Mariners Atl. Portfolio, Inc. v Hector
2015 NY Slip Op 32499(U)
December 14, 2015
Supreme Court, Kings County
Docket Number: 509931/14
Judge: Larry D. Martin
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At an I.A.S. Trial Term, Part 44 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 14th day of December, 2015.

PRESENT:

Hon. LARRY D. MARTIN, J.S.C.

MARINERS ATLANTIC PORTFOLIO, INC.,
PLAINTIFF,

-VS-

JOHN HECTOR, et al,
DEFENDANTS.

INDEX No. 509931/14

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The following papers numbered 1 to 4 read on this motion	Papers Numbered
Notice of Motion - Order to Show Cause and Affidavits (Affirmations) Annexed	1-2
Answering Affidavit (Affirmation)	3
Reply Affidavit (Affirmation)	4

Upon the foregoing papers in the instant action seeking to foreclose on the mortgage encumbering the premises located at 122 Dumont Avenue in Brooklyn, New York, defendant John Hector ("defendant") moves for an order, pursuant to CPLR 3211 (a) (3), (a) (5) and (a) (10), dismissing the instant action on the grounds of lack of standing, res judicata, expiration of the applicable limitations period and failure to join a necessary party.

On or about December 21, 2009, plaintiff Mariners Atlantic Portfolio, LLC's ("plaintiff") predecessor in interest Citimortgage, Inc. ("Citimortgage") commenced a prior foreclosure action entitled *Citimortgage, Inc. v Hector*, Index No. 32471/09 (the "prior action"), against the same defendant and seeking to foreclose on the same mortgage that is the subject of the instant action. Therein, it was alleged that the note and mortgage were subsequently assigned to Citigroup Global Markets Realty Corp ("Citigroup Global"). By decision and order February 11, 2014 (the "2014 order"), Citimortgage's motion for an order substituting plaintiff for the property, amending the caption, granting default judgment against the non-appearing defendants, reforming the legal

description of the premises and appointing a referee was denied. In the 2014 order, the Court noted that the plaintiff herein was the putative assignee of Citimortgage. The 2014 order dismissed the prior action "without prejudice" on the grounds that "plaintiff [therein] did not have the right to foreclose on the subject mortgage, and it failed to demonstrate compliance with RPAPL §§ 1303 and 1304." The 2014 order further provided that "if or when plaintiff [therein] re-commences such action, the Court directs that the plaintiff be barred from collecting accrued interest, fees, and costs due from ninety (90) days prior to the commencement of this action (September 22, 2009) until the date it chooses to recommence ..."

Subsequently, on or about October 24, 2014, plaintiff commenced the instant action. In the complaint, plaintiff alleges, among other things, that "the note and mortgage were ultimately assigned to the [p]laintiff herein as evidenced by the indorsement affixed to the note and later evidenced by written instrument dated September 12, 2012 ..."

Defendant now moves for the relief requested herein.

"'Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action. As a general rule, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy'" (*Landau v LaRossa Mitchell & Sons*, 11 NY3d 8, 12-13 [2008] quoting *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 [1999]). Notably, "when the disposition of a case is based upon a lack of standing only, the lower courts have not yet considered the merits of the claim ..." (*Landau*, 11 NY3d at 14). Additionally, "a dismissal 'without prejudice' lacks a necessary element of res judicata-by its terms such a judgment is not a final determination on the merits" (*Landau*, 11 NY3d at 13; *see e.g. Miller Mfg. Co. v Zeiler*, 45 NY2d 956, 958 [1978]).

It is well settled that compliance with RPAPL §§ 1303 and 1304 is a condition precedent to commencing a mortgage foreclosure action (*Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 106 [2d Dept 2011]). However, dismissal of a complaint for the failure to satisfy a condition precedent to suit is not a final judgment on the merits (*see Sabbatini v Galati*, 43 AD3d 1136, 1139 [2d Dept 2007]). In this regard, insofar as the 2014 order dismissed the prior action on the grounds that RPAPL §§ 1303 and 1304 were not strictly complied with, such dismissal does not have res judicata effect in the instant action (*see Sabbatino*, 43 AD3d at 1139).

Here, in the 2014 order, the Court held that the plaintiff therein failed to demonstrate that it had standing to commence the prior action. While this was one of the bases of the Court's determination to ultimately dismiss the prior action, it was not a dismissal of the prior action on the merits so as to warrant res judicata effect in the instant action. Furthermore, the dismissal of the prior action was without prejudice (*Landau*, 11 NY3d at 13).

Nevertheless, the Court is bound to address the issue of standing as defendant seeks dismissal of the instant action on that ground. "A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced. The plaintiff may demonstrate that it is the holder or assignee of the underlying note by showing either a written assignment of the underlying note or the physical delivery of the note. On a defendant's motion pursuant to CPLR 3211(a) (3) to dismiss the complaint based upon the plaintiff's alleged lack of standing, the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing as a matter of law. To defeat the motion, a plaintiff must submit evidence which raises a question of fact as to its standing" (*US Bank Nat. Ass'n v Guy*, 125 AD3d 845, 846 [2d Dept 2015], internal citation and quotation marks omitted).

"The physical delivery of the note to the plaintiff from its owner prior to commencement of a foreclosure may, in certain circumstances, be sufficient to transfer the mortgage obligation and create standing to foreclose" (*Aurora Loan Services, LLC v Taylor*, 25 NY3d 355, 361 [2015]).

Defendant maintains that plaintiff has failed to address the issues regarding standing that were raised in the 2014 order. In opposition, plaintiff submits the April 8, 2013 affidavit of Karen Shoup ("Ms. Shoup"), Assistant Vice President of BSI Financial Services ("BSI"), plaintiff's servicer and attorney-in fact, previously submitted in support of the underlying motion for an Order of Reference (denied by the 2014 order) in the prior action. In her affidavit, Ms. Shoup avers, among other things, that the subject "note and mortgage were ultimately acquired by Mariners and Mariners took delivery of the original promissory note as evidenced by the endorsement/allonge affixed to the note and later by assignment of mortgage dated September 12, 2012, which was recorded in the office of the Kings County Clerk/City Register on October 15, 2012 in CRFN No. 2012000407641" (Shoup Aff., ¶ 5). Ms. Shoup further avers, without specifying the date, that "as of at all times thereafter, [plaintiff] was/is in possession of the original note and endorsement/allonge affixed thereto" (Shoup Aff., ¶ 6).

Based upon a review of the record submitted by the parties, the Court finds that plaintiff has failed to submit sufficient evidence to demonstrate that it had standing to commence the instant action. Plaintiff fails to submit the "endorsement/allonge affixed to the note" that is referred to by Ms. Shoup so as to demonstrate when plaintiff "took delivery" of same. The affidavit was deficient in 2014 at the time of the underlying motion in the prior action and is still deficient now in the instant action. Plaintiff should, at the very least, submit evidence (perhaps in the form of a new affidavit) demonstrating physical delivery of the note to it prior to the commencement of the instant action (*see Deutsche Bank National Trust Company v Weiss*, –NYS3d–, 2015 WL 7270431, *1 [2d Dept 2015]; *see also Aurora Loan Services, LLC v Taylor*, 25 NY3d 355, 362 [2015]). The written assignment

of mortgage to plaintiff transferred only the mortgage and, thus, failed to demonstrate that the note also was assigned at that time (*id.*).

Turning to that branch of defendant's motion to dismiss the instant action on statute of limitations grounds, "[a]s a general matter, an action to foreclose a mortgage may be brought to recover unpaid sums which were due within the six-year period immediately preceding the commencement of the action. With respect to a mortgage payable in installments, separate causes of action accrued for each installment that is not paid, and the statute of limitations begins to run, on the date each installment becomes due. However, even if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the statute of limitations begins to run on the entire debt" (*Wells Fargo, NA v Burke*, 94 AD3d 980, 982 [2d Dept 2012], internal citation and quotation marks omitted; *see* CPLR 213 [4]).

Based upon a review of the record submitted by the parties, that branch of defendant's motion seeking to dismiss the instant action on the grounds that the applicable limitations period has expired is denied as moot. Contrary to both parties' contentions, the limitations period does not run from either the date of commencement of the prior action on December 21, 2009 or 30 days from the date of defendant's default in making payments in 2006. In any event, plaintiff failed to submit a copy of the September 10, 2009 letter referenced by Ms. Shoup in her affidavit (Shoup Aff., ¶ 9). Also, if the entity who sent the September 10, 2009 letter did not have standing to do so, then the limitations period did not begin to run at that time.

With respect to that branch of defendant's motion to dismiss the instant action for failure to join a necessary party, the Court denies that branch of the motion as moot. The failure to join the heirs of the estate of Florence Carter to the instant action merely renders any foreclosure judgment rendered herein ineffective as against them (*see* RPAPL 1311; *see also 1426 46 St., LLC v Klein*, 60

AD3d 740, 742 [2d Dept 2009]).

Accordingly, defendant's motion is granted to the extent that the instant action is dismissed without prejudice on the grounds of lack of standing.

The foregoing constitutes the decision, order and judgment of the Court.

ENTER, DEC 14 2015

HON. LARRY D. MARTIN
J.S.C.

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