

JFKYYZ Various L.P. v Williams

2017 NY Slip Op 30868(U)

March 13, 2017

Supreme Court, Queens County

Docket Number: 702650/2016

Judge: Darrell L. Gavrin

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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN**
Justice

IA PART 27

JFKYYZ VARIOUS L.P.,

Index No. 702650/16

Plaintiff,

Motion

Date October 4, 2016

- against-

Motion

Cal. No. 65

LAUREL E. WILLIAMS A/K/A LAUREL WILLIAMS,
MICHAEL A. WILLS, CAPITAL ONE BANK, STATE
OF NEW YORK DEPARTMENT OF TAXATION AND
FINANCE, CITY OF NEW YORK ENVIRONMENTAL
CONTROL BOARD, CITY OF NEW YORK
DEPARTMENT OF TRANSPORTATION PARKING
VIOLATIONS BUREAU, CITY OF NEW YORK
TRANSIT AUTHORITY TRANSIT ADJUDICATION
BUREAU, CHASE BANK USA, NA, and JOHN DOE
#1 through JOHN DOE #99,

Motion

Seq. No. 1

Defendants.

The following numbered papers read on this motion by plaintiff, pursuant to CPLR 3212, for summary judgment against defendant, Laurel E. Williams; to strike Williams’s affirmative defenses; for an order granting default judgment against non-answering defendants; to amend the caption; and to appoint a referee to compute the amount owed to plaintiff; and cross motion by defendants, Laurel E. Williams and Michael A. Wills (“defendants”), dismissing the complaint, or in the alternative for defendant, Wills, to file and serve a late answer, pursuant to CPLR 3012(d).

Papers
Numbered

Notice of Motion - Affirmation - Exhibits.....	EF 28 - 50
Notice of Cross Motion - Affirmation - Exhibits.....	EF 51 - 84
Affirmation in Opposition - Exhibits.....	EF 86 - 94
Reply Affirmation.....	EF 95 - 96

Upon the foregoing papers, it is ordered that the motion and cross motion are determined as follows:

Plaintiff seeks to foreclose on a mortgage given by defendant, Michael Wills, of real property known as 114-06 Merrick Boulevard, Jamaica, New York, and to secure a note, evidencing a loan in the principal amount of \$153,800. [The defendant, Wills, then executed and delivered a second note in the amount of \$110,279.57 and executed a second mortgage against the property. The defendant, Wills, at that time also executed a consolidation extension and modification agreement whereby the first mortgage and second mortgage were consolidated to form a single lien in the amount of \$250,000.] Plaintiff alleges that it is the holder of the mortgage and underlying obligation and that defendant, Wills defaulted under the terms of the note and mortgage.

That branch of plaintiff's motion to amend the caption to substitute Mary Smith and Lucy Woods in place of "John Doe #1" and "John Doe #2" and delete the remaining John Doe defendants, is granted. The caption shall be amended to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

JFKYYZ VARIOUS L.P.,

Plaintiff,

-against-

Index No. 702650/16

LAUREL E. WILLIAMS A/K/A LAUREL WILLIAMS,
MICHAEL A. WILLS, CAPITAL ONE BANK, STATE
OF NEW YORK DEPARTMENT OF TAXATION AND
FINANCE, CITY OF NEW YORK ENVIRONMENTAL
CONTROL BOARD, CITY OF NEW YORK
DEPARTMENT OF TRANSPORTATION PARKING
VIOLATIONS BUREAU, CITY OF NEW YORK TRANSIT
AUTHORITY TRANSIT ADJUDICATION BUREAU
CHASE BANK USA, NA, MARY SMITH and LUCY
WOODS,

Defendants.

A party moving for summary judgment must show by admissible evidence that there are no material issues of fact in controversy (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once a plaintiff's standing is placed in issue by the defendant, it is incumbent upon the plaintiff to prove its standing to be entitled to relief (*see U.S. Bank N.A. v Sharif*, 89 AD3d 723 [2d Dept 2011]). A plaintiff

establishes that it has standing where it demonstrates that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note (*Bank of N.Y. v Silverberg*, 86 AD3d 274 [2d Dept 2011]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95 [2d Dept 2011]). An assignment of the mortgage without assignment of the underlying note or bond is a nullity (*Deutsche Bank Natl. Trust Co. v Barnett*, 88 AD3d 636 [2d Dept 2011]). Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation (*U.S. Bank, N.A. v Collymore*, 68 AD3d 752 [2d Dept 2009]).

In the case at bar, plaintiff has failed to establish, *prima facie*, that it was the holder or assignee of the note prior to commencement of the action (*Deutsche Bank Nat. Trust Co. v Brewton*, 1423 AD3d 643 [2d Dept 2016]). The copy of the note submitted in support of its motion was made payable to Primary Mortgage Banking Corporation, and includes an endorsement on the note by Primary Mortgage Banking Corporation to North Fork Bank. Plaintiff also submitted copies of multiple allonges, such as from North Fork Bank to Greenpoint Mortgage Funding, Inc., one from Greenpoint Mortgage Funding, Inc. to Sutherland Asset I, LLC, one from Sutherland Asset I, LLC to Sutherland Grantor Trust, Series VII, and one from Sutherland Grantor Trust, Series VII to JFKYYZ Various, L.P. The endorsements on the note and most of the allonges are undated and not attached to the actual note. The affidavit from the servicer does not mention the allonges and does not state whether plaintiff had the allonges when plaintiff came into possession of the note. Furthermore, there is no evidence that the allonges are so firmly affixed to the note as to become part thereof (UCC 3-202; *Slutsky v Blooming Grove Inn*, 147 AD2d 208 [2d Dept 1989]). In fact, the allonges herein are submitted as separate exhibits and does not appear to be attached to the note at all. Moreover, the copy of the note attached to the complaint do not contain the allonges. Inasmuch as plaintiff's counsel alleges in reply papers that the allonges were firmly affixed to the note, such allegation, without more, is insufficient.

Plaintiff also points to an assignment of the mortgage in attempt to establish standing. Plaintiff alleges that the mortgage was assigned from each of the parties along with the endorsements and allonges. The assignment from Sutherland Asset I, LLC to Sutherland Grantor Trust, Series VII, however, was of the mortgage only and not of the note. Consequently, as an assignment of a mortgage without the underlying debt is a nullity, plaintiff failed to demonstrate in its moving papers that it had standing to commence the action based upon the assignment (*see U.S. Bank N.A. v Dellarmo*, 94 AD3d 746 [2d Dept 2012]). In their cross motion, however, defendants have not affirmatively established that plaintiff lacked standing. Therefore, the issue of standing cannot be determined as a matter of law as there is an issue of fact as to whether plaintiff was the lawful holder of the note when it commenced the instant action (*see Deutsche Bank Natl. Trust Co. v Rivas*, 95 AD3d 1061 [2d Dept 2012]). In light of this determination, those branches of plaintiff's motion to strike the answer for a default judgment and to appoint a referee, are denied at this juncture.

Defendants further argue that the case should be dismissed on the ground that plaintiff did not comply with RPAPL 1304. This argument is without merit, as the subject loan was not a home loan. RPAPL 1304 provides that, in stances involving a home loan, at least ninety days before a lender begins an action against a borrower to foreclose on a mortgage, the lender must provide notice to the borrower that the loan is in default and that his or her home is at risk (*Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95 [2d Dept 2011]). In the case at bar, it is undisputed that the borrower did not reside at the subject premises. Therefore, RPAPL 1304 is not applicable to this action. Similarly, for the same reason, defendants are not entitled to a foreclosure conference, pursuant to CPLR 3408 (*see Richlew Real Estate Venture v Grant*, 131 AD3d 1223 [2d Dept 2015]).

Finally, defendants seek to dismiss the complaint for lack of personal jurisdiction over defendant, Wills, due to improper service. Plaintiff submits an affidavit of service, dated April 7, 2016, reflecting that defendant, Wills, was served on April 6, 2016, at his residence located at 2804 Westbourne Ave, Far Rockaway, New York, by delivery of the summons and complaint to Michael “Smith,” a person of suitable age and discretion, and that service was completed by a subsequent mailing of the summons and complaint to the same address. This affidavit of service constitutes *prima facie* proof of proper service upon defendant, Wills, pursuant to CPLR 308(2) (*see Chichester v Alal-Amin Grocery & Halal Meat*, 100 AD3d 820 [2d Dept 2012]; *US Natl. Bank Assn. v Melton*, 90 AD3d 742 [2d Dept 2011]).

Although defendant, Wills asserts that he had no knowledge of the commencement of the foreclosure action, he has offered nothing to rebut or dispute the veracity or contents of the affidavit of service (*see Manhattan Sav. Bank v Kohen*, 231 AD2d 499, 500 [2d Dept 1996]). A defendant’s bare and unsubstantiated denial of receipt does not rebut the presumption of proper service created by the affidavit of service (*see Beneficial Homeowner Serv. Corp. v Gerald*, 60 AD3d 984 [2d Dept 2009]). “A court need not conduct a hearing to determine the validity of the service of process where the defendant fails to raise an issue of fact regarding service” (*Hamlet on Olde Oyster Bay Homeowners Assn., Inc. v Ellner*, 57 AD3d 732, 733 [2d Dept 2008]). In reply, defendants submitted an affidavit from Wills with details of the alleged lack of service. The court did not consider this affidavit as it was submitted improperly for the first time in the reply papers (*see L’Aquila Realty, LLC v Jalyng Food Corp.*, 103 AD3d 692 [2d Dept 2013]). Accordingly, those branches of defendants’ cross motion to dismiss the complaint, are denied.

That branch of defendants’ cross motion to serve a late answer is likewise denied. A defendant moving to compel the acceptance of an untimely answer, must establish a reasonable excuse for the default and a potentially meritorious defense (*see Wells Fargo, N.A. v Cervini*, 84 AD3d 789 [2d Dept 2011]). The determination of what constitutes a reasonable excuse is left to the sound discretion of the court (*see Abrams v City of New York*, 13 AD3d 566 [2d Dept 2004]). Defendant, Wills has failed to put forth a reasonable excuse for his default (*see Reich v Redley*, 96 AD3d 1038 [2d Dept 2012]). As defendant, Wills did not demonstrate a reasonable excuse for his default, it is not necessary to consider whether he proffered a potentially

meritorious defense (*Deutsche Bank Natl. Trust Co. v Conway*, 99 AD3d 755 [2d Dept 2012]).

Accordingly, plaintiff's motion and defendants' cross motion, are denied.

Dated: March 13, 2017

DARRELL L. GAVRIN, J.S.C.