

Federal Natl. Mtge. Assn. ("Fannie Mae") v Benoit

2016 NY Slip Op 32091(U)

October 7, 2016

Supreme Court, Queens County

Docket Number: 18040/2014

Judge: Robert J. McDonald

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This is an action to foreclose a mortgage encumbering property located at 240-15 Caney Road, Rosedale, New York 11422.

Based on the record before the Court, on June 2, 2007, defendant Judy Benoit obtained a loan in the principal amount of \$160,000 from Precision Financial, Inc., secured by a mortgage executed by defendants Judy Benoit and Frantz Benoit. Plaintiff asserts that it is the owner and holder of the note and mortgage by assignment of mortgage. Plaintiff further asserts that defendants Judy Benoit and Frantz Benoit defaulted under the note and mortgage when they failed to make their monthly mortgage payments beginning on January 1, 2010.

Plaintiff subsequently accelerated the mortgage and commenced this action by filing a lis pendens and summons and complaint on December 17, 2014. Plaintiff submits affidavits of service on all of the named defendants, including occupants Reggie Wolford, Tanya Brown, and Lisa Hensley. Defendants Judy Benoit and Frantz Benoit (the Benois) served an answer with affirmative defenses dated March 10, 2015. The remaining defendants failed to answer or appear and are in default.

Residential foreclosure settlement conferences were held on March 11, 2015 and June 3, 2015. Defendants failed to appear at the conference held on June 3, 2015, this matter was released, and plaintiff was permitted to proceed with this foreclosure action.

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 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]). Upon such a showing, the burden shifts to defendants to produce evidence in admissible form sufficient to raise a material issue of fact requiring a trial.

In support of the motion for summary judgment, plaintiff submits an affidavit of merit from a foreclosure specialist of Seterus, Inc. (Seterus), the authorized servicer of plaintiff. The affiant states that based upon a personal review of the business records for and relating to the subject loan, which are maintained in the course of Seterus' regularly conducted business activities and are made at or near the time of the event, the Benois defaulted under the terms of the note and mortgage by failing to tender payment for the monthly installment due for January 1, 2010. The affiant further states that Seterus is in physical possession of the original note as custodian on behalf of plaintiff. Seterus was in possession of the note as of April 8, 2014.

Plaintiff contends that it has made a prima facie showing that it is entitled to summary judgment based upon its submission of the note, mortgage, and affidavit of merit evidencing the Benois' failure to make the contractually required loan payments.

In opposition, the Benois cross-move to dismiss the foreclosure action on the grounds that, inter alia, plaintiff failed to demonstrate compliance with RPAPL 1304. Specifically, the Benois contend that plaintiff failed to demonstrate that it served the 90 day pre-foreclosure notice upon both mortgagors and failed to serve the notice at their last known address. Additionally, the Benois contend that the affidavit of merit fails to establish what manner of office practice or procedure was used by plaintiff to ensure that mailed items were always properly addressed and mailed by registered or certified and first class mail.

Where a defendant has properly asserted non-compliance with RPAPL 1304, as here, the plaintiff must adduce proof that the 90 day pre-foreclosure notice requirements have been satisfied (see Zarabi v Movahedian, 136 AD3d 895 [2d Dept. 2016]; Cenlar, FSB v Weisz, 136 AD3d 855 [2d Dept. 2016]; Citimortgage v Espinal, 134 AD3d 876 [2d Dept. 2016]).

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]). The 90 day pre-foreclosure notice must be sent by registered or certified mail and also by first-class mail to the last known address of the borrower, and if different, to the mortgaged premises (see RPAPL 1304[2]). "[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" (Aurora Loan Services, LLC v Weisblum, 85 AD3d 95, 107 [2d Dept. 2011]). The plaintiff's "failure to show strict compliance requires dismissal" (Aurora Loan Services, LLC v Weisblum, 85 AD3d 95, 103 [2d Dept. 2011]). 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]).

The affidavit of merit states "a ninety (90) day pre-foreclosure notice ("90 Day Notice") was sent to Judy Benoit on April 25, 2014, to the address of the property, at 240-15 Caney Road, Rosedale, NY 11422, and to the Borrower's last known address which is also 240-15 Caney Road, Rosedale, NY 1142, by certified and first class mail." The affidavit further states that it is in the regular course of business of Seterus to enter the date that the 90 day notices were served on the borrower on the Pulse Screen.

Upon a review of the motion, cross-motion, opposition and reply thereto, this Court finds as follows:

Plaintiff failed to establish that it strictly complied with the 90 day notice requirements of RPAPL 1304 as plaintiff failed to send the notice to the last known address of Judy Benoit. Plaintiff mailed the notice of default on March 22, 2010 to Judy Benoit at her last known address, 11 Carmen St., Hempstead, NY. However, plaintiff failed to send the 90 day notice to the last known address. Rather, plaintiff only sent the 90 day notice to the mortgaged premises. Additionally, the affidavit of merit fails to establish the office practice which ensured that the notices were properly mailed.

Moreover, the parties disagree regarding the proper parties to whom the 90 day notice must be sent. It is undisputed that Frantz Benoit was not sent a 90 day notice. Plaintiff contends that he is not a "borrower" within the meaning of the statute because only Judy Benoit is a borrower on the note. Contrary to this contention, the Benois both executed the mortgage, are collectively identified in the mortgage as the "borrower", and both agreed to pay the amounts due under the note. The mortgage also states that the lender can bring a lawsuit to take away the borrower's remaining rights in the property and have the property sold. Based on the language of the mortgage, this Court finds

that Frantz Benoit is a borrower within the meaning of RPAPL 1304, and was entitled to receive a 90 day notice prior to commencement of this action (see Aurora Loan Services, LLC v Weisblum, 85 AD3d 95, 103 [2d Dept. 2011]).

In light of such determination, this Court need not address the remaining contentions set forth in the cross-motion.

Accordingly, and based on the reasons set forth above, it is hereby

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

ORDERED, that defendants Frantz Benoit and Judy Benoit's cross-motion to dismiss the complaint for failure to comply with RPAPL 1304 is granted, the complaint is dismissed in its entirety, and the Clerk of Court is authorized to enter judgment accordingly.

Dated: October 7, 2016
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.