

LaSalle Bank N.A. v Browd

2015 NY Slip Op 30833(U)

May 8, 2015

Supreme Court, Queens County

Docket Number: 18563/08

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE** HOWARD G. LANE **IA Part** 6
Justice

LASALLE BANK NATIONAL ASSOCIATION,
AS TRUSTEE FOR CERTIFICATE HOLDERS
OF BEAR STERNS ASSET BACKED
SECURITIES I, LLC, ASSET BACKED
CERTIFICATES, SERIES 2005-EC1,
Plaintiff,

-against-

SHRAGA BROWD, et al.,
Defendants.

Index
Number 18563/08

Motion
Date January 13, 2015

Motion Cal. No. 118

Motion Seq. No. 2

The following numbered papers read on this motion by plaintiff to vacate the memorandum decision dated June 8, 2010 and filed on July 9, 2010, to strike the answer of defendants Shraga Browd and Sheyna Browd, for summary judgment against defendants Browd, for leave to amend the caption deleting reference to defendants “John Doe” and “Jane Doe” and inserting the names of “Yehuda Browd” and “Steven Browd” in place and stead of the “John Doe” and “Jane Doe” defendants, and for leave to appoint a referee; and this cross motion by defendants Shraga Browd and Sheyna Browd pursuant to CPLR 3211 to dismiss the complaint insofar as asserted against them based upon lack of standing.

**Papers
Numbered**

Notice of Motion - Affidavits - Exhibits1-7
Notice of Cross Motion - Affidavits - Exhibits8-9
Answering Affidavits - Exhibits10-12
Reply Affidavits13-14

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff commenced this action on July 25, 2008 to foreclose a mortgage, encumbering the real property known as 144-29 78th Avenue, Flushing, New York, given by defendants Shraga Browd and Sheyna Browd, as security for the payment of a note executed by defendant Shraga Browd, evidencing a loan in the principal amount of \$446,250.00 plus interest from Encore Credit Corp d/b/a Encore Credit (Encore). In the complaint, plaintiff alleges that it is the holder of the note and mortgage, and defendants Browd defaulted under the mortgage and note, and as a consequence, plaintiff elected to declare the entire mortgage debt to be due and owing.

Defendants Shraga Browd and Sheyna Browd, then appearing in a self-represented capacity, served a joint answer, asserting various affirmative defenses, including lack of standing. The remaining defendants are in default in appearing or answering the complaint.

A residential foreclosure conference was held on June 2, 2010, at which conference defendant Shraga Browd appeared, and by order of the same date, the Court Attorney Referee directed the case to proceed by motion. The Court Attorney Referee noted that the case had not settled, and defendant borrowers had been provided with a “financial work-out package” on March 22, 2010, but failed to submit “same” for plaintiff’s review.

Plaintiff previously moved to strike the answer of defendants Shraga Browd and Sheyna Browd, for summary judgment against defendants Shraga Browd and Sheyna Browd, for leave to amend the caption deleting reference to defendants “John Doe” and “Jane Doe” and inserting the names of “Yehuda Browd” and “Steven Browd” in place and stead of the “John Doe” and “Jane Doe” defendants, and for leave to appoint a referee. By memorandum decision dated June 8, 2010 and filed on July 9, 2010, the court granted the motion and directed submission of the order. Plaintiff failed to submit a proposed order for signature within sixty (60) days after the signing and filing of the memorandum decision (22 NYCRR 202.48[a]). When the proposed order was submitted in 2013, the court declined to sign it, deeming the motion to have been abandoned.

Plaintiff moves to vacate the memorandum decision, to strike the answer of defendants Shraga Browd and Sheyna Browd, for summary judgment against defendants Browd, for leave to amend the caption deleting reference to defendants “John Doe” and “Jane Doe” and inserting the names of “Yehuda Browd” and “Steven Browd” in place and stead of the “John Doe” and “Jane Doe” defendants, and for leave to appoint a

referee. Defendants Shraga Browd and Sheyna Browd, now appearing by counsel, oppose the motion, and cross-move pursuant to CPLR 3211 to dismiss the complaint insofar as asserted against them based upon lack of standing. Plaintiff opposes the cross motion, asserting, among other things, that it is untimely, having been made post-joinder. The remaining parties have not appeared in relation to the motion or cross motion.

That branch of the motion by plaintiff to vacate the memorandum decision dated June 8, 2010 is denied as moot insofar as no order was submitted, and the motion was deemed abandoned.

That branch of the motion for leave to amend the caption deleting reference to the “John Doe” and “Jane Doe” defendants and substituting in their place and stead Yehuda Browd and Steven Browd as party defendants is granted.

It is ORDERED that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

LASALLE BANK NATIONAL ASSOCIATION,
AS TRUSTEE FOR CERTIFICATE HOLDERS
OF BEAR STERNS ASSET BACKED SECURITIES I,
LLC, ASSET BACKED- CERTIFICATES,
SERIES 2005-EC1,

Index No. 18563/08

Plaintiff ,

-against-

SHRAGA BROWD, SHEYNA BROWD, ASSET
ACCEPTANCE LLC, YEHUDA BROWD and
STEVEN BROWD,

Defendants.

It is well established that the proponent of a summary judgment motion “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). In a residential mortgage foreclosure action, a plaintiff establishes its prima

facie entitlement to judgment as a matter of law by producing the mortgage and the unpaid note, and evidence of the default (*see Midfirst Bank v Agho*, 121 AD3d 343 [2d Dept 2014]). Where the plaintiff is not the original lender and standing is at issue, the plaintiff seeking summary judgment must also submit evidence that it received both the mortgage and note by a proper assignment, which can be established by the production of a written assignment of the note (*see Aurora Loan Servs., LLC v Taylor*, 114 AD3d 627 [2d Dept 2014]; *see Homecomings Fin., LLC v Guldi*, 108 AD3d 506 [2d Dept 2013]), or by physical delivery to the plaintiff of the note (*see Kondaur Capital Corp. v McCary*, 115 AD3d 649 [2d Dept 2014]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 108 [2d Dept 2011]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Plaintiff offers, among other things, a copy of the pleadings, the mortgage, the note, an assignment dated February 18, 2008, the affirmation of its counsel, and an affidavit of Bret Cline, a “Document Control Officer” with Select Portfolio Servicing, Inc. (Select Portfolio), the servicing agent for plaintiff and purported attorney-in-fact for plaintiff, and two limited powers of attorney. The note bears an undated endorsement in blank, by Christopher Ledezma, as “Sr. Shipping Analyst,” for Encore and indicates it is payable without recourse. The mortgage names Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for Encore (and its successors and assigns) and indicates that, for the purposes of recording the mortgage, MERS was the mortgagee of record. The February 18, 2008 assignment is by MERS on behalf of Encore to plaintiff.

Plaintiff, in its prior motion for summary judgment, relied upon the assignment as the basis for establishing standing. The Appellate Division, Second Department, in the case of *Bank of New York v Silverberg*, (86 AD3d 274 [2d Dept 2011]), held that a purported assignment by MERS to establish standing to commence a foreclosure action where MERS was listed in the underlying mortgage instruments as a nominee and mortgagee for the purpose of recording but never was the actual holder or assignee of the underlying notes. The *Silverberg* case was determined after this court rendered its memorandum decision dated June 8, 2010.

Now plaintiff’s counsel indicates that plaintiff relies upon physical delivery of the note to confer standing, and asserts the assignment was secured as a “prophylactic measure to ward off any unnecessary confusion.”

To the extent plaintiff relied in its complaint upon the MERS assignment, the assignment to plaintiff of the mortgage states that the mortgage was assigned together with the note. Such an assignment of a note is effective only if the party assigning the

note has authority to do so (*see Bank of N.Y. v Silverberg*, 86 AD3d at 280-283; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d at 109). The subject mortgage, however, did not specifically give MERS the authority to assign the note, and plaintiff has presented no evidence that MERS was actually in possession of the note at the time of that assignment. Therefore, in the absence of any proof that MERS had the authority to assign the note on behalf of Encore, and there being no other proof that the note was assigned to plaintiff, the assignment, at the most, effected an assignment of the mortgage without underlying note. Inasmuch as an assignment of a mortgage without the underlying debt is a nullity (*see Deutsche Bank Natl. Trust Co. v Barnett*, 88 AD3d 636, 637 [2d Dept 2009]; *Bank of N.Y. v Silverberg*, 86 AD3d at 280), plaintiff's standing has not been established by virtue of the MERS assignment.

To the extent plaintiff asserts that it had physical possession of the note at the time of the commencement of this action, the affidavit of Mr. Cline does not give any factual details as to when plaintiff received physical possession of the note (*see US Bank Nat. Assn. v Faruque*, 120 AD3d 575 [2d Dept 2014]; *Deutsche Bank Natl. Trust Co. v Barnett*, 88 AD3d 636, 637 [2d Dept 2011]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d at 108; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752 [2d Dept 2009]) and by whom physical delivery of the note was made (*see Homecomings Fin., LLC v Guldi*, 108 AD3d 506 [2d Dept 2013]; *HSBC Bank USA v Hernandez*, 92 AD3d 843 [2d Dept 2012]; *cf. Aurora Loan Servs., LLC v Taylor*, 114 AD3d 627). In addition, to the degree Mr. Cline's knowledge is based upon plaintiff's records (as opposed to the records of Select Portfolio), he does not establish that he had personal knowledge of plaintiff's business practices or procedures. The affirmation of plaintiff's counsel is not based upon personal knowledge and therefore is of no probative or evidentiary significance regarding the issue of whether plaintiff received physical possession of the note prior to commencement of the action (*see Zuckerman v City of New York*, 49 NY2d at 563). That a copy of the note and endorsement was annexed to the complaint does not itself demonstrate plaintiff was in physical possession of the original note (with endorsement) at the time of commencement of the action.

Furthermore, to the extent plaintiff relies upon limited powers of attorney to demonstrate Select Portfolio is authorized to act on its behalf with respect to this litigation, the limited power of attorney dated August 5, 2013 appoints Select Portfolio as the attorney-in-fact for JPMorgan Chase Bank, N.A. to act in connection with all mortgage loans serviced by JPMorgan Chase Bank, N.A. as "Master Servicer" pursuant to certain pooling and servicing agreements described in "Exhibit A" to the power of attorney, solely for the purpose of performing such and acts and executing such documents in the name of Master Servicer in its capacity as attorney-in-fact for U.S. Bank National Association, as trustee. In the limited power of attorney dated May 3, 2013, U.S.

Bank National Association appoints JPMorgan Chase Bank, N.A. as attorney-in-fact in various specified respects in connection with certain trusts identified in “Exhibit A” to the power of attorney, including the foreclosure of a mortgage. Exhibit “A” includes a list of trusts, but plaintiff has failed to demonstrate that the subject mortgage is included as an asset of any of such trusts.

Under such circumstances, plaintiff has failed to establish, prima facie, that it had standing to commence the action. Those branches of the motion by plaintiff for summary judgment on the complaint insofar as asserted against defendants Shraga Browd and Sheyna Browd and to strike the affirmative defenses asserted by defendants Shraga Browd and Sheyna Browd based upon lack of standing are denied.

With respect to the cross motion, defendants Shraga Browd and Sheyna Browd should have labeled their cross motion as one made pursuant to CPLR 3212 rather than one pursuant to CPLR 3211 (*see Schultz v Estate of Sloan*, 20 AD3d 520 [2d Dept 2005]; *Hertz Corp. v Luken*, 126 AD2d 446 [1st Dept 1987]). Plaintiff, however, has failed to show that such mistake or defect caused it any prejudice. Plaintiff understands the cross motion only seeks to adjudicate the validity of the defense of lack of standing, and plaintiff took the opportunity to address that issue in its opposition papers to the cross motion. Therefore, the procedural defect is disregarded (*see Schultz v Estate of Sloan*, 20 AD3d 520; *Hertz Corp. v Luken*, 126 AD2d 446).

Defendants Shraga Browd and Sheyna Browd, however, have failed to offer any evidence, including any documentary evidence, to establish conclusively that plaintiff did not physically possess the note at the time of the institution of this action. Their failure to make the requisite prima facie showing warrants the denial of their cross motion notwithstanding the failure by plaintiff to establish its entitlement to judgment as a matter of law on the complaint insofar as asserted against defendants Shraga Browd and Sheyna Browd. A question of fact remains with respect to the issue of whether plaintiff was the lawful holder of the note when it commenced the action (*see U.S. Bank Nat. Assn. v Faruque*, 120 AD3d 575; *Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680, 683 [2d Dept 2012]; *Deutsche Bank Natl. Trust Co. v Rivas*, 95 AD3d 1061 [2d Dept 2012]). The cross motion by defendants Shraga Browd and Sheyna Browd for summary judgment dismissing the complaint insofar as asserted against them based upon lack of standing is denied.

That branch of the motion by plaintiff to dismiss the first affirmative defense of defendants Shraga Browd and Sheyna Browd based upon the pendency of a prior action is granted. Plaintiff previously commenced the action entitled *LaSalle Bank N. A. v Browd* (Supreme Court, Queens County, Index No. 4073/08), but discontinued it (see Stipulation

to Discontinue dated July 19, 2008).

That branch of the motion by plaintiff to dismiss the third affirmative defense of defendants Shraga Browd and Sheyna Browd to the extent it is based upon failure to state a cause of action is denied. The assertion of that defense in an answer may not be subject to motion to strike or provide a basis to test sufficiency of the complaint (*see Butler v Catinella*, 58 AD3d 145, 157-148 [2d Dept 2008]).

That branch of the motion by plaintiff to dismiss the third affirmative defense of defendants Shraga Browd and Sheyna Browd to the extent it is based upon plaintiff's alleged failure to allege any default is granted. Plaintiff specifically alleged in the complaint that defendants Shraga Browd and Sheyna Browd failed to make payments of principal and interest and other charges pursuant to the mortgage and note as set forth in "Schedule E", annexed to the complaint. Schedule "E" indicates the date of default was September 1, 2007.

With respect to that branch of the motion by plaintiff to dismiss the third affirmative defense of defendants Shraga Browd and Sheyna Browd to the extent it is based upon failure to serve a notice to cure and notice of acceleration, plaintiff has shown such defense is without merit. Plaintiff has established it complied with the condition precedent contained in the mortgage agreement (*see* paragraphs 15 and 22 of the subject mortgage), which required that it provide defendants Shraga Browd and Sheyna Browd with a notice of default prior to demanding payment of the loan in full. Plaintiff elected to accelerate the mortgage within the complaint and by filing a summons and complaint (*see Albertina Realty Co. v Rosbro Realty Corp.*, 258 NY 472, 476 [1932]). Defendants Shraga Browd and Sheyna Browd have failed to raise a triable issue of fact in opposition to establish the validity of the defense based upon failure to comply with the contractual condition precedent. That branch of the motion by plaintiff to dismiss the third affirmative defense of defendants Shraga Browd and Sheyna Browd to the extent it is based upon failure to serve a notice to cure and notice of acceleration is granted.

That branch of the motion by plaintiff to dismiss the third affirmative defense asserted by defendants Shraga Browd and Sheyna Browd based upon failure to state a cause of action under federal law and applicable state statutes, and the federal and New York State Constitutions is granted. Defendants Shraga Browd and Sheyna Browd have failed to allege any specific state or federal statutory, or constitutional, violations (CPLR 3013).

That branch of the motion by plaintiff to dismiss the fourth affirmative defense asserted by defendants Shraga Browd and Sheyna Browd based upon improper service of

process is granted. They failed to move to dismiss the complaint upon such ground within sixty (60) days of service of a copy of their answer, and have made no application to extend the period of time upon the ground of undue hardship (CPLR 3211[e]). As a consequence, such defense is deemed waived (CPLR 3211[e]; *see Dimond v Verdon*, 5 AD3d 718 [2d Dept 2004]).

That branch of the motion by plaintiff to dismiss the fifth affirmative defense asserted by defendants Shraga Browd and Sheyna Browd to the extent it is based upon an alleged violation of the Federal Fair Debt Collection Practices Act (FDCPA) (*see* 15 USC § 1692 *et seq.*) is granted. The FDCPA, however, does not generally apply to a creditor seeking to enforce a contract, such as a mortgage or note (*see United Cos. Lending v Candela*, 292 AD2d 800, 801–802 [4th Dept 2002], *citing* 15 USC § 1692a [6][F][iii]; *see also Maguire v Citicorp Retail Servs.*, 147 F3d 232, 235 [2d Cir 1998]; *Wadlington v Credit Acceptance*, 76 F3d 103, 106 [6th Cir 1996]). Defendants Shraga Browd and Sheyna Browd make no allegation that plaintiff “in the process of collecting [its] own debts, used any name other than [its] own which would indicate that a third person [wa]s collecting or attempting to collect such debts” (15 USC § 1692a [6]).

That branch of the motion by plaintiff to dismiss the fifth affirmative defense asserted by defendants Shraga Browd and Sheyna Browd based upon the doctrine of unclean hands is granted. Defendants Shraga Browd and Sheyna Browd have failed to allege or prove any facts to support such defense (*see Glenesk v Guidance Realty Corp.*, 36 AD2d 852 [2d Dept 1971], *abrogated on other grounds by Butler v Catinella*, 58 AD3d 145; CPLR 3018[b]).

That branch of the motion by plaintiff to dismiss the sixth affirmative defense asserted by defendants Browd based upon failure to join all necessary parties is granted. RPAPL 1311 provides that a necessary defendant is one “whose interest is claimed to be subject and subordinate to the plaintiff’s lien.” RPAPL 1311(3) requires that “[e]very person having any lien or incumbrance upon the real property which is claimed to be subject and subordinate to the lien of the plaintiff” be made a party. The proper remedy for nonjoinder of a necessary party is to allow the action to continue and to direct the missing party to be joined (*see NC Venture I, L.P. v Complete Analysis, Inc.*, 22 AD3d 540 [2d Dept 2005; *Dime Sav. Bank of N.Y. v Johneas*, 172 AD2d 1082 [4th Dept 1991]). Defendants Browd have failed to identify the purported necessary party who has not been named or joined. As a consequence, they have failed to show the unnamed person or entity cannot be made a party and the action cannot fairly proceed without that party (*see* CPLR 1001[b], 3211[a][10]).

That branch of the motion by plaintiff to dismiss the claim for damages set forth in

the “wherefore” clause of the answer of defendants Browd is granted. Defendants Browd have failed to allege any facts or made any showing of actionable wrong to sustain a cause of action as a counterclaim to support a claim for damages.

That branch of the motion by plaintiff for leave to appoint a referee is denied at this juncture.

That branch of the motion by plaintiff for an award of sanctions, including attorneys’ fees is denied.

Dated: May 8, 2015

Howard G. Lane, J.S.C.