

US Bank N.A. v Murray
2015 NY Slip Op 31141(U)
March 2, 2015
Supreme Court, Suffolk County
Docket Number: 12-21757
Judge: Emily Pines
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**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 23 - SUFFOLK COUNTY**

P R E S E N T :

Hon. EMILY PINES
Justice of the Supreme Court

MOTION DATE 11-18-13
ADJ. DATE 3-02-2015
Mot. Seq. #001 - MG

-----X

US BANK NATIONAL ASSOCIATION, AS
TRUSTEE FOR CREDIT SUISSE FIRST
BOSTON MORTGAGE SECURITIES CORP.,
CSFB MORTGAGE PASS-THROUGH
CERTIFICATES, SERIES 2005-8
3476 Stateview Blvd.
Ft. Mill, SC 29715

GROSS POLOWY ORLANS, LLC
Attorney for Plaintiff
25 Northpointe Parkway, Suite 25
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Attorney for Defendant
330 Motor Parkway, Suite 201
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Plaintiff,

- against -

SCOTT MURRAY, MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS,
INC. AS NOMINEE FOR COASTAL CAPITAL
CORP D/B/A THE MORTGAGE SHOP,

JOHN DOE (Said names being fictitious, it being
the intention of Plaintiff to designate any and all
occupants of premises being foreclosed herein,
and any parties, corporations or entities, if any,
having or claiming an interest or lien upon the
mortgaged premises.)

Defendants.

-----X

Upon the following papers numbered 1 to 35 read on this motion for summary judgment and an order of reference;
Notice of Motion/ Order to Show Cause and supporting papers 1 - 28; ~~Notice of Cross Motion and supporting papers _____;~~
Answering Affidavits and supporting papers 29-31; Replying Affidavits and supporting papers 32-35; ~~Other _____;~~ (and after
hearing counsel in support and opposed to the motion) it is,

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ORDERED that the motion by plaintiff, US Bank National Association, as Trustee for Credit Suisse First Boston Mortgage Securities Corp., CSFB Mortgage Pass-Through Certificates, Series 2005-8 (US Bank), for an order pursuant to CPLR 3212 granting summary judgment in its favor against defendant Scott Murray (defendant), fixing the defaults as against the non-appearing, non-answering defendants, for leave to amend the caption of this action pursuant to CPLR 3025 (b) and, 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 deleting plaintiff's address from the caption and by substituting Kevin Murray in place of defendant "John Doe"; and it is further

ORDERED that plaintiff is directed to serve a copy of this order 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

 US BANK NATIONAL ASSOCIATION, AS TRUSTEE
 FOR CREDIT SUISSE FIRST BOSTON MORTGAGE
 SECURITIES CORP., CSFB MORTGAGE PASS-
 THROUGH CERTIFICATES, SERIES 2005-8

Plaintiff

- against -

SCOTT MURRAY, MORTGAGE ELECTRONIC
 REGISTRATION SYSTEMS, INC. AS NOMINEE FOR
 COASTAL CAPITAL CORP D/B/A THE MORTGAGE
 SHOP, KEVIN MURRAY,

Defendants.

 X

This is an action to foreclose a mortgage on property known as 38 45th Street, Islip, New York. On June 13, 2005, defendant executed a fixed rate note in favor of Coastal Capital Corp. d/b/a The Mortgage Shop (Coastal) agreeing to pay the sum of \$236,800.00 at the yearly interest rate of 5.875 percent. On said date, defendant also executed a mortgage in the principal sum of \$236,800.00 on the subject property. The mortgage indicated Coastal to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of Coastal as well as the mortgagee of record for the purposes

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of recording the mortgage. The mortgage was recorded on July 27, 2005 in the Suffolk County Clerk's Office. By agreement dated December 21, 2009, defendant and Wells Fargo Bank, N.A. d/b/a America's Servicing Company agreed to amend and supplement the mortgage loan by executing a loan modification agreement which created, *inter alia*, a single lien in the principal amount of \$229,218.39. Thereafter, on November 8, 2011, the mortgage was transferred by assignment of mortgage from MERS, as nominee for Coastal, to plaintiff US Bank. The assignment of mortgage was recorded on December 6, 2011 in the Suffolk County Clerk's Office.

America's Servicing Company sent a notice of default dated March 14, 2012 to defendant stating that he had defaulted on his note and mortgage and that the amount past due was \$20,715.60. As a result of his continuing default, plaintiff commenced this foreclosure action on July 19, 2012. In its complaint, plaintiff alleges in pertinent part that defendant breached his obligations under the terms of the note and mortgage by failing to pay the installment due on May 1, 2011. Defendant interposed an answer with affirmative defenses.

The Court's computerized records indicate that a foreclosure settlement conference was held on May 6, 2013 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. In support of its motion, plaintiff submits among other things, the affirmations of Steven Rosenfeld, Esq. in support of the motion; the affirmation of Melissa M. Bundt, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the affidavits of Glenn Dalton and Rodney Lorrell Young, vice presidents loan documentation of Wells Fargo Bank, N.A. d/b/a America's Servicing Company (Wells Fargo), the servicer of the mortgage loan; the pleadings; the note, mortgage, loan modification agreement and an assignment 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 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. Bank of N.Y. v O'Kane*, 308 AD2d 482, 764 NYS2d 635 [2d Dept 2003]; see *Argent Mtge. Co., LLC v Mentasana*, 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]; *Countrywide Home Loans, Inc. v Delphonse*, 64 AD3d 624, 883 NYS2d 135 [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]). Here, Rodney Lorrell Young avers that the note was endorsed in blank by Coastal and that Wells Fargo was in possession of the note on October 1, 2005, before the date of the loan modification. Glenn Dalton avers that "[t]he promissory note was indorsed in blank" and confirms that plaintiff US Bank "was in possession of the promissory note prior to July 19, 2012" (*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 his 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, 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]; *Ames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]).

In his opposing papers, defendant re-asserts his pleaded affirmative defense that the plaintiff lacks standing to prosecute its claims for foreclosure and sale. The defendant contends that plaintiff's assertion that the note was endorsed in blank does not necessarily lead to the conclusion that plaintiff is the holder of the note; that there is no explanation as to how Wells Fargo obtained the note and there is no showing that it was somehow thereafter transferred to the plaintiff; and, that plaintiff failed to explain what gave Wells Fargo the authority to modify the mortgage which at the time was not assigned to either Wells Fargo or the plaintiff. In reply, plaintiff has submitted a limited power of attorney extending powers to Wells Fargo including the ability to "execute bonds, notes, mortgages, deeds of trust and other contracts, agreements and instruments..." Accordingly, plaintiff has established that the servicing agent

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and attorney in fact, Wells Fargo, may properly act on behalf of US Bank and set forth facts constituting the claim in this action (CPLR 3215[f]).

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 uncontroverted facts establish that plaintiff physically possessed the promissory note, which was indorsed in blank, prior to the commencement of the action. Here, neither the defenses raised in his answer nor, those asserted on this motion rebut the plaintiff's *prima facie* showing of its entitlement to summary judgment.

Defendant's contention that plaintiff's summary judgment motion should be denied in order to afford defendant an opportunity to obtain discovery is unavailing. 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]). The opposing papers submitted by defendant were 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]). Defendant's claim is thus rejected as unmeritorious.

With respect to any of the remaining affirmative defenses, defendants have failed to raise any triable issues 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 (see *Cochran Inv. Co., Inc. v Jackson*, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007] quoting *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 664 NYS2d 345 [2d Dept 1997]). Here, answering 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]).

Lastly, the Court notes that defendant does not deny having received the loan proceeds or having defaulted on his mortgage loan payments (see *Citibank, N.A. v Souto Geffen Co.*, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]).

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Accordingly, the motion for summary judgment is granted against the answering defendant. Plaintiff's request for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is 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: 3/2/15

Emily Pines
HON. EMILY PINES J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION