

Nationstar Mtge., LLC v Sullivan
2018 NY Slip Op 33424(U)
December 18, 2018
Supreme Court, Kings County
Docket Number: 505664/2014
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 18th day of December, 2018.

P R E S E N T:

HON. CARL J. LANDICINO,

Justice.

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NATIONSTAR MORTGAGE, LLC,

Index No.: 505664/2014

Plaintiff,

DECISION AND ORDER

- against -

LAURENCE SULLIVAN, ZET PEREZ, NY
FINANCIAL SERVICES, LLC, CITY OF NEW
YORK ENVIRONMENTAL CONTROL BOARD,

Motions Sequence #4

Defendants.

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

Papers Numbered

Notice of Motion/Cross Motion and

Affidavits (Affirmations) Annexed..... 1/2, 3,

Memorandum of Law..... 4,

Opposing Affidavits (Affirmations)..... 5,

Reply Affidavits (Affirmations).....

Upon the foregoing papers, and after oral argument, the Court finds as follows:

In this action Plaintiff, Nationstar Mortgage, LLC (hereinafter “the Plaintiff”) commenced suit against Defendants Laurence Sullivan, Zet Perez, NY Financial Services, LLC, and the City of New York Environmental Control Board (hereinafter collectively “the Defendants”) in relation to a property known as 40-19 10th Avenue, Brooklyn, N.Y. (the “Property” or the “Premises”).

The Plaintiff seeks to compel Defendants Laurence Sullivan and Zet Perez (hereinafter “the Defendants”) to re-execute a mortgage (“Mortgage”) and a mortgage consolidation, extension and modification agreement (“CEM”), apparently identical in form to that which Sullivan and Peretz allegedly executed on April 30, 2007. The Plaintiff alleges that the original mortgage documents at issue were misplaced. The Plaintiff also seeks, *inter alia*, judgment pursuant to CPLR 3001 and Article 15 of the Real Property Actions and Proceedings Law (RPAPL) declaring the Plaintiff to

be the holder and beneficiary of the lien created by the above referenced mortgage, a judgment declaring the copies of the Mortgage and CEM to be true and accurate copies, and a judgment declaring that the Plaintiff is the holder and beneficiary of a consolidated mortgage lien against the subject Property in the amount of \$648,000.00. The Plaintiff now moves (motion sequence #4) for an order pursuant to CPLR 3212 granting summary judgment on its above referenced causes of action. In the alternative, the Plaintiff seeks leave to amend the complaint in order to assert a claim for fraud as against Defendant Laurence Sullivan.

The Defendants oppose the motion and argue that it should be denied. Specifically, the Defendants contend that there are material questions of fact regarding whether the Plaintiff is in fact a beneficiary of the Mortgage and CEM and whether the Defendants in fact executed the documents. In their Affirmation in Opposition, the Defendants point to the deposition testimony of Defendant Perez, who testified that he did not sign the documents at issue.

It has long been established that “[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it ‘should only be employed when there is no doubt as to the absence of triable issues of material fact.’” *Kolivas v. Kirchoff*, 14 AD3d 493 [2nd Dept, 2005], citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989].

Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v. Plotnick*, 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

“A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that, when the action was commenced, it was either the holder or assignee of the underlying note.” *YMJ Meserole, LLC v. 98 Meserole St., LLC*, 133 A.D.3d 848, 849, 20 N.Y.S.3d 407, 408 [2nd Dept, 2015]. “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. Adrian Collymore*, 68 A.D.3d 752, 754, 890 N.Y.S.2d 578, 580 [2nd Dept, 2009].

Turning to the merits of the instant motion, the Court finds that the Plaintiff has presented sufficient evidence to establish its *prima facie* entitlement to summary judgment. Specifically, the Court finds that the Plaintiff has provided sufficient evidence that it should be granted summary judgment declaring that the Plaintiff is the holder and beneficiary of a consolidated mortgage lien against the Property in the sum of \$648,000.00, the original of which was apparently misplaced. In support of its application, the Plaintiff relies primarily on the Affidavit of Edward Hyne, an employee of the Plaintiff. Edward Hyne, who is identified as the Senior Principal of Litigation Resolution for Plaintiff, states that the Plaintiff “is currently in possession of the ink original \$648,000.00 promissory note containing an allonge from Remi Capital, Inc. to Greenpoint Mortgage Funding, Inc., and an endorsement in blank from Greenpoint Mortgage Funding, Inc.” Finally, Hyne states that “[f]or unknown reasons, the Gap Mortgage and CEMA were never recorded in the office of the Kings County Clerk.” In addition to the Affidavit of Edward Hyne, the Plaintiff has also produced a copy of the Borrower’s Certification & Authorization relating to a mortgage loan from Remi Capital, Inc., dated April 30, 2007, a copy of the Uniform Residential

Loan Application dated April 30, 2007, a copy of a New York Mortgage Loan Commitment dated April 30, 2007, a copy of the Lender's Closing Instructions from Greenpoint Mortgage Funding dated April 30, 2007, a HUD Settlement Statement dated April 30, 2007, a copy of a Limited Power of Attorney to Correct Documents form dated April 30, 2007, a copy of a Truth in Lending Disclosure Statement dated April 30, 2007, a copy of the Adjustable Rate Note dated April 30, 2007, a copy of a Mortgage dated April 30, 2007, a copy of a Consolidation, Extension & Modification Agreement dated April 30, 2007, a copy of the Consolidated Mortgage dated April 30, 2007, and a copy of a Consolidated Adjustable Rate Note for \$648,000.00 dated April 30, 2007. These documents, taken together, are sufficient evidence to establish the Plaintiff's *prima facie* burden. *See JPMorgan Chase Bank, N.A. v. Roseman*, 137 A.D.3d 1222, 1222, 29 N.Y.S.3d 380, 381 [2nd Dept, 2016].

In opposition, the Defendants have raised a material issue of fact that prevents this Court from granting summary judgment against the Defendants. The Defendants point to and contend, (paragraph 10) in their Affirmation in Opposition, that "Perez' steadfast denials present a definitive question of fact as to what happened with these mortgage documents and whether Perez ever signed them." In opposition to the instant motion, the Defendants point to statements made by Defendant Perez at his examination before trial (EBT) during which he stated that he did not sign the documents at issue. When asked (Plaintiff's Motion, Exhibit L, Page 68) whether he recognized the signature as his, he stated "no", when asked whether he remembered signing the documents, Defendant Perez again stated "no". When asked about other documents (the interim interest rider) Defendant Perez stated (Plaintiff's Motion, Exhibit L, Page 78) "[t]he only papers I signed was the day of the closing when we bought the house."¹ These denials were consistent throughout Defendant Perez's EBT and present a material question of fact regarding whether the Defendant Perez signed the documents at issue. *See U.S. Bank Natl. Assn. v. Goldin*, 160 A.D.3d

¹ While the Property at issue was purchased by the Defendants in 2005, the documents that are the subject of the instant proceeding were apparently related to a refinance in 2007.

1012, 72 N.Y.S.3d 646 [2nd Dept, 2018] and *Countrywide Home Loans, Inc. v. Gomez*, 138 A.D.3d 670, 29 N.Y.S.3d 64 [2nd Dept, 2016].

The Plaintiff's request for an equitable lien, in the total amount of \$581,016.50, is also denied. Plaintiff contends that at the refinance transaction of the subject indebtedness, Remi Capital, Inc. funded the payment of outstanding liens totaling \$581,016.50; \$518,220.62 to EMC and \$62,795.88 to Greenpoint Mortgage. Plaintiff, in addition to the Hyne affidavit in relation thereto, provides documentary evidence. As to the purported payment to EMC the Plaintiff relies on the HUD Settlement Statement (Hyne Affidavit, Exhibit H) reflecting same. However, Hyne does not indicate that he has knowledge sufficient to make a representation as to the purported payment in 2007. Additionally, Defendant Perez denied having signed the HUD Settlement Statement, during his deposition. In relation to the alleged Greenpoint payoff, the Plaintiff relies on the Hyne affidavit, the HUD Settlement Statement and a satisfaction of mortgage (Patel Affirmation, Exhibit N). Similarly, neither the affidavit nor the documents clearly establish that the purported payments were actually made by Remi Capital, Inc. or Greenpoint Mortgage. As such, Plaintiff's entitlement to an equitable lien has not been established.

However, the Court grants that aspect of the Plaintiff's application seeking to amend the Plaintiff's Complaint in order to assert a claim for fraud against Defendant Laurence Sullivan. In general, CPLR §3025(b) provides that leave to amend or supplement pleadings shall be freely given at any time upon such terms as may be just. *See* CPLR §3025(b). Courts have sought to ensure that any "proposed amendment was not palpably insufficient or patently devoid of merit (*see* CPLR §3025(c)) and there was no showing of prejudice to the defendants." *Saldivar v. I.J. White Corp.*, 30 A.D.3d 577, 816 N.Y.S.2d 384 [2nd Dept, 2006]; *see McCallister v. Kapadia*, 179 A.D.2d 802, 580 N.Y.S.2d 876 [2nd Dept, 1992]; *Esposito v. Time Motor Sales*, 88 A.D.2d 902, 450 N.Y.S.2d 592 [2nd Dept, 1992]. In the instant proceeding, the Plaintiff attached a proposed

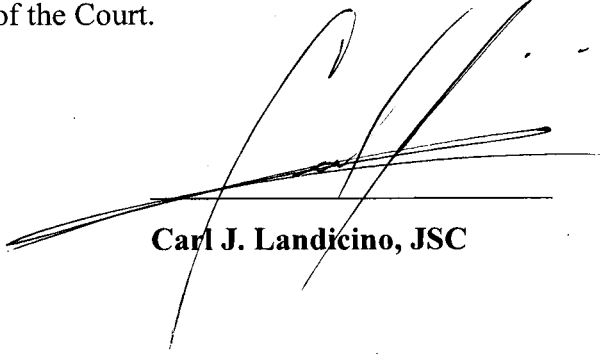
Amended Complaint, as Exhibit "R" to the Attorney's Affirmation, and a review of the proposed Seventh Cause of Action in that Amended Complaint reflects that it is not palpably insufficient or patently devoid of merit. Moreover, the Defendants raise no objection to this application.

Based on the foregoing, it is hereby ORDERED as follows:

The Plaintiff's motion (motion sequence #4) is denied except to the extent that the Court grants the Plaintiff leave to Amend the Complaint. Plaintiff shall serve the Amended Verified Complaint, as annexed to its moving papers, within 30 days of the date hereof.

This constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, JSC

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KINGS COUNTY CLERK
FILED

