Citimae Inc. v Bougouin
2015 NY Slip Op 31927(U)
September 23, 2015
Supreme Court, Suffolk County
Docket Number: 13-15940
Judge: W. Gerald Asher

SHORT FORM ORDER

Index No.: 13-15940

SUPREME COURT - STATE OF NEW YORK
IAS PART 32 - SUFFOLK COUNTY

PRESENT: Hon. W. GERARD ASHER
Justice of the Supreme Court

CITIMAE INC.,

Plaintiff,

-against-

JEAN BOUGOUIN, MARY BOUGOUIN, GE MONEY BANK and JOHN DOE and JANE DOE #1 through #7, the last seven (7) names being fictitious and unknown to the plaintiff, the persons or parties intended being the tenants, occupants, persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the Complaint,

Defendants.

MOTION DATE: 5-27-14 (004)
6-26-14 (002)
ADJ. DATE: 4-15-15
MOT. SEQ. # 002- MD
 # 004 - MG

STIENE & ASSOCIATES, P.C.
Attorneys for Plaintiff
187 East Main Street
Huntington, New York 11743

JOHN RENO, ESQ.
Attorney for Defendant Mary Bougouin
1913 Deer Park Avenue
Deer Park, New York 11729

Upon the following papers numbered 1 to 53 read on this motion for an order appointing a guardian ad litem; Notice of Motion/ ~~Order to Show Cause~~ and supporting papers (#002) 1 - 11; Answering Affidavits and supporting papers 12 - 14; Replying Affidavits and supporting papers 15 - 19; Notice of Motion/ ~~Order to Show Cause~~ and supporting papers (#004) 20 - 37; Answering Affidavits and supporting papers 38 - 46; Replying Affidavits and supporting papers 47 - 53; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motions (#002 and #004) by plaintiff Citimae, Inc. (Citimae), are consolidated for purposes of this determination; and it is further

ORDERED that this motion (#002) by plaintiff pursuant to CPLR 1202 for an order appointing a Guardian Ad Litem, is denied; and it is further

ORDERED that this motion (#004) by plaintiff pursuant to CPLR 3212 for summary judgment on its complaint as against defendant Mary Bougouin, 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.

This is an action to foreclose a residential mortgage on premises known as 107 Mole Place, Amityville, New York. On October 29, 1986, defendants Jean Bougouin and Mary Bougouin executed a fixed rate note in favor of Intercounty Mortgage Corp. agreeing to pay the sum of $175,200.00 at the yearly rate of 10.500 percent. On the same date, defendants also executed a mortgage in the principal sum of $175,200.00 on the subject property. The mortgage was recorded on December 9, 1986 in the Suffolk County Clerk's Office. On October 29, 1986, the note and mortgage were transferred by assignment of mortgage from Intercounty Mortgage Corp. to Citibank, N.A. The assignment of mortgage was recorded on November 25, 1987 in the Suffolk County Clerk's Office. Thereafter, on July 6, 1989, the note and mortgage were transferred by assignment of mortgage from Citibank, N.A. to Security Pacific National Trust Co. (New York) as Trustee. The assignment of mortgage was recorded on September 10, 1990 in the Suffolk County Clerk's Office. By duplicate assignment dated July 31, 1990, the note and mortgage were transferred by assignment of mortgage from Citibank, N.A. to Security Pacific National Trust Co. (New York) as Trustee. The assignment of mortgage was recorded on September 24, 1990 in the Suffolk County Clerk's Office. On December 10, 2009, the note and mortgage were transferred by assignment of mortgage from Bank of America, NA successor by merger Bank of America National Trust and Savings Association successor by merger Bankamerica National Trust Company fka Security Pacific National Trust Company (New York) to JPMorgan Chase Bank, N.A. The assignment of mortgage was recorded on January 25, 2010 in the Suffolk County Clerk's Office. Lastly, on April 9, 2013, the mortgage was transferred by assignment of mortgage from JPMorgan Chase Bank, N.A. to Citimae, Inc., the plaintiff herein.

Washington Mutual sent a notice of default dated October 19, 2009 to defendants Bougouin stating that they had defaulted on their mortgage loan and that the amount past due was $19,516.38. As a result of defendants' continuing default, plaintiff commenced this foreclosure action on June 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 payments. Defendant Mary Bougouin interposed an answer with affirmative defenses and cross claims.

The Court's computerized records indicate that a foreclosure settlement conference was held on December 12, 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 an order pursuant to CPLR 1202 for an order appointing a guardian ad litem (#002) contending that defendant Mary Bougouin has exhibited, *inter alia*, crippling anxiety, manic episodes and paranoia. Defendant Mary Bougouin n/k/a Mary Giorgianni (defendant) has submitted opposition to the motion.

It is well settled that this State's public policy is to afford rigorous protection of the rights of the mentally infirm (*see* ***Vinokur v Balzaretti***, 62 AD2d 990, 403 NYS2d 316 [2d Dept 1978]). CPLR 1201provides that "[a] person shall appear by his guardian ad litem if...he is an adult incapable of adequately prosecution or defending his rights". Thus, in the discharge of its duty, a court may appoint a guardian ad litem on behalf of a person who is incapable of defending his rights, notwithstanding the fact that there has been no formal adjudication of incapacity (*see* ***In re Mary H.***, 126 AD3d 794, 5 NYS3d 270 [2d Dept 2015]).

Here, since defendant has not consented to the appointment of a guardian ad litem, the curtailment of her freedom to defend her rights must be sufficiently justified. In sum, the record in this matter demonstrates that, although defendant may have exhibited some idiosyncratic behavior before plaintiff's counsel, she is capable of adequately protecting her rights. She has retained private counsel, has cooperated with her attorney and has filed opposition to the two motions presently before the Court. Furthermore, the undersigned observed defendant Bougouin's demeanor as she interacted with the court and counsel at court appearances held on: January 28, 2014; February 25, 2014; March 25, 2014; January 28, 2015 and March 20, 2015. During said proceedings, she acted appropriately and demonstrated that she understands the nature and purpose of this action. Under these circumstances, it is concluded that the defendant is capable, with the assistance of counsel, of adequately defending her rights. Accordingly, the application for the appointment of a guardian ad litem is denied.

Plaintiff now moves (#004) for summary judgment on its complaint. In support of its motion, plaintiff submits among other things, the affirmation of Charles W. Marino, Esq. in support of the motion; the affirmation of Charles W. Marino, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the affidavit of Nereida Magana, vice president, JPMorgan Chase Bank, N.A., servicer of the mortgage loan; the pleadings; the note, mortgage and assignments 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 the defendant's former counsel; and, a proposed order appointing a referee to compute. Answering defendant has submitted opposition to the motion on the ground that plaintiff does not have 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" (***Republic Natl. Bank of N.Y. v O'Kane***, 308 AD2d 482, 764 NYS2d 635 [2d Dept 2003]; *see* ***Argent Mtge. Co., LLC v Mentesana***, 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 defendants as such papers included a copy of the mortgage and the unpaid note together with due evidence of defendants' 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; ***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, Nereida Magana avers that plaintiff was the holder 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 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 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]; ***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]; ***Aames Funding Corp. v Houston***, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]).

In her opposing papers, defendant re-asserted her pleaded affirmative defense that the plaintiff lacks standing to prosecute its claims for foreclosure and sale. The defendant contends that a question of fact exists with respect to the plaintiff's standing as plaintiff has failed to present clear and convincing evidence that it was in possession of the note prior to the commencement of the action and that the chain of mortgage assignments does not indicate that the mortgage is presently owned by plaintiff.

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 facts establish that plaintiff, as the original lender, has physical possession of the consolidated note and CEMA and had taken physical delivery prior to the commencement of the action. By its submissions, the plaintiff demonstrated that it was the owner of the note at the time of commencement, and that it had possession of the same, directly or through a custodian, at the time of commencement, by the submission of, *inter alia*, the affidavit of the plaintiff's servicing officer and by attaching copies of the note, the mortgage and the assignment to the complaint, which are referenced therein as exhibits (*see*, ***Nationstar Mtge., LLC v Catizone***, 127 AD3d 1151, 9 NYS3d 315 [2d Dept 2015]; ***Bank of N.Y. Mellon Trust Co. NA v Sachar***, 95 AD3d 695, 943 NYS2d 893 [2d Dept 2012]; *cf.*, ***Deutsche Bank Natl. Trust Co. v Haller***, 100 AD3d 680, 954 NYS2d 551 [2d Dept 2012]). Such evidence demonstrates that the plaintiff holds the original note and mortgage. Neither the defenses raised in the answer nor, those asserted on this motion rebut the plaintiff's *prima facie* showing of its entitlement to summary judgment.

Accordingly, the motion for summary judgment is granted against the answering defendant. That branch of the motion seeking to fix the defaults as against the remaining defendants who have not answered or appeared herein is granted. 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 (*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: Sept. 23, 2015

W. Gerard Asher
Hon. W. GERARD ASHER J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**