

Bank of N.Y. Mellon v Knowles
2016 NY Slip Op 31683(U)
September 6, 2016
Supreme Court, New York County
Docket Number: 850098/2015
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMOND
J.S.C.
Justice

PART 35

Index Number : 850098/2015
BANK OF NEW YORK MELLON
vs
KNOWLES, HAROLD D.
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 7/15/16
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is

In this mortgage foreclosure action, plaintiff The Bank of New York Mellon FKA The Bank of New York, as Trustee for the Certificateholders of The CWALT, Inc., Alternative Loan Trust 2007-22, Mortgage Pass-through Certificates, Series 2007-22 ("plaintiff") moves for summary judgment against defendants, to amend the title due to mutual mistake, and to appoint a referee to compute the amount due. Defendants Harold D. Knowles and Wilbert Knowles a/k/a Wilbert Knowles ("defendants") oppose the motion and cross move to dismiss the complaint.

Factual Background

In support of its motion, plaintiff submits copies of the "indorsed" Note, Mortgage and Assignments of Mortgage, Notice of Intent to Accelerate Mortgage, and affidavit of Theresa Gill ("Gill") as Document Coordinator of the mortgage loan servicer for plaintiff setting forth the date of default and the sums due. Plaintiff argues that the submissions establish that its entitlement to summary judgment, including its standing as holder of the Note and as assignee of the Mortgage, at the time the action was commenced and for a correction in the title. The copy of the Note consists of three pages, the first and second pages of which bear the terms of the Note and the third of which bears the following in all capital letters:

Pay to the order of

Without Recourse

Countrywide Home Loans, Inc., a New York Corporation
Doing business as American's Wholesale Lender

By: [signature]
Michelle Sjolander
Executive Vice President

Dated: _____, J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

The Mortgage and Assignment demonstrates that the Mortgage was assigned to plaintiff. Further, “by mutual mistake,” the description of the premises incorrectly or inadvertently cited the legal description of the premises.

In opposition and in support of dismissal, defendants argue that there is no showing that the Note upon which plaintiff’s motion is based was transferred from the original lender to the plaintiff, and plaintiff violated 15 USC 1641(g) in failing to provide defendants, as the debtors, “with written notice of the Note transferee.” Notice of new servicing companies does not satisfy this requirement. Further, the Note fails to bear any written endorsement so as to demonstrate that it was transferred to plaintiff in accordance with UCC 3-202. According to defendants, plaintiff’s third, separate page to the Note, bears a purported endorsement, and such document does not satisfy UCC 3-202. And, there is no showing of mutual mistake, as any mistake is unilateral. The Certificate of Merit¹ fails to describe the documents on which the affiant relies, and the Affidavit of Gill is fraudulent; upon information and belief, Gill’s attestations are not based on any evidentiary foundation. Thus, such documentary evidence demonstrates the merits of defendants’ affirmative defenses based on lack of standing, lack of privity.

In reply and opposition to dismissal, plaintiff argues that the cross-motion, e-filed the day before the return date of the motion, is untimely pursuant to CPLR 2214 and 2215. Further, unlike the affirmative defense of standing, the remaining affirmative defenses unsupported by any documentary evidence or argument should be deemed abandoned. The affidavit by Gill is adequately based on documentary evidence. Plaintiff’s standing is established by physical delivery of the Note, the controlling document.

Further,² plaintiff submits the affidavit of the Nicole Curry (“Curry”), a Supervisor of plaintiff’s servicer, who attests the endorsement on the third page of the submissions is on the reverse side of the Note.

In response, defendants objects to the Court’s request for additional submissions to rectify plaintiff’s papers were deficient.

Discussion

In order to obtain summary judgment in a foreclosure action, plaintiff must establish evidence of the mortgage, the note, and defendants’ default (*see, ING Real Estate Finance (USA) LLC v. Park Ave. Hotel Acquisition*, 89 AD3d 506, 933 NYS2d 217 [1st Dept 2011] (“Plaintiffs established *prima facie* their right to foreclosure with undisputed evidence that defendant failed to pay the outstanding principal due under the parties’ loan agreements”)).

Here, plaintiff established a *prima facie* entitlement to judgment of foreclosure and sale and appointment of a referee to compute the amount owed under the Mortgages, in that it established that is the owner and holder of the subject Notes and Mortgages at issue, that such notes and mortgages are in default, and there are no valid defenses to plaintiff’s claims.

Plaintiff established that it is currently, and was the holder of the subject Note and assignee of the subject mortgage at the time this action was commenced. The affidavits submitted by plaintiff’s servicer and the accompanying documentation and records

¹ The Certificate of Merit was made part of the Summons and Complaint (E-doc #1).

² Upon review of the initial papers, the Court directed additional submissions on the issue of standing.

sufficiently satisfy plaintiff's burden on its motion (*Matapos Technology Ltd. v Compania Andina de Comercio Ltd.*, 68 AD3d 672, 891 NYS2d 394 [1st Dept 2009] (upholding summary judgment granted to plaintiff, a holder of the notes); *IRB-Brasil Resseguros S.A. v Eldorado Trading Corp. Ltd.*, 68 AD3d 576, 891 NYS2d 362 [1st Dept 2009] (summary judgment granted on affidavit submitted on motion to renew indicating that plaintiff was the holder the notes following an assignment)).

As to defendants' affirmative defense that plaintiff lacks standing, a plaintiff proves it has standing to commence a mortgage foreclosure action by showing that it was "both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action was commenced" (*Wells Fargo Bank, N.A. v. Jones*, 139 A.D.3d 520, 32 N.Y.S.3d 95 [1st Dept 2016] citing *Bank of N.Y. Mellon Trust Co. NA v. Sachar*, 95 A.D.3d 695, 695, 943 N.Y.S.2d 893 [1st Dept 2012]). "In a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action was commenced" (*OneWest Bank FSB v. Carey*, 104 A.D.3d 444, 960 N.Y.S.2d 306 [1st Dept 2013] (finding that the Bank's evidence submitted in opposition to defendant's motion to dismiss the foreclosure complaint, "including the affidavit from plaintiff's employee, established that an assignment of the note had been effectuated by physical delivery of the note prior to the commencement of the instant action") citing *U.S. Bank, N.A. v. Collymore*, 68 A.D.3d 752, 753, 890 N.Y.S.2d 578 [2d Dept 2009] and *Bank of N.Y. Mellon Trust Co. NA v. Sachar*, 95 A.D.3d 695, 943 N.Y.S.2d 893 [1st Dept 2012])).

To the degree Ms. Gill, plaintiff's loan servicer document coordinator, states that plaintiff "was the holder of the original note, allonges, mortgage, and assignments of mortgage prior to the instant action being commenced February 27, 2015," and remains the holder of same." (§4). Ms. Gill attests to having "personal knowledge" of the plaintiff's records (§5). According to Ms. Gill, the Note and Mortgage were assigned to plaintiff "by delivery of the subject Note prior to commencement of the instant action and as memorialized by an Assignment of Mortgage" Thus, the Note was delivered, and the Mortgage was assigned, to plaintiff prior to suit. Further, Ms. Curry, plaintiff's loan servicer's Supervisor, attests that she "ha[s] personal knowledge of Plaintiff's records" and she "reviewed the Original Note that is the subject of the instant Foreclosure and verify that the endorsement 'in blank' is affixed to the Note by a stamp located on the reverse side of the second page of the Note" (§6). The "attachment of [an] indorsed note, the mortgage, and the mortgage assignment to the summons and complaint at the time the action was commenced" is sufficient to establish plaintiff's standing herein (*Nationstar Mtge., LLC v Catizone*, 127 A.D.3d 1151, 9 N.Y.S.3d 315 [2d Dept 2015]).

As plaintiff establishes standing by virtue of its status as holder of the note, *U.S. Bank, N.A. v Collymore*, 68 A.D.3d 752, 890 N.Y.S.2d 578 [2d Dept 2009]) does not necessarily defeat plaintiff's showing in this action. In *U.S. Bank, N.A. v Collymore*, the Court held that:

the Bank failed to establish that the note was physically delivered to it prior to the commencement of the action. The affidavit of a vice-president of the Bank submitted in support of summary judgment did not indicate when the note was physically delivered to the Bank, and the version of the note attached to the vice-president's affidavit contained an undated indorsement in blank by the original lender. Furthermore, the Bank's reply

submissions included a different version of the note and an affidavit from a director of the Residential Funding Corporation which contradicted the affidavit of the Bank's vice-president in tracing the history of transfers of the mortgage and note to the Bank. In view of the Bank's incomplete and conflicting evidentiary submissions, an issue of fact remains as to whether it had standing to commence this action.

(Emphasis added).

Here, the subject note with endorsement on the reverse side of the Note was attached to the plaintiff's complaint, and not merely submitted on its subsequent motion for summary judgment.

It is noted that “[s]upplemental affirmations should be ‘sparingly used to clarify limited issues, and should not be used as a matter of course to correct deficiencies in a party's moving or answering papers’” (*Amerino v. State*, 35 Misc.3d 1239(A), 954 N.Y.S.2d 757 [Court of Claims, 2012]). Here, the original moving papers contained all three pages, and the plaintiff's servicer attested that the three-page Note was delivered to plaintiff prior the commencement of the action. Contrary to defendants' contention, the further submission did not correct any deficiency; it clarified the third page as representing the reverse side of the Note.

Further, defendants claim that plaintiff violated the notice requirements of 15 USC 1641(g)³ fails to raise an issue of fact as to their liability. Defendants cites no caselaw indicating that plaintiff's failure, if any, to provide notice under 15 USC 1641(g) defeats plaintiff's motion for summary judgment.

The Certificate of Merit describes the documents Sydelnik reviewed as “the mortgage, security agreement and note or bond underlying the mortgage executed by” defendants.

And, defendants conclusory assertion of fraud by Ms. Gill is unsupported by any facts or documents, and unsupported by the existing record.

Finally, it is undisputed that the title inaccurately describes the subject property due to a mistake.

In light of the above, the cross-motion to dismiss lacks merit.

³³ 15 USC 1641(g), entitled “Notice of new creditor, provides:

(1) In general

In addition to other disclosures required by this subchapter, not later than 30 days after the date on which a mortgage loan is sold or otherwise transferred or assigned to a third party, the creditor that is the new owner or assignee of the debt shall notify the borrower in writing of such transfer, including--

(A) the identity, address, telephone number of the new creditor;

(B) the date of transfer;

(C) how to reach an agent or party having authority to act on behalf of the new creditor;

(D) the location of the place where transfer of ownership of the debt is recorded; and

(E) any other relevant information regarding the new creditor.

Conclusion

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted, and the attached Order is signed; and it is further


ORDERED that defendants' cross-motion to dismiss the complaint is denied; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

DATED:

9/6/16



HON. CAROL R. EDMEAD
J.S.C.

- 1. CHECK ONE :
- 2. CHECK AS APPROPRIATE :
- 3. CHECK IF APPROPRIATE :

DO NOT POST

CASE DISPOSED

MOTION IS: GRANTED DENIED

SETTLE ORDER

FIDUCIARY APPOINTMENT

NON-FINAL DISPOSITION

GRANTED IN PART OTHER

SUBMIT ORDER

REFERENCE