

Bank of N.Y. Mellon v Umanzor-Martinez

2015 NY Slip Op 30550(U)

April 10, 2015

Supreme Court, Suffolk County

Docket Number: 2105/2012

Judge: Jr., Andrew G. Tarantino

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**ORIGINAL
WHEN BLUE**

At PART 50 of the Supreme Court in and
for the County of Suffolk, at One Court
Street, Annex Building, Riverhead, New
York, on April 10, 2015

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

-----x
**THE BANK OF NEW YORK MELLON FKA THE
BANK OF NEW YORK, AS TRUSTEE FOR THE
CERTIFICATEHOLDERS OF THE CWALT,
INC., ALTERNATIVE LOAN TRUST 2006-0A2
MORTGAGE PASS-THROUGH CERTIFICATES,
SERIES 2006-0A2,**

Plaintiff(s)

Index No. **2105/2012**

Motion seq. **001: MotD**
Orig. Date: 4/29/2014
Adj. Date: 8/5/2014

Motion seq. **002: XMD**
Orig. Date: 4/29/2014
Adj. Date: 8/5/2014

-against-

**MIRNA UMANZOR-MARTINEZ, MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS,
INC., ACTING SOLELY AS A NOMINEE FOR
COUNTRYWIDE BANK, N.A., UNITED STATES
OF AMERICA - DEPARTMENT OF THE
TREASURY - INTERNAL REVENUE SERVICE,
ASSET ACCEPTANCE LLC ASSIGNEE OF
BALLYS TOTAL FITNESS, "JOHN DOE 1 to
JOHN DOE 25", said names being fictitious, the
persons or parties intended being the persons,
parties, corporations or entities, if any, having or
claiming an interest in or lien upon the mortgaged
premises described in the complaint,**

Defendant(s).

**ORDER DEFERRING
SUMMARY JUDGMENT AND
THE APPOINTMENT OF A
REFEREE**

-----x

Upon consideration of the Notice of Motion 1) pursuant to CPLR 3211 (b), to dismiss the affirmative defenses asserted by the defendant, Mirna Umanzor-Martinez ["the borrower" or "the defendant"], 2) for summary judgment in favor of the plaintiff Bank of New York Mellon FKA the Bank of New York , as Trustee for the Certificate Holders of the CWALT, Inc., Alternative Loan Trust 2006-0A2 Mortgage Pass-Through Certificates, Series 2006-0A2 ["the plaintiff"], dismissing the defendant's five counterclaims, 3) pursuant to CPLR 3215 entering judgment against the defaulting defendants, 4) amending the caption, and 5) referring the action to a referee to compute the amount due, the supporting affirmation and affidavits, the revised memorandum of law in

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support dated July 21, 2014, and the plaintiff's supporting exhibits (sequence 001), the affirmation in opposition to the plaintiff's summary judgment motion and in support of the defendant's cross motion to dismiss, the supporting affirmation and exhibits (sequence 002), and the plaintiff's reply affirmation and affidavit, exhibits 1 through 3, and the reply memorandum of law, it is now

ORDERED that motion sequences 001 and 002 are consolidated for purposes of this determination; and it is further

ORDERED that so much of the plaintiff's motion seeking an order dismissing the affirmative defenses and counterclaims asserted by the borrower is granted; and it is further

ORDERED that so much of the plaintiff's motion seeking an order granting summary judgment in favor of the plaintiff is adjourned in accordance herewith; and it is further

ORDERED that the Court grants leave to the defendant, if the defendant be so advised, to serve and file a sur-reply on the sole issue of the plaintiff's noncompliance with RPAPL 1304 on or before May 10, 2015; and it is further

ORDERED that so much of the plaintiff's motion seeking an order pursuant to CPLR 3215 entering judgment against the defaulting defendants is granted; and it is further

ORDERED that so much of the plaintiff's motion seeking an order amending the caption is granted; and it is further

ORDERED that so much of the plaintiff's motion seeking an order referring the action to a referee to compute the amount due is adjourned in accordance herewith; and it is further

ORDERED that so much of the defendant's cross motion seeking an order dismissing the complaint is denied; and it is further

ORDERED that so much of the defendant's cross motion seeking an order referring the matter back to the foreclosure settlement conference part is denied.

The plaintiff in a foreclosure action establishes its prima facie entitlement to judgment as a matter of law by producing the mortgage, the unpaid note, and evidence of the defendant's default in payment (*see One W. Bank, FSB v. DiPilato*, 124 A.D.3d 735, 998 N.Y.S.2d 668; *Peak Fin. Partners, Inc. v. Brook*, 119 A.D.3d 539, 987 N.Y.S.2d 916; *Emigrant Mtge. Co., Inc. v. Beckerman*, 105 A.D.3d 895, 964 N.Y.S.2d 548). Where the plaintiff is not the original lender and standing is at issue, the plaintiff seeking summary judgment must also provide evidence that it received both the mortgage and note by a proper assignment (*see Citimortgage, Inc. v. Stosel*, 89 A.D.3d 887, 888, 934 N.Y.S.2d 182; *CitiMortgage, Inc. v. Rosenthal*, 88 A.D.3d 759, 761, 931

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N.Y.S.2d 638; *Deutsche Bank Natl. Trust Co. v. Barnett*, 88 A.D.3d 636, 637, 931 N.Y.S.2d 630; *Wells Fargo Bank v. Marchione*, 69 A.D.3d 204, 207, 887 N.Y.S.2d 615), which can be established by the production of a written assignment of the note (*see Aurora Loan Servs., LLC v. Taylor*, 114 A.D.3d 627, 980 N.Y.S.2d 475; *Homecomings Fin., LLC v. Guldi*, 108 A.D.3d 506, 969 N.Y.S.2d 470; *Deutsche Bank Natl. Trust Co. v. Whalen*, 107 A.D.3d 931, 932, 969 N.Y.S.2d 82; *Aurora Loan Servs., LLC v. Weisblum*, 85 A.D.3d 95, 108, 923 N.Y.S.2d 609) or by physical delivery to the plaintiff of the mortgage and note (*see Kondaur Capital Corp. v. McCary*, 115 A.D.3d 649, 981 N.Y.S.2d 547; *Aurora Loan Servs., LLC v. Weisblum*, 85 A.D.3d at 108, 923 N.Y.S.2d 609; *U.S. Bank, N.A. v. Collymore*, 68 A.D.3d 752, 890 N.Y.S.2d 578).

Here, the plaintiff established through admissible evidence (*see Montefiore Med. Ctr. v. Liberty Mut. Ins. Co.*, 31 A.D.3d 724, 725, 818 N.Y.S.2d 464), its standing as the holder of the note and mortgage by demonstrating that the note was physically delivered to it prior to the commencement of this action (*see Aurora Loan Services, LLC v. Taylor*, 114 A.D.3d 627, 980 N.Y.S.2d 475 [2d Dept. 2014]). Specifically, an affidavit submitted by the plaintiff established that it obtained physical possession of the original note, previously held by Countrywide Bank, N.A., and then Countrywide Home Loans, by delivery to plaintiff's custody on March 24, 2006, prior to the commencement of the action on January 17, 2012 (*see Deutsche Bank Natl. Trust Co. v. Whalen*, 107 A.D.3d at 932, 969 N.Y.S.2d 82). It can reasonably be inferred from these averments that physical delivery of the note was made to the plaintiff as Trustee by Countrywide Home Loans, and since the exact delivery date was provided, there is no further detail necessary for the plaintiff to establish standing (*Aurora Loan Services, LLC v. Taylor*, 114 A.D.3d at 628-29). The defendant offered no evidence to contradict those factual averments and, therefore, failed to raise a triable issue of fact with respect to the plaintiff's standing or demonstrate, prima facie, her own entitlement to dismissal of the complaint.

With respect to the plaintiff's legal capacity to sue, the defendant failed to advance any authority disputing the proposition that litigation involving a trust as a party must be brought by or against the trustee in its capacity as such (*Kirschbaum v. Elizabeth Ortman Trust of 1977*, 3 Misc.3d 1110[A], 787 N.Y.S.2d 678 [Table] [N.Y.Sup. 2004]).

The Court notes that other than the defendant's first two affirmative defenses, namely, the plaintiff's purported lack of capacity to sue and lack of standing, respectively, the borrower does not discuss or challenge the plaintiff's arguments supporting dismissal of the remaining affirmative defenses or her seven counterclaims. To the extent that the borrower did not introduce any facts raising a material issue of fact as to affirmative defenses three through six and her seven counterclaims, the affirmative defenses are struck and the counterclaims are dismissed (*Citimortgage, Inc. v. Chow Ming Tung*, --- N.Y.S.3d ---, 2015 WL 1213591 [2d Dept. 2015], citing *Flagstar Bank v. Bellafiore*, 94 A.D.3d 1044, 943 N.Y.S.2d 551 [2d Dept. 2012]).

The alternative basis for the defendant's cross motion to dismiss was the plaintiff's failure to prove strict compliance with the mandatory 90-day pre-foreclosure warning requirements (*see* RPAPL §1304; *see also Hudson City Sav. Bank v. DePasquale*, 113 A.D.3d 595, 977 N.Y.S.2d 895 [2d Dept. 2014], *citing Aurora Loan Services, LLC v. Weisblum*, 85 A.D.3d 95, 923 N.Y.S.2d 609 [2d Dept. 2011]). Any inconsistencies in the plaintiff's initial moving papers as to the service of the 90-day notice were cured by the affidavit of Melissa Davidson dated July 18, 2014 ["the Davidson affidavit"].¹

According to the Davidson affidavit, Bank of America, N.A. ["BANA"], was the servicer of the defendant's loan when the action was commenced. Davidson is a BANA employee with personal knowledge of BANA's procedures for creating its business records. According to BANA's business records, kept in the ordinary course of business, BANA sent separate copies of a 90-day, pre-foreclosure notice to the borrower in both Spanish and English, dated March 15, 2011. The notices were mailed pursuant to RPAPL 1304 by first class mail and certified mail, return receipt requested, at the borrower's last known address, 20 Chevy Chase, Amityville, and at the mortgaged premises located at 111 Smith Street, Amityville. All four notices were sent on March 17, 2011. Annexed to the Davidson affidavit was a signed return receipt for the certified mailing to the borrower's residence dated March 21, 2011. Also annexed was a copy of the return receipt to the mortgaged premises marked as "unclaimed" by the United States Postal Service.

There is little doubt that had the Davidson affidavit and the accompanying exhibits been submitted as part of the moving application in the first instance, the plaintiff would have satisfied its burden on summary judgment insofar as demonstrating compliance with RPAPL 1304 (*see Hudson City Sav. Bank v. DePasquale, supra*). The dilemma for the Court is whether summary judgment is precluded since the evidence of compliance with 1304 was only supplied in the plaintiff's "Reply Affirmation in Further Support of Plaintiff's Summary Judgment Motion" rather than in the initial moving papers (*see generally King v. Dobriner*, 106 A.D.3d 1053, 966 N.Y.S.2d 162 [2d Dept. 2013] [it was improper for plaintiff to submit affidavit of merit from medical expert for the first time in reply papers]).

In light of the plaintiff's failure to provide the information concerning service of the 90-day pre-foreclosure notice in the moving application, rather than denying the plaintiff's motion with leave to renew, in the Court's discretion and in the interest of judicial economy, the Court grants leave to the defendant to serve and file a sur-reply on the sole issue of the plaintiff's alleged

¹ The Court notes that to the extent that the plaintiff's attorney recited conflicting dates for the 90-day pre-foreclosure warning in ¶ 3 of her affirmation dated April 7, 2014, and on pages 2 and 5 of her revised memorandum of law, respectively, it is of no significance, as the attorney had no personal knowledge of when the requisite notice was dated or mailed by the mortgagee or its servicer, and the attorney's representations concerning it are of no probative value to the Court (*see Currie v. Wilhouski*, 93 A.D.3d 816, 941 N.Y.S.2d 218 [2d Dept. 2012]).

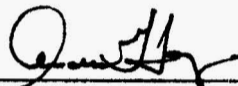
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noncompliance with RPAPL 1304, in light of the Davidson affidavit and annexed exhibits, on or before May 10, 2015. So much of the plaintiff's application that seeks summary judgment and an order of reference is adjourned, pending consideration of the defendant's sur-reply on that single issue. If no sur-reply is submitted by May 10th, the papers will be considered as fully submitted.

To summarize, so much of the plaintiff's motion seeking an order dismissing the affirmative defenses and the counterclaims asserted by the borrower is granted. So much of the plaintiff's motion seeking an order pursuant to CPLR 3215 entering judgment against the defaulting defendants and amending the caption is granted.

So much of the plaintiff's motion seeking an order granting summary judgment in its favor and for the appointment of a referee to compute is adjourned. If the defendant be so advised, the defendant may serve and file a sur-reply on the sole issue of the plaintiff's noncompliance with RPAPL 1304 on or before May 10, 2015. The defendant's cross motion seeking an order dismissing the complaint or referring the matter back to the foreclosure settlement conference part is denied.

Dated: April 10, 2015



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

___ FINAL DISPOSITION

XX_ NON-FINAL DISPOSITION