

State of N.Y. Mtge. Agency v Ashford

2016 NY Slip Op 31816(U)

March 16, 2016

Supreme Court, Suffolk County

Docket Number: 13-7445

Judge: Thomas F. Whelan

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE: 12/17/15
SUBMIT DATE: 2/26/16
Mot. Seq. # 001 - MotD (Limited Trial)
Pre-Trial Conf: 4/29/16
CDISP: YES

-----X
STATE OF NEW YORK MORTGAGE AGENCY :
 :
 : Plaintiff, :
 :
 : -against- :
 :
 KENNETH ASHFORD a/k/a KENNETH M. :
 ASHFORD, ANGELA ASHFORD a/k/a ANGELA :
 D. ASHFORD, and "JOHN DOE", said name :
 being fictitious, it being the intention of plaintiff to :
 designate any and all occupants of premises being :
 foreclosed herein, and any parties, corporations, or :
 entities, if any, having or claiming an interest or :
 lien upon the mortgaged premises, :
 :
 : Defendants. :
 :
 -----X

SHAPIRO, DiCARO & BARAK
Attys. For Plaintiff
175 Mile Crossing Blvd.
Rochester, NY 14624

BLUTTER & BLUTTER, ESQS.
Attys. For Defs. Ashford
497 So. Oyster Bay Rd.
Plainview, NY 11803

Upon the following papers numbered 1 to 8 read on this motion for summary judgment, caption amendment, and appointment of referee among other things; Notice of Motion/Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers _____; Answering papers 5-6; Reply papers 7-8; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that those portions of this motion (#001) by the plaintiff for, in effect, summary judgment dismissing the affirmative defenses asserted in the answer of the Ashford defendants, each of which is limited to a challenge to the plaintiff's standing, is considered under CPLR 3212 and is granted; and it is further

New York Mortgage Agency v Ashford
Index No. 7445/2013
Page 2

ORDERED that those portions of this motion wherein the plaintiff seeks an order identifying Angela Ashford as John Doe and a caption amendment to reflect this change is considered under CPLR 1024 and is granted; and it is further

ORDERED that those portions of this motion wherein the plaintiff seeks a default judgment against the newly identified defendant, Angela Ashford, is considered under CPLR 3215 and is granted only to the extent that the default in answering the plaintiff's service of the summons and complaint is hereby fixed and determined; and it is further

ORDERED that the remaining portions of this motion wherein the plaintiff seeks summary judgment on its complaint against the obligor/mortgagor defendants Ashford and a default judgment against Angela Ashford together with the appointment of a referee to compute amounts due under the subject note and mortgage is denied, without prejudice, as premature; and it is further

ORDERED that pursuant to CPLR 3212(g), the court finds that the plaintiff is possessed of the requisite standing to prosecute its claims for foreclosure and sale and declares that the issue of standing is hereby resolved in favor of the plaintiff for all purposes and that the trial of this action shall be limited to the issues of fact framed herein by the court to be whether the plaintiff complied with the ninety day notice requirements imposed upon by RPAPL § 1304 and whether the plaintiff can establish existence and contents of the promissory note executed by the Ashford defendants on July 11, 2008, the original of which has been lost, so as to entitle the plaintiff to its contractual remedy of foreclosure and sale; and it is further

ORDERED that a pre-trial conference shall be held on **April 29, 2016**, at 9:30 a.m in the courtroom of the undersigned located in the Annex Building of the Supreme Court at One Court Street, Riverhead, NY 11901 so as to ready this matter for the limited trial framed herein and to schedule the date of such trial.

The plaintiff commenced this action in March of 2013 to foreclose the lien of a July 11, 2008 mortgage given by the Ashford defendants to JPMorgan Chase Bank, N.A. to secure a July 11, 2008 note in the principal amount of \$323,000.00 likewise given by such defendants. In the complaint served, the plaintiff alleges that the Ashford defendants defaulted in their payment obligations under the terms of the loan documents in March of 2012. In response to the plaintiff's service of the summons and complaint, the Ashford defendants appeared herein by answer and therein asserted three affirmative defenses, all which challenge the standing of the plaintiff.

By the instant motion (#001), the plaintiff seeks summary judgment dismissing the affirmative defenses asserted in the answer of the Ashford defendants and an award of summary judgment on its complaint against such defendants. The plaintiff further seeks an order identifying the true name of an unknown defendant served with process together with a caption amendment to reflect this change and a default judgment against such person. The plaintiff also seeks an order appointing a referee to compute amounts due under the terms of the note and mortgage.

New York Mortgage Agency v Ashford
Index No. 7445/2013
Page 3

The motion is opposed by the Ashford defendants in papers consisting of an affirmation of their counsel to which certain documentary exhibits are attached. Therein, defense counsel contends that the plaintiff's submissions are insufficient to establish the summary judgment demanded due to insufficient proof including insufficient proof of the plaintiff's standing. In addition, counsel asserts that plaintiff failed to establish service of the pre-action, ninety-day notice of default and cure required by RPAPL § 1304, although this issue was not raised as an affirmative defense in the answer served by the Ashford defendants. The plaintiff disputes these contentions of defense counsel in reply papers that were served in response to the defendants' opposing papers.

For the reasons stated below, the motion is granted to the extent set forth below.

Entitlement to summary judgment in favor of the foreclosing plaintiff is established, prima facie, by the plaintiff's production of the mortgage and the unpaid note, and evidence of the default in payment (*see Wells Fargo Bank, N.A. v Eroboho*, 127 AD3d 1176, 9 NYS2d 312 [2d Dept 2015]; *Wells Fargo Bank, N.A. v DeSouza*, 126 AD3d 965, 3 NYS2d 619 [2d Dept 2015]; *OneWest Bank, FSB v DiPilato*, 124 AD3d 735, 998 NYS2d 668 [2d Dept 2015]; *Wells Fargo Bank, N.A. v Ali*, 122 AD3d 726, 995 NYS2d 735 [2d Dept 2014]). Where, the plaintiff's standing has been placed in issue by the defendant's answer, the plaintiff also must establish its standing as part of its prima facie showing (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 12 NYS3d 612 [2015]; *Loancare v Firshing*, 130 AD3d 787, 2015 WL 4256095 [2d Dept 2015]; *HSBC Bank USA, N.A. v Baptiste*, 128 AD3d 77, 10 NYS2d 255 [2d Dept 2015]). In addition, the plaintiff pleads compliance with with RPAPL § 1304 pursuant to RPAPL § 1302 or a defendant has properly asserted non-compliance therewith as a defense in his or her answer or in papers submitted in opposition to a motion for summary judgment, the plaintiff must adduce due proof that the pre-action foreclosure 90 day notice requirements have been satisfied (*see Zarabi v Movahedian*, ___ AD3d ___, 2016 WL 618580 [2d Dept 2016]; *Cenlar v Weisz*, ___ AD3d ___, 2016 WL 619740 [2d Dept 2016]; *Citimortgage v Espinal*, 134 AD3d 876, 23 NYS3d 251 [2d Dept 2016]; *Bank of New York v Aquino*, 131 AD3d 1186, 16 NYS3d 770 [2d Dept 2015]; *cf. PHH Mtge. Corp. v Celestin*, 130 AD3d 703, 11 NYS3d 871 [2d Dept 2015]).

A foreclosing plaintiff has standing if it is either the holder or the assignee of the underlying note at the time that the action is commenced (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, *supra*; *Loancare v Firshing*, 130 AD3d 787, *supra*; *Emigrant Bank v Larizza*, 129 AD3d 904, 13 NYS3d 129 [2d Dept 2015]). "Either a written assignment of the underlying note or the physical delivery of it to the plaintiff prior to the commencement of the action is sufficient to transfer the obligation" (*see id.*, *Wells Fargo Bank, NA v Parker*, 125 AD3d 848 5 NYS3d 130 [2d Dept 2015]; *U.S. Bank NA v Guy*, 125 AD3d 845, 5 NYS3d 116 [2d Dept 2015]). "No special form or language is necessary to effect an assignment so long as the language shows the intention of the owner of right to transfer it" (*US Bank Natl. Ass'n v Akande*, ___ AD3d ___, 24 NYS3d 914 [2d Dept 2016], quoting *Bank of New York v Silverberg*, 86 D3d 274, 289, 925 NYS2d 274 [2d Dept 2011]; quoting *Suraleb, Inc. v International Trade Club, Inc.*, 13 AD3d 612, 612, 788 NYS2d 403 [2d Dept 2004]; *see also OneWest Bank FSB v Carey*, 104 AD3d 444, 960 NYS2d 306 [1st Dept 2013]; *Chase Home Fin., LLC v Miciotta*, 101 AD3d 1307, 956 NYS2d 271 [3d Dept 2012]).

Here, the plaintiff's standing was duly established by the written assignment of mortgage executed on July 16, 2008 by the original lender, JPMorgan Chase Bank, N.A., to the plaintiff, as such assignment included a clear and unequivocal assignment of the note secured by such mortgage. Contrary to the contentions of defense counsel, this assignment, which was recorded in the office or the Suffolk County Clerk, duly established the standing of the plaintiff to prosecute its claims for foreclosure and sale (*see US Bank Natl. Ass'n v Akande*, ___ AD3d ___, 24 NYS3d 914 [2d Dept 2016]). The plaintiff thus established its entitlement to summary judgment dismissing the affirmative defenses asserted in the answer of the defendants as all were limited to the issue of the plaintiff.

The court rejects as erroneous the plaintiff's claim that the Ashford defendants' failure to assert the plaintiff's purported non-compliance with the RPAPL § 1304 pre-action, ninety-day notice requirements constituted a waiver of such defense thereby precluding its assertion in opposition to this motion. Such a waiver extends only to defendants who defaulted in appearing by answer and who do not establish grounds for the vacatur of his or her default on excusable default grounds (*see Citimortgage v Espinal*, 134 AD3d 876, 23 NYS3d 251 [2d Dept 2016]; *see also Zarabi v Movahedian*, ___ AD3d ___, 2016 WL 618580 [2d Dept 2016], *supra*; *Centlar v Weisz*, ___ AD3d ___, 2016 WL 619740 [2d Dept 2016], *supra*). Upon its consideration of the record adduced on this motion, the court finds that the plaintiff's submissions were insufficient to establish the plaintiff's compliance with the notice provisions of RPAPL § 1304.

The plaintiff claims that following the July 16, 2008 assignment of the note and mortgage to the plaintiff by JPMorgan Chase Bank, N.A. [hereinafter Chase], the original lender, Chase continued to service the loan until June 2, 2014 when servicing rights were transferred to M&T Bank (*see* ¶ 27 of the Affirmation of plaintiff's counsel Dioniso attached to the moving papers). The plaintiff further claims that the RPAPL § 1304 notice was mailed by certified and first class mail to each of the Ashford defendants at the mortgaged premises on August 24, 2012 by "Chase" who filed proof of such mailings with the Superintendent of Banking pursuant to RPAPL § 1306 on August 27, 2012 (*see* Exhibit C attached to the moving papers). In support of these assertions the plaintiff submits a March 2, 2015 affidavit of an employee of M&T Bank, who is therein alleged to be the current loan servicer, who states that she has personal knowledge of the facts alleged therein including the mailings of the RPAPL § 1304 notices.

The plaintiff further submits a Power of Attorney executed by the plaintiff on February 15, 2012 in favor of M&T Bank which was accepted by M&T Bank on May 25, 2012 and recorded in the office of the County Clerk on July 21, 2012 (*see* Exhibit G attached to the moving papers). The authority of M&T Bank as attorney-in-fact for the plaintiff was limited to real estate transactions, insurance matters and claims and litigation including the "power to execute all documents regarding foreclosure" (*see id.*). However, such power of attorney was revoked by the terms of a subsequent Power of Attorney executed by the plaintiff on May 15, 2013 in favor of JPMorgan Chase Bank, N.A. Chase was therein authorized to engage in real estate transactions, insurance matters and claims and litigation including the power "to execute all documents regarding foreclosure" (*see* Exhibit H attached to the moving papers). The record is devoid of

documentary proof that M&T Bank was re-appointed as agent on June 2, 2014, thereby making it the current loan servicer as alleged in its affidavit of merit and the affirmation of plaintiff's counsel referenced above. There is thus a question of a fact as to the due and proper service of the RPAPL § 1304 issued by Chase which it filed with the Superintendent of Banking pursuant to RPAPL § 1306 in August of 2012 as alleged by the defendants.

The court further finds that the plaintiff's submissions failed to establish, prima facie, due proof of the defendants' execution of the lost note and of its contents. To establish entitlement to enforcement of a lost note under the Uniform Commercial Code, the plaintiff must demonstrate defendants' execution of the note, the circumstances surrounding its custody and its loss and the content of the terms of such note (*see* UCC § 3-804; *Marrazzo v Piccolo*, 163 AD3d 369, 558 NYS2d 103, 104 [2d Dept 1990]; *see also CitiBank, N.A. v Benedict*, 2000 WL322785 [S.D.N.Y. 2000]). To establish the validity of a lost instrument under common law principles, which apply to instruments not constituting commercial paper, the plaintiff must demonstrate by clear and convincing proof, the due execution of the instrument and due proof of its contents (*see Argent Mortgage Company, LLC v35 Plank Road Realty Corp.*, 131 AD3d 909, 15 NYS3d 473 [2d Dept 2015]; *see also Edwards v Noyes*, 65 NY 125, 127 [1875]). An authenticated, certified copy of the instrument may serve as a vehicle to the establishment of its contents (*see* SCPA § 1407).

Here, the plaintiff alleged in its complaint that the original note was lost. In its moving papers, the plaintiff, through its counsel, alleges that a copy of the note was found and such copy is submitted, together with an affidavit of lost note executed on September 17, 2012 by an employee of the custodial subsidiary of the original lender, Chase. Plaintiff's counsel asserts that Chase allegedly continued to service the loan following its assignment of the note and mortgage to the plaintiff in 2008 until June 2, 2014 when the servicing rights were allegedly transferred to M&T Bank (*see* ¶¶ 27-28 of the Affirmation of plaintiff's counsel attached to the moving papers and affidavit of Lost Note attached as Exhibit D to the moving papers). The affidavit of lost note was thus properly executed on September by the custodial agent of the original lender who was then allegedly serving as the loan servicer.

As indicated above, however, these factual assertions are contradicted by the *plaintiff's* production of the February 15, 2012 Power of Attorney issued by the plaintiff in favor of M&T Bank. The factual allegations set forth in the September 17, 2012 affidavit of Lost Note do not establish execution of the note by the Ashford defendants, which was denied by such defendants in their answer. Nor were the contents of the lost note duly established as the lost note affiant offers no factual assertions with respect thereto. The incorporation of a copy of the note, which is labeled certified on its face by an unidentified individual into the September 17, 2012 affidavit of Lost Note executed by Chase's custodial subsidiary is inconclusive since such copy differs from the uncertified copy that is attached as Exhibit A to the moving papers. This Exhibit A copy contains a special indorsement in favor of the plaintiff that is not included on the certified copy that is attached to the September 17, 2012 affidavit of Lost Note. Questions of fact thus exist with respect to the plaintiff's entitlement to the remedy of foreclosure and sale since sufficient proof of the existence and contents of such note has not been presented.

New York Mortgage Agency v Ashford
Index No. 7445/2013
Page 6

In view of the foregoing, and pursuant to the provisions of CPLR 3212(g), the court finds that the plaintiff has standing to prosecute its claims for foreclosure and sale. Accordingly, the court hereby resolves the issue of standing in favor of the plaintiff for all purposes which warrants the dismissal of the affirmative defenses in the answer served by the Ashford defendants pursuant to CPLR 3212. The court further finds that pursuant to CPLR 3212(g), the trial of this action shall be limited to the issues of fact framed herein by the court which are: 1) whether the plaintiff complied with the ninety day notice requirements imposed upon it by RPAPL § 1321; and 2) the existence and contents of the July 11, 2008 promissory note by the defendants and the existence and contents of such note, the original of which has allegedly been lost.

DATED: 3/16/16



THOMAS F. WHELAN, J.S.C.