

Deutsche Bank Natl. Trust Co. v Simons

2015 NY Slip Op 30896(U)

May 28, 2015

Supreme Court, Queens County

Docket Number: 19399/2013

Judge: Robert J. McDonald

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MEMORANDUM

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

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DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS TRUSTEE FOR GSR MORTGAGE LOAN TRUST
2006-OA1,

Index No.: 19399/2013

Motion Date: 03/02/15

Plaintiff,

Motion No.: 26

- against -

Motion Seq.: 1

TONI SIMONS, INDYMAC BANK, FSB, A
FEDERALLY CHARTED SAVINGS BANK, NEW
YORK CITY ENVIRONMENTAL CONTROL BOARD,
NEW YORK CITY TRANSIT ADJUDICATION
BUREAU, and "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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The following papers numbered 1 to 13 were read on this motion by plaintiff for an order dismissing the answer of the defendant, Toni Simons, granting summary judgment in favor of the plaintiff; for an order pursuant to RPAPL § 1321 appointing a referee to ascertain and compute the amount due to the plaintiff; and amending the caption by substituting a named defendant as a necessary party defendant in stead and place of John Doe:

Papers
Numbered

Notice of Motion Affidavits-Exhibits.....	1 - 7
Affirmation in Opposition-Affirmation.....	8 - 9
Reply Affirmation.....	10 - 13

In this mortgage foreclosure action, plaintiff moves for an order striking the answer of defendant Toni Simons; granting

summary judgment against said defendant on the ground that the answer contains no valid defense and no triable issue of fact exists; granting a default judgment against the remaining defendants who have not answered; appointing a referee to compute the sum due and owing to plaintiff; and amending the caption. Defendant, Toni Simons, pro se, has submitted opposition to the motion.

This foreclosure action pertains to the property located at 167-24 Foch Boulevard, Jamaica, New York, 11434. Based upon the record before this court, the defendant entered into an Adjustable Rate Note and Mortgage with IndyMac Bank F.S.B. on May 23, 2006 in the principal amount of \$272,000.00. The plaintiff asserts that defendant defaulted on her mortgage when she failed to make her monthly mortgage payments beginning July 1, 2012.

The plaintiff subsequently accelerated the defendant's mortgage and brought an action to foreclose its mortgage by filing a lis pendens and summons and complaint on October 18, 2013. The defendant was personally served on October 22, 2013 by serving a person of suitable age and discretion at the defendant's residence. Defendant, pro se, joined issue by serving an answer on October 28, 2013 containing a general denial, asserting that plaintiff lacked standing to sue, stating that the plaintiff had not offered a modification arrangement, and asserting that the plaintiff had not submitted an affidavit pursuant to CPLR 3012-b.

A foreclosure settlement conference was scheduled by the court for February 26, 2014. Defendant although duly notified of the conference date, failed to appear for the conference. Justice Marguerite A. Grays issued an order directing the plaintiff to file an application for an Order of Reference by April 10, 2014. A preliminary conference was held on May 22, 2014 at which the defendant appeared but plaintiff failed to appear. A compliance conference was held on September 15, 2014 at which the defendant appeared but the plaintiff failed to appear. The plaintiff filed a Note of Issue on December 8, 2014. This matter is presently on the calendar of the trial scheduling part on June 25, 2015.

In support of the motion for summary judgment, the plaintiff submits the affirmation of counsel, Dale McLaren, Esq., the affidavit of Cynthia Wallace who reviewed the records of the mortgage loan servicing agent; 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 mortgage assignment; 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 Certificate of Merit pursuant to CPLR 3012-b executed by Dale McLaren, Esq., dated December 3, 2014.

Plaintiff asserts that on May 23, 2006, defendant obtained a mortgage loan from IndyMac Bank in the principal amount of \$272,000.00 in order to finance her purchase of the subject property. The mortgage loan was memorialized by an adjustable rate note and mortgage executed by Ms. Simons and recorded on June 9, 2006. Counsel asserts that Note was indorsed in blank by IndyMac Bank the originator of the loan and as such may be negotiated by transfer of possession alone. Further the plaintiff has submitted evidence showing that the mortgage was assigned by IndyMac to Deutsche Bank National Trust Company by assignment of mortgage dated October 30, 2012. Further the affidavit of Cynthia Wallace states that based upon her personal examination of the records maintained by the servicer, Deutsche Bank was in possession of the note and mortgage at the time the action was commenced.

Thus, counsel asserts that the plaintiff is the current holder of the Note and Mortgage and was the holder of the Note and Mortgage on the date the action was commenced. The written assignment of the mortgage was recorded on December 17, 2012. The record contains copies of the indorsed note, mortgage and assignment of mortgage to the plaintiff.

Notice of default was sent to defendant on December 7, 2012 in accordance with the terms of the mortgage. Counsel also submits evidence that on May 3, 2013 the plaintiff was served with a 90 day notice by certified mail pursuant to RPAPL 1304 and with all notices in compliance with RPAPL 1303.

Plaintiff asserts that the defendant was lawfully served with a summons and complaint and that the court therefore has personal jurisdiction. In addition, the plaintiff asserts, contrary to the defendant's contention, that it had standing to bring the action by presenting sufficient evidence of the written assignment from IndyMac and transfer of the note and mortgage to the plaintiff prior to the commencement of the action. Counsel asserts that based upon the evidence submitted the plaintiff has made a prima facie showing that it is entitled to summary judgment and an order appointing a referee to compute.

In opposition to the motion, defendant asserts that the plaintiff lacks standing as it failed to provide the court with sufficient evidence that it held the note and mortgage at the time of the commencement of the action. In addition, the defendants claim to be victims of predatory lending and contend

that the defendant violated Federal and State disclosure laws.

Plaintiff asserts that the defendant's affirmative defenses, which refer to loss mitigation efforts, standing, and alleged predatory lending, should be dismissed as the defendant has failed to set forth any factual basis of wrongdoing. With respect to loss mitigation efforts the defendant failed to appear at the Residential Foreclosure Conference on February 26, 2014. With respect to the defendant's claim of predatory lending, counsel claims that the pleading is insufficient as it does not specify any facts upon which the claim is based. Thus, plaintiff asserts that the answer must be dismissed as it is not supported by a statutory or common law basis. With respect to the claim of lack of standing asserted in the answer, plaintiff contends that plaintiff has proven that it had standing by submitting proof that it was the holder of the note and mortgage at the time the action was commenced.

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 mortgagor Toni Simons. The moving papers demonstrate, prima facie, that none of the asserted defenses set forth in the answer of defendant are meritorious and plaintiff is entitled to summary judgment on its claims against Ms. Simons (see EMC Mortg. Corp. v Riverdale Assocs., 291 AD2d 370 [2d Dept. 2002]; State of New York v Lang, 250 AD2d 595 [2d Dept. 1998]). As stated above, the complaint herein sufficiently sets forth a valid cause of action for foreclosure. Plaintiff has submitted a copy of the mortgage, note and affidavit from Ms. Wallace establishing Ms. Simons default in payment. The plaintiff demonstrated proper service of the summons and complaint and showed by admissible evidence that it had been properly assigned the note indorsed in blank and mortgage as of the date of the commencement of the action. Plaintiff demonstrated when it became the lawful holder of the note pursuant to the valid

assignment of the note to it. Therefore, the moving papers demonstrated, prima facie, that none of the asserted defenses set forth in the answer of defendant are meritorious and that plaintiff is entitled to summary judgment on its claims against Velasquez (see State of New York v Lang, 250 AD2d 595).

The burden then shifted to Defendant to establish the existence of a triable issue of fact (see State Bank of Albany v Fioravanti, 51 NY2d 638, 647 [1980]).

Here, although the defendant has made several allegations regarding the invalidity of the mortgage assignment and the fact that the plaintiff was not offered any loss mitigation, defendant failed to appear at the residential foreclosure conference although duly notified of same. Defendant has not disputed that she executed the Note and Mortgage, defaulted on her loan payments, received notice of the default or attempted to cure her default. This court finds, therefore, that the defendant's assertions in opposing the motion are without merit as defendant has not provided a sufficient evidentiary basis to raise a material issue of fact as to jurisdiction, predatory lending or the validity of the note, the mortgage or the assignment.

Accordingly, this court finds that the conclusory allegations set forth in defendant's affirmative defenses are insufficient to defeat the motion for summary judgment. Therefore, the plaintiff's motion for summary judgment is granted and the affirmative defenses contained in the defendant's answer are stricken. The submissions further reflect that Plaintiff is entitled to amend the caption to substitute MIKE CARDOZA in place of the John Doe defendant. That branch of the motion for a default judgment against the remaining 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 and to amend the name of the plaintiff is granted

Settle order on notice.

Dated: May 28, 2015
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.