Deutsche Bank Natl. Trust Co. v Anderson
2015 NY Slip Op 31371(U)
July 22, 2015
Supreme Court, Queens County
Docket Number: 21435/2013
Judge: David Elliot
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE David Elliot
Justice

IAS Part 14

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR IMPAC SECURED ASSETS CORP., SERIES 2006-3,

Plaintiff,

-against-

SANDRA ANDERSON, Appointed Executrix of the Estate of Floyd Bailey a/k/a Floyd Bailey, Sr., et al.,

Defendants.

Index No. 21435 2013

Motion Date May 13, 2015

Motion Cal. No. 45

Motion Seq. No. 2

The following papers read on this motion by plaintiff for summary judgment against defendant Sandra Anderson, Appointed Executrix of the Estate of Floyd Bailey a/k/a Floyd Bailey, Sr., to strike the answer of defendant Anderson, for leave to enter a default judgment against the defaulting parties, for leave to appoint a referee to compute the total sums due and owing to plaintiff, and for leave to amend caption, substituting “Deutsche Bank National Trust Company, as Trustee under the Pooling and Servicing Agreement relating to IMPAC Secured Assets Corp., Mortgage Pass-Through Certificates, Series 2006-3" for plaintiff and “Gerald Anderson” and “Crystal Anderson” for defendants “John Doe #1” and “John Doe #2,” and excising defendants “John Doe #3” through “John Doe #10.”

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-6
Answering Affidavits - Exhibits	7-8
Reply Affidavits	9-11

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

Plaintiff commenced this action on November 21, 2013 to foreclose a mortgage given by Floyd Bailey as security for the payment of a note evidencing a loan in the principal amount of $470,250.00 plus interest from IMPAC Funding Corporation d/b/a IMPAC

Lending Group on the real property known as 120-17 135th Street, South Ozone Park, New York. In the complaint, plaintiff alleged that it is the holder of the note and mortgage, and Floyd Bailey defaulted in payment of the mortgage installment due on November 1, 2007 pursuant to the note and mortgage, and as a consequence, plaintiff elected to declare the entire mortgage debt to be immediately due and owing.

Defendant Sandy Anderson, the executrix of the Estate of Floyd Bailey, appeared by counsel, who served an answer upon her behalf. Plaintiff caused defendants Criminal Court of the City of New York, New York State Department of Taxation and Finance, New York City Environmental Control Board, New York City Parking Violations Bureau, New York City Transit Adjudication Bureau, Midland Funding LLC, United States of America- Internal Revenue Service, United States of America, Gerald Anderson s/h/a "John Doe #1" and Crystal Anderson s/h/a "John Doe #2" to be served with process. It did not cause defendants "John Doe #3" through "John Doe #10" to be served with process, having determined that those defendants are unnecessary parties to this action. Defendants Criminal Court of the City of New York, New York State Department of Taxation and Finance, New York City Environmental Control Board, New York City Parking Violations Bureau, New York City Transit Adjudication Bureau, Midland Funding LLC, United States of America- Internal Revenue Service, United States of America, Gerald Anderson s/h/a "John Doe #1" and Crystal Anderson s/h/a "John Doe #2 have not appeared or answered the complaint.

A residential foreclosure conference was held on March 13, 2014. By order dated the same date, the Court Attorney-Referee noted that the case had not settled, and directed plaintiff to appear at a status conference on August 28, 2014, and to file an application for an order of reference by that conference date. The Court Attorney-Referee also indicated that defendant Sandy Anderson, the executrix of the Estate of Floyd Bailey a/k/a Floyd Bailey Sr., would pursue financing options.

Plaintiff thereafter made an *ex parte* application for an order of reference which was denied with leave to renew upon notice to those defendants entitled to notice. The court, in declining to sign the proposed order, noted that defendant Sandy Anderson had appeared by counsel and served an answer, and her counsel had appeared at the foreclosure settlement conference held pursuant to CPLR 3408 on March 13, 2014.

By order dated August 28, 2014, the Court Attorney-Referee directed plaintiff to appear at a final status conference on April 28, 2015, and file an application for an order of reference by that conference date.

Plaintiff made the instant motion on February 13, 2015. Defendant Anderson, the executrix of the Estate of Floyd Bailey a/k/a Floyd Bailey Sr., now appearing in a

self-represented capacity, opposes the motion. The remaining defendants have not appeared in relation to the motion.

Counsel for plaintiff indicates that the name of plaintiff in the summons is a truncated version of plaintiff's actual name, namely Deutsche Bank National Trust Company, as Trustee under the Pooling and Servicing Agreement relating to IMPAC Secured Assets Corp., Mortgage Pass-Through Certificates, Series 2006-3. That branch of the motion by plaintiff for leave to amend the caption substituting "Deutsche Bank National Trust Company, as Trustee under the Pooling and Servicing Agreement relating to IMPAC Secured Assets Corp., Mortgage Pass-Through Certificates, Series 2006-3" for plaintiff and "Gerald Anderson" and "Crystal Anderson" for defendants "John Doe #1" and "John Doe #2," and excising defendants "John Doe #3" through "John Doe #10" is granted.

It is ORDERED that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee under the Pooling and Servicing Agreement relating to IMPAC Secured Assets Corp., Mortgage Pass-Through Certificates, Series 2006-3,
Plaintiff,

Index No. 21435 2013

-against-

SANDRA ANDERSON, Appointed Executrix of the Estate of Floyd Bailey a/k/a Floyd Bailey, Sr., CRIMINAL COURT OF THE CITY OF NEW YORK, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, MIDLAND FUNDING LLC, UNITED STATES OF AMERICA- INTERNAL REVENUE SERVICE, UNITED STATES OF AMERICA, GERALD ANDERSON and CRYSTAL ANDERSON,
Defendants.

It is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

In support of its motion, plaintiff offers, among other things, a copy of the pleadings, the note, mortgage and assignment dated September 30, 2008, a copy of the order of Surrogate's Court, Queens County decreeing defendant Sandy Anderson be issued letters of administration for the Estate of Floyd Bailey, the affirmation of its counsel, the affidavit dated January 14, 2015, of Debra Lee Wojciechowski, an officer of Bank of America, N. A. (BANA), as plaintiff's servicer of the mortgage loan, attesting to the default, and the affidavit dated December 29, 2012, of Michael Matz, an employee of BANA with the title of Assistant Vice-President. The copy of the note bears an undated endorsement in blank, on a separate, undated and unnumbered page following said note, by Linda Caballero, "Authorized Signatory" on behalf of IMPAC Funding Corporation d/b/a IMPAC Lending Group, and indicates it is payable without recourse.

"Generally, a plaintiff in a mortgage foreclosure action is entitled to summary judgment if it establishes the existence of a mortgage, an unpaid note, and the defendant's default, and the defendant fails to raise a triable issue of fact in opposition" (*PNC Bank, N.A. v Klein*, 125 AD3d 953, 954 [2d Dept 2015]; *see NationStar Mtge., LLC v Silveri*, 126 AD3d 864 [2d Dept 2015]; *Wachovia Bank, N .A. v Carcano*, 106 AD3d 724, 725 [2d Dept 2013]; *Swedbank, AB, N.Y. Branch v Hale Ave. Borrower, LLC*, 89 AD3d 922, 923 [2d Dept 2011], *lv to appeal dismissed* 19 NY3d 940 [2012]). Plaintiff asserts the original note no longer exists, having been lost, but that prior to the loss, the note had been held by it.

UCC 3-804 makes manifest that a suit may be brought by the "owner" of a lost instrument, upon due proof of its ownership, facts which prevent the production of the instrument, and its terms. Furthermore, a court is authorized to require security indemnifying the obligor.[1]

The copy of the note submitted by plaintiff provides sufficient evidence of its terms. To the extent plaintiff relies upon the affidavit of Mr. Matz to demonstrate proof of its ownership of the note and an accounting for the absence of the note, Mr. Matz states in his affidavit that "some" of the information therein is taken from BANA's business records. He

---

1.The requirement is not an absolute one, and the matter is left to the discretion of the court (*see* UCC 3-804, Official Comment; *Newbury Place Reo III, LLC v Sulton*, 48 Misc 3d 1206(A) [Sup Ct Kings County, 2015]).

also states that he has personal knowledge of BANA's procedures for creating and maintaining its business records, and such records are made at or near the time of the occurrence of the matters set forth therein by persons with personal knowledge of the information in the business record, or from information transmitted by persons with personal knowledge, and are kept in the course of BANA's regularly conducted business activities. He further states that it is the regular practice of BANA to keep such records. Mr. Matz additionally states he has personal knowledge of BANA's procedures for the safekeeping and retrieval of original notes serviced by BANA on behalf of the note holder and BANA's lost note procedures for determining that an original note is lost. According to Mr. Matz, based upon the business records of BANA, "BANA or [BANA's] predecessor (as servicer or by merger), or *the* custodian" acquired physical possession of the note on or before August 4, 2006" (emphasis supplied). Mr. Matz states that the note is lost due to destruction, theft or "otherwise," and that based upon his personal knowledge, BANA's lost note procedures were followed in making this determination the note was lost and a good faith effort was made to locate the lost note in accordance with those procedures. He states that on information and belief, after due diligence, possession of the note cannot reasonably be obtained, and based upon BANA's business records, the loss of possession of the note was not the result of a rightful transfer or lawful seizure of the note.

Ms. Wojciechowski states that the information in her affidavit is based upon BANA's business records, of which she has personal knowledge of the procedure used by BANA in their creation and maintenance. She also states such business records are made at or near the time of the occurrence of the matters set forth therein by persons with personal knowledge of the information in the business record, or from information transmitted by persons with personal knowledge, are kept in the course of BANA's regularly conducted business activities, and it is the regular practice of BANA to make such records. She further states that BANA, as servicer, maintained continuous physical possession of the note until loss occurred, and that BANA acquired possession of "the" lost note affidavit on or before December 28, 2012 from plaintiff.

These affidavits are conclusory. It is the court's responsibility to make legal conclusions based upon presentation of facts. The affidavit of Mr. Matz does not specify which entity came into possession of the note on or before August 4, 2006, and does not identify BANA's predecessor as servicer or by merger, or the custodian to which he makes reference. The affidavit of Ms. Wojciechowski does not identify the lost note affidavit which BANA received from plaintiff on or before December 28, 2012. It does not appear to have been Mr. Matz's affidavit insofar as his affidavit is dated December 29, 2012. In addition, the affidavits contain no description of BANA's procedures for the safekeeping and retrieval of original notes serviced by BANA and for searching for notes believed to be lost. They do not include any indication as to where the original notes are likely to be kept following

delivery, what efforts if any, were made to preserve them, whether notes were routinely or otherwise destroyed, who conducted the search in this instance and whether a search was conducted in every location where notes were likely to be found (*see Rivera-Irby v City of New York*, 71 AD3d 482 [1st Dept 2010]; *see also Marrazzo v Piccolo*, 163 AD2d 369 [2d Dept 1990]).

Under such circumstances, plaintiff has failed to make a prima facie showing that it was the holder of the note prior to its loss and the facts which prevent the production of the note, and thus plaintiff is not entitled to summary judgment as against defendant Sandy Anderson. Accordingly, that branch of the motion by plaintiff for summary judgment against defendant Sandy Anderson is denied.

With respect to that branch of the motion by plaintiff to strike the affirmative defenses raised by defendant Sandy Anderson in her answer, plaintiff bears the burden of demonstrating that the affirmative defenses are 'without merit as a matter of law' " (*Greco v Christoffersen*, 70 AD3d 769, 771 [2d Dept 2010], quoting *Vita v New York Waste Servs., LLC*, 34 AD3d 559, 559 [2d Dept 2006]).

The first affirmative defense asserted by defendant Sandy Anderson in her answer is based upon lack of personal jurisdiction over defendants. To the extent defendant Sandy Anderson asserts lack of personal jurisdiction with respect to her codefendants, she lacks standing to make such assertion because that claim is a personal one which may be raised, if at all, only by the codefendant (*see Wells Fargo Bank, N.A. v Bowie*, 89 AD3d 931 [2d Dept 2011; *Home Sav. of Am. v Gkanios*, 233 AD2d 422, 423 [2d Dept 1996]). To the extent she asserts lack of personal jurisdiction with respect to herself, she has failed to move to dismiss the complaint upon such ground within 60 days of service of a copy of her answer, and has made no application to extend the period of time upon the ground of undue hardship (CPLR 3211[e]). As a consequence, she is deemed to have waived such defense (CPLR 3211[e]; *see Dimond v Verdon*, 5 AD3d 718 [2d Dept 2004]). That branch of the motion by plaintiff to strike the first affirmative defense asserted by defendant Sandy Anderson in her answer is granted.

As to the second defense for failure to state a cause of action for foreclosure, it appears from the face of the complaint that same properly states a cause of action to foreclose the mortgage. However, to the extent plaintiff seeks dismissal of that defense, same is denied (*see Butler v Catinella*, 58 AD3d 145 [2008]; *BAC Home Loans Servicing, LP FKA v Mostafa*, 2013 NY Slip Op 33199 [U] [Sup Ct Queens County 2013]).

The third affirmative defense asserted by defendant Sandy Anderson in her answer is based upon the doctrines of res judicata and collateral estoppel. Defendant Sandy

Anderson has failed to allege or prove any facts to support this defense (*see Glenesk v Guidance Realty Corp.*, 36 AD2d 852 [2d Dept 1971], *abrogated on other grounds by Butler v Catinella*, 58 AD3d 145; *MacIver v George Braziller, Inc.*, 32 Misc 2d 477 [1961]; CPLR 3018[b]). That branch of the motion by plaintiff to strike the third affirmative defense asserted by defendant Sandy Anderson in her answer is granted.

That branch of the motion by plaintiff for leave to enter a default judgment against defendants Criminal Court of the City of New York, New York State Department of Taxation and Finance, New York City Environmental Control Board, New York City Parking Violations Bureau, New York City Transit Adjudication Bureau, Midland Funding LLC, United States of America- Internal Revenue Service, United States of American, Gerald Anderson and Crystal Anderson is granted only to the extent that these defendants are in default in answering or otherwise appearing herein. That branch of the motion for leave to appoint a referee is denied.

Dated: July 22, 2015

J.S.C.