

Wells Fargo Bank, N.A. v Thompson
2015 NY Slip Op 32519(U)
December 10, 2015
Supreme Court, Suffolk County
Docket Number: 10665/2011
Judge: Richard I. Horowitz
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SHORT FORM ORDER

INDEX No. 10665/2011

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. RICHARD I. HOROWITZ
A.J.S.C.

MOTION DATE 5/5/14
Mot. Seq. #001 MG

-----X
WELLS FARGO BANK, N.A., :

Plaintiff, :

- against - :

COLIN T. THOMPSON A/K/A COLIN :
THEODORE THOMPSON, KIM THOMPSON, :
BENEFICIAL NEW YORK, INC., NEW YORK :
STATE DEPARTMENT OF TAXATION :
AND FINANCE :

JOHN DOE (Said name being fictitious, it being :
the intention of Plaintiff to designate any and all :
occupants of premises being foreclosed herein, :
and any parties, corporations or entities, if any, :
having or claiming an interest or lien upon the :
mortgaged premises). :

Defendants. :

HOGAN LOVELLS US, LLP
Attorneys for Plaintiff
875 Third Avenue
New York, New York 10022

DeLISA LAW GROUP, PLLC
Attorneys for Defendants Colin
Thompson and Kim Thompson
475 Montauk Highway
West Islip, New York 11795

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Upon the following papers numbered 1-25 read on this motion for summary judgment; action; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 19 - 23; Replying Affidavits and supporting papers 24 -25; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (#001) by plaintiff Wells Fargo Bank, N.A., *inter alia*, pursuant to CPLR §3212 for summary judgment on its complaint against the answering defendants Colin T. Thompson and Kim Thompson, dismissing the counterclaims asserted by 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; and it is further

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ORDERED that the non-appearing, non-answering defendants are hereby deemed in default; and it is further

ORDERED that the caption is hereby amended by striking therefrom defendant "John Doe"; and it is further

ORDERED that plaintiff is directed to serve a copy of this Order amending the caption of this action upon the Calendar Clerk of this Court; and it is further

ORDERED that the caption of this action hereinafter appears as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

WELLS FARGO BANK, N.A.,

X

Plaintiff,

- against -

COLIN T. THOMPSON A/K/A COLIN THEODORE THOMPSON,
KIM THOMPSON, BENEFICIAL NEW YORK, INC., NEW YORK
STATE DEPARTMENT OF TAXATION AND FINANCE,

Defendants.

X

This is an action to foreclose a mortgage on a premises known as 631 Peter Paul Drive, West Islip, New York. On January 23, 2006, defendants Colin and Kim Thompson executed a note in favor of Ohio Savings Bank agreeing to pay the sum of \$325,000.00 at the yearly rate of 6.25 percent. On the same date, defendants executed a mortgage in the principal sum of \$325,000.00 on the subject property. The mortgage was delivered to Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for Ohio Savings Bank. Prior to the commencement of this action the note was endorsed in blank. Plaintiff asserts that the note and mortgage were delivered to Wells Fargo in August of 2006, and that plaintiff remained in continuous physical possession of the note and mortgage through the commencement of this action. A written assignment of mortgage to Wells Fargo was executed on March 8, 2011 and recorded on March 21, 2011.

Notices of default were sent to defendants on several dates between 2007 and 2010. The final default notice, dated October 12, 2010, was sent to defendants stating that they had defaulted on their mortgage loan and that the amount past due was \$307,439.44. As a result of defendants' continuing default, plaintiff commenced this foreclosure action on March 30, 2011.

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In its complaint plaintiff alleges, *inter alia*, that defendants breached their obligations under the terms and conditions of the note and mortgage by failing to make their monthly payments. Defendant served an answer and asserted three counterclaims.

The Court's computerized records indicate that a foreclosure settlement conference was scheduled for September 17, 2013, at which time this matter was referred as an IAS Part since the homeowner defaulted. Thus, there has been compliance with CPLR §3408 and no further settlement conference is required.

Plaintiff now moves for an order granting summary judgment, dismissing the counterclaims, appointing a referee to compute and amending the caption alleging that defendants failed to comply with the terms of the loan agreement and mortgage and, that the defendants' general denials fail to raise a material issue of triable fact. In support of its motion, plaintiff submits, *inter alia*, the affidavit of Alisha Mulder, Vice President of Loan Documentation for plaintiff; the affirmation of Megan S. Smith, Esq.; the pleadings; the note and mortgage, and assignment of mortgage; notice of default; memoranda of law; notices pursuant to RPAPL §§ 1320, 1304 and 1303; affidavits of service for the summons and complaint; an affidavit of service for the instant summary judgment motion; and a proposed order of reference.

Although defendants asserted several affirmative defenses and counterclaims in their answer, the sole argument submitted in opposition to the instant motion is that plaintiff does not have standing. The gravamen of defendants' argument with respect to the issue of standing is that plaintiff "is the servicer of the loan, not the holder and servicer", and, as such, the failure to allege within the complaint that Fannie Mae owns the note and mortgage is fatal to the claims (*see* DeLisa Affirmation, dated April 24, 2014, at ¶¶ 7-10). For the reasons asserted below, plaintiff's motion for summary judgment is granted.

"[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, 482, 764 NYS2d 635 [2d Dept 2003]; *see Argent Mtge. Co., LLC v Montesana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Once a plaintiff has made this showing, the burden then shifts to defendant to produce evidentiary proof in admissible form sufficient to require a trial of their defenses (*see Redrock Kings, LLC v Kings Hotel, Inc.*, 109 AD3d 602, 970 NYS2d 804 [2d Dept 2013]; *Aames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]; *see also Washington Mut. Bank v Valencia*, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]).

Initially, plaintiff demonstrated prima facie entitlement to summary judgment against the answering defendants by providing sufficient proof of its physical possession of the note and mortgage, together with due evidence of the answering defendants' default in payment under the terms of the loan documents (*see* CPLR §3212; RPAPL §1321; *Wells Fargo Bank, N.A. v*

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DeSouza, 126 AD3d 965, 3 NYS3d 619 [2d Dept 2015]; *Neighborhood Hous. Serv. of New York City v Hawkins*, 97 AD3d 554, 947 NYS2d 321 [2d Dept 2012]; *Baron Assoc., LLC v Garcia Group Enters.*, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]).

Where, as here, standing is put into issue by the defendants, the plaintiff is required to prove it has standing in order to be entitled to relief requested (*Aurora Loan Servs., LLC v Taylor*, 114 A.D.3d 627, 628, 980 N.Y.S.2d 475 [2014], *aff'd*, 25 NY3d 355 [2015]; *see Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 242, 837 N.Y.S.2d 247 [2d Dept 2007]). In a mortgage foreclosure action “[a] plaintiff has standing where it is the holder or assignee of both the subject mortgage and of the underlying note at the time the action is commenced” (*HSBC Bank USA v Hernandez*, 92 AD3d 843, 939 NYS2d 120 [2d Dept 2012]; *US Bank, NA v Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; *Countrywide Home Loans, Inc. v Gress*, 68 AD3d 709, 888 NYS2d 914 [2d Dept 2009]). “Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation” (*Hernandez, supra*).

In the matter at hand, plaintiff demonstrated that it was in physical possession of the note at the time it commenced the action, and, thus, it had standing to pursue this foreclosure proceeding. In fact, defendants did not dispute the testimony of Alisha Mulder, Vice President of Loan Documentation, who averred that the note and mortgage were physically delivered to plaintiff during August 2006 and that plaintiff continued to be in possession of the note and mortgage through commencement of this action in 2011 (*see* Mulder Affidavit, at ¶ 8). Parenthetically, the Court notes that any claim by plaintiff that standing was established by the MERS transfer was without merit because there was insufficient evidence that MERS had the authority to assign the note to plaintiff (*see* UCC 3-201; *Homecomings Financial LLC v Guldi*, 108 AD3d 506, 969 NYS2d 470 [2d Dept 2013]). Regardless, standing has been established, and plaintiff demonstrated *prima facie* entitlement to summary judgment.

Even when viewed in the light most favorable to defendants, the submissions failed to raise a triable issue of material fact as to standing or other bona fide defense to the action (*see Bayview Loan Servicing, LLC v 254 Church Street, LLC*, 129 AD3d 650, 9 NYS3d 589 [2d Dept 2015]; *Emigrant Funding Corp. v Agard*, 121 AD3d 935, 995 NYS2d 154 [2d Dept 2014]; *Mendel Group, Inc. v Prince*, 114 AD3d 732, 980 NYS2d 519 [2d Dept 2014]). “Motions for summary judgment may not be defeated merely by surmise, conjecture or suspicion” (*Shaw v Time-Life Records*, 38 NY2d 201, 379 NYS2d 390 [1975]). Notably, defendants do not dispute that they failed to make payments due on the note (*see Citibank, N.A. v Souto Geffen Co.*, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]). Accordingly, the remaining contentions of defendant are rejected as being without merit.

With regard to the counterclaims alleging, *inter alia*, fraud, improper servicing of the loan and violations of Banking Law 6-1 and 6-m, defendants failed to present any credible evidence that plaintiff in any way acted unlawfully or contrary to any of its statutory obligations.

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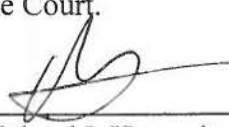
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Moreover, the affirmation of counsel, who lacks personal knowledge of the facts, is insufficient to defeat the motion (*see Bank of New York v Castillo*, 120 AD3d 598, 991 NYS2d 446 [2d Dept 2014]). It further appears that these claims may have been abandoned as defendants failed to address them altogether in their opposition. As such, the counterclaims cannot stand, and that branch of the motion for summary judgment dismissing the counterclaims is granted.

Based upon the foregoing, plaintiff's motion for summary judgment is granted. That branch of the motion 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]; *Bank of East Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]). The branch of the motion seeking to amend the caption to delete therefrom defendant "John Doe" is further granted. The Court is simultaneously signing the Order of Reference with this Order.

This constitutes the Decision and Order of the Court.

Dated: December 10, 2015



Hon. Richard I. Horowitz, A.J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION