

Ocwen Loan Servicing, LLC v Dusenbury
2016 NY Slip Op 30537(U)
March 30, 2016
Supreme Court, Queens County
Docket Number: 706230/2014
Judge: David Elliot
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

OCWEN LOAN SERVICING, LLC,
Plaintiff(s),

Index
No. 706230 2014

- against -

Motion
Date March 11, 2016

ELIZABETH DUSENBURY, et al.,
Defendant(s).

Motion
Cal No. 95

Motion
Seq. No. 1

The following papers read on this motion by plaintiff for an order, *inter alia*, granting it summary judgment against defendants Elizabeth and James Dusenbury (defendants Dusenbury).

	Papers <u>Numbered</u>
Notice of Motion - Affirmation - Exhibits.....	EF17-33
Answering Affirmation - Exhibits.....	EF34-35
Reply.....	EF36-38
Stipulation.....	EF40

By order dated March 17, 2016, this matter was set down for conference on March 30, 2016 to determine whether the motion would be considered as without opposition, inasmuch as the court was not in receipt of “working copies” defendants Dusenbury’s opposition. In lieu of an appearance on that date, the parties were permitted to submit a stipulation agreeing that this court consider the motion as fully submitted. By stipulation dated March 22, 2016, the parties have so stipulated. As such, the motion shall be considered as if it were marked fully submitted.

Plaintiff commenced this action to foreclose a mortgage against real property known as 220-06 113rd Avenue, Laurelton, New York. On June 21, 2007, defendant Elizabeth Dusenbury executed and delivered to Indymac Bank, F.S.B., a Federally Chartered Savings Bank, a note in the principal amount of \$230,000.00. On the same date, defendants Dusenbury executed and delivered a mortgage in the same amount, securing the premises as collateral security for the note. Pursuant to the complaint, electronically filed on September 3, 2014, plaintiff alleges that it is the holder of the note and mortgage, having been delegated the authority to institute the subject mortgage foreclosure action, that defendants Dusenbury failed to comply with the conditions of the note and mortgage by failing to make the payment that became due on February 1, 2013, and each subsequent payment thereafter and that, as a result, plaintiff elected to accelerate the debt by commencing this action.

Plaintiff has demonstrated that defendant Federal Home Loan Mortgage Corporation has been served with process and has failed to answer or otherwise appear herein. Plaintiff has also established that defendants “John Doe #1” through “John Doe #12” were not served with process as they are not necessary parties to this action. As such, that branch of the motion for an order amending the caption to delete reference to defendants “John Doe #1” through “John Doe #12” is granted.

Defendants Dusenbury interposed an answer together with nine affirmative defenses, including lack of standing and noncompliance with RPAPL § 1304. The matter remained in the Foreclosure Conference Part for approximately nine months until it was released on September 10, 2015, as “defendants have decided that they no longer wish to pursue a modification” (Cimino, CA-R). Plaintiff was directed to file an application for an order of reference by May 31, 2016. Accordingly, plaintiff now moves for summary judgment and related relief. Defendants Dusenbury oppose the motion.

It is well established that the proponent of a summary judgment motion “must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). In a residential mortgage foreclosure action, a plaintiff establishes its *prima facie* entitlement to judgment as a matter of law by producing the mortgage and the unpaid note, and evidence of the default (*see Midfirst Bank v Agho*, 121 AD3d 343 [2014]). Where the plaintiff is not the original lender and standing is at issue, the plaintiff seeking summary judgment must also submit evidence that it received both the mortgage and note by a proper assignment, which can be established by the production of a written assignment of the note (*see Aurora Loan Servs., LLC v Taylor*, 114 AD3d 627 [2014], *affd* 25 NY3d 355 [2015]; *see Homecomings Fin., LLC v Guldi*, 108 AD3d 506 [2013]), or by physical delivery to the plaintiff of the note (*see Kondaur Capital Corp. v McCary*, 115 AD3d 649 [2014];

Aurora Loan Servs., LLC v Weisblum, 85 AD3d 95 [2011]). In addition, the plaintiff must make a *prima facie* showing of strict compliance with RPAPL § 1304, which is a condition precedent to the commencement of the foreclosure action (*see Aurora Loan Services, LLC v Weisblum*, 85 AD3d at 107). The failure to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Here, plaintiff, as holder of the note, has established that it has standing to commence the within action by virtue of: production of the aforementioned note – containing a blank indorsement – and corresponding mortgage; the affidavit of Morgan Battle Ames, Contract Management Coordinator for plaintiff, wherein which she indicates that plaintiff, directly or through its agent/custodian, received physical delivery of the original note on September 2, 2014, which is one day prior to commencement, and continues to hold same; and the fact that the endorsed note was annexed to the complaint herein¹ (*see Deutsche Bank Nat. Trust Co. v Leigh*, __AD3d__, 2016 NY Sip Op 01635 [2016]; *Bank of N.Y. Mellon v Visconti*, 126 AD3d 950 [2016]; *LNV Corp. v Francois*, 134 AD3d 1071 [2015]; *Citimortgage, Inc. v Goldberg*, 134 AD3d 880 [2015]; *Nationstar Mtge., LLC v Catizone*, 127 AD3d 1151 [2015]).

In opposition to this showing, defendants Dusenbury have failed to raise a triable issue of fact. To the extent they aver that Ms. Ames’ affidavit “lacks specific factual details (i.e., who, what, where and how),” the Court of Appeals has stated – when confronted with a similar affidavit of fact – that, “[a]lthough the better practice would have been for [plaintiff] to state how it came into possession of the note in its affidavit in order to clarify the situation completely, we conclude that, under the circumstances of this case, the court did not err in granting summary judgment to [plaintiff]” (*Aurora Loan Servs., LLC*, 25 NY3d at 367). Given the circumstances presented in this case, this court, too, finds that plaintiff has sufficiently demonstrated its standing to commence this action.

Further, any challenge to the written assignment presented on the motion is irrelevant since plaintiff demonstrated its standing by physical delivery of the note prior to commencement of the action (*see Wells Fargo Bank, N.A. v Charlaff*, 134 AD3d 1099 [2015]).

With respect to RPAPL § 1304, however, plaintiff has failed to meet its *prima facie* burden of establishing “strict compliance” with the statute, since plaintiff has failed to

1. The endorsed note, mortgage, and assignment of mortgage were also annexed to the Certificate of Merit (CPLR § 3012-b), same also having been e-filed along with the summons and complaint herein.

produce an affidavit of service of the requisite 90-day notice (*see Bank of N.Y. Mellon v Aquino*, 131 AD3d 1186 [2015]; *Flagstar Bank, FSB v Anderson*, 129 AD3d 665 [2015]; *Wells Fargo Bank, N.A. v Burke*, 125 AD3d 765 [2015]; *Deutsche Bank Nat. Trust Co. v Spanos*, 102 AD3d 909 [2013]; *U.S. Bank N.A. v Tate*, 102 AD3d 859 [2013]).

Ms. Ames' affidavit is not based upon her personal knowledge of the actual mailings, the date of which same were mailed she does not specify. To the extent it is based upon her knowledge obtained from business records, such affidavit, even when considered with the annexed "true copies" of the 90-day notices,² is insufficient to establish what manner of office practice or procedure was used by plaintiff to ensure that mailed items were always properly addressed and mailed by registered or certified and first class mail (*see Frankel v Citicorp Ins. Services, Inc.*, 80 AD3d 280 [2010]; *Residential Holding Corp. v Scottsdale Ins. Co.*, 286 AD2d 679 [2001]; *Smith v Palmeri*, 103 AD2d 739 [1984]; *see also Lindsay v Pasternack Tilker Ziegler Walsh Stanton & Romano LLP*, 129 AD3d 790 [2015]; *Wells Fargo Bank, N.A. v Tessler*, 2016 NY Misc LEXIS 636 [Sup Ct, Kings County 2016]).

It would appear that the Second Department agrees that compliance with RPAPL § 1304 requires, if not an affidavit of service, an affidavit which at least addresses the "standard business procedure regarding all notices to the borrower(s)" (*Citimortgage, Inc. v Espinal*, 134 AD3d 876 [2015]). *Espinal*, decided on December 16, 2015, determined that the affiant therein, who produced the postal service tracking number for the notice, a copy of the plaintiff's correspondence log, and explained that it was standard business procedure regarding notices to borrowers to enter mailing information in the correspondence log, sufficiently established proper service pursuant to RPAPL § 1304 (*id.* at 879). In reaching that conclusion, the Court cited to, *inter alia*, *Bossuk v Steinberg* (58 NY2d 916 [1983]) and *Nassau Ins. Co. v Murray* (46 NY2d 828 [1978]), which cases stand for the proposition that evidence of office practice and procedure *specifically* with respect to addressing and mailing of an item is sufficient to demonstrate actual mailing of that item. That evidence is not present here.

It is further noted, and as pointed out by counsel in opposition to this branch of the motion, that a question of fact exists as to whether plaintiff indeed complied with RPAPL § 1304 given the fact that the Proof of Filing Statement annexed as an exhibit to the motion, so as to demonstrate compliance with RPAPL § 1306, indicates that the mailing was made on May 13, 2015 (post-commencement). However, the 90-day notice annexed to the motion is dated January 3, 2014. While in reply to the opposition, plaintiff states that, due to

2. Annexing a copy of the notice does not establish proof of proper mailing of same (*HSBC Mtge. Corp. (USA) v Gerber*, 100 AD3d 966 [2012]).

ministerial error, it included the filing confirmation for a previously sent 90-day notice and, as such, it annexes the correct notice for mailing on January 3, 2014, same does not eliminate all issues of fact as to compliance with the statute since, *inter alia*, the filing statement does not establish proof of actual mailing.

With respect to that branch of the motion by plaintiff to strike defendants Dusenbury's affirmative defenses raised in their answer, plaintiff bears the burden of demonstrating that the affirmative defenses are without merit as a matter of law (*Greco v Christoffersen*, 70AD3d 769 [2010], quoting *Vita v New York Waste Servs., LLC*, 34AD3d 559 [2006]).

As to the first defense sounding in failure to state a cause of action for foreclosure, it appears from the face of the complaint that same properly states a cause of action to foreclose the mortgage. However, to the extent plaintiff seeks dismissal of that defense, same is denied for the reasons set forth in, *inter alia*, *Mazzei v Kyriacou* (98 AD3d 1088 [2012]) and *Butler v Catinella* (58 AD3d 145 [2008]).

As to the second affirmative defense alleging lack of subject matter jurisdiction, plaintiff is entitled to dismissal of this defense since this court "indisputably" has the authority to adjudicate mortgage foreclosure actions (*Wells Fargo Bank Minnesota, Natl. Assn. v Mastropaolo*, 42 AD3d 239 [2007]).

As to the third affirmative defense alleging lack of standing, plaintiff is entitled to dismissal of this defense for the reasons discussed, *supra*.

The fourth affirmative defense alleges that plaintiff failed to comply with RPAPL §§ 1303, 1304, and 1306. With respect to RPAPL § 1303, plaintiff submitted *prima facie* evidence of proper service of the RPAPL § 1303 notice upon defendants Dusenbury by virtue of the affidavits of service of Alan S. Feldman, which stated that he served on each defendant a copy of said notice, which was printed on a colored piece of paper, which color differed from that of the color of the summons and complaint, and the notice was in bold, fourteen-point type, with the title thereof in bold, twenty-point type, all in accordance with the statute (RPAPL § 1303 [2]; see *Aurora Loan Servs., LLC*, 85 AD3d at 102-103). Defendants Dusenbury, who did not submit affidavits in opposition, failed to rebut this *prima facie* showing.

However, for the reasons set forth, *supra*, plaintiff is not entitled to dismissal of the portion of this defense which alleges noncompliance with RPAPL §§ 1304 and 1306.

As to the fifth affirmative defense which disputes the amount owed, same is not a valid defense to a foreclosure action; any such dispute is, rather an issue to be presented to

a referee whose role it is to calculate the amount due and owing under the loan documents (RPAPL § 1321). As such, plaintiff is entitled to dismissal of this defense.

As to the sixth affirmative defense alleging that plaintiff did not possess the loan documents it swore it reviewed in its pleadings, and further requesting the production of original note and mortgage, this defense is without merit. Plaintiff has indicated that defendants Dusenbury have not served any demands for documents. Further, defendants Dusenbury do not cite to any legal authority which would require production of the original note in this context (*see Aurora Loan Servs., LLC*, 25 NY3d at 366).

As to the seventh affirmative defenses alleging laches, waiver, estoppel and ratification, plaintiff is entitled to dismissal of this defense as same amounts to bare legal conclusions.

As to the eighth affirmative defense alleging failure to name a necessary party, same does not prevent plaintiff from obtaining a judgment herein; rather, that party's rights will simply be left unaffected by any judgment rendered herein (*see 1426 46 St., LLC v Klein*, 60 AD3d 740 [2009]; *Board of Mgrs. of Parkchester N. Condominium v Alaska Seaboard Partners Ltd. Partnership*, 37 AD3d 332 [2007]). Plaintiff is entitled to dismissal of this defense.

As to the ninth affirmative defense which reserves the right to assert additional defenses, same is conclusory and warrants dismissal (*see e.g. BP3 Capital LLC v Yosupov*, 29 Misc 3d 1239 [A] [Sup Ct, Queens County 2010]).

To the extent plaintiff seeks a default judgment against defendant Federal Home Loan Mortgage Corporation, ostensibly on its second and third causes of action, same is denied. Plaintiff has not addressed these causes of action in its motion. Neither has plaintiff submitted "proof of the facts constituting the claim" (CPLR § 3215 [f]). Finally, though not addressed on this motion, it is noted that, to the extent plaintiff seeks reformation of the mortgage since the one filed with the City Register contained a partially incorrect legal description, same will not be granted absent presentment of the subject deed containing the correct description of the premises.

Accordingly, the branches of plaintiff's motion for an order granting it summary judgment against defendants Dusenbury and appointing a referee to compute are denied. The branch of the motion for an order dismissing their affirmative defenses is granted only to the extent that their second, third, portion of the fourth alleging noncompliance with RPAPL § 1303, fifth, sixth, seventh, eighth, and ninth affirmative defenses are dismissed. The branch of the motion for amendment of the caption is granted; the caption is amended by deleting

“John Doe #1” through “John Doe #12.”

Dated: March 30, 2016

J.S.C.