

Bank of Am., N.A. v Giaramita
2016 NY Slip Op 32139(U)
August 15, 2016
Supreme Court, Suffolk County
Docket Number: 3646/2014
Judge: Howard H. Heckman, Jr.
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SUPREME COURT - STATE OF NEW YORK
CALENDAR CONTROL PART 18 - SUFFOLK COUNTY

COPY

PRESENT:
HON. HOWARD H. HECKMAN JR., J.S.C.

INDEX NO.: 3646/2014
MOTION DATE: 03/02/2015
MOTION SEQ. NO.: 001 MG

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BANK OF AMERICA, N.A.,

Plaintiffs,

-against-

THOMAS GIARAMITA aka THOMAS A.
GIARAMITA,

Defendants.
-----X

PLAINTIFFS' ATTORNEY:
BERKMAN, HENOCH, PETERSON,
PEDDY & FENCHEL, P.C.
100 GARDEN CITY PLAZA
GARDEN CITY, NY 11530

DEFENDANT PRO SE:
THOMAS GIARAMITA
80 4TH AVENUE
HUNTINGTON STATION, NY 11746

Upon the following papers numbered 1 to 30 read on this motion; Notice of Motion/ Order to Show Cause and supporting papers 1- 21; Notice of Cross Motion and supporting papers 1; Answering Affidavits and supporting papers 22-23; Replying Affidavits and supporting papers 24-30; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff Bank of America, N.A., seeking an order: 1) granting summary judgment striking the answer of the defendant Thomas Giaramita a/k/a Thomas A. Giaramita; 2) substituting Franklin Gomez and Wendy Osario as named party defendants in place and stead of defendants referred to as "John Doe #1" through "John Doe #2" and discontinuing the action against any remaining defendants identified as "John Doe #3" through "John Doe #12"; 3) deeming all appearing and non-appearing defendants in default; 4) amending the caption; and 5) appointing a referee to compute the sums due and owing to the plaintiff in this mortgage foreclosure action is granted; and it is further

ORDERED that plaintiff is directed to serve a copy of this order amending the caption upon the Calendar Clerk of the Court; and it is further

ORDERED that plaintiff is directed to serve a copy of this order with notice of entry upon all parties who have appeared and not waived further notice pursuant to CPLR 2103(b)(1),(2) or (3) within thirty days of the date of this order and to promptly file the affidavits of service with the Clerk of the Court.

Plaintiff's action seeks to foreclose a mortgage in the sum of \$182,000.00 executed by the defendant Thomas Giaramita a/k/a Thomas A. Giaramita on February 11, 2003 in favor of Countrywide Home Loans, Inc. On that same date the defendant also executed a promissory note evidencing the indebtedness. On October 6, 2009 Countrywide assigned the note and mortgage to BAC Home Loans Servicing, LP. Countrywide endorsed the note in blank payable to the bearer. By

Certificate of Merger dated June 28, 2011 the assignee, BAC Home Loans Servicing, LP, merged into Bank of America, N.A. Plaintiff claims that the defendant defaulted in making timely monthly mortgage payments under the terms of the original note and mortgage since May 1, 2009. Plaintiff's motion seeks an order granting summary judgment striking defendant's answer and for the appointment of a referee.

In opposition, the defendant submits an attorney's affirmation and claims that Bank of America lacks standing to prosecute this foreclosure action since the bank has failed to prove that it was the holder of the note at or prior to the time this action was commenced. Defendant argues that the bank officer's affidavit is hearsay and provides insufficient proof concerning the physical transfer of the note to establish the bank's capacity to sue as the alleged holder of the note. Defendant also claims that the bank failed to provide proper notice of intent to accelerate the mortgage payments in compliance with Section 15 of the mortgage agreement since the bank served the notice to the incorrect address. Defendant contends that the notice should have been sent to defendant's actual residential address for notice purposes and not to the mortgaged premises and that the lender was fully aware that the defendant/owner did not occupy those premises. Finally defendant claims that the borrower is entitled to a preliminary conference and claims that plaintiff's prior action involving the same claims has never been discontinued and therefore this action should be dismissed.

In reply the plaintiff submits an attorney's affirmation and argues that the bank has established standing by virtue of its possession of the duly indorsed note at the time this action was commenced. It is the plaintiff's position that evidence in the form of the bank official's affidavit confirms that the lender had possession of the note when the action was commenced and continues to retain possession of the note thereby proving standing. The plaintiff also claims that the default notice which was delivered to the mortgaged premises complies with the requirements of notice set forth in the mortgage agreement, and argues that absent proof to show that the borrower promptly notified the lender of his change of address, no basis exists to find that proper notice was not given to Giaramita. Finally, plaintiff claims that the defendant is not entitled to a preliminary conference and states that the prior foreclosure action was discontinued by Order (Rebolini, J.) dated October 16, 2013.

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 eliminate any material question of fact from the case. The grant of summary judgment is appropriate only when it is clear that no material and triable issues of fact have been presented (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957)). The moving party bears the initial burden of proving entitlement to summary judgment (*Winegrad v. NYU Medical Center*, 64 NY2d 851 (1985)). Once such proof has been proffered, the burden shifts to the opposing party who, to defeat the motion, must offer evidence in admissible form, and must set forth facts sufficient to require a trial of any issue of fact (CPLR 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557 (1980)). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v. Associated Fur Manufacturers*, 46 NY2d 1065 (1979)).

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 default in payment (see *Wells Fargo Bank N.A. v. Eraboba*, 127 AD3d 1176, 9 NYS3d 312 (2nd Dept., 2015);

Wells Fargo Bank, N.A. v. Ali, 122 AD3d 726, 995 NYS2d 735 (2nd Dept., 2014)). Where the plaintiff's standing is placed in issue by the defendant's answer, the plaintiff must also establish its standing as part of its prima facie showing (*Aurora Loan Services v. Taylor*, 25 NY3d 355, 12 NYS3d 612 (2015); *Loancare v. Firshing*, 130 AD3d 787, 14 NYS3d 410 (2nd Dept., 2015); *HSBC Bank USA, N.A. v. Baptiste*, 128 AD3d 77, 10 NYS3d 255 (2nd Dept., 2015)). In a foreclosure action, a plaintiff has standing if it is either the holder of, or the assignee of, the underlying note at the time that the action is commenced (*Aurora Loan Services v. Taylor, supra.*; *Emigrant Bank v. Larizza*, 129 AD3d 94, 13 NYS3d 129 (2nd Dept., 2015)). Either a written assignment of the note or the physical transfer of the note to the plaintiff prior to commencement of the action is sufficient to transfer the obligation and to provide standing (*Wells Fargo Bank, N.A. v. Parker*, 125 AD3d 848, 5 NYS3d 130 (2nd Dept., 2015); *U.S. Bank v. Guy*, 125 AD3d 845, 5 NYS3d 116 (2nd Dept., 2015)). A plaintiff's attachment of a duly indorsed mortgage note to its complaint coupled with an affidavit in which it alleges that it had possession of the note prior to the commencement of the action constitutes due proof of the plaintiff's standing to prosecute its claim for foreclosure and sale (*see Nationstar Mortgage, LLC. v. Catizone*, 127 AD3d 1151, 9 NYS3d 315 (2nd Dept., 2015)).

Plaintiff has submitted sufficient evidence to establish standing to maintain this foreclosure action by submission of an affidavit from a bank official who relies upon the mortgagee's records to confirm that the lender possessed (and continues to possess) the indorsed promissory note at the time the action was commenced. The affidavit provides sufficient proof that the bank had possession of the underlying promissory note prior to commencement of this action (*Nationstar Mortgage v. Catizone, supra.*).

Moreover the bank has shown that the defendant has defaulted under the terms of the February 11, 2003 mortgage by failing to make timely monthly mortgage payments since May 1, 2009. The bank, having proven entitlement to summary judgment, it is incumbent upon the defendant to submit relevant, evidentiary proof sufficiently substantive to raise genuine issues of fact concerning why the lender is not entitled to foreclose the mortgage. Defendant has wholly failed to do so.

Defendant's two arguments in opposition to the bank's motion are that the bank lacks standing to prosecute its claims and that the lender failed to provide adequate notice of default as required under the terms of the mortgage agreement. With respect to standing, the borrower's argument centers on the fact that bank official who reviewed the lender's records does not have personal knowledge of the transaction between the parties and therefore his sworn statements constitute inadmissible hearsay. That contention is not supportable since the plaintiff's representative's sworn statement is based upon knowledge acquired by a review of the business records kept in the ordinary course of business. This evidence, set forth in the bank official's affidavit dated November 23, 2014, satisfies the business records exception to the hearsay rule and is sufficiently detailed in all other respects to provide the proof necessary to prima facie entitlement to summary judgment (CPLR 4518; *Landmark Capital Investments v. Li-Shan Wang*, 94 AD3d 418, 941 NYS2d 144 (1st Dept., 2012); *Merrill Lynch Business Financial Services, Inc. v. Trataros Construction, Inc.*, 30 AD3d 336, 819 NYS2d 223 (1st Dept., 2006)).

As to notice of default, the mortgage provides that all notices were to be mailed to the mortgaged premises unless the borrower gave prior notice to the lender of a different address. The record shows that the plaintiff provided a default notice in compliance with the terms of the

mortgage by mailing the notice of default dated June 16, 2009 to the mortgage premises address. There is no relevant, admissible evidence submitted by the defendant in the form of an affidavit or documentary evidence to show that the borrower had provided a different address to the lender prior to his default. The submission of an attorney's affirmation provides no admissible evidence to establish a genuine issue of fact and therefore no legal basis exists to deny the plaintiff's motion for failure to comply with the mortgage notice requirements. The defendant's remaining contentions concerning the prior action and the borrower's right to a preliminary conference are equally without merit. Accordingly the plaintiff's motion seeking an order granting summary judgment and for the appointment of a referee must be granted. The proposed order for the appointment of a referee has been signed simultaneously with the execution of this order.

Dated: August 15, 2016



Handwritten signature of Howard H. Heckman Jr. over a horizontal line.

J.S.C.

Hon. Howard H. Heckman Jr.