

PNC Bank, N.A. v San Giovanni
2015 NY Slip Op 30938(U)
May 15, 2015
Supreme Court, Suffolk County
Docket Number: 18963/2011
Judge: William B. Rebolini
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Short Form Order

SUPREME COURT - STATE OF NEW YORK**I.A.S. PART 7 - SUFFOLK COUNTY****PRESENT:****WILLIAM B. REBOLINI**
Justice

PNC Bank, National Association,

Plaintiff,

-against-

Michael San Giovanni a/k/a Michael Sangiovanni,
Karla Manzueta, HSBC Mortgage Corporation
(USA), Mortgage Electronic Registration Systems,
Inc.,

Defendants.

Motion Sequence No.: 002; MGMotion Date: 7/9/14Submitted:Index No.: 18963/2011Attorney for Plaintiff:Sheldon May & Associates PC
225 Merrick Road
Rockville Centre, NY 11570Attorney for DefendantMichael San Giovanni
a/k/a Michael Sangiovanni:Defendant Pro Se:Karla Manzueta
14 Gregory Lane
Central Islip, NY 11722Howard B. Arber, Esq.
64 Hilton Avenue
Hempstead, NY 11550Clerk of the Court

Upon the following papers numbered 1 to 26 read upon this motion for summary judgment and an order of reference: Notice of Motion and supporting papers, 1 - 16; Answering Affidavits and supporting papers, 17 - 24; Replying Affidavits and supporting papers, 25 - 26; it is

ORDERED that this motion (001) by plaintiff PNC Bank, National Association (PNC) pursuant to CPLR 3212 for summary judgment on its complaint as against defendant Michael San Giovanni a/k/a Michael Sangiovanni (defendant), fixing the defaults as against the non-appearing, non-answering defendants and, for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is granted.

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This is an action to foreclose a mortgage on premises known as 14 Gregory Lane, Central Islip, New York. On July 26, 2005, defendant and Karla Manzueta (Manzueta) executed a fixed rate note in favor of Nationpoint a division of Nat. City Bank of In. (Nationpoint) agreeing to pay the sum of \$220,000.00 at the yearly rate of 5.9990 percent. On the same date, defendant and Manzueta also executed a mortgage in the principal sum of \$220,000.00 on the subject property. The mortgage was recorded on August 11, 2005 in the Suffolk County Clerk's Office. Thereafter, on December 2, 2005, the note and mortgage were transferred by assignment of mortgage from Nationpoint to First Franklin Financial Corporation (First Franklin). The assignment of mortgage was recorded on March 8, 2006 in the Suffolk County Clerk's Office. On May 26, 2011, the mortgage was transferred by corporate assignment of mortgage from First Franklin to plaintiff PNC. The assignment of mortgage was recorded on June 10, 2011 in the Suffolk County Clerk's Office.

Select Portfolio Servicing, Inc. (SPS), servicer of the subject loan, sent a notice of default dated January 31, 2011 to defendant and Manzueta stating that they had defaulted on their mortgage loan and that the amount past due was \$11,386.93. As a result of the continuing default, plaintiff commenced this foreclosure action on June 10, 2011. In its verified complaint, plaintiff alleges in pertinent part that defendant and Manzueta breached their obligations under the terms of the note and mortgage by failing to make their monthly installment due on September 1, 2010 and subsequent payments thereafter. Defendant interposed an answer with affirmative defenses.

The Court's computerized records indicate that a foreclosure settlement conference was held on March 28, 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 complaint¹. In support of its motion, plaintiff submits among other things, the affirmation of Ted Eric May, Esq. in support of the motion; the affirmation of Ted Eric May, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the affidavits of Dana Crawford and David Coleman, document control officers for SPS, the servicer and attorney in fact for plaintiff; the pleadings; the note, mortgage and assignments of mortgage; proof of notices pursuant to RPAPL 1320, 1303 and 1304; affidavits of service of the summons and complaint; an affidavit of service of the instant summary judgment motion upon the defendant's counsel; and, a proposed order appointing a referee to compute. Defendant has submitted opposition to the motion.

"[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.*

¹ Plaintiff's previous application for summary judgment was denied by prior order dated April 18, 2013 for, *inter alia*, failure to submit evidence of the December 2, 2005 assignment of mortgage. Such assignment, with proof of recording with the Suffolk County Clerk's Office, was submitted with the instant application.

Bank of N.Y. v O’Kane, 308 AD2d 482, 764 NYS2d 635 [2d Dept 2003]; see *Argent Mtge. Co., LLC v Montesana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]; *Wells Fargo Bank, N.A. v Webster*, 61 AD3d 856, 877 NYS2d 200 [2d Dept 2009]). “The burden then shifts to the 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’ ” (*U.S. Bank Natl. Assn. TR U/S 6/01/98 [Home Equity Loan Trust 1998–2] v Alvarez*, 49 AD3d 711, 711, 854 NYS2d 171 [2d Dept 2008], quoting *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 664 NYS2d 345 [2d Dept 1997], *lv to appeal dismissed* 91 NY2d 1003, 676 NYS2d 129 [1998]; see also *Emigrant Mtge. Co., Inc. v Beckerman*, 105 AD3d 895, 895, 964 NYS2d 548 [2d Dept 2013]).

Here, plaintiff has established its *prima facie* entitlement to summary judgment against the answering defendant as such papers included a copy of the mortgage and the unpaid note together with due evidence of defendant’s default in payment under the terms of the loan documents (see *Jessabell Realty Corp. v Gonzales*, 117 AD3d 908, 985 NYS2d 897 [2d Dept 2014]; *Bank of New York Mellon Trust Co. v McCall*, 116 AD3d 993, 985 NYS2d 255 [2d Dept 2014]; *North Bright Capital, LLC v 705 Flatbush Realty, LLC*, 66 AD3d 977, 889 NYS2d 596 [2d Dept 2009]).

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 *U.S. Bank of N.Y. v Silverberg*, 86 AD3d 274, 279, 926 NYS2d 532 [2d Dept 2011]; *U.S. Bank, N.A. v Adrian Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; *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. Holder status is established where the plaintiff is the special indorsee of the note or takes possession of a mortgage note that contains an indorsement in blank on the face thereof as the mortgage follows as incident thereto (see UCC § 3–202; § 3–204; § 9–203[g]). Delivery of the note to a custodial agent of the plaintiff will suffice to establish the standing of a foreclosure plaintiff under the foregoing rules (see *Deutsche Bank Natl. Trust Co. v Whalen*, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]; *HSBC Bank USA, Natl. Assn. v Sage*, 1212 AD3d 1126, 977 NYS2d 446 [3d Dept 2013]). Here, Dana Crawford avers that SPS received the original file from the records custodian on May 9, 2011, which was prior to the commencement of the action, and confirmed the physical possession of the note along with other documents contained within the file (see *Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674, 838 NYS2d 622 [2d Dept 2007]). The plaintiff thus has established, *prima facie*, its standing to prosecute this action.

It was thus incumbent upon the answering defendant to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff’s *prima facie* showing or in support of the affirmative defenses asserted in their answer or otherwise available to him (see *Flagstar Bank v Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Grogg Assocs. v South Rd. Assocs.*, 74 AD3d 1021,

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907 NYS2d 22 [2d Dept 2010]; *Wells Fargo Bank v Karla*, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]).

In his opposing papers, defendant re-asserted his pleaded affirmative defense that the plaintiff lacks standing to prosecute its claims for foreclosure and sale. The defendant contends that a question of fact exists with respect to the plaintiff's standing as plaintiff has not produced the original mortgage and as such is not entitled to any relief and that the assignments are defective as they do not contain the required language regarding the authority of the individual who executed them.

The court finds that none of defendant's allegations give rise to questions of fact that implicate a lack of standing on the part of the plaintiff. Here, the facts establish that plaintiff had physical possession of the note prior to the commencement of the action. Here, neither the defenses raised in the answer nor, those asserted on this motion rebut the plaintiff's *prima facie* showing of its entitlement to summary judgment.

Also rejected is defendant's contention that plaintiff's summary judgment motion should be denied in order to afford defendant an opportunity to obtain discovery. 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 *Garcia v Lenox Hill Florist III, Inc.*, 120 AD3d 1296, 993 NYS2d 86 [2d Dept 2104]; *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]). Defendant's opposition papers which aver that it is his intention to "both inspect plaintiff's file and all of the mortgage related documents including, but not limited to, the mortgage application, to explore whether there are any irregularities which would impact upon this litigation" is patently insufficient to satisfy the aforementioned statutory burden. Thus, defendant failed to sufficiently demonstrate that he 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]; *Anzel v Pisotino*, 105 AD3d 784, 962 NYS2d 700 [2d Dept 2013]; *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]).

As to his remaining assertions, defendant has 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” (*Shaw v Time-Life Records*, 38 NY2d 201, 379 NYS2d 390 [1975]). Notably, the defendant did not deny having received the loan proceeds and having defaulted on his loan payments in his opposition papers (see *Citibank, N.A. v Souto Geffen Co.*, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]). Accordingly, the remaining contentions of defendant are rejected by the court.

Based upon the foregoing, the motion for summary judgment is granted against answering defendant. 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 *Green Tree Serv. v Cary*, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]; *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: 5/15/2015


HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION