HSBC Bank USA, N.A. v Autry
2017 NY Slip Op 31361(U)
June 23, 2017
Supreme Court, Westchester County
Docket Number: 52240/2015
Judge: William J. Giacomo
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To commence the statutory time period 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
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

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HSBC BANK USA, NATIONAL ASSOCIATION AS TRUSTEE FOR WELLS FARGO ASSETS SECURITIES CORPORATION, MORTGAGE ASSET-BACKED PASS-THROUGH CERTIFICATES SERIES 2007-PA3,

Index No. 52240/2015

Plaintiff,

DECISION & ORDER

– against –

FRANCES AUTRY, WENDY JOHNSON, WORLDWIDE ASSET PURCHASING LLC, JOHN DOE (Those unknown tenants, occupants, persons or corporations or their heirs, distributes, executors, administrators, trustees, guardians, assignees, creditors or successors claiming an interest in the mortgaged premises),

Defendants.

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In this action to foreclose on a mortgage, the plaintiff moves for summary judgment against the defendants Frances Autry and Wendy Johnson, for a default judgment against the non-answering defendants, to amend the caption, and for an order of reference:

Papers Considered

1. Notice of Motion/Affirmation of Alexandra R. Heaney, Esq./ Exhibits A-P/Proposed Order;
2. Affirmation in Opposition of Mary Aufrecht, Esq./Exhibits A-F;
3. Reply Affirmation of Amber A. Jurek, Esq.

Factual and Procedural Background

Plaintiff commenced this action against the defendants to foreclose on a mortgage on the premises located at 4 Homewood Road, Mount Vernon, New York, owned by the defendants Frances Autry and Wendy Johnson. Defendants Autry and Johnson joined

issue with the service of their answer dated July 12, 2016[1]. The remaining defendants did not appear or answer.

Plaintiff moves for summary judgment against Autry and Johnson, pursuant to CPLR 3212, for a default judgment against the non-appearing defendants, to amend the caption, and for an order of reference. Plaintiff submits a copy of the mortgage, the note, and evidence of defendants' default.

In support of its motion, plaintiff submits an affidavit of Natalie J. Bryant, vice president of loan documentation at Wells Fargo Bank, N.A., servicer for plaintiff. Ms. Bryant attests that she is familiar with the business records maintained by Wells Fargo for the purpose of servicing mortgage loans. The records are made at or near the time by persons with knowledge of the activity and transactions reflected or from information provided by persons with knowledge. The records are kept in the regular course of business. Ms. Bryant states that she has personal knowledge of this matter by her examination of the business records relating to the subject mortgage loan and confirming the information.

Ms. Bryant attests that plaintiff is in possession of the promissory note which was indorsed in blank. Plaintiff had possession of the note on March 1, 2010, on or before this action was commenced on February 19, 2015. According to Ms. Bryant, defendants are in default of the note and mortgage since the payment due August 1, 2009 and all subsequent payments. She reviewed the 90-day pre-foreclosure notice sent to the defendants by certified mail and also by first-class mail and a copy is attached to the motion. In accordance with the provisions of the mortgage, a notice of default was also mailed to defendants at the last known address provided. A copy of the notice of default is attached to the motion. Based upon the default, plaintiff called due the entire unpaid balance together with interest and disbursements, including reasonable attorneys' fees and costs. The total amount due to plaintiff through October 11, 2016, is $735,957.61.

Plaintiff submits an affidavit of mailing of Matthew Joseph Julian, vice president loan documentation of Wells Fargo Bank, N.A., the servicer for plaintiff. Mr. Julian attests that in the regular performance of his job functions, he is familiar with the business records maintained by Wells Fargo and has personal knowledge of the operation of and the circumstances surrounding the preparation, maintenance, distribution, and retrieval of records in Wells Fargo's records keeping systems. These records, according to Mr. Julian, are made at or near the time by, or from information provided by, persons with knowledge of the activity and transactions reflected in such records. The records are kept in the ordinary course of business activity conducted by Wells Fargo and it is the regular

[1] Defendants previously moved to dismiss this action based upon improper service. In an order of this Court, dated December 14, 2015, the motion was granted solely to the extent of directing a traverse hearing. A traverse hearing was subsequently held wherein the Court (Walker, J.) found that service was not proper. Plaintiff thereafter moved to extend its time to serve the summons and complaint, which was granted in an order of this Court dated June 17, 2016.

practice of Wells Fargo to make these records. Mr. Julian attests that he has personal knowledge of the matters stated in his affidavit by examining the business records.

Mr. Julian states that pursuant to paragraph 22 of the mortgage, plaintiff mailed out a notice of default, dated October 23, 2014, to the defendants at the property and their mailing address by first class mail. The notice of default advised defendants of the amount due to cure the default and that the failure to cure the default could result in an acceleration of the mortgage loan. According to Mr. Julian, Wells Fargo's practice in 2014 was to generate and mail such notices to defaulted borrowers on the date of the notice, but not later than two days from the date of the notice. Once mailed, the practice was to place a copy of the notice in Wells Fargo's file for that mortgage loan as a record that the notice was mailed. The attached copy of the notice of default in question was obtained from the electronic file created and maintained by Wells Fargo. Mr. Julian is familiar with such practice in his capacity as vice president loan documentation. Based upon his knowledge and his review of the Wells Fargo file for this particular mortgage loan, he attests that Wells Fargo's regular practice was adhered to with respect to the notice of default. In 2014, it was also Wells Fargo's regular business practice to create and maintain a NY mailbook to memorialize its mailing of the notice of default by first-class mail. The mailbook reflects that Wells Fargo mailed the notice of default to the defendants by first-class mail on October 23, 2014.

Mr. Julian further attests that plaintiff mailed a 90-day notice to defendants, dated October 23, 2014, pursuant to RPAPL 1304, at the property and their mailing address by certified and first-class mail. Wells Fargo's regular practice in 2014 was to generate and mail such notices to defaulted homeowners on the date of the notice, but not later than two days thereof. Once mailed, a copy of the notice was placed in Wells Fargo's file for that mortgage loan as a record that the notice was mailed. Mr. Julian attests that the attached copies of 90-day notice were obtained from the electronic file created and maintained by Wells Fargo. Mr. Julian is familiar with such practices in his capacity as vice president loan documentation. Based upon his knowledge and review of the file for this mortgage loan, he attests that Wells Fargo's regular practice was adhered to with respect to this 90-day notice. In 2014, it was Wells Fargo's regular business practice to create and maintain a NY 90 Day Certified Manifest to memorialize its mailing of the 90-day notice by certified mail. A copy of the proof of mailing from the post office, along with the 90-day notice is attached to the motion.

In opposition, defendants argue that plaintiff failed to demonstrate that it has standing and failed to demonstrate compliance with conditions precedent to commencing this action. Defendants argue that plaintiff failed to include an affidavit of service to satisfy its burden with respect to paragraph 22 of the mortgage and RPAPL 1304. Defendants also argue that plaintiff failed to sufficiently establish its standing to commence this action by failing to submit a copy of the Pooling and Servicing Agreement, failed to demonstrate that the note was assigned or physically delivered to plaintiff, and that the note is endorsed in blank.

Discussion

I. Standing

In order to establish a prima facie case in an action to foreclose a mortgage, a plaintiff must produce the mortgage, the note, and evidence of default (*see JPMorgan Chase Bank, N.A. v Weinberger*, 142 AD3d 643, 644 [2d Dept. 2016]; *HSBC Bank USA, N.A. v Spitzer*, 131 AD3d 1206, 1206-1207 [2d Dept 2015]). Here, plaintiff established its prima facie entitlement to judgment as a matter of law by producing the mortgage, the note, and evidence of defendant's default in payment.

Where the issue of standing is raised by a defendant, the plaintiff is required to prove its standing in order to be entitled to relief (*see JPMorgan Chase Bank, N.A. v Weinberger*, 142 AD3d at 644; *HSBC Bank USA, N.A. v Roumiantseva*, 130 AD3d 983 [2d Dept 2015]). A plaintiff establishes standing in a mortgage foreclosure action by demonstrating that it is the holder or assignee of the underlying note at the time the action is commenced (*see U.S. Bank N.A. v Saravanan*, 146 AD3d 1010 [2d Dept 2017] *citing Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361 [2015]). "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, and the mortgage passes with the debt as an inseparable incident" (*U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 754 [2d Dept 2009]).

In *Deutsche Bank Natl. Trust Co. v Naughton* (137 AD3d 1199 [2d Dept 2016]), the Court held that the plaintiff established, prima facie, that it had standing to prosecute the action through the submission of an affidavit from a vice president of its loan servicer. The loan servicer averred that, based on his personal knowledge and his review of the books and business records maintained by the plaintiff, the loan servicer, and their agents in the ordinary course of business with respect to the mortgage loan, the note and mortgage were physically transferred to the plaintiff on a specific date which was prior to the commencement of the foreclosure action. Similarly, here, Ms. Bryant attests that plaintiff had been in possession of the note since March 1, 2010, prior to the commencement of this action on February 19, 2015.

Moreover, contrary to defendants' argument, the fact that the note was indorsed in blank does not demonstrate that plaintiff does not have standing. "'An indorsement in blank specifies no particular indorsee and may consist of a mere signature. An instrument payable to order and indorsed in blank becomes payable to bearer and may be negotiated by delivery alone until specially indorsed' (UCC 3-204[2]). 'Bearer' means . . . a person in possession of a negotiable instrument' (UCC 1-201[b][5]). There is simply no requirement that an entity in possession of a negotiable instrument that has been endorsed in blank must establish how it came into possession of the instrument in order to be able to enforce it (see UCC 3-204[2])" (*JPMorgan Chase Bank, N.A. v Weinberger*, 142 AD3d 643, 645 [2d Dept 2016]).

II. Notice of Default

Here, the notice of default provided by plaintiff satisfied the provision in paragraph 22 of the mortgage (*see Indymac Bank, F.S.B. v Kamen*, 68 AD3d 931 [2d Dept 2009]). The mortgage requires that the notice must provide that the date by which the default must be corrected "will be at least 30 days from the date on which the notice is given" (*see Wachovia Bank, N.A. v Carcano*, 106 AD3d 724 [2d Dept 2013]).

Mr. Julian, an employee of Wells Fargo, plaintiff's loan servicer, attests that he has personal knowledge of Wells Fargo's record keeping procedures and that mail logs are kept in the regular course of business. His review of the mail logs established that, pursuant to paragraph 22 of the mortgage, plaintiff mailed out a notice of default, dated October 23, 2014, to the defendants at the property and their mailing address by first class mail. The notice of default advised defendants of the amount due to cure the default and that the failure to cure the default by November 27, 2014, could result in an acceleration of the mortgage loan. The notice of default adequately conformed to the provisions of the mortgage which govern such notice (*see First Trust Nat'l Ass'n v Meisels*, 234 AD2d 414 [2d Dept 1996]).

III. 90-Day Notice

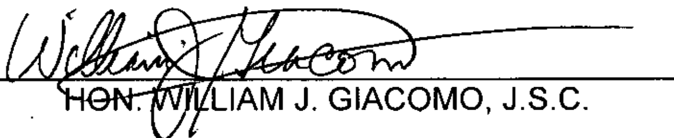
"[W]here, as here, the plaintiff in a residential foreclosure action alleges in its complaint that it has served an RPAPL 1304 notice on the borrowers, in support of a motion for summary judgment the plaintiff must 'prove its allegation by tendering sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL 1304'" (*Bank of N.Y. Mellon v Aquino*, 131 AD3d 1186 [2d Dept 2015] *citing Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 106 [2d Dept 2011]).

Compliance with RPAPL 1304 is a condition precedent to the commencement of a foreclosure action and the plaintiff has the burden of demonstrating such compliance (*see Flagstar Bank, FSB v Damaro*, 145 AD3d 858 [2d Dept 2016]; *Aurora Loan Services, LLC v Weisblum*, 85 AD3d at 106). Pursuant to RPAPL 1304, "at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower, including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower in at least fourteen-point type" (RPAPL 1304 [1]). RPAPL 1304 sets forth the requirements for the content of such notice (see RPAPL 1304 [1]), and states that such notice must be sent by registered or certified mail, and also by first-class mail, to the last known address of the borrower (*see* RPAPL 1304 [2]) (*see Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909, 910 [2d Dept 2013]). "By requiring the lender or mortgage loan servicer to send the RPAPL 1304 notice by registered or certified mail and also by first-class mail, the Legislature implicitly provided the means for the plaintiff to demonstrate its compliance with the statute, i.e., by submission of the proof of mailing by the post office" (*CitiMortgage, Inc. v Pappas*, 147 AD3d 900 [2d Dept 2017]).

Here, the affidavit of Mr. Julian described the loan servicer's standard business practice with regard to sending RPAPL 1304 90-day notices to borrowers, and affirmed, based on the business records he reviewed regarding the subject loan, that the notices had been sent to the defendants in compliance with the requirements of RPAPL 1304. The plaintiff also submits copies of the RPAPL 1304 notices sent to the defendants, copies of the return receipts, and tracking transaction information. Thus, the plaintiff demonstrated the absence of material issues as to its strict compliance with RPAPL 1304. In opposition, defendant failed to raise a triable issue of fact (*see Flagstar Bank, FSB v Mendoza*, 139 AD3d 898 [2d Dept 2016]).

Accordingly, plaintiff's motion is GRANTED and the order of reference is signed herewith.

Dated: White Plains, New York
June 23, 2017



HON. WILLIAM J. GIACOMO, J.S.C.