20 Cap Fund I, LLC v Sookhai

2017 NY Slip Op 32817(U)

December 22, 2017

Supreme Court, Queens County

Docket Number: 700311/17

Judge: Darrell L. Gavrin

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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

20 CAP FUND I, LLC,

Plaintiff,

- against-

DHARMDEO SOOKHAI, INDRANIE SOOKHAI, "JOHN DOE" and "MARY DOE," said names being fictitious, it being the intention of plaintiff to designate any and all occupants, tenants, persons or corporations, if any, having or claiming an interest in or lien upon the premises being foreclosed therein,

Defendants.

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Motion Date August 23, 2017

Motion Cal. No. 226

Motion Seq. No. 1

The following numbered papers read on this motion by plaintiff for an order granting summary judgment, appointing a referee to compute, to amend the case caption, dismissing the affirmative defenses interposed on behalf of the defendants Dharmdeo Sookhai and Indranie Sookhai ("defendants"); and on the cross motion by defendants for summary judgment dismissing the complaint.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits............................	EF 33-46
Notice of Cross Motion - Affirmation - Exhibits...................	EF 48-56
Affirmation in Further Support of Motion..............................	EF 57-58
Reply Affirmation- Exhibit..	EF 59-62

Upon the foregoing papers it is ordered that this motion and cross motion are determined as follows:

Plaintiff commenced this action by filing the notice of pendency and the summons and complaint on January 9, 2017. Plaintiff seeks to foreclose on a mortgage given by the defendants, as record owners of the subject real property, known as 252-82nd Avenue, Jamaica, New York to secure an open ended line of credit in the amount of $175,000. The plaintiff alleges that it is the holder of the mortgage and underlying obligation and that the defendants defaulted under the terms of the line of credit and mortgage by failing to make the monthly installment payment due on December 20, 2008 and as a consequence, it elected to accelerate the entire mortgage debt. The plaintiff has moved for summary judgment, default judgment, to amend the caption and for an order of reference. The defendants have cross moved for summary judgment dismissing the complaint.

The branch of the motion to amend the caption by replacing the "John Does" and "Jane Does" defendants with Marie Ramharakh, Vishal Sookhai, Hamwatie Sookhai, and Vidlya Sookhai is granted. It is ordered that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS
---x
20 CAP FUND I LLC,

Plaintiff,

-against-

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DHARMDEO SOOKHAI, INDRANIE SOOKHAI,
MARIE RAMHARAKH, VISHAL SOOKHAI,
HAMWATIE SOOKHAI and VIDLYA SOOKHAI,

Defendants.
---x

A party moving for summary judgment must show by admissible evidence that there are no material issues of fact in controversy and that they are entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). On a motion for summary judgment in a foreclosure action, a plaintiff must make a *prima facie* showing by producing the mortgage, the unpaid

note, bond or obligation and the evidence of default and the assignment of the mortgage documents to it *(see EMC Mtge. Corp. v Riverdale Assoc.*, 291 AD2d 370 [2d Dept 2002]; *IMC Mtge. Co. v Griggs*, 289 AD2d 294 [2d Dept 2001]).

In support of its motion the plaintiff submitted the affidavit of Corey O'Brien, managing member of the plaintiff. This affidavit is not sufficient to support the motion for summary judgment. Mr. O'Brien does not identify the records he relied upon to establish the defendant's default (*see Bank of America, N.A. v Thomas*, 138 AD3d 523, [1st Dept 2016]). Here, plaintiff did not become the holder of the note until after the defendant's default. In his affidavit Mr. O'Brien did not allege that he was familiar with records from any prior servicer which were kept prior to the time plaintiff became the owner of the note or when FCI Lender Service began servicing the loan, when the default actually occurred. In fact, he does not actually name any prior servicer nor does he state that plaintiff incorporated the records from this unnamed person or entity into its own records.

Mr. O'Brien only states that "[w]here applicable, the records include documentation obtained and maintained by plaintiff, from prior servicers or note holders relating to the loan." The filing of papers which are received from other entities even papers that were kept in the regular course of business is insufficient to qualify those documents as business records, because the documents which were received were not made in the regular course of business of the recipient, who is not in a position to provide the necessary foundational testimony (*see Lodato v Greyhawk N. Am., LLC*, 39 AD3d 494 [2d Dept 2007])). In order to establish the proper foundation by the recipient of the records, who does not have personal knowledge of the maker's business practice and procedures, the recipient must show that it either incorporated the records into its own records or that it relied upon the records in its day-to-day operations (*Matter of Carothers v Geico Indem. Co.*, 79 AD3d 864 [2d Dept 2010]). Here, there has been no such showing. Therefore, the plaintiff failed to establish the admissibility of the records relied upon to establish the defendants' default under the business records exception to the hearsay rule (CPLR 4518[a]; *HSBC Mtge. Servs., Inc. v Royal*, 142 AD3d 952 [2d Dept 2016]; *Aurora Loan Servs. LLC v Mercius*, 130 AD3d 861 [2d Dept 2016]; *Citibank, N.A. v Cabrera*, 130 AD3d 861 [2d Dept 2015]). Inasmuch as the plaintiff's motion was based upon evidence that was not in admissible form, the plaintiff failed to establish its *prima facie* entitlement to judgment as a matter of law.

Turning next to the branches of the motion to strike the affirmative defenses, the defendant's first affirmative defense in essence alleges the plaintiff lacks standing to commence this action. Once a plaintiff's standing is placed in issue by the defendant, it is incumbent upon the plaintiff to prove its standing to be entitled to relief (*see U.S. Bank N.A. v Sharif*, 89 AD3d 723 [2d Dept 2011]). A plaintiff establishes that it has standing where it demonstrates that it is both the holder or assignee of the subject mortgage and the holder or

assignee of the underlying note *(Bank of N.Y. v Silverberg*, 86 AD3d 274 [2d Dept 2011]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95 [2d Dept 2011]). An assignment of the mortgage without assignment of the underlying note or bond is a nullity (*Deutsche Bank Natl. Trust Co. v Barnett*, 88 AD3d 636 [2011]). 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 (*U.S. Bank, N.A. v Collymore*, 68 AD3d 752 [2d Dept 2009]). Here, the plaintiff established its standing through the affidavit of its managing member who stated that the plaintiff had physical possession of the note prior to the commencement of the lawsuit.

The second affirmative defense is that the plaintiff did not comply with RPAPL 1304. RPAPL 1304 provides that with regard to a home loan at least ninety days before a lender begins an action against a borrower to foreclose on a mortgage, the lender must provide notice to the borrower that the loan is in default and his or her home is at risk *(Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95 [2d Dept 2011]). "[P]roper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of the foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition" *(Aurora Loan Servs., LLC* 85 AD3d at 107). The plaintiff did not provide any affidavit that attests to any details concerning the service of the RPAPL 1304 notice. The affidavit from plaintiff's managing member does not state that he served the RPAPL 1304 notice or identify the individual who did so, nor does he refer to standard office practice by the plaintiff's servicer to ensure that items are properly addressed and mailed. While the affidavit states that it is based upon his review of business records, there is no discussion of the office procedures that were in place to ensure that the mailed items were properly addressed and mailed (*see Frankel v Citicorp Ins. Services, Inc.*, 80 AD3d 280 [2d Dept 2010]; *Residential Holding Corp. v Scottsdale Ins. Co.*, 286 AD2d 679 [2d Dept 2001]). Thus, the affidavit is not sufficient to establish that a RPAPL 1304 notice was properly sent by registered or certified mail and also by first-class to the borrower (*see Deutsche Bank Nat. Trust Co. v Spanos*, 102 AD3d 909 [2d Dept 2013]).

Additionally, the copy of the RPAPL 1304 notice submitted to the court does not contain all of the statutorily mandated content in that it does not include "a list of at least five housing counseling agencies as designated by the division of housing and community renewal, that serve the region where the borrower resides" with "the counseling agencies' last known address and telephone numbers" (RPAPL 1304[2]; *see Wells Fargo Bank, N.A. v Barrett*, 33 Misc 3d 1207(A), 2011 NY Slip Op 51805(U) [Sup Ct, Queens County 2011, McDonald, J.]). While the list purportedly contains five counseling agencies, it in fact only contains four agencies as the last two are identical. Therefore, this affirmative defense will not be dismissed.

The remaining affirmative defenses are without merit and are dismissed. The third affirmative defense is that the plaintiff willfully overstated the amount due. A challenge to the amount of damages is insufficient to defeat a motion for summary judgment (*see Shufelt v Bulfamante*, 92 AD3d 936 [2d Dept 2012]). The fourth affirmative defense is that the plaintiff is barred by unclean hands and equitable estoppel. This conclusory allegation is without merit and will be dismissed. The fifth affirmative defense is that the action is barred by the statute of frauds. Inasmuch as the note and mortgage were memorialized in writing, this affirmative defense is dismissed.

The sixth affirmative defense is that the action is barred by the statute of limitations. The defendants have also cross moved for summary judgment dismissing the complaint on this defense. With respect to a mortgage payable in installments, separate causes of action accrue for each installment that is not paid and the statute of limitations begins to run on the date each installment becomes due (*Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753 [2d Dept 2010]; *Loiacono v Goldberg*, 240 AD2d 476 [2d Dept 1997]). However, once a mortgage debt is accelerated the entire amount is due and the statute of limitations begins to run on the entire debt (*Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980 [2d Dept 2012]; *EMC Mtge. Corp. v Patella*, 279 AD2d 604 [2d Dept 2001]). Here, the defendant failed to establish that the action is time-barred (*see Nationstar Mortg., LLC v Weisblum*, 143 AD3d 866 [2d Dept 2006]). Though the default allegedly occurred on December 20, 2008, the debt was not accelerated until this action was commenced. In reply in further support of its cross motion, the defendant argues that the note was accelerated by a letter sent on September 28, 2008 when the Home Equity Line of Credit was suspended and that the home equity line of credit unlike a normal mortgage note is not an installment loan. Even considering these arguments improperly raised for the first time in reply, they do not raise an issue with regards to the statute of limitations. The letter suspending the line of credit did not accelerate the debt it simply suspended the credit line and in fact explicitly stated that monthly payments were still required. Additionally, contrary to the argument put forth by the defendants the subject home equity line of credit had monthly payment schedule and was thus an installment contract.

The seventh affirmative defense is that the action is barred by the doctrine of champerty. This affirmative defense is without merit. A champerty defense in a mortgage foreclosure action is construed narrowly and will not apply unless the mortgage was acquired for the very purpose of bringing suit on it to the exclusion of any other purpose (Judiciary Law § 489; *see Red Tulip LLC v Neiva*, 44 AD3d 204 [1st Dept 2007]). In this instance the defense does not arise on the allegations in the complaint.

The defendant has cross moved for summary judgment dismissing the complaint based upon the ground that the statute of limitations has expired, the plaintiff is guilty of laches, that the defendants have paid all or substantially all of the amounts due under the line

of credit and plaintiff is guilty of champerty and maintenance. As discussed above, the defense of champerty and statute of limitations are without merit. As to the defense of laches, this too is without merit. First, laches is not a defense to a foreclosure action brought within the statute of limitations (*see First Federal Sav. & Loan Assn. of Rochester v Capalongo*, 152 AD2d 833 [3d Dept 1989]). Second, this defense was not raised in an answer and was, thus, waived (see *Fade v Pugliani/Fade*, 8 AD3d 612 [2d Dept 2004]). Therefore, the cross motion for summary judgment must be denied.

Accordingly, the branch of the plaintiff's motion to amend the caption is granted. The branch of the plaintiff's motion for summary judgment is denied. The branches of the plaintiff's motion to strike the first, third, fourth, fifth, sixth and seventh affirmative defenses are granted and those defenses are dismissed. The branch of the plaintiff's motion to dismiss the second affirmative defense is denied. The cross motion by the defendants for summary judgment dismissing the complaint is denied.

Dated: December 22, 2017

DARRELL L. GAVRIN, J.S.C.