

U.S. Bank N.A. v Eun H. Choi
2015 NY Slip Op 31066(U)
February 6, 2015
Supreme Court, Suffolk County
Docket Number: 30924-10
Judge: Thomas F. Whelan
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ORIGINAL SUPREME COURT - STATE OF NEW YORK
IAS PART 33 SUFFOLK COUNTY

PRESENT: HON. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 12-20-13
~~FILED~~ DATE 1/23/15 (File transferred 12/15/14 Seltz)
Mot. Seq. #002 - MG

U.S. BANK NATIONAL ASSOCIATION AS
TRUSTEE FOR CSAB MORTGAGE-BACKED
PASS-THROUGH CERTIFICATES, SERIES
2006-1 (CSAB 2006-1),

FEIN, SUCH & CRANE, LLP
Attorneys for Plaintiff
1400 Old Country Road Ste C103
Westbury, N. Y. 11590

Plaintiff,

RONALD D. WEISS, ESQ.
Attorney for Defendant
Eun H. Choi
734 Walt Whitman Rd., Suite 203
Melville, N. Y. 11747

-against-

EUN H. CHOI; WAN YONG CHOI; KMT
GROUP, LLC; "JOHN DOE #1-5" AND "JANE
DOE #1-5" said names being fictitious, it being the
intention of Plaintiff to designate any and all
occupants, tenants, persons or corporations, if any,
having or claiming an interest in or lien upon the
premises being foreclosed herein

Defendants.

Upon the following papers numbered 1 to 27 read on this motion for summary judgment and an order of reference
Notice of Motion/ Order to Show Cause and supporting papers 1 - 18; ~~Notice of Cross Motion and supporting papers~~ _____;
Answering Affidavits and supporting papers 19 - 23; Replying Affidavits and supporting papers 24 - 27; ~~Other~~ _____; (and after
hearing counsel in support and opposed to the motion) it is,

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers,
the motion is decided as follows: it is

ORDERED that this motion by plaintiff U.S. Bank National Association as Trustee for CSAB
Mortgage-Backed Pass-Through Certificates, Series 2006-1 (CSAB 2006-1) (US Bank), for an order
pursuant to CPLR 3212 awarding summary judgment in its favor against defendants Eun H. Choi and Wan
Yong Choi (defendants Choi), for an order of reference appointing a referee to compute pursuant to Real
Property Actions and Proceedings Law § 1321, and for leave to amend the caption of this action pursuant
to CPLR 3025 (b), is granted; and it is further

ORDERED that the caption is hereby amended by substituting defendant Yong Choi in place of

defendant “John Doe #1”, Andrew Choi in place of defendant “John Doe #2”, and Soon Choi in place of “Jane Doe #1” and by striking therefrom defendants “John Doe #3” through “John Doe #5” and “Jane Doe #2 through “Jane Doe #5”; 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

U.S. BANK NATIONAL ASSOCIATION AS
TRUSTEE FOR CSAB MORTGAGE-BACKED
PASS-THROUGH CERTIFICATES, SERIES
2006-1 (CSAB 2006-1),

Plaintiff,

-against-

EUN H. CHOI; WAN YONG CHOI; KMT
GROUP, LLC; YONG CHOI; ANDREW CHOI;
SOON CHOI;

Defendants.

This is an action to foreclose a mortgage on premises known as 53 Manchester Road, Huntington, New York. On April 21, 2006, defendant Eun Hee Choi executed a fixed rate note in favor of The Hemisphere National Bank (Hemisphere) agreeing to pay \$556,000.00 at the yearly rate of 7.8750 percent. On the same date, defendants Choi executed a first mortgage in the principal sum of \$556,000.00 on their home, the subject property. The mortgage indicated Hemisphere to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of Hemisphere as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on June 7, 2006 in the Suffolk County Clerk’s Office. Thereafter, the mortgage was transferred by an assignment of mortgage dated August 4, 2010 from MERS, as nominee for Hemisphere to plaintiff US Bank. The assignment of mortgage was recorded on August 30, 2010 with the Suffolk County Clerk’s Office.

By letter dated February 2, 2010, a notice of default was sent to defendant Eun H. Choi stating that his loan was in default and that the amount past due was \$64,249.89. As a result of defendant’s continuing default, plaintiff commenced this foreclosure action on August 18, 2010. In its complaint, plaintiff alleges in pertinent part that defendants Choi breached their obligations under the terms of the note and mortgage by failing to make monthly payments. Defendants Choi interposed an answer with 16 affirmative defenses and three counterclaims.

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The Court's computerized records indicate that a foreclosure settlement conference was held on May 16, 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 complaint contending that defendants Choi defaulted under the terms of the loan agreement and mortgage for failure to pay the April 1, 2009 payment and subsequent payments thereafter and that defendants' answer and defenses are without merit. In support of its motion, plaintiff submits among other things: the sworn affidavits of Patricia A. Labelle, vice president of 1st United Bank, attorney-in-fact for plaintiff U.S. Bank, the affidavit of Sylvia Nile, sr. vice president of 1st United Bank, attorney-in-fact for plaintiff U.S. Bank; the affirmation of Michael S. Hanusek, Esq. in support of the application; the summons and complaint; the pleadings; the note, mortgage and an assignment of mortgage; a notice of default; proof of notices pursuant to RPAPL 1320, 1303 and 1304; the affirmation of Richard A. Gerbino, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); affidavits of service for the summons and complaint; an affidavit of service for the instant summary judgment motion upon counsel for defendants Choi; and a proposed order appointing a referee to compute. Defendants Choi oppose the motion, *inter alia*, on the ground that plaintiff lacks standing.

"[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 defendants' 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]).

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*

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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. Here, plaintiff established that it took possession of the note by physical delivery prior to the commencement of the action (see *Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674, 838 NYS2d 622 [2d Dept 2007]). US Bank also submitted documentation, in the form of a written assignment, which established that it was the owner and holder of the subject note and mortgage prior to the commencement of the action. Thus plaintiff thus 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]).

In their opposing papers, defendants Choi 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 by reason of plaintiff's failure to establish physical possession of the original note and that the assignment was a defective. The court finds, however, that none of these allegations give rise to questions of fact that implicate a lack of standing on the part of the plaintiff. Here, plaintiff established that at the time of the commencement of this action it possessed the requisite standing to prosecute its pleaded claims for foreclosure and sale of the mortgaged premises. The record establishes that plaintiff was validly assigned the note and mortgage that is the subject of this foreclosure action and that it took possession of the note prior to the commencement of the action (see *Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674, 838 NYS2d 622 [2d Dept 2007]). The defendants' contentions are thus unavailing.

Also unavailing is the defendants' assertion that plaintiff's summary judgment motion should be denied for failure to comply with their discovery request. Here, plaintiff's reply affirmation established that plaintiff responded to defendants' discovery demands on November 11, 2010.

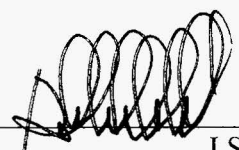
The remaining arguments in opposition to plaintiff's motion and the remaining affirmative defenses fail to raise a triable issue of fact concerning any bona fide defense to foreclosure in opposition to the motion for summary judgment (see *Rimbambito, LLC v Lee*, 118 AD3d 690, 986 NYS2d 855 [2d Dept 2014]; *Bank of Smithtown v 219 Sagg Main, LLC*, 107 AD3d 654, 968 NYS2d 95 [2d Dept 2013][unclean hands]; *American Airlines Federal Credit Union v Mohamed*, 117 AD3d 974, 986 NYS2d 530 [2d Dept 2014] [lack of good faith in denying loan modification]; *Putnam County Sav. Bank v Mastrantone*, 111 AD3d 914, 975 NYS2d 684 [2d Dept 2013] [lack of personal jurisdiction]). Notably, defendants Choi do not deny that they defaulted on their mortgage payments. Accordingly, the motion for summary judgment is granted in favor of plaintiff against defendants Eun H. Choi and Wan Yong Choi

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and for order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is 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: 2/6/15



HON. THOMAS F. WHELAN J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION