Pennymac Corp. v Pryce
2018 NY Slip Op 31497(U)
July 9, 2018
Supreme Court, Queens County
Docket Number: 708132/14
Judge: Allan B. Weiss

M E M O R A N D U M

SUPREME COURT QUEENS COUNTY
CIVIL TERM PART 2

PENNYMAC CORP.,

Plaintiff,

-against-

CASSIUS PRYCE; et al.

Defendants.

ALLAN B. WEISS

Index No.: 708132/14

Motion Date: 4/16/18

Motion Seq. No.: 2

In this action to foreclose a mortgage, plaintiff moves for an Order vacating the Order entered on January 26, 2017 which dismissed this action, restoring the action to active status, granting plaintiff summary judgment as against the defendant, CASSIUS PRYCE (hereinafter the defendant) and a default judgment as against the defaulting defendants, appointing a referee to ascertain and compute the amount due to the plaintiff and amending the caption by substituting TONY DOE, ERIC DOE, MIKE DOE, JANET DOE, JANAY DOE, CLAUDIUS PRYCE and JANET PRYCE as defendants in place of the defendants s/h/a "JOHN DOES" and "JANE DOES".

The defendant, opposes the plaintiff's motion to restore and cross-moves for summary judgment dismissing the complaint for failure to serve the RPAPL §1304 90-day pre-foreclosure notice.

First, plaintiff moves to vacate the Order dismissing this action on the grounds that it was issued based upon incorrect

facts, that it violated the express provisions of CPLR 3216 and that it has a reasonable excuse for the alleged default and a meritorious cause of action (CPLR 5015[a][1]).

On October 6, 2015 after a status conference where the plaintiff appeared, but the defendant did not, the Referee issued an Order, entered on October 14, 2015, directing the plaintiff to move for an Order of Reference by the next status conference date of June 21, 2016. On December 1, 2015 the plaintiff moved for an Order of Reference which was returnable on January 5, 2016 and adjourned on that day to March 8, 2016 apparently to allow plaintiff to oppose the defendant's cross-motion seeking to vacate his default in failing to appear in this action and for leave to serve a late answer. By Stipulation entered on March 3, 2016 the plaintiff withdrew its motion and agreed to accept the defendant's answer upon certain conditions.

Notwithstanding the foregoing the Referee by a Report and Recommendation dated December 15, 2015 recommended that the action be dismissed for plaintiff's failure to move for an Order of Reference by June 21, 2016. Based upon this erroneous Report the action was dismissed.

The Order must be vacated also on the grounds that the court failed to comply with CPLR 3216 as amended effective January, 2015. CPLR 3216(a) essentially provides that the court may dismiss a party's pleading for neglect to prosecute on its own

initiative or upon the motion of a party "with notice to the parties," regardless of whether dismissal is prompted by the motion of a party or the court's own doing. Thus, the court in this case was required to provide the plaintiff facing dismissal, in addition to the notice in the October 6, 2015 order, additional notice of its intention to dismiss (see Siegel, N.Y. Prac. § 375 at p. 721 [6th ed.]). It appears that no such notice was provided.

The plaintiff has also established entitlement to vacature pursuant to CPLR 5015(a)(1) by demonstrating a reasonable excuse for the default, i.e. that it complied with the order of the court, and a meritorious cause of action for foreclosure.

A mortgagee establishes its prima facie entitlement to summary judgment in a foreclosure action where it produces both the mortgage and unpaid note, together with evidence of the mortgagor's default (see Citibank, N.A. v Van Brunt Properties, LLC, 95 AD3d 1158 [2012]; Capstone Bus. Credit, LLC v Imperia Family Realty, LLC, 70 AD3d 882 [2010]; U.S. Bank Natl. Assn. TR U/S 6/01/98 [Home Equity Loan Trust 1998-2] v Alvarez, 49 AD3d 711, 712 [2008]). Where 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 [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 (see Flagstar Bank, FSB v Anderson, 129 AD3d 665 [2015]; Bank of N.Y. v Silverberg, 86 AD3d 274 [2d Dept 2011]; Aurora Loan Servs., LLC v Weisblum, 85 AD3d 95 [2d Dept 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, and the mortgage passes with the debt as an inseparable incident" (U.S. Bank, N.A. v Collymore, 68 AD3d 752, 754 [2009]; see US Bank N. Assn. v Faruque, 120 AD3d 575, 577 [2014]).

The plaintiff established its prima facie entitlement to judgment as a matter of law by submitting the mortgage, the underlying note, and evidence of the defendant's default, and by demonstrating the lack of merit of the defendant's affirmative defenses (see HSBC Bank USA, N.A. v Espinal, 137 AD3d 1079 [2016]; Wells Fargo Bank, N.A. v Charlaff, 134 AD3d 1099 [2015] Bank of New York Mellon Trust Co. v McCall, 116 AD3d 993 [2014]).

Here, the plaintiff established, prima facie, its standing by demonstrating that the note was in its possession when it commenced the action, as evidenced by its attachment of a copy of the note endorsed in blank to the summons and complaint (see HSBC Bank USA, National Association v Oscar, 161 AD3d 1055. 1056 [2018]; US Bank N.A. v Cohen, 156 AD3d 844, 846 [2017]). The defendant's claims of defects in the assignments of the mortgage

is insufficient to raise a triable issue. "[T]he note, and not the mortgage, is the dispositive instrument that conveys standing to foreclose under New York law because the transfer in full of the underlying obligation automatically transfers the mortgage as well unless the parties agree that the transferor is to retain the mortgage" (Deutsche Bank Trust Co. Ams. v Vitellas, 131 AD3d 52, 59 [2015] [internal quotation marks omitted]).

Plaintiff also demonstrated that the subject loan was not a "home loan" within the meaning of RPAPL 1304, and that it was therefore not required to comply with the statutory notice provisions (RPAPL 1304 [5]; see Fairmont Capital, LLC v Laniado, 116 AD3d 998, 998-999 [2014]). Furthermore, even if the subject loan was a "home loan" within the meaning of RPAPL 1304, the plaintiff submitted evidence sufficient to establish, prima facie, that it mailed the RPAPL 1304 notice in compliance with the statute.

In opposition defendant failed to raise a triable issue of fact. Defendant's conclusory affidavit asserting that "he complied with paragraph 6 of the mortgage" "Borrowers Obligation to Occupy the Premises", is insufficient to overcome his assertion in his affidavit dated February 16, 2016, and the 2010 Bankruptcy proceeding that the premises are "rental" property.

Accordingly, the plaintiff's motion is granted in its entirety, the defendant's affirmative defenses are dismissed and

the Order entered on January 26, 2017 is vacated. The action is restored to active status.

The defendant's cross-motion is denied.

Settle Order.

Dated: July 9, 2018
D# 58

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J. S. C.