

JP Morgan Chase Bank, N.A. v Johnson
2018 NY Slip Op 33449(U)
December 18, 2018
Supreme Court, Suffolk County
Docket Number: 009923/2010
Judge: James Hudson
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Supreme Court of the County of Suffolk
State of New York - Part XL

COPY

PRESENT:**HON. JAMES HUDSON***Acting Justice of the Supreme Court*

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JP MORGAN CHASE BANK, NATIONAL
 ASSOCIATION, AS PURCHASER OF THE
 LOANS AND OTHER ASSETS OF
 WASHINGTON MUTUAL BANK, FORMERLY
 KNOWN AS WASHINGTON MUTUAL BANK
 FA,

Plaintiff,

-against-

1. WILLIAM C. JOHNSON,
2. NANCY C. JOHNSON,
3. HOME 123 CORPORATION,
4. MORTGAGE ELECTRONIC
 REGISTRATION SYSTEMS, INC., and
5. JUDITH A. PASCALE, SUFFOLK COUNTY
 CLERK,

Defendants.

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MOT. SEQ. NO.:004 -MD; CASEDISP

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Upon the following papers numbered 67 to 79 read on this Motion/Order to Show Cause for Dismissal: ~~and after hearing counsel in support and opposed to the motion~~ it is,

ORDERED that the motion (seq. no.:004) of Defendants William C. Johnson and Nancy C. Johnson ("Defendants") requesting dismissal of the complaint based upon Plaintiff's lack of standing to sue pursuant to CPLR Rule 3211(a) (3) is converted to a motion for summary judgment pursuant to CPLR Rule 3212(b) as issue was joined prior to the filing of the motion, and summary judgment granted to Plaintiff.

Defendants' First Motion for Dismissal Pursuant to CPLR Rule 3211(a)(3)

Defendants initially filed its motion for relief (mot. seq.:001) on or about August 8th, 2011, citing CPLR Rule 3211(a) (3), requesting dismissal of the complaint, asserting that Plaintiff lacks the legal capacity to sue and does not have standing in this action. On July 17th, 2012, Judge Spinner issued an Order granting summary judgment to Plaintiff pursuant to CPLR Rule 3212, as issue was already joined at the time of motion filing. Therefore, relief pursuant to CPLR Rule 3211(a) (3) as requested by Defendants was improper and conversion from CPLR Rule 3211(a) (3) to CPLR Rule 3212 was required. As previously stated in that Order:

“Under Rule 3212(b) a Court is authorized upon a motion for summary judgment to search the record and grant a non-moving party summary judgment on the issue that is the subject of the motion before the Court... (*Backer v. Bouza Falco Co.*, 28AD3d 503, 814 NYS2d 188 [2d Dept 2006], *lv to app den*, 7 NY3d 707, 821 NYS2d 812, 854 NE2d 1276[2006]).”

The trial Court had the authority to search the record and grant summary judgment to a nonmoving party with respect to an issue that was the subject of a summary judgment motion before the court (*Goldstein v. County of Suffolk*, 300 AD2d 441, 751 NYS2d 549 [2d Dept 2002]). In the case at bar, although Defendants were the movants seeking dismissal of the case, as the motion (seq. no.:001) was filed after issue was joined, Judge Spinner converted the motion to one for summary judgment pursuant to CPLR Rule 3212, and awarded summary judgment to Plaintiff; the nonmoving party.

Defendants appealed, same appeal resulting in a decision that Judge Spinner had failed to provide adequate notice to the Parties that their motion to dismiss was being converted into one for summary judgment. That Order effectively declared that Plaintiff is the lawful holder of the consolidated mortgage, the question of issue in the case in chief.

The Appellate Court found that “the parties’ evidentiary submissions were not so extensive as to make it ‘unequivocally clear’ that they were ‘laying bare their proof’ and ‘deliberately charting a summary judgment course’” (*JP Morgan Chase Bank National Association v. Johnson*, 129 AD3d 914, 10 NYS3d 446 [2d Dept 2015]; *quoting Wesolowski v. St. Francis Hosp.*, 108 AD3d 525, 968 NYS2d 181 [2d Dept 2013]; *quoting Sokol v. Leader*, 74 AD3d 1180, 1183, 904 NYS2d 153 [2d Dept 2010]; *see Patel v. Primary Constr., LLC*, 115 AD3d 834, 982 NYS2d 340 [Mem] [2d Dept 2014]).

The Order was reversed and the case remanded to the Supreme Court "...so as to provide the Johnsons an opportunity to lay bare their proof in support of the motion, and for a new determination thereafter" (*Johnson, supra.*). That initial Defendants' motion (seq. no.:001) was withdrawn on April 4, 2018 before the Court.

Defendants' Motion for Dismissal of the Action Pursuant to CPLR Rule 3211(a)(3) - Mot. Seq. No.:004

Defendants are now making their *second* motion for relief citing to CPLR Rule 3211, filed after issue has been joined (seq.no:004). This Court upon review has considered the issue of whether Plaintiff has standing to bring this action.

It is the determination of the Court that Defendants have been provided ample time to present their proof in support of their motion for summary judgment and in opposition to summary judgment being awarded to Plaintiff. The Appellate Court decision was rendered June 17th, 2015. The submission date of Defendants' first motion to dismiss which was converted by the Court to one for summary judgment (mot. seq.:001) was February 3rd, 2016. Defendants made two (2) submissions following the Appellate Court ruling. Defendants filed an Affirmation in support of Defendants' motion for Summary Judgment dated November 9th, 2015. Defendants filed a Reply Affirmation in opposition to granting summary judgment to Plaintiff dated February 2nd, 2016. Same Affirmations have been reviewed and considered by the Court. It is noted that Defendants have mailed correspondence to the Court in support of their position on several occasions. That correspondence is not part of any motion sequence. "Litigation by letter" is improper and will not be considered by this Court.

Upon review of the two (2) above noted submissions of Defendants in support and in opposition, it is noted that Defendants' February 2nd, 2016 submission contains affidavits of Nancy C. Johnson and William C. Johnson. A review of those affidavits fails to contain a denial by either Defendant that they applied for the subject loans nor denial that they executed the related loan documents. Nor does either affidavit deny receipt of the loan monies, same being in excess of \$1.4 million dollars. The Affidavits, in sum, question whether Plaintiff is in possession of the subject note and assert Defendants' belief that Plaintiff is not, and was not, at the time the instant case was filed, in possession of the subject note. Defendants therefore contend that Plaintiff does not have standing and that the instant case must therefore be dismissed. Same affidavits were not part of Defendants' motion filing prior to the June 17th, 2015 Appellate Court decision. The Court notes that Defendants were provided with ample opportunity to "lay bare their proof" and that, by the filing of their affidavits have done so.

The Court has also examined Plaintiff's December 21st, 2015 submission in support of granting summary judgment to Plaintiff, pursuant to CPLR Rule 3212. Plaintiff in its papers, *inter alia*, has provided proof of the critical issue herein, that Plaintiff is in possession of the original, duly executed notes and has been since prior to the filing of the instant foreclosure action. Plaintiff has submitted as proof the affidavit of Charles Herndon, Vice President, JP Morgan Chase Bank. Same affiant swears that JP Morgan Chase Bank is the bearer and holder and in possession of the original notes and that he has reviewed the original notes which have been in the possession and custody of JP Morgan Chase Bank since before the commencement of the instant case.

As noted by Judge Spinner in his July 17th, 2012 Order, the possession of a promissory note provides presumptive ownership of that note. A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating 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 (*U.S. Bank, N.A. v. Morrison*, 160 AD3d 679, 74 NYS3d 296 [2d Dept 2018]; *Deutsche Bank National Trust Co. v. Torres*, 45 Misc3d 1212[A], 5 NYS3d 327 [Table] [Sup Ct Suffolk Cty 2014]). The holder of the note is deemed that owner of the underlying mortgage (*Brighton BK, LLC v. Kurbatsky*, 131 AD3d 1000, 17 NYS3d 137 [2d Dept 2015]; *Bank of New York v. Silverberg*, 86 AD3d 274, 926 NYS2d 532 [2d Dept 2011]). "Mere delivery of instruments of indebtedness is sufficient to confer standing and the recording to a written assignment of mortgage merely serves to put the world on record notice of the transfer of rights" (*HSBC Bank USA Nat. Ass'n v. Delacadena*, 25 Misc3d 1216[A] 2, 901 NYS2d 907 [Table] [Sup Ct Suffolk Cty 2009]; see *Fryer v. Rockefeller*, 18 Sickels 268, 63 NY 268, 276 [1875]).

Where Plaintiff is assignee of mortgage and underlying note at time foreclosure action was commenced, Plaintiff has standing to maintain action (*Federal Nat. Mtge. Assn. v. Youkelsone*, 303 AD2d 546, 755 NYS2d 730 [2d Dept 2003]). Plaintiff has established its standing to bring the instant case. Defendants have failed to prove that Plaintiff does not have standing. Defendants have had ample opportunity to marshal and present evidence demonstrating lack of standing and have failed to sustain that burden. It has been established that a motion for summary judgment is an extreme request for relief. "Summary judgment is a drastic remedy and should not be granted where there is any doubt of a triable issue" (*Moskowitz v. Garlock*, 23 AD2d 943, 259 NYS2d 1003 [3d Dept 1965]). The granting of a summary judgment motion is "the procedural equivalent of a trial" (*Crowley's Milk Co. v. Klein*, 24 AD2d 920, 264 NYS2d 680 [3d Dept 1965]). "...a party does not carry its burden in moving forward for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense" (*Red River Living Center, LLC v. ADL Data Systems, Inc.*, 98 AD3d 724, 725-26, 950 NYS2d 179, 181 [2d

Dept 2012]). When a party seeks summary judgment it must affirmatively establish its entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (see *Voss v. Netherlands Insurance Co.*, 22 NY3d 728, 985 NYS2d 448, 8 NE3d 828 [2014]; *Vega v. Restani Construction Corp.*, 18 NY3d 499, 942 NYS2d 13, 965 NE2d 240 [2012]; *Yun Tung Chow v. Reckitt & Coleman, Inc.*, 17 NY3d 29, 926 NYS2d 377, 950 NE2d 113 [2011]).

Plaintiff has filed and served its summons and complaint and Defendants have timely answered. Defendants are on notice that a motion to dismiss pursuant to CPLR Rule 3211(a)(3) made after issue has been joined, is a motion for summary judgment pursuant to CPLR Rule 3212 (*Wesolowski, supra.*). Defendant's motion sequence no.:004 is duplicative. Defendants previously made the identical request in motion sequence no.:001, withdrawn April 12, 2018. Same earlier motion (mot. seq.:001) was converted to one pursuant to CPLR Rule 3212 by Judge Spinner. That conversion from a motion to dismiss pursuant to CPLR Rule 3211(a)(3) to one for summary judgment pursuant to CPLR Rule 3212 was Affirmed on interlocutory appeal. Defendants are on actual notice of Judge Spinner's July 17th, 2012 Order and the Appellate Court decision (*Johnson, supra.*).

The Appellate Court Ordered that Defendant have the opportunity to "lay bare its proof". Defendant, by its instant motion (mot. seq.: 004) submits further documents to the Court. The Court has duly considered Defendant's additional affidavits and documents. The Court finds that Defendants' motion fails to state an issue which would require dismissal of the action or which would justify summary judgment being awarded to Defendants. To the contrary, upon review, Defendants' instant motion fails to demonstrate an issue of fact sufficient to deny summary judgment to Plaintiff. Defendants' instant motion is improper in that it requests relief pursuant to CPLR Rule 3211(a)(3) rather than CPLR Rule 3212. The relief requested by Defendant in its motion (seq. 004), dismissal of the complaint based upon Plaintiff's lack of standing pursuant to CPLR Rule 3211(a)(3), is rejected in its entirety. The additional arguments of Defendants in their instant motion for dismissal of the action pursuant to CPLR Rule 3211(a)(3), which relief request has been converted by the Court to one requesting summary judgment against Plaintiff pursuant to CPLR Rule 3212(b), have been considered herein and are hereby rejected, *with prejudice*.

Plaintiff has shown that there is no issue of fact to warrant a trial, and that there is no defense to the cause of action or that the cause of action or defense has no merit. Plaintiff has therefore met the burden of CPLR Rule 3212(b) and is awarded summary judgment against the Defendants. There being no material question of fact, there being no meritorious defense to the cause of action, and it being the determination of the Court that Plaintiff JP Morgan Chase Bank National Association, as purchaser of the loans and other assets of

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Washington Mutual Bank formerly known as Washington Mutual Bank, FA ("JP Morgan Chase Bank"), has standing to maintain this action, it is hereby

ORDERED, ADJUDGED AND DECREED, that JP Morgan Chase Bank is the lawful mortgagee of record under the filed note and mortgage against the mortgaged premises: 1 Washington Drive, Hampton Bays, New York 11946, known and designated by tax map identification District:0900; Section: 259.00; Block: 02.00; Lot: 043.034, and it is further

ORDERED that the motion (mot. seq.:004) of Defendants William C. Johnson and Nancy C. Johnson for dismissal of the action pursuant to CPLR Rule 3211[a][3] is converted by the Court to a motion for summary judgment pursuant to CPLR Rule 3212(b) is denied in its entirety to Defendants; and it is further

ORDERED that Plaintiff JP Morgan Chase Bank is granted summary judgment against Defendants William C. Johnson and Nancy C. Johnson.

Settle Judgment pursuant to 22 NYCRR § 202.48 on or before February 15th, 2019.

DATED: DECEMBER 18th, 2018
RIVERHEAD, NY


HON. JAMES HUDSON
Acting Justice of the Supreme Court