

U.S. Bank N.A. v Goulding

2016 NY Slip Op 32126(U)

August 1, 2016

Supreme Court, Queens County

Docket Number: 708789/2015

Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

MEMORANDUM

SUPREME COURT - STATE OF NEW YORK
COUNTY OF QUEENS - **IAS PART 34**

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U.S. BANK NATIONAL ASSOCIATION, AS
TRUSTEE FOR LSF9 MASTER PARTICIPATION
TRUST,

BY: McDONALD, J.

Index No.: 708789/2015

Plaintiff,

Motion Date: 7/21/16

- against -

Motion No.: 170

CARL GOULDING, ROXANNE GOULDING, and
"JOHN DOE #1" through "JOHN DOE #10",
the last 10 names being fictitious and
unknown to the Plaintiff, the persons
or parties intended being the persons
or parties, if any, having or claiming
an interest in or lien upon the
mortgaged premises described in the
verified complaint,

Motion Seq.: 1

Defendants.

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The following electronically filed documents read on this motion by plaintiff for an Order pursuant to CPLR 3212, directing entry of summary judgment in favor of plaintiff and against defendants Carl Goulding and Roxanne Goulding, striking the affirmative defenses and dismissing the counterclaims, directing entry of default judgment, appointing a referee, and amending the caption; and on this cross-motion by defendants Carl Goulding and Roxanne Goulding for an Order denying plaintiff's motion for an order of reference and summary judgment and dismissing the action pursuant to CPLR 3211(a) (2), (3) and (7):

Papers
Numbered

Notice of Motion-Affirmation-Exhibits-Memo. of Law...	EF 19 - 42
Notice of Cross-Motion-Affidavits-Exhibits.....	EF 45
Memo. of Law in Opposition to Cross-Motion and in Reply-Affirmation.....	EF 53 - 54

This is an action to foreclose a mortgage encumbering real property located at 115-88 225th Street, Cambria Heights, New York 11411.

Based on the record before this Court, on October 13, 2007, defendants Carl Goulding and Roxanne Goulding (collectively hereinafter defendants) obtained a loan from Household Finance Realty Corporation of New York, A Delaware Corporation, in the principal amount of \$467,400, secured by a mortgage encumbering the subject premises. Plaintiff alleges that it is the holder of the mortgage and underlying obligation and that defendant defaulted under the terms of the note and mortgage by failing to make the monthly installment payment due on August 1, 2008 and continuing thereafter. As a consequence, plaintiff elected to accelerate the entire mortgage debt.

On August 20, 2015, plaintiff commenced this action by filing a summons and complaint and notice of pendency. All defendants, including occupant Latoya Goulding, were duly served and failed to appear or otherwise move and their time to do so has expired, except for defendants who interposed an answer with counterclaims and affirmative defenses dated October 10, 2015. This matter was released from the residential foreclosure settlement conference part on December 7, 2015 when defendants failed to adhere to a submission deadline for a loan modification. Plaintiff now seeks an order of reference.

In support of the motion, plaintiff submits an affidavit from Tomica T. Moore, a default servicing officer at Caliber Home Loans, Inc. (Caliber), the servicing agent and attorney-in-fact for plaintiff. Moore affirms that after a personal review of Caliber's records, which are maintained by Caliber in the regular course of its business, plaintiff became the holder of the Note by way of transfer via allonge. Specifically, the original lender executed an allonge in blank. Plaintiff came into physical possession of the note with the allonge in blank on October 27, 2014 via delivery to its document custodian, Wells Fargo Bank, N.A. (Wells Fargo). Thereafter, the note was delivered to plaintiff's foreclosure counsel, Cohn & Roth. Moore further affirms that defendants defaulted on the note and mortgage by failing to tender the payment due on August 1, 2008 and continuing thereafter. Moore states that on February 12, 2015, the 90-day pre-foreclosure notices pursuant to RPAPL 1304 were mailed to defendants. On May 8, 2015 a notice of default was mailed.

It is well settled that a plaintiff in a mortgage foreclosure action establishes a prima facie case of entitlement to foreclose through submission of proof of the existence of the underlying note, mortgage and default in payment after due demand (see Witelson v Jamaica Estates Holding Corp. I, 40 AD3d 284 [1st Dept. 2007]; 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]).

Plaintiff demonstrated proper service of the summons and complaint. Plaintiff also demonstrated through admissible evidence that it was the holder of the note when the action was commenced. Additionally, Moore affirmed that there was in fact a default under the terms of the note and mortgage. As such, plaintiff established its prima facie case.

In opposition and in support of their cross-motion, defendants contend that plaintiff's motion must be denied and the matter dismissed because plaintiff failed to comply with RPAPL 1304 and failed to establish its standing. As to plaintiff's standing, defendants specifically contend that the affidavit of merit is improper as it was executed by a signor without the requisite authority, there is no proof of physical delivery and possession of the note at the time the action was commenced, the allonge is not affixed to the note, and there is a defective chain of assignments of mortgage.

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]). "[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" (Id. at 107). 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]).

Plaintiff submits the Moore affidavit to demonstrate compliance with RPAPL 1304. Moore affirms that on February 12, 2015, Caliber, as plaintiff's servicer, sent notices by both first class and certified mail to defendants at the mortgaged premises. Copies of the notices are annexed to the motion papers and are dated February 12, 2015 and addressed separately to each defendant at the mortgaged premises. New York State Department of Financial Services' Proof of Filing Statement is also annexed and shows that the 90-day pre-foreclosure notices were filed on February 13, 2015.

This Court finds that defendants' conclusory denials of receipt of the 90-day notice contained in their affidavits dated June 30, 2016 lack the factual specificity and detail required to rebut the prima facie proof of proper mailing set forth in Moore's affidavit (see ACT Props., LLC v Garcia, 102 AD3d 712 [2d Dept. 2013]; Bank of N.Y. v Espejo, 92 AD2d 707 [2d Dept. 2012]; Deutsche Bank Natl. Trust Co. v Hussain, 78 AD3d 989 [2d Dept. 2010]).

The challenges to Moore's affidavit are also insufficient to raise a triable issue of fact. "[A] witness who is familiar with the practices of a company that produced the records at issue, and who generally relies upon such records, may have the requisite knowledge to meet the CPLR requirements for the admission of a business record, provided that the witness can also attest that (1) the record was made in the regular course of business; (2) it was the regular course of business to make such record; and (3) the record was made contemporaneously with the relevant event, thereby assuring its reliability" (People v Brown, 13 NY3d 332, 341 [2009]). The factual allegations set forth in the affidavit, including a personal review of the servicer's records, sufficiently established the admissibility of Moore's statements under the business records exception to the hearsay rule (see Portfolio Recovery Assoc., LLC v Lall, 127 AD3d 576 [1st Dept. 2015]; Merrill Lynch Bus. Fin. Servs. Inc. v Trataros Constr., Inc., 30 AD3d 336 [1st Dept. 2006]; Bank of Am., NA v. Maeder, 16 NYS3d 791 (Sup. Ct., Suffolk Cnty. 2015)). Additionally, plaintiff has submitted the power of attorney to demonstrate that Caliber acted as attorney-in-fact for plaintiff, and thus, could execute that affidavit of merit (see Aurora Loan Servs., LLC v Taylor, 114 AD3d 627 [2d Dept. 2014], aff'd 25 NY3d 355 [2015]; Wells Fargo Bank, N.A. v Arias, 121 AD3d 973 [2d Dept. 2014]; HSBC Bank USA, N.A. v Sage, 112 AD3d 1126 [3d Dept. 2013]).

Turning to defendants' challenge to plaintiff's standing, "[w]here, as here, standing is put into issue by a defendant, the plaintiff must prove its standing in order to be entitled to relief" (Aurora Loan Services, LLC v Taylor, 114 AD3d 627 [2d Dept. 2014][internal citations omitted]; see Midfirst Bank v Agho, 121 A.D.3d 343 [2d Dept. 2014]; U.S. Bank, N.A. v Collymore, 68 AD3d 752 [2d Dept. 2009]). A plaintiff has standing where it is both the holder or assignee of the subject mortgage and the underlying note at the time the action is commenced (see Aurora Loan Services, LLC v Taylor, 114 AD3d 627 [2d Dept. 2014], aff'd 25 NY3d 355 [2015]; Deutsche Bank Natl. Trust Co. v Whalen, 107 AD3d 931 [2d Dept. 2013]; Bank of N.Y. v Silverberg, 86 AD3d 274 [2d Dept. 2011]).

This Court finds that the evidence submitted by plaintiff, including a copy of the note and the Moore affidavit, affirming that plaintiff's document custodian was in possession of the note on March 30, 2007, is sufficient to establish standing to commence the action (see Bank of N.Y. v Silverberg, 86 AD3d 274 [2d Dept. 2011]; U.S. Bank, N.A. v Collymore, 68 AD3d 752 [2d Dept. 2009]; Kondaur Capital Corp. v Argyros, 28 Misc.3d 1230[A][Sup. Ct. Queens Cty. 2013]). Defendants have failed to produce any evidence to dispute such. Although defendants contend that there is no date on the allonge, they fail to cite any authority requiring such (see U.S. Bank Nat'l Assoc. v Guy, 125 AD3d 845 [2d Dept. 2015][finding that by producing a note with an affixed undated allonge endorsed in blank was sufficient to demonstrate standing]). Since the mortgage passes with the debt that is evidenced by the note as an inseparable incident thereto, plaintiff established its standing to commence the within action (see US Bank Natl. Assn. v Cange, 96 AD3d 825 [2d Dept. 2012]; U.S. Bank, NA v Sharif, 89 AD3d 723[2d Dept. 2011]). Thus, defendants argument that plaintiff lacked standing because the assignments are improper is irrelevant as plaintiff has established its standing by physical delivery prior to and at the time of commencement of the action.

Additionally, plaintiff has also established its standing via plaintiff's co-counsel's certification of the note. Kevin T. MacTiernan, Esq., an associate at Cohn & Roth, plaintiff's co-counsel, affirms that Cohn & Roth received the original note on July 10, 2015, which was prior to commencement of the action. Additionally, Mr. MacTiernan affirms that Cohn & Roth maintains possession of the original note, and he has reviewed the original note, which includes an allonge in blank from the original lender. He further affirms that the allonge is firmly affixed to the original note.

Accordingly, plaintiff's motion for summary judgment is granted and the affirmative defenses and counterclaims contained in defendants' answer are stricken. All remaining defendants are deemed to be in default. Plaintiff's application for the appointment of a referee to compute the amounts due under the subject mortgage is granted and the caption shall be amended.

Defendants' cross-motion is denied.

Settle Order.

Dated: August 1, 2016
Long Island City, N.Y.

ROBERT J. McDONALD
J.S.C.