

Federal Natl. Mtge. Assoc. v Sanchez

2017 NY Slip Op 32362(U)

October 20, 2017

Supreme Court, Suffolk County

Docket Number: 22950-2013

Judge: William G. Ford

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

COPY

PRESENT:

Motion Sequence #: 001 - MD
#: 002 - MG

HON. WILLIAM G. FORD
JUSTICE of the SUPREME COURT
_____ X

ORDER

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Plaintiff,

- against -

PLAINTIFF'S ATTORNEY:
ROSICKI, ROSICKI & ASSOCIATES, PC
By: Lijue T. Philip, Esq.
1 Old Country Road
Carle Place, NY 11514

LEON SANCHEZ; DESILEE REALTY CORP; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK AS SUCCESSOR IN INTEREST TO JPMORGAN CHASE BANK, NA AS INDENTURE TRUSTEE FOR GREENPOINT HOME EQUITY LOAN TRUST 2004-1, HOME EQUITY LOAN ASSET-BACKED NOTES, SERIES 2004-1, UNITED STATES OF AMERICA - INTERNAL REVENUE SERVICE; "JOHN DOES" and "JANE DOES", said names being fictitious, parties intended being possible tenants or occupants of premises, and corporations, other entities or persons who claim, or may claim, a lien against the premises,

Defendants.

_____ X

DEFENDANT'S ATTORNEY:
LESTER & ASSOCIATES
By: Gabriel R. Korinman, Esq.
600 Old Country Road
Garden City, NY 11530

The Court has considered on this (*Mot. Seq. 1*) Plaintiff's Notice of motion and Affirmation of Lijue T. Philips Esq., and (*Mot. Seq. 2*) defendants opposition and Cross-motion and Affirmation of Gabriel R. Korinman Esq., Plaintiff's Reply affirmation, and defendant's reply, and the oral argument in this matter held on September 20, 2017.

ORDERED that this motion by plaintiff, Federal National Mortgage Association ("plaintiff"), for summary judgment and appointment of a referee has been duly considered and the same is hereby **DENIED** for the reasons discussed below. The cross-motion seeking disqualification of plaintiff's counsel is **GRANTED** and it is further

ORDERED that plaintiff serve a copy of this decision with notice of entry on defendants within 30 days' time, and it is further

ORDERED that a copy of this decision be attached to any further or subsequent application for the same or similar relief sought herein;

BACKGROUND

Federal National Mortgage Association (hereinafter "Plaintiff", or "bank" or "FNMA") moves for summary judgment and appointment of a referee based on the alleged default of the defendant borrower Leon Sanchez. On or about May 8, 2003 Sanchez executed and delivered a Note to GreenPoint Mortgage Funding Inc. in the amount of \$104,000.00. As collateral security, defendant also executed and delivered a mortgage dated May 8, 2003 which was subsequently recorded in the Office of the Suffolk County Clerk on or about May 28, 2003 in Liber 20403 at page 603. Thereafter on or about November 7, 2008, MERS as nominee for GreenPoint Mortgage Funding Inc. assigned the note to BAC Home Loans Servicing LP, f/k/a Countrywide Home Loans Servicing LP. Thereafter, on or about June 11, 2012, Bank of America N.A. a successor to BAC Home Loans Servicing LP, assigned the note to Federal National Mortgage Association.

In support of the instant motion, plaintiff relies on the affidavit of one Nathan Ablen a Foreclosure Specialist of Seterus Inc., a sub-servicer of Plaintiff FNMA. This affidavit avers that: "to the extent that the business records were created by prior holders and/ or servicers, these records have been integrated into Seterus' business records and are kept and relied upon as a regular business practice and in the ordinary course of business conducted by Seterus, Inc." The affidavit also states that the original Note was delivered to a "custodian" for FNMA on June 1, 2010, slightly less than two years **before** the assignment to FNMA.[emphasis supplied]

In opposition to the motion, and in support of it's own cross motion, the affirmation of defendant's counsel Gabriel R. Korinman avers that plaintiff's motion in support contains inadmissible hearsay, and because of concurrent representation, plaintiff's counsel must be disqualified.

STANDARD OF REVIEW

As is well established as the law regarding residential mortgage foreclosure in this State and in this department, a plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced (*see Kondaur Capital Corp. v. McCary*, 115 AD3d 649, 650, 981 NYS2d 547; *see HSBC Bank USA v. Hernandez*, 92 AD3d at 843, 939 NYS2d 120; *Bank of N.Y. v. Silverberg*, 86 AD3d at 279, 926 NYS2d 532). 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 (*see Aurora Loan Serv., LLC v. Taylor*, 114 AD3d 627, 980 NYS2d 475; *HSBC Bank USA v. Hernandez*, 92 AD3d at 844, 939 NYS2d 120; *U.S. Bank, N.A. v. Collymore*, 68 AD3d at 754, 890 NYS2d 578). As a general matter, once a promissory note is tendered to and accepted by an assignee, the mortgage passes as an incident to the note (*see Bank of N.Y. v. Silverberg*, 86 AD3d at 280, 926 NYS2d 532). However, the transfer of the mortgage without the debt is a nullity, and no interest is acquired

by it (*see Bank of N.Y. Mellon v. Gales*, 116 AD3d 723, 982 NYS2d 911; *Bank of N.Y. v. Silverberg*, 86 AD3d at 280, 926 NYS2d 532), because a mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation (*see Deutsche Bank Natl. Trust Co. v. Spanos*, 102 AD3d 909, 911, 961 NYS2d 200); *U.S. Bank Nat. Ass'n v. Faruque*, 120 AD3d 575, 577, 991 NYS2d 630, 632–33 [2d Dept. 2014]).

A plaintiff in a mortgage foreclosure action establishes a prima facie case for summary judgment by submission of the mortgage, the note, bond or obligation, and evidence of default (*see Valley Natl. Bank v Deutsch*, 88 AD3d 691, 930 NYS2d 477 [2d Dept 2011]; *Wells Fargo Bank v Das Karla*, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; *Washington Mut. Bank, F.A. v O'Connor*, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]). The burden then shifts to the defendant to demonstrate “the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff” (*Capstone Bus. Credit, LLC v Imperia Family Realty, LLC*, 70 AD3d 882, 883, 895 NYS2d 199 [2d Dept 2010], *quoting Mahopae Natl. Bank v Baisley*, 244 AD2d 466, 467, 644 NYS2d 345 [2d Dept 1997]).

It is well settled that the proponent of a summary judgment motion bears the initial burden of making a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (*Norwest Bank Minn. v Sabloff*, 297 AD2d 722, 723, 747 NYS2d 559 [2d Dept 2002]). Failure to make such a prima facie showing requires denial of the motion regardless of the sufficiency of the opposition papers (*De Santis v Romeo*, 177 AD2d 616, 616, 576 NYS2d 323 [2d Dept 1991]).

Movant establishes its prima facie entitlement to judgment as a matter of law by the production of copies of the mortgage, the unpaid note, and evidence of default (*see e.g. Aurora Loan Servs., LLC v Enaw*, 126 AD3d 830, 7 NYS3d 146; *U.S. Bank N.A. v. Weinman*, 123 AD3d 1108, 2 NYS3d 128; *Plaza Equities, LLC v. Lamberti*, 118 AD3d 688, 689, 986 NYS2d 843; *Solomon v. Burden*, 104 AD3d 839, 961 NYS2d 535), and demonstrates its standing based both on its physical possession of the note, and on its status as an assignee of the note, as of the date that the action was commenced (*see Wells Fargo Bank, N.A. v. Parker*, 125 AD3d 848, 5 NYS3d 130; *Wells Fargo Bank, N.A. v. Ali*, 122 AD3d 726, 995 NYS2d 735); *Emigrant Bank v. Larizza*, 129 AD3d 904, 905, 13 NYS3d 129, 131 [2d Dept. 2015]).

Here, the subservicer’s affidavit fails to establish a sufficient foundation for the admission of a business record. The affiant here, Mr. Ablen, has no personal knowledge of the prior holders business and record-keeping practices, and there is no affidavit supporting the prior record-keeping practices. *See U.S. Bank N.A. v. Handler*, 140 A.D. 3d 948,949 (2015), *Aurora Loan Services LLC v. Mercius* 138 A.D. 3d 650 [2d Dept.2016]. The plaintiff has failed to establish that the records relied upon by Seterus were admissible under the business records exception to the hearsay rule CPLR 4518(a) because Mr. Ablen cannot attest that he was personally familiar with the record -keeping practices of the prior holders.

With respect to the cross-motion to disqualify plaintiff’s counsel, it is undisputed by the parties that plaintiff’s firm, Rosicki, Rosicki & Associates represented defendant Sanchez in an action

venued in neighboring Nassau County captioned: Braneli Corp. And Atkinson v. Desilee Realty Corp. et. al. Index 10584/11. This court heard the oral arguments of counsel, and written memoranda on this point and finds that counsel must be disqualified. The Braneli action was commenced on or about July 19, 2011 and the stipulation of discontinuance was filed on December 13, 2013. The foreclosure action as against Sanchez reflects affidavits of service being filed on October 4, 2013 and as against the corporation Desilee Realty Corp. on September 17, 2013. While counsel for plaintiff at argument asserts that the Braneli matter was substantially settled in early August of 2013.

The standard for disqualification depends on whether the representation was concurrent or successive. For concurrent representation, it is *prima facie* improper for an attorney to simultaneously represent a client and another party with interests directly adverse to that client. *Hempstead Video Inc. V. Incorporated Village of Valley Stream et al* 409 F. 3d at 127, 133(2nd Cir. 2005). Under those circumstances, a "*per se*" standard applies and the attorney must be disqualified unless he is able to demonstrate at the very least, that there will be no actual or apparent conflict in loyalties or diminution in the vigor of his representation. Further, the affidavit of defendant Leon Sanchez alleges that Rosicki obtained confidential financial information concerning himself and Desilee Realty Corp. The affirmation of Lijue Philip Esq. Rosicki's attorney does not address whether confidential information was or was not disclosed, he merely avers that Sanchez is not specific about the information. This is flatly insufficient to establish that there is no actual or apparent conflict in loyalties.

CONCLUSION

For all the forgoing reasons, it is

ORDERED that the plaintiff's motion seeking summary judgment and an Order of reference is **DENIED** and it is further

ORDERED that the cross motion seeking disqualification of plaintiff's counsel is **GRANTED** and it is further

ORDERED that plaintiff serve a copy of this decision with notice of entry on defendants within 30 days' time.

The forgoing constitutes the decision and Order of the Court.

Dated: October 20, 2017
Riverhead, New York



WILLIAM G. FORD, J.S.C.

___ FINAL DISPOSITION

X NON-FINAL DISPOSITION