Bank of N.Y. Mellon v Molter
2018 NY Slip Op 32220(U)
September 5, 2018
Supreme Court, Suffolk County
Docket Number: 36858/2010
Judge: William G. Ford

[* 1]

SHORT FORM ORDER **INDEX NO.: 36858/2010**

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

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

Motions Submit Date: 04/12/18
Mot Seq 003 MD; RTC

PLAINTIFF'S COUNSEL:
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DEFENDANT'S COUNSEL:
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THE BANK OF NEW YORK MELLON f/k/a THE BANK OF NEW YORK as Trustee for Certificate Holders CWABS, Inc., Asset-Backed Certificates, Series 2005-10 4828 Loop Central Drive Houston, TX 77081,

Plaintiff,

-against-

JOHN W. MOLTER a/k/a JOHN MOLTER, JEANNE L. MOLTER, BANK OF AMERICA, N.A., PEOPLE OF THE STATE OF NEW YORK, JOHN DOE (said names being fictitious it being the intention of plaintiff to designate any and all occupants of premises being foreclosed herein, and ay parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises),

Defendants.

On defendant's motion to dismiss the complaint for neglect to prosecute pursuant to CPLR 3216 & for lack of standing pursuant, the following was considered:

1. Notice of Motion & Affirmation in Support dated October 27, 2017 and supporting papers;
2. Affirmation in Opposition dated February 13, 2018 and opposing papers; and upon due deliberation and full consideration; it is

ORDERED that defendant's motion to dismiss plaintiff's complaint for neglect to prosecute pursuant to CPLR 3216 is **denied** as follows; and it is further

ORDERED that defendant's motion to dismiss the complaint for plaintiff's lack of standing is also **denied** for the reasons set forth below; and it is further

ORDERED that counsel for the parties are hereby directed to appear before this Court for a status conference regarding plaintiff's intent to continue to prosecute this matter on NOVEMBER 01, 2018 at 10:00 a.m.; and it is further

ORDERED that counsel for plaintiff serve a copy of this decision with notice of entry on counsel for defendant by certified first class mail, return receipt requested **no later than** 14 days before the scheduled status conference in this matter.

This is a residential mortgage foreclosure action on a premises commonly known as 58 Winterberry Drive, Middle Island, Town of Brookhaven, New York 11953 in Suffolk County. Defendant John Molter executed a promissory note borrowing in principal $ 441,000 on July 25, 2005. The note was secured by a mortgage of the same date on the subject property

Premised upon defendant's alleged default in his obligation to render a timely monthly payment under his note and mortgage on September 1, 2008, plaintiff Bank of New York Mellon as Trustee commenced this residential mortgage foreclosure action filing a summons, complaint and notice of pendency on October 4, 2010. Defendant by counsel joined issue interposing an answer with affirmative defenses on October 18, 2010.

In connection with its prosecution of this action, and as noted above, plaintiff in commencing the action filed a notice of pendency on October 4, 2010, which pursuant to Article 65 of the CPLR, expired three years thereafter on October 4, 2013. Since then, plaintiff did not file successive notices in 2013 or 2016. In fact, not until February 14, 2017, did plaintiff file another notice of pendency on defendant's mortgaged premises. On this basis, defendant has now moved the court to dismiss plaintiff's action on the grounds of neglect to prosecute. On this line of reasoning, defendant argues that within the meaning of CPLR 6513 & 65616, defendant states that plaintiff's successive notice was wrongly filed without having shown good cause to the court based upon prior expiration of other notices of pendency. Moving separately, defendant challenges plaintiff's standing to sue as a holder of the promissory note and thus seeks dismissal of the action on that basis.

Plaintiff opposes defendant's application in its entirety arguing grounds which are taken in turn. First, plaintiff notes that a strict construction and application of CPLR 3216 militates in its favor as all of the procedural requirements preceding dismissal have not occurred in this matter. Second, plaintiff offers a bank officer's affidavit as proof of its status as noteholder prior to the commencement of this action, thus refuting defendant's conclusions that it lacks standing to sue. Plaintiff prevails on both points and for that reasons defendant's motion must be unsuccessful.

Pertaining specifically to dismissal of a civil action for neglect to prosecute, our Second Department has been clear. For an action to be dismissed pursuant to CPLR 3216, three requirements must be satisfied: (1) issue must have been joined, (2) one year must have elapsed following joinder, and (3) party seeking such relief must have served a written demand by registered or certified mail requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within ninety days after receipt of such demand." However, the Court of Appeals has since instructed that while CPLR 3216 ordinarily requires service by registered or certified mail as a condition precedent to dismissal movant's failure to comply with this requirement is merely a procedural irregularity, that without

a showing of prejudice to a substantial right of the plaintiff, should not interpedently exist as a jurisdictional defect warranting dismissal of defendant's motion to dismiss for neglect to prosecute (***Michaels v Sunrise Bldg. and Remodeling, Inc.***, 65 AD3d 1021, 1022, 885 NYS2d 110, 111 [2d Dept 2009][interpreting CPLR 3216[b]; *see also* ***Bokhari v Home Depot U.S.A., Inc.***, 4 AD3d 381, 381–82, 771 NYS2d 395, 396 [2d Dept 2004][movant's failure to serve a CPLR 3216 90–day notice by certified or registered mail determined to constitute a procedural irregularity, that absent a showing of prejudice to a substantial right of the plaintiff, should not result in vacating a dismissal of the action]).

Thus, it is clear that courts are prohibited from dismissing an action pursuant to CPLR 3216 based on neglect to prosecute unless the statutory preconditions to dismissal are met (***Deutsche Bank Nat. Tr. Co. v Augustin***, 155 AD3d 823, 823, 63 NYS3d 876 [2d Dept 2017]). Thus, it has been held that within the mortgage foreclosure context "[a]n action cannot be dismissed pursuant to CPLR 3216(a) 'unless a written demand is served upon 'the party against whom such relief is sought' in accordance with the statutory requirement, along with a statement that the 'default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion by the party serving said demand for dismissal as against him for unreasonably neglecting to proceed' " (***Deutsche Bank Nat. Tr. Co. v Cotton***, 147 AD3d 1020, 1021, 46 NYS3d 913, 914 [2d Dept 2017]). Put somewhat differently, for a dismissal order to issue, the CPLR 3216 permits a court, on its own initiative, to dismiss an action for want of prosecution where certain conditions precedent have been complied with. One such precondition is that the court must serve the plaintiff with a written demand to serve and file a note of issue within 90 days after receipt of the demand (***BankUnited v Kheyfets***, 150 AD3d 948, 949, 57 NYS3d 159, 160 [2d Dept 2017]).

CPLR 3216 permits a court to dismiss an action for want of prosecution only after the court or the defendant has served the plaintiff with a written notice demanding that the plaintiff resume prosecution of the action and serve and file a note of issue within 90 days after receipt of the demand. Moreover, case law provides that the failure to comply with the demand will serve as the basis for a motion to dismiss the action. Since CPLR 3216 is a legislative creation and not part of a court's inherent power, the failure to serve a written notice that conforms to the provisions of CPLR 3216 is the failure of a condition precedent to dismissal of the action (***Wasif v Khan***, 82 AD3d 1084, 1084–85, 919 NYS2d 203, 204 [2d Dept 2011]).

Here, plaintiff is correct that none of the procedural requirements have been met entitling defendant to an order dismissing its complaint at this time. Thus, that aspect of defendant's motion is **denied**. Further, the fact that plaintiff's prior notice of pendency expired in 2013, without a refiling until 2017, also does not form a basis warranting dismissal. The law on this point is also clear. The Second Department has previously said as much:

> CPLR 6513 provides that a notice of pendency is valid for three years from the date of filing and may be extended for additional three-year periods "for good cause shown." The general rule is that the extension must be requested, and the extension order "filed, recorded and indexed," before expiration of the prior notice. " 'This is an exacting rule; a notice of pendency that has expired without extension is a nullity' " The general rule does not apply, however, to an action to foreclose a mortgage on real property

(***Sudit v Labin***, 148 AD3d 1077, 1077–78, 50 NYS3d 132, 133 [2d Dept 2017])

However, all, the Court pauses to note that defendant has brought to the fore a general and perceived pattern of delay in the prosecution of this matter. While it is true that defendant himself filed for federal bankruptcy on July 31, 2017, which was terminated November 8, 2017. That filing itself required this Court to impose a stay of proceedings in this matter, which plaintiff itself moved to lift in November 2017. Nevertheless, since then no further overt actions have been taken by plaintiff to resume prosecution. The Court also takes note that this matter commenced in October 2010, almost 8 years ago. Since this action seeking a foreclosure has remained fallow in the court's inventory for an extraordinarily lengthy period of time with no activity by the plaintiff, this Court with the issuance of this order has put this matter down for a status conference to allow plaintiff to resume prosecution of this matter. At the completion of the court's assessment of the status of the action, the plaintiff is directed to undertake the following forthwith:

The plaintiff is directed to file with the court any intended summary judgment motion for foreclosure and/or any intended Order of Reference and/or Judgment of Foreclosure upon proper notice within ninety (90) days of this date, or alternatively plaintiff must file a notice of discontinuance and vacatur of the lis pendens within ninety (90) days of this date.

The failure to comply with this order or provide the court with a good faith basis for non-compliance will result in the dismissal of this action without prejudice and an order directing the County Clerk of the County of Suffolk, upon the payment by the plaintiff of the proper fees, if any, to cancel and discharge of record, all Notices of Pendency filed in this action against the subject premises, and to enter upon the margin of the record of the same, a notice of cancellation referring to this order.

The plaintiff shall serve a copy of this Order upon the defendant(s) at the defendants(s)' last known address and the Referee, if applicable, within ten (10) days hereof and file proof of such service with the County Clerk.

Turning next to defendant's arguments challenging plaintiff's standing, precedent holds that, on a defendant's motion to dismiss the complaint based upon the plaintiff's alleged lack of standing, the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing as a matter of law (***Marathon Structured Asset Sols. Tr. v Fennell***, 153 AD3d 511, 512, 61 NYS3d 232, 234 [2d Dept 2017]; ***Wells Fargo Bank, N.A. v Archibald***, 150 AD3d 935, 936, 55 NYS3d 116, 117 [2d Dept 2017]; ***Deutsche Bank Tr. Co. Americas v Vitellas***, 131 AD3d 52, 59–60, 13 NYS3d 163, 170 [2d Dept 2015]). "To defeat a defendant's motion, the plaintiff has no burden of establishing its standing as a matter of law; rather, the motion will be defeated if the plaintiff's submissions raise a question of fact as to its standing" (***New York Community Bank v McClendon***, 138 AD3d 805, 806, 29 NYS3d 507, 509 [2d Dept 2016]).

Concerning the law of standing for the mortgage foreclosure plaintiff, it is well known that plaintiff need only demonstrate 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. "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" (***DLJ Mortg. Capital, Inc. v Pittman***, 150 AD3d

818, 819, 56 NYS3d 120, 121–22 [2d Dept 2017]); *see also* ***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).

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]). It is settled that '[t]here is simply no requirement that an entity in possession of a negotiable instrument that has been endorsed in blank must establish how it came into possession of the instrument in order to be able to enforce it' " (***Wells Fargo Bank, NA v Thomas***, 150 AD3d 1312, 1313, 52 NYS3d 894, 895 [2d Dept 2017]).

Plaintiff proves *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, by moving to dismiss the complaint on this basis, defendant-movant bears the burden of proof that plaintiff lacks standing. Apart from his counsel's hearsay affirmation raising conclusory argument, defendant offers no corroborative proof in support of this defense whatsoever. This is contrasted with plaintiff's proffer of a bank officer affidavit from servicer New Penn Financial, LLC sworn by foreclosure specialist Daryl Wilson dated October 5, 2017 which was offered pursuant to CPLR 4518 on a personal review of defendant's mortgage loan records routinely kept, created and maintained in the ordinary course of business. Wilson testified that plaintiff came into possession of defendant's promissory note prior to commencement of the action, and offered a chain of custody of the note explaining that the note was assigned by the Mortgage Electronic Registration Systems, Inc. (MERS) as nominee to America's Wholesale Lender to the plaintiff in an instrument dated September 6, 2010, recorded by the Suffolk County Clerk on October 20, 2010 at Liber 22000, page 579. For purposes of this action at the pre-answer dismissal motion stage, this suffices to rebut defendant's conclusory arguments on the issue of standing. Thus, that branch of defendant's motion is **denied**.

The foregoing constitutes the decision and order of this Court.

Dated: September 5, 2018
Riverhead, New York

WILLIAM G. FORD, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**