

U.S. Bank Nat'l Assoc. v Bank of Smithtown

2014 NY Slip Op 32795(U)

October 14, 2014

Sup Ct, Suffolk County

Docket Number: 05684/2014

Judge: Jr., Andrew G. Tarantino

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SUPREME COURT - PART 50
COUNTY OF SUFFOLK - STATE OF NEW YORK

PRESENT

HON. ANDREW G. TARANTINO, JR.
A.J.S.C.

Index No. 05684/2014
Orig. Date: 6/4/2014
Adj. Date: 6/24/2014
001: MG

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**U.S. BANK NATIONAL ASSOCIATION AS
TRUSTEE FOR THE HOLDERS OF THE FIRST
FRANKLIN MORTGAGE LOAN TRUST
MORTGAGE PASS-THROUGH CERTIFICATES,
SERIES 2005-FF10,**

Plaintiff(s),

**ORDER GRANTING
SUMMARY JUDGMENT**

-against-

THE BANK OF SMITHTOWN,

Defendant(s).

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Upon consideration of the Notice of Motion for an Order striking the defendant's Answer and for summary judgment in the plaintiff's favor, the supporting affirmation and exhibits A through I, the affirmation in opposition on behalf of the defendant and exhibits A through D, and the plaintiff's affirmation in further support of summary judgment and exhibit A, it is now

ORDERED that the motion by the plaintiff U.S. Bank National Association as Trustee for the Holders of the First Franklin Mortgage Loan Trust Mortgage Pass-Through Certificates, Series 2005-FF10, for an order striking the defendant's Answer with affirmative defenses and for summary judgment is granted; and it is further

ORDERED that if the defendant, People's United Bank, successor by merger to Bank of Smithtown, shall desire to redeem the mortgage bid on by the Plaintiff, the defendant shall within sixty days from the service of a copy of the judgment herein upon the defendant or its attorney, give the Plaintiff notice of the defendant's desire and intent to so redeem in accordance with the Order and Judgement Foreclosing Right of Redemption, as modified, signed simultaneously herewith.

On this motion for summary judgment by the plaintiff U.S. Bank National Association as Trustee for the Holders of the First Franklin Mortgage Loan Trust Mortgage Pass-Through Certificates, Series 2005-FF10 ["U.S. Bank" or "the plaintiff"], unless otherwise indicated the following facts are undisputed.

This action was brought pursuant to RPAPL §1352 to strictly foreclose a right of redemption of the defendant, People's United Bank, successor by merger to Bank of Smithtown ["People's Bank" or "the defendant"], pursuant to a lien held by the defendant upon the real property located at 11 Real Nautic Court, Hampton Bays, New York ["the subject premises"]. The action was commenced on March 17, 2014. The defendant answered on April 3, 2014, asserting general denials and six affirmative defenses. Prior to any discovery taking place, the plaintiff moved for summary judgment seeking an order striking the defendant's Answer, dismissing the affirmative defenses, and awarding the plaintiff summary judgment including judgment foreclosing the defendant's right of redemption.

By way of background, a judgment of foreclosure and sale of the subject property was granted on November 27, 2012. After the foreclosure sale of the subject property to U.S. Bank for \$500,000.00, and according to the Referee's Report of Sale dated February 26, 2013, there remained a deficiency in the amount of \$429,091.06. This amount did not include two subordinate mortgages. First Franklin, a Division of National City Bank of Indiana ["First Franklin"], had given the mortgagors a mortgage in the amount of \$185,000.00 which mortgage was recorded on October 6, 2005. In 2008, a second subordinate mortgagee, The Suffolk County National Bank ["SCNB"], had given the mortgagors a mortgage in the amount of \$144,166.85 which was recorded on April 7, 2008.

The plaintiff affirms that after the sale to the plaintiff and the plaintiff's receipt of a deed of conveyance dated March 27, 2013, U.S. Bank learned that the defendant had a judgment against the mortgagors in the amount of \$270,621.84 docketed on November 6, 2009. The defendant's judgment was subsequent to the lien of the mortgage under which the underlying foreclosure action was based, as well as the two mortgages held by First Franklin and SCNB, respectively.

RPAPL §1311 requires the plaintiff in a mortgage foreclosure action to join, as a party defendant, any person "whose interest is claimed to be subject and subordinate to the plaintiff's lien" (*6820 Ridge Realty LLC v. Goldman*, 263 A.D.2d 22, 701 N.Y.S.2d 69 [2d Dept. 1999]). Under the statute, these necessary parties include "[e]very person having an estate or interest in possession * * * in the property as a tenant in fee", as well as all junior lienholders (*see* RPAPL 1311[1]). The rationale for joinder of tenants and junior lienholders "derives from the underlying objective of foreclosure actions—to extinguish the rights of redemption of all those who have a subordinate interest in the property and to vest complete title in the purchaser at the judicial sale" (*Id.* at 26).

The absence of a necessary party in a foreclosure action leaves that party's rights unaffected by the judgment and sale, and the foreclosure sale may be considered void as to the omitted party (*see Polish Nat. Alliance v. White Eagle Hall Co.*, 98 A.D.2d 400, 406, 470 N.Y.S.2d 642; *see also, Marine Midland Bank v. Freedom Rd. Realty Assocs.*, 203 A.D.2d 538,

611 N.Y.S.2d 34). The purchaser of the foreclosed property has two potential remedies—the commencement of a strict foreclosure action pursuant to RPAPL §1352, or a reforeclosure action pursuant to RPAPL §1503. RPAPL §1523 further provides that a judgment of reforeclosure under RPAPL 1503 may be issued only where it appears that “there was a defect in the original foreclosure proceedings * * * [which] was not occasioned by the fraud or wilful neglect of the plaintiff”. In contrast, RPAPL §1352 places no such limitation on the right to obtain a judgment (*6820 Ridge Realty LLC v. Goldman*, 263 A.D.2d at 27).

Recognizing that the defendant was a necessary party to the underlying foreclosure action, the plaintiff commenced this action pursuant to RPAPL §1352 for a judgment seeking the following relief: to fix and determine the defendant’s rights, if any, in the subject premises, to foreclose the defendant’s right, title, interest, claim, lien and equity of redemption in and to the subject premises, unless the defendant redeems the premises and paid the mortgage debt with interest and costs to the plaintiff within a defined period fixed by the Court, that upon failure to redeem the defendant be forever precluded from redeeming and barred from claiming any title or interest in the property, and that the subject premises be deemed and declared free of any and all claims of the defendant.

In support of its motion for summary judgment, the plaintiff tendered, among other things, the underlying judgment of foreclosure and sale entered on December 27, 2012, the referee’s report of sale, the referee’s deed in foreclosure transferring the property to the plaintiff, the defendant’s judgment entered on November 6, 2009, the affidavit of service demonstrating that service of process was properly effected and that the action is timely, the original mortgage dated August 5, 2005, the assignment of mortgage from the original lender to First Franklin Financial Corporation dated September 1, 2005, and the subsequent assignment from First Franklin Financial Corporation to the plaintiff, also dated September 1, 2005.¹ The plaintiff also demonstrated that First Franklin and SCNB had interests in the premises that are superior and paramount to those of the defendant. Such proof was more than sufficient to discharge plaintiff’s initial burden on the motion for summary judgment.

Notably, the plaintiff acknowledges, and its proposed “Order and Judgment Foreclosing Right of Redemption” provides, that even if judgment is granted in the plaintiff’s favor, the defendant would have the opportunity to exercise its right of redemption. Although plaintiff concedes that there was an error in failing to name the defendant in the original foreclosure action, the error was neither deliberate nor prejudicial since “[t]he remedy for holders of an interest not named in a foreclosure action pursuant to Article 13 of the RPAPL is that they are to be given the right to redeem,” the very reason for the commencement of this action.

The defendant submitted no affidavit of fact from anyone with personal knowledge so

¹ The plaintiff commenced the underlying foreclosure action on August 11, 2010.

that the defendant's attorney's affirmation as to any factual issues including but not limited to counsel's argument that the plaintiff had no standing to commence the underlying foreclosure action or the instant strict foreclosure action has no probative value (*Rockaway Imp., LLC. v. Danco Transmission Corp.*, 9 Misc.3d 210, 214, 801 N.Y.S.2d 138 [N.Y.City Civ.Ct. 2005]).

That the plaintiff was aware, or should have been aware of the existence of the defendant's lien by the foreclosure search and/or continuation search conducted by its title company prior to commencing the underlying foreclosure action does not raise a material issue of fact precluding summary judgment in the plaintiff's favor. The right to prosecute a strict foreclosure action is not dependent on whether the failure to name a junior interest holder was an intentional act or an inadvertent error. In contrast to reforeclosure, strict foreclosure is "an absolute right" and "whether plaintiff had knowledge of defendant's lien at the time it took [title] is irrelevant" (*2035 Realty Co. v. Howard Fuel Corp.*, 77 A.D.2d 870, 871, 431 N.Y.S.2d 57 [2d Dept.1980], citing R.P.A.P.L. § 1503; see also *Davis v. Cole*, 193 Misc.2d 380, 747 N.Y.S.2d 722 [N.Y.Sup. 2002]). Strict foreclosure, among other differences, does not lead to a sale but would result in an order which "shall provide that a failure to redeem or commence an action for the foreclosure of [a subordinate] mortgage or other lien within [the time fixed by the court] shall preclude such person having a right of redemption" and such interest shall "be extinguished and terminated" (*Davis v Cole*, *supra* at 383; RPAPL § 1352).

That there was apparently no order confirming the sale by the referee pursuant to RPAPL §1355(2) does not deprive the plaintiff of standing to maintain this action, or preclude summary judgment in the plaintiff's favor. The failure to obtain an Order confirming the report of sale is a mere irregularity where the defendant can not show any prejudice to a substantial right (*Fidelity Bond & Mtge. Co. v Lucas*, 135 A.D.2d 778, 523 N.Y.S.2d 125 [2d Dept. 1987]).

The defendant has also failed to raise an issue of fact that the plaintiff lacked standing in the underlying foreclosure action with proof in admissible form. The plaintiff produced two assignments from the original mortgagee, to each of the successor mortgagees in the underlying foreclosure action which assigned not only the mortgage but the "bond or note or obligation described in said mortgage" (see generally *U.S. Bank, N.A. v. Collymore*, 68 A.D.3d 752, 753, 890 N.Y.S.2d 578; *Countrywide Home Loans, Inc. v. Gress*, 68 A.D.3d 709, 709, 888 N.Y.S.2d 914; *Wells Fargo Bank, N.A. v. Marchione*, 69 A.D.3d 204, 207–208, 887 N.Y.S.2d 615; *Mortgage Elec. Registration Sys., Inc. v. Coakley*, 41 A.D.3d 674, 674, 838 N.Y.S.2d 622; *Federal Natl. Mtge. Assn. v. Youkelsone*, 303 A.D.2d 546, 546–547, 755 N.Y.S.2d 730; *First Trust Natl. Assn. v. Meisels*, 234 A.D.2d 414, 651 N.Y.S.2d 121).

As for defendant's fourth affirmative defense, "[a]ssuming, without deciding, that the defense of unclean hands is applicable to a mortgage foreclosure action, the defendant failed to present evidence of immoral or unconscionable conduct by plaintiff (see *PHH Mtge. Corp. v. Davis*, 111 A.D.3d 1110, 1112, 975 N.Y.S.2d 480 [2013], *lv. dismissed* 23 N.Y.3d 940, 987

U.S.Bank National Association v The Bank of Smithtown
Index No. 005684-2014
Page 5

N.Y.S.2d 593, 10 N.E.3d 1148 [2014] [internal quotation marks and citations omitted]).

The argument asserted in an attorney's affirmation that summary judgment is premature before the completion of discovery is without merit (*1375 Equities Corp. v. Buildgreen Solutions, LLC*, 120 A.D.3d 783, 992 N.Y.S.2d 288 [2d Dept. 2014]).

The plaintiff's motion seeking an order striking the defendant's Answer with affirmative defenses and for summary judgment is granted. The proposed Order and Judgment submitted with the moving papers providing for a right of redemption, as modified, is being signed herewith.

Dated: OCT 14 2014



ANDREW G. TARANTINO, JR., A.J.S.C.

XX FINAL DISPOSITION

____ NON-FINAL DISPOSITION