

Bank of N.Y. Mellon v Wass

2015 NY Slip Op 30727(U)

May 1, 2015

Supreme Court, Suffolk County

Docket Number: 12-1707

Judge: Arthur G. Pitts

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 9-19-13
ADJ. DATE 12-19-13
Mot. Seq. # 001 - MG

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THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATE HOLDERS OF CWALT, INC., ALTERNATIVE LOAN TRUST 2007-OA11, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-OA11,

Plaintiff,

- against -

ROBERT R. WASS, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR COUNTRYWIDE BANK, FSB, STATE FARM INSURANCE COMPANY A/S/O STUART A. LUSTBERG, "JOHN DOE #1" to "JOHN DOE #10," the last 10 names being fictitious and unknown to plaintiff, the persons or parties intended being the 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 37 read on this motion for summary judgment and order of reference; Notice of Motion/ Order to Show Cause and supporting papers 1 - 30; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 31 - 37; Replying Affidavits and supporting papers ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

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ORDERED that this motion (001) by plaintiff The Bank of New York Mellon for an order pursuant to CPLR 3212 granting summary judgment on its verified complaint, 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 caption is hereby amended by deleting “John Doe #1” through “John Doe #10,” 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

THE BANK OF NEW YORK MELLON FKA THE BANK OF
 NEW YORK, AS TRUSTEE FOR THE CERTIFICATE
 HOLDERS OF CWALT, INC., ALTERNATIVE LOAN
 TRUST 2007-OA11, MORTGAGE PASS-THROUGH
 CERTIFICATES, SERIES 2007-OA11,

Plaintiff,

- against -

ROBERT R. WASS, MORTGAGE ELECTRONIC
 REGISTRATION SYSTEMS, INC., AS NOMINEE FOR
 COUNTRYWIDE BANK, FSB, STATE FARM
 INSURANCE COMPANY A/S/O STUART A. LUSTBERG,

Defendants.

This is an action to foreclose a mortgage on premises known as 80 Hallock Avenue, Smithtown, New York. On July 6, 2007, defendant Robert Wass executed an adjustable rate note in favor of Countrywide Bank, FSB (“Countrywide”), agreeing to pay \$256,000.00 at the yearly rate of 8.625 percent. The note contained two allonges: the first allonge was payable to the order of Countrywide Home Loans, Inc. without recourse from Countrywide Bank, FSB. The second allonge was endorsed in blank without recourse from Countrywide Home Loans, Inc. On the same date, defendant executed a first mortgage in the principal sum of \$256,000 on the subject property. The mortgage indicated Countrywide to be the lender and Mortgage

Electronic Registration Systems, Inc. (“MERS”) to be the nominee of Countrywide as well as the mortgagee of record for the purpose of recording the mortgage. The mortgage was recorded on September 17, 2007 in the Suffolk County Clerk’s Office. Thereafter, the mortgage was transferred by an assignment of mortgage dated May 8, 2010 from MERS, as nominee for Countrywide to plaintiff. The assignment of mortgage was recorded on August 23, 2011 with the Suffolk County Clerk’s Office. In addition, the record reveals that the servicing agent of the plaintiff, BAC Home Loans Servicing, LP merged into Bank of America, National Association by certificate of merger, dated June 28, 2011.

By letter dated July 26, 2010, a notice of default was sent to defendant stating that the loan was in default and that the amount past due was \$2,960.45. As a result of defendant’s continuing default, plaintiff commenced this foreclosure action on January 11, 2012. In its complaint, plaintiff alleges in pertinent part that defendant breached his obligations under the terms of the note and mortgage by failing to make monthly payments. Defendant interposed an answer with general denials, twelve affirmative defenses, and three counterclaims.

The court’s computerized records indicate that on April 24, 2012, the parties appeared for a foreclosure settlement conference, at which time the defendant conceded that he did not occupy the premises. Therefore, the matter was not eligible for a settlement conference and was referred as an IAS case.

Plaintiff now moves for summary judgment on its complaint contending that defendant defaulted under the terms of the loan agreement and mortgage for failure to pay the May 1, 2010 payment and subsequent payments thereafter and that defendant’s answer and counterclaims are without merit. In support of its motion, plaintiff submits, among other things: the sworn affidavit of Melissa Davidson, Assistant Vice President, Operations Team of Bank of America, the master loan servicer for the plaintiff and its power of attorney, a copy of the power of attorney, the affirmation of Suzanne M. Berger, Esq. in support of the application; the pleadings; the note, mortgage and assignment of mortgage; the notice of default; proof of notices pursuant to RPAPL §§§ 1320, 1303 and 1304; affidavits of service for the summons and complaint; affidavit of service for the instant summary judgment motion; and a proposed order appointing a referee to compute. Defendant opposes the motion, *inter alia*, on the ground that plaintiff lacks standing.

“[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 (*see Republic Nat’l Bank of N.Y. v O’Kane*, 308 AD2d 482, 482, 764 NYS2d 635 [2d Dept 2003]; *Village Bank v Wild Oaks Holding*, 196 AD2d 812, 601 NYS2d 940 [2d Dept 1993]). Once a plaintiff has made this showing, the burden then shifts to defendant to produce evidentiary proof in admissible form sufficient to require a trial on their defenses (*see Aames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]; *Household Fin. Realty Corp. v Winn*, 19 AD3d 545, 796 NYS2d 533 [2d Dept 2005]).

Here, plaintiff established its prima facie entitlement to summary judgment by providing evidence of the assignment, the mortgage, the note, the default of the defendant, and by demonstrating that their affirmative defenses and counterclaims are without merit (*see Jessabell Realty Corp. v Gonzales*, 117 AD3d 908, 985 NYS2d 897 [2d Dept 2014]; *Bank of N.Y. Mellon Trust Co. v McCall*, 116 AD3d 993, 985 NYS2d 255 [2d Dept 2014]). The affidavit from Melissa Davidson reveals that the mortgage was assigned

by assignment of mortgage. In addition, Ms. Davidson states that prior to the commencement of this action the note was endorsed by Countrywide in favor of Countrywide Home Loans, Inc., and endorsed in blank by Countrywide Home Loans, Inc., and that plaintiff has been the owner and holder of the note and mortgage since October 30, 2007, and remains the owner and holder of these documents. Ms. Davidson further states that the defendant defaulted on the loan by failing to make the payment due for May 1, 2010. She also notes that Bank of America, as servicer of the loan, sent a letter to defendant on July 26, 2010 alerting him that his loan was in serious default, and, on February 10, 2011, Bank of America sent a 90-day letter to defendant. The defendant failed to pay the amount in arrears.

The burden then shifted to defendants to lay bare their proof in opposition to the plaintiff's prima facie showing (*see Jessabell Realty Corp. v Gonzales, supra*).

In opposition, the defendant has failed to raise an issue of fact. The defendant contends that the plaintiff did not obtain the note through a valid assignment, therefore it is not the holder of the note and does not have standing in this action. Defendant further claims that the plaintiff did not own the note prior to October 30, 2007 inasmuch as the signor, Laurie Meder, was not authorized to execute the assignment until November 27, 2007, and should be deemed by the court as void. Defendant submits, among other things, a copy of Exhibit A, Resolutions Adopted by The Board of Directors of Countrywide Bank, FSB ("Exhibit A"), dated October 31, 2007; a copy of a Certificate of Assistant Secretary ("Certificate"), dated November 27, 2007; and a copy of the Pooling and Servicing Agreement for the plaintiff. Exhibit A provides six RESOLVED paragraphs, the first RESOLVED paragraph gives authority to any Senior Managing Director, or Executive Vice President and any Assistant Secretary to execute, endorse, and/or deliver corporate assignments, note endorsements, note allonges, document releases necessary to effectively transfer mortgage loans. The sixth RESOLVED paragraph indicates that "all actions taken by any person designated and authorized to act for or on behalf of the directors of the Bank, prior to the adoption of these resolutions which would have been authorized had such actions been taken after adoption of these resolutions, are hereby ratified, confirmed, approved, and adopted in all respects." The Certificate, dated November 27, 2007, reveals that the Assistant Secretary certified that the resolutions dated October 31, 2007 have not been amended, modified, revoked or rescinded and have been in full force and effect since their adoption. The Assistant Secretary further authorized Laurie Meder to use a facsimile signature stamp on bank documents. The Pooling and Servicing Agreement provides for the delivery of the mortgage loan to the plaintiff on or before October 30, 2007.

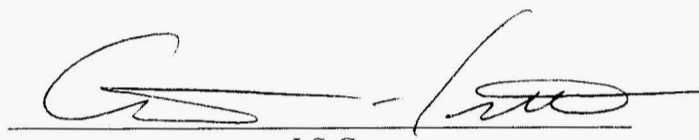
Where, as here, standing is put into issue by the defendant, the plaintiff is required to prove it has standing in order to be entitled to the relief requested (*see Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680, 954 NYS2d 551 [2d Dept 2011]; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; *Wells Fargo Bank Minn. v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). The standing of a plaintiff in a mortgage foreclosure action is measured by its ownership, holder status or possession of the note and mortgage at the time of the commencement of the action (*see Bank of N.Y. v Silverberg*, 86 AD3d 274, 279, 926 NYS2d 532 [2d Dept 2011]; *U.S. Bank, N.A. v Collymore, supra*; *Wells Fargo Bank, N.A. v Marchione*, 69 AD3d 204, 887 NYS2d 615 [2d Dept 2009]). 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.

The court finds that Laurie Meder, as Senior Vice President, was authorized to execute the assignment pursuant to the first RESOLVED paragraph of Exhibit A, and that her actions on October 30, 2007 were ratified and approved by the sixth RESOLVED paragraph on October 31, 2007. That the Certificate provided for a facsimile signature on November 27, 2007 is of no moment, since the sixth RESOLVED paragraph of Exhibit A provides for Countrywide Bank, FSB's ratification and approval of signatures made prior to that date. Therefore, the delivery of the note and mortgage was timely pursuant to the Pooling and Servicing Agreement, Laurie Meder was authorized to sign the allonge to the note, and the plaintiff demonstrated that it has standing to commence the action. Under these circumstances, the court does not reach the remainder of the defendant's contentions.

Based upon the foregoing, the motion for summary judgment is granted against defendant Robert Wass. 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 Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *Bank of E. Asia 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: May 1, 2015



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION