

Central Mtge. Co. v Torres

2014 NY Slip Op 32744(U)

October 21, 2014

Sup Ct, Suffolk County

Docket Number: 10-21923

Judge: Ralph T. Gazzillo

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 9-5-13
ADJ. DATE 10-4-13
Mot. Seq. # 002 - MD
 # 003 - XMD

-----X
CENTRAL MORTGAGE COMPANY, :
: :
 Plaintiff, :
: :
 -against- :
: :
JESUS TORRES, MARIA TORRES, MORTGAGE :
ELECTRONIC REGISTRATION SYSTEMS INC., :
WILMINGTON FINANCE, INC., UNITED :
STATES OF AMERICA, OLIPHANT :
FINANCIAL CORP., PEOPLE OF THE STATE :
OF NEW YORK, JOHN T. MATHER :
MEMORIAL HOSPITAL OF PORT JEFFERSON :
INC., BROOKWOOD MANAGEMENT :
COMPANY, CENTURION CAPITAL :
CORPORATION ASSIGNEE OF THE FCNB :
NEWPORT NEWS, CAPITAL ONE BANK, :
M. SFORZA D/B/A CONSOLIDATED FUEL OIL :
CO., GOOD SAMARITAN HOSPITAL, CAPITAL :
ONE BANK, USA, NA, DISCOVER BANK, :
NEW YORK STATE DEPARTMENT OF :
TAXATION AND FINANCE, :
: :
"JOHN DOE #1" through "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, described in the complaint, :
: :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 48 read on this motion for summary judgment and order of reference and cross motion to dismiss and cancel the lis pendens; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19; Notice of Cross Motion and supporting papers 20 - 35; Answering Affidavits and supporting papers 36 - 43; Replying Affidavits and supporting papers 44 - 478; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by plaintiff pursuant to CPLR 3212 for an order granting summary judgment on its complaint against defendant Jesus Torres, 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 denied; and it is further

ORDERED that defendant Torres' cross motion (002) for an order denying plaintiff's motion for summary judgment, dismissing the action pursuant to CPLR 3211 (a) (3), and canceling the lis pendens is denied.

This is an action to foreclose a mortgage on premises known as 17 Franklin Avenue, Brentwood, New York. On December 29, 2006, defendant Jose Torres executed an note in favor of Wilmington Finance, Inc. (Wilmington), agreeing to pay the sum of \$299,000.00 at the rate of 6.75 percent. On the same date defendants Jose Torres and Maria Torres executed a mortgage in the principal sum of \$299,000.00 on the subject property. The mortgage indicated Wilmington to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of Wilmington as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on January 17, 2007 in the Suffolk County Clerk's Office. The note contains an allonge by which the note is endorsed in blank by Don Malabuyo, Designated Signer for Wilmington. Thereafter, the note and mortgage were transferred by assignment of mortgage dated May 1, 2010 from MERS to Central Mortgage Company (Central), the plaintiff herein. The assignment of mortgage was recorded on June 21, 2010 with the Suffolk County Clerk's Office. On October 7, 2008, defendants Jose Torres and Marie Torres executed, acknowledged and delivered a loan modification agreement in favor of plaintiff Central, agreeing to pay a new balance of \$309,418.60 at a variable interest rate.

Central sent a notice of default dated February 2, 2010 to defendant Jesus Torres stating that he had defaulted on his mortgage loan. As a result of defendant's continuing default, plaintiff commenced this foreclosure action on June 10, 2010. In its complaint, plaintiff alleges in pertinent part that defendants Jesus Torres and Marie Torres breached their obligations under the terms of the note and mortgage by failing to make their monthly payments commencing with the October 1, 2009 payment. Defendant Jesus Torres interposed an answer asserting general denials, nine affirmative defenses and one counterclaim.

The Court's computerized records indicate that a foreclosure settlement conferences were held from June 5, 2013 through July 10, 2013, 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 Torres breached their obligations under the terms of the loan agreement and mortgage by failing to tender monthly

payments commencing with their September 1, 2008 payment and subsequent payments thereafter. In support of its motion, plaintiff submits among other things: the sworn affidavit of Teresa Swayze, assistant vice president of plaintiff; the pleadings; the note, mortgage and assignments; 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 defendants' counsel; and a proposed order appointing a referee to compute.

Defendant Jesus Torres cross-moves for an order denying plaintiff's motion, dismissing the complaint pursuant to CPLR 3211 (a) (3), and canceling the lis pendens. In his cross motion, defendant reasserts his pleaded affirmative defense that plaintiff lacks standing to prosecute its claims of foreclosure and sale. Defendant contends that a question of fact exists with respect to plaintiff's standing by reason of plaintiff's failure to demonstrate that it was the owner of the note at the commencement of this action, and that the undated endorsements in blank on the note and allonge without any additional proof fail to establish the date on which plaintiff purportedly took ownership of the note.

As to plaintiff's summary judgment application, "[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 Mastropaolo*, 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]; *Wells Fargo Bank, N.A. v Marchione*, 69 AD3d 204, 887 NYS2d 615 [2d Dept 2009]). "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 at 753; *Countrywide Home Loans, Inc. v Gress*, 68 AD3d 709, 888 NYS2d 914 [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). However, "a transfer or assignment of only the mortgage without the debt is a nullity and no interest is acquired by it," since a mortgage is merely security for a debt and cannot exist independently of it (*U.S. Bank N.A. v Dellarmo*, 94 AD3d 746, 748, 942 NYS2d 122 [2d Dept 2012]; see *Deutsche Bank Natl. Trust Co. v Barnett*, 88 AD3d 636, 931 NYS2d 630 [2d Dept 2011]; see also *Homecomings Fin., LLC v Guldi*, 108 AD3d 506, 969 NYS2d 470 [2d Dept 2013]).

Holder status is established where the plaintiff is the special endorsee of the note or takes possession of a mortgage note that contains an endorsement in blank on the face thereof as the mortgage follows as

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incident thereto (*see* UCC § 3-202; § 3-204; § 9-203[g]). Delivery of a note endorsed in blank may be established in the following manner: 1) physical delivery of the note to the plaintiff or its custodial agent prior to the commencement of the action (*see Kondaur Capital Corp. v McCary*, 115 AD3d 649, 981 NYS2d 547 [2d Dept 2014]; *Deutsche Bank Natl. Trust Co. v Whalen*, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]) 2) possession of an endorsed note by the endorsee on a specific date that is prior to the commencement of the action, from which it may be reasonably inferred that physical delivery of the note was made to the plaintiff by the endorsee (*see Aurora Loan Serv., LLC v Taylor*, 114 AD3d 627, 980 NYS2d 475 [2d Dept 2014]) or 3) pre-commencement possession of the note by a custodial agent of a trustee plaintiff named in a pooling and servicing agreement, the relevant portions of which are put before the court with a redacted mortgage loan schedule identifying the subject loan as one in the pool of loans securitized under the pooling and servicing agreement (*see HSBC Bank USA, Nat. Assn. v Sage*, 112 AD3d 1126, 977 NYS2d 446 [3d Dept 2013]).

Here, plaintiff failed to establish, *prima facie*, that it had standing to commence the action as it did not demonstrate that the note was physically delivered to it prior to the commencement of the action (*see HSBC Bank USA v Hernandez*, 92 AD3d 843, 939 NYS2d 120 [2d Dept 2012]). The affidavit of Ms. Swayze, assistant vice president of plaintiff, merely states that “Plaintiff has physical possession of the Note, having taken physical delivery of the Note from Wilmington Finance, Inc. prior to the commencement of this action.” Said affidavit contains conclusory statements regarding plaintiff’s possession of the note, and does not give any factual details of a physical delivery and, thus, fails to establish that the plaintiff had physical possession of the note prior to commencing the action (*see US Bank Nat. Assn. v Faruque*, 2014 NY Slip Op 05785 [2d Dept 2014]; *Deutsche Bank Natl. Trust Co. v Haller*, *supra*; compare *Aurora Loan Services, LLC v Taylor*, *supra*; *Deutsche Bank Nat. Trust Co. v Whalen*, *supra*). In addition, even though the assignment indicates that MERS assigned the note and mortgage to plaintiff, there is no evidence to establish that Wilmington assigned, or physically delivered, the note to MERS so that MERS physically possessed the note or that MERS had the authority from Wilmington to assign the note (*see Midland Mtge. Co. v Imtiaz*, 110 AD3d 773, 973 NYS2d 257 [2d Dept 2013]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]). Thus, the issue of standing cannot be determined as a matter of law on this record, because there is a question of fact as to whether plaintiff was the lawful holder of the note when it commenced this action (*see Federal Natl. Mtge. Assn. v Cappelli*, ___ AD3d ___, 990 NYS2d 856 [2d Dept 2014]; *Deutsche Bank Natl. Trust Co. v Haller*, *supra*).

Based on the forgoing, plaintiff’s motion for summary judgment and the other relief demanded is denied and the cross motion of defendant Torres for an order dismissing the complaint and canceling the lis pendens is denied. The proposed order submitted by plaintiff has been marked “unsigned.”

Dated: _____

A.J.S.C.

___ FINAL DISPOSITION

 NON-FINAL DISPOSITION

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