JP Morgan Chase Bank, N.A. v Smith
2016 NY Slip Op 30426(U)
March 15, 2016
Supreme Court, Kings County
Docket Number: 509165/2014
Judge: Bernard J. Graham
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: Part 36

Index No.: ~~509~~ 509165/2014
Motion Calendar No.
Motion Sequence No.

JP MORGAN CHASE BANK, NATIONAL ASSOCIATION,

Plaintiff(s),

-against-

HUGH SMITH a/k/a HUGH C. SMITH, et al.,

Defendant(s).

DECISION / ORDER

Present:
Hon. Judge Bernard J. Graham
Supreme Court Justice

Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion to extend plaintiff's time to file its summary judgment motion, to award summary judgment and the appointment of a referee to compute.

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1-2
Order to Show cause and Affidavits Annexed.....	
Answering Affidavits	3
Replying Affidavits.....	4
Exhibits.....	
Other:.....	

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Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Plaintiff, JP Morgan Chase Bank, National Association ("Chase"), has moved for an Order, pursuant to CPLR § 3212, awarding summary judgment in favor of the plaintiff and against the defendant/borrower, Hugh Smith a/k/a Hugh C. Smith ("Mr. Smith"), striking the answer of the defendant and seeking the appointment of a referee to compute the sums due and owing the plaintiff pursuant to the terms of the mortgage. Defendant opposes the relief sought in the motion by the plaintiff, contending that summary judgment is not an appropriate remedy based upon several grounds which include: that plaintiff lacks standing; plaintiff failed to prove compliance with several statutory provisions, including RPAPL §§ 1304 and 1306; and there was

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an alleged violation of the Truth-in-Lending Act.

Background:

This action was commenced by the plaintiff to foreclose upon a mortgage dated January 8, 2011, in the principal amount of $457,000.00. The defendant/borrower executed and delivered to Patriot One Mortgage Bankers LLC (the "mortgagee"), a promissory note on November 5, 2007, whereby the defendant/borrower agreed to pay the sum of $457,000.00 in monthly payments through December 1, 2037. As collateral security for the payment of said indebtedness, the defendant executed and delivered to Mortgage Electronic Registration Systems, Inc. ("MERS"), solely as nominee for Patriot One Mortgage Bankers LLC, a mortgage which was recorded in the Office of the City Register of the City of New York on December 4, 2007. The note and mortgage were subsequently assigned to Chase on August 29, 2011, and recorded in the Office of the City Register of the City of New York on September 20, 2011. Thereafter the parties entered into a consolidation, extension and modification agreement dated September 8, 2012. The original note was allegedly delivered to the plaintiff prior to the commencement of this action, and plaintiff contends that they have maintained possession of the original note since that date (see the affidavit of Mimoza Petreska, employed as a vice-president of Chase, which affidavit is annexed to the Notice of Motion). The mortgage encumbers the premises ("subject property") located at 2264 Linden Blvd., Brooklyn, New York.

The terms of the mortgage (paragraph #22) provided that the failure of the defendant/borrower to make any payment due under the note, which remains uncured, is considered to be a default under the mortgage, which would entitle the plaintiff to seek to accelerate the unpaid portion of the mortgage.

The defendant/borrower failed to make the monthly payment due under the note on or about May 1, 2014, and has not made any subsequent monthly payments due thereafter. Prior to the commencement of this action, plaintiff allegedly sent by mail, on or about July 30, 2014, a notice of default to the defendant (Mr. Smith) at the property address. In addition, the plaintiff allegedly mailed a ninety (90) day pre-foreclosure notice on June 3, 2014, pursuant to RPAPL § 1304, to the defendant/borrower at the subject property address and filed proof thereof with the

Superintendent of the Department of Financial Services (see Exhibit "A" annexed to the Notice of Motion). As a result of the failure of the defendant to pay the amounts due under the note and mortgage, and to cure his default, plaintiff commenced this foreclosure action on or about October 6, 2014, by the filing of a summons, verified complaint and Notice of Pendency in the office of the County Clerk of Kings County. Service of the summons and complaint was effectuated upon Mr. Smith, by personal service on October 10, 2014, at 2264 Linden Blvd., Brooklyn, New York.

Defendant, Mr. Smith appeared in this matter by counsel, on or about June 10, 2014, by the submission of a verified answer, which answer contained several affirmative defenses. On or about October 27, 2014, a Request for Judicial Intervention (R.J.I.), Note of Issue and Certificate of Readiness was then filed by plaintiff's counsel.

Plaintiff's contentions:

Plaintiff contends that they have established their prima facie entitlement to a judgment as a matter of law by submitting the mortgage, the note and evidence of a default. Here, the plaintiff states that they have submitted copies of the note and mortgage and conclusively established that the borrower is in default of his obligations under said loan documents.

In moving to dismiss the affirmative defenses that are contained in defendants' answer, plaintiff maintains that these defenses are devoid of factual and legal merit and as a result should be stricken.

As to the first affirmative defense, defendant alleges that the plaintiff lacked standing to commence the within action. In response, plaintiff maintains that they were the original lender of the consolidated mortgage and loan and they did not assign the consolidated note and have remained in possession of this note at the time this action was commenced. Plaintiff further alleges that the mortgage originally held by Patriot One Mortgage Bankers LLC was properly assigned to the plaintiff and this transfer is reflected by the indorsement to plaintiff contained on the allonge dated November 5, 2007, which is annexed to the first note involved in the consolidation chain.

As to the second affirmative defense, defendant alleges that the amount claimed by the plaintiff is incorrect as payments were purportedly not credited by the plaintiff. In response,

plaintiff maintains that these are conclusory allegations which are not supported by any documentation. Plaintiff submitted the affidavit of Ms. Petreska who delineated the amount due to the plaintiff as well as the details of defendant's default.

As to the third affirmative defense, defendant alleges that plaintiff seeks to collect fees and charges in excess of those to which it is entitled. In response, plaintiff maintains that this defense is purely conclusory as it fails to specify which fees or costs the plaintiff is not entitled to.

As to the fourth affirmative defense, defendant alleges that the plaintiff failed to provide proper notice of the default or a ninety (90) day pre-foreclosure notice as required by RPAPL § 1304. In response, plaintiff maintains that they properly served these notices and have provided copies of both the default notice (dated July 30, 2014) which is annexed as Exhibit "A" to the Notice of Motion and the RPAPL § 1304 notice (dated June 3, 2014) which were mailed to the defendant at the property address.

As to the fifth affirmative defense, defendant alleges that the plaintiff failed to provide required disclosures pursuant to the Truth-in-Lending Act (TILA). In response, plaintiff maintains that this claim would be barred by the Statute of Limitations, as a TILA claim must be commenced within one year of the date of occurrence.

As to the sixth affirmative defense, defendant alleges that plaintiff is barred by the statute of frauds. In response, plaintiff asserts that the subject mortgage is a written instrument which was executed by the defendant as security for the underlying debt and it was properly executed and acknowledged.

As to the seventh affirmative defense, defendant alleges that the plaintiff failed to state a cause of action in its complaint. In response, plaintiff maintains that the complaint sets out a cause of action for breach of the mortgage contract which includes details as to mortgage and note and evidence of defendant's non-payment.

Here, plaintiff argues that they have demonstrated their entitlement to summary judgment by submitting the note, mortgage, assignment of mortgage and evidence that defendants defaulted on their obligations under the note and mortgage. It is undisputed that the defendant/borrower failed to make the payments due and owing commencing on or about May 1, 2014, or any payment due subsequent thereto. After the lender establishes its prima facie claim, the burden

shifts to the defendant to provide proof in admissible form of the existence of a triable issue of fact (see Wells Fargo Bank v. Webster, 61 AD3d 856, 877 NYS2d 200 [2nd Dept. 2009]; Rose v. Levine, 52 AD3d 800, 861 NYS2d 374 [2nd Dept. 2008]).

Defendant's contention:

Defendant opposes the relief sought by plaintiff in its motion for summary judgment upon several grounds. Defendant maintains that the plaintiff has failed to establish that it has standing as the allonge utilized by the plaintiff to assign the note from Patriot One Mortgage Bankers is defective as the allonge was not allegedly executed by Patriot One, but rather by the plaintiff purporting to act as attorney in fact for Patriot One.

As to the issue of whether the predicate ninety (90) day notice, pursuant to RPAPL § 1304, was served upon the defendant, defendant maintains that plaintiff has not satisfactorily established that it delivered the ninety day notice to the defendant nor have they proved compliance with the statute. Defendant asserts that the plaintiff has not established that such notice was sent by either certified or registered mail. Defendant further challenges the print type of the notice and whether the notice was sent to the defendant in a separate envelope from other mailings or notices.

As to the default notice, defendant asserts that said notice was deficient in that it failed to advise the borrower that in the event that the default is not cured that the lender may acquire the property by either foreclosure or sale. Defendant further maintains that the notice should have advised the borrower that they have a right to commence an action against the plaintiff rather than simply defend the action.

Defendant maintains that the plaintiff has failed to show that they have complied with the Truth in Lending Act (TILA) or Regulation Z and that the statute of limitations should not prevent the defendant from utilizing these defenses.

Discussion:

This Court has reviewed the submissions of counsel for the respective parties and considered the arguments presented herein, as well as the applicable law in making its

determination with respect to the underlying mortgage and note, and the relief sought herein.

It appears from the documents submitted that the plaintiff has demonstrated its prima facie entitlement to summary judgment by submitting the mortgage, unpaid note with mortgagor's signature, the assignment of the mortgage and evidence of a default (an affidavit that the borrower defaulted in the payment of its obligations under the note and mortgage) (see Wells Fargo Bank v. Karla, 71 AD3d 1006, 896 NYS2d 681 [2nd Dept. 2010]; Capstone Bus. Credit v. Imperia Family Realty, 71 AD3d 1006, 895 NYS2d 199 [2nd Dept. 2010]; Cochran Inv. v. Jackson, 38 AD3d 704, 705, 834 NYS2d. 198-199 [2nd Dept. 2007]). Here, the defendant/borrower does not deny in his answer that the documents related to the note and mortgage were executed and that the loan proceeds were received by the defendant. In addition, the original mortgage was modified in 2012, which occurred subsequent to the assignment of the mortgage to the plaintiff.

This Court has further reviewed the affirmative defenses set forth by the defendant in his answer, the contention by counsel and their responses, and have addressed several of these arguments below.

This Court is not persuaded by the attempt of the defendant (first affirmative defense) to challenge the standing of the plaintiff. Plaintiff has established through the affidavit of Mimoza Petreska that they were in possession of the note prior to the time that this action was commenced by the plaintiff, and continue to be in possession of the note. The submission of an affidavit on behalf of the plaintiff which established that the plaintiff had physical possession of the note when the action was commenced has been held to be prima facie proof that the plaintiff has standing (see Wells Fargo Bank v. Charlaff, 134 AD3d 1099, 2015 NY Slip Op. 09673 [2nd Dept. 2015]; Aurora Loan Servs., LLC v. Taylor, 25 NY3d 355, 359-360, 12 NYS3d 612 [2015])

A plaintiff has standing in a foreclosure action where it is both the holder of the note and mortgage or assignee or holder of the subject mortgage and the holder or assignee of the underlying note, either by physical delivery or execution of a written assignment (see Wells Fargo Bank, N.A. v. Marchione, 69 AD3d 204, 207-09, 887 NYS2d 615 [2nd Dept. 2009]) and has been in continuous possession of the note and mortgage since prior to the commencement of this proceeding. The physical delivery of a mortgage note to the plaintiff prior to commencement of a foreclosure action may be sufficient to transfer the mortgage obligation and create standing to

foreclose (see Aurora Loan Servs., LLC v. Taylor, 25 NY3d at 361). The mortgage passes with the debt as an inseparable incident (see MERS v. Coakley, 41 AD2d 674, 838 NYS2d 622 [2nd Dept. 2007]).

This Court is satisfied that the plaintiff has complied with all conditions precedent prior to the commencement of this foreclosure action. The plaintiff has submitted evidence that they have acted in accordance with the terms of the note and mortgage as well as complied with the state and federal statutes. RPAPL §1304 provides for service of a notice upon the borrower at least ninety (90) days prior to the commencement of legal action by a lender against a borrower if specific criteria is met and the mortgage qualifies as a home loan. Here, the ninety (90) day foreclosure notice was sent to the defendant, Mr. Smith on June 3, 2014, by regular and certified mail, to the subject property address, 2264 Linden Blvd., Brooklyn, New York. Proof of compliance with the ninety (90) day pre-foreclosure notice was filed with the Banking Department of the New York State Department of Financial Services (see Exhibit "A" annexed to the Notice of Motion). Prior to the commencement of this action, plaintiff also allegedly sent a default notice to the defendant Mr. Smith.

As to any alleged violation of the Truth-in-Lending Act (TILA), this claim would be barred by the statute of limitations. Actions under 15 USC § 1601 are subject to a one year statute of limitations that begins to run when the alleged violation occurs (see Matthews v. New Century Mortgage Corp., 185 F. Supp.2d 874 [2002]). In addition, there has been no proof adduced that the plaintiff violated the statute. TILA requires lenders to disclose, prior to origination of a mortgage loan: (1) the finance charge, as defined by Regulation Z; (2) the amount financed; (3) the annual percentage rate; (4) the total payments and (5) the conditions governing prepayment in addition to providing notice to the borrower of a right of rescission (see 12 CFR § 226.23[b][1]; Beach v. Ocwen Federal Bank, 523 US 410 [1998]; HSBC Bank USA v. Picarelli, 23 Misc.3d 1135(A), 889 NYS2d 882 [Sup. Ct. Qns. County, 2009]). There has been no allegation that the defendant had not acknowledged receipt of the TILA disclosure document, as well as the notice of the right to cancel the transaction which provides for a period of rescission.

Accordingly, this Court cannot find that the defenses of the defendants are supported by substantive arguments and therefore are stricken. Summary judgment shall be granted if upon all

the papers and proof submitted, the cause of action shall be established sufficiently to warrant the Court as a matter of law in directing judgment in favor of any party (see Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Conclusion:

This Court finds that the defendant has failed to raise any defense in his answer sufficient to prevent the Court from awarding summary judgment to the plaintiff. By reason of there being no triable issues of fact in dispute, the defenses of the defendant are stricken and an award of summary judgment to the plaintiff is granted. This Court will appoint a referee to compute the sums due and owing the plaintiff pursuant to the terms of the mortgage in a separate order submitted with this motion.

Enter:

Dated: March 15, 2016
Brooklyn, New York

Hon. Bernard J. Graham, Justice
Supreme Court, Kings County

HON. BERNARD J. GRAHAM

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