Wells Fargo Bank, NA v Constantine-Plummer
2016 NY Slip Op 32097(U)
June 1, 2016
Supreme Court, Queens County
Docket Number: 22982/2012
Judge: David Elliot
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M E M O R A N D U M

SUPREME COURT - QUEENS COUNTY
I.A.S. PART 14

WELLS FARGO BANK, NA,
Plaintiff(s),

-against-

SHIRLEY CONSTANTINE-PLUMMER, etc., et al.,
Defendant(s).

Index No. 22982/2012

By: **ELLIOT, J.**

Date: June 1, 2016

Motion Cal. No. 169

Motion Seq. No. 2

Motion Date: May 23, 2016

In this action to foreclose a mortgage, plaintiff moves for an order, *inter alia*, granting it summary judgment against defendants Shirley Constantine-Plummer a/k/a Shirley Watkins (Watkins), the obligor/record owner herein, and Speedie Plummer (Plummer), a record owner, and appointing a referee to compute. By prior order dated February 5, 2015, these defendants' answers were deemed timely and validly served. Though served with the instant motion, neither Watkins nor Plummer have opposed it.

It is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2 d557 [1980]).

In a residential mortgage foreclosure action, a plaintiff establishes its prima facie entitlement to judgment as a matter of law by producing the mortgage and the unpaid note, and evidence of the default (*see Midfirst Bank v Agho*, 121 AD3d 343 [2014]). Where the plaintiff is not the original lender and standing is at issue, the plaintiff seeking summary judgment must also submit evidence that it received both the mortgage and note by a proper assignment, which can be established by the production of a written assignment of the note (*see Aurora Loan Servs., LLC v Taylor*, 114AD3d 627 [2014], affd 25 NY3d 355 [2015]; *see Homecomings Fin., LLC v Guldi*, 108AD3d 506 [2013]), or by physical delivery to the plaintiff of the note (*see Kondaur Capital Corp. v McCary*, 115 AD3d 649 [2014]; *Aurora Loan Servs., LLC v Weisblum*, 85AD3d 95 [2011]). In addition, the plaintiff must make a prima facie showing of strict compliance with RPAPL § 1304, which is a condition precedent to the commencement of the foreclosure action (*see Aurora Loan Services, LLC*, 85 AD3d at 107).

Here, plaintiff has met its prima facie burden of establishing its entitlement to foreclose the mortgage by submitting, *inter alia*, the note, mortgage, and affidavit of Bradley Richard, Vice President Loan Documentation of plaintiff, wherein which Shirley's default was detailed. Moreover, plaintiff established its standing to commence this action since Mr. Richard attested to the fact that plaintiff was in possession of the note on May 2, 2012 and on or before November 14, 2012, the latter of which being the commencement date of this action (*see Deutsche Bank Nat. Trust Co. v Naughton*, 137 AD3d 1199 [2016]; *U.S. Bank Natl. Assn. v Godwin*, 137 AD3d 1260 [2016]; *Well Fargo Bank, N.A. v Joseph*, 137 AD3d

896 [2016]). Moreover, the endorsed note was annexed to the complaint (*see e.g. JPMorgan Chase Bank, N.A. v. Roseman*, 137 AD3d 1222 [2016]; *Deutsche Bank Natl. Trust Co. v Leigh*, 137 AD3d 841 [2016]).

With respect to defendants' affirmative defense regarding RPAPL § 1304, such a defense is not available to Plummer since he is not a borrower.[1] Regarding Watkins, plaintiff submits the affidavit of mailing of Asahia Brooks, plaintiff's Vice President Loan Documentation, wherein which she certifies that the RPAPL § 1304 notice was sent to Watkins by first class and certified mail on December 4, 2011 to the property address.

With respect to that branch of the motion by plaintiff to strike defendants' remaining affirmative defenses raised in their answer, plaintiff bears the burden of demonstrating that the affirmative defenses are "without merit as a matter of law" (*Greco v Christoffersen*, 70AD3d 769 [2010], quoting *Vita v New York Waste Servs., LLC*, 34AD3d 559 [2006]). The respective affirmative defenses raised in the answers of Plummer and Watkins are nearly identical.

As to the first affirmative defense regarding standing, plaintiff has established its entitlement to dismissal of this defense, as discussed *supra*.

As to the second affirmative defense alleging lack of compliance with RPAPL § 1302, plaintiff has indeed complied with same by indicating in the complaint that it is the holder of the note and mortgage being foreclosed.

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1. Though Plummer was named as a "borrower" in the loan modification agreement, he did not sign said agreement.

As to the third affirmative defense, plaintiff established that the mortgage document does not require that a notice of default be sent, even though one was mailed to Plummer.

As to the fourth affirmative defense alleging lack of compliance with RPAPL § 1304, plaintiff has established compliance therewith, as discussed *supra*.

As to the fifth affirmative defense alleging non-compliance with HAMP, plaintiff demonstrated that the loan was ineligible for modification under HAMP since it was insured by the FHA (*see e.g. Flagstar Bank, FSB v Walker*, 112 AD3d 885 [2013]).

As to the sixth affirmative defense, plaintiff has established that said defense – alleging noncompliance with HUD regulations – is conclusory and, as such, fails to meet the minimum pleading requirements (CPLR 3013).

As to the seventh affirmative defense alleging partial payment, it is well-settled that a dispute as to the amount owed is not a bar to summary judgment; rather, same is the purpose of the appointment of a referee (RPAPL § 1321). Moreover, Mr. Richard's affidavit explains that payments were made since the filing of the complaint, that those payments were insufficient to reinstate the loan, but that they were applied to the loan and had the effect of moving up the date of default.

As to the eighth affirmative defense alleging plaintiff's failure to file an RJI and submit an affirmation pursuant to Administrative Order 431/11, same is without merit. County Clerk records show that an RJI was indeed filed in this action, as well as the requisite

attorney affirmation, both on December 21, 2012.

As to the ninth and tenth affirmative defenses alleging noncompliance with CPLR 3012-b, said statute was not in effect at the time of commencement of this action.

As to the "catchall" eleventh affirmative defense, defendants have failed to comply with CPLR 3013. Moreover, the allegations therein formed the basis for their ability to vacate their default in this action. Their default was indeed vacated and their answer deemed timely served. However, said defendants have not opposed this motion. To that extent, they have failed to raise a triable issue of fact with respect to plaintiff's ability to foreclose and with respect to the potential merit to any of their defenses (*see Nationstar Mtge., LLC v Silveri*, 126 AD3d 864 [2015]; *Flagstar Bank v Bellafiore*, 94 AD3d 1044 [2012]).

That branch of the motion deeming non-appearing and non-answering defendants in default is denied as moot inasmuch as that relief was granted by order dated February 5, 2015.

That branch of the motion seeking judgment on its second cause of action is denied for failure to submit "proof of the facts constituting the claim" (CPLR § 3215 [f]).

Accordingly, the motion is granted without opposition. Plaintiff is awarded summary judgment against Plummer and Watkins. Their answer and affirmative defenses are stricken and deemed a notice of appearance. Plaintiff is granted leave to submit an order of reference.

Submit Order.

J.S.C.