

U.S. Bank N.A. v Martinez
2015 NY Slip Op 31603(U)
July 15, 2015
Supreme Court, Suffolk County
Docket Number: 2013-10808
Judge: Emily Pines
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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

COPY

Present: HON. EMILY PINES
J. S. C.

Original Motion Dates: 03-19-2015
Motion Submit Dates: 06-18-2015
Motion Sequence Nos.: 001 MG
002 MD

Final
 Non Final

_____ X
U.S. BANK NATIONAL ASSOCIATION, AS
TRUSTEE FOR THE LXS 2006-16N,

Attorneys for Plaintiff
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Dana B. Briganti, Esq.
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New York, New York 10022

Plaintiff,

- against -

Attorney for Defendant Martinez
Charles Wallshein, Esq.
115 Broadhollow Road, Suite 350
Melville, New York 11747

ANGELA MARTINEZ a/k/a ANGELA C.
MARTINEZ, NGUYEN PLASTIC SURGERY, IC,
PEOPLES ALLIANCE FEDERAL CREDIT UNION,
AMERICAN EXPRESS BANK FSB, TOYOTA
MOTOR CREDIT CORPORATION, PROPERTY
ASSESSMENT CORRECTION GROUP ASSET
SERVICING CORP., PORTFOLIO RECOVERY
ASSOCIATES LLC., et al,

Attorneys for Defendant People's
Alliance Federal Credit Union
Nicholas Vincent Campasano, Esq.
2000 Deer Park Avenue
Deer Park, New York 11729

Defendants.

_____ X

This is an action to foreclose a mortgage on property known as 5 Lincoln Avenue,
Smithtown, New York. The record reveals that, on August 31, 2006, defendant Angela Martinez

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(“defendant”) executed a note in favor of IndyMac Bank, FSB (“IndyMac”), agreeing to pay the sum of \$436,000. The note was indorsed in blank. On said date, defendant also executed a mortgage in the principal sum of \$436,000 on the subject property. The mortgage indicated IndyMac to be the lender and Mortgage Electronic Registration Systems, Inc. (“MERS”) to be the nominee of IndyMac as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on November 17, 2006 with the Suffolk County Clerk’s Office. By assignment dated April 24, 2009, MERS, as nominee for IndyMac, assigned said mortgage to IndyMac Federal Bank (“IndyMac Federal”). The assignment was recorded on May 6, 2009 with the Suffolk County Clerk’s office. A second assignment occurred on January 20, 2010, when Indymac Federal assigned the mortgage to One West Bank FSB, and recorded on February 17, 2010 with the Suffolk County Clerk’s office. The third assignment occurred on January 5, 2012, wherein One West Bank assigned the mortgage to U.S. Bank National Association, as trustee. The third assignment was recorded on July 17, 2012 with the Suffolk County Clerk’s office.

A notice of default was sent by plaintiff on December 7, 2012 to the defendant stating that she had defaulted on her mortgage loan and that the amount past due was \$172,632.76 from October 1, 2008. As a result of defendants’ continuing default, plaintiff commenced this foreclosure action on April 18, 2013. In its complaint plaintiff alleges in pertinent part that the defendant breached her obligations under the terms of the note and mortgage by failing to make her monthly installment due on October 1, 2008 and subsequent payments thereafter. The defendants asserted a verified answer on June 18, 2013 containing thirteen affirmative defenses and five counterclaims.

The court’s computerized records indicate that a foreclosure settlement conference was held on September 15, 2014. The matter was referred to an IAS Part on the ground that no settlement occurred. Thus, there has been compliance with CPLR 3408 and no further settlement

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conferences are required.

Plaintiff now moves for summary judgment on its complaint. Defendant cross-moves for summary judgment dismissing the complaint.

“[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, 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. *Ames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 (2d Dept 2007); *Household Fin. Realty Corp. v Winn*, 19 AD3d 545, 796 NYS2d 533 (2d Dept 2005). 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 *Bank of N.Y. v Silverberg*, 86 AD3d 274, 279, 926 NYS2d 532 (2d Dept 2011); *Wells Fargo Bank, N.A. v Marchione*, 69 AD3d 204, 887 NYS2d 615 (2d Dept 2009). “A plaintiff has standing where it is the holder or assignee of both the subject mortgage and of the underlying note at the time the action is commenced.” *HSBC Bank USA v Hernandez*, 92 AD3d 843, 939 NYS2d 120 (2d Dept 2012); *Countrywide Home Loans, Inc. v Gress*, 68 AD3d 709, 888 NYS2d 914 (2d Dept 2009). “Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation” (*HSBC Bank USA v Hernandez*, 92 AD3d 843, *supra*).

Here, the plaintiff has established its entitlement to summary judgment against the answering defendant as such papers included the pleadings, a copy of the mortgage, assignment of mortgage, the unpaid note together with due evidence of defendant’s default in payment under

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the terms of the loan documents, a copy of the limited power of attorney, and the affidavit of Rashad Blanchard. See CPLR 3212; RPAPL § 1321; *Neighborhood Hous. Servs. of N.Y. City, Inc. v Hawkins*, 97 AD3d 554, 947 NYS2d 321 (2d Dept 2012); *Baron Assoc., LLC v Garcia Group Enters., Inc.*, 96 AD3d 793, 946 NYS2d 611 (2d Dept 2012). Rashad Blanchard avers in his affidavit that he is employed as a loan analyst for Ocwen Financial Corporation, whose indirect subsidiary is Ocwen Loan Servicing, LLC, plaintiff's loan servicer and attorney in fact. Blanchard states that the loan was securitized and pooled with other loans in the Lehman XS Trust Mortgage Pass-Through Certificates 2006-16N. Blanchard further states that the note was physically delivered to plaintiff on September 7, 2006, and that plaintiff has been in continuous possession of the original note since that date. Blanchard further states that the thirty day notice was mailed to defendant on December 14, 2012 and that defendant has not cured her default.

It was thus incumbent upon the answering defendant to submit proof sufficient to raise a genuine pleadings, her personal affidavit, copies of the mortgage assignments, the note, the trust agreement gov 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), which defendant failed to do. Defendant submits, *inter alia*, the pleadings, defendant's personal affidavit, trust agreement governing the pass-through certificates, and correspondence. Although defendant asserts that plaintiff did not have possession of the note prior to commencement of the instant action, she submits no proof that supports such a claim. Even her personal affidavit, wherein she states that she applied unsuccessfully to obtain loan modifications in 2010, fails to raise a triable issue of fact.

As to her remaining assertions, defendant has failed to demonstrate, through the production of competent and admissible evidence, a viable defense or counterclaim which could raise a triable issue of fact. See *Deutsche Bank Natl. Trust Co. v Posner*, 89 AD3d 674, 933

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NYS2s 52 (2d Dept 2011). Notably, the defendant did not deny having received the loan proceeds and having defaulted on her loan payments in the opposition papers. *Citibank, N.A. v Souto Geffen Co.*, 231 AD2d 466, 647 NYS2d 467 (1st Dept 1996). Accordingly, the defendant's cross motion is denied.

Accordingly, the plaintiff's motion for summary judgment is granted against the answering defendant, and her answer is dismissed. The branch of the motion seeking to fix the defaults as against the remaining defendants who have not answered or appeared herein is granted. The plaintiff's request for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is also granted. The defendant's cross motion is denied in its entirety.

Accordingly, it is

ORDERED that the plaintiff's motion (001) and defendant Angela Martinez' cross motion (002) are consolidated for the purpose of this determination; and it is further

ORDERED that the plaintiff's motion (001) pursuant to CPLR 3212 for summary judgment on its complaint against defendant Angela Martinez, fixing the defaults as to the non-appearing, non-answering defendants, and to amend the caption of this action pursuant to CPLR 3025 (b) is granted; and it is further

ORDERED that the defendant Angela Martinez' cross motion (002) for summary judgment is denied; and it is further

ORDERED that the caption is hereby amended by substituting U.S, Bank National Association, as Trustee for Lehman XS Trust Mortgage pass-Through Certificates, Series 2006-

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16N in the place and stead of U.S. Bank National Association, as Trustee for the LXS 2006-16N; and it is further

ORDERED that the 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 plaintiff shall submit a proposed order of reference pursuant to RPAPL 1321; and it is further

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ORDERED that the caption of this action shall hereinafter appear as follows:

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK**

**U.S. BANK NATIONAL ASSOCIATION, as
Trustee for Lehman XS Trust Mortgage Pass-Through
Certificates, Series 2006-16N,**

Plaintiff,

-against-

**ANGELA MARTINEZ, A/K/A ANGELA C. MARTINEZ,
NGUYEN PLASTIC SURGERY, PC, PEOPLES
ALLIANCE FEDERAL CREDIT UNION, AMERICAN
EXPRESS BANK FSB, TOYOTA MOTOR CREDIT
CORPORATION, PROPERTY ASSESSMENT
CORRECTION GROUP ASSET SERVICING CORP.,
PORTFOLIO RECOVERY ASSOCIATES LLC, et al,**

Defendants,

**Dated: July 15, 2015
Riverhead, New York**



**EMILY PINES
J. S. C.**

_____ **FINAL DISPOSITION** **X** **NON-FINAL DISPOSITION**