

Bank of Am., N.A. v Bahadur
2015 NY Slip Op 30473(U)
March 27, 2015
Sup Ct, Queens County
Docket Number: 700147/2014
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x
BANK OF AMERICA, N.A.

Index No. 700147/2014

Motion Date: 02/05/15

Motion No.: 13

Plaintiff,

Motion Seq.: 1

- against -

RICHARD BAHADUR, KATHERINE BAHADUR,
NYC PARKING VIOLATIONS BUREAU, NYC
ENVIRONMENTAL CONTROL BOARD and "JOHN
DOE," AND "JANE DOE," the last two
names being fictitious, said parties
intended being tenants or occupants,
if any, having or claiming an interest
in, or lien upon the premises
described in the complaint,

Defendants.

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The following papers numbered 1 to 13 were read on this motion by plaintiff, BANK OF AMERICA, N.A, for an order granting summary judgment in favor of the plaintiff; granting a default judgment against all non-answering defendants; for an order pursuant to RPAPL § 1321 appointing a Referee to ascertain and compute the amount due to the plaintiff; and for an order amending the caption to substitute EYAN BAHADUR, as a party defendant in place and stead of the JOHN DOE and JANE DOE defendants:

Papers
Numbered

Notice of Motion-Affidavits-Exhibits-Memo of Law.....	1 - 7
Affirmation in Opposition.....	8 - 10
Reply Affirmation.....	11 - 13

This foreclosure action pertains to the property located at 146-29 106th Avenue, Jamaica, New York, 11435. Based upon the record before this court, the defendant, RICHARD BAHADUR, entered into note and RICHARD BAHADUR and KATHERINE BAHADUR entered into a mortgage with Greenpoint Mortgage Funding, on December 13, 2006 in the principal amount of \$369,000. Thereafter, on March 22, 2012, the mortgage was assigned to plaintiff by way of an assignment dated March 22, 2012 and recorded on April 11, 2012. The plaintiff asserts that defendants defaulted on the mortgage when they failed to make their monthly mortgage payments beginning March 1, 2012.

Pursuant to the terms of the mortgage, a demand letter and notice to cure was sent to defendants on June 3, 2013. A 90 day pre-foreclosure notice was sent to the defendants on January 15, 2013. The plaintiff subsequently accelerated the defendants' mortgage and brought an action to foreclose by filing a lis pendens and summons and complaint on January 9, 2014. The plaintiff submits affidavits of service on all of the named defendants. Defendant Richard and Katherine Badahur were served with a copy of the summons and complaint and all necessary RPAPL notices, pursuant to CPLR 308, at their residence on January 16, 2014. None of the defendants answered the summons and complaint and they are in default.

The defendants failed to appear at the residential foreclosure settlement conference which took place on March 24, 2014, although duly notified of the conference date. At that time, Referee Lance Evans found that the case could not be settled and ordered the plaintiff to proceed by motion for an Order of Reference.

In support of the motion for summary judgment, the plaintiff submits the affirmation of counsel, Corey Robson, Esq., the affidavit of Debra Lee Wojciechowski, an officer at Bank of America; a copy of the Note and Mortgage; copies of the affidavits of service on all the defendants; a copy of the pleadings; a copy of the assignment of the Mortgage and Note; 90 day notice of intent to foreclose; copy of the RPAPL 1304 notices sent to the defendant with the summons and complaint; and a copy of the attorney affidavit pursuant to the Administrative Order of the Chief Administrative Judge under AO/548/10, executed by Scott Reel, Esq;

In her affidavit, Debra Lee Wojciechowski, an officer of Bank of America, N.A. states that based upon her personal knowledge and her personal review of the bank's business records, plaintiff Bank of America, is in possession of the Promissory

Note which has been duly indorsed and was in possession of the note at the time the action was commenced. She confirms that the plaintiff was in possession of the Promissory Note prior to the commencement of the action and that Bank of America is the assignee of the security instrument for the subject loan. The record contains copies of the indorsed note, mortgage, and assignment of mortgage

She states that there is in fact a default under the terms and conditions of the Promissory Note and Mortgage because the March 1, 2012 mortgage payment and subsequent payments were not timely made by the defendants. She states that she has reviewed the 90 day pre-foreclosure notice which was sent to the defendant by certified mail and also by first-class mail to the last known address of the borrower. In addition, a notice of default was mailed to the mortgagor at the last known address and the default was not cured. Ms. Wojciechowski states that the unpaid principal balance is \$323,456.74.

Plaintiff now seeks an order granting summary judgment. Plaintiff contends, based upon the evidence submitted, that it has made a prima facie showing that it is entitled to summary judgment. Plaintiff asserts that the defendants were all lawfully served with a summons and complaint and that the Court, therefore, has personal jurisdiction. Plaintiff asserts that it has established, prima facie, entitlement to summary judgment based upon its submission of the Note, the Mortgage, the notice of default and the affidavit of Ms. Wojciechowski evidencing the defendant's failure to make the contractually required loan payments. Counsel also asserts that all of the defendants are in default having failed to serve an answer to the summons and complaint and no triable issues of fact or affirmative defenses have been raised by the defendants.

In opposition, defendant Katherine Bahadur, pro se, asserts that the plaintiff's motion for summary judgment must be denied as there are material questions of fact as to whether plaintiff had standing at the time the action was commenced. Defendant asserts that Bank of America, as successors in interest, lacks standing to foreclose on the subject note and mortgage. She states that Bank of America was not a party to the original loan and failed to proffer any evidence as to when it acquired an interest in the Note. In addition she asserts that she has been approved for a loan modification.

In reply, the plaintiff asserts that the plaintiff has standing to commence the instant action as the Note was assigned by Greenpoint Mortgage Funding Inc. to plaintiff by assignment

dated May 22, 2012. In addition plaintiff states that the evidence shows that the plaintiff had possession of the Note which was indorsed in blank at the time the action was commenced. Further, plaintiff asserts that neither defendant Richard nor Katharine Badahur served an answer to the complaint denying any allegations in the complaint including that it had standing to commence the action. As such plaintiff asserts that the defendants are in default and waived their right to contest the issue of standing (citing HSBC Bank v Dammond, 59 AD3d 679 [2d Dept. 2009]; U.S. National Association v Denaro, 98 AD3d 964 [2d Dept. 2012]; CitiMortgage, Inc. v Rosenthal, 88 AD3d 759 [2d Dept. 2011]).

It is well settled that a plaintiff in a mortgage foreclosure action establishes a prima facie case of entitlement to summary judgment through submission of proof of the existence of the underlying note, mortgage and default in payment after due demand (see Witelson v Jamaica Estates Holding Corp. I, 40 AD3d 284 [1st Dept. 2007]; Marculescu v Ouanez, 27 AD3d 701 [2d Dept. 2006]; US. Bank Trust National Assoc. v Butti, 16 AD3d 408 [2d Dept. 2005]; Layden v Boccio, 253 AD2d 540 [2d Dept. 1998]; State Mortgage Agency v Lang, 250 AD2d 595 [2d Dept. 1998]). Upon such a showing, the burden shifts to the defendant to produce evidence in admissible form sufficient to raise a material issue of fact requiring a trial.

This Court finds that the plaintiff's submissions are sufficient to establish its entitlement to summary judgment against defendant mortgagors, Richard Bahadur and Katherine Bahadur.

In addition, the defendants waived any argument that plaintiff lacked standing to commence the foreclosure action by failing to interpose an answer or file a timely pre-answer motion which asserted the defense of standing (see CPLR 3211(e); Countrywide Home Loans Servicing, LP v Albert, 78 AD3d 983 [2d Dept. 2010]; Deutsche Bank Natl. Trust Co. v Hussain, 78 ASD3d 989 [2d Dept. 2010]; HSBC Bank, USA, v Dammond, 59 AD3d 679 [2d Dept. 2009]). The defense of lack of standing is waivable as it affects only a court's power to render a judgment on the merits for the plaintiff and does not implicate the court's jurisdiction or competence to entertain an action (see Wells Fargo Bank Minnesota, N.A. v Mastropaola, 42 AD3d 242-243 [2d Dept. 2003]).

Plaintiff has submitted a copy of the mortgage, note, and affidavit from Ms. Wojciechowski establishing defendant's default in payment. The plaintiff demonstrated proper service of the summons and complaint and showed by admissible evidence that it

had standing to commence the action as it had properly been assigned the plaintiff's prior mortgage from Greenpoint and had properly been in physical possession of the Note as of the date of the commencement of the action. Thus the plaintiff demonstrated that it had standing to commence the action.

Accordingly, for all of the above stated reasons, the instant motion for summary judgment is granted. The submissions further reflect that plaintiff is entitled to amend the caption to delete the "John Doe" defendants and substitute the names of EYAN BAHADUR. That branch of the motion for a default judgment against the defendants who have not answered or appeared herein is granted. Plaintiff's further application for the appointment of a referee to compute the amounts due under the subject mortgage is also granted.

Order of Reference signed contemporaneously herewith.

Dated: March 27, 2015
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.