

Deutsche Bank Natl. Trust Co. v Persad
2016 NY Slip Op 32125(U)
July 1, 2016
Supreme Court, Queens County
Docket Number: 706469/2015
Judge: David Elliot
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

DEUTSCHE BANK NATIONAL TRUST
COMPANY,

Plaintiff(s)

- against -

RAKESH PERSAD, et al.

Defendant(s).

Index

No. 706469 2015

Motion

Date June 23, 2016

Motion

Cal. No. 37

Motion

Seq. No. 1

The following papers read on this motion by plaintiff for an order, inter alia, granting it summary judgment against defendant Rakesh Persad (defendant), striking his answer, and appointing a referee to compute; and on this cross motion by defendant for an order dismissing the complaint pursuant to CPLR 3211 (a) (3).

	<u>Papers Numbered</u>
Notice of Motion - Affirmation - Exhibits.....	EF18-35
Notice of Cross Motion - Affirmation - Exhibits.....	EF36-40
Answering Affirmation - Exhibits.....	EF41-46

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff commenced this action on June 19, 2015 to foreclose a modified mortgage on the real property known as 107-25 75th Street, Ozone Park, New York, given by defendant as security for the payment of a note in favor of Novastar Mortgage, Inc., dated October 30, 2006, evidencing an indebtedness in the principal amount of \$459,200.00, plus interest. In the complaint, plaintiff alleges that it is the owner and holder of the note and mortgage or has been delegated the authority to institute a mortgage foreclosure action by the owner and

holder of the note and mortgage. It also alleges that defendant defaulted under the terms of the loan by failing to pay the monthly payment due thereunder on October 1, 2014 and each subsequent payment and that, as a result, plaintiff elected to accelerate the mortgage debt.

Defendant served an answer, asserting various affirmative defenses. The remaining defendants have failed to answer or otherwise appear herein, except for defendants sued herein as “John Doe #1” through “John Doe #12,” who are not necessary parties to this action. Plaintiff has now moved for summary judgment and related relief and defendant has cross-moved for dismissal.

Initially, to the extent plaintiff urges that defendant’s motion be denied as untimely, given the fact that plaintiff addressed the motion on the merits, plaintiff waived its objection to same (*see Piquette v City of New York*, 4 AD3d 402 [2004]). As such, the cross motion will be considered on its merits.

On a motion to dismiss for lack of standing, “the burden is on the moving defendant to establish, prima facie, the plaintiff’s lack of standing, rather than on the plaintiff to affirmatively establish its standing in order for the motion to be denied” (*Deutsche Bank Trust Co. Ams. v Vitellas*, 131 AD3d 52 [2015]; *see Flagstar Bank, FSB v Campbell*, 137 AD3d 853 [2016]; *HSBC Bank USA, NA v Lewis*, 134 AD3d 764 [2015]). Here, defendant has failed to eliminate issues of fact as to whether the note was physically delivered to plaintiff prior to the commencement of the action, defendant merely attempting to point to deficiencies in plaintiff’s proof submitted on its own motion (*see Citimortgage, Inc. v Simon*, 137 AD3d 1190 [2016]; *U.S. Bank Natl. Assn. v Weinman*, 123 AD3d 1108 [2014]; *cf. HSBC Bank USA, Natl. Assn. v Roumiantseva*, 130 AD3d 983 [2015]). As such, defendant is not entitled to dismissal of the complaint for lack of standing.

Turning to plaintiff’s motion, 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 NY2d 557 [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]; *see Homecomings Fin., LLC v Guldi*, 108 AD3d 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 Weisblum*, 85 AD3d at 107). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Plaintiff has met its prima facie burden of establishing its entitlement to summary judgment by submitting, inter alia, a copy of the note, which was specifically endorsed to plaintiff by the originator of the loan, the mortgage, the loan modification agreement, and the affidavit of Alex Quintero, Contract Management Coordinator for Ocwen Loan Servicing, LLC, plaintiff's servicer, detailing the circumstances of the default. Moreover, plaintiff established its standing to foreclose by way of Quintero's affidavit, demonstrating that plaintiff received physical delivery of the original note on December 13, 2006, and was in possession and the holder of the note prior to commencement of this action.

To the extent defendant challenges the affidavit of merit by indicating that the affiant does not have personal knowledge of the facts, the affidavit is indeed admissible pursuant to the business exception to the hearsay rule (CPLR 4518; *see Citimortgage, Inc. v Espinal*, 134 AD3d 876 [2015]). Further, the fact that the affidavit was from the servicer and not plaintiff is not fatal; based on his review of business records, Quintero established that the note was physically delivered on a date certain which is prior to the commencement of this action (*see e.g. U.S. Bank Natl. Assn. v Godwin*, 137 AD3d 1260 [2016]). Further, the affiant was not required to specifically state that it was delivered directly from the originator of the loan (*see e.g. Aurora Loan Servs. LLC v Taylor*, 25 NY3d 355 [2015]). In any event, irrespective of the affidavit, standing was sufficiently established by virtue of the fact that the endorsed note was annexed to the e-filed complaint (*see JPMorgan Chase Bank, N.A. v Roseman*, 137 AD3d 1222 [2016]; *Nationstar Mtge., LLC v Catizone*, 127 AD3d 1151 [2015]).

Turning to RPAPL § 1304, plaintiff initially states that the 90-day pre-foreclosure notice was not required to be sent because defendant filed an application for the adjustment of debts, *i.e.*, he applied for and subsequently entered into a loan modification agreement. However, the statute provides only that "[t]he ninety day period specified in the notice contained in subdivision one of this section shall not apply, or shall cease to apply, if the borrower has filed an application for the adjustment of debts" (RPAPL § 1304[3]). The Legislature did not specify that the statute itself would not apply, only that the 90-day waiting period before commencing a foreclosure action would not apply.

Plaintiff has otherwise failed to meet its burden of demonstrating, prima facie, that it strictly complied with the mandates of RPAPL § 1304. Quintero stated that “[a]t least ninety (90) days prior to commencement of the present action, Defendant was sent, via certified and first class mail, the requisite 90-Day Pre-Foreclosure Notice pursuant to RPAPL § 1304 (True copies of the 90-Day Notice are annexed as **Exhibit ‘G’**).” As plaintiff has failed to submit an affidavit of service, it is not entitled to summary judgment (*see Cenlar, FSB v Censor*, 139 AD3d 781 [2016]; *Bank of New York Mellon v Aquino*, 131 AD3d 1186 [2015]; *Wells Fargo Bank, NA v Burke*, 125 AD3d 765 [2015]). Quintero’s affidavit is not based upon his personal knowledge of the actual mailings; neither does he specify the date that they were mailed. To the extent it is based upon his knowledge obtained from business records, such affidavit, even when considered with the annexed “true copies” of the 90-day notices,¹ is insufficient to establish what manner of office practice or procedure was used by the servicer to ensure that mailed items were always properly addressed and mailed by registered or certified and first class mail (*see Espinal*, 134 at 878; *Frankel v Citicorp Ins. Services, Inc.*, 80 AD3d 280 [2010]; *Residential Holding Corp. v Scottsdale Ins. Co.*, 286 AD2d 679 [2001]; *Smith v Palmeri*, 103 AD2d 739 [1984]; *see also Lindsay v Pasternack Tilker Ziegler Walsh Stanton & Romano LLP*, 129 AD3d 790 [2015]; *Wells Fargo Bank, N.A. v Tessler*, 2016 NY Misc LEXIS 636 [Sup Ct, Kings County 2016]).

With respect to that branch of the motion by plaintiff to strike defendant’s affirmative defenses raised in his 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]).

Plaintiff has established that defendant’s first defense alleging failure to comply with RPAPL § 1303 is without merit. Plaintiff submitted prima facie evidence of proper service of the RPAPL § 1303 notice upon defendant by virtue of the affidavit of service of Steve C. Kemp, which stated that he served on this defendant a copy of said notice, which was printed on a colored piece of paper, which color differed from that of the color of the summons and complaint, and the notice was in bold, fourteen-point type, with the title thereof in bold, twenty-point type, all in accordance with the statute (RPAPL § 1303 [2]; *see Weisblum*, 85 AD3d at 102-103).

For the reasons set forth, *supra*, plaintiff is not entitled to dismissal of defendant’s second affirmative defense regarding RPAPL § 1304.

1. Annexing a copy of the notice does not establish proof of proper mailing of same (*HSBC Mtge. Corp. (USA) v Gerber*, 100 AD3d 966 [2012]).

Plaintiff has failed to establish its entitlement to dismissal of the third affirmative defense alleging a violation of the Truth in Lending Act. “Contrary to the plaintiff’s contention, the expiration of the statutory period for commencement of a Truth in Lending action will not bar the interposition of a defense thereunder by a consumer where the defense, as here, arises out of the same transaction as the one sued upon” (*First Trust Natl. Assn. v Chiang*, 242 AD2d 599 [1997]).

With respect to the fourth affirmative defense alleging a violation of the Real Estate Settlement Procedures Act (RESPA), though plaintiff’s contentions regarding the statute of limitations are misplaced (*see above discussion*), it is noted that a disclosure violation of RESPA does not constitute a valid defense to a mortgage foreclosure action (*see Fremont Inv. and Loan v Haley*, 23 Misc 3d 1138[A] [Sup Ct, Queens County 2009]). Thus, plaintiff is entitled to dismissal of this defense.

With respect to the fifth affirmative defense alleging failure to state a cause of action for foreclosure, it appears from the face of the complaint that same properly states a cause of action to foreclose the mortgage. However, to the extent plaintiff seeks dismissal of that defense, same is denied for the reasons set forth in, inter alia, *Mazzei v Kyriacou* (98 AD3d 1088 [2012]) and *Butler v Catinella* (58 AD3d 145 [2008]).

Plaintiff has established its entitlement to dismissal of defendant’s sixth, seventh, and thirteenth affirmative defenses for breach of contract, breach of the implied covenant of good faith and fair dealing, and unconscionability, respectively, as conclusory (CPLR 3013).

Plaintiff has established its entitlement to dismissal of defendant’s eighth affirmative defense for failure to comply with 12 USC 1701x (c) (5); defendant makes no allegation that the statute applies herein or that same prevents plaintiff from commencing a foreclosure action (*see Colfin Metro Funding LLC v Rojas*, 2014 NY Slip Op 32187[U][Sup Ct, Queens County 2014]).

Plaintiff has established its entitlement to dismissal of defendant’s ninth affirmative defense regarding the alleged imposition of “illegal charges.” The monies claimed to be due are to be determined by a referee (RPAPL § 1321).

For the reasons set forth, *supra*, plaintiff is entitled to dismissal of defendant’s tenth affirmative defense alleging lack of standing.

The claim of unclean hands asserted as the eleventh affirmative defense in the answer is unsupported by any factual allegation (*see Moran Enterprises, Inc. v Hurst*, 96 AD3d 914 [2012]). Thus, plaintiff is entitled to its dismissal.

Plaintiff has established its entitlement to dismissal of the twelfth affirmative defense alleging a violation of Banking Law § 349; defendants have not established that plaintiff was the originator of the loan and thus, engaged in the practices complained of. It is noted that defendant does not set forth with any particularity what those alleged practices were.

Plaintiff has established its entitlement to dismissal of the thirteenth affirmative defense alleging a violation of the Federal Trade Commission Act, as same is inapplicable in the context of a mortgage foreclosure action (*see Herrejon v Ocwen Loan Serv., LLC*, 980 F Supp 2d 1186 [ED Cal 2013]).

In opposition to plaintiff's showing, defendant only challenges plaintiff's standing and alleged compliance with RPAPL § 1304. Standing has been established as a matter of law, as discussed, *supra*, and plaintiff has failed to meet its burden with respect to compliance with RPAPL § 1304.

With respect to that branch of the motion for an amendment of the caption, same is granted. The caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS TRUSTEE FOR NOVASTAR MORTGAGE
FUNDING TRUST SERIES 2006-6 NOVASTAR
HOME EQUITY LOAN ASSET-BACKED
CERTIFICATES SERIES 2006-6,
Plaintiff,

- against -

RAKESH PERSAD, MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., CHEMICAL
BANK N/K/A JPMORGAN CHASE BANK,
N.A., WELLS FARGO BANK, NATIONAL
ASSOCIATION, SUCCESSOR BY MERGER
TO WELLS FARGO HOME MORTGAGE,
INC. F/K/A NORWEST MORTGAGE, INC.,
Defendants.

It is noted that, to the extent plaintiff moves for summary judgment on its remaining causes of action, plaintiff has submitted no evidence or argument in support thereof.

Accordingly, the branches of the motion for an order awarding plaintiff summary judgment against defendant Persad, awarding judgment by default against the remaining defendants, and appointing a referee to compute, are denied. The branch of the motion for an order striking the answer and affirmative defenses is granted to the extent that all affirmative defenses are stricken with the exception of the second, third, and fifth affirmative defenses. The branch of the motion for an order amending the caption is granted as set forth above.

Dated: July 1, 2016

J.S.C.