

JPMorgan Chase Bank, N.A. v Ferreira
2015 NY Slip Op 30433(U)
March 12, 2015
Supreme Court, Suffolk County
Docket Number: 12-24275
Judge: Joseph A. Santorelli
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 12-1-14 (003)
MOTION DATE 12-3-14 (004)
MOTION DATE 1-30-15 (005)
ADJ. DATE 2-26-15
Mot. Seq. # 003 - MD
 # 004 - MG
 # 005 - XMD

-----X
JPMORGAN CHASE BANK, NATIONAL
ASSOCIATION,

Plaintiff,

- against -

SERGIO F. S. FERREIRA a/k/a SERGIO
FERREIRA, his respective heirs-at-law, next-of-
kin, distributees, executors, administrators,
trustees, devisees, legatees, assignees, lienors,
creditors and successors in interest and generally
all persons having or claiming under, by or
through said defendants who may be deceased by
purchase, inheritance, lien or otherwise, any right,
title or interest in the real property described in
the complaint herein, MARIA A.
CONSTANTINO-FERREIRA a/k/a MARIA
CONSTANTINO-FERREIRA a/k/a MARIA A.
FERREIRA a/k/a MARIA FERREIRA, her
respective heirs-at-law, next-of-kin, distributees,
executors, administrators, trustees, devisees,
legatees, assignees, lienors, creditors and
successors in interest and generally all persons
having or claiming under, by or through said
defendants who may be deceased by purchase,
inheritance, lien or otherwise, any right, title or
interest in the real property described in the
complaint herein, JP MORGAN CHASE BANK,
N.A., MIDLAND FUNDING LLC, TOWN
SUPERVISOR TOWN OF BABYLON,

STIENE & ASSOCIATES, P.C.
Attorney for Plaintiff
187 East Main Street
Huntington, New York 11743

RAYMOND W. VERDI, JR., ESQ.
Attorney for Defendant Ferreira
116 East Main Street, Suite C
Patchogue, New York 11772

JOSEPH WILSON, ESQ.
Attorney for Defendant Town of Babylon
200 E. Sunrise Highway
Lindenhurst, New York 11757

PORTFOLIO RECOVERY ASSOCIATES, LLC,
 TEACHERS FEDERAL CREDIT UNION,
 COMMISSION OF TAXATION AND
 FINANCE TCD CHILD SUPPORT
 ENFORCEMENT SECTION, CLERK OF THE
 SUFFOLK COUNTY DISTRICT COURT, NEW
 YORK STATE DEPARTMENT OF
 TAXATION AND FINANCE AND UNITED
 STATES OF AMERICA-INTERNAL
 REVENUE SERVICE, DEBBIE THOMAS,
 NICOLE THOMAS,

Defendants.

X

Upon the following papers numbered 1 to 40 read on this motion for summary judgment and an order of reference (003); Notice of Motion (003)/ ~~Order to Show Cause~~ and supporting papers 1 - 8; Notice of Motion (004)/ ~~Order to Show Cause~~ and supporting papers 9 - 32; Notice of Cross Motion (005) and supporting papers 33 - 36; Answering Affidavits and supporting papers 37 - 40; ~~Replying Affidavits and supporting papers _____; Other _____; (and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion (003) by plaintiff JPMorgan Chase Bank, National Association (JPMorgan) and the motion (004) by plaintiff JPMorgan are consolidated for purposes of this determination, and are considered together with the cross motion (005) by defendant Sergio F.S. Ferreira a/k/a Sergio Ferreira (defendant); and it is further

ORDERED that the motion (003) by plaintiff JP Morgan for an order pursuant to RPAPL 1325 appointing a Receiver, is denied without prejudice with leave to renew upon proper papers as set forth, including but not limited to a copy of the papers submitted with this application and a copy of this order; and it is further

ORDERED that the motion (004) by plaintiff JP Morgan pursuant to CPLR 3212 for summary judgment on its complaint as against answering defendant, 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, 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

ORDERED that the cross motion by defendant (005) for an order dismissing the action for plaintiff's failure to comply with the requirements of RPAPL 1304 and CPLR 3211(a)(3), is denied; and it is further

ORDERED that the caption is hereby amended by substituting SRMOF II 2012-1 Trust, U.S. Bank Trust National Association, not in its individual capacity but solely as Trustee; 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

_____^x
 SRMOF II 2012-1 TRUST, U.S. BANK TRUST NATIONAL
 ASSOCIATION, NOT IN ITS INDIVIDUAL CAPACITY
 BUT SOLELY AS TRUSTEE ,

Plaintiff,

- against -

SERGIO F. S. FERREIRA a/k/a SERGIO FERREIRA,
 MARIA A. CONSTANTINO-FERREIRA a/k/a
 MARIA CONSTANTINO-FERREIRA a/k/a MARIA A.
 FERREIRA a/k/a MARIA FERREIRA, her respective heirs-
 at-law, next-of-kin, distributees, executors, administrators,
 trustees, devisees, legatees, assignees, lienors, creditors and
 successors in interest and generally all persons having or
 claiming under, by or through said defendants who may be
 deceased by purchase, inheritance, lien or otherwise, any right,
 title or interest in the real property described in the complaint
 herein, JP MORGAN CHASE BANK, N.A., MIDLAND
 FUNDING LLC, TOWN SUPERVISOR TOWN OF BABYLON,
 PORTFOLIO RECOVERY ASSOCIATES, LLC, TEACHERS
 FEDERAL CREDIT UNION, COMMISSION OF TAXATION
 AND FINANCE TCD CHILD SUPPORT ENFORCEMENT
 SECTION, CLERK OF THE SUFFOLK COUNTY DISTRICT
 COURT, NEW YORK STATE DEPARTMENT OF TAXATION
 AND FINANCE AND UNITED STATES OF AMERICA-
 INTERNAL REVENUE SERVICE, DEBBIE THOMAS,
 NICOLE THOMAS,

Defendants.

_____^x
 This is an action to foreclose a mortgage on property known as 126 Strauss Avenue, Selden, New York. On November 12, 2003, defendant and Maria A. Constantino-Ferreira executed a fixed rate note in favor of Cross Island Capital Corp. (Cross Island) agreeing to pay the sum of \$284,900.00 at the yearly interest rate of 6.125 percent. On said date, defendant and Maria A. Constantino-Ferreira also executed a mortgage in the principal sum of \$284,900.00 on the subject property. The mortgage was recorded on December 1, 2003 in the Suffolk County Clerk's Office. Thereafter, on April 5, 2005, the note and mortgage were transferred by assignment of mortgage from Cross Island to plaintiff JPMorgan.

The assignment of mortgage was recorded on May 11, 2005 in the Suffolk County Clerk's Office.

Chase sent a notice of default dated December 8, 2011 to defendant stating that he had defaulted on his note and mortgage and that the amount past due was \$65,183.45. As a result of his continuing default, plaintiff commenced this foreclosure action on August 9, 2012. In its complaint, plaintiff alleges in pertinent part that mortgagors breached their obligations under the terms of the note and mortgage by failing to pay the installment due on December 1, 2009. Defendant interposed an answer with affirmative defenses.

The Court's computerized records indicate that a foreclosure settlement conference was held on September 10, 2014 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 conference is required.

Plaintiff now moves for summary judgment (004) on its complaint. In support of its motion, plaintiff submits among other things, the affirmation of Stephen J. Vargas, Esq. in support of the motion; the affirmation of Christopher Virga, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the affidavit of Gina Gray, vice president of Selene Finance LP, servicer and attorney-in-fact for SRMOF II, plaintiff's assignee; the pleadings; the note, mortgage and assignments of mortgage; proof of notices pursuant to RPAPL 1320, 1303 and 1304; affidavits of service of the summons, complaint, supplemental summons and amended complaint; an affidavit of service of the instant summary judgment motion upon the defendant's counsel; and, a proposed order appointing a referee to compute. Defendant has submitted a cross motion opposing plaintiff's motion and seeking an order dismissing the complaint.

"[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, 764 NYS2d 635 [2d Dept 2003]; see *Argent Mtge. Co., LLC v Mentosana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]; *Wells Fargo Bank, N.A. v Webster*, 61 AD3d 856, 877 NYS2d 200 [2d Dept 2009]). "The burden then shifts to the defendant to demonstrate 'the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff'" (*U.S. Bank Natl. Assn. TR U/S 6/01/98 [Home Equity Loan Trust 1998-2] v Alvarez*, 49 AD3d 711, 711, 854 NYS2d 171 [2d Dept 2008], quoting *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 664 NYS2d 345 [2d Dept 1997], *lv to appeal dismissed* 91 NY2d 1003, 676 NYS2d 129 [1998]; see also *Emigrant Mtge. Co., Inc. v Beckerman*, 105 AD3d 895, 895, 964 NYS2d 548 [2d Dept 2013]).

Here, plaintiff has established its *prima facie* entitlement to summary judgment against the answering defendant as such papers included a copy of the mortgage and the unpaid note together with due evidence of defendant's default in payment under the terms of the loan documents (see *Jessabell Realty Corp. v Gonzales*, 117 AD3d 908, 985 NYS2d 897 [2d Dept 2014]; *Bank of New York Mellon Trust Co. v McCall*, 116 AD3d 993, 985 NYS2d 255 [2d Dept 2014]; *North Bright Capital, LLC v 705 Flatbush Realty, LLC*, 66 AD3d 977, 889 NYS2d 596 [2d Dept 2009]; *Countrywide Home Loans, Inc. v Delphonse*, 64 AD3d 624, 883 NYS2d 135 [2d Dept 2009]).

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]). 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, 939 NYS2d 120 [2d Dept 2012]; *US Bank, NA v Collymore*, 68 AD3d 752; *Countrywide Home Loans, Inc. v Gress*, 68 AD3d 709, 888 NYS2d 914 [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, 923 NYS2d 609 [2d Dept 2011]). 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]*). Here, the plaintiff established its lawful status as assignee by a written assignment of the note and mortgage prior to the commencement of this action and its physical possession of the note containing an indorsement in blank (*see Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674, 38 NYS2d 622 [2d Dept 2007]). The plaintiff thus established, *prima facie*, its standing to prosecute this action.

It was thus incumbent upon the answering defendant to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff’s *prima facie* showing or in support of the affirmative defenses asserted in his answer or otherwise available to him (*see Flagstar Bank v Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Grogg Assocs. v South Rd. Assocs.*, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; *Wells Fargo Bank v Karla*, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]).

In his cross motion, defendant re-asserts his pleaded affirmative defenses that the plaintiff lacks standing to prosecute its claims for foreclosure and sale and that plaintiff did not comply with the notice provisions under RPAPL 1304. The defendant also contends that a question of fact exists with respect to the 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 that plaintiff had standing, or the legal capacity to commence this action.

Defendant’s asserted defense that the plaintiff lacks standing to sue by reason of its non-ownership of the subject note and mortgage is refuted by the record. Where “the plaintiff is the assignee of the mortgage and underlying note at the time the foreclosure action was commenced, the plaintiff has standing to maintain the action” (*Countrywide Home Loans v Gress*, 68 AD3d 709, 888 NYS2d 914 [2d Dept. 2009]; *quoting Federal Natl. Mtg. Assn. v Youkelsone*, 303 AD2d 546, 755 NYS2d 730 [2d Dept 2003]; *see also Wells Fargo Bank v Marchione*, 69 AD3d 204, 887 NYS2d 615 [2d Dept 2009]). Here, the plaintiff claims ownership of the note and mortgage under a written assignment executed by a

nominee of the original lender in favor of the plaintiff which pre-dates the commencement of this action by almost two years.

The branch of defendant's application for an order dismissing the complaint on the grounds that plaintiff failed to comply with the requirements of RPAPL 1304, a condition precedent to commencement of a foreclosure action, is denied. The Court initially notes that defendant does not deny having received the loan proceeds or having defaulted on his mortgage loan payments in his affidavit (see *Citibank, N.A. v Souto Geffen Co.*, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]). Instead, he relies on the alleged failure of plaintiff to provide the requisite notices pursuant to RPAPL 1304. Proper service of the notice required by RPAPL 1304 is a condition precedent to the commencement of a residential foreclosure action (see *Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95). Here, the plaintiff satisfied its burden that service of the RPAPL 1304 notice was properly made. The affidavit of Gina Gray evidences that a 90 day pre-foreclosure RPAPL 1304 notice was sent to defendant on November 29, 2011, by first class and registered or certified mail to his last known address, which is 266 River Road, Shirley, New York. Defendant merely asserts that he never received a copy of the RPAPL 1304 notice from plaintiff or any other person or entity. Defendant's unsupported denial of receipt of such notice is insufficient to rebut plaintiff's showing of proper service. As a moving party, defendant is required to affirmatively demonstrate that the condition precedent pursuant to RPAPL 1304 was not satisfied. "[A] party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense" (*Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909; *Velasquez v Gomez*, 44 AD3d 649, 843 NYS2d 368 [2d Dept 2007], quoting *George Larkin Trucking Co. v Lisbon Tire Mart*, 185 AD2d 614, 615, 585 NYS2d 894 [4th Dept 1992]). Having failed to submit sufficient evidence, defendant failed to satisfy his burden on this branch of his cross motion. Here, neither the defenses raised in his answer nor those asserted in his cross motion rebut the plaintiff's *prima facie* showing of its entitlement to summary judgment.


Plaintiff's application (003) for an order appointing a Receiver pursuant to RPAPL 1325 is denied, with leave to renew, for failure to provide proof of service of the subject motion upon defendant and/or his attorney.

Based upon the foregoing, the motion for summary judgment is granted against answering defendant. That branch of the motion seeking to fix the defaults as against the remaining defendants who have not answered or appeared herein is granted. Plaintiff's request for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is also 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]). Plaintiff's motion (003) for an order appointing a Receiver is denied with leave as reflected herein. The defendant's cross motion (005) is denied in its entirety.

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

Dated: **MAR 12 2015**



HON. JOSEPH A. SANTORELLI
J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION