

CitiMortgage, Inc. v Croce

2017 NY Slip Op 30681(U)

February 14, 2017

Supreme Court, Suffolk County

Docket Number: 27176/2013

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.: 27176/2013
MOTION DATE: 01/07/2016
MOTION SEQ. NO.: 002 MG

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CITIMORTGAGE, INC.,

Plaintiffs,

-against-

MICHAEL CROCE, JEANETTE A. CROCE A/K/A
JEANETTE CROCE,

Defendants.

PLAINTIFFS' ATTORNEY:
AKERMAN LLP
666 FIFTH AVE., 20TH FLOOR
NEW YORK, NY 10103

DEFENDANTS' ATTORNEYS:
MACCO & STERN, LLP
135 PINELAWN RD., STE. 120S
MELVILLE, NY 11747

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Upon the following papers numbered 1 to 46 read on this motion; Notice of Motion/ Order to Show Cause and supporting papers 1-37 Motion #002; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 38-44; Replying Affidavits and supporting papers 45-46; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff CitiMortgage, Inc., Successor by Merger to ABN AMRO Mortgage Group Inc., seeking an order: 1) granting summary judgment striking the answer of defendants Michael Croce and Jeanette Croce; 2) substituting Danielle Croce as a named party defendant in place and stead of defendants identified as "John Doe #1-5" and "Jane Doe #1-5"; 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 original sum of \$268,000.00 executed by defendants Michael Croce and Jeanette Croce on April 9, 2001 in favor of Homecomings Financial Network, Inc. On the same date the defendants also executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. By assignment dated March 13, 2003 Mortgage Electronic Registration Systems, Inc. as nominee for Homecomings Financial Network, Inc. assigned the mortgage to ABN AMRO Mortgage Group, Inc. The Croce defendants

executed a promissory note and a mortgage dated April 22, 2003 in the sum of \$79,180.03 in favor of ABN AMRO Mortgage Group, Inc. The Croce defendants executed a consolidation, extension and modification agreement and a consolidated promissory note dated April 22, 2003 in the sum of \$322,700.00 in favor of ABN AMRO Mortgage Group, Inc. The Croce defendants executed another promissory note and mortgage dated May 16, 2006 in the sum of \$77,034.55. Finally, the Croce defendants executed a consolidation, extension and modification agreement and a consolidated promissory note dated May 16, 2006 in the single lien amount of \$371,850.00. By Certificate of Merger dated August 21, 2007, ABN AMRO Mortgage Group, Inc. merged into CitiMortgage, Inc. Plaintiff claims that the defendants have defaulted in making timely monthly mortgage payments since September 1, 2012. Plaintiff's motion seeks an order granting summary judgment striking defendant's answer and for the appointment of a referee.

In opposition defendants submit an affidavit from the defendant Michael Croce and an attorney's affirmation and claim that the plaintiff lacks standing to prosecute this foreclosure action since there is insufficient proof submitted to prove the bank's standing to prosecute this action. Defendants contend that they never borrowed money from CitiMortgage and that there is insufficient proof to show that the bank was the lawful owner or holder of the promissory note and mortgage at the time the action was commenced. Defendants contend that there is insufficient proof submitted to show that the defendants' mortgage and/or promissory note passed to CitiMortgage as a result of the merger and argue that they are entitled to discovery to obtain documents in the form of schedules and lists together with testimony to confirm whether ownership and physical possession of the Croces' mortgage and promissory note passed to CitiMortgage. Defendants contend that plaintiff is obligated to submit affidavits from representatives of each entity in the chain of possession of the promissory note who have personal knowledge of the facts and circumstances surrounding the note's transfer and delivery. Defendants claim that the hearsay affidavit submitted by the mortgage servicing employee is insufficient to establish plaintiff's standing since proof of ownership and possession of the note is required.

In reply, the plaintiff submits an attorney's affirmation and argues that the affidavit submitted by CitiMortgage's business operations analyst in support of the summary judgment motion, which is based upon documentary evidence maintained by the mortgage lender, provides sufficient proof to establish the bank's entitlement to summary judgment. Plaintiff asserts that the admissible evidence submitted proves that CitiMortgage had standing to maintain this action as the holder of the consolidated promissory note by demonstrating that the duly indorsed in blank note was in CitiMortgage's possession prior to the date this action was commenced on October 8, 2013. Plaintiff argues that no further details are required once proof has been submitted that CitiMortgage was in physical possession of the duly indorsed note in blank. Plaintiff claims that the defendants do not contest the fact that they have been in default in making any payments in compliance with the underlying agreements since September 1, 2012 and therefore the mortgage holder is entitled to an award of summary judgment and for the appointment of a referee to compute the sums due and owing to the bank. Plaintiff also claims that defendants are not entitled to discovery since the evidence submitted establishes the bank's entitlement to foreclose as a matter of law and since the defendants have never served discovery demands. Plaintiff also contends that the bank has acted in good faith by taking part in CPLR 3408 court mandated settlement conferences and claims that the defendants did not qualify for a loan modification. Finally, plaintiff argues that defendants' remaining myriad of affirmative defenses and counterclaims are without legal merit and must therefore be dismissed.

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)).

Plaintiff's proof of standing consists of: 1) copies of the mortgages and promissory notes signed by the defendants including the May 16, 2006 promissory note indorsed in blank by an ABN AMRO representative; 2) a copy of the August 21, 2007 Certificate of ABN AMRO/CitiMortgage Merger confirming CitiMortgage's acquisition of all of the now defunct mortgagee's assets; 3) an affidavit from a CitiMortgage business operations analyst detailing the business records maintained by the mortgage servicer including details confirming defendants' default in making payments due under the parties agreements, CitiMortgage's physical possession of the indorsed in blank promissory note since September 7, 2012 and CitiMortgage's service and filing of notices of default to the defaulting borrowers required by the consolidated mortgage and RPAPL 1304 & 1306.

With respect to the issue of the business records exception to the hearsay rule, the three foundational CPLR 4518(a) requirements are: 1) the record must be made in the regular course of business – reflecting a routine, regularly conducted business activity, needed and relied upon in the performance of business functions; 2) it must be the regular course of business to make the records- (i.e. the record is made in accordance with established procedures for the routine, systematic making of the record); and 3) the records must have been made at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter, assuring that the recollection is fairly accurate and the entries routinely made (*People v. Kennedy*, 68 NY2d 569, 579-580, 510 NYS2d 853 (1986)). An additional requirement for admissibility requires that the loan servicer's representative allege that

he/she was personally familiar with the plaintiff's record keeping practices and procedures (*see Aurora Loan Services, LLC v. Baritz*, 2016 NY Slip Op 07154 (2nd Dept., 2016); *Deutsche Bank National Trust Co. v. Brewton*, 140 AD3d 948, 34 NYS3d 463 (2nd Dept., 2016); *U.S. Bank, NA v. Handler*, 140 AD3d 948, 34 NYS3d 463 (2nd Dept., 2016)).

Paragraphs 3, 4 & 5 of the affidavit from CitiMortgage's business operations analyst states:

3. I have knowledge of the facts contained in this affidavit by virtue of my position at Citi, my familiarity with certain Citi practices and procedures, and based upon my review and analysis of the relevant business records and other documents of Citi referenced and attached herein. More particularly, I am familiar with certain systems of record Citi uses to maintain, record and create information related to the residential mortgage loans that it services. For the loans it services, Citi typically maintains a hard-copy file of certain loan documents, an electronic file of imaged loan documents and letters, and electronic records for transactions, payments, communications, escrow account activity, disbursements, events, documents, instruments and analyses (**Loan Records**).

4. It is Citi's custom and practice that entries created relating to customer payments, principal, interest, fees and other charges in those systems of record are made at or near the time of the transaction by people with firsthand knowledge of the transactions or from information provided by people with such firsthand knowledge. It is also Citi's custom and practice that these records are maintained in the regular course of Citi's business as a loan servicer. It is the regular practice of Citi to make such records and rely on those records in the ordinary course of its business.

5. I am familiar with and have access to Loan Records for a loan taken out by Michael Croce and Jeanette Croce, which I have reviewed to verify the accuracy of this affidavit. Citi services this loan on behalf of the loan's owner, The Federal Home Loan Mortgage Corporation (**Freddie Mac**).

With respect to the issue of standing, paragraph 22 of the affidavit from CitiMortgage's representative, relying upon the mortgage servicing records maintained by the mortgage servicer states:

22. Citibank, N.A. is the custodian of the collateral file, which includes the Croces original and consolidates (sic) notes. Citi has been in direct or constructive possession of the original and consolidated notes since at least September 7, 2012. This is shown on the NLS Final Document File Location Screen, which tracks the location of the original collateral file, which includes the consolidated notes signed by the Croces. This is a Loan Record maintained by Citi. A copy of the NLS File Location History screen is annexed.... The NLS file Location History... shows that on September 7, 2012, the collateral file was recorded as being at "SLRECS," the St. Louis records center in O'Fallon, Missouri. On September 7, 2012, the collateral file was retrieved in order to image the original consolidated note. The cover page of the note... confirms the note was imaged that day. Since being received in September, 2012, the collateral file has not left

Citi's possession. The NLS file location screen shows that the collateral file was confirmed to be in the records center in O'Fallon, Missouri on August 3, 2015, as shown by notations "8/03/15" and "SLDPLT" a records center in Citibank's facility in O'Fallon, Missouri. Citi, as servicer, has unfettered access to the collateral documents, including the note. I have retrieved the collateral file, personally reviewed the collateral file, and found the April 2001 note, April 2003 note, April 2003 consolidated note, May 2006 note, and May 2006 consolidated note within it.

Plaintiff has submitted sufficient evidence in the form of an affidavit from a Citi mortgage servicing representative (satisfying the business records exception to the hearsay rule) to prove it had standing, as the holder of the note by confirming that the consolidated promissory note indorsed in blank by a representative of ABN AMRO was in CitiMortgage's possession prior to the commencement of this action. (*Aurora Loan Services v. Taylor, supra.*; *Wells Fargo Bank v. Parker, supra.*; *US Bank N.A. v. Ehrenfeld*, 144 AD3d 893, 2016 NY Slip Op 07639 (2nd Dept., 2016); *GMAC Mortgage, LLC v. Sidberry*, 144 AD3d 863, 2016 NY Slip Op 07623 (2nd Dept., 2016)). Plaintiff CitiMortgage has also submitted sufficient documentary proof to establish its standing to maintain this action on behalf of Freddie Mac by submission of a copy of the Certificate of Merger dated August 21, 2007 between ABN AMRO and CitiMortgage, and by submission of a copy of the consolidated promissory note indorsed in blank by a ABN AMRO representative. The mortgage servicer's representative establishes the fact that CitiMortgage serviced the mortgage loan, served all required notices to the defaulting defendants, and retained possession of the consolidated, indorsed in blank note at least since September 7, 2012, which preceded the date of filing of the complaint on October 8, 2013.

With respect to the defendant's remaining claims that they are entitled to discovery and that the bank has failed to negotiate in good faith, the defendants have not made a satisfactory showing of the evidence sought which would create an issue of fact. Mere hope and speculation that additional discovery might yield evidence sufficient to raise a triable issue of fact is not a basis for denying summary judgment (*Lee v. T.F. DeMilo Corp.*, 29 AD3d 867, 815 NYS2d 700 (2nd Dept., 2006); *Sasson v. Setina Mfg. Co., Inc.*, 26 AD3d 487, 810 NYS2d 500 (2nd Dept., 2006)). Moreover, court records indicate that the defendants were afforded three foreclosure settlement conferences on April 15, 2014, June 18, 2014 and September 2, 2014 and that upon their default in appearing for the September, 2014 conference the action was marked "not settled". Under these circumstances, absent some showing that the bank failed to negotiate in good faith no basis exists to defeat plaintiff's summary judgment motion. Finally the defendants have failed to raise any further evidence to address their numerous remaining pleaded affirmative defenses and two counterclaims set forth in their answer in opposition to this motion. Those remaining defenses and counterclaims must therefore be deemed abandoned and subject to dismissal (*Citibank, N.A. v. Van Brunt Properties, LLC*, 95 AD3d 1158, 945 NYS2d 330 (2nd Dept., 2012); *Wells Fargo Bank Minnesota, N.A. v. Perez*, 41 AD3d 590, 837 NYS2d 877 (2nd Dept., 2007)).

In conclusion the bank has shown, and the defendants do not dispute, that they have defaulted under the terms of the mortgage by failing to make timely monthly mortgage payments since September 1, 2012. The bank, having proven entitlement to summary judgment, it is incumbent upon the defendants to submit relevant, evidentiary proof sufficiently substantive to raise genuine issues of fact concerning why the lender is not entitled to foreclose the mortgage. Defendants have wholly failed to do so. 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: February 14, 2017



J.S.C.