

US Bank N.A. v Cadeumag

2018 NY Slip Op 34485(U)

March 20, 2018

Supreme Court, Kings County

Docket Number: Index No. 899/14

Judge: Mark I. Partnow

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At an IAS Term, Part FRP2 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 20th day of March, 2018.

P R E S E N T:

HON. MARK I. PARTNOW,

Justice.

-----X

US BANK NATIONAL ASSOCIATION,
AS TRUSTEE FOR HE STRUCTURED ASSET
SECURITIES CORPORATION MORTGAGE LOAN
TRUST 2006-BC1,

Plaintiff,

- against -

Index No. 899/14

CLAUDE CADEUMAG, AS HEIR AND
ADMINISTRATOR FOR THE ESTATE OF
LORVANA CADEUMAG, et al.,

Defendants.

-----X

The following papers numbered 1 to 8 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____
_____ Affidavit (Affirmation) in further support _____
Other Papers _____

1, 2-5 _____

6, 7, 8 _____

Upon the foregoing papers, plaintiff US Bank National Association, as Trustee for the Structured Asset Securities Corporation Mortgage Loan Trust 2006-BC1 moves for an order 1) granting plaintiff summary judgment, 2) dismissing with prejudice the answer and affirmative defenses of defendants Claude Cadeumag, as heir and Administrator for the

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Estate of Lorvana Cadeumag and Wendy Cadeumag and Nancy Cadeumag, each in their capacity as heir of the Estate of Lorvana Cadeumag (defendants), 3) granting permission to treat defendants' answer as a limited notice of appearance, 4) amending the caption to substitute Meusic Etienne, Nashi Woodham and Rene Doe in place of "John Doe," 5) appointing a referee to compute and 6) deeming non-appearing defendants in default. Defendants cross-move for an order granting summary judgment in favor of defendants, dismissing the complaint pursuant to CPLR 3211 (a) (3), cancelling and tolling interest and directing plaintiff to provide an undertaking pursuant to General Business Law [GBL] § 394-a (2) and UCC § 3-804.

Plaintiff commenced this action to foreclose a mortgage encumbering the property at 719 Bristol Street in Brooklyn. The mortgage was executed by Lorvana Cadeumag on October 17, 2005 to secure a note in favor of Aegis Funding Corporation (Aegis) in the amount of \$420,000.00. The mortgage was recorded on November 9, 2005 in the name of Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for Aegis. By assignment dated March 27, 2009 and recorded April 20, 2009, the mortgage was purportedly assigned from MERS, as nominee for Aegis, to plaintiff. On April 22, 2009, plaintiff commenced a prior foreclosure action against Lorvana Cadeumag (Kings County index No. 9758/09) alleging that she defaulted under the terms of the mortgage and note by failing to make the monthly payment due on October 1, 2008. The 2009 action, however, was commenced following the death of Lorvana and was therefore a nullity (*US Bank N.A. v*

Cadeumag, 147 AD3d 881 [2d Dept 2017]). Plaintiff commenced the instant action against defendants (the administrator for and heirs of Laverna's estate) on January 17, 2014. In its amended complaint, plaintiff alleges that it "is in possession of the original note with a proper endorsement and/or allonge and is therefore, the holder of both the note and mortgage, which passes as incident to the note." In their verified answer with counterclaims, defendants interpose various affirmative defenses including lack of standing.

Generally, to establish prima facie entitlement to judgment as a matter of law in an action to foreclose a mortgage, a plaintiff must produce the mortgage, the unpaid note, and evidence of default (*see Deutsche Bank Trust Co. Ams. v Garrison*, 147 AD3d 725, 726 [2d Dept 2017]; *Deutsche Bank Natl. Trust Co. v Abdan*, 131 AD3d 1001, 1002 [2d Dept 2015]; *Plaza Equities, LLC v Lamberti*, 118 AD3d 688, 689 [2d Dept 2014]). Where, as here, the issue of standing is raised by a defendant, a plaintiff must also establish its standing as part of its prima facie case (*see Deutsche Bank Trust Co. Ams. v Garrison*, 147 AD3d at 726; *Security Lending, Ltd. v New Realty Corp.*, 142 AD3d 986, 987 [2d Dept 2016]; *LGF Holdings, LLC v Skydel*, 139 AD3d 814, 814 [2d Dept 2016]). A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that, when the action was commenced, it was either the holder of, or the assignee of, the underlying note (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361–362 [2015]; *Security Lending, Ltd. v New Realty Corp.*, 142 AD3d at 987; *LGF Holdings, LLC v Skydel*, 139 AD3d at 814; *Wells Fargo Bank, N.A. v Rooney*, 132 AD3d 980, 981 [2d Dept 2015]). "Holder status is

established where the plaintiff possesses a note that, on its face or by allonge, contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff” (*Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375, 1376 [3d Dept 2015]; see *U.S. Bank, N.A. v Zwisler*, 147 AD3d 804 [2d Dept 2017]). “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 [2d Dept 2009]; see *Security Lending, Ltd. v New Realty Corp.*, 142 AD3d at 987; *LGF Holdings, LLC v Skydel*, 139 AD3d at 814).

In support of its motion for summary judgment and related relief, plaintiff submits a copy of the mortgage, a copy of the note together with an “affidavit of lost note,” and the affidavit of Elizabeth Ann Nickel, who identifies herself therein as “Vice President Loan Documentation for Wells Fargo Bank, N.A.,” the servicer of the subject mortgage loan for plaintiff. In her affidavit, Nickel avers that pursuant to a Trust Agreement, dated April 1, 2006, plaintiff became the custodian of Lorvanna Cadeumag’s mortgage loan, along with other mortgage loans, for which Wells Fargo Bank, N.A. was designated as the servicer. Nickel avers:

“On April 1, 2006, pursuant to Section 2.01 (a) of the Trust Agreement, the Mortgage Loan was ‘transfer[red], assign[ed], set[] over, deposit[ed] with and otherwise convey[ed]’ to the Trust. The Mortgage Loan is included on the Mortgage Loan Schedule (attached as Schedule I to the Trust Agreement), which identifies the mortgage loans that were assigned to the

Trust by and pursuant to the Trust Agreement. Annexed as **Exhibit K** is a copy of the relevant page from the Mortgage Loan Schedule for Loan Number ****3156, which is a unique number assigned to the Mortgage Loan.

* * *

“In connection with the transfer and assignment of the Mortgage Loan to the Trust, and pursuant to Section 2.01 (b) (i) of the Trust Agreement, the Lost Note Affidavit ‘stating that the original Mortgage Note was lost, misplaced or destroyed, together with a copy of the related Mortgage Note’ was delivered to the custodian.

* * *

“On March 27, 2009, [MERS] as nominee for Aegis Funding Corporation[,] its successors and assigns, executed a written Assignment of Mortgage to [plaintiff] (the ‘Assignment’), which was recorded on April 20, 2009.”

According to an affidavit of lost note sworn to on February 7, 2006 by Jose Guevara, “Assistant Secretary” for Aegis, the subject note “cannot be produced because it has been lost or destroyed.” Annexed to the affidavit is a copy of the subject note bearing an indorsement from Aegis to the order of Aegis Mortgage Corporation and an indorsement from Aegis Mortgage Corporation to plaintiff. In his affidavit, Guevara further stated that the note “is not in the possession of any person having any lawful claim to the same.”

Uniform Commercial Code [UCC] § 3-804 provides:

“The owner of an instrument which is lost, whether by destruction, theft or otherwise, may maintain an action in his own name and recover from any party liable thereon upon due proof of his ownership, the facts which prevent his production of the instrument and its terms. The court shall require security,

in an amount fixed by the court not less than twice the amount allegedly unpaid on the instrument, indemnifying the defendant, his heirs, personal representatives, successors and assigns against loss, including costs and expenses, by reason of further claims on the instrument, but this provision does not apply where an action is prosecuted or defended by the state or by a public officer in its behalf.”

At the outset, the lost note affidavit does not state when the search was made or by whom, and does not indicate approximately when the note was lost (*see US Bank N.A. v Richards*, 155 AD3d 522 [1st Dept 2017]). Further, under UCC § 3-804 an action may be maintained by the “owner” of a lost instrument “in his own name and recover from the party liable thereon upon due proof of his ownership.” Because plaintiff does not dispute that the indorsed note was lost by Aegis and was never delivered to its possession, plaintiff cannot establish standing as a holder of the note.¹ Thus, in order to establish standing, plaintiff must prove that it is became the “owner” (assignee) of the note prior to the commencement of this action (*see Bayview Loan Servicing, LLC v Warter*, 56 Misc 3d 1212[A], 2017 NY Slip Op 50974[U] [Sup Ct, Essex County 2017] [court found foreclosure plaintiff had standing where assignee, which had lost the original note but produced lost note affidavit, assigned the note to plaintiff by written assignment]).

¹The Official Commentary to UCC § 3-804 provides that:

“The plaintiff who claims to be the owner of such an instrument is not a holder as that term is defined in this Act, since he is not in possession of the paper, and he does not have the holder’s prima facie right to recover under the section on the burden of establishing signatures. He must prove his case. He must establish the terms of the instrument and his ownership, and must account for its absence.”

In this matter, plaintiff relies on the Trust Agreement to show that it was duly assigned ownership of the subject note prior to the commencement of this action. Plaintiff specifically cites to Section 2.01(a) of the Trust Agreement which provides that “[c]oncurrently with the execution and delivery of this Agreement, the *Depositor* does hereby transfer, assign, set over, deposit with and otherwise convey to the Trustee, without recourse, . . . , in trust, all the right, title and interest of the Depositor in and to the Mortgage Loans” (emphasis added). However, the Trust Agreement defines the “Depositor” as “Structured Asset Securities Corporation.” While the Trust Agreement may be thus sufficient to demonstrate the assignment to plaintiff of certain notes which were held or owned by Structured Asset Securities Corporation, plaintiff does not submit any written assignment showing that the subject note was duly assigned from Aegis to Structured Asset Securities Corporation prior to the date of the Trust Agreement. As there is a gap in the chain of written assignments of the note from Aegis to plaintiff, plaintiff may not rely on the Trust Agreement as proof of its standing (*see U.S. Natl. Assn. v Said*, 38 Misc 3d 1214[A], 2013 NY Slip Op 50101[U] [Sup Ct, Queens County 2013]).

Plaintiff also failed to establish standing based upon an assignment of the note and mortgage from MERS to plaintiff prior to commencement of the action, as there is no proof the note was delivered or assigned from Aegis to MERS prior to the execution of the assignment to plaintiff (*see Aurora Loan Servs., LLC v Mercius*, 138 AD3d 652, 652 [2d Dept 2016]; *HSBC Bank USA, N.A. v Roumiantseva*, 130 AD3d 983, 984 [2d Dept 2015]).

Plaintiff does not submit any other documentary evidence purporting to establish a chain of assignments of the note from Aegis to plaintiff.² As a result, plaintiff's motion for summary judgment and an order of reference relief is denied.

Turning to defendants' cross motion to dismiss the complaint based upon plaintiff's alleged lack of standing, the burden is on defendants to establish, prima facie, plaintiff's lack of standing as a matter of law (*see U.S. Bank N.A. v Guy*, 125 AD3d 845, 847 [2d Dept 2015]; *HSBC Mtge. Corp. [USA] v MacPherson*, 89 AD3d 1061, 1062 [2d Dept 2011]). To defeat the motion, plaintiff must submit evidence which raises a question of fact as to its standing (*see U.S. Bank N.A. v Guy*, 125 AD3d at 847; *US Bank N.A. v Faruque*, 120 AD3d 575, 578 [2d Dept 2014]; *Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680, 683 [2d Dept 2012]).

Defendants failed to demonstrate, prima facie, that the instant action should be dismissed upon plaintiff's alleged lack of standing (*see Wells Fargo Bank, N.A. v Talley*, 153 AD3d 583, 585 [2d Dept 2017]). Furthermore, under the particular facts of this action, the Court finds that plaintiff adequately explained its delay in prosecuting *this* action as the

²Plaintiff argues in its reply memorandum of law that it "is not required to proffer a written assignment of each intervening transfer of a mortgage loan before it is transferred to the plaintiff" (Plaintiff's Reply Memorandum of Law in Further Support of its Motion for Summary Judgment and Default Judgment at 6, n 5). However, the cases cited in support of this argument involve scenarios where the note was physically delivered to the plaintiff, making proof of written assignments unnecessary. In this matter, the subject note was lost by Aegis and never delivered to plaintiff, thus requiring plaintiff to establish its ownership of the note through a proper chain of assignments.

2009 action was a nullity (*see Citicorp Trust Bank, FSB v. Vidaurre*, 155 AD3d 934, 934-935 [2d Dept 2017]). Thus, the Court will not toll interest accrued on the Note.

Defendants also cross-move for an order directing plaintiff to post an undertaking, pursuant to UCC 3-804, because plaintiff seeks to foreclose based on a lost promissory note.

UCC 3-804 provides:

“The owner of an instrument which is lost, whether by destruction, theft or otherwise, may maintain an action in his own name and recover from any party liable thereon upon due proof of his ownership, the facts which prevent his production of the instrument and its terms. *The court shall require security, in an amount fixed by the court not less than twice the amount allegedly unpaid on the instrument, indemnifying the defendant, his heirs, personal representatives, successors and assigns against loss, including costs and expenses, by reason of further claims on the instrument*, but this provision does not apply where an action is prosecuted or defended by the state or by a public officer in its behalf” (emphasis added).

Here, an undertaking, pursuant to UCC 3-804 is warranted to “protect[] defendants from the risk of double liability should the lost instrument[s] reappear” (*Beswick v Weiss*, 126 AD2d 854, 856 [1987]). Accordingly, it is

ORDERED that the branch of plaintiff’s motion seeking summary judgment, an order of reference and an order striking defendants’ answer is denied; and it is further

ORDERED that the branch of plaintiff’s motion seeking a default judgment against the non-appearing defendants, New York City Environmental Control Board, New York City Parking Violations Bureau, New York City Transit Adjudication Bureau, Criminal Court City of New York, United States of America - Internal Revenue Service, New York State

Department of Taxation and Finance, Lucienne Exil, Sundia Exil, Tamara Exil, Elaine Condo, Eldiu Boiner, Meusic Etienne, Nashi Woodham, and Rene Doe, is granted, on default; and it is further

ORDERED that the branch of plaintiff's motion seeking an order amending the caption to substitute Meusic Etienne, Nashi Woodham, and Rene Doe as defendants in place of the "John Doe" and "Jane Doe" defendants is granted; and it is further

ORDERED that the caption shall hereinafter appear as follows:

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US BANK NATIONAL ASSOCIATION,
AS TRUSTEE FOR HE STRUCTURED ASSET
SECURITIES CORPORATION MORTGAGE LOAN
TRUST 2006-BC1,

Plaintiff,

- against -

Index No. 899/14

CLAUDE CADEUMAG, AS HEIR AND
ADMINISTRATOR FOR THE ESTATE OF
LORVANA CADEUMAG, WENDY
CADEUMAG AS HEIR AND
ADMINISTRATOR FOR THE ESTATE OF
LORVANA CADEUMAG, NANCY CADEUMAG
AS HEIR AND ADMINISTRATOR FOR
THE ESTATE OF LORVANA CADEUMAG,
NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD, NEW YORK CITY
PARKING VIOLATIONS BUREAU, NEW YORK
CITY TRANSIT ADJUDICATION BUREAU,
CRIMINAL COURT CITY OF NEW YORK,
UNITED STATES OF AMERICA - INTERNAL
REVENUE SERVICE, NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE,
LUCIENNE EXIL, SUNDIA EXIL, TAMARA

EXIL, ELAINE CONDO, ELDIU BOINER,
MEUSIC ETIENNE, NASHI WOODHAM,
AND RENE DOE

Defendants.

-----X; and it is further

ORDERED that the branch of defendants' cross motion for summary judgment and dismissal is denied; and it is further

ORDERED that the branch of defendants' cross motion to toll the interest is denied; and it is further

ORDERED that the branch of defendants' cross motion seeking an undertaking, pursuant to UCC 3-804, is granted without opposition and plaintiff is directed to post an undertaking of at least \$823,392.10 within 30 days of service of this decision and order with notice of entry.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

HON. MARK I PARTNOW
SUPREME COURT JUSTICE

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