Waterfall Victoria Mtge. Trust 2001-1 v Stastny
2015 NY Slip Op 30969(U)
January 8, 2015
Supreme Court, Suffolk County
Docket Number: 19356-11
Judge: Ralph T. Gazzillo
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[* 1]

SHORT FORM ORDER

INDEX
NO.: 19356-11

SUPREME COURT - STATE OF NEW YORK
IAS PART 6 - SUFFOLK COUNTY

PRESENT: Hon. RALPH T. GAZZILLO
Justice of the Supreme Court

MOTION DATE 12-4-13
ADJ. DATE
Mot. Seq. #001 - MG

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Waterfall Victoria Mortgage Trust 2001-1

Plaintiff,

-against-

Linda Stastny a/k/a Linda A. Stastny, Edward Stastny a/k/a Edward J. Stastny, and "JOHN DOE #1" through "JOHN DOE #12", the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises being foreclosed herein,

Defendants.

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Upon the following papers numbered 1 to 41 read on this motion fro summary judgment and an order of reference; Notice of Motion/ Order to Show Cause and supporting papers 1 - 24; ~~Notice of Cross Motion and supporting papers ____~~; Answering Affidavits and supporting papers 25 - 39; Replying Affidavits and supporting papers 40 - 41; ~~Other ____~~; ~~(and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by plaintiff Waterfall Victoria Mortgage Trust 2011-1 (Waterfall) pursuant to CPLR 3212 for summary judgment on its complaint against defendants Linda Stastny a/k/a Linda A. Stastny and Edward Stastny a/k/a Edward J. Stastny (defendants), to amend the caption of this action pursuant to CPLR 3025 (b), 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 striking therefrom defendants "John Doe #1" through "John Doe #12"; 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

Waterfall Victoria Mortgage Trust 2001-1

Plaintiff,

-Against-

Linda Stastny a/k/a Linda A. Stastny, Edward Stastny a/k/a Edward J. Stastny,

Defendants.

This is an action to foreclose a mortgage on property known as 1057 John Roe Smith Avenue, Medford, New York. On July 5, 2007, defendants executed a fixed rate note in favor of Argent Mortgage Company, LLC (Argent) agreeing to pay the sum of $300,000.00 at the yearly rate of 6.300 percent. On said date, defendants also executed a mortgage in the principal sum of $300,000.00 on the subject property. The mortgage was recorded on August 7, 2007 in the Suffolk County Clerk's Office. By assignment dated January 13, 2009, Citi Residential Lending Inc., as attorney-in-fact for Argent, assigned the note and mortgage to Mortgage Electronic Registration Systems, Inc. (MERS). The assignment of mortgage was recorded on February 26, 2009 in the Suffolk County Clerk's Office. Thereafter, on June 7, 2011, the note and mortgage transferred by assignment of mortgage from MERS to plaintiff Waterfall. The assignment of mortgage was recorded on June 22, 2011 in the Suffolk County Clerk's Office.

Quantum Servicing Corporation, through its attorney, sent a notice of default dated February 17, 2011 to defendants stating that they had defaulted on their mortgage loan and that the amount past due was $58,167.01. As a result of defendants continuing default, plaintiff commenced this foreclosure action on June 15, 2011. In its complaint, plaintiff alleges in pertinent part that defendants breached their obligations under the terms of the note and mortgage by failing to make the monthly installment due on April 1, 2009 and subsequent payments thereafter. Defendants interposed a verified answer with affirmative defenses and counterclaims.

The Court's computerized records indicate that a foreclosure settlement conference was held on November 14, 2011 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 conferences are required.

Plaintiff now moves for summary judgment on its complaint. In support of its motion, plaintiff submits among other things: the sworn affidavit of David McDonnell, managing director, for the servicing agent and attorney in fact for plaintiff; the affirmation of Ted Eric May, Esq. in support of the instant 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 pleadings; the note, mortgage and

assignments of mortgage; notices pursuant to RPAPL 1320, 1304 and 1303; affidavits of service for the summons and complaint; and, an affidavit of service for the instant summary judgment motion upon defendants' counsel. Defendants have submitted opposition to the summary judgment 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" (*see* ***Republic Natl. 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. of New York v Winn***, 19 AD3d 545, 796 NYS2d 533 [2d Dept 2005]). 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]; ***US Bank, NA v Collymore***, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; ***Wells Fargo Bank Minn., NA v Mastropaolo***, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]).

Here, plaintiff has established its entitlement to summary judgment against the answering defendants as such papers included a copy of the mortgage, the unpaid note together with due evidence of their default in payment under the terms of the loan documents (*see* CPLR 3212; RPAPL 1321; ***Neighborhood Hous. Serv. of New York City v Hawkins***, 97 AD3d 554, 947 NYS2d 321 [2d Dept 2012]; ***Baron Assoc., LLC v Garcia Group Enter.***, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; ***Citibank, N.A. v Van Brunt Prop., LLC***, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]; ***Archer Capital Fund, L.P. v GEL, LLC***, 95 AD3d 800, 944 NYS2d 179 [2d Dept 2012]; ***Swedbank, AB v Hale Ave. Borrower, LLC.***, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]; ***Rossrock Fund II, L.P. v Osborne***, 82 AD3d 737, 918 NYS2d 514 [2d Dept 2011]).

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; ***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]). Here, David McDonnell avers that plaintiff is the holder and owner of the note and that the note was negotiated to plaintiff and/or plaintiff's agent prior to the commencement of this action by way of an allonge and/or endorsement fixed to the note, which remains in plaintiff's and/or plaintiff's agent's physical possession. The plaintiff thus has established, *prima facie*, its has standing to prosecute this action.

It was thus incumbent upon the answering defendants 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 them (*see* ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***Grogg Assocs. v South Rd. Assocs.***, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; ***Wells Fargo Bank v Karla***, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; ***Washington Mut. Bank v O'Connor***, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]; ***J.P. Morgan Chase Bank, N.A. v Agnello***, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; ***Aames Funding Corp. v Houston***, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]).

In their opposing papers, defendants re-assert their pleaded affirmative defense that the plaintiff lacks standing to prosecute its claims for foreclosure and sale. The defendants contend that a question of fact exists with respect to the plaintiff's standing as the assignment of mortgage dated June 7, 2011 appears to be defective, that plaintiff has failed to present any evidence that Crystal Moore had authority to execute the assignment of mortgage dated January 13, 2009, that the assignment of mortgage does not contain a power of attorney; and, that the assignment of mortgage was notarized in Florida.

The court finds that none of defendants' allegations give rise to questions of fact that implicate a lack of standing on the part of the plaintiff. Here, the uncontroverted facts establish that plaintiff physically possessed the original note containing an indorsement in blank prior to the commencement of the action and that the mortgage passed as an incident to the note upon its physical delivery of same to plaintiff.

As to the defendants' remaining assertions, the Court initially notes that defendants do not deny in their affidavits that they are in default on their mortgage loan payments. Instead, they rely on purported defects in the RPAPL 1304 and 1306 notices. Celeste Martinez states in her affidavit in support of defendants' opposition papers that she conducted a "forensic review" of the foreclosure file in the instant case, including the RPAPL 1304 and 1306 notices, and found that said notices do not comply with the statute.

RPAPL 1304 provides that in a residential foreclosure action, at least 90 days before the lender commences an action against the borrower, the lender must send a notice to the borrower including certain language and the notice must be in 14-point type. The notice must be sent by registered or certified mail and also by first-class mail to the last known address of the borrower, and if different, to the residence that is the subject of the mortgage (see RPAPL 1304). The statute further provides that the notice shall contain a list of at least five housing counseling agencies that serve the region where the borrower resides (id.).

It is well settled that proper service of the notices required by RPAPL 1304 is a condition precedent to the commencement of a residential foreclosure action, and is the plaintiff's burden to establish (*see* ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, 961 NYS2d 200 [2d Dept 2013]; ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]). Here, plaintiff established, through the affidavit of David McDonnell, that Sheldon May & Associates, P.C., as attorney for the owner and holder of the note and mortgage, sent two separate 90-day notices, one

via certified mail return receipt requested and one by first class mail on February 24, 2011. While defendants, who do not deny having received notices pursuant to RPAPL 1304, assert that certain language contained within the RPAPL 1304 did not comply with the statutory requirements, such has not been supported by any competent evidence. The Court specifically finds the affidavit of Celeste Martinez to be unpersuasive. Ms. Martinez has failed to establish that she possesses any expert knowledge or qualifications to conduct such a forensic review and as a result thereof, her affidavit is insufficient so as to raise a triable issue of fact in support of defendants' contentions (*see* ***Vereczkey v Sheik***, 57 AD3d 527, 869 NYS2d 143 [2d Dept 2008]; *citing* ***Martinez v Roberts Consolidated Industries, Inc.***, 299 AD2d 399, 749 NYS2d 279 [2d Dept 2002]).

In any event, any alleged failure of plaintiff to satisfy the RPAPL 1304 notice requirements, even if true, merely constitutes a defense to the action and did not deprive the Court of subject matter jurisdiction to render an order of reference (see ***Deutsche Bank Trust Co. Americas v Shields***, 116 AD3d 653, 983 NYS2d 286 [2d Dept 2014]; ***Pritchard v Curtis***, 101 AD3d 1502, 957 NYS2d 440 [3d Dept 2012]; ***Signature Bank v Epstein***, 95 AD3d 1199, 945 NYS2d 347 [2d Dept 2012]).

With respect to their remaining affirmative defenses and counterclaims, defendants have failed to raise any triable issues of fact. Accordingly, the motion for summary judgment is granted against the answering defendants. 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 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: 1/20/15

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION