

Wachovia Bank of Delaware, NA v Henderson

2015 NY Slip Op 31324(U)

June 19, 2015

Supreme Court, Queens County

Docket Number: 16701/2010

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x
WACHOVIA BANK OF DELAWARE, NA,

Plaintiff,

- against -

Index No. 16701/2010

Motion Date: 03/09/15

Motion No.: 137

Motion Seq.: 1

JULIAN M. HENDERSON a/k/a JULIAN
HENDERSON, DENISE O. HENDERSON a/k/a
DENISE HENDERSON, COMPTON MEERABUX,
NEW YORK CITY ENVIRONMENTAL CONTROL
BOARD, NEW YORK CITY PARKING
VIOLATIONS BUREAU, NEW YORK CITY
TRANSIT ADJUDICATION BUREAU, NEW YORK
STATE DEPARTMENT OF TAXATION AND
FINANCE, TURTLE & HUGHES, INC.,

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

Defendants.

- - - - - x

The following papers numbered 1 to 17 were read on this
motion by plaintiff, WACHOVIA BANK OF DELAWARE, NA, for an order
granting summary judgment and striking the answers of the
answering defendants; for a default judgment against all non-
answering defendants; for an order pursuant to RPAPL § 1321
appointing a Referee to ascertain and compute the amount due to
the plaintiff; and for an order amending the caption to delete
the John Doe defendant and to amend the name of the plaintiff:

Papers
Numbered

Notice of Motion-Affidavits-Exhibits-Memo of Law.....	1 - 7
Affirmation in Opposition.....	8 - 12
Reply Affirmation.....	13 - 17

This foreclosure action pertains to the property located at 191-19 109th Avenue, St. Albans, New York, 11412. Based upon the record before this court, the defendants, Julian Henderson and Denise Henderson entered into a note and mortgage with First Horizon Home Loan Corporation d/b/a First Horizon Lending Center on June 27, 2003 in the principal amount of \$52,000.00. The note contains an allonge with an indorsement from First Horizon Home Loan Corporation.

Thereafter, the mortgage was assigned to plaintiff, Wachovia Mortgage Corporation, by way of an assignment dated August 27, 2003 and recorded on September 7, 2005. The mortgage was further assigned to Wachovia Bank of Delaware by assignment dated June 22, 2010 and recorded on July 19, 2010. Following the commencement of the action, the plaintiff assigned the mortgage to Monument Street Funding II, LLC by an assignment of mortgage executed on March 22, 2013 and recorded on April 2, 2013. The plaintiff asserts that defendants defaulted on the mortgage when they failed to make their monthly mortgage payments beginning April 1, 2009.

Pursuant to the terms of the mortgage, a demand letter and notice to cure was sent to defendants on January 17, 2010. A 90 day pre-foreclosure notice was also sent to the defendants on May January 14, 2010. The plaintiff subsequently accelerated the defendants' mortgage and brought an action to foreclose by filing a lis pendens and summons and complaint on June 30, 2010. The plaintiff submits affidavits of service on all of the named defendants. The Henderson defendants were served with a copy of the summons and complaint and all necessary RPAPL notices pursuant to CPLR 308, at their residence on July 9, 2010. Defendants Compton Meerabux and defendant Julian Henderson served answers to the complaint. However, Julian Henderson's answer was served on July 11, 2013, three years after service of the complaint, and was rejected by the plaintiff as untimely.

A Residential Foreclosure Conference Order was entered on February 4, 2011. The defendants failed to appear although duly notified and Referee Mark Kugelman ordered the plaintiff to proceed by motion for an order of reference.

In support of the motion for summary judgment, the plaintiff submits the affirmation of counsel, Antoinetta D. Mucilli, Esq., the affidavit of Monica I. Montalvo Rivas, Vice President of Loan Documentation of Monument Street Funding-II, LLC and Vice President of Loan Documentation for Wells Fargo Bank, N.A., servicer for the plaintiff; a copy of the note and mortgage; copies of the affidavits of service on all the defendants; a copy of the pleadings; copies of the assignments of the mortgage and note; a copy of the 90 day notice of intent to foreclose; a copy of the RPAPL 1304 notices served on the defendants with the summons and complaint; a copy of the residential foreclosure part conference order; and a copy of the attorney affidavit pursuant to the Administrative Order of the Chief Administrative Judge A/O 431/11, executed by Antoinetta D. Mucilli, Esq. dated December 4, 2014.

In her affidavit, Monica I. Rotalvo Rivas, states that based upon her personal knowledge and her personal review of the bank's business records, plaintiff Wachovia Bank Delaware was in possession of the promissory note, indorsed in blank, prior to the commencement of the action on June 30, 2010. She states that since the commencement of the action, the mortgage has been assigned to Monument Street Funding-II, LLC and recorded on April 2, 2013. She states that the defendants are in default because the April 1, 2009 and subsequent payments were not made. She submits a copy of the 90 day pre-foreclosure notice sent to the defendants by certified and first class mail prior to February 13, 2010. She also states that notice of default was mailed to the defendants and they failed to cure the default. Ms. Rivas states that as of October 21, 2014 the principal balance is \$27,963.81 and with interest and other costs including insurance and taxes the total owed to the plaintiff is \$42,381.22.

Plaintiff now seeks an order granting summary judgment against the answering defendant, Compton Meerabux, and an order seeking a default judgment against the non-answering defendants including Julian and Denise Henderson. Plaintiff contends, based upon the evidence submitted, that it has made a prima facie showing that it is entitled to summary judgment and the appointment of a referee to compute. Plaintiff asserts that the defendants were all lawfully served with a summons and complaint and that the Court, therefore, has personal jurisdiction. Plaintiff asserts that it has established, prima facie, entitlement to summary judgment based upon its submission of the note, the mortgage, the notice of default, and the affidavit of Ms. Rivas evidencing the defendants' failure to make the contractually required loan payments. Counsel also asserts that all of the defendants are in default other than Compton Meerabux,

having failed to serve a timely answer to the summons and complaint and no triable issues of fact or affirmative defenses have been raised by the defendants.

Defendant Compton Meerbux has not opposed the motion.

Defendants Julian and Denise Henderson submit opposition to the motion on the ground that they did not receive Help for Homeowners in Foreclosure served with the summons and complaint pursuant to RPAPL 1303; that two copies of the 90 day pre-foreclosure notice were not delivered as required by RPAPL § 1304; the foreclosure notices are defective and there is no assignment of mortgage. Counsel asserts therefore that the plaintiff did not have standing to commence the action. Counsel asserts with respect to the 90 day notice that there is no sworn affidavit from the person who allegedly served the 90 day notice.

In reply, plaintiff asserts that neither Julian M. Henderson or Denise Henderson served a timely answer to the complaint denying any allegations in the complaint including that it had standing to commence the action. As such plaintiff asserts that the defendants are in default and waived their right to contest the issue of standing (see HSBC Bank v Dammond, 59 AD3d 679 [2d Dept. 2009]; U.S. National Association v Denaro, 98 AD3d 964 [2d Dept. 2012]; CitiMortgage, Inc. v Rosenthal, 88 AD3d 759 [2d Dept. 2011]).

Plaintiffs also submit copies of the affidavits of service showing that the defendants were served with the summons and complaint as well as the RPAPL § 1303 notices in accordance with CPLR 308(2) at the subject property address on July 9, 2010. The affidavits of service of the process server constitutes prima facie evidence that the defendants were properly served with the notices (see Bank of N.Y. v Sequi, 68 AD3d 908 [2d Dept. 2009]; Cavalry Portfolio Servs., LLC v Reisman, 55 AD3d 524 [2d Dept. 2008]; Jefferson v Netusil, 44 AD3d 621 [2d Dept. 2007]). The unsubstantiated denial of receipt of service of the RPAPL § 1303 notice is insufficient to rebut the presumption of proper service created by a properly-executed affidavit of service (see Deutsche Bank Natl. Trust Co. v Hussain, 78 AD3d 989 [2d Dept. 2010]; Beneficial Homeowner Serv. Corp. v Girault, 60 AD3d 984 [2d Dept. 2009]). With respect to service of the 90 day notice this court finds that the evidence submitted by the plaintiff is sufficient to show compliance with RPAPL § 1304.

It is well settled that a plaintiff in a mortgage foreclosure action establishes a prima facie case of entitlement to judgment through submission of proof of the existence of the

underlying note, mortgage and default in payment after due demand (see Witelson v Jamaica Estates Holding Corp. I, 40 AD3d 284 [1st Dept. 2007]; Marculescu v Ouanez, 27 AD3d 701 [2d Dept. 2006]; US. Bank Trust National Assoc. v Butti, 16 AD3d 408 [2d Dept. 2005]; Layden v Boccio, 253 AD2d 540 [2d Dept. 1998]; State Mortgage Agency v Lang, 250 AD2d 595 [2d Dept. 1998]).

Plaintiff has submitted a copy of the mortgage, note, and affidavit from Ms. Rivas establishing defendants' default in payment. The plaintiff demonstrated proper service of the summons and complaint and RPAPL § 1303 notices and showed by admissible evidence that it had standing to commence the action as it had properly been assigned the defendants' prior mortgage and had properly been in physical possession of the note indorsed in blank as of the date of the commencement of the action. Thus the plaintiff demonstrated that it had standing to commence the action (see Aurora Loan Services, LLC v Taylor, 2015 NY Slip Op 04872 [2015]).

This Court finds that the plaintiff's submissions are sufficient to establish its entitlement to a default judgment against the defaulting defendant mortgagors, Julian M. Henderson and Denise Henderson.

In addition, the defendants waived any argument that plaintiff lacked standing to commence the foreclosure action by failing to interpose an answer or file a timely pre-answer motion which asserted the defense of standing (see CPLR 3211(e); Countrywide Home Loans Servicing, LP v Albert, 78 AD3d 983 [2d Dept. 2010]; Deutsche Bank Natl. Trust Co. v Hussain, 78 ASD3d 989 [2d Dept. 2010]; HSBC Bank, USA, v Dammond, 59 AD3d 679 [2d Dept. 2009]). The defense of lack of standing is waivable as it affects only a court's power to render a judgment on the merits for the plaintiff and does not implicate the court's jurisdiction or competence to entertain an action (see Wells Fargo Bank Minnesota, N.A. v Mastropaola, 42 AD3d 242-243 [2d Dept. 2003]).

The motion for summary judgment striking the answer of defendant Compton Meerabux is granted without opposition.

Accordingly, for all of the above stated reasons, the instant motion for a default judgment against the defendants who have not timely answered or appeared herein, including Julian Henderson and Denise Henderson, is granted. The submissions reflect that plaintiff is entitled to amend the caption to delete the "John Doe" defendants and substitute the name of John Doe #1. Plaintiff is also granted leave to amend the name of the petitioner to MONUMENT STREET FUNDING-II LLC. Plaintiff's further

application for the appointment of a referee to compute the amounts due under the subject mortgage is granted.

Order signed contemporaneously herewith.

Dated: June 19, 2015
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.