

Bank of N.Y. Mellon Trust Co., N.A. v Magioncalda
2016 NY Slip Op 32512(U)
October 7, 2016
Supreme Court, Suffolk County
Docket Number: 1541/12
Judge: Thomas F. Whelan
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COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE: 3/30/16
SUBMIT DATE: 8/26/16
Mot. Seq. #001 - MD
Mot. Seq. # 002 - XMot D
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THE BANK OF NEW YORK MELLON TRUST COMPANY, NATIONAL ASSOCIATION f/k/a The Bank of New York Trust Company, NA, as Successor to JPMorgan Chase Bank, NA, as Trustee for RASC 2004KS6,

Plaintiff,

-against-

ROBERT L. MAGIONCALDA, VIRGINIA MAGIONCALDA, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., as nominee for Fremont Investment and Loan, ACTIVE DOOR & WINDOW CORP., BRUCE DAVIS, CAPITAL ONE BANK, DIANA SHULMAN, PLATINUM FINANCIAL SERVICES CORP., ROSE MAR REALTY CO., UNITED STATES OF AMERICAN (EASTERN DISTRICT), "JOHN DOE", "RICHARD ROE", "JANE DOE", "CORA COE", "DICK MOE" and "RUBY POE", the six defendants last named in quotation marks being intended to designate tenants or occupants in possession of the herein described premises or portions thereof, if any there by, said names being fictitious, their true name being unknown to plaintiff,

Defendants.

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Bank of New York v Magioncalda
Index no. 1541/12
Page 2

Upon the following papers numbered 1 to 13 read on this motion by the plaintiff for summary judgment and the appointment of a referee, among other things and the cross motion by defendants Magioncalda to amend their answer, among other things; Notice of Motion/Order to Show Cause and supporting papers 1 - 6; Notice of Cross Motion and supporting papers 7-10; Answering papers _____; Reply papers _____; Other 11-12 (affirmation); 13 (memorandum); (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (#001) by the plaintiff for an order awarding it accelerated judgments on its complaint, the deletion of the unknowns as party defendants and an order appointing a referee to compute is considered under CPLR 3212, 3215, 1003 and RPAPL § 1321 and is denied; and it is further

ORDERED that those portions of the cross motion (#002) by defendants, Robert L. Magioncalda and Virginia Magioncalda, wherein they seek leave to serve an amended answer is granted, conditionally, only to the following limited extent: that the Magioncalda defendants are hereby granted leave to file and serve an amended answer containing one affirmative defense challenging the plaintiff's standing, *provided* that such amended answer is filed and served within 45 days of the date of this order. The remaining portions of the cross motion are denied.

The plaintiff commenced this action on January 9, 2012 to foreclose the lien of a mortgage dated March 23, 2004 executed by defendant, Robert Magioncalda, in favor of Freemont Investment and Loan, to secure a mortgage note of the same date likewise executed by said defendant. The loan went into default in April of 2006 and the plaintiff commenced a prior action to foreclose in March of 2010. By motion submitted in December of 2011, the plaintiff sought an order discontinuing that prior action and other relief which was granted on February 29, 2012, which was subsequent to the institution of this action by forty days.

In response to the plaintiff's service of the summons and complaint upon the defendants, the Magioncalda defendants served an answer dated February 8, 2012 and therein asserted one affirmative defense, namely that the plaintiff's prosecution of this second action was precluded by the pendency of the prior action. The other defendants served with process failed to appear herein by answer.

By the instant motion (#001), the plaintiff seeks summary judgment dismissing the answer served by the Magioncalda defendants and an award of summary judgment on its complaint against them. In addition, the plaintiff moves for an order dropping the unknowns listed in the caption as party defendants together with a caption amendment to reflect these changes and default judgments against the remaining defendants who were served with process. The appointment of a referee to compute amounts due under the terms of the note and mortgage is the plaintiff's last demand for relief.

The Magioncalda defendants oppose the plaintiff's motion in cross moving papers (#002) in which they seek leave to serve an amended answer in the form of the one attached to the moving papers which contains twenty one separately numbered affirmative defenses and five counterclaims. In addition, the Magioncalda defendants seek a dismissal of this action based upon the standing defenses asserted in their proposed amended answer. For the reasons stated below, the plaintiff's motion (#001) is denied while the cross motion (#002) of the Magioncalda defendants is granted to the extent set forth below.

Entitlement to summary in favor of foreclosing plaintiff is established, prima facie, by the plaintiff's production of the mortgage and the unpaid note, and evidence of the default in payment (see *Wells Fargo Bank, N.A. v Erobobo*, 127 AD3d 1176, 9 NYS2d 312 [2d Dept 2015]; *Wells Fargo Bank, N.A. v DeSouza*, 126 AD3d 965, 3 NYS2d 619 [2d Dept 2015]; *OneWest Bank, FSB v DiPilato*, 124 AD3d 735, 998 NYS2d 668 [2d Dept 2015]; *Wells Fargo Bank, N.A. v Ali*, 122 AD3d 726, 995 NYS2d 735 [2d Dept 2014]). Here, the moving papers submitted by the plaintiff established a prima facie entitlement to an award of summary judgment by the plaintiff's production of the note, mortgage and evidence of a default in payment under the terms thereof. In this regard the court notes that there was no denial of the default in payment set forth in the answer served. The moving papers further established that the sole affirmative defense asserted in the answer of the defendants was without merit, since the prior action had been discontinued shortly after the commencement of this action and no harm or prejudice inured to the defendants by the limited simultaneous pendency of both actions (see *Wells Fargo Bank, N.A. v Irizarry*, ___ AD3d ___, 2016 WL 4371577 [2d Dept 2016]). The plaintiff thus made a prima facie showing of its entitlement to the summary judgment demanded by it.

That the plaintiff was under no obligation to establish its standing in its moving papers is clear as standing is not an element of a foreclosing plaintiff's claim for foreclosure and sale, but instead, is an affirmative defense that was waived by the Magioncalda defendants by their failure to assert in their original answer (see *Bank of New York Trust Co., N.A. v Chiejina*, ___ AD3d ___, 36 NYS3d 512 [2d Dept 2016]; *U.S. Bank Natl. Assoc. v Dorestant*, 131 AD3d 467, 15 NYS3d 142 [2d Dept 2015]; *JP Morgan Chase Bank Natl. Assoc., v Butler*, 129 AD3d 777, 2015 WL 3605382 [2d Dept 2015]; *Deutsche Bank Natl. Trust Co. v Islar*, 122 AD3d 566, 996 NYS2d 130 [2d Dept 2014]). Nevertheless, a waived standing defense, like certain other affirmative defenses, may be asserted in an amended answer, served as of right or pursuant to leave of court (see *Onewest, F.S.B. v Goddard*, 131 AD3d 1028, 17 NYS2d 142 [2d Dept 2015]; *Deutsche Bank Trust Co. Am. v Cox*, 110 AD3d 760, 973 NYS2d 662 [2d Dept 2013]; *Aurora Loan Serv. v Dimura*, 104 AD3d 796, 962 NYS2d 304 [2d Dept 2013]; *U.S. Bank, N.A. v Sharif*, 89 AD3d 723, 723, 933 NYS2d 293 [2d Dept 2011]; *Ingrami v Rovner*, 45 AD3d 806, 847 NYS2d 132 [2d Dept 2007]).

Where, as here, the plaintiff voluntarily addresses its standing in a motion for summary judgment, even though that defense was not originally asserted by an answering defendant, but such defendant opposes the motion and cross moves for leave to amend the answer to assert that defense,

the plaintiff enlarges its burden on its motion to include a showing of its standing (*see U.S. Bank v Prmiano*, 140 AD3d 857, 32 NYS3d 643 [2d Dept 2016]). Accordingly, the court shall address the defendants' cross motion before it returns to its determination of the plaintiff's motion-in-chief.

The standard in determining an application for leave to amend a pleading is statutorily skewed in favor of the applicant, as CPLR 3025 provides that such applications shall be liberally granted (*see* CPLR 3025[b]). Controlling appellate case authorities have instructed that, in the absence of prejudice or surprise to a non-moving party, leave should be granted without an examination of the merits of the proposed amendments nor any obligation to support them with evidentiary materials (*see Onewest, F.S.B. v Goddard*, 131 AD3d 1028, *supra*; *Katz v Castlepoint Ins. Co.*, 121 AD3d 948, 995 NYS2d 131 [2d Dept 2014]; *Rosicki & Rosicki Assocs. PC v Cochems*, 59 AD3d 512, 873 NYS2d 184 [2d Dept 2009]). However, proposed amendments that are palpably insufficient or patently devoid of merit will be rejected without any showing of surprise or prejudice to non-moving parties (*see Vista Prop., LLC v Rockland Eye, Ear, Nose and Throat Assocs. PC*, 60 AD3d 846, 875 NYS2d 248 [2d Dept 2009]; *Lucido v Mancuso*, 49 AD3d 220, 222, 851 NYS2d 238 [2d Dept 2008]).

A review of the proposed amended answer attached to the moving papers reveals that the only potentially meritorious defense asserted is the standing defense which is contained in some, but not all, of the several, separately enumerated defenses. All other affirmative defenses, all of which are boilerplate in nature, and each of the counterclaims premised upon them are palpably insufficient or patently devoid of merit (*see North Am. Sav. Bank, FSB v Esposito-Com*, 141 AD3d 706, 35 NYS3d 491 [2d Dept 2016]; *Wells Fargo Bank, N.A. v Morgan*, 139 AD3d 1046, 32 NYS3d 595 [2d Dept 2016]; *see also Flagstar Bank, FSB v Davis*, 50 Misc3d 1205[A], 28 NYS3d 648 [Sup. Court, Suffolk County 2015]). Accordingly, the defendants' cross motion, is granted, conditionally to the following limited extent: that leave to file and serve an amended answer containing one affirmative defense challenging the plaintiff's standing is granted provided that such amended answer is filed and served within 45 days of the date of this order.

Returning to the plaintiff's motion, the court finds that the plaintiff's submissions were insufficient to establish, by proof in admissible form, that the plaintiff was in possession of the mortgage note prior to commencement of this action. The copy of the note submitted by the plaintiff did not include the Adjustable Rate Rider that accompanied the defendants' copy of the note and the two undated special indorsements appearing on a separate page are not referable to the mortgage note. The plaintiff's reliance on its incomplete copy of the note and the separate page containing the undated special indorsements to Residential Funding Corporation and JPMorgan Chase Bank, N.A., as Trustee, whose relationship to the plaintiff is not addressed, is insufficient to establish its standing. In addition, the conclusory and inadmissible allegations of the plaintiff's possession of the note on a date certain prior to the commencement of this action set forth in the affidavit of an employee of the current loan servicer was also insufficient to establish the plaintiff's standing (*see Deutsche Bank Natl. Trust Co. v Brewton*, ___ AD3d ___, 2016 WL 4533606 [2d Dept 2016]; *Deutsche*

Bank of New York v Magioncalda
Index no. 1541/12
Page 5

Bank Natl. Trust Co. v. Webster, ___ AD3d ___, 2016 WL 4443729 [2d Dept 2016]; *Aurora Loan Servs., LLC v Mercius*, 138 AD3d 650, 29 NYS3d 462 [2d Dept 2016]). Accordingly, the plaintiff's motion for accelerated judgments and the other incidental relief outlined above is denied.

By the same token, the defendants' submissions did not establish, as a matter of law, that the plaintiff lacked standing to prosecute its claims for foreclosure and sale as no proof in admissible form establishing that the plaintiff was not in possession of a duly indorsed note prior to the commencement of this action was put before the court by the defendants. Many of the contentions advanced by defense counsel are premised upon perceived defects or irregularities in the various assignments of mortgage which are irrelevant to the issue of standing if the plaintiff can establish its possession of the note on or before the date of the commencement of this action by due and competent proof (see *Wells Fargo Bank v Charlaff*, 134 AD3d 1009, 24 NYS3d 317 [2d Dept 2015]; see also *U.S. Bank, N.A. v Askew*, 138 AD3d 402, 27 NYS3d 856 [1st Dept 2016]). The remaining contentions of defense counsel offered in support of the demand for dismissal of the complaint, such as those regarding "the particulars of note delivery" are likewise unavailing under such circumstances (see *Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 12 NYS3d 612 [2015]; *U.S. Bank, N.A. v Askew*, 138 AD3d 402, *supra*). Those portions of the defendants' motion wherein they seek dismissal of the complaint due to a purported lack of standing on the part of the plaintiff is denied.

In view of the foregoing, the plaintiff's motion-in-chief (#001) is denied while the defendants' cross motion (#002) is granted, conditionally, only to the following limited extent: that the defendants are hereby granted leave to file and serve an amended answer containing one affirmative defense challenging the plaintiff's standing, *provided* that such amended answer is filed and served within 45 days of the date of this order. The failure on the part of the defendants to serve and file an amended answer containing one affirmative defense predicated upon a lack of standing on the part of the plaintiff within the 45 days leave herein granted, will constitute a waiver of such defense and a vacatur of the leave so granted.

DATED: 10/7/16


THOMAS F. WHELAN, J.S.C.