

U.S. Bank Natl. Assoc. v Christensen

2014 NY Slip Op 32498(U)

September 25, 2014

Sup Ct, Suffolk County

Docket Number: 41386-09

Judge: Arthur G. Pitts

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
IAS PART 43 - SUFFOLK COUNTY

PRESENT: HON. ARTHUR G. PITTS

Justice of the Supreme Court

U.S. BANK NATIONAL ASSOCIATION AS
TRUSTEE FOR JPMORGAN MORTGAGE
ACQUISITION CORP. 2005-WMC1, ASSET
BACKED PASS THROUGH CERTIFICATES
SERIES 2005-WMC1 10890 Rancho Bernardo
Road, San Diego CA 92127,

Plaintiff,

-against-

EDWARD A. CHRISTENSEN, SUZANNE
CHRISTENSEN, CLERK OF THE SUFFOLK COUNTY
DISTRICT COURT, JOHN DOE (said name being
fictitious to designate any and all occupants of
premises being foreclosed herein, and any parties
corporations or entities, if any, having or claiming
an interest or lien upon the mortgaged premises.)

Defendants.

MOTION DATE: 7-3-13
ADJ. DATE:
MOT. SEQ. # 003 - MG

COPY

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X

Upon the following papers numbered 1 to 54 read on this motion for summary judgment and an order of reference; Notice of Motion/ Order to Show Cause and supporting papers 1 - 30; ~~Notice of Cross Motion and supporting papers _____~~; Answering Affidavits and supporting papers 31 - 51; Replying Affidavits and supporting papers 52 - 54; ~~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 the motion by plaintiff U.S. Bank National Association as Trustee for JPMorgan Mortgage Acquisition Corp. 2005-WMC1, Asset Backed Pass Through Certificates Series 2005-WMC1.(US Bank) pursuant to CPLR 3212 for an order granting summary judgment on its complaint against defendants Edward A. Christensen and Suzanne Christensen (Christensen), fixing the defaults as against the non-answering and non-appearing defendants, to amend the caption of this action pursuant to CPLR 3025 (b) and. for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is granted; and it is further

US Bank v Christensen
Index No. 09-41386
Page 2

ORDERED that the caption is hereby amended by striking therefrom the names of defendants “John Doe”; 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

U.S. BANK NATIONAL ASSOCIATION AS
TRUSTEE FOR JPMORGAN MORTGAGE
ACQUISITION CORP. 2005-WMC1, ASSET
BACKED PASS THROUGH CERTIFICATES
SERIES 2005-WMC1 10890 Rancho Bernardo
Road, San Diego CA 92127,

Plaintiff,

-against-

EDWARD A. CHRISTENSEN, SUZANNE
CHRISTENSEN, CLERK OF THE SUFFOLK
COUNTY DISTRICT COURT,

Defendants.

This is an action to foreclose a mortgage on premises known as 10 Cider Mill Ln., Huntington, New York. On May 19, 2005, defendants Christensen executed a fixed rate note in favor of GE Money Bank agreeing to pay the sum of \$463,000.00 at the yearly rate of 6.500 percent. On the same date defendants Christensen also executed a first mortgage in the principal sum of \$463,000.00 on the subject property. The mortgage indicated GE Money Bank to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of GE Money Bank as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on May 27, 2005 in the Suffolk County Clerk’s Office. Thereafter, the mortgage was transferred by assignment of mortgage dated June 11, 2009 from MERS, as nominee for GE Money Bank to US Bank, the plaintiff herein. The assignment of mortgage was recorded on July 23, 2009 with the Suffolk County Clerk’s Office. On June 24, 2005, the note was transferred via allonge from GE Money Bank f/k/a GE Capital Consumer Card Co. to WMC Mortgage Corp. Thereafter, the note was transferred via allonge from WMC Mortgage LLC, successor in interest to WMC Mortgage Corporation to JPMorgan Mortgage Acquisition Corporation.

On December 1, 2008, a notice of default was sent to defendants Christensen stating that they had defaulted on their mortgage loan and the amount past due was \$20,307.35. As a result of defendants' continuing default, plaintiff commenced this foreclosure action on October 15, 2009. 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 their monthly payments commencing with the October 1, 2008 payment. Defendants interposed an answer with 23 affirmative defenses and one counterclaim.

The Court's computerized records indicate that a foreclosure settlement conference was held on March 21, 2011 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 conferences are required.

Plaintiff now moves for summary judgment on its complaint contending that defendants Christensen breached their obligations under the terms of the loan agreement and mortgage by failing to tender monthly payments commencing with their October 1, 2008 payment and subsequent payments thereafter. In support of its motion, plaintiff submits among other things: the sworn affidavit of Joshua Fowler, vice president with JPMorgan Chase Bank, N.A. (Chase), attorney-in-fact and servicer for US Bank; the sworn affidavit of Felicia T. Saintil-Deltis, assistant secretary with Chase; the affirmations of Justin F. Capuano, Esq. in support of the instant motion; the affirmation of Justin F. Capuano, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the pleadings; the note, mortgage and an assignment; a power of attorney; notices pursuant to RPAPL 1320 and 1303; affidavits of service for the summons and complaint; an affidavit of service for the instant summary judgment motion upon defendants' counsel; 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” (*see Republic Natl. Bank of N.Y. v O’Kane*, 308 AD2d 482, 482, 764 NYS2d 635 [2d Dept 2003]; *Village Bank v Wild Oaks Holding*, 196 AD2d 812, 601 NYS2d 940 [2d Dept 1993]). Once a plaintiff has made this showing, the burden then shifts to defendant to produce evidentiary proof in admissible form sufficient to require a trial on their defenses (*see Aames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]; *Household Fin. Realty Corp. of New York v Winn*, 19 AD3d 545, 796 NYS2d 533 [2d Dept 2005]). 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, 954 NYS2d 551 [2d Dept 2011]; *US Bank, NA v Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; *Wells Fargo Bank Minn., NA v Mastropalo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]).

The standing of a plaintiff in a mortgage foreclosure action is measured by its ownership, holder status or possession of the note and mortgage at the time of the commencement of the action (*see U.S. Bank of N.Y. v Silverberg*, 86 AD3d 274, 279, 926 NYS2d 532 [2d Dept 2011]; *U.S. Bank, N.A. v Adrian Collymore*, 68 AD3d 752; *Wells Fargo Bank, N.A. v Marchione*, 69 AD3d 204, 887 NYS2d 615 [2d Dept 2009]). Because “a mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation” (*Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909, 961 NYS2d 200 [2d Dept 2013] [internal citations omitted]), a mortgage passes as an incident of the note upon its physical delivery to the plaintiff. Holder status is established where the 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]).

“It is not necessary, however, that the party seeking to foreclose provided the consideration. A mortgage may be valid as long as proper consideration exists for the underlying obligation; once a party has lawfully obtained both the mortgage and the underlying promissory note, that party has standing to foreclose on the mortgage in the event of the default on the borrower’s obligation” (*Rose v Levine*, 107 AD3d 967, 969-970, 969 NYS2d 72 [2d Dept 2013]). Thus, the fact that plaintiff did not loan any money to defendants Christensen or service the loan is not a relevant consideration in determining standing.

Felicia T. Saintil-Deltis avers in her affidavit in further support of plaintiff’s motion that she has access to and has reviewed the business records concerning the subject loan, that the loan “records are kept and maintained by Chase in the course of its regularly conducted business activities”, that “[t]he note was physically delivered to Chase as attorney-in-fact for the plaintiff on May 27, 2009 and, that “[t]he note has been in Chase’s possession from that date through the present.” Here, plaintiff established through admissible evidence its standing as the holder of the note and mortgage by demonstrating that it obtained physical possession of the note on May 27, 2009, almost five months prior to the commencement of this action (*see Aurora Loan Services, LLC v Taylor*, 114 AD3d 627, 980 NYS2d 475 [2d Dept 2014]; *Deutsche Bank Nat. Trust Co. v Whalen*, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]). Defendants Christensen offered no evidence to contradict said factual averments and, therefore, failed to raise a triable issue of fact concerning plaintiff’s standing (*see id.*). In addition, inasmuch as there was physical delivery of the note, and the mortgage passes as an incident to the note, any alleged lack of authority of MERS to assign the mortgage is rendered immaterial (*see MLCFC 2007-9 Mixed Astoria, LLC v 36-02 35th Ave. Development, LLC*, 116 AD3d 745, 983 NYS2d 604 [2d Dept 2014]; *Bank of New York v Silverberg*, 86 AD3d 274, 926 NYS2d 532 [2d Dept 2011]).

The remaining arguments in opposition to plaintiff’s motion include the assertion that plaintiff as servicing agent does not have an equitable interest in the subject mortgage loan; that the endorsement in blank on the note is a legal nullity; that certain terms of the trust agreement were violated by the trustee and that the power of attorney is meaningless. Defendants Christensen failed to raise a triable issue of fact concerning any bona fide defense to foreclosure in opposition to the motion for summary judgment and by their remaining affirmative defenses (*see Rimbambito, LLC v Lee*, 118 AD3d 690, 986 NYS2d 855 [2d Dept 2014]; *Bank of Smithtown v 219 Sagg Main, LLC*, 107 AD3d 654, 968 NYS2d 95 [2d Dept 2013][unclean hands]; *American Airlines Federal Credit Union v Mohamed*, 117 AD3d 974, 986 NYS2d 530 [2d Dept 2014] [lack of good faith in denying loan modification]; *Putnam County Sav. Bank v Mastrantone*, 111 AD3d 914, 975 NYS2d 684 [2d Dept 2013] [lack of personal jurisdiction]). Notably, defendant Suzanne Christensen in her affidavit does not deny that the Christensens defaulted on their mortgage payments.

Also unavailing is the defendants’ assertion that plaintiff’s summary judgment motion should be denied as premature. CPLR 3212(f) provides that “should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just”. Appellate case authorities have long instructed that to avail oneself

US Bank v Christensen
Index No. 09-41386
Page 5

of the safe harbor this rule affords, the claimant must “offer an evidentiary basis to show that discovery may lead to relevant evidence and that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff” (*Martinez v Kreychmar*, 84 AD3d 1037, 923 NYS2d 648 [2d Dept 2011]; see *Seaway Capital Corp. v 500 Sterling Realty Corp.*, 94 AD3d 856, 941 NYS2d 871 [2d Dept 2012]). In addition, the party asserting the rule must demonstrate that he or she made reasonable attempts to discover facts which would give rise to a genuine triable issue of fact on matters material to those at issue (see *Swedbank, AB v Hale Ave. Borrower, LLC*, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]). Here, the papers submitted by defendants Christensen were insufficient to satisfy the aforementioned statutory burden. Thus, defendants failed to sufficiently demonstrate that they made reasonable attempts to discover the facts which would give rise to a triable issue of fact or that further discovery might lead to relevant evidence (see CPLR 3212 [f]; *Cortes v Whelan*, 83 AD3d 763, 922 NYS2d 419 [2d Dept 2011]; *Sasson v Setina Mfg. Co., Inc.*, 26 AD3d 487, 810 NYS2d 500 [2d Dept 2006]). Accordingly, defendants’ claim is thus rejected as unmeritorious.

Accordingly, the motion for summary judgment is granted against defendants Christensen. In addition, plaintiff’s request for an order fixing the default of the non-appearing, non-answering defendants and an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is granted (see *Green Tree Serv. v Cary*, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]; *Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *Bank of East Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

The proposed order appointing a referee to compute pursuant to RPAPL 1321 is signed simultaneously herewith as modified by the court.

Dated: September 25, 2014



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION