HSBC Bank USA v Bhatti
2016 NY Slip Op 30167(U)
January 29, 2016
Supreme Court, Queens County
Docket Number: 21162/2013
Judge: Robert J. McDonald

MEMORANDUM

SUPREME COURT - STATE OF NEW YORK
COUNTY OF QUEENS - **IAS PART 34**

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HSBC BANK USA, NATIONAL ASSOCIATION AS TRUSTEE FOR WELLS FARGO ASSET SECURITIES CORPORATION, MORTGAGE ASSET-BACKED PASS-THROUGH CERTIFICATES SERIES 2007-PA4,

Plaintiff,

- against -

SADAF J. BHATTI, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR RBS CITIZENS, N.A., RBS CITIZENS 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, and "JOHN DOE #1" through "JOHN DOE #10", the last ten names being fictitious and unknown to the plaintiff, the person or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the Complaint,

Defendants.

BY: McDONALD, J.

Index No.: 21162/2013

Motion Date: 1/19/16

Motion No.: 75

Motion Seq.: 1

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The following papers numbered 1 to 11 read on this motion by plaintiff for an Order granting plaintiff summary judgment, striking the answer of defendant SADAF J. BHATTI (defendant); awarding plaintiff a default judgment against the defaulting parties; appointing a Referee to compute the amount due to plaintiff; and amending the caption of this action:

	Papers Numbered
Notice of Motion-Affidavits-Exhibits	1 - 5
Affirmation in Opposition-Exhibits	6 - 8
Affirmation in Reply-Exhibit	9 - 11

This is an action to foreclose a mortgage encumbering the premises located at 73-04 199th Street, Fresh Meadows, NY 11366.

On April 18, 2007, defendant obtained a loan in the principal amount of $592,000.00 from Wells Fargo Bank, N.A., secured by a mortgage encumbering the subject premises. Plaintiff alleges that the note, indorsed in blank, was then transferred to plaintiff prior to commencement of this action. Plaintiff asserts that defendant defaulted on the note and mortgage when defendant failed to make the monthly mortgage payments beginning on January 1, 2010 and continuing thereafter.

Plaintiff alleges that a notice of default and a 90 day pre-foreclosure notice were mailed to defendant on March 22, 2013. Plaintiff subsequently accelerated the mortgage and commenced this action by filing a lis pendens and summons and complaint on November 18, 2013. Plaintiff submits affidavits of service on all of the named defendants as well as Amrah Bhatti, sued herein as John Doe #1, Nida Bhatti, sued herein as John Doe #2, Javed Bhatti, sued herein as John Doe #3, and "John Doe" (refused name), sued herein as John Doe #4. All defendants defaulted in appearing except for defendant borrower who served an answer dated December 30, 2013.

Pursuant to CPLR 3408, residential foreclosure settlement conferences were held on March 10, 2014, June 6, 2014, and September 10, 2014, at which time no settlement could be reached and the matter was released from the conference part.

It is well settled that a plaintiff in a mortgage foreclosure action establishes a prima facie case of entitlement to summary judgment through submission of proof of the existence of the underlying note, mortgage, and default in payment after due demand (see American Airlines Federal Credit Union v Mohamed, 117 AD3d [2d Dept. 2014]; TD Bank, N.A. v 126 Spruce Street, LLC, 117 AD3d 716 [2d Dept. 2014]; Citibank, N.A. v Van Brunt Properties, LLC, 95 AD3d [2d Dept. 2012]). Upon such a showing, the burden shifts to defendant to produce evidence in admissible form sufficient to raise a material issue of fact requiring a trial.

In support of the motion, plaintiff submits an affirmation from counsel, James Cassar, Esq.; an affidavit from Armenia L. Harrell, Vice President Loan Documentation of Wells Fargo Bank, N.A., the servicing agent to plaintiff; copies of the note, mortgage, and assignment; a copy of the pleadings; copies of the affidavits of service on all defendants; and copies of the notice of default and 90-day pre-foreclosure notice.

In the affidavit of merit, Armenia L. Harrell states that based upon a personal review of plaintiff's business records, plaintiff is in possession of the note and had possession of the note on February 21, 2012, which was prior to commencement of this action. Ms. Harrell attests that there is in fact a default under the terms and conditions of the note and mortgage because the January 1, 2010 mortgage payment was not timely made. Ms. Harrell also affirms that the 90-day pre-foreclosure notice was sent to the borrowers by certified mail and also by first-class mail. Such is confirmed by the affidavit of mailing affirmed by James Green. Ms. Harrell states that a notice of default was sent to defendant via first class mail to defendant's last known address, which is also the mortgaged premises, on March 22, 2013.

Plaintiff contends that it has made a prima facie showing that it is entitled to summary judgment based upon its submission of the note, mortgage, and Ms. Harrell's affidavit evidencing defendant's failure to make the contractually required loan payments and that plaintiff was the holder of the note prior to commencement of this action.

In opposition, defendant's counsel, Holly Meyer, Esq., contends that the affidavit of Ms. Harrell is inadmissible and insufficient; the electronic documents are inadmissible; plaintiff lacks standing; the transfer of the loan to plaintiff is void; plaintiff's notice of default is improper; and plaintiff failed to comply with RPAPL 1304.

This Court finds that Ms. Harrell properly laid the foundation for her affidavit to qualify the records that she relied on as business records. "[A] witness who is familiar with the practices of a company that produced the records at issue, and who generally relies upon such records, may have the requisite knowledge to meet the CPLR requirements for the admission of a business record, provided that the witness can also attest that (1) the record was made in the regular course of business; (2) it was the regular course of business to make such record; and (3) the record was made contemporaneously with the relevant event, thereby assuring its reliability" (People v Brown, 13 NY3d 332, 341 [2009]). The factual allegations set forth in Ms. Harrell's affidavit, including her personal review of the records and the agency status of Wells Fargo Bank, N.A, as servicer of the loan for plaintiff, sufficiently established the admissibility of her statements under the business records exception to the hearsay rule (see Deutsche Bank Natl. Trust Co. v Monica, 131 AD3d 737 [3d Dept. 2015]; Portfolio Recovery Assoc., LLC v Lall, 127 AD3d 576 [1st Dept. 2015]; Merrill Lynch Bus. Fin. Servs. Inc. v Trataros Constr., Inc., 30 AD3d 336 [1st Dept. 2006]).

"Where, as here, standing is put into issue by a defendant, the plaintiff must prove its standing in order to be entitled to relief" (Aurora Loan Services, LLC v. Taylor, 114 AD3d 627 [2d Dept. 2014][internal citations omitted]; see Midfirst Bank v. Agho, 121 A.D.3d 343 [2d Dept. 2014]; U.S. Bank, N.A. v Collymore, 68 AD3d 752 [2d Dept. 2009]). A plaintiff has standing where it is both the holder or assignee of the subject mortgage and the underlying note at the time the action is commenced (see Aurora Loan Services, LLC v. Taylor, 114 AD3d 627 [2d Dept. 2014]; Deutsche Bank Natl. Trust Co. v Whalen, 107 AD3d 931 [2d Dept. 2013]; Bank of N.Y. v Silverberg, 86 AD3d 274 [2d Dept. 2011]).

This Court finds that the evidence submitted by plaintiff including Ms. Harrell's affidavit stating that plaintiff was in possession of note indorsed in blank on February 21, 2012, which was prior to commencement of this action, is sufficient to establish standing to commence the action (see Aurora Loan Servs., LLC v Taylor, 114 AD3d 627 [2d Dept. 2014]; Bank of N.Y. v Silverberg, 86 AD3d 274 [2d Dept. 2011]; U.S. Bank, N.A. v Collymore, 68 AD3d 752 [2d Dept. 2009]). "Where a note is transferred, a mortgage securing the debt passes as an incident to the note" (Deutsche Bank Natl. Trust Co. v Spanos, 102 AD3d 909 [2d Dept. 2013]). Therefore, "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" (HSBC Bank USA v Hernandez, 92 AD3d 843 [2d Dept. 2012]). Since the mortgage passes with the debt that is evidenced by the note as an inseparable incident thereto, plaintiff established its standing to commence the within action (see US Bank Natl. Assn. v Cange, 96 AD3d 825 [2d Dept. 2012]; U.S. Bank, NA v Sharif, 89 AD3d 723[2d Dept 2011]).

Accordingly, as plaintiff has demonstrated its standing by demonstrating that it was the holder of, and in possession of, the note at the time this action was commenced, any challenge to the assignment is insufficient to demonstrate that plaintiff lacks standing. In any event, the assignment of the mortgage to plaintiff is dated March 13, 2013 and assigns the mortgage and "all monies now owing or that may hereafter become due and owing". As such, the note and mortgage were assigned to plaintiff by assignment of mortgage prior to commencement of this action. Defendant's arguments regarding the trust and the Pooling and Servicing Agreement (PSA) are improper. Defendant, as mortgagor whose loan is owned by a trust, does not have standing to challenge plaintiff's standing based on purported noncompliance with the PSA (see Wells Fargo Bank, N.A. v Erobobo, 127 AD3d 1176 [2d Dept. 2015]).

Next, defendant contends that plaintiff failed to satisfy a condition precedent by failing to provide notice as required by the terms of the subject mortgage. Ms. Harrell affirms that a notice of default was mailed via first class mail on March 22, 2013, addressed to defendant at his last known address, which is the mortgaged premises. A copy of the notice of default is attached to the motion papers and identifies that amount required to cure the default and the deadline to submit payment. Ms. Harrell's affidavit is sufficient to demonstrate compliance with the terms of the note and mortgage (see Indymac Bank, F.S.B. v Kamen, 68 AD3d 931 [2d Dept. 2009]).

Defendant also alleges that plaintiff failed to comply with RPAPL 1304. RPAPL 1304 provides that at least 90 days before a lender begins an action against a borrower to foreclose on a mortgage, the lender must provide notice to the borrower that the loan is in default and his or her home is at risk (see Aurora Loan Services, LLC v Weisblum, 85 AD3d 95 [2d Dept. 2011]). "[P]roper service of the RPAPL § 1304 notice on the borrower or borrowers is a condition precedent to the commencement of the foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition" (id. at 107). The presumption of receipt by the addressee "may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed" (see Residential Holding Corp. v Scottsdale Ins. Co., 286 AD2d 679 [2d Dept. 2001]). Ms. Harrell's affidavit along with Mr. Green's affidavit demonstrate compliance with RPAPL 1304. Both affirm that plaintiff sent the 90-day notice on March 22, 2013 by certified and first class mail to defendant at the mortgaged property, which is also his last known address. A copy of the 90-day notice is annexed to the moving papers, is dated March 22, 2013, and is addressed to defendant at the mortgaged premises. Proof of filing with the New York State Banking Department is also annexed. As both Ms. Harrell and Mr. Green have identified that the business records were personally reviewed and that the notice was sent to defendant, plaintiff presented sufficient proof that it complied with RPAPL 1304. Moreover, defendant has not submitted his own affidavit denying receipt of any notice. Only an affirmation from counsel has been presented in opposition to this motion.

Lastly, a dispute as to the exact amount owed by defendant to plaintiff does not warrant the denial of summary judgment (see Crest/Good Mfg. Co. v Baumann, 160 AD2d 831 [2d Dept. 1990]). Such a dispute is a matter for an appointed referee to determine (see id. at 831; Johnson v Gaughan, 128 AD2d 756 [2d Dept. 1987]). Moreover, this Court notes that defendant has not disputed the existence of the note, mortgage, or default thereunder.

The remainder of defense counsel's affirmation is insufficient to raise a question of fact. As defendant has failed to raise a material issue of fact in opposition, plaintiff is entitled to the relief sought (see Baron Assoc., LLC v Garcia Group Enters., Inc., 96 AD3d 793 [2d Dept. 2012]; Wells Fargo Bank Minn., Natl. Assn. v Perez, 41 AD3d 590 [2d Dept. 2007], lv dismissed 10 NY3d 791 [2008]).

Therefore, plaintiff's motion for summary judgment is granted and defendant's answer is stricken. Plaintiff's branches of its application for a default judgment against the remaining defaulting defendants and for the appointment of a referee to compute the amounts due under the subject mortgage are also granted. The submissions further reflect that plaintiff is entitled to amend the caption by substituting AMRAH BHATTI, NIDA BHATTI, JAVED BHATTI, and JOHN DOE, in place and stead of the "JOHN DOE #1" through "JOHN DOE #4", respectively, and discontinuing the action against the remaining defendants sued herein as "JOHN DOE #5" through "JOHN DOE #10".

Order of Reference signed simultaneously herewith.

Dated: January 29, 2016
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.