

Wells Fargo Bank, NA v Carreno
2017 NY Slip Op 31136(U)
May 23, 2017
Supreme Court, Suffolk County
Docket Number: 13678/12
Judge: Thomas F. Whelan
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COPY

SUPREME COURT - STATE OF NEW YORK
IAS PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 7/28/15
SUBMIT DATE 5/12/17
Mot. Seq. # 002 - MG
Mot. Seq. # 003 - XMD
CDISP Y N X

-----X
WELLS FARGO BANK, NA d/b/a AMERICAN :
SERVICING COMPANY, :
 :
 :
 Plaintiff, :
 :
 -against- :
 :
 MARK CARRENO, MORTGAGE ELECTRONIC :
 REGISTRATION SYSTEMS, INC., as nominee :
 for Continental Mortgage Bankers, Inc. d/b/a :
 FINANCIAL EQUITIES, PEOPLE OF THE :
 STATE OF NEW YORK COHALEN COURT :
 COURT COMPLEX and MARIETTE TURSO, :
 :
 :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 12 read on this motion for summary judgment and appointment of referee, among other things and cross motion to serve an amended answer; Notice of Motion/Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers: 5-7; Opposing papers: ; Reply papers 8-9; 10; Other 11-12 (affirmation); (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (#002) by the plaintiff for, among other things, summary judgment is granted in its entirety, and it is further

ORDERED that the cross motion (#003) by defendant, Mark Carreno, for an Order to serve and file an amended answer to assert the ground of lack of standing, is denied in its entirety, and it is further

ORDERED that the proposed Order submitted by the plaintiff, as modified, is signed simultaneously herewith.

This foreclosure action deficiency commenced by filing on May 2, 2012. The matter was reassigned to this Part pursuant to Administrative Order No. 52-17, dated May 5, 2017 and submitted for decision on May 12, 2017. In essence, on March 24, 2005, deceased non-party, Virginia Carreno, borrowed \$196,800.00 from plaintiff's predecessor in interest and executed a promissory note. On that same date, Virginia Carreno and defendant Mark Carreno, executed a mortgage as to the subject premises. On February 26, 2011, Virginia Carreno and defendant Mark Carreno (hereinafter "Carreno"), entered into a Home Affordable Modification Agreement (hereinafter "Agreement") with the instant plaintiff and with a new principal sum of \$218,111.41, which included a deferred principal balance. Since June 1, 2011, the defendant mortgagor, Carreno, has failed to pay the monthly installments due and owing. Thereafter, Virginia Carreno passed away on February 26, 2012. Carreno has contested this action with an answer that contains no affirmative defenses.

A prior application for summary judgment was granted, in part, by the Hon. W. Gerard Asher by short form order dated December 23, 2014, wherein he sought additional information as to RPAPL §1303 compliance, as to the estate of Virginia Carreno and a copy of the loan modification. Plaintiff has complied with these directives and has waived its right to seek a deficiency judgment against the estate of Virginia Carreno.

Carreno has cross moved (#003), to amend his answer to assert, in essence, aside from the request for a further modification, the single ground of lack of standing on the part of the plaintiff. Plaintiff has opposed the cross motion. The Court will address the issue of standing first, since the outcome may undermine plaintiff's moving papers.

As stated above, Carreno now seeks leave of the Court to challenges plaintiff's standing to commence this foreclosure action. Carreno is precluded from asserting that the plaintiff lacks standing as a defense since he never made a pre-answer motion to dismiss or set forth the claim in an affirmative defense by timely answering (*see* CPLR 3018[b]; 3211[a], [c]; *US Bank Natl. Assn. v Konstantinovic*, 147 AD3d 1002 48 NYS3d 182 [2d Dept 2017]; *MidFirst Bank v Ajala*, 146 AD3d 875, 44 NYS3d 771 [2d Dept 2017]; *JP Morgan Chase Bank Natl. Assn. v Butler*, 129 AD3d 777, 12 NYS3d 145 [2d Dept 2015]). Moreover, Carreno failed to raise the issue in the prior application before the Hon. W. Gerard Asher. As such, the issue is waived.

Moreover, the application is untimely. The answer was filed on May 11, 2012. Not only was there judicial intervention resulting in the prior order noted above, counsel for Carreno admits that his office has represented Carreno since May 1, 2013, a date even before the prior short form order. The unexplained delay results in unfair surprise (*see Wells Fargo Bank, N.A. v Fanto*, 146 AD3d

1012, 45 NYS3d 546 [2d Dept 2017]; *Wells Fargo Bank, N.A. v Morgan*, 139 AD3d 1046, 32 NYS3d 595 [2d Dept 2016]; *South Point, Inc. v Rana*, 139 AD3d 935, 30 NYS3d 710 [2d Dept 2016]; *HSBC Bank USA, N.A. v Halls*, 136 AD3d 752, 24 NYS3d 752 [2d Dept 2016]; *U.S. Bank Nat. Assn. v Lomuto*, 140 AD3d 852, 35 NYS3d 123 [2d Dept 2016]).

Additionally, as set forth below, the cross motion is without merit.

One of the various ways standing may be established is by due proof that the plaintiff or its custodial agent was in possession of the note prior to the commencement of the action. The production of such proof is sufficient to establish, prima facie, the plaintiff's possession of the requisite standing to prosecute its claims for foreclosure and sale (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 12 NYS3d 612 [2015]; *U.S. Bank v Ehrenfeld*, 144 AD3d 893, 41 NYS3d 269 [2d Dept 2016]; *JPMorgan Chase Bank, Natl. Assn. v Weinberger*, 142 AD3d 643, 37 NYS3d 286 [2d Dept 2016]; *Citimortgage, Inc. v Klein*, 140 AD3d 913, 33 NYS3d 432 [2d Dept 2016]; *U.S. Bank Natl. Assn. v Godwin*, 137 AD3d 1260, 28 NYS3d 450 [2d Dept 2016]; *Wells Fargo Bank, N.A. v Joseph*, 137 AD3d 896, 26 NYS3d 583 [2d Dept 2016]; *Emigrant Bank v Larizza*, 129 AD3d 904, 13 NYS3d 129 [2d Dept 2015]; *Deutsche Bank Natl. Trust Co. v Whalen*, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]).

Appellate case authorities have repeatedly held that in determining the standing of a foreclosing plaintiff, it is the mortgage note that is the dispositive instrument, not the mortgage indenture (*see Aurora Loan Servs., LLC v Mandel*, 148 AD3d 965, 50 NYS3d 154 [2d Dept 2017]; *Everhome Mtge. Co. v Pettit*, 235 AD3d 1054, 23 NYS3d 408 [2d Dept 2016]). This result is mandated by the long standing principal incident rule which provides that because a mortgage is merely the security for the debt, the obligations of the mortgage pass as an incident to the passage of the note (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, *supra*; *Wells Fargo Bank, N.A. v Charlaff*, 134 AD3d 1099, 24 NYS3d 317 [2d Dept 2015]; *Emigrant Bank v Larizza*, 129 AD3d 904, *supra*). A foreclosing plaintiff has standing if it is either the holder or the assignee of the underlying note at the time that the action is commenced (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, *supra*; *Loancare v Firshing*, 130 AD3d 787, 14 NYS3d 410 [2d Dept 2015]; *Emigrant Bank v Larizza*, 129 AD3d 904, *supra*). "Either a written assignment of the underlying note or the physical delivery of it to the plaintiff prior to the commencement of the action is sufficient to transfer the obligation" (*see id.*, *Wells Fargo Bank, NA v Parker*, 125 AD3d 8485 NYS3d 130 [2d Dept 2015]; *U.S. Bank NA v Guy*, 125 AD3d 845, 5 NYS3d 116 [2015]).

The plaintiff may also establish its standing by demonstrating that it is the holder of the mortgage note within the contemplation of the Uniform Commercial Code. Holder status is established where the plaintiff possesses a note that, on its face or by allonge, contains an endorsement in blank or bears a special endorsement payable to the order of the plaintiff (*see UCC 1-201; 3-202; 3-204; Hartford Acc. & Indem. Co. v American Express Co.*, 74 NY2d 153, 159 [1989]). A "holder" is "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession" (UCC 1-201[b][21]). Notably, the holder of an instrument whether or not he is the owner may ... enforce payment in his own name

(see UCC 3-301; *Wells Fargo Bank, N.A. v Ostiguy*, 127 AD3d 1375, 8 NYS3d 669 [3d Dept 2015]). “‘Bearer’ means ... a person in possession of a negotiable instrument” (UCC 1-201[b][5]), and where the note is endorsed in blank, it may be negotiated by delivery alone (see UCC 3-202[1], 3-204[2]). “An endorsement in blank specifies no particular endorsee and may consist of a mere signature” and “[a]n instrument payable to order and endorsed in blank becomes payable to bearer and may be negotiated by delivery alone until specially endorsed (UCC 3-204[2])” (*JPMorgan Chase Bank, Natl. Assn. v Weinberger*, 142 AD3d 643, *supra*).

Under this statutory framework, it is clear that to establish its standing as the holder of a duly endorsed note in blank, a plaintiff is only required to demonstrate that it had physical possession of the note prior to commencement of the action (see *Deutsche Bank Natl. Trust Co. v Brewton*, 142 AD3d 683, 37 NYS3d 25 [2d Dept 2016]; *JPMorgan Chase Bank, Natl. Assn. v Weinberger*, 142 AD3d 643, 645, *supra*). In such cases “‘it is unnecessary to give factual details of the delivery in order to establish that possession was obtained prior to a particular date’” since a plaintiff in possession of a note endorsed in blank is thus without obligation to establish how it came into possession of the instrument in order to be able to enforce it (see UCC 3-204[2]; *Pennymac Corp. v Chavez*, 144 AD3d 1006, 42 NYS3d 239 [2d Dept 2016], quoting *JPMorgan Chase Bank, Natl. Assn. v Weinberger*, 142 AD3d at 645, *supra*). In addition, because “a signature on a negotiable instrument ‘is presumed to be genuine or authorized’ (see UCC 3-307[1][b]), the plaintiff is not required to submit proof that the person who endorsed the subject note to the plaintiff on behalf of the original lender was authorized to do so” (*CitiMortgage, Inc. v McKinney*, 144 AD3d 1073, 42 NYS3d 302 [2d Dept 2016]).

Moreover, the apparent invalidity of any written assignments of mortgage are thereby rendered irrelevant to the issue of standing (see *Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, *supra*). Here, Carreno attempts to challenge the assignments of the mortgage, by comparison to a prior affidavit from a servicer, as set forth in the cross motion papers, is without merit since it is the note that is the controlling document for standing purposes (see *Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, *supra*; *Aurora Loan Servs., LLC v Mandel*, 148 AD3d 965, *supra*; see also *Deutsche Bank Natl. Trust Co. v Pietranico*, 32 Misc3d 528, 928 NYS2d 818 [Sup. Ct. Suffolk County 2011], *affd.* 102 AD3d 724, 957 NYS2d 868 [2013]).

Indeed, the establishment of the plaintiff’s actual possession of the mortgage note or its constructive possession through an agent on a date prior to the commencement of the action is so conclusive that it renders, unavailing, claims of content defects in allonges (see *U.S. Bank v Askew*, 138 AD3d 402, 27 NYS3d 856 [1st Dept 2016]). It further renders unavailing, all claims of content defects in the chain of mortgage assignments (see *Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, *supra*; *CitiMortgage, Inc. v McKinney*, 144 AD3d 1073, *supra*; *JPMorgan Chase Bank, Natl. Ass’n v Weinberger*, 142 AD3d 643, *supra*; *Deutsche Flagstar Bank, FSB v Mendoza*, 139 AD3d 898, 32 NYS3d 278 [2d Dept 2016]; *US Bank Natl. Trust v Naughton*, 137 AD3d 1199, 28 NYS3d 444 [2d Dept 2016]; *Deutsche Bank Natl. Trust v Whalen*, 107 AD3d 931, *supra*).

The affidavit of Susana Leal-Salgado, dated March 20, 2015, a Vice President Loan Documentation of Wells Fargo Bank, N. A., the plaintiff, demonstrates that based upon her review

of the records maintained by the plaintiff, with which she has personal knowledge, and kept and relied upon as a regular business practice and in the ordinary course of loan servicing business, the plaintiff came into possession of the original note before the commencement of the action. Such proof was sufficient to establish the plaintiff's standing due to its status as the holder of the mortgage note prior to the commencement of this action.

As recently held by the Second Department, a plaintiff that has possession of the note has standing, even where the plaintiff is the servicer and not the owner of the mortgage loan (*see Central Mtge. Co. v Davis*, 149 AD3d 898, __ NYS3d __ [2d Dept 2017]). Here, plaintiff has demonstrated possession of the note prior to the commencement of the action (*see OneWest Bank, FSB v Simpson*, 148 AD3d 920, 49 NYS3d 523 [2d Dept 2017]; *Hudson City Sav. Bank v Genuth*, 148 AD3d 687, 48 NYS3d 687 [2d Dept 2017]; *HSBC Bank USA v Espinal*, 137 AD3d 1079, *supra*; *LNV Corp. v Francois*, 134 AD3d 1071, 22 NYS3d 543 [2d Dept 2015]).

Additionally, as set forth in the affidavit of Andrea Kruse, dated June 29, 2015, a Vice President Loan Documentation for the plaintiff, Wells Fargo has had possession of the original note since April 11, 2005, more than seven years before the commencement of this action. As such, standing is demonstrated (*see Bank of America, N.A. v Barton*, 149 AD3d 676, 50 NYS3d 546 [2d Dept 2017]; *U.S. Bank Natl. Assn. v Cruz*, 147 AD3d 1103, 47 NYS3d 459 [2d Dept 2017]). This affidavit was properly submitted in opposition to the cross-motion and Carreno had an opportunity to reply to same (*see Central Mtge. Co. v Jahnsen*, __ AD3d __, 2017 WL 1658560 [2d Dept 2017]).

Finally, the Court agrees with plaintiff's contention that by entering into and making payments upon the modification agreement with plaintiff, Carreno reaffirmed plaintiff's ownership rights to the note at issue (*see IRB-Brasil Resseguros S.A. v Portobello Intern. Ltd.*, 84 AD3d 637, 923 NYS2d 508 [1st Dept 2011]).

The affirmative defenses asserted in the proposed answer of Carreno, to the extent they are premised upon a purported lack of standing are without merit. Moreover, as set forth in the short form order of Justices Asher, CPLR 3408 has been complied with.

The cross motion (#003) is denied in its entirety (*see Roman Catholic Diocese of Brooklyn, N.Y. v Christ the King Regional High School*, 149 AD3d 997, 50 NYS3d 306 [2d Dept 2017]; *Bank of America, N.A. v Barton*, 149 AD3d 676, 50 NYS3d 546 [2d Dept 2017]; *Castle Peak 2012-1 Loan Trust Mtge. Backed Notes, Series 2012-1 v Sottile*, 147 AD3d 720, 46 NYS3d 161 [2d Dept 2017]; *see generally Wells Fargo Bank, N.A. v Miller*, __ AD3d __, 2017 WL 2125724 [2d Dept 2017]).

The moving papers (#002) demonstrated, prima facie, the plaintiff's entitlement to the relief requested. Once the plaintiff makes a prima facie showing, the burden shifts to the defendant to demonstrate "the existence of a trial issue of fact as a bona fide defense to the action" (*Baron Assocs., LLC v Garcia Group Enters., Inc.*, 96 AD3d 793, 793, 946 NYS2d 611 [2d Dept 2012], quoting *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 467, 664 NYS2d 345 [2d Dept 1997]).

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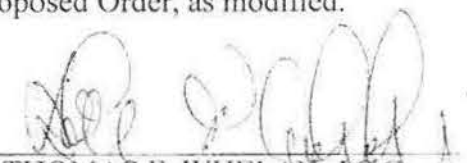
It was thus incumbent upon answering defendant, to raise a genuine question of fact with respect to its possession of some bona fide defense to the plaintiff's claims for foreclosure and sale. However, after consideration of the above determination as to the issue of standing, no questions of fact were raised in the cross motion and opposing papers from the answering defendant. The plaintiff's prima facie showing of its entitlement to the summary judgment demanded by it thus remains in tact and unrebutted (*see Nationstar Mtge., LLC v Wong*, 132 AD3d, 825, 18 NYS3d 669 [2d Dept 2016]).

The court finds that the plaintiff is entitled to summary judgment dismissing the answer and an award of summary judgment on its complaint against such defendant. Those portions of this motion wherein the plaintiff seeks such relief are thus granted.

The moving papers further established the default in answering on the part of all non-answering defendants served with process (*see HSBC Bank USA, N.A. v Alexander*, 124 AD3d 838, 4 NYS3d 47 [2d Dept 2015]; *U.S. Bank, N.A. v Razon*, 115 AD3d 739, 740, 981 NYS2d 571 [2d Dept 2014]). Accordingly, the defaults of all such defendants are hereby fixed and determined. Since the plaintiff has been awarded summary judgment against the sole answering defendant and has established a default in answering by the remaining defendants, the plaintiff is entitled to an order appointing a referee to compute amounts due under the subject note and mortgage (*see RPAPL § 1321; Bank of East Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]; *Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *LaSalle Bank, NA v Pace*, 31 Misc3d 627, 919 NYS2d 794 [Sup. Ct. Suffolk County 2011], *aff'd*, 100 AD3d 970, 955 NYS2d 161 [2d Dept 2012]).

Therefore, the Court grants plaintiff's motion (#002) in its entirety, denies defendant's cross motion (#003) in its entirety and simultaneously signs the proposed Order, as modified.

DATED: 5/23/17


THOMAS F. WHELAN, J.S.C.