U.S. Bank Natl. Assoc. v Beymer
2016 NY Slip Op 31589(U)
August 15, 2016
Supreme Court, New York County
Docket Number: 850236/2013
Judge: Gerald Lebovits

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART 7

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR J.P. MORGAN MORTGAGETRUST 2006-A6,

Plaintiff,

- against -

JOHN M. BEYMER A/K/A JOHN BEYMER, BARBARA BRUNO, BOARD OF MANAGERS OF 50 PINE STREET CONDOMINIUM - 50 PINE STREET ASSOCIATES, LLC, CUMIS INSURANCE SOCIETY, INC., BELLEVUE HOSPITAL CENTER, CITY OF NEW YORK DEPARTMENT OF TRANSPORTATION PARKING VIOLATIONS BUREAU, and JOHN DOE and JANE DOE #1 through #7, the last seven (7) names being fictitious and unknown to the plaintiff, the person or parties intended being the tenants, occupants, persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the Complaint,

Defendants.

Index No.: 850236/2013
DECISION/ORDER
Motion Seq. No. 1

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing plaintiff's motion for summary judgment and defendants John M. Beymer and Barbara Bruno's cross-motion to dismiss.

Papers	**Numbered**
Plaintiff's Notice of Motion	1
Defendants' Affirmation in Opposition	2
Defendants Beymer and Bruno's Affidavit in Opposition	3
Defendants Beymer and Bruno's Notice of Cross-Motion	4
Defendants Beymer and Bruno's Affidavit in Support of Motion	5
Plaintiff's Affirmation in Opposition to Cross-Motion	6

Rosicki, Rosicki & Associates, Plainview (Melissa S. Kubit, Esq. of counsel), for plaintiff.
Sanders, Gutman & Brodie, P.C., Brooklyn (Jordan Brodie of counsel), for defendants John Beymer and Barbara Bruno.

Gerald Lebovits, J.

Plaintiff U.S. Bank National Association, as Trustee for J.P. Morgan MortgageTrust 2006-A6 moves for the following relief: (1) pursuant to CPLR 3212 for summary judgment against defendants, John M. Beymer a/k/a John Beymer (Beymer) and Barbara Bruno (Bruno);

(2) pursuant to CPLR 3215 for a default judgment against defendants Board of Managers of 50 Pine Street Condominium - 50 Pine Street Associates, LLC; Cumis Insurance Society, Inc.; Bellevue Hospital Center; and City of New York Department of Transportation Parking Violations Bureau; (3) for the appointment of a referee to compute the total sums due to plaintiff under RPAPL 1321; and (4) to amend the caption, removing defendants "JOHN DOE AND JANE DOE #1 through #7."

Defendants Beymer and Bruno cross-move to dismiss the complaint.

In support of its motion, plaintiff submits the affidavit of Sean M. Broeker, a vice president of JPMorgan Chase Bank, National Association (Chase), the loan servicer for plaintiff. Broeker explains that Beymer signed a note dated August 3, 2006, in the principal amount of $980,000 (Note), which was secured by a mortgage (Mortgage) on a property located at 50 Pine Street, Unit 12S, New York, New York 10005 (Premises). He avers that, as a mortgage servicer, Chase collects payments from Beymer and maintains up-to-date electronic records concerning the loans that it services in its electronic record-keeping system. He has access to Chase's business records, including the business records relating to Beymer's loan.

Broeker states that Beymer failed to make the payment that was due for July 1, 2008, and failed to make subsequent payments to bring the loan current; the entire loan balance is now due to plaintiff. Plaintiff claims that as of January 14, 2014, it is entitled to $1,338,765.67 allegedly due under the loan documents, exclusive of attorney fees and costs in this action. Broeker states further that his review of the records maintained by Chase reveals the following information regarding plaintiff's sending of the 90-day pre-foreclosure notice (PFN): a PFN dated March 25, 2013, was sent to "BEYMER, JOHN M" at the Premises (the address of the property secured by the Mortgage), and to the last known address, "26 Court Street, C/O Jordan Brodie, Brooklyn, NY 11242," by certified and first class mail.

According to plaintiff, it served Beymer and Bruno, and the other defendants — Board of Managers of 50 Pine Street Condominium - 50 Pine Street Associates, LLC, Cumis Insurance Society, Inc., Bellevue Hospital Center, City of New York Department of Transportation Parking Violations Bureau — with a copy of the summons and complaint, together with the required notice under RPAPL 1303. The notice was on blue colored paper and met all other statutory requirements. Only Beymer and Bruno answered, but Bellevue Hospital Center made an appearance (affirmation of Charles W. Marino, Esq., ¶¶ 17-19; exhibits G, H, and I to Marino affirmation).

Plaintiff also states that defendants "JOHN DOE AND JANE DOE #1 through #7" were not served with a copy of the summons and complaint; in any event, plaintiff argues that they are not necessary parties. Plaintiff requests that this action be discontinued as against them and that the caption be amended accordingly. Plaintiff also notes that a settlement conference pursuant to CPLR 3408 was not held because defendants do not reside at the Premises.

The complaint provides that the Note and Mortgage were transferred to plaintiff under an "Assignment of Mortgage," recorded in the New York County Clerk's Office on August 14, 2008 (complaint, ¶ 6; Marino affirmation, ¶ 15). Plaintiff argues that it has established a prima

facie entitlement to summary judgment because it produced the Mortgage, the unpaid Note, and evidence of defendants' default.

In opposition, defendants contend that Chase failed properly to serve the predicate notices, and that Chase's mailing of the notices to the Premises in 2013 was improper because Chase was notified in 2011 of defendants' residence in California. They claim that both defendants Beymer and Bruno lived at the Premises until the Spring of 2007, when they moved to California, and have resided in California ever since. They allege that, beginning in 2007 and continuing to the present, they communicated with Chase to modify the Mortgage. In February 2014, a Chase representative contacted them seeking additional information concerning their then-pending application for a modification of the Mortgage. They allege that throughout 2011, they notified Chase on multiple occasions of their new address in California; Chase communicated with them in writing at their old and current address in California. They say they were served with the summons and complaint at their residence in California, thus demonstrating that Chase was aware of their address in California.

Defendants contend that the mailings to addresses other than their residence address were improper and do not comply with the terms of the Note and Mortgage. In addition to the 30-day notice to cure set forth in the Note, the Mortgage provides at paragraph 22 that an additional notice must be served before demanding immediate payment of all sums due under the Note and Mortgage. They argue that no notice of default under paragraph 22 of the Mortgage was ever served upon them before Chase commenced this action. Thus, they argue that Chase failed before commencing this action to comply with the notice requirement set forth in the Mortgage.

Defendants also argue that Chase mailed the notice pursuant to RPAPL 1304 to the same improper addresses even though Chase knew that neither of those addresses was defendants' last known address.

Also, defendants argue that the complaint fails to allege that no other action is pending for the same relief as is sought in this action. In 2008, an action was commenced in this court under Index Number 110513/08 (the 2008 Action) seeking the same relief sought in this action. At the time of the commencement of this action in 2013, the 2008 Action was still pending and had not been discontinued. They assert that the 2008 Action was not discontinued until January 2014, after this action was commenced in 2013.

In its reply papers, plaintiff argues that defendants' arguments do not address the merits of the case but are merely procedural. Although defendants' counsel argues in paragraph 15 of its affirmation that plaintiff never asserted possession of the underlying Note (which is endorsed in blank), the complaint recites that "plaintiff is now and was at the commencement of the within action the sole, true and lawful owner of the said Note and Mortgage securing the same" (complaint, ¶18). Moreover, plaintiff contends, defendants have not been subjected to simultaneous or duplicative and vexatious litigation because the 2008 Action has been inactive since 2008 and has since been discontinued.

Determination

Plaintiff's motion is decided as follows: (1) summary judgment against Beymer and Bruno is denied; (2) judgment against defendants Board of Managers of 50 Pine Street Condominium - 50 Pine Street Associates, LLC, Cumis Insurance Society, Inc., Bellevue Hospital Center, and City of New York Department of Transportation Parking Violations Bureau is granted; (3) appointing a referee to compute the amount due plaintiff under RPAPL 1321 is denied; and (4) amending the caption to remove defendants "JOHN DOE AND JANE DOE #1 through #7" is granted.

Defendants' cross-motion for dismissal of the complaint is granted.

Discussion

In a foreclosure action, plaintiff has the burden to show that it has satisfied the condition precedent that it "proper[ly] serv[ed] . . . RPAPL 1304 notice on the borrower or borrowers." (*Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 106 [2d Dept 2011].) RPAPL 1304 is mandatory and contains specific requirements: "Content, timing, and service provisions of RPAPL 1304 are very specific and couched in mandatory language" (*Aurora Loan Servs., LLC*, 85 AD3d at 103-104.)

Defendants argue that plaintiff failed to comply with RPAPL 1304 because they do not reside in the Premises and that the notices were not sent to their last known address. In response, plaintiff argues that it was required to send the notice only to the Premises, even though it also sent it to the last known address (see affirmation in opposition to cross motion at ¶ 4). This argument is meritless. RPAPL 1304 (2) provides, in relevant part:

> "Such notice shall be sent by such lender, assignee or mortgage loan servicer to the borrower, by registered or certified mail and also by first-class mail *to the last known address of the borrower, and if different, to the residence that is the subject of the mortgage*. Such notice shall be sent by the lender, assignee or mortgage loan servicer in a separate envelope from any other mailing or notice. Notice is considered given as of the date it is mailed" (emphasis added).

The plain language of the statute requires that if the borrower is not residing at the place that is the subject of the mortgage, then the notice must be sent to two places: the last known address of the borrower and the "residence that is the subject of the mortgage." The statute does not use the word "or." Statutory notice under RPAPL 1304 (2) would be meaningless if a plaintiff were required to mail notice only to the residence that is the subject of the mortgage when the borrower no longer resides at the residence.

In any event, plaintiff states that it was also sent to the last known address which, according to plaintiff, is:

"JOHN M BEYMER
26 COURT ST
C/O JORDAN BRODIE
BROOKLYN, NY 11242-0000"

Plaintiff does not explain the basis for its assertion that this is the last known address of defendants. Instead, plaintiff states: "Defense counsel admits in paragraph 6 of his Affirmation to having received the pre-foreclosure Notices at a secondary Address which had been provided to the plaintiff by defendants" (see affirmation in opposition to cross motion at ¶ 5). Defendants' counsel, however, does not make that admission. Also, no support exists for plaintiff's assertion that the notice was sent to a "secondary Address which had been provided to the plaintiff by defendants." Furthermore, even if defendants had become aware of the notice, because of the mailing to the "secondary" address, the lack of prejudice is not a factor that would excuse an improper mailing (*See Aurora Loan Servs.*, 85 AD3d at 107.)

Defendants assert that plaintiff was aware that they were residing in California, and they support their assertion with documentary evidence (see exhibit 1 to defendants' joint aff in opposition). As discussed above, defendants claim that since the Spring of 2007, they have resided in California. They also explain their ongoing communications with Chase concerning a modification of the Mortgage and that Chase was aware of their California residency. They also state that, throughout 2011, they notified Chase on multiple occasions of their new address in California. Although defendants do not provide proof to support this assertion, they provide evidence that Chase was aware of their residency in California. Defendants attach several letters, addressed to their California residences, that they received from Chase (Defendants' Affirmation in Opposition, Exhibit 1.) They question why plaintiff mailed a copy of the notice to them at their attorney's office given that they never designated that office as an address for mailing of notices. Plaintiff does not address this issue.

Broeker's affidavit is insufficient to establish that plaintiff complied with RPAPL 1304. Broeker does not explain whether he personally mailed the notices to defendants. Broeker does not show proof of mailing. And, in any event, if he did not personally mail the notices, Broeker does not establish plaintiff's office practices in mailing notices under RPAPL 1304. Nor does Broeker explain how plaintiff knew that the Court Street address was defendants' last known address. Plaintiff has not established its prima facie case to entitle it to summary judgment.

Defendants have demonstrated that the complaint be dismissed. They submit three letters that plaintiff sent to defendant John Beymer in 2011 addressed to two California addresses: (1) 109 Fleet Street, Marina Del Ray, CA 90292-5736; and (2) 6744 Clybourn Ave Apt 237, North Hollywood, CA 91606. It is unclear where in California defendants reside. In any event, defendants have demonstrated that plaintiff had notice of defendants' California residence since 2011.

The court notes that plaintiff knew that defendants' last known address was in California in 2013. In 2013, plaintiff sent defendants its motion to discontinue the 2008 action. Plaintiff sent the motion to the Marina Del Ray address (plaintiff's Affirmation in Opposition to Cross-Motion, Exhibit E).

Because plaintiff failed to tender sufficient evidence demonstrating strict compliance with RPAPL 1304 but defendants establish a prima facie entitlement to judgment as a matter of law on their cross-motion, the complaint must be dismissed insofar as it is asserted against them. (*Wells Fargo Bank, N.A. v Eisler*, 118 AD3d 982, 982-983 [2d Dept 2014]; *Hudson City Sav. Bank v DePasquale*, 113 AD3d 595, 596 [2d Dept 2014] [holding that plaintiff failed to tender sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL 1304, and defendants established prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against them]; *Aurora Loan Servs.*, 85 AD3d at 106 [holding that on defendants' cross- motion, defendants established prima facie entitlement to judgment dismissing complaint insofar as asserted against them based on improper service of notice pursuant to RPAPL 1304, and plaintiff did not rebut the showing].)

Plaintiff's request for default judgment against defendants Board of Managers of 50 Pine Street Condominium - 50 Pine Street Associates, LLC; Cumis Insurance Society, Inc.; and City of New York Department of Transportation Parking Violations Bureau is granted. Except for defendant Bellevue Hospital Center, these defendants failed to appear, and all failed to respond to the motion. RPAPL 1311 explains who is a necessary defendant in a mortgage foreclosure action: "RPAPL 1311 . . . codifies the equitable principle that persons holding title to the premises or acquiring any right to or lien on the property should be made defendants." (*NC Venture I, L.P. v Complete Analysis, Inc.*, 22 AD3d 540, 542 [2d Dept 2005] [internal quotation marks and citation omitted].) The reason for "joinder of these interests derives from the underlying objective of foreclosure actions – to extinguish the rights of redemption of all those who have a subordinate interest in the property and to vest complete title in the purchaser at the judicial sale." (*Id.*)

Plaintiff is not entitled to a default judgment against Bellevue Hospital Center because Bellevue Hospital Center has appeared in the action. (*See Stewart v Raymond Corp.*, 84 AD3d 932, 933 [2d Dept 2011].) But Bellevue Hospital Center did not oppose plaintiff's motion. Plaintiff is thus entitled to summary judgment against Bellevue Hospital Center.

Finally, the request to amend the caption removing defendants "JOHN DOE AND JANE DOE #1 through #7" is unopposed and granted. In effect, plaintiff seeks to discontinue the action against them. A court should grant a motion for a voluntary discontinuance "[i]n the absence of special circumstances, such as prejudice to a substantial right of the defendant, or other improper consequences . . . ." (*Wells Fargo Bank, N.A. v Chaplin*, 107 AD3d 881, 883 [2d Dept 2013].)

Accordingly, it is

ORDERED that the motion by plaintiff U.S. Bank National Association, as Trustee for J.P. Morgan MortgageTrust 2006-A6 is granted to the extent that it seeks (1) judgment against defendants Board of Managers of 50 Pine Street Condominium - 50 Pine Street Associates, LLC, Cumis Insurance Society, Inc., Bellevue Hospital Center, and City of New York Department of Transportation Parking Violations Bureau; and (2) discontinue the action as against defendants "JOHN DOE AND JANE DOE #1 through #7, and to amend the caption excising these

defendants, and the action is discontinued as to defendants "JOHN DOE AND JANE DOE #1 through #7; and the motion is otherwise denied; and plaintiff shall settle order; and it is further

ORDERED that the cross-motion by John M. Beymer a/k/a John Beymer and Barbara Bruno for dismissal of the complaint is granted and the complaint is dismissed without prejudice and with costs and disbursements to these defendants upon submission of an appropriate bill of costs; and it as further

ORDERED that plaintiff serve a copy of this decision and order with notice of entry on all parties and the County Clerk's Office, which is directed to enter judgment accordingly.

Dated: August 15, 2016

J.S.C.

HON. GERALD LEBOVITS
J.S.C.