

US Bank NA v Khan
2016 NY Slip Op 30153(U)
January 28, 2016
Supreme Court, Queens County
Docket Number: 23398/09
Judge: Allan B. Weiss
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M E M O R A N D U M

SUPREME COURT QUEENS COUNTY
CIVIL TERM PART 2

HON. ALLAN B. WEISS

US BANK NATIONAL ASSOCIATION, AS
TRUSTEE FOR CSMC MORTGAGE-BACKED PASS
THROUGH CERTIFICATES, SERIES 2006-4,

Index No: 23398/09

Plaintiff,

Motion Date: 10/26/15

-against-

Motion Seq. No.: 2

FARIZ U. KHAN, AMK CAPITAL CORP.,
AS AGENT, MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., AS
NOMINEE FOR N.Y. FINANCIAL MORTGAGE
LENDING, A NEW YORK CORPORATION,
NEW YORK CITY ENVIRONMENTAL CONTROL
BOARD, NEW YORK CITY TRANSIT ADJUDICATION
BUREAU, PEOPLE OF THE STATE OF NEW YORK
and SHARON SINGH

Defendants.

In this action to foreclose a mortgage the plaintiff moves for an Order striking the defendant's, FARIZ U. KHAN's, answer, granting summary judgment in its favor, appointing a referee to ascertain and compute the amount due to the plaintiff and amending the caption by deleting the plaintiff's address and substituting Sharon Singh in place of the defendant s/h/a John Doe¹.

Defendant, Khan opposes on the grounds that the court's order denying plaintiff's prior motion for summary judgment is

¹ The caption of the action was previously amended in the Order dated April 28, 2014, entered on May 3, 2014.

the law of the case, *res judicata*, successive summary judgment motions are disfavored and that plaintiff has still failed to establish its standing.

Although it is true that successive motions for summary judgment are disfavored (see St. John's Univ. v Butler Rogers Baskett Architects, P.C., 105 AD3d 728 [2013]; Baron v Charles Azzue, Inc., 240 AD2d 447 [1997]), such motions may be considered where it is based upon "newly discovered evidence" or where the movant demonstrates "other sufficient justification" (see Lapadula v Kwok, 304 AD2d 798, 800 [2003] quoting Marine Midland Bank v Fisher, 85 AD2d 905, 906 [1981]).

As sufficient justification for making this motion, plaintiff asserts that the court should entertain the instant motion as it would be a waste of time to conduct a trial when the case may be properly resolved by a motion. Plaintiff further claims that plaintiff has now established its standing by submitting a new affidavit and a copy of the note evincing the indebtedness indorsed in blank.

The plaintiff has demonstrated sufficient justification for departing from the general rule (see Carreras v Weinreb, 33 AD3d 953 [2006], Varsity Transit, Inc. v The Board of Education of the City of New York, 300 AD2d 38, 39-40 [2002]; Detko v McDonald's Restaurants of New York, Inc., 198 AD2d 208 [1993] lv denied 83 NY2d 752 [1994]) and will address the motion on the merits.

A further ground for entertaining the instant motion is that the court overlooked the blank indorsement on the copy of the note that was previously submitted.² The absence of the indorsement was the basis for finding that plaintiff failed to demonstrate its standing and for denial of the prior summary judgment motion.

All of the defendant's affirmative defenses raised in opposition to the prior summary judgment motion, except the defense of lack of standing, were dismissed in the Order dated April 28, 2014. Thus, only the issue of standing remains outstanding.

A mortgagee establishes its prima facie entitlement to summary judgment in a foreclosure action where it produces both the mortgage and unpaid note, together with evidence of the mortgagor's default (see Citibank, N.A. v. Van Brunt Properties, LLC, 95 AD3d 1158 [2012]; Capstone Bus. Credit, LLC v Imperia Family Realty, LLC, 70 AD3d 882 [2010]; U.S. Bank Natl. Assn. TR U/S 6/01/98 [Home Equity Loan Trust 1998-2] v Alvarez, 49 AD3d 711, 712 [2008]). Where a plaintiff's standing is placed in issue by the defendant, it is incumbent upon the plaintiff to prove its standing to be entitled to relief (see U.S. Bank N.A. v Sharif,

²During the determination of the instant motion, the plaintiff's prior summary judgment motion and evidentiary submissions were reviewed which showed that the first page of the note was missing, but the third page did contain the same blank indorsement as appears on the note present in this motion.

89 AD3d 723 [2011]). A plaintiff establishes that it has standing where it demonstrates that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note (see Flagstar Bank, FSB v Anderson, 129 AD3d 665 [2015]; Bank of N.Y. v Silverberg, 86 AD3d 274 [2d Dept 2011]; Aurora Loan Servs., LLC v Weisblum, 85 AD3d 95 [2d Dept 2011]). "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, and the mortgage passes with the debt as an inseparable incident" (U.S. Bank, N.A. v Collymore, 68 AD3d 752, 754 [2009]; see US Bank N. Assn. v Faruque, 120 AD3d 575, 577 [2014]).

The plaintiff established its prima facie entitlement to judgment as a matter of law by submitting the mortgage, the underlying note, and evidence of defendant's, Kahn's default, (see Bank of New York Mellon Trust Co. v. McCall, 116 AD3d 993 [2014]; Countrywide Home Loans, Inc. v. Delphonse, 64 AD3d 624, 625 [2009]; Wells Fargo Bank Minnesota, Nat. Ass'n v. Mastropaolo, 42 AD3d 239 [2007]).

Plaintiff has also established its standing by submitting the affidavit of the affidavit of Teri L. Townsend President Loan Modification of plaintiff's servicer, and a full copy of the note evincing the indebtedness indorsed in blank, a copy of the Power of Attorney and Article II Section 2.01, of the Pooling and

Servicing Agreement dated April 1, 2006, which establish, prima facie, that the plaintiff is now and was at the time of the commencement of the action in possession of the note.

In opposition, the defendants failed to raise a triable issue of fact rebutting the plaintiff's showing (see Wells Fargo Bank Minn., N.A. v Perez, 41 AD3d 590 [2007]; Trans World Grocers v Sultana Crackers, 257 AD2d 616, 617 [1999]; Home Sav. of Am. v Isaacson, 240 AD2d 633 [1997]).

Accordingly, the motion for summary judgment and appointment of a referee is granted and the defendant's affirmative defenses including lack of standing, are dismissed.

The branch of plaintiff's motion to strike the defendant's answer is denied. Plaintiff has failed to submit any basis for striking the defendant's answer which is tantamount to a default in answering (see e.g. Wilson v. Galicia Contr. & Restoration Corp., 10 NY3d 827, 830 [2008]; Rokina Optical Co., Inc. v. Camera King, Inc., 63 NY2d 728, 730, [1984]; Fappiano v. City of New York, 5 AD3d 627 [2004] lv denied 4 NY3d 702 [2004]).

Granting summary judgment does not require striking the defendant's answer.

Settle Order.

Dated: January 28, 2016
D# 53

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J. S. C.