

TD Bank, N.A. v Hack
2014 NY Slip Op 33197(U)
September 11, 2014
Supreme Court, Queens County
Docket Number: 14561/10
Judge: Augustus C. Agate
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MEMORANDUM

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24
Justice

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TD BANK, N.A. F/K/A COMMERCE BANK, N.A.,

Plaintiff,

-against-

Index No. 14561/10

Motion

Dated: June 12, 2014

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DORIS HACK, ET AL.,

Defendants.

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This motion by the plaintiff for summary judgment against defendants Doris Hack and Narul Hack, the appointment of a Referee to compute and other related relief is decided as follows:

This is an action by plaintiff to foreclose on a mortgage on residential property located at 47-21 196th Place, Flushing, New York. Plaintiff alleges that it is the holder of the subject mortgage and note. Plaintiff further alleges that defendants subsequently defaulted under the terms of the mortgage and note by failing to make the required payments due. Plaintiff thereafter commenced this foreclosure action, and defendants served an Answer with affirmative defenses and counterclaims. Plaintiff now moves for, *inter alia*, summary judgment and the appointment of a Referee to compute.

On a motion for summary judgment in a foreclosure action, a plaintiff makes a prima facie showing by producing the mortgage, the unpaid note and proof of the default by the defendant.

(*Redrock Kings, LLC v Kings Hotel, Inc.*, 109 AD3d 602, 602 [2d Dept 2013]; *Wachovia Bank, N.A. v Carcano*, 106 AD3d 724, 725 [2d Dept 2013]; *Wells Fargo Bank, N.A. v Webster*, 61 AD3d 856, 856 [2d Dept 2009]; *Household Fin. Realty Corp. of New York v Winn*, 19 AD3d 545, 546 [2d Dept 2005].)

In the case at bar, plaintiff satisfied its initial burden demonstrating its entitlement to summary judgment. Plaintiff submits the mortgage, the unpaid note and evidence of the default by the defendants. Plaintiff also submits the affidavit of Tonya Daigneault, the Assistant Vice President and Collection Supervisor II for the plaintiff bank. Ms. Daigneault avers that her responsibilities include review and knowledge of plaintiff's loan accounting systems, method of processing payments and credits to loan accounts, loan balances, loan advance and payment records and loan documents. Ms. Daigneault also avers that based upon the records the bank maintains, she has knowledge of, *inter alia*, the advances made under the loan documents and the original loan amount, payment records, credits allowed, if any, delinquency status and current loan balance. Ms. Daigneault avers that defendants have been in default on their mortgage since August 30, 2009, and the default has not been cured.

In opposition, defendant has failed to assert any valid defenses which could raise a triable issue of fact. (*Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753, 755 [2d Dept 2010].)

Defendants' argument that plaintiff lacks standing to maintain this action is without merit. In a foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced. (*Bank of N.Y. v Silverberg*, 86 AD3d 274, 279 [2d Dept 2011]; *Countrywide Home Loans, Inc. v Gress*, 68 AD3d 709, 709 [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, and the mortgage passes with the debt as an inseparable incident."

(*U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 754 2d Dept 2009]; see *HSBC Bank USA v Hernandez*, 92 AD3d 843, 844 [2d Dept 2012].) In addition, an instrument payable to order and indorsed in blank becomes payable to the bearer and may be negotiated by delivery alone. (see UCC § 3-204[2]; *Mortgage Elec. Registration Sys. v Coakley*, 41 AD3d 674, 674 [2d Dept 2007].) Where standing is raised a defense by the defendant, the plaintiff is required to prove its standing before it may be determined whether the plaintiff is entitled to relief. (*U.S. Bank, N.A. v Sharif*, 89 AD3d 723, 724 [2d Dept 2011]; *U.S. Bank, N.A. v Collymore*, 68

AD3d at 753.)

In the case at bar, plaintiff established that it has standing to maintain this action. In her affidavit, Ms. Daigneault states that plaintiff was the holder of the note and mortgage when the complaint was filed on June 8, 2010. She further avers that plaintiff "was and to date remains, in physical possession of the original Note..." (see *Deutsche Bank Natl. Trust Co. v Whalen*, 107 AD3d 931, 932 [2d Dept 2013].) Furthermore, plaintiff submits a letter of the Comptroller of the Currency, Administrator of National Banks, dated May 30, 2008, which served as official authorization given to TD Bank, National Association to operate the branches of Commerce Bank/North and Commerce Bank, National Association.

Defendants also aver that they never received a Notice of Default and Right to Cure from the plaintiff. However, Ms. Daigneault avers in her affidavit that a Notice of Default was sent to the defendants by first class mail on December 10, 2009. She has annexed a copy of the default notice with the certified mail receipt.

With respect to the counterclaims, however, plaintiff has not addressed any of these claims in the moving papers and, thus, has not made a prima facie showing of its entitlement to summary judgment dismissing the counterclaims.

Accordingly, the branch of this motion by the plaintiff for

summary judgment against defendants Doris Hack and Narul Hack on the complaint, striking the affirmative defenses, the appointment of a Referee to compute and amendment of the caption is granted.

The branch of the motion by plaintiff for summary judgment dismissing the counterclaims is denied.

Settle Order.

Date: September 11, 2014

AUGUSTUS C. AGATE, J.S.C.