Wells Fargo Bank, N.A. v Banks
2015 NY Slip Op 32102(U)
October 26, 2015
Supreme Court, Queens County
Docket Number: 707334/2014
Judge: David Elliot

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

WELLS FARGO BANK, N.A.,
Plaintiff(s),

- against -

MICHAEL C. BANKS, et al.,
Defendant(s).

Index
No. 707334 2014

Motion
Date October 5, 2015

Motion
Cal No. 144

Motion
Seq. No. 1

The following papers read on this motion by plaintiff for an order, *inter alia*, granting it summary judgment against defendant Michael C. Banks (defendant) and appointing a referee to compute.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	EF26-44
Answering Affirmation - Exhibits.....	EF45-47
Reply.....	EF50-54

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

Plaintiff commenced this action to foreclose a mortgage against real property known as 144-45 Springfield Boulevard, Jamaica, New York. On November 22, 2003, defendant executed and delivered to Wachovia Mortgage Corporation a note in the principal amount of $309,300.00. On the same date, defendant executed and delivered a mortgage in the same amount, securing the premises as collateral security for the note. Pursuant to the complaint, electronically filed on October 10, 2014, plaintiff alleges that it is the owner and holder of the subject note and mortgage or has been delegated authority to institute the subject

mortgage foreclosure action, that defendant defaulted under the terms of the loan documents by failing to make the monthly installment due on July 1, 2013, and subsequent payments, and that, as a result, plaintiff elected to accelerate the debt by commencing this action.

Plaintiff has demonstrated that Nierma Thompson and Mr. Holly, sued herein as "John Doe," were served with process and have failed to answer or otherwise appear herein. The other named defendants have also failed to answer or appear, with the exception of defendant-mortgagor, who has interposed an answer with affirmative defenses, including lack of standing and noncompliance with RPAPL § 1304. Plaintiff now moves for summary judgment and related relief. Defendant opposes the motion.

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 *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 has standing to commence the within action by virtue of: production of the aforementioned note and corresponding mortgage; evidence that plaintiff is the successor-by-merger to the originator of the loan (*see* Banking Law § 602; *PNC Bank, Natl. Assn. v Klein*, 125 AD3d 953 [2015]); and the affidavit of April J. Linn, plaintiff's Vice President Loan Documentation, wherein which she indicates that plaintiff currently is and was in possession of the indorsed note prior to commencement of the action; all of these factors are coupled with the fact that the note was annexed to the e-filed summons and complaint herein, and the note together with mortgage were separately e-filed along with same (*see Aurora Loan Servs., LLC v Lopa*, 130 AD3d 952 [2015]; *Nationstar*

Mtge., LLC v Catizone, 127 AD3d 1151 [2015]; *Aurora Loan Servs., LLC v Taylor*, 114 AD3d 627 [2014], *affd* 25 NY3d 355 [2015]). Defendant has presented nothing in opposition sufficient to raise a triable issue of fact with respect to plaintiff's standing.

With respect to RPAPL § 1304, however, plaintiff has failed to meet its *prima facie* burden establishing "strict compliance" with the statute. Ms. Linn merely indicates that she "reviewed the 90 day pre-foreclosure notice sent to borrower(s) by certified mail and also by first-class mail to the borrower(s) last known address, and to the mortgaged property." 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*, — AD3d —, 2015 NY Slip Op 06997 [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 Ms. Linn does not state, for example, the date that the notice was alleged to have been sent, nor does she 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]).

To the extent plaintiff avers that RPAPL § 1304 does not apply to this action since the subject loan is not a "home loan" as defined by the statute (RPAPL § 1304 [5] [a]), same is without merit. Subsection 5 (a), defining a "home loan" for purposes of the statute, at (iii) thereof, states that a home loan is one in which the real estate is "used or occupied, or intended to be used or occupied wholly or partly, as the home or residence of one or more persons and which is or will be occupied by the borrower as the borrower's principal dwelling." Residency for purposes of RPAPL § 1304 is not determined at the time the foreclosure action is commenced (*One W. Bank, FSB v Greenhut*, 36 Misc 3d 1205 [A] [Sup Ct, Westchester County 2012]). A statute should not be interpreted in a manner that would render its terms superfluous or redundant (*see Matter of Sin, Inc. v Department of Fin. of City of N.Y.*, 71 NY2d 616 [1988]). Had the Legislature intended that plaintiffs need not comply with RPAPL § 1304 if the borrower did not *currently* reside at the subject premises, it would not have instructed, *inter alia*, that the notice be sent to the "last known address of the borrower" (RPAPL § 1304 [2]), or that the 90-day waiting period before commencing a foreclosure action would not apply or would cease to apply if the borrower no longer occupied the premises as his or her principal dwelling (RPAPL § 1304 [3]).[1] The court, thus,

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1. Comparatively, the Legislature did not specify that the *statute* would not apply if the borrower no longer occupied the premises as his or her principal dwelling; rather, it provided only

finds that this interpretation – that the statute applies in this instance, despite the fact that defendant does not currently reside in the subject premises – is consistent with the statutory purpose of the pre-foreclosure notice, the legislative history for the law noting "a typical lack of communication between distressed homeowners and their lenders prior to the commencement of litigation, leading to needless foreclosure proceedings" and the bill sponsor seeking "to bridge that communication gap in order to facilitate a resolution that avoids foreclosure" by providing a pre-foreclosure notice advising the borrower of "housing counseling services available in the borrower's area" and an "additional period of time ... to work on a resolution" (*Aurora Loan Servs., LLC*, 85 AD3d at 107, *quoting* Senate Introducer Mem. in Support, Bill Jacket, L. 2008, ch. 472, at 10).

Rather than simply providing a proper affidavit of service of the notice in reply to defendant's opposition, plaintiff avers that defendant "has not and nor did he intend to occupy the mortgaged property as his principal dwelling" by submitting defendant's loan application in which he stated that the premises would be his "secondary residence." This merely creates another issue of fact as to whether RPAPL § 1304 applies to the subject loan, as it contradicts the relevant mortgage provision that states that the borrower "will occupy the Property and use the Property as [his] principal residence within 60 days after [he] sign[s] this Security Instrument," absent certain exceptions which have not been demonstrated to apply here.

Finally, to the extent that plaintiff suggests that the defense is without merit as defendant did not proffer a sworn affidavit denying receipt of the notice, same is not necessary for purposes of this motion, as it is plaintiff's *prima facie* burden to establish strict compliance with the statute once the defense is raised, as noted above.

With respect to that branch of the motion by plaintiff to strike defendant's affirmative defenses raised by defendant in his answer, 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 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 for the reasons set forth in, *inter alia*, *Mazzei v Kyriacou* (98 AD3d 1088 [2012]) and *Butler v Catinella* (58 AD3d 145 [2008]).

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that the *90-day waiting period* before commencing a foreclosure action would not apply.

As to the second affirmative defense for improper service of the RPAPL § 1304 notice, plaintiff is not entitled to dismissal of same for the reasons noted, *supra*.

As to the third defense based on plaintiff's alleged failure to set forth on the face of the summons "Consumer Credit Transaction," pursuant to CPLR 305, same is inapplicable, as this is an action to foreclose a mortgage and not an action to recover the debt (*see* 2-22 Bergman on New York Mortgage Foreclosures § 22.02). Dismissal of this defense is warranted.

As to the fourth defense for failure to name a necessary party, same does not prevent plaintiff from obtaining a judgment herein; rather, that party's rights will simply be left unaffected by any judgment rendered herein (*see 1426 46 St., LLC v Klein*, 60 AD3d 740 [2009]; *Board of Mgrs. of Parkchester N. Condominium v Alaska Seaboard Partners Ltd. Partnership*, 37 AD3d 332 [2007]). Plaintiff is entitled to dismissal of this defense.

As to the fifth affirmative defense regarding lack of standing (labeled again as the "fourth" affirmative defense), plaintiff is entitled to dismissal of same, as plaintiff has established it had authority to commence this action.

Accordingly, the branches of plaintiff's motion for an order granting it summary judgment against defendant Michael C. Banks and appointing a referee to compute are denied. The branch of the motion for an order dismissing his affirmative defenses is granted only to the extent that defendant's third, fourth, and fifth affirmative defenses are dismissed. The branch of the motion for amendment of the caption is granted; the caption is amended by substituting "Nierma Thompson" and "Mr. Holly" in the place and stead of "John Doe." All non-answering and non-appearing defendants are deemed in default. The motion is otherwise denied.

Dated: October 26, 2015

J.S.C.