

U.S. Bank N.A. v Pelaez
2016 NY Slip Op 30759(U)
April 27, 2016
Supreme Court, Queens County
Docket Number: 70811/2014
Judge: Robert J. McDonald
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SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. ROBERT J. McDONALD
Justice

IAS PART 34

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U.S. BANK NATIONAL ASSOCIATION AS
TRUSTEE FOR MERRILL LYNCH FIRST
FRANKLIN MORTGAGE LOAN TRUST, MORTGAGE
LOAN ASSET-BACKED CERTIFICATES, SERIES
2007-5,

Index No.: 70811/2014

Motion Date: 4/18/16

Motion No.: 165

Plaintiff,

Motion Seq.: 1

- against -

ISOLINA PELAEZ, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, NEW YORK
CITY TRANSIT ADJUDICATION BUREAU, NEW
YORK STATE DEPARTMENT OF TAXATION AND
FINANCE,

JOHN DOE (being fictitious, the names
unknown to Plaintiff intended to be
tenants, occupants, persons or
corporations having or claiming an
interest in or lien upon the property
described in the complaint or their
heirs at law, distributees, executors,
administrators, trustees, guardians,
assignees, creditors or successors.)

Defendants.

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The following EF papers numbered 24-47 read on this motion by
plaintiff for an Order granting summary judgment pursuant to CPLR
3212, dismissing the defenses asserted in defendant Isolina
Pelaez's answer, and treating the answer as a limited notice of
appearance; appointing a referee; amending the caption; and
deeming all non-appearing and non-answering defendants to be in
default:

	<u>Papers Numbered</u>
Notice of Motion-Affidavits-Memo. of Law-Exhibits....	EF 24 - 43
Affirmation in Opposition-Exhibits.....	EF 44
Affirmation in Reply-Exhibits.....	EF 45 - 47

This is an action to foreclose a mortgage encumbering

property located at 182-37 89th Avenue, Hollis, New York 11423.

Based on the record before the Court, on July 11, 2007, defendant obtained a loan from First Franklin Financial Corp. in the principal amount of \$456,000.00. Plaintiff asserts that it is the holder of the note and mortgage, and defendant defaulted pursuant to the terms of the note and mortgage when defendant failed to make the monthly mortgage payments beginning on December 1, 2011 and continuing thereafter.

Plaintiff subsequently accelerated the mortgage and commenced this action by filing a lis pendens and summons and complaint on October 29, 2014. Plaintiff submits affidavits of service on all defendants, including occupant Mr. Pelaez (first name refused). Defendant borrower served an answer on March 6, 2015. All other defendants are in default.

This matter was released from the residential foreclosure settlement conference part on September 28, 2015 when defendant failed to submit a full and complete loan modification. Plaintiff now seeks an order of reference.

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 the 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 the affirmation of counsel, Tracy M. Fournier, Esq.; a copy of the residential foreclosure conference order; an affidavit from April Martin, a Document Execution Specialist for Nationstar Mortgage LLC, the servicer for plaintiff; a copy of the limited power of attorney authorizing Nationstar Mortgage LLC to act on plaintiff's behalf; a copy of the certificate of merit pursuant to CPLR 3012-b; copies of the 90-day pre-foreclosure notices and notice of default; a copy of the pleadings; copies of the affidavits of service upon all defendants; and a memorandum of law.

In the affidavit of merit, April Martin states that based upon a personal review of plaintiff's business records, Nationstar Mortgage LLC, as agent for plaintiff, has physical

possession of the original note endorsed in blank. She states that the original note endorsed in blank was transferred to plaintiff prior to commencement of this action and plaintiff continues to hold the note. She affirms that defendant is in default under the terms and conditions of the note and mortgage because the December 1, 2011 payment and subsequent payments were not made. Ms. Martin affirms that 90-day pre-foreclosure notices and a demand letter were sent to defendant.

Plaintiff contends that it has made a prima facie showing that it is entitled to summary judgment based upon its submission of the note endorsed in blank, mortgage, and Ms. Martin's affidavit evidencing defendant's failure to make the contractually required loan payments.

In opposition, defendant submits an affirmation from counsel, Alesha N. Powell, Esq., contending that plaintiff lacks standing, plaintiff failed to comply with RPAPL 1304, and plaintiff failed to state a claim pursuant to CPLR 3211(a)(7).

"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 a copy of the note endorsed in blank and the affidavit from Ms. Martin stating that based upon a personal review of the servicer's records plaintiff is in possession of the note, is sufficient to establish standing to commence the action (see 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]).

Moreover, since the holder of the note is deemed the owner of the underlying mortgage loan with standing to foreclose, and as the mortgage passes as an incident to the note, the validity of any assignments is irrelevant to the issue of plaintiff's standing (see Wells Fargo Bank, N.A. v Charlaff, 134 AD3d 1099 [2d Dept. 2015]; Aurora Loan Services, LLC v Taylor, 114 AD3d 627 [2d Dept. 2014]).

Defendant's allegation that the complaint is insufficient and fails to state a cause of action upon which relief can be granted is meritless. Plaintiff complied with RPAPL 1302(a)(1) in the first paragraph of the complaint by stating that plaintiff is the holder of the note and mortgage, and thus, has standing to commence the foreclosure action. Additionally, the complaint alleges that there is a mortgage, there is an unpaid note, and that defendant has defaulted.

Lastly, defendant alleges that plaintiff failed to comply with RPAPL 13014. 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]).

Plaintiff submits Ms. Martin's affidavit to demonstrate compliance with RPAPL 1304. Ms. Martin affirms that plaintiff sent the 90-day notice by certified and first class mail to defendant at both the mortgaged property and her last known mailing address, which is her current attorney's address. Copies of the notices are annexed to the motion papers, are dated October 11, 2014, and are addressed to defendant at the mortgaged premises and at her last known mailing address. As Ms. Martin has 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.

The remainder of defendant's opposition is insufficient to

raise a question of fact. As defendant has failed to raise a material issue of fact, 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 the affirmative defenses contained in defendants' answer are stricken. Plaintiff's application for the appointment of a referee to compute the amounts due under the subject mortgage is also granted and the caption shall be amended as proposed.

Order of Reference signed contemporaneously herewith.

Dated: April 27, 2016
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.