Wells Fargo Bank, N.A. v Magagna
2015 NY Slip Op 31053(U)
June 19, 2015
Supreme Court, Queens County
Docket Number: 6110 2013
Judge: David Elliot
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

WELLS FARGO BANK, N.A.,
Plaintiff(s),

- against -

RICHARD MAGAGNA, et al.,
Defendant(s).

Index No. 6110 2013

Motion Date March 12, 2015

Motion Cal. No. 156

Motion Seq. No. 1

The following papers numbered 1 to 14 read on this motion by plaintiff for an order granting it summary judgment against defendants Richard Magagna and Melissa Magagna f/k/a Melissa Cavaliere (defendants), striking their answer and dismissing their affirmative defenses and counterclaims, appointing a referee to compute, amending the caption; and on this cross motion by defendants for an order granting them summary judgment dismissing the complaint or, in the alternative, permitting discovery.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits....................................	1-5
Notice of Cross Motion - Affirmation - Exhibits...........................	6-11
Answering Affirmation - Exhibits...	12-14

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

Plaintiff commenced this action to foreclose a mortgage against real property known as 166-23 24th Road, Whitestone, New York. Briefly, defendants executed a note and mortgage in the amount of $200,000.00, in favor of EAB Mortgage Company, Inc., on June

21, 2000. The parties then executed a new note and mortgage for $52,717.33, on May 16, 2001. On that same date, the parties entered into a Consolidation, Extension and Modification Agreement (CEMA 1), consolidating and modifying the two loans to form a single lien in the amount of $250,000.00. Defendants executed another note and mortgage in the amount of $62,704.49, in favor of BNY Mortgage Company LLC, on March 10, 2003. On that same date, the parties entered into a Consolidation, Extension and Modification Agreement (CEMA 2), consolidating and modifying CEMA 1 and the aforementioned loan to form a single lien in the amount of $305,000.00. Defendants executed another note and mortgage in the amount of $219,269.21, in favor of Wall Street Mortgage Bankers, Ltd., on May 13, 2010. On that same date, the parties entered into a Consolidation, Extension and Modification Agreement (CEMA 3), consolidating and modifying CEMA 2 and the aforementioned loan to form a single lien in the amount of $490,435.00. Pursuant to its complaint, plaintiff alleges it "is the holder of the subject Note and Mortgage or has been delegated the authority to institute a mortgage foreclosure action by the holder of the subject Note and Mortgage," that defendants defaulted under the terms thereunder by failing to make the monthly installment which became due and owing on June 1, 2012 and all subsequent payments and, as a result, it elected to accelerate the debt by virtue of the filing of the summons and complaint and *lis pendens* on March 29, 2013.

Plaintiff has demonstrated that all defendants were served with process and have defaulted in answering or appearing herein, with the exception of the cross-moving defendants, who interposed an answer with affirmative defenses and counterclaims, including defenses based upon noncompliance with RPAPL §§ 1303 and 1304, failure to comply with notice provisions in certain mortgages requiring notices of default, lack of standing, and plaintiff's failure to be licensed as a debt collector.

Turning first to the cross motion, which seeks dismissal of this action, to the extent defendants argue that dismissal is warranted for plaintiff's failure to comply with certain conditions precedent of the June 21, 2000, May 16, 2001, and March 10, 2003, mortgages with respect to the requirement that the lender provide proper notices of default, plaintiff adequately demonstrated that there was no default notice requirement per the consolidated mortgage (*see Emigrant Funding Corp. v Agard*, 121 AD3d 935 [2014]). Pursuant to the terms of Sections II and IV of CEMA 3, the terms of the corresponding consolidated note and mortgage, respectively, superceded all terms, covenants, and provisions of the previous notes and mortgages. Thus, defendants are not entitled to dismissal on that basis. Further, plaintiff is entitled to dismissal of defendants' third affirmative defense which alleges failure to comply with provisions of the mortgages requiring a notice of default.

Neither are defendants entitled to dismissal of the complaint on plaintiff's alleged status as an unlicensed debt collector since they did not submit sufficient proof to establish

that plaintiff is a debt collection agency within the meaning of New York City Administrative Code § 20-489 (a); defendants' reliance on *Centurion Capital Corp. v Druce* (14 Misc 3d 564 [Civ Ct New York County 2006]) is not instructive, as this is an equitable action to foreclose a mortgage and not an action to recover sums due under a credit card agreement. Further, plaintiff is entitled to dismissal of defendants' ninth affirmative defense which alleges that plaintiff is an unlicensed debt collector.

Defendants next seek dismissal based upon plaintiff's alleged failure to prove that it served the notice as required by RPAPL § 1304. Defendants failed to meet their burden in that respect, as they state in their respective affidavits only that "I never received such a notice." This bare assertion is insufficient to "affirmatively demonstrate that the pre-condition was not satisfied" (*Deutsche Bank Nat. Trust Co. v Spanos*, 102 AD3d 909 [2013]). Moreover, defendants' alleged failure to receive the 90-day notice does not conclusively prove that the notice was not sent to them.

That being said, however, plaintiff has failed to submit sufficient proof demonstrating that it strictly complied with RPAPL § 1304. The affidavit of Susana Leal-Salgado, who is plaintiff's Vice President of Loan Documentation, merely indicates that she reviewed the "notice sent to the Borrowers by verified [sic] and first class mail to the last known address of the mortgagor." Neither does the affidavit of Trudyann Yearwood, who is also a Vice President of Loan Documentation, eliminate any issues as to proper service. Though she, like Ms. Leal-Salgado, stated that she is familiar with plaintiff's business records and has examined same, and that, consequently, she was able to certify and affirm that the notice was properly sent, same is insufficient since it does not amount to a proper affidavit of service of the statutorily-required notice (*see Flagstar Bank, FSB v Anderson*, __AD3d__, 2015 NY Slip Op 04606, *citing Wells Fargo Bank, NA v Burke*, 125 AD3d 765 [2015] [plaintiff failed to tender sufficient evidence to eliminate triable issue since it did not submit an affidavit of service]; *Deutsche Bank Nat. Trust Co.*, 102 AD3d at 910-911; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95 [2011]). Contrary to Ms. Yearwood's statement in her affidavit, proof of certified mailing was not, in fact, annexed (*cf. Emigrant Mtge. Co., Inc. v Persad*, 117 AD3d 676 [2014][1]). For this reason, plaintiff is not entitled to summary judgment

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1. The plaintiff's Affirmation in Reply in this case, submitted to the lower court and available in the full history report on Westlaw (2013 WL 9594051), reveals that the record before the court included an affidavit of service as well as a copy of the certified mailing receipt. The Second Department determined that plaintiff conclusively established that it complied with RPAPL § 1304, as defendant could not rebut the presumption of proper mailing created by the affidavit of service.

against defendants, dismissal of their second affirmative defense, or an order appointing a referee to compute.

Finally, defendants seek dismissal based upon plaintiff's alleged lack of standing to commence this action. Initially, it is noted that, where the plaintiff is not the original lender and standing is at issue, the plaintiff seeking summary judgment, as is the case here, must 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 [2014]; *see Homecomings Fin., LLC v Guldi*, 108 AD3d 506 [2013]), or by physical delivery to the plaintiff of the note (*see Kondaur Capital Corp. v McCary*, 115 AD3d 649 [2014]; *Aurora Loan Servs., LLC*, 85 AD3d at 108).

Here, while defendants are not entitled to outright dismissal of plaintiff's complaint based on this defense, as they failed to conclusively establish that plaintiff was without the authority to commence this action, neither has plaintiff demonstrated the absence of a triable issue of fact in that regard (*see e.g. US Bank, NA v Weinman*, 123 AD3d 1108 [2014]) and, to that extent, those defenses sounding in lack of standing are not subject to dismissal. The affidavit of Ms. Leal-Salgado is insufficient to meet plaintiff's burden, inasmuch as her declaration that "I confirm that [plaintiff] was in possession of the Consolidated Promissory Note prior to March 29, 2013[, the date of commencement of this action]," is bereft of factual details of a physical delivery of the note prior to commencement and, while the consolidated note is endorsed to plaintiff, it bears no date (*id.*; *see Flagstar Bank, FSB*, 2015 NY Slip Op 04606, at *1). Further, the corporate assignment of mortgage, dated August 13, 2012 – irrespective of issues regarding whether Mortgage Electronic Registration Systems Inc., as nominee for Wall Street Mortgage Bankers, Ltd., had authority to assign such a document – by its terms, was an assignment of the mortgage *only*, and is insufficient by itself to conclusively establish standing (*see Bank of America, NA v Paulsen*, 125 AD3d 909 [2015]; *see generally Citibank, N.A. v Herman*, 125 AD3d 587 [2015]; *Deutsche Bank Nat. Trust Co.*, 102 AD3d at 911-912).

To the extent plaintiff's counsel avers in opposition to the cross motion that plaintiff has adequately proven its standing by producing copies of all the endorsed notes, mortgages, and CEMAs, that argument does not prove that plaintiff was in possession of those documents at the time of commencement of this action[2]; it should be noted that the endorsed note was not filed along with the complaint herein (*see e.g. Nationstar Mortg., LLC v Catizone*, 127 AD3d 1151 [2015]; *Deutsche Bank Nat. Trust Co. v Haller*, 100 AD3d 680 [2012]).

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2. Such statement does no more than prove that plaintiff was in possession of same at the time of the making of its motion.

Turning to the remaining branches of plaintiff's motion, plaintiff has established that defendants' first, fourth, tenth, eleventh, twelfth, and thirteenth affirmative defenses and three counterclaims (two of which are duplicative of defenses asserted) are either conclusory or without merit as a matter of law, and defendants have failed to specifically address plaintiff's prima facie showing.

Accordingly that branch of defendants' cross motion for an order dismissing the complaint is denied. The branch of the cross motion for a order permitting defendants to "continue getting discovery from plaintiff" is denied, as defendants have not demonstrated that any demands for discovery were served. The branch of plaintiff's motion for an order granting it summary judgment against these defendants, striking their answer, and appointing a referee to compute is denied. That branch of its motion for an order dismissing their affirmative defenses and counterclaims is granted only to the extent that defendants' first, third, fourth, ninth, tenth, eleventh, twelfth, and thirteenth affirmative defenses and three counterclaims are dismissed. The branch of the motion amending the caption is granted, and "John Doe #1" through "John Doe #10" are stricken from the caption. Finally, the remaining defendants are in default in answering or otherwise appearing herein.

Dated: June 19, 2015

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J.S.C.