Bank of N.Y. Mellon v Davis
2018 NY Slip Op 32551(U)
October 4, 2018
Supreme Court, New York County
Docket Number: 850339/2013
Judge: Arthur F. Engoron

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON **PART** IAS MOTION 37EFM

Justice

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THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF CWALT, INC., ALTERNATIVE LOAN TRUST 2007-7T2, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-7T2,

Plaintiff,

- v -

CHESTER DAVIS SR., NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, CRIMINAL COURT OF THE CITY OF NEW YORK, JOHN DOE #1 THROUGH JOHN DOE #10, THE LAST TEN NAMES BEING FICTITIOUS AND UNKNOWN TO THE PLAINTIFF, THE PERSON OR PARTIES INTENDED BEING THE PERSONS OR PARTIES, IF ANY, HAVING OR CLAIMING AN INTEREST IN OR LIEN UPON THE MORTGAGED PREMISES DESCRIBED IN THE COMPLAINT,

Defendants.

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INDEX NO. 850339/2013

MOTION DATE 07/05/2018

MOTION SEQ. NO. 004

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 004) 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, plaintiff's motion for summary judgment is hereby granted, and plaintiff's motion for a default judgment against certain defendants is hereby denied.

Background

Plaintiff commenced this action to foreclose a mortgage securing an indebtedness of $1,200,000 on the premises located at 203 West 137th Street, New York, NY 10030 ("the Premises"). On January 24, 2007, defendant Chester B. Davis, Sr. ("Davis") executed a promissory note ("the Note") in favor of non-party America's Wholesale Lender ("America's"). On the same date, Davis executed a mortgage ("the Mortgage"), mortgaging the Premises as collateral for the Note, in favor of non-party Mortgage Electronic Registration Systems, Inc. ("MERS"), acting solely as a nominee for America's. On January 30, 2007, non-party Bank of America, N.A. ("BANA"), as trustee for the Certificateholders of CWALT, Inc. ("the Trust"), received the Mortgage (and retained the original Note and Mortgage until 2013). On February 20, 2007, BANA recorded the Mortgage in the Office of the County Clerk of New York County in CRFN 2007000096635. On May 16, 2013, BANA assigned the Mortgage to plaintiff and recorded in CRFN 2013000201858; plaintiff now holds the original Note and Mortgage. Upon plaintiff's information and belief, all other named defendants have or claim to have some interest in or lien upon the Premises, or have been paid or equitably subordinated to the Mortgage. Since this action commenced, the mortgage servicer has changed several times; the current servicer is non-party Bayview Loan Servicing, LLC ("Bayview").

Pursuant to the Note, Davis promised to make consecutive monthly payments of principal and interest on the first of every month, commencing March 1, 2007, up to and including February 1, 2037, when the entire principal and interest accrued would be due and payable. Pursuant to the Mortgage, the mortgagee can (1) collect and charge to the loan all amounts necessary to maintain the Premises (e.g., insurance, taxes); (2) in the case of default, declare the entire indebtedness secured by the Mortgage immediately due and payable; and (3) in the case of default, sell the Premises.

The complaint alleges that Davis failed to comply with the Note and the Mortgage by failing to make payments beginning April 1, 2009. Plaintiff alleges that it is in possession of the original Note with a proper endorsement and/or allonge and is the holder of the Note and the Mortgage, which passes as incident to the Note. Pursuant to the Mortgage, upon Davis's default, plaintiff declared the entire principal balance to be due and owing.

On or about November 14, 2013, plaintiff served the instant summons and complaint upon defendants. On May 4, 2015, after two motions to dismiss were denied, Davis served his answer. To date, all other defendants ("the Defaulting Defendants") have failed to move, answer, or otherwise appear in this action, and as of January 22, 2014, they are all in default. On April 4, 2016, plaintiff filed a Note of Issue.

By notice of motion dated May 7, 2016, plaintiff moved, pursuant to CPLR 3212 and 3215, seeking: (1) summary judgment in its favor; (2) to strike Davis's answer; (3) a default judgment against the Defaulting Defendants; (4) to appoint a referee to compute the total sums due and owing to it; and (4) to discontinue the action against "John Doe #1" through "John Doe #10" and amending the caption accordingly. By Decision and Order dated December 19, 2016 ("Hagler's D&O"), the Hon. Schlomo Hagler denied the motion, without prejudice, directing plaintiff to "provide proof that defendants were served with a Notice of Default on a certain date by first-class mail."

The Instant Motion

By notice of motion dated April 30, 2018, plaintiff now moves, pursuant to CPLR 3212 and 3215, for the same relief. Plaintiff submits, inter alia, the affidavits of (1) Keli Smith, Bayview's Document Coordinator, who is familiar with how Bayview services its mortgage loans and how it maintains its records; (2) Carmeka Yu'Shay Edwards, BANA's Assistant Vice President, whose mailing affidavit is based upon a review of BANA's books and records maintained on plaintiff's behalf in the regular course of business; (3) Kyra Schwartz, an employee of Frenkel Lambert Weiss Weisman and Gordon, LLP ("FLW"), plaintiff's counsel, who is the manager of a group of FLW employees responsible for receiving, storing, and returning original loan documents from the firms' clients; and (4) Nichole Renee Williams, another BANA Assistant Vice President, attesting to how BANA received, stored, and returned the original Note and Mortgage in the regular course of its business (collectively with the other affidavits, "Plaintiff's Affidavits"). Plaintiff's Affidavits attest to the following facts: (1) in January and March of 2007, BANA received the original Note and Mortgage, respectively, from plaintiff; (2) Bayview mailed to Davis a notice of default dated May 18, 2009 ("Notice of Default") via first-class mail at his last known residence, which is located at the Premises; (3) Bayview mailed to Davis a 90-day foreclosure notice dated June 24, 2013 ("90-Day Notice") via certified mail and first-class mail on June 26, 2013, before the commencement of this action on or about November 14, 2013; (4) pursuant to Real Property Actions & Proceedings Law ("RPAPL") § 1306(2), electronic notice was filed with the Superintendent of Banks (confirmation # NYS3311251) within three business days of mailing the 90-Day Notice; (5) pursuant to RPAPL § 1304, BANA mailed to Davis the 90-Day Notice by certified and first-class mail at least 90 days before commencement of the instant action; and (6) on July 15, 2013, FLW received the original Note in preparation of commencing this action.

In its motion for summary judgment, plaintiff argues, inter alia: (1) that it has standing to commence this action, as plaintiff, through its counsel FLW, received the original Note and Mortgage on July 15, 2013, before it commenced this action on or about November 14, 2013, which is sufficient to confer standing; (2) that Williams' mailing affidavit establishes that it had physical possession of the original Note before commencement of this action; (3) that Plaintiff's Affidavits are proper and should be considered on the merits, as a loan servicer may testify to facts that are not based upon personal knowledge, but, rather, on documentary evidence, such as the company's business records (admissible pursuant to CPLR 4518, the business records exception of the hearsay rule); and (4) that it provided Davis with the proper notices, i.e., the Notice of Default and the 90-Day Notice, in compliance with statutory requirements, as evinced by Davis's signed return receipt, confirming that he did, in fact, receive the notices.

In opposition, Davis argues, inter alia: (1) that plaintiff lacks standing, as there remains a question of fact as to whether the original Note was physically delivered to plaintiff prior to the commencement of this action; (2) that plaintiff's motion should be denied because it was filed 757 days after the Note of Issue was filed, in violation of CPLR 3212(a), which requires summary judgment motions to be made 120 days post-Note of Issue; (3) that Plaintiff's Affidavits are not enough for the inference that the Notice of Default was properly mailed, as the affiants' allegations are inadmissible hearsay because the affiants have no personal knowledge of the matters to which they attest; and (4) that questions of fact remain outstanding, such as, inter alia, (i) whether the Notice of Default was delivered in compliance with the terms of the Mortgage, (ii) whether the 90-Day Notice was served in compliance with RPAPL § 1304, and (iii) whether MERS ever had any interest in the Note to assign.

Discussion

As a preliminary matter, this Court hereby grants plaintiff's request to discontinue this action against defendants "John Doe #1" through "John Doe #10," and to amend the caption accordingly.

I. Plaintiff's Motion for a Default Judgment is Hereby Denied

Pursuant to CPLR 3215(a), "[w]hen a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him." However, pursuant to CPLR 3215(c), "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs." Here, the Defaulting Defendants defaulted as of January 22, 2014, and plaintiff failed to bring a motion for a default judgment against them until May 27, 2016, more than two years after the default. Thus, plaintiff's motion for a default judgment is denied, and the complaint is dismissed, without costs, as against the Defaulting Defendants.

Accordingly, plaintiff's motion for a default judgment is hereby denied.

II. Plaintiff's Motion for Summary Judgment is Hereby Granted

A court may grant summary judgment where there is no genuine issue of material fact, and the moving party has made a *prima facie* showing of entitlement to a judgment as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1st Dept 1990) ("The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment"). The moving party's burden is to tender sufficient evidence to demonstrate the absence of any material issue of fact. See Ayotte v Gervasio, 81 NY2d 1062 (1993). Once this initial burden has been met, the burden then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980). In an action to foreclose a mortgage, a plaintiff establishes its case, as a matter of law, through (1) the production of the mortgage, (2) the unpaid note, and (3) evidence of default. See Marton Assocs. v Vitale, 172 AD2d 501, 501 (2d Dept 1991).

Plaintiff's motion for summary judgment is not barred by CPLR 3212(a)'s 120-days rule. Plaintiff made its original motion for summary judgment on May 27, 2016, 47 days after it filed its Note of Issue on April 4, 2016. Hagler's D&O denied the original motion without prejudice and directed plaintiff to provide additional documentary evidence, thereby tolling plaintiff's time to make a successive summary judgment motion. Hagler's D&O, which provides a directive that plaintiff be given additional time to provide necessary documents, and presumably allows plaintiff to move for summary judgment again at a later time, supersedes the general CPLR 3212(a) requirement and renders that requirement inapplicable. See Barlow v Harlem Hosp. Ctr., 253 AD2d 355, 355 (1st Dept 1998) ("The [order], which permitted summary judgment motions to be made before trial was never vacated; hence, pursuant to CPLR 3212(a), that order renders that provision's 120-day time limitation on such motions inapplicable here"). Furthermore, even if Hagler's D&O did not toll plaintiff's time to make a successive summary judgment motion, the Court has broad discretion to consider such a motion on "good cause" shown. See CPLR 3212(a); see generally Gonzalez ex rel. Gonzalez v 98 Mag Leasing Corp., 95 NY2d 124, 129 (2000) (trial court "has discretion in determining whether to consider a motion for summary judgment made more than 120 days after the filing of a note of issue"). This Court finds that plaintiff has shown "good cause" for its delay in light of Hagler's D&O's directive.

Plaintiff's Affidavits are proper and will be considered on the merits. Factual allegations set forth in a foreclosing plaintiff's, or loan servicer's, affidavit is sufficient to establish its entitlement to summary judgment, even if such allegations are not based upon personal knowledge of the affiant, but instead are based upon documentary evidence admissible under CPLR 4518, the business records exception to the hearsay rule. Pursuant to CPLR 4518(a):

> Any writing or record ... shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act ... . The court may consider the method or manner by which the electronic record was stored, maintained or retrieved in determining whether the exhibit is a true and accurate representation of such electronic record. All other circumstances of the making of the [record], including lack of personal knowledge by the maker, may be proved to affect its weight, but they shall not affect its admissibility.

Id.; see also Portfolio Recovery Assoc., LLC v Lall, 127 AD3d 576, 576 (1st Dept 2015) ("Plaintiff's reliance on [business records attested to by an employee of the loan servicer] was a sufficient basis on which to permit its employee to lay the foundation for the admission of the affidavit"). It is well-settled law that the affidavit of a vice president of the loan servicer, such as Edwards and Williams, falls within the business records exception of the hearsay rule if the affiants properly lays down the foundation for admission. The affiants must indicate that they were personally familiar with the loan servicer's recordkeeping systems, that the records they relied on were made in the regular course of business, and that they personally reviewed those records. See Bank of America, Nat. Ass'n v Brannon, 156 AD3d 1, 10 (1st Dept 2017) ("These allegations

sufficed to establish plaintiff's default and the basis of [the affiant's] knowledge. [The affiant] indicated that he was personally familiar with the recordkeeping systems ..., that the records he relied on were made in the regular course of business and that he personally reviewed them").

Plaintiff has established, by producing Plaintiff's Affidavits and other documentary evidence, that it properly mailed to Davis the Notice of Default and the 90-Day Notice. Pursuant to RPAPL § 1304, "at least [90] days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower, including mortgage foreclosure, such [servicer] shall give notice to the borrower." Here, plaintiff mailed to Davis the 90-Day Notice in June 2013 and commenced the instant action in November 2013, almost five months later, thus satisfying RPAPL § 1304. Plaintiff's Affidavits are sufficient to confer the inference that the Notice of Default and 90-Day Notice were properly mailed to and received by Davis. As the court stated in HSBC Bank USA, Natl. Ass'n v Ozcan, 154 AD3d 822, 826 (2d Dept 2017):

> Although an affidavit of service may be a preferable method for a plaintiff to prove that it mailed the RPAPL 1304 notices in accordance with the statute, that is not the only method by which a residential foreclosure plaintiff may establish that it properly mailed the required notice. As this Court has previously observed, there is no requirement that a plaintiff in a foreclosure action rely on any particular set of business records to establish a prima facie case, so long as the plaintiff satisfies the admissibility requirements of CPLR 4518(a), and the records themselves actually evince the facts for which they are relied upon. Thus, mailing may be proved by any number of documents meeting the requirements of the business records exception to the hearsay rule under CPLR 4518.

Id. (internal quotations and citations omitted). Additionally, plaintiff submits Davis's signed return receipt of the mailed notices, establishing plaintiff's proper mailing and notice, and Davis's receipt, thereof.

Plaintiff has established standing to commence this action. Plaintiff's Affidavits establish that plaintiff received the original Note on July 15, 2013, and thus had the Note in its physical possession when it commenced this action on or about November 14, 2013. As the court stated in Deutsche Bank Natl. Trust Co. v Naughton, 137 AD3d 1199, 1200 (2d Dept 2016):

> Plaintiff submitted an affidavit of James Brantley, a vice president of its loan servicer. Brantley averred that, based on his personal knowledge and his review of the books and business records maintained by the plaintiff, the loan servicer, and their agents in the ordinary course of business with respect to the mortgage loan, the note and mortgage were physically transferred to the plaintiff ... . Through Brantley's affidavit, the plaintiff established, prima facie, that it has standing to prosecute this action because it was in possession of the note before the ... commencement of this action. Since the plaintiff established its standing by physical delivery of the note, we need not address the validity of the subsequent assignment to it of the mortgage.

Plaintiff has established its entitlement to summary judgment on its breach of contract claim against Davis. In support of its motion, plaintiff submitted, inter alia: the Note; the Mortgage; the assignment of the Mortgage to plaintiff; Plaintiff's Affidavits, which state the nature of the action, information about the execution of the Note and Mortgage, that plaintiff was the owner and holder of the original Note and Mortgage prior to the commencement of this action, the date Davis failed to make payment, and the amount due and owing; proof of service and copies of the certified and first-class envelopes mailed to Davis at the Premises; and Davis's signed return receipt, confirming receipt of the aforementioned notices. The evidence in the record demonstrates that (1) a valid Note and Mortgage exist between plaintiff and Davis, and (2) Davis defaulted on his payment obligations thereunder. Therefore, plaintiff is entitled to summary judgment on its breach of contract claim and is entitled to collect on the mortgage. See Pennymac Holdings, LLC v Tomanelli, 139 AD3d 688, 689 (2d Dept 2016) ("plaintiff sustained its burden of demonstrating its *prima facie* entitlement to judgment as a matter of law by submitting the mortgage, the unpaid note, and the affidavit of Clifford Giles, a "Default Specialist" of the plaintiff's loan servicer, attesting to the default of the defendant").

The Court has considered Davis's arguments other than those discussed above and finds them unavailing and/or non-dispositive.

Accordingly, plaintiff's motion for summary judgment in its favor is hereby granted.

Conclusion

The clerk is hereby directed to (1) discontinue this action, as against defendants "John Doe #1" through "John Doe #10" and amend the caption accordingly; and (2) to dismiss the complaint, as against defendants New York City Environmental Control

Board, New York City Parking Violations Bureau, New York City Transit Adjudication Bureau, and Criminal Court of the City of New York.

Plaintiff's motion for a default judgment is hereby denied.

Plaintiff's motion for summary judgment is hereby granted, as against defendant Chester B. Davis, Sr. Plaintiff to settle order on notice within 14 days of the date hereof.

Plaintiff's request for reasonable attorney's fees and costs is hereby severed and referred to a special referee to hear and report (CPLR 4311). In order to obtain such a hearing, plaintiff may submit to Room 119 a copy of this Decision & Order and notice of entry, together with a Special Referee Info Sheet (http://nycourts.gov/courts/1jd/supctmanh/refpart-infosheet-10-09.pdf).

10/4/2018
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE