

HSBC Bank USA v Serafin

2017 NY Slip Op 32361(U)

September 21, 2017

Supreme Court, Suffolk County

Docket Number: 19879/2009

Judge: C. Randall Hinrichs

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 49 SUFFOLK COUNTY

PRESENT: HON. C. RANDALL HINRICHS
Justice of the Supreme Court

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HSBC BANK USA, AS TRUSTEE FOR DALT
2007-1 3232 Newmark Drive
Miamisburg, OH 45342

Plaintiff,

LECLAIRRYAN
By Mikelle V. Bliss, Esq.
Attorneys for Plaintiff
885 Third Avenue, Sixteenth Floor
New York, NY 10022

- against -

PELAYO SERAFIN, VICTOR SERAFIN,
NICOLE TORRES, CSGA LLC, LAUREN
MARZLOCK, MRC RECEIVABLES CORP.,
THE BIG M CORPORATION D/B/A
MANDEE,

Defendants.

RONALD WEISS, ESQ.
Attorney for Defendants, SERAFIN
734 Walt Whitman Road, Suite 203
Melville, NY 11747

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Upon limited issue trial conducted upon order of this court dated February 2, 2017 and held on July 12, 2017,
it is

ORDERED that following trial on the limited issue of RPAPL notice pursuant to 1304, the court
finds all the requirements for judgment of foreclosure have been met by the plaintiff; and it is further

ORDERED that plaintiff is directed to submit a proposed order appointing a referee to compute
amounts due under the subject mortgage pursuant to RPAPL § 1321; and it is further

ORDERED that upon completion of the referee's report, the plaintiff is directed to move for
confirmation of the referee's report and a judgment of foreclosure via notice of motion to allow the
defendant an opportunity to be heard solely regarding the referee's computations; 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 herein and not waived further notice pursuant to CPLR 2103(b)(1), (2) or (3)
within thirty (30) days of the date herein, and to promptly file the affidavits of service with the Clerk of
the Court.

This is an action to foreclose a mortgage on real property known as 6 Parnet Court, Port Jefferson Station, New York 11776 ("the subject property").

It is uncontested that on April 20, 2007, the defendant Pelayo Serafin ("the defendant-mortgagor") executed a fixed-rate note in favor of National City Mortgage, a Division of National City Bank ("the lender") in the principal sum of \$328,700.00. On April 20, 2007, the defendant-mortgagor also executed an interest only payment period note addendum, whereby the note was modified to provide for 120 interest only payments of \$2,020.14, and thereafter, interest and principle payments of \$2,622.92 per month for the remaining 20 years of the loan. To secure said note, the defendant-mortgagor, gave the lender a mortgage on the subject property on the same date. The mortgage was recorded on May 29, 2007.

The note and mortgage were acquired by HSBC Bank USA, as Trustee for DALT 2007-1 ("the plaintiff") prior to commencement of the action but following a series of mergers and assignments. More specifically, by assignment executed on July 24, 2007, the lender transferred the mortgage and "all beneficial interest" thereunder to National City Mortgage Co., a subsidiary of National City Bank. The assignment was subsequently recorded on October 11, 2007. The lender merged with and into National City Bank effective October 1, 2008. By assignment executed on May 18, 2009, National City Real Estate Services, successor to National City Mortgage, Inc., formerly known as National City Mortgage Co., transferred the "mortgage and the [a]ssignor's beneficial interest under the [m]ortgage" to the plaintiff. The second assignment was recorded on June 15, 2009. On November 6, 2009, National City Bank merged with and into PNC Bank, National Association ("PNC"). At all times since the inception of the loan, the loan was serviced by National City Bank or its successor servicer by merger PNC.

It is uncontested that the defendant-mortgagor defaulted on the note and mortgage by failing to make the monthly payment of interest due on August 1, 2008, and each month thereafter. After the defendant-mortgagor allegedly failed to cure the default in payment, the plaintiff commenced an action by the filing of the *lis pendens*, summons and complaint on May 26, 2009 against Pelayo Serafin, Victor Serafin and Nicole Torres, *inter alia*. Defendants Pelayo and Victor Serafin ("Defendant-mortgagors") answered the summons and complaint. Defendant Nicole Torres was deemed in default along with all other non-appearing non-answering defendants.

At the time of commencement of this action, a lender or servicer of "high-cost", "subprime" and "non-traditional" "home loans" was required to provide a defaulting mortgagor with 90-day notice of default pursuant to RPAPL 1304. Defendant-mortgagors contend that the subject loan is a "non-traditional" home loan pursuant to RPAPL 1304(5)(e) that required plaintiff to provide notice of default 90 days before the commencement of the foreclosure action. At the time of the commencement of this action, RPAPL 1304(5)(e) defined a non-traditional home loan as "a payment option adjustable rate mortgage or interest only loan consummated between January 1, 2003 and 2008." RPAPL 1304(5) (e). To determine if the subject loan constitutes a non-traditional interest only or adjustable loan as defined by the statute, "the clearest indicator of legislative intent is the statutory text." (*Balsam v. Fioriglio*, 123 A.D.3d 750, 751[2d Dept. 2014]) and such text should be "giving effect to the plain meaning thereof." *Id.* Relying on the unvarnished text it is clear that non-traditional loans are to be defined as interest only or adjustable rate loans. It is abundantly clear that defendants' loan did not meet the definition of a non-traditional.

It is uncontested that the subject loan was consummated during the proscribed period and that the defendant executed a mortgage addendum that required 120 monthly interest only payments for the first 10 years of the mortgage loan. Plaintiff has shown by a preponderance of the evidence that loan and addendum are styled as fixed rate 30 year mortgage loan of equal payments of \$2,270.25 per month over the life of the mortgage. The interest only addendum does not modify the interest rate or the ultimate amount to be paid but reconfigures the payments into two categories including a lower, interest-only payment of \$2,020.14 for the first 120 payments with the remaining 240 payments increased to \$2,622.92 to cover both interest and principle until 2037. In addition, the addendum states that the defendant-mortgagor shall make all monthly payments until "I have paid the principal and interest" Exhibit 1. It is equally clear that defendants' loan did not meet the definition of an adjustable rate. The rate of interest was the same over the life of the loan. Thus, plaintiff was not required to provide RPAPL 1304 notice prior to the initiation of foreclosure proceedings on this loan.

Furthermore, the plaintiff has proven by a preponderance of the evidence that it complied with the strict requirements of RPAPL 1304 though compliance was not required. At trial, the plaintiff called a single witness, Dorothy Thomas, Mortgage Officer and employee of PNC, servicer for the plaintiff. The sole witness, testified that she is personally familiar with the business practices of PNC and its predecessor by merger, National City Bank. She testified in detail to the general business practices of both PNC and National City to generate and mail 90-day notices required pursuant to RPAPL 1304. Ms. Thomas testified that the plaintiff utilizes a computer based macro to identify the mortgages requiring 90-day notice and a computer based template to generate the letters. She further testified that the letters are collated and checked for accuracy then sent to a secure printer. Once printed the notices are placed into envelopes and copies sent contemporaneously with an upload to the "file unit." Ms. Thomas also described the process by which certified and regular mail identifiers are placed on the 90-day notice letters and mailed in accordance with the identifiers. She further testified that National City mailed a 90-day notice to defendant Pelayo Serafin via certified and regular mail to at the subject property address on October 29, 2008 and that the indication of such service was noted in the servicers computer system.

Plaintiff also entered into evidence two copies of the 1304 notice and a screen print of plaintiff's document computer tracking system labeled "Collections/Customer Service Loan Activity Archive" showing two entries stating "NY 90 Day Prop Add-1st Borr" and "NY 90 Day Prop Add-1st Borr-R" Though submission of the plaintiff's screen shot and copies of the notices alone would not be sufficient for the plaintiff to meet its burden (*CitiMortgage, Inc. v. Pappas*, 147 A.D.3d 900, 47 N.Y.S.3d 415, 416 [N.Y. App. Div. 2017])[opining 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"]. Ms. Thomas's detailed testimony and familiarity with respect to the plaintiff's letter generating and mailing practices and procedures were sufficient to meet the plaintiff's burden regarding mailing of the 90-day notice. (See *CitiMortgage, Inc. v. Pappas*, 147 A.D.3d 900, 47 N.Y.S.3d 415, 417 [N.Y. App. Div. 2017]).

In all other respects, the plaintiff has established satisfaction of the requirements of RPAPL 1304.

The Court grants judgment in favor of the plaintiff. The court finds that the plaintiff complied with the requirements of RPAPL 1304 though compliance was not required. The plaintiff has established all elements required to obtain a judgment of foreclosure and sale upon confirmation of the referee's report.

The plaintiff is directed to move for confirmation of the referee's report and a judgment of foreclosure via notice of motion to allow the defendant an opportunity to be heard solely regarding the referee's computations (see CPLR 4313; CPLR 4403; *36 North Water, Inc. v Mark Caliper, Inc.*, 295 AD2d 499, 744 NYS2d 454 [2d Dept 2002] ["A defendant's appearance in an action entitles him to service of all papers and notice of all proceedings through and subsequent to judgment"]; see also, *Home Sav. Bank v Chiola*, 203 AD2d 525, 611 NYS2d 235 [2d Dept 1994] citing *Martine v Lowenstein*, 68 NY 456 [1877]).

DATED: September 21, 2017


C. RANDALL HINRICHS
J.S.C.

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