Ridgewood Sav. Bank v Parpounas
2015 NY Slip Op 31952(U)
September 23, 2015
Supreme Court, Suffolk County
Docket Number: 32366-13
Judge: Thomas F. Whelan
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[* 1]

SHORT FORM ORDER

INDEX No. 32366-13

COPY

SUPREME COURT - STATE OF NEW YORK
IAS PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 10/23/14
SUBMIT DATE 7/31/15
Mot. Seq. # 001 - MOTD
Mot. Seq. # 002 - XMD
Pre-Trial Conf: 10/30/15
CDISP Y____ N X

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RIDGEWOOD SAVINGS BANK,

Plaintiff,

-against-

KAREN L. PARPOUNAS, DOREEN MICHIENZI, and John Doe and Jane Doe, these last two names being fictitious and unknown to the plaintiff, intended as persons having some claim or interest in the mortgage premises,

Defendants

----------X

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Upon the following papers numbered 1 to 16 read on this motion by plaintiff for summary judgment and the appointment of a referee among other things, and cross motion by defendants for summary judgment and dismissal of the complaint; Notice of Motion/Order to Show Cause and supporting papers 1 - 3; Notice of Cross Motion and supporting papers 4-7; Answering Affidavits and supporting papers 8-10; Replying Affidavits and supporting papers 11-12; Other 13 (memorandum); 14 (affidavit); 15 (memorandum); 16 (stipulation 2/9/15); and after hearing counsel in support of and opposed to the motion at oral argument held on July 31, 2015, it is

ORDERED that this motion (#001) by the plaintiff for summary judgment against the answering defendants, Doreen Michienzi and Bob Bonano, a default judgment against defendant Parpounas, an order identifying Bonano as John Doe and, in effect, the deletion of the remaining unknown defendants and an order of reference is considered under CPLR 3212, 3215, 1024 and RPAPL § 1321 and is granted to the extent set forth below; and it is further

ORDERED that the cross motion (#002) by answering defendants, Doreen Michienzi and Bob Bonano for summary judgment dismissing the plaintiff's complaint is considered under CPLR 3212 and RPAPL Article 13 and is denied; and it is further

ORDERED that a pre-trial conference shall be held herein on **October 30, 2015**, at 9:30 a.m. in Part 33, at the courthouse located at 1 Court Street - Annex, Riverhead, New York.

The plaintiff commenced this action to foreclose the lien of a mortgage given by Ida Parente, now deceased, to JPMorgan Chase Bank, N.A. on June 21, 2010 to secure a note of the same date likewise given by the deceased mortgagor to JPMorgan Chase Bank, N.A. (hereinafter Chase Bank). On September of 2010, the mortgagor transferred title to the mortgaged premises to defendant Parpounas, while retaining a life estate therein. Upon the death of the mortgagor in December of 2010, defendant Parpounas became the sole owner of the premises. Defendant Michienzi and Bob Bonano, who was served with process as John Doe, are occupants of the premises. The mortgage loan went into default on March 1, 2011 and the plaintiff, who allegedly purchased the loan from the original lender after its merger with it's assignee, Chase Home Finance, LLC, commenced this foreclosure action in December of 2013.

Following service of the summons, complaint and other initiatory papers, defendant Parpounas defaulted in answering while defendants, Michienzi and Bonano appeared herein by answer. Therein, these defendants assert some ten affirmative defenses, including a lack of standing and/or capacity to sue by the plaintiff, a lack of subject matter jurisdiction and the absence of personal jurisdiction over the defendants, failure to join a necessary party, namely defendant Parpounas, failure to serve the contractual notice of default upon representatives of the deceased mortgagor, failure to comply with statutory conditions precedent and that the plaintiff's claim is barred by the filing of a prior notice pendency. In addition, the answering defendants assert one counterclaim for damages and sanctions that is premised upon the purported frivolous nature of the plaintiff's claim for foreclosure and sale.

The plaintiff now moves (#001) for summary judgment against the answering defendants, a default judgment against defendant Parpounas and the other relief outlined above. Defendant Parpounas joined in the plaintiff's motion thereby waiving all defenses she may have had to the plaintiff's including those concerning improper service of the summons and complaint upon her. The answering defendants oppose the plaintiff's motion by way of cross moving papers in which they demand summary judgment on the several standing defenses (First, Second and Third affirmative defenses) asserted in their answer. In addition, the defendants seek dismissal of the complaint by reason of the plaintiff's purported failure to jurisdictionally join a necessary party, namely, defendant Karen Parpounas, which is pleaded in the Seventh affirmative defense and a failure to join the estate of the deceased mortgagor, which was not pleaded. The defendants further seek summary judgment dismissing the complaint due to a failure to serve the estate representative with the contractual notice of default (Fifth affirmative defense) and with a failure to serve the ninety day statutory notice of default and required by RPAPL §1304 and with non-compliance with the filing and pleading requirements of RPAPL §1306 (Eighth Affirmative Defense). As an additional ground for denial of the plaintiff's motion, the answering defendants contend that such motion is procedurally improper because it was not interposed by attorneys of record who commenced this action on behalf of the plaintiff.

Rejected as unmeritorious are the defendants' contentions that the plaintiff's motion must be denied because it was interposed by attorneys who are not the attorneys of record for the plaintiff. The plaintiff's current counsel was authorized by a July 18, 2014 consent to change attorney and in such capacity it conferred with counsel for the defendants during the course of the pendency of its motion regarding adjournments and settlement possibilities.

Those portions of the plaintiffs' motion wherein it seeks a default judgment against defendant Parpounas are granted (*see* CPLR 3215; ***Mortgage Elec. Registration Sys., Inc. v Holmes***, 131 AD3d 680, 2015 WL 5023782 [2d Dept 2015]). Entry of any such judgment is premature at this juncture since such entry must abide computations of amounts due by the court or by reference (*see* RPAPL § 1321). Also granted are those portions of its motion wherein the plaintiff seeks an order identifying answering defendant Bob Bonanno as John Doe and, in effect, the deletion of the other unknown defendant (*see* CPLR 1024; 1003).

The court further grants those portions of the plaintiff's motion wherein it seeks dismissal of the counterclaim asserted in the defendants' answer, as none of the conduct complained of constitutes frivolous conduct under 22 NYCRR Part 130-1 and because claims of bad faith conduct do not give rise to cognizable claims for the recovery of damages (*see* ***Licalzi v Wells Fargo Bank, N.A.***, 125 AD3d 942, 5 NYS3d 158 [2d Dept 2015]). The plaintiff is further awarded summary judgment dismissing the following affirmative defenses: Fourth [lack of subject matter jurisdiction]; Sixth [legal insufficiency]; Ninth [prior notice of pendency] and Tenth [lack of personal jurisdiction over the answering defendants]. Each of these defenses were shown, prima facie, to be lacking merit (*see* ***U.S. Bank, N.A. v Peters***, 27 AD3d 742, 9 NYS3d 58 [2d Dept 2015]; ***Federal Natl. Mtge. Ass'n. v Ambrosio***, 123 AD3d 658, 998 NYS2d 422 [2d Dept 2015]; ***Wells Fargo Bank v Bowie***, 89 AD3d 931, 932 NYS2d 702 [2d Dept 2011]; CPLR Article 65; CPLR 3211[e]). The answering defendants failed to raise any question of fact with respect to these pleaded defenses in their cross moving papers or reply papers.

The court also awards the plaintiff summary judgment seeking dismissal of the Seventh affirmative defense set forth in the answer, which is limited to a purported failure to join Karen Parpounas as a necessary party, due to improper service. The answering defendants are without standing to raise any defect in service of the summons and complaint upon a co-defendant (*see* ***Wells Fargo Bank, N.A. v Bowie***, 89 AD3d 931, 932 NYS2d 702 [2d Dept 2011]; ***NYCTL 1996-1 Trust v King***, 13 AD3d 429, 787 NYS2d 61 [2d Dept 2004]; ***Home Sav. of Am., FA. v Gkanios***, 233 AD2d 422, 650 NYS2d 756 [2d Dept 1996]). In addition, the court awards the plaintiff summary judgment dismissing the Eighth affirmative defense since none of the statutory conditions precedent upon which the Eighth affirmative defense is premised are applicable to this action because the borrower is deceased (*see* RPAPL §§ 1304; 1306). In addition, the court finds that the answering defendants, who are mere occupants of the mortgaged premises, are without standing to challenge plaintiff's compliance with the recent statutory enactments aimed at keeping certain mortgage borrowers under certain loans in their homes (*see* RPAPL §§ 1304; 1306; CPLR 3408; *see also* ***Mahoney v Pataki***, 98 NY2d 45, 745 NYS2d 760 [2002]).

However, the plaintiff failed to address in its moving papers the Fifth affirmative defense asserted in the answer of the moving defendants which is premised upon a purported failure to observe a contractual default notice obligation imposed upon it by the mortgage indenture. Those portions of the plaintiff's motion wherein it seeks dismissal of the Fifth affirmative defense is thus denied.

In addition the plaintiff failed to establish, prima facie, a lack of merit in the affirmative defenses numbered First, Second (incorrectly denominated a lack of capacity to sue) and Third in which the defendants challenge the plaintiff's standing. While the court finds that defendants' complaints about the written assignment of mortgage from the original lender to the plaintiff are unavailing since a foreclosing plaintiff's possession of the mortgage note alone prior to the commencement of the action confers standing and renders an ineffective written assignment irrelevant (*see* ***HSBC Bank USA, Natl. Ass'n v Sage***, 112 AD3d 1126, 977 NYS2d 446 [3d Dept 2013]; ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]; *see also* ***Tuthill Fin. v Abundant Life Church, U.P.C.***, 122 AD3d 918, 998 NYS2d 387 [2d Dept 2014]), the plaintiff's moving papers failed to demonstrate, prima facie, its standing due to its pre-action possession of the note and that the defendants' allegations with respect to the plaintiffs' non-possession and non-holder status, which are sprinkled throughout the First, Second and Third affirmative defenses, are wholly lacking in merit.

In its moving papers, the plaintiff relies upon the allegations fact asserted in the affidavit of Victoria J. Greenwood, an employee of the plaintiff's servicer, in which she averred that the plaintiff had possession of the mortgage note "directly or through an agent at the time of the commencement of the action" (*see* Greenwood affidavit submitted in support of the plaintiff's motion). This conclusory allegation by an agent of its current loan servicer is insufficient to establish the plaintiff's standing under controlling appellate case authorities recently issued that are outlined below.

A foreclosing plaintiff has standing if it is either the holder or the assignee of the underlying note at the time that the action is commenced (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, 12 NYS3d 612 [2015]; ***Loancare v Firshing***, 130 AD3d 787, 2015 WL 4256095 [2d Dept 2015]; ***Emigrant Bank v Larizza***, 129 AD3d 904, 13 NYS3d 129 [2d Dept 2015]). "Either a written assignment of the underlying note or the physical delivery of it to the plaintiff prior to the commencement of the action is sufficient to transfer the obligation" (*see id.*; ***Wells Fargo Bank, NA v Parker***, 125 AD3d 8485 NYS3d 130 [2d Dept 2015]; ***U.S. Bank NA v Guy***, 125 AD3d 845, 5 NYS3d 116 [2015]).

In cases wherein the plaintiff's standing rests not upon a duly effective written assignment of the note, but upon, its pre-action possession of the note, proof that the plaintiff was in possession of the note on a day certain prior to the commencement of the action is sufficient to establish, prima facie, the plaintiff's possession of the requisite standing to prosecute its claims for foreclosure and sale (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, *supra*). In addition, the plaintiff's attachment of a duly indorsed mortgage note to its complaint or to the certificate of merit required by CPLR 3012-b, coupled with an affidavit in which it alleges that it had possession of the note prior to commencement of the action, has been held to constitute due proof of the plaintiff's standing to prosecute its claim for

foreclosure and sale (*see* ***Nationstar Mtge., LLC v Catizone***, 127 AD3d 1151, 9 NYS3d 315 [2015]). Standing of a foreclosing plaintiff may be established by due proof of the particulars of note delivery to the plaintiff prior to the commencement of the action (*see* ***HSBC Bank U.S.A., N.A. v Baptiste***, 128 AD3d 773, 10 NYS2d 255 [2d Dept 2015]; *cf.*, ***Flagstar Bank v Anderson***, 129 AD3d 665, 12 NYS2d 118 [2d Dept 2015]; ***Bank of Am., N.A. v Paulsen***, 125 AD3d 909 [2015]). Delivery of an instrument such as a promissory note to an agent of the plaintiff may also effect a valid transfer of the note to the plaintiff (*see* ***HSBC Bank USA, Natl. Ass'n v Sage***, 112 AD3d 1126, *supra*; ***Deutsche Bank Natl. Trust Co. v Whalen,*** 107 AD3d 931, *supra*; ***Depew Dev., Inc. v AT&A Trucking Corp.***, 210 AD2d 974, 621 NYS2d 242 [4th Dept 1994]; ***Wolfin v Security Bank***, 170 AD 519, 156 NYS 474, 476 [1915]; *see also* ***Corporation Venezolana de Fomento v Vintero Sales Corp***., 452 F.Supp. 1108 [SDNY 1978]).

Here, the affidavit of the plaintiff's servicing agent failed to establish the plaintiff's standing as Ms. Greenwood alleged neither delivery of the note to the plaintiff nor its agent on day certain prior to the commencement of this action. Further, there were no particulars regarding note delivery to the plaintiff at a time prior to the commencement of the action. None of the factual allegations asserted by counsel in the plaintiff's memoranda of law regarding note transfers or other indicia of its standing may be considered since such allegations are not proffered in admissible form by a person with knowledge thereof. Those portions of the plaintiff's motion wherein it seeks summary judgment dismissing the standing defenses in the answer of the defendants and on its complaint against the answering defendants together with an order of reference are thus denied.

Next considered is the cross motion (#002) by the answering defendants for summary judgment dismissing the complaint. The court rejects as unmeritorious, the answering defendants' unpleaded demands for summary judgment dismissing the plaintiff's complaint due to a failure to join the estate of the deceased mortgagor as a party defendant to this action. It is well settled that a mortgagor who has made an absolute conveyance of all his or her interest in the mortgaged premises, including the equity of redemption, is not a necessary party to foreclosure, unless a deficiency judgment is sought (*see* ***DLJ Mtge. v 44 Brushy Neck, Ltd.***, 51 AD3d 857, 859 NYS2d 221 [2d Dept 2008]). Here, this unpleaded defense has been met by the plaintiff's withdrawal of any and all pleaded demands for a deficiency judgment against the deceased mortgagor, Ida Parente, or her estate (*see* Section IV pp. 5 -6 of plaintiff's memo in opposition to cross motion).

Also rejected are the answering defendants' demands for summary judgment dismissing the complaint due to purported failures on the part of the plaintiff to comply with the contractual notice of default allegedly required to be sent the representative of the estate of the deceased mortgagor (*see* Fifth affirmative defense asserted in answer). The cross moving papers failed to demonstrate that the notices of default due the mortgagor under the terms of the mortgage indenture are required to be sent to the estate representative or to survivors of a mortgagor who dies during the term of the mortgage loan. In addition, the court finds that the answering defendants lack standing to challenge the plaintiff's compliance with the notice provisions in the mortgage indenture since any such notice provisions inure solely to the benefit of the mortgagor (*see* ***VAC Serv. Corp. v Technology Ins. Co., Inc.***, 49 AD3d 524,

853 NYS2d 577 [2d Dept 2008]; *see also* ***BDG Oceanside, LLC v RAD Term. Corp.***, 14 AD3d 472, 787 NYS2d 388 [2d Dept 2005]; ***Pile Found. Constr. Co., Inc. v Berger, Lehman Assoc., P.C.***, 253 AD2d 484, 676 NYS2d 664 [2d Dept 1998]). Pursuant to CPLR 3212(b), the plaintiff is awarded reverse summary judgment dismissing the defendants' Fifth affirmative defense.

Those portions of the defendants' motion wherein they seek summary judgment dismissing the plaintiff's complaint due its purported lack of standing are denied. A defendant moving for summary judgment on grounds that the plaintiff lacks standing to prosecute its claim for foreclosure and sale must establish, prima facie, that the plaintiff lacks of standing as a matter of law by due proof in admissible form (*see* CPLR 3212; ***U.S. Bank v Morrison***, 120 AD3d 1223, 993 NYS2d 50 [2d Dept 2014]; ***U.S. Bank Natl. Assoc. v Pia***, 73 AD3d 752, 901 NYS2d 104 [2d Dept 2010]). A motion based on perceived gaps in the plaintiff's ability to establish its claim is insufficient (*see* ***Deutsche Bank Natl. Trust Co. v Spano***, 102 AD3d 909, 961 NYS2d 200 [2d Dept 2013]).

Here, the defendants assert that the written assignment of mortgage dated June 21, 2010 mortgage names Ridgeway Savings Bank as assignee rather than the plaintiff, Ridgewood Savings Bank, as assignee of the mortgage and that this error has not been established to be a mere misnomer attributable to a scrivener's error. However, the defendants offer no proof that an entity known as Ridgeway Bank exists and is the owner of the note and other loan documents. The defendants further assert that the assignment is fraudulent and thus warrants a dismissal of the complaint. This claim is also without evidentiary support (*see* ***Deutsche Bank Natl. Trust Co. v Haller***, 100 AD3d 689, 954 NYS2d 551 [2d Dept 2012]). In addition, as indicated above, none of these or any of the other complaints about the validity or effectiveness of the written assignment of mortgage are relevant or material since the plaintiff does not rely upon the assignment of the mortgage to be controlling on the issue of its standing, but instead, relies upon its possession of the indorsed note prior to the commencement of the action (*see* ***HSBC Bank USA, Natl. Ass'n v Sage***, 112 AD3d 1126, *supra*; ***Deutsche Bank Natl. Trust Co. v Whalen*** 107 AD3d 93, *supra*). All defenses predicated upon the ineffectiveness of the written assignment of mortgage dated July 19, 2010 by JPMorgan Chase Bank, N.A. to the plaintiff under a misnomer or otherwise are dismissed.

The defendants' further challenges to the proof submitted by the plaintiff, did not establish that the plaintiff is without standing as questions of fact regarding the plaintiff's possession of the note prior to the commencement of the action were not eliminated by the defendants' submissions (*see* ***Deutsche Bank Natl. Trust Co. v Rivas***, 95 AD3d 1061, 945 NYS2d 328 [2d Dept 2012]).

The court has considered the remaining contentions of defense counsel offered in support the answering defendants' cross motion and in opposition to the plaintiff's motion-in-chief and finds them to be without merit. The defendants are thus not entitled to an award of summary judgment dismissing the plaintiff's complaint.

In view of the forgoing, the defendants' cross motion (#002) is denied. The plaintiff's motion (#001) for accelerated judgments and other relief is granted to the following extent: 1) the plaintiff is awarded a default judgment against defendant Parpounas by reason of her default in answering which is hereby fixed and determined as is her waiver of all defenses including any personal jurisdictional defense she may have which is contained in the stipulation executed by her and the plaintiff dated February 9, 2015; 2) the plaintiff is awarded summary judgment dismissing the answering defendants' counterclaim and their Fourth, Sixth, Seventh, Eighth, Ninth and Tenth affirmative defenses set forth in their answer; 3) the plaintiff is awarded reverse summary judgment dismissing the Fifth affirmative defense asserted in the defendants' answer and so much of the First, Second and Third affirmative defenses that are premised upon the ineffectiveness or other invalidity of the written assignment of the mortgage dated June 21, 2010.

To ready this matter for trial, counsel for the respective parties are directed to appear for a pre-trial conference on the date scheduled above.

DATED: 9/23/15

THOMAS P. WHELAN, J.S.C.