

<b>U.S. Bank N.A. v Cruz</b>
2017 NY Slip Op 31964(U)
September 15, 2017
Supreme Court, New York County
Docket Number: 850158/2015
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP., MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES 2004-AR3,

Plaintiff,

-against-

INDEX NO. 850158/2015
MOTION DATE 09-06-2017
MOTION SEQ. NO. 002
MOTION CAL. NO.

CARMELO CRUZ, JPMORGAN CHASE BANK, N.A., BOARD OF MANAGERS OF THE DIPLOMAT CONDOMINIUM, CRIMINAL COURT OF THE CITY OF NEW YORK, NEW YORK SUPREME COURT, CITY OF NEW YORK DEPARTMENT OF TRANSPORTATION PARKING VIOLATIONS BUREAU, CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, CITY OF NEW YORK TRANSIT AUTHORITY TRANSIT ADJUDICATION BUREAU, RICHLAW REAL ESTATE VENTURE,

and JOHN DOE AND JANE DOE #1 through #7, the last seven (7) names being fictitious and unknown to the plaintiff, the persons or parties intended being the tenants, occupants, persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the complaint,

Defendants.

The following papers, numbered 1 to 6 were read on this motion pursuant to CPLR §2221[d] to reargue:

Table with 2 columns: PAPER NUMBERED, PAPERS NUMBERED. Rows include Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: [ ] Yes [X] No

Upon a reading of the foregoing cited papers, it is Ordered, that plaintiff's motion pursuant to CPLR §2221[d] to reargue the June 21, 2016 Decision and Order of this Court denying the motion for summary judgment, and upon reargument to obtain the relief sought in Motion Sequence 001, is granted.

Defendant, Carmelo Cruz, is the titled owner of the residential condominium unit, #9B, at 210 East 47th Street, New York, New York. On November 20, 2003, Mr. Cruz, executed and delivered to M.L. Moskowitz & Co. Inc. d/b/a Equity Now, a note and mortgage for the principal amount of \$210,000.00. On February 17, 2013, Carmelo Cruz executed and delivered a Loan Modification Agreement, with JP Morgan Chase Bank, N.A., that went into effect on April 1, 2013, adjusting the principal balance of the Note and Mortgage to \$232,232.72. On April 10, 2015, a Limited Power of Attorney was entered into between defendant, JP Morgan Chase Bank, N.A. and plaintiff. The Limited Power of Attorney identifies JP Morgan Chase Bank, N.A. as the mortgage loan servicer acting on plaintiff's behalf (Mot. Exh.1-D).

It is alleged that effective December 1, 2013, Mr. Cruz defaulted on the mortgage and note by failing to tender the full amount of the monthly payment that was due, and failed to tender timely payments thereafter.

Plaintiff filed a Notice of Pendency and commenced this action on April 23, 2015, and served the defendants with the Summons and Complaint. Mr. Cruz was

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

also served with a homeowner's notice as required by RPAPL §1303[1][a]. Mr. Cruz's Answer to the Complaint asserts nine affirmative defenses: failure to state a claim, unjust enrichment, laches, breach of agreement by plaintiff, negligence or breach of contract by plaintiff, failure to give credit for amounts paid by Mr. Cruz, lack of personal jurisdiction, plaintiff's lack of standing, and plaintiff's lack of contractual relationship with the defendant. JP Morgan Chase Bank, N.A., filed a Notice of Appearance and Notice of Intention to Make an Application pursuant to RPAPL § 1351[3], dated June 15, 2015, for proceeds of sale on any surplus monies on a "corresponding subordinate mortgage." None of the other named defendants appeared or answered in this action.

Plaintiff's motion filed under Motion Sequence 001 sought summary judgment against Carmelo Cruz, a default judgment pursuant to CPLR §3215, against the non-appearing defendants, and pursuant to RPAPL §1321 the appointment of a referee to compute the amount due to plaintiff. Plaintiff also sought to discontinue the claims asserted against "JOHN DOE AND JANE DOE #1 through #7," which were not served with a Summons and Complaint, because they are not necessary parties to the action, and to have the caption amended. The June 21, 2016 Decision and Order of this Court denied the motion finding that plaintiff had not provided prima facie evidence that it has standing. It was determined that the Affidavit of Gary Brunton, Vice President of JP Morgan Chase Bank, N.A. was conclusory, with no statement as to when plaintiff took possession of the note, the identity of the agent, or that the note was assigned before commencement of this action.

Plaintiff's motion pursuant to CPLR §2221[d] seeks to reargue the June 21, 2016 Decision and Order of this Court and upon reargument to obtain the relief sought in Motion Sequence 001.

The Court has discretion to grant a motion to reargue upon a showing that it, "overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law" (Foley v. Roche, 68 A.D. 2d 558, 418 N.Y.S. 2d 588 [1st Dept., 1979]). Reargument is not intended to afford an unsuccessful party successive opportunities to argue issues previously decided, or to present arguments different from those originally asserted (Setters v. Al Properties and Developments (USA) Corp., 139 A.D. 3d 492, 32 N.Y.S. 3d 87 [1<sup>st</sup> Dept., 2016]).

Plaintiff is granted reargument of the June 21, 2016 Decision and Order. This Court misapprehended that the affidavit of Gary Brunton Vice President, of JP Morgan Chase Bank, N.A., the servicer, properly relied on records kept in the ordinary course of business, which are sufficient to establish standing (Mot. Exh. 3). This Court overlooked the Affidavit of Note Possession by Renada N. Decatur, Assistant Vice President of JP Morgan Chase Bank, N.A., stating that the original records were obtained on July 24, 2012, and kept by, JPMorgan Chase Custody Services, Inc. ("JPMCCSI") and stored in a secure vault facility located in Monroe, Louisiana (Mot. Exh. 5). The stored records were accessible for viewing electronically. The copy of the adjustable rate note indorsed in blank to plaintiff, legal description, recorded mortgage and loan modification were attached as Exhibits A-D to the Complaint when it was filed on April 23, 2015 (NYSEF Docket Nos. 1-6), further verifying the factual details of possession by plaintiff before the commencement of this action (see Bank of New York Mellon v. Knowles, 151 A.D. 3d 596, 57 N.Y.S. 3d 473 [1<sup>st</sup> Dept. 2017] and U.S. Bank National Association v. Saravanan, 146 A.D. 3d 1010, 45 N.Y.S. 3d 547 [2<sup>nd</sup> Dept., 2017]).

Carmelo Cruz's argument that he did not have any business relationship with the plaintiff, and that his business relationship was with JP Morgan Chase Bank, N.A., and that he may potentially lose property that he has owned since 1993, is not a reason to deny reargument.

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of

law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence in admissible form, requiring a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 571 N.E. 2d 645; 569 N.Y.S. 2d 337 [1999]). Conclusory assertions, “or speculation and a ‘shadowy semblance of an issue’ are insufficient to defeat summary judgment” (Stonehill Capital Management, LLC v. Bank of the West, 28 N.Y. 3d 439, 68 N.E. 3d 683, 45 N.Y.S. 3d 864 [2016]).

Carmelo Cruz under Motion Sequence 001 opposes summary judgment arguing that plaintiff failed to make a prima facie showing because the motion relies on hearsay. Mr. Cruz claims he dealt with JP Morgan Chase Bank, N.A., did not enter into any business relationship with the plaintiff, and that it has not been established that he owes the plaintiff the amount stated. It is further argued by Mr. Cruz that there remains an issue of fact on standing.

Standing is established in a foreclosure action by proof of physical delivery of the note or assignment of the note to the plaintiff prior to commencement of the action (Aurora Loan Servs. LLC v. Taylor, 25 N.Y. 3d 355, 34 N.E. 3d 363, 12 N.Y.S. 3d 612 [2015]). The endorsement to plaintiff on the adjustable rate note, the language in the April 10, 2015 Limited Power of Attorney giving JP Morgan Chase Bank, N.A. authority to act as servicer and agent, attachment of the note, mortgage and loan modification to the complaint at the commencement of this action, together with the affidavits on behalf of the servicer are sufficient to establish standing (see Bank of New York Mellon v. Knowles, 151 A.D. 3d 596, 57 N.Y.S. 3d 473 [1<sup>st</sup> Dept. 2017], Wilmington Trust Co. v. Walker, 149 A.D. 3d 409, 51 N.Y.S. 3d 64 [1<sup>st</sup> Dept. 2017] and U.S. Bank National Association v. Saravanan, 146 A.D. 3d 1010, 45 N.Y.S. 3d 547 [2<sup>nd</sup> Dept., 2017]).

The affidavits submitted by the servicer as agent on behalf of the plaintiff are not hearsay and Mr. Cruz’s conclusory assertions are not enough to deny the granting of summary judgment. He has failed to raise an issue of fact.

Accordingly, it is ORDERED, that plaintiff’s motion pursuant to CPLR §2221[d] to reargue the June 21, 2016 Decision and Order of this Court denying summary judgment against defendant CARMELO CRUZ, and upon reargument to obtain the relief sought in Motion Sequence 001, is granted, and it is further,

ORDERED that the June 21, 2016 Decision and Order of this Court filed under Motion Sequence 001 is vacated, and the motion for summary judgment filed under Motion Sequence 001 is restored, and it is further,

ORDERED that upon reargument, plaintiff’s motion filed under Motion Sequence 001, pursuant to CPLR §3212 for summary judgment against defendant, CARMELO CRUZ, for a default judgment against the non-appearing defendants pursuant to CPLR §3215, to appoint a referee to compute the total sums due and owing to the plaintiff pursuant to RPAPL §1321, and to amend the caption excising the defendants “JOHN DOE AND JANE DOE #1 through #7,” is granted, and it is further,

ORDERED that summary judgment is granted against defendant CARMELO CRUZ, and it is further,

ORDERED that CARMELO CRUZ’s Answer asserting affirmative defenses, is dismissed with prejudice, and it is further,

ORDERED that the non-appearing and non-answering defendants are in default, and it is further,

ORDERED, that plaintiff is directed to settle order on notice, by serving all named parties and the General Clerk's Office (Room 119 - Order Section), with a copy of the proposed order for their review, to be forwarded to this Court, and it is further,

ORDERED, that the proposed order to be settled shall include, the proposed amended caption, reference to a Referee to be designated by this Court, to ascertain and compute the amount due to plaintiff, whether the premises being foreclosed can be sold in parcels, and whether the defaults can be fixed and determined, and it is further,

ORDERED that the Clerk of the Court shall enter judgment accordingly.

ENTER:

  
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MANUEL J. MENDEZ,  
J.S.C.

MANUEL J. MENDEZ  
J.S.C.

Dated: September 15, 2017

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION  
Check if appropriate:     DO NOT POST                       REFERENCE