provides only a recitation of the complaint and a review of business records maintained by others. Both the complaint, verified by counsel, and the affidavit from the BANA representative contain only conclusory assertions regarding plaintiff’s possession of the note and are void of any factual details to establish when physical delivery of the note to plaintiff occurred.

Plaintiff has failed to establish its possession of the note prior to commencement of the action and thus its standing to bring the action (*see Bank of N.Y. Mellon v. Gales*, *supra*; *U.S. Bank National Association v. Farque*, *supra*).

As defendant has raised a genuine question of fact concerning plaintiff's standing to bring the action, plaintiff's motion for summary judgment must be denied (*see HSBC Bank USA, National Association v Gilbert*, ___ AD3d ___, 2014 N.Y. Slip Op. 05950 [2d Dept, 2014]), and with it its ancillary motions setting the default of non-appearing, non-answering defendants, for an order of reference pursuant to RPAPL § 1321 and to amend the caption to substitute Hudson as plaintiff.

Defendants' cross-motions are denied. Although defendants have raised triable issues of fact as to plaintiff's standing they have not submitted proof warranting dismissal of the action pursuant to CPLR 3211(a)(3) or (a)(7). A party seeking summary judgment may not merely point to gaps in an opponent's proof to obtain relief, it must adduce affirmative evidence of entitlement to that relief (*see Torres v. Industrial Container*, 305 AD2d 136 [1st Dept 2003]; *Gilbert Frank Corp. v. Federal Insurance*, 70 NY2d 966 [1988]; *Winegrad v. New York University Medical Center*, 64 NY2d 851 [1985]). The issue of standing cannot be determined upon this record, as questions of fact remain as to when the note was indorsed and whether the note was physically delivered to plaintiff prior to commencing the action (*see Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680 [2d Dept 2011], *US Bank National Association v Faruque*, *supra*). Defendants' motion for summary judgment is denied, as is their request for counsel fees.

Defendants claim that plaintiff did not comply with the notice provisions under RPAPL §§ 1303, 1304 and 1306 and moves to dismiss on those grounds. Those applications are denied.

Defendant Johanna V. Bovich's ("Ms. Bovich") moves for an order dismissing the complaint as to her on the grounds that plaintiff failed to comply with the requirements of RPAPL §§ 1303 and 1304. Ms. Bovich asserts by affidavit that she was not served with a notice pursuant to RPAPL § 1303, nor a notice pursuant to RPAPL 1304. The court notes that she does not deny having received the loan proceeds or having defaulted on her mortgage loan payments in her affidavit (*see Citibank, N.A. v Souto Geffen Co.*, 231 AD2d 466 [1st Dept 1996]). Instead, she relies on the alleged failure of plaintiff to provide the requisite notices pursuant to RPAPL §§ 1303 and 1304 and proof of service.

Proper service of the notices is a condition precedent to the commencement of a residential foreclosure action, and is plaintiff's burden to establish (*see Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909 [2d Dept 2013]). Plaintiff submitted proof of service of the RPAPL § 1303 notice upon both defendants by serving defendant Richard C. Bovich, Jr. ("Mr. Bovich"). Plaintiff has submitted affidavits of service, both dated March 23, 2010, by its process server, stating that service of a copy of the summons, complaint and the notice pursuant to RPAPL § 1303 on colored paper that is other than the color of the summons and complaint, was made on Mr. Bovich pursuant to CPLR 308 (1) on March 22, 2010 at approximately 12:07 P.M., and that the same time service of the same documents were made on Ms. Bovich, by serving Mr. Bovich as a person of suitable age and discretion pursuant to CPLR 308 (2). The court notes there is no affidavit from Mr. Bovich contesting this fact.

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A process server's sworn affidavit of service constitutes prima facie evidence of proper service (*see ACT Prop., LLC v Ana Garcia*, 102 AD3d 712 [2d Dept 2013]; *Deutsche Bank Natl. Trust Co. v Pietranico*, 102 AD3d 724 [2d Dept 2013]). A defendant may rebut the process server's affidavit by an affidavit containing specific and detailed contradictions of the allegations in the process server's affidavit, but bare, conclusory and unsubstantiated denials of receipt of the notices served with a copy of the summons and complaint are insufficient to rebut the presumption of proper service created by the process server's affidavit (*see U.S. Bank Natl. Assn. v Tate*, 102 AD3d 859 [2d Dept 2013]).

Defendants also contends plaintiff has not provided sufficient proof of service of the 90-day notice as required by RPAPL § 1304. The affirmation of plaintiff's counsel and an affidavit of plaintiff's representative reflects that the 90-day notice, containing the requisite language required by statute, was sent by first class mail and registered mail dated September 1, 2009. A copy of that notice pursuant was annexed to plaintiff's moving papers. The court is again left with only the unsubstantiated and conclusory denials of service of the RPAPL § 1304 notice contained in the affidavit of Ms. Bovich. As indicated above, such a bare and conclusory denial is insufficient to rebut the prima facie showing of proper service.

Again, defendants' bald an unsupported assertion, upon information and belief, that plaintiff did not comply with RPAPL 1306 is without merit. Plaintiff's counsel states that plaintiff complied with RPAPL § 1306 by filing the required 90-day notice (RPAPL § 1304) with the New York State Banking Department n/k/a/ New York State Department of Financial Services. Defendant has offered no proof to contradict that affirmation.

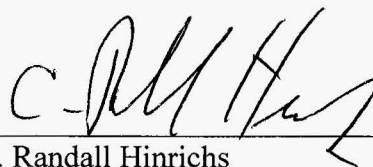
Accordingly, those portions of the cross motion seeking dismissal of the complaint on the basis that plaintiff failed to comply with a statutory condition precedent as same applies to RPAPL 1303, 1304 and 1306 are denied.

That branch of defendants' cross motion seeking dismissal of the action based on plaintiff's alleged commission of champerty is denied. Defendants' submission is insufficient as to raise an issue of fact with respect to such defense (*see 71 Clinton St. Apts. LLC v 71 Clinton Inc.*, 114 AD3d 583 [1st Dept 2014]).

The proposed order appointing a referee to compute pursuant to RPAPL § 1321 is marked "Not Signed" by the court.

This constitutes the decision and order of the court.

Dated: September 9, 2014



 C. Randall Hinrichs
 J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION