

HSBC Bank USA, N.A. v Rodney

2016 NY Slip Op 30761(U)

April 12, 2016

Supreme Court, Queens County

Docket Number: 705120/2015

Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

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

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HSBC BANK USA, NATIONAL ASSOCIATION AS
TRUSTEE FOR NOMURA ASSET ACCEPTANCE
CORPORATION, MORTGAGE PASS-THROUGH
CERTIFICATES, SERIES 2007-1,

Index No.: 705120/2015

Motion Date: 3/28/16

Motion No.: 67

Motion Seq.: 1

Plaintiff,

- against -

GWENDOLYN RODNEY, PEOPLE OF THE STATE
OF NEW YORK, GE MONEY BANK, NEW YORK
CITY ENVIRONMENTAL CONTROL BOARD,

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.

- - - - - x

The following papers numbered 1 to 15 read on this motion by plaintiff for an Order appointing a Referee to ascertain the amount due plaintiff and to determine whether the mortgaged premises can be sold in parcels, amending the caption to substitute Neile Rodney as a party defendant in place of "John Doe", and deeming all non-appearing and non-answering defendants to be in default; and on this cross-motion by defendant Gwendolyn Rodney (defendant) for an Order denying plaintiff's motion; dismissing the action for failing to sufficiently establish service of notice pursuant to RPAPL 1304, and granting defendant attorney fees:

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1 - 4
Notice of Cross-Motion-Affidavits-Exhibits.....	5 - 9
Affirmation in Opposition to Cross-Motion-Exhibits.....	10 - 12
Reply in Further Support of Plaintiff's Motion-Exhibits...	13 - 15

This is an action to foreclose a mortgage encumbering real property located at 148-20 115th Avenue, Jamaica, NY 11436.

Based on the record before this Court, on November 17, 2006, defendant obtained a loan from GFI Mortgage Bankers, Inc. in the principal amount of \$336,000.00, secured by a mortgage encumbering the subject premises. Plaintiff alleges that it is the holder of the mortgage and underlying obligation and that defendant defaulted under the terms of the note and mortgage by failing to make the monthly installment payment due on December 1, 2014. As a consequence, plaintiff elected to accelerate the entire mortgage debt.

On May 18, 2015, plaintiff commenced this action by filing a summons and complaint and notice of pendency. All defendants were duly served and failed to appear or otherwise move and their time to do so has expired. Gwendolyn Rodney and the People of the State of New York appeared by notice of appearance, but have not moved with respect to the complaint. This matter was released from the Residential Foreclosure Conference Part on October 27, 2015. Plaintiff now seeks an Order of Reference.

Entitlement to a judgment of foreclosure is established, as a matter of law, where the plaintiff produces the mortgage, the unpaid note, and evidence of the default (see Emigrant Mtge. Co., Inc. v Beckerman, 105 AD3d 895 [2d Dept. 2013]; Solomon v Burden, 104 AD3d 839 [2d Dept. 2013]; Baron Assoc., LLC v Garcia Group Enters., Inc., 96 AD3d 793 [2d Dept. 2012]).

In support of the motion, plaintiff submits an affirmation from counsel, Amanda Rudroff-Lavis, Esq.; a copy of the residential foreclosure conference order; an affidavit of merit from Stacey Daniels, Vice President Loan Documentation of Wells Fargo, N.A., plaintiff's servicer; a copy of the power of attorney; copies of the note, mortgage, assignments of mortgage, and loan modification agreement; copies of the notice of default and 90-day notice; copies of the notice of pendency, RPAPL 1303 notice, summons and complaint; copies of the affidavits of service; and a copy of the notices of appearance.

In her affidavit, based on her personal knowledge after a review of plaintiff's business records, Ms. Daniels affirms that there is a default under the terms of the note and mortgage as the December 1, 2014 payment and subsequent payments were not made. She further affirms that the 90 day pre-foreclosure notice and notice of default were mailed to defendant.

A Lost Note Affidavit has also been submitted by Kristoffer Michael Pumarlo, a Vice President Loan Documentation of plaintiff's servicer. Mr. Pumarlo affirms that the original note has been inadvertently lost, misplaced or destroyed. He further affirms that a diligent search has been made, but the note has not been found. A copy of the note is attached to the affidavit.

It is well settled that a plaintiff in a mortgage foreclosure action establishes a prima facie case of entitlement to foreclose through submission of proof of the existence of the underlying note, mortgage and default in payment after due demand (see Witelson v Jamaica Estates Holding Corp. I, 40 AD3d 284 [1st Dept. 2007]; Marculescu v Ouanez, 27 AD3d 701 [2d Dept. 2006]; US. Bank Trust National Assoc. v Butti, 16 AD3d 408 [2d Dept. 2005]; Layden v Boccio, 253 AD2d 540 [2d Dept. 1998]; State Mortgage Agency v Lang, 250 AD2d 595 [2d Dept. 1998]). Plaintiff demonstrated proper service of the summons and complaint. Plaintiff also demonstrated through admissible evidence that it was the assignee of the note and mortgage prior to commencement of this action. Plaintiff annexed an assignment from the original lender to Nomura Credit and Capital, Inc. dated November 17, 2006 and recorded on December 19, 2007 and an assignment from Nomura Credit and Capital, Inc. to plaintiff dated January 6, 2012 and recorded on February 3, 2012. Thereafter, a loan modification was entered into between defendant and plaintiff on December 28, 2013.

Defendant submits her own affidavit in opposition to plaintiff's motion and cross-moves to dismiss the action on the grounds that she never received a 90 day pre-foreclosure notice pursuant to RPAPL 1304. Counsel for defendant, Michael J. Ciaravino, Esq., also submits an affirmation stating that plaintiff has failed to comply with RPAPL 1304, which is a condition precedent to commencement of a foreclosure action (citing Aurora Loans, LLC v Weisblum, 85 AD3d 95 [2d Dept. 2011]). Defendant also contends that the request to amend the case caption is improper as Neile Rodney does not reside at the subject premises.

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. Daniels affirms that a 90 day pre-foreclosure notice was sent to defendant by certified mail and also by first-class mail. A copy of the notice dated August 21, 2014 is attached to the motion papers and is addressed to defendant at the mortgaged premises. Plaintiff has also annexed a copy of the 90 day notice certified mailing green slip returned by the U.S. Postal Service which contains defendant’s signature. Proof of filing with the New York State Banking Department is also annexed. As Ms. Daniels 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. Moreover, defendant merely submits an affidavit stating that she never received the notice. A conclusory denial of receipt is insufficient to establish that plaintiff failed to comply with RPAPL 1304 (see Deutsche Bank Natl. Trust Co. v Pietranico, 102 AD2d 859 [2d Dept. 2013]; U.S. Bank N.A. v Tate, 102 AD3d 859 [2d Dept. 2013]; Aurora Loan Services, LLC v Weisblum, 85 AD3d 95 [2d Dept. 2011]).

Regarding plaintiff’s request to amend the caption to substitute Neile Rodney in place of “John Doe”, the process server’s affidavit states that Neile Rodney was discovered at the subject property. Defendant merely argues that Neile Rodney does not reside at the property. As such, plaintiff is entitled to amend the caption to list a John Doe defendant found at the subject property.

The remainder of defendant’s opposition is insufficient to create an issue of fact. Accordingly, and based on the foregoing, it is hereby

ORDERED, that plaintiff's motion is granted; and it is further

ORDERED, that defendant Gwendolyn Rodney's cross-motion is denied.

The Order of Reference has been signed simultaneously herewith.

Dated: April 12, 2016
Long Island City, N.Y.

ROBERT J. McDONALD
J.S.C.