

Bank of N.Y. Mellon v Smith
2016 NY Slip Op 33008(U)
May 24, 2016
Supreme Court, Westchester County
Docket Number: 56393/2014
Judge: Lawrence H. Ecker
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

-----X
THE BANK OF NEW YORK MELLON F/K/A
THE BANK OF NEW YORK, AS TRUSTEE FOR
THE CERTIFICATE HOLDERS OF CWMBS, INC.,
CHL MORTGAGE PASS-THROUGH TRUST 2007-
10, MORTGAGE PASS-THROUGH TRUST 2007-
10 CERTIFICATES, SERIES 2007-10,

Plaintiff,

-against-

DEREK SMITH, PEOPLE OF THE STATE OF NEW YORK, THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK, AS TRUSTEE FOR THE BENEFIT OF THE CERTIFICATE HOLDERS OF THE CWHEQ, INC., CWHEG REVOLVING HOME EQUITY LOAN TRUST SERIES 2007-D, UNITED STATES OF AMERICA ACTING THROUGH THE IRS, JOHN DOE (being fictitious, the names unknown to Plaintiff intended to be tenants, occupants, persons or corporations having or claiming to have an interest in or lien upon the property described in the complaint, or their heirs at law, distributees, executors, administrators, trustees, guardians, assignees, creditors or successors),

Defendants.
-----X

ECKER, J.

The following papers numbered 1 through 24 were read on plaintiff's motion for summary judgment and the appointment of a referee to compute, made pursuant to CPLR 3212.:

PAPERS**NUMBER**

Notice of Motion, Affirmation, Affidavit, Exhibits A - P Memorandum of Law,	1 - 18 ¹
Affirmation in Opposition, Exhibits 1-3, Memorandum of Law	19 - 23
Reply Affirmation	24

In this residential mortgage foreclosure action, defendant Derek Smith (“defendant”) has raised several affirmative defenses and arguments in opposition to plaintiff Bank of New York Mellon’s (“plaintiff”) motion for summary judgment and the appointment of a referee to compute. The issues include, *inter alia*, plaintiff’s standing, the sufficiency of the loan servicer’s affidavit, and the sufficiency of the content and the proof of the sending of the 30 day and 90 day notices.

In defendant’s affidavit in opposition, at ¶ 12, he states that a prior foreclosure action was filed against him on April 1, 2013 by plaintiff, involving the same premises [Ex. 3]. At that time, the loan was serviced by Bank of America, as evidenced by the demand letters sent to defendant from 2009 through 2012 [Ex. 2]. The copy of the 2013 action provided by defendant [Ex. 3] shows an e-filing date of April 1, 2013 but no index number. The court conducted its own NYSCEF search and ascertained that the index number for that earlier action is 54590/2013. Plaintiff’s attorneys in that action were McCabe, Weisberg & Conway, P.C. Plaintiff’s attorneys in this action are Gross Poloway, LLC. Defendant’s attorneys in each action are the same, namely Marco & Sitaras, PLLC, who submitted an answer on behalf of defendant in the earlier filed case.

Defendant’s answer in the earlier foreclosure was filed on May 22, 2013 and is the last filing under NYSCEF docket #54590/2013, other than a notification that defendant’s attorneys had re-structured, but still with the same principals. The court is lacking information about the earlier foreclosure and neither party has provided any information as to the status or disposition of the earlier matter. Therefore, the court assumes it is still a viable action. That being the case, the commencement of the case under this index number, with the corroborating proof provided by a representative of Residential Credit Solutions, Inc., who is identified as “the Servicer for Plaintiff” is curious.

The court finds troubling that the attorneys for the parties have not addressed the issue that a prior action is pending, or if it is not, what the circumstances were that led to the disposition of the earlier case. The court has reviewed the answer filed by defendant in this case wherein the affirmative defense of another action pending was not raised. See CPLR 3211(a)(4). Having answered without having raised that defense in the answer, or by pre-answer motion, that affirmative defense is now waived [CPLR

¹ Court rules require plaintiff to use numbered exhibit tabs and defendant to use lettered exhibit tabs.

3211(e)]. As such, that prior action is deemed a nullity, with no bearing upon this action.

Upon consideration of defendant's arguments relative to this action, the court finds that plaintiff has sufficiently demonstrated, by its authorized present servicer, that the note and mortgage were in plaintiff's possession at the time of commencement of this action, that the 30 day and 90 day notices were sufficient as to form, with suitable confirmation of having been sent, and that there is no denial that the amount demanded is owing and due. *Rajamin v Deutsche Bank National Trust Co.*, 757 F3d. 79 [2d Cir 2014].

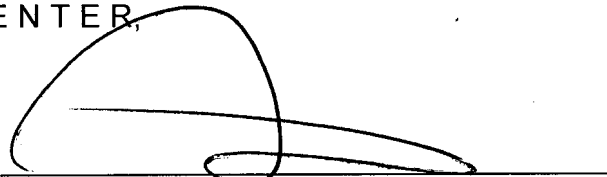
The court notes the servicer's affidavit misstatement of fact that the note was in the plaintiff's possession as of the date of the closing on the loan in November, 2007; however, the court finds this is not fatal to plaintiff's claim that it was in possession of the note (via blank endorsement) and the mortgage (via duly recorded assignment), each prior to the commencement of this action. *Aurora Loans Services, LLC v Taylor*, 25 NY3d 355 [2016]; *Wells Fargo N.A. v Parker*, 125 AD3d 848 [2d Dept 2015]. Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment, made pursuant to CPLR 3212, is granted, in furtherance of which the court has signed the Order submitted by plaintiff simultaneously herewith.

The foregoing constitutes the Decision/Order of the court.

Dated: White Plains, New York
May 24 2016

ENTER,



HON. LAWRENCE H. ECKER, JSC

Appearances

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