Flagstar Bank, FSB v Alterman
2015 NY Slip Op 30524(U)
March 25, 2015
Supreme Court, Suffolk County
Docket Number: 11-11298
Judge: Ralph T. Gazzillo
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[* 1]

SHORT FORM ORDER

INDEX No. 11-11298

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 4-4-13
ADJ. DATE
Mot. Seq. # 001 - MG

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FLAGSTAR BANK, FSB,

Plaintiff,

- against -

SCOTT ALTERMAN A/K/A SCOTT D. ALTERMAN; TINA ALTERMAN; PALISADES ACQUISITION XVI, LLC ASSIGNEE OF MITSUBISHI, "JOHN DOE" and "JANE DOE" # 1 through # 7", the last seven (7) names being fictitious and unknown to the plaintiff, the persons or parties intended being the tenants, occupants, persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the Verified Complaint,

Defendants.

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Upon the following papers numbered 1 to 26 read on this motion for summary judgment and an order of reference; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15; ~~Notice of Cross Motion and supporting papers ___~~; Answering Affidavits and supporting papers 16 - 22; Replying Affidavits and supporting papers 23 - 26; ~~Other ___~~; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that this motion by plaintiff Flagstar Bank, FSB (Flagstar), pursuant to CPLR 3212 for summary judgment on its complaint against defendants Scott Alterman a/k/a Scott D. Alterman and Tina Alterman (collectively Alterman), to strike the combined answer of defendants Alterman, for a default judgment as against the non-answering, non-appearing defendants 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 plaintiff's application to amend the caption of this action pursuant to CPLR 3025 (b) is granted; and it is further

ORDERED that the caption is hereby amended by substituting DKR Mortgage Asset Trust, a Delaware Statutory Trust, as plaintiff in place of Flagstar and by striking therefrom the names of defendants "John Doe and Jane Doe #1 through #7"; 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

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DKR MORTGAGE ASSET TRUST, A DELAWARE STATUTORY TRUST,

Plaintiff,

- against -

SCOTT ALTERMAN A/K/A SCOTT D. ALTERMAN; TINA ALTERMAN; PALISADES ACQUISITION XVI, LLC ASSIGNEE OF MITSUBISHI,

Defendants.

---x

This is an action to foreclose a mortgage on premises known as 24 Saint George Dr. W., Shirley, New York. On February 26, 2008, defendants Alterman executed a note in favor of ICC Mortgage Services (ICC) agreeing to pay the sum of $258,165.00 at the yearly rate of 5.875 percent. On February 26, 2008, defendant Alterman executed a mortgage in the principal sum of $258,165.00 on their home. The mortgage indicated ICC to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of ICC as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was purportedly recorded on March 13, 2008 in the Suffolk County Clerk's Office. Thereafter, on March 24, 2011, the mortgage was transferred by assignment of mortgage from MERS, as nominee for ICC, to plaintiff Flagstar and purportedly recorded on September 19, 2011 with the Suffolk County Clerk's Office. Thereafter, on June 8, 2011, the note and mortgage were transferred by assignment of mortgage from Flagstar to the Secretary of Housing and Urban Development (HUD) and purportedly recorded on March 1, 2012 with the Suffolk County Clerk's Office. Lastly, on June 9, 2011, the note and mortgage were transferred by assignment of mortgage from HUD to DKR Mortgage Asset Trust I (DKR) and purportedly recorded on March 1, 2012 with the Suffolk County Clerk's Office. The note contains the indorsement of the president of ICC transferring ownership of the note to Flagstar.

Flagstar sent notices of default dated September 17, 2010 to defendants Alterman stating that they had defaulted on their mortgage loan and that the amount past due was $30,371.51. As a result of defendants' continuing default, plaintiff commenced this foreclosure action on April 5, 2011. In its complaint, plaintiff alleges in pertinent part, that defendants breached their obligations under the terms of the note and mortgage by failing to make the monthly payments commencing with the September 1, 2009 payment. Defendants interposed a combined general answer with affirmative defenses.

The Court's computerized records indicate that a foreclosure settlement conference was held on May 29, 2012, 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 on its complaint contending that defendants breached their obligations under the terms of the loan agreement and mortgage by failing to tender monthly payments commencing with the September 1, 2009 payment and subsequent payments thereafter. In support of its motion, plaintiff submits among other things: the sworn affidavit of John Kontoulis, CEO for Kondaur Capital Corporation (Kondaur), servicing agent for DKR; the affidavit of Robin Kennedy-Colnaghi, AVP, Foreclosure Department of Flagstar; the affirmation of Roshene A. Kemp, Esq. in support of the instant motion; the affirmation of Roshene M. Kemp, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the pleadings; the note, mortgage and assignments of mortgage; notices pursuant to RPAPL §§ 1320, 1304 and 1303; affidavits of service for the summons and complaint; an affidavit of service for the instant summary judgment motion upon defendants; and a proposed order appointing a referee to compute. Defendants Alterman have submitted opposition to plaintiff's summary motion citing, *inter alia*, plaintiff's alleged lack of standing. Plaintiff has submitted a reply.

"[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, 482, 764 NYS2d 635 [2d Dept 2003]; *see* ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Once a plaintiff has made this showing, the burden then shifts to defendant to establish by admissible evidence the existence of a triable issue of fact as to a defense (*see* ***Washington Mut. Bank v Valencia***, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]).

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]). It is well settled that lack of standing does not constitute a jurisdictional defect (*see* ***HSBC Bank USA, NA v Taher***, 104 AD3d 815, 962 NYS2d 301 [2d Dept 2013]; ***Deutsche Bank Natl. Trust Co. v Hunter***, 100 AD3d 810, 954 NYS2d 181 [2d Dept 2012]; ***Bank of N.Y. v Alderazi***, 99 AD3d 837, 951 NYS2d 900 [2d Dept 2012]; ***U.S. Bank v Emmanuel***, 83 AD3d 1047, 921 NYS2d 320 [2d Dept 2011]; ***Wells Fargo Bank Minn., N.A. v Mastropaolo***, 42 AD3d 239). "Whether the action is being pursued by the proper party is an issue separate from the subject matter of the action or proceeding, and does not affect the court's power to entertain the case before it." (***Wells Fargo Bank Minn., N.A. v Mastropaolo***, 42 AD3d 239). 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 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 [2d Dept 2012]; *see* ***Deutsche Bank Natl. Trust Co. v Barnett***, 88 AD3d 636 [2d Dept 2011]; *see also* ***Homecomings Fin., LLC v Guldi***, 108 AD3d 506, 969 NYS2d 470 [2d Dept 2013]).

A promissory note is a negotiable instrument within the meaning of the Uniform Commercial Code (*see* Uniform Commercial Code § 3-104; ***Mortgage Elec. Registration Sys., Inc. v Coakley***, 41 AD3d 674, 838 NYS2d 622 [2d Dept 2007]). Uniform Commercial Code § 3-204 (2) provides "[a]n indorsement in blank specifies no particular indorsee and may consist of a mere signature. An instrument payable to order and indorsed in blank becomes payable to bearer and may be negotiated by delivery alone until specially indorsed."

Here, plaintiff has established, *prima facie*, that it had standing to commence this action. The uncontroverted evidence submitted by the plaintiff in support of its motion demonstrated that the note and mortgage were assigned to Flagstar prior to the commencement of the action. Plaintiff produced the note and mortgage executed by defendants Alterman, as well as evidence of defendants' nonpayment, thereby establishing a prima facie case as a matter of law (*see* ***Wells Fargo Bank Minnesota, Natl. Assn. v Mastropaolo***, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). In addition, the affidavit from John Kontoulis, CEO for Kondaur, avers that the defendants defaulted on their payments commencing with the September 1, 2009 payment and payments thereafter; that a notice of default was tendered to defendants; that a 90 day pre-foreclosure notice was tendered to defendants by first class mail and via certified mail to their last known address; and, that defendants failed to cure the default. Robin Kennedy-Colnaghi, AVP, Foreclosure Department of Flagstar, avers that plaintiff has been in the exclusive possession of the note and mortgage since February 29, 2008, which was prior to the commencement of this action on April 5, 2011, and accordingly has the requisite standing to commence this action.

Once plaintiff has made a prima facie showing, it is incumbent on 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" (*see* ***Cochran Inv. Co., Inc. v Jackson***, 38 AD3d 704, 834 NYS2d 198, 199 [2d Dept 2007] *quoting* ***Mahopac Natl. Bank v Baisley***, 244 AD2d 466, 467, 664 NYS2d 345 [2d Dept 1997]). Defendants claim that the plaintiff's motion is premature since there has been no discovery. This claim is rejected. CPLR 3212(f) provides that "should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just". Appellate case authorities have long instructed that to avail oneself of the safe harbor this rule affords, the claimant must "offer an evidentiary basis to show that discovery may lead to relevant evidence and that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff" (***Martinez v***

Kreychmar, 84 AD3d 1037, 923 NYS2d 648 [2d Dept 2011]; *see* ***Seaway Capital Corp. v 500 Sterling Realty Corp.***, 94 AD3d 856, 941 NYS2d 871 [2d Dept 2012]). In addition, the party asserting the rule must demonstrate that he or she made reasonable attempts to discover facts which would give rise to a genuine triable issue of fact on matters material to those at issue (*see* ***Swedbank, AB v Hale Ave. Borrower, LLC***, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]). Here, the opposing papers submitted by defendants Alterman were insufficient to satisfy this statutory burden. The defendants failed to demonstrate that they made reasonable attempts to discover the facts which would give rise to a triable issue of fact or that further discovery might lead to relevant evidence (*see* CPLR 3212 [f]; ***Cortes v Whelan***, 83 AD3d 763, 922 NYS2d 419 [2d Dept 2011]; ***Sasson v Setina Mfg. Co., Inc.***, 26 AD3d 487, 810 NYS2d 500 [2d Dept 2006]). Accordingly, defendants' claim of prematurity is thus rejected as unmeritorious.

Furthermore, defendants' remaining claims, *inter alia*, that they were never served with a notices pursuant to RPAPL §§1303 and 1304 and that defendants never defaulted and as such Flagstar terminated the agreement in bad faith, are rejected by the Court. These assertions have not been put forth by a defendant's affidavit but instead, by the affirmation of counsel. A party opposing a summary judgment motion must demonstrate by admissible evidence the existence of a factual issue and the submission of a hearsay affirmation by counsel alone does not satisfy this requirement (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***La Capria v Bonazza***, 153 AD2d 551, 544 NYS2d 848 [2d Dept 1989]). Here, counsel's affirmation is speculative, conclusory and unsupported by sufficient credible evidence. Accordingly, defendants have failed to demonstrate, through the production of competent and admissible evidence, a viable defense which could raise a triable issue of fact (*see* ***Deutsche Bank Natl. Trust Co. v Posner***, 89 AD3d 674, 933 NYS2d 52 [2d Dept 2011]). "Motions for summary judgment may not be defeated merely by surmise, conjecture or suspicion" (*see* ***Shaw v Time-Life Records***, 38 NY2d 201, 646 NYS2d 162 [1975]; ***Dombrowski v County of Nassau***, 230 AD2d 705, 646 NYS2d 162 [2d Dept 1996]). Notably, defendants do not deny having received the loan proceeds and having defaulted on their loan payments.

The court thus finds that defendants Alterman have failed to rebut the plaintiff's prima facie showing of its entitlement to the summary judgment demanded by it on its complaint. Accordingly, the motion for summary judgment is granted against defendants Alterman and the defendants' combined answer is stricken. Plaintiff's request for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is granted (*see* ***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]).

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

Dated: 3/25/15

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**