

US Bank N.A. v Ahmed
2015 NY Slip Op 31959(U)
October 23, 2015
Supreme Court, Queens County
Docket Number: 31417 2010
Judge: David Elliot
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

US BANK NATIONAL ASSOCIATION, etc.,
Plaintiff(s),

Index
No. 31417 2010

- against -

Motion
Date August 6, 2015

RASHID AHMED, et al.,
Defendant(s).

Motion
Cal. No. 155

Motion
Seq. No. 2

Conference
Date October 15, 2015

Papers
Numbered

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By prior order dated August 21, 2015, the motion was set down for conference/oral argument to be held on September 17, 2015 at 10:30 a.m. in this Part. Counsel for defendants Rashid Ahmed and Jahanara Begum (defendants) submitted and filed an affirmation of engagement and requested that the matter be adjourned. The matter was adjourned, as requested, to October 15, 2015, to be held at 9:30 a.m.; however, defense counsel did not appear on said date. As such, the motion will be decided on the papers submitted.

Plaintiff commenced this action to foreclose a mortgage against real property known as 45-02 102nd Street, Corona, New York. On February 21, 2007, defendants executed and delivered to Wells Fargo Bank, N.A., a note in the principal amount of \$560,000.00. On the same date, defendants executed and delivered a mortgage in the same amount, securing the premises as collateral security for the note. Pursuant to the complaint, filed on December 20,

2010, plaintiff alleges that it is the holder of the subject note and mortgage, that defendants defaulted under the terms of the loan documents by failing to make the monthly installment due on September 1, 2009, and that, as a result, plaintiff elected to accelerate the debt by commencing this action.

Though plaintiff points out that all defendants, including those served herein as “John Doe,” have been served with process or have voluntarily appeared herein,¹ and that none – with the exception of the mortgagor defendants – have appeared answered or moved and that their time to appear or otherwise move has expired and not been extended, plaintiff appears not to seek any affirmative relief with respect to holding any of the non-answering/non-appearing defendants in default, either per the Notice of Motion or the Affirmation in Support thereof. As such, the court will not order any such relief *sua sponte*. Notwithstanding, the court notes that there appears to be an issue as to whether service has properly been effectuated upon defendants Arrow Financial Services, LLC, and Arrow Financial Services LLC APO GE Money Bank. The affidavits of service of process with respect to these defendants indicate, respectively, that they were purportedly served with the summons and complaint care of CT Corporation System. A review of the County Clerk file reveals that CT Corporation filed a correspondence addressed to plaintiff’s counsel, dated August 4, 2015, whereby same states that “[a]fter checking our records and the records of the State of NY, it has been determined that C T Corporation System is not the registered agent for an entity by the name of Arrow Financial Services, L.L.C.,” and, as such, CT was unable to forward. It is unclear whether plaintiff received this mailing. Further, it is noted that a review of the Department of State records reveals that CT Corporation System is not named as the agent for service of process.

Answering defendants have interposed several affirmative defenses and counterclaims, including lack of standing and noncompliance with RPAPL § 1304. Plaintiff now moves for summary judgment and related relief. Defendants oppose the motion, averring that: (1) the motion should be denied and the action dismissed as abandoned pursuant to CPLR 3215 (c); (2) plaintiff’s servicing agent and defendants are in communication regarding settlement; and (3) “upon information and belief, Defendant [Rashid Ahmed] is in poor health and has unable [sic] to assist fully in defense of this case.”

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 a residential mortgage foreclosure action, a plaintiff establishes its

1. Defendant United States of America served and filed a Notice of Appearance and Waiver.

prima facie entitlement to judgment as a matter of law by producing the mortgage and the unpaid note, and evidence of the default (*see Midfirst Bank v Agho*, 121 AD3d 343 [2014]). Where the plaintiff is not the original lender and standing is at issue, the plaintiff seeking summary judgment must also submit evidence that it received both the mortgage and note by a proper assignment, which can be established by the production of a written assignment of the note (*see Aurora Loan Servs., LLC v Taylor*, 114 AD3d 627 [2014]; *see Homecomings Fin., LLC v Guldi*, 108 AD3d 506 [2013]), or by physical delivery to the plaintiff of the note (*see Kondaur Capital Corp. v McCary*, 115 AD3d 649 [2014]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95 [2011]). In addition, the plaintiff must make a *prima facie* showing of strict compliance with RPAPL § 1304, which is a condition precedent to the commencement of the foreclosure action (*see Aurora Loan Services, LLC v Weisblum*, 85 AD3d at 107). The failure to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Here, plaintiff has established that it had standing to commence the within action by virtue of, *inter alia*, an assignment of mortgage dated July 13, 2010, whereby the originator of the loan assigned to plaintiff herein the subject “Mortgage, Together with all moneys now owing or that may hereafter become due or owing in Respect thereof . . . “TO HAVE AND TO HOLD the said Mortgage and Note,” as well as the affidavit of Robert Antonio, Vice President Loan Documentation of plaintiff’s servicing agent, wherein which he states that U.S. Bank National Association, as Trustee For STARM Mortgage Loan Trust 2007-3, Mortgage Pass Through Certificates, Series 2007-3,” plaintiff by its full and proper name, received possession of the endorsed note on March 29, 2010, and was in possession at the time of commencement of the action (*see e.g. Emigrant Bank v Larizza*, 129 AD3d 904 [2015]; *Wells Fargo Bank, N.A. v Ali*, 122 AD3d 726 [2014]; *Wells Fargo Bank, N.A. v Arias*, 121 AD3d 973 [2014]). Defendants have presented nothing in opposition sufficient to raise a triable issue of fact with respect to plaintiff’s standing.

To the extent defendants cite CPLR 3215 (c), same is inapplicable herein inasmuch as defendants have answered the complaint. As to the possibility of a settlement, same is not a basis for denying summary judgment herein, and plaintiff represented to the court at the scheduled conference/oral argument that a settlement is not likely, given the amount alleged to be due and owing under the loan documents. Further, it is noted that, per the Residential Foreclosure Conference Order dated February 24, 2012, Court Attorney-Referee Evans indicated that defendants “failed to demonstrate the requisite financial viability in order to qualify for plaintiff/lender’s in house traditional styled modification.” Finally, as defendants failed to appear for the scheduled conference/oral argument, the claim of settlement made by counsel “[u]pon information and belief” was not further substantiated; neither was the

claim that defendant Ahmed is “in poor health” and cannot assist in his defense of the matter.²

With respect to RPAPL § 1304, however, plaintiff has failed to meet its *prima facie* burden establishing “strict compliance” with the statute. Mr. Antonio merely indicates that he “reviewed the 90 day pre-foreclosure notice sent to borrower(s) by certified mail and also by first-class mail to the last known address of the borrower(s), and if different, to the residence that is the subject of the Mortgage and a copy of said notice(s) is attached.” Same does not amount to an affidavit of service of said notice, requiring denial of summary judgment in plaintiff’s favor (*see Bank of New York Mellon v Aquino*, 131 AD3d 1186 [2015]; *Flagstar Bank, FSB v Anderson*, 129 AD3d 665 [2015]; *Wells Fargo Bank, NA v Burke*, 125 AD3d 765 [2015]; *U.S. Bank N.A. v Tate*, 102 AD3d 859 [2013]; *Deutsche Bank Nat. Trust Co. v Spanos*, 102 AD3d 909 [2013]). It is noted that Mr. Antonio does not state, for example, the date that the notice was alleged to have been sent, nor does he give any indication of the standard mailing practices or procedures of the entity alleged to have sent the notice and that those procedures were followed in this instance (*see e.g. HSBC Mtge. Corp. (USA) v Erneste*, 22 Misc 3d 1115 [A][Sup Ct Kings County 2009], *citing St. Vincent’s Hosp. of Richmond v Government Empls. Ins. Co.*, 50 AD3d 1123 [2008]). It is noted that annexing a copy of the notice does not establish proof of proper mailing (*HSBC Mtge. Corp. (USA) v Gerber*, 100 AD3d 966 [2012]). While the court takes note of the certified mailing number superimposed on the copies of the notice annexed to the motion, same does not, in any event, establish proof of mailing also by first-class mail.

With respect to that branch of the motion by plaintiff to dismiss defendants’ affirmative defenses raised by them in their answer (which were also denominated as counterclaims), plaintiff bears the burden of demonstrating that the affirmative defenses are without merit as a matter of law (*Greco v Christoffersen*, 70AD3d 769 [2010], *quoting Vita v New York Waste Servs., LLC*, 34AD3d 559 [2006]).

As to the first and eighth affirmative defenses that defendants were not represented by counsel at the closing and that the loan transaction was unconscionable, respectively, there is no requirement that defendants be represented by counsel in this circumstance (and defendants have not asserted that plaintiff – or its predecessor – prevented them from obtaining counsel of their choosing at the time), and there is no indication that defendants were both without a meaningful choice and that the mortgage terms were unreasonably favorable to plaintiff (*see Matter of State of New York v Avco Fin. Serv. of N.Y.*, 50 NY2d 383 [1980]; *Baron Associates, LLC v Garcia Group Enterprises, Inc.*, 96 AD3d 793 [2012];

2. The exhibits provided in support of counsel’s statements were insufficient, on their own, to support said statements.

see generally Matter of Friedman, 64 AD2d 70 [1978]). Thus, plaintiff is entitled to dismissal of these defenses.

As to the second affirmative defense that a foreclosure settlement conference was not held pursuant to CPLR 3408, same is belied by the record herein, which indicates that two conferences were held, resulting in an Order releasing the matter, noted, *supra*. Thus, plaintiff is entitled to dismissal of this defense.

As to the third affirmative defense that plaintiff failed to comply with RPAPL § 1302, the complaint, at paragraphs “first” and “eleventh” thereat, contain the allegations required by this statute. Thus, plaintiff is entitled to dismissal of this defense.

As to the fourth and fifth affirmative defenses that plaintiff lacks standing, same are without merit inasmuch as plaintiff has affirmatively established it had standing to commence this action, noted, *supra*. Thus, plaintiff is entitled to dismissal of these defenses.

As to the sixth affirmative defense regarding non-compliance with RPAPL § 1304, plaintiff is not entitled to dismissal of same for the reasons aforementioned.

As to the seventh affirmative defense alleging a violation of Banking Law § 349, the loan documents fully set forth the terms of the subject mortgage loan and demonstrate that no deceptive act or practice occurred (*see Patterson v Somerset Investors Corp.*, 96 AD3d 817 [2012]); further, the counterclaim is time-barred and, thus, is dismissed (CPLR 214 [2]; *see Corsello v Verizon New York, Inc.*, 18 NY3d 777 [2012]; *Pike v New York Life Ins. Co.*, 72 AD3d 1043 [2010]).

Accordingly, the branches of the motion granting plaintiff summary judgment against defendants Rashid Ahmed and Jahanara Begum, striking their answer, and appointing a referee to compute, are denied. The branch of the motion for an order striking their affirmative defenses/counterclaims is granted only to the extent that defendants’ first, second, third, fourth, fifth, seventh, and eighth affirmative defenses/counterclaims are dismissed. The branch of the motion for an order amending the caption is granted. The caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE
FOR STARM MORTGAGE LOAN TRUST 2007-3,
MORTGAGE PASS THROUGH CERTIFICATES,
SERIES 2007-3,

Plaintiff,

-against-

RASHID AHMED, JAHANARA BEGUM, ARROW
FINANCIAL SERVICES, LLC, ARROW FINANCIAL
SERVICES LLC APO GE MONEY BANK, BANK OF
AMERICA, N.A., CRIMINAL COURT OF THE CITY
OF NEW YORK, NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD, NEW YORK CITY PARKING
VIOLATIONS BUREAU, NEW YORK CITY
TRANSIT ADJUDICATION BUREAU, THE UNITED
STATES OF AMERICA ACTING THROUGH THE IRS,
ELEEN AHMED, MARIA GOMEZ, and ROCIO
MARTINEZ,

Defendants.

The motion is otherwise denied.

Dated: October 23, 2015

J.S.C.