

Bank of N.Y. Mellon Trust Co., N.A. v Pinto
2016 NY Slip Op 32536(U)
November 3, 2016
Supreme Court, Suffolk County
Docket Number: 17195/10
Judge: Howard H. Heckman, Jr.
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SUPREME COURT - STATE OF NEW YORK
IAS PART 18 - SUFFOLK COUNTY

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

INDEX NO.: 17195/10
MOTION DATE: 063/02/16
MOTION SEQ. NO.: 005 MG
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THE BANK OF NEW YORK MELLON TRUST CO.,
N.A.,

Plaintiffs,

-against-

HAMILTON PINTO, ET AL,

Defendants.
-----X

PLAINTIFFS' ATTORNEY:
ROSICKI, ROSICKI & ASSOCIATES, P.C.
51 E. BETHPAGE ROAD
PLAINVIEW, NY 11803

DEFENDANTS' ATTORNEYS:
FRIEDMAN LAW ASSOCIATES, P.C.
300 WHEELER RD., STE. 101
HAUPPAUGE, NY 11788

**ATTORNEY FOR HAMPTON DREAM
PROPERTIES, LLC:**
CHRISTOPHER THOMPSON, ESQ.
33 DAVIDSON LANE EAST
WEST ISLIP, NY 11795

Upon the following papers numbered 1 to 19 read on this motion; Notice of Motion/ Order to Show Cause and supporting papers 1- 10; Notice of Cross Motion and supporting papers 11-16; Answering Affidavits and supporting papers___; Replying Affidavits and supporting papers 17-19; Other___; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff The Bank of New York Mellon Trust Company, seeking an order: 1) granting summary judgment striking the answers of defendant Hamilton Pinto and Hampton Dream Properties, LLC; 2) discontinuing the action against defendants identified as "John Does" and "Jane Does"; 3) deeming all appearing and non-appearing defendants in default; 4) amending the caption; and 5) reforming the description of the mortgaged premises; and 6) 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 the motion by non party/proposed intervenor defendant, Hampton Dream Properties, LLC, seeking an order pursuant to CPLR 1012, 1013 & 3211(a)(1)&(7) & RPAPL 1304 granting leave for the proposed intervenor Hampton Dream Properties, LLC (HDP) to intervene as a named party defendant and dismissing plaintiff's complaint is granted solely to the extent that the summons and complaint are hereby amended by adding Hampton Dream Properties, LLC, as a defendant. The proposed answer annexed to the motion papers shall be deemed served nunc pro tunc to the date of service of Hampton Dream Properties's motion; and it is further;

ORDERED all other requests for relief asserted by defendant Hampton Dream Properties, LLC, are denied; 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 \$880,000.00 executed by the defendant Hamilton Pinto on July 24, 2007 in favor of JP Morgan Chase Bank, N.A. On the same date defendant Hamilton Pinto executed a promissory note promising to repay the entire amount of the indebtedness to the mortgage lender. By assignment dated June 1, 2010, JP Morgan Chase Bank, N.A., assigned the mortgage to plaintiff The Bank of New York Mellon Trust Company. Plaintiff claims that the defendant Pinto defaulted in making timely monthly mortgage payments since January 1, 2010. Plaintiff's motion seeks an order granting summary judgment, striking the defendant's answer and for the appointment of a referee.

In opposition and support of its motion, the non-party/proposed intervenor defendant Hampton Dream Properties, LLC, submits an affidavit from a member of HDP and an attorney's affirmation, and claims that HDP is the current title owner of the mortgaged premises having acquired title by deed dated February 25, 2014 and is therefore a necessary party to this foreclosure action. HDP contends that it had no notice of plaintiff's foreclosure action since the original notice of pendency filed by the lender had expired by operation of law on June 9, 2013. HDP also claims that a release of mortgage was recorded in the Suffolk County Clerk's Office on September 3, 2014 indicating that the mortgage lien no longer exists and submits as proof copies of two pages from an introductory tax map search page listing a "9/3/2014 Release" between "JP Morgan Chase Bank, N.A." and "Hamilton Pinto". HDP contends that plaintiff's summary judgment motion must be denied since substantial issues of fact exist concerning; 1) plaintiff's lack of standing; 2) plaintiff's failure to include it as a named defendant since HDP is a necessary party; 3) plaintiff's failure to submit sufficient admissible proof to establish the mortgagor/defendant's default and to establish a factual basis for reforming the description set forth in the mortgage; 4) plaintiff's failure to comply with the mortgage default and 90 day notice requirements pursuant to RPAPL 1304; and 5) plaintiff's violation of General Business Law 6-m & 6-l since it is likely that the mortgage is a high-cost, sub-prime home loan. HDP also argues that based upon the release of the underlying mortgage lien and the plaintiff's failure to comply with the 90 day notice requirement (RPAPL 1304), which is a condition precedent to commencing this foreclosure action, the complaint must be dismissed. HDP also claims that plaintiff's second cause of action seeking to reform the description of the mortgaged premises must be denied.

In reply, the plaintiff submits an attorneys' affirmation and consents to that portion of HDP's application to be included as a named party defendant in this action. Plaintiff claims that the underlying mortgage encumbering the premises has never been released and asserts that there is no relevant, admissible evidence submitted by HDP to prove its claim. In support of the bank's claim it submits a copy of a "Release of Property from Mortgage" dated June 2, 2014 which provides that a Chase/Pinto mortgage dated June 24, 2007 in the sum of \$110,000.00 is released "from the lien created by the mortgage" and "is not a release of the obligation under the Note as said obligation has not been fully paid." Plaintiff claims that clearly the mortgage sought to be foreclosed in the sum of

\$880,000.00 was not the mortgage reflected in the June 2, 2014 release. Plaintiff also claims that no basis exists to dismiss the complaint since the bank has submitted sufficient proof to establish its standing to maintain this action, to prove that all required default notices were properly served and to demonstrate the defendant's continuing default in making mortgage payments due under the terms of the loan agreement. Plaintiff also argues that there is no evidence submitted to support HDP's arbitrary claim that the loan was a high cost home loan in violation of New York Banking Law and asserts that the second cause of action seeking reformation of the description of the premises due to a typographical error must be granted. Plaintiff claims that the description in the deed conveying title to the mortgagor and the mortgage are identical and must be corrected to accurately describe the premises.

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 may establish its standing by proof that it is the assignee of the subject note and mortgage under a written assignment of the note by the owner thereof at the time of the execution of the written assignment (*Wells Fargo Bank, N.A. v. Walker*, 141 AD3d 986, 2016 Slip Op 05605 (3rd Dept., 2016); *Emigrant Bank v. Larizza*, 129 AD3d 904, 13 NYS3d 129 (2nd Dept., 2015); *Peak Financial Partners, Inc. v. Brook*, 119 AD3d 539, 987 NYS2d 916 (2nd Dept., 2014); *Chase Home Finance, LLC v. Miciotta*, 101 AD3d 1307, 956 NYS2d 271 (3rd Dept., 2012); *Wells Fargo Bank, N.A. v. Wine*, 90 AD3d 1216, 935 NYS2d 664 (3rd Dept., 2011)).

Plaintiff has submitted sufficient evidence in the form of an affidavit from a mortgage

servicing document control officer, satisfying the business records exception to the hearsay rule (*see* 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)), to prove that defendant Hamilton Pinto has defaulted under the terms of the July 24, 2007 note and mortgage by failing to make timely monthly payments since January 1, 2010. The bank, having proven entitlement to summary judgment, it is incumbent upon an opposing party 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/intervenor HDP has wholly failed to do so.

With respect to the issue of standing, the plaintiff has submitted sufficient proof in the form of the affidavit from the mortgage servicing document control officer (satisfying the business records exception to the hearsay rule) and by submission of a copy of the Chase/Bank of New York Mellon Assignment to establish that the original Chase mortgage was assigned to the plaintiff by written assignment dated June 1, 2010 and recorded on June 18, 2010 in the Suffolk County Clerk's Office. The written assignment executed by a vice president of JP Morgan Chase Bank, N.A., by its terms, conveys the mortgage "(TOGETHER) with the bond or note or obligation described in said mortgage, and the moneys due and to grow due thereon with interest..." Such evidence demonstrates that the assignment effectuated the legal transfer of both the mortgage and the note to the plaintiff on the date of its execution, which was June 1, 2010. Based upon this evidence, the plaintiff had standing to maintain this foreclosure action since its ownership interest in the promissory note and the mortgage has been established and was prior to commencement of this action on June 9, 2010 (*Wells Fargo Bank, N.A. v. Walker, supra.*; *U.S. Bank, N.A. v. Collymore*, 68 AD3d 752, 890 NYS2d 578 (2nd Dept., 2009); *Bank of New York v. Silverberg*, 86 AD3d 274, 926 NYS2d 532 (2nd Dept., 2011)). The failure to record the assignment prior to commencement of the action does not provide a basis to deny plaintiff standing since the assignment of the note and mortgage is effective on the date that it is signed (*U.S. Bank, N.A. v. Collymore, supra.*; *Wells Fargo Bank, N.A. v. Marchione*, 69 AD3d 204, 887 NYS2d 615 (2nd Dept., 2009)).

With respect to HDP's claims that the underlying mortgage has been released and no longer encumbers the property, the admissible proof submitted by the plaintiff in the form of a copy of the June 2, 2014 release proves that the satisfaction recorded by Chase for a mortgage lien in the original sum of \$110,000.00 was not the mortgage at issue in this foreclosure proceeding which is in the original amount of \$880,000.00. No basis therefore exists to dismiss the complaint based upon a "release" of the mortgage lien. As to HDP's remaining contentions, the record reveals that the party (HDP) raising issues concerning the mortgagee's failure to comply with the mortgage default notice provisions and the statutory 90 day notice requirements (RPAPL 1304), is not a signatory to the mortgage or the promissory note, and thus does not have standing to itself raise these issues. Those default notice defenses are personal to the mortgagor/defendant Pinto, and his failure to raise them in opposition to the plaintiff's summary judgment motion has the effect of waiving those defenses (*see New York Community Bank v. J Realty F Rockaway Ltd.*, 108 AD3d 756, 969 NYS2d 796 (2nd Dept., 2013); *Starkman v. City of Long Beach*, 106 AD3d 1076, 965 NYS2d 609 (2nd Dept., 2013)). The intervenor/defendant is without capacity to raise such claims on its own behalf as a defense to plaintiff's foreclosure action since those defenses can only be asserted by the "borrower" pursuant to RPAPL 1304 and under the terms of the mortgage (*Wells Fargo Bank, N.A. v. Bowie*, 89 AD3d 931, 932 NYS2d 702 (2nd Dept., 2011); *NY CTL 1996-1 Trust v. King*, 13 AD3d 429, 787 NYS2d 61 (2nd Dept., 2004)).

The remaining contentions advanced by HDP are claims by its attorney that the loan “may” be a high cost, subprime home loan in violation of New York Business Law 6-m & 6-l and that the application to reform the description of the premises must be denied. Absent submission of admissible, evidentiary proof that the loan was in violation of the Business Law no basis exists to deny plaintiff’s summary judgment motion. The submission of an attorney’s affirmation claiming it is “likely” that the loan is unlawful without any further documentation or evidence to support this claim fails to raise a genuine question of fact to defeat plaintiff’s motion. For the same reason no basis exists to deny plaintiff’s application to reform the description of the premises given the undisputed fact that both the mortgage and the deed contain the same scrivener’s error. Finally, as neither defendant has failed to raise any other evidence to address the pleaded affirmative defenses set forth in their answers in opposition to plaintiff’s motion, those affirmative defenses must be deemed abandoned and subject to dismissal (*see Kronick v. L.P. Therault Co., Inc.*, 70 AD3d 648, 892 NYS2d 85 (2nd Dept., 2010); *Citibank, N.A. v. Van Brunt Properties, LLC*, 95 AD3d 1158, 945 NYS2d 330 (2nd Dept., 2012); *Flagstar Bank v. Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 (2nd Dept., 2012); *Wells Fargo Bank Minnesota, N.A. v. Perez*, 41 AD3d 590, 837 NYS2d 877 (2nd Dept., 2007)).

Accordingly, the intervenor/defendant HDP’s motion seeking an order dismissing plaintiff’s complaint is denied and the plaintiff’s motion for an order granting summary judgment and for the appointment of a referee to compute the sums due and owing to the plaintiff is granted. The proposed order of reference has been signed simultaneously with the execution of this order.

Dated: November 3, 2016



J.S.C.