U.S. Bank N.A. v Rozo-Castellanos
2018 NY Slip Op 34608(U)
July 16, 2018
Supreme Court, Suffolk County
Docket Number: Index No. 609339/2015
Judge: Howard H. Heckman, Jr.
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Short Form Order

SUPREME COURT - STATE OF NEW YORK
IAS PART 18 - SUFFOLK COUNTY

PRESENT:
HON. HOWARD H. HECKMAN JR., J.S.C.

INDEX NO.: 609339/2015
MOTION DATE: 02/27/2018
MOTION SEQ. NO.: #001 MG

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U.S. BANK N.A.,

Plaintiff,

-against-

LENA ROZO-CASTELLANOS, GEORGE L. CASTELLANOS,

Defendants.

---X

PLAINTIFF'S ATTORNEY:
LEOPOLD & ASSOCIATES, P.C.
80 BUSINESS PARK DR., STE. 110
ARMONK, NY 10504

DEFENDANT'S ATTORNEY:
DAVID L. SINGER, P.C.
150 BROADHOLLOW RD., STE. 122
MELVILLE, NY 11747

Upon the following papers numbered 1 to 24 read on this motion ; Notice of Motion/ Order to Show Cause and supporting papers 1- 11 ; Notice of Cross Motion and supporting papers 1 ; Answering Affidavits and supporting papers 12-21 ; Replying Affidavits and supporting papers 22-24 ; Other 25-26 ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff U.S. Bank, N.A. seeking an order: 1) granting summary judgment striking the answer of defendants Lena Rozo- Castellanos and George L.Castellanos; 2) substituting Wilson "Smith" as a named party defendant in place and stead of a defendant designated as "John Doe #1"and discontinuing the action against any remaining defendants identified as "John Doe #2" through "John Doe #12; 3) deeming all appearing and non-appearing defendants in default; 4) amending the caption; and 5) appointing a referee to compute the sums due and owing to the plaintiff in this mortgage foreclosure action is granted; and it is further

ORDERED that plaintiff is directed to serve a copy of this order amending the caption upon the Calendar Clerk of the Court; and it is further

ORDERED that plaintiff is directed to serve a copy of this order with notice of entry upon all parties who have appeared and not waived further notice pursuant to CPLR 2103(b)(1),(2) or (3) within thirty days of the date of this order and to promptly file the affidavits of service with the Clerk of the Court.

Plaintiff's action seeks to foreclose a mortgage in the original sum of $392,000.00 executed by defendants Lena Rozo-Castellanos and George L. Castellanos on August 7, 2006 in favor of GreenPoint Mortgage Funding, Inc. On that same date defendant Lena Rozo-Castellanos executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. By assignment dated August 13, 2014 the mortgage and note were assigned to the plaintiff. Plaintiff claims that the defendant defaulted in making timely payments due under the terms of the mortgage agreement by failing to make the October 1, 2007 payment and all required payments since that date.

GMAC Mortgage LLC, plaintiff's predecessor, commenced a prior foreclosure action on the same mortgaged premises bearing (Index #23633/2008) by filing a notice of pendency, summons and complaint in the Suffolk County Clerk's Office on June 24, 2008. That action was voluntarily discontinued by Order (Doyle, J.) dated December 14, 2011. GMAC Mortgage LLC then commenced a second action bearing index number (255961/2011) by filing a notice of pendency, summons, and complaint in the Suffolk County Clerk's Office on August 11, 2011 which was voluntarily discontinued by Order (Emerson, J.) dated March 22, 2012. Plaintiff commenced this foreclosure action by filing a notice of pendency, summons and complaint in the Suffolk County Clerk's Office on August 31, 2015. Defendants Lena Rozo-Castellanos and George L.Castellanos served an answer dated September 29, 2015 containing seven affirmative defenses. Plaintiff's motion seeks an order granting summary judgment striking defendants' answer and for the appointment of a referee.

In opposition, defendants claim that the plaintiff has failed to prove that it has standing to maintain this action; that the action is time barred by the applicable six year statute of limitations period; and therefore the complaint should be dismissed.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material question of fact from the case. The grant of summary judgment is appropriate only when it is clear that no material and triable issues of fact have been presented (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957)). The moving party bears the initial burden of proving entitlement to summary judgment (*Winegrad v. NYU Medical Center*, 64 NY2d 851 (1985)). Once such proof has been proffered, the burden shifts to the opposing party who, to defeat the motion, must offer evidence in admissible form, and must set forth facts sufficient to require a trial of any issue of fact (CPLR 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557 (1980)). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v. Associated Fur Manufacturers*, 46 NY2d 1065 (1979)).

Entitlement to summary judgment in favor of the foreclosing plaintiff is established, prima facie by the plaintiff's production of the mortgage and the unpaid note, and evidence of default in payment (*see Wells Fargo Bank N.A. v. Erobobo*, 127 AD3d 1176, 9 NYS3d 312 (2nd Dept., 2015); *Wells Fargo Bank, N.A. v. Ali*, 122 AD3d 726, 995 NYS2d 735 (2nd Dept., 2014)). Where the plaintiff's standing is placed in issue by the defendant's answer, the plaintiff must also establish its standing as part of its prima facie showing (*Aurora Loan Services v. Taylor*, 25 NY3d 355, 12 NYS3d 612 (2015); *Loancare v. Firshing*, 130 AD3d 787, 14 NYS3d 410 (2nd Dept., 2015); *HSBC Bank USA, N.A. v. Baptiste*, 128 AD3d 77, 10 NYS3d 255 (2nd Dept., 2015)). In a foreclosure action, a plaintiff has standing if it is either the holder of, or the assignee of, the underlying note at the time that the action is commenced (*Aurora Loan Services v. Taylor*, *supra.*; *Emigrant Bank v. Larizza*, 129 AD3d 94, 13 NYS3d 129 (2nd Dept., 2015)). Either a written assignment of the note or the physical transfer of the note to the plaintiff prior to commencement of the action is sufficient to transfer the obligation and to provide standing (*Wells Fargo Bank, N.A. v. Parker*, 125 AD3d 848, 5 NYS3d 130 (2nd Dept., 2015); *U.S. Bank v. Guy*, 125 AD3d 845, 5 NYS3d 116 (2nd Dept., 2015)). A plaintiff's attachment of a duly indorsed mortgage note to its complaint coupled with an affidavit in which it alleges that it had possession of the note prior to the commencement of the action constitutes due proof of the plaintiff's standing to prosecute its claim for foreclosure and sale (*see*

Nationstar Mortgage, LLC. v. Catizone, 127 AD3d 1151, 9 NYS3d 315 (2nd Dept., 2015)).

Plaintiff has submitted sufficient evidence to establish standing to maintain this foreclosure action by providing an affidavit from the mortgage servicer's vice president (which qualifies as admissible evidence under the business records exception to the hearsay rule- CPLR 4518) who has reviewed the business records maintained by the lender and who can confirm that the plaintiff had possession of the duly indorsed promissory note at the time this action was commenced on August 31, 2015. Such evidence provides sufficient proof that the plaintiff had possession of the underlying indorsed promissory note at or prior to commencement of this action and therefore has standing to maintain this foreclosure action (*Nationstar Mortgage v. Catizone, supra.).* Any alleged issues surrounding the mortgage assignments are irrelevant to the issue of standing in this case since the plaintiff has established possession of the duly indorsed promissory note at or prior to commencing this action (*Federal National Mortgage Assoc. v. Yakaputz II, Inc.,* 141 AD3d 506, 35 NYS3d 236 (2nd Dept., 2016); *Deutsche Bank National Trust Co. v. Leigh,* 137 AD3d 841, 28 NYS3d 86 (2nd Dept., 2016); *Nationstar Mortgage, LLC v. Catizone, supra.*)).

With respect to the statute of limitations affirmative defense, CPLR 213(4) provides that "an action upon a bond or note, the payment of which is secured by a mortgage upon real property, or upon a bond or note and mortgage so secured, or upon a mortgage of real property, or any interest therein" must be commenced within six years. It is the general rule that "where the acceleration of the maturity of a mortgage debt on default is made optional with the mortgagee, some affirmative action must be taken by the lender evidencing its election to take advantage of the accelerating provision, and that until such action is taken the acceleration provision has no operation" (*see Ward v. Walkley et al.,* 143 AD2d 415, 532 NYS2d 426 (2nd Dept., 1988) reciting 55 Am Jr 2d, Mortgages 386; 38 NY Jur, Mortgages and Deeds of Trust 76, 300; *see also, Clayton National, Inc. v. Guldi,* 307 AD2d 982, 763 NYS2d 493 (2nd Dept., 2003)).

Defendants claim that the acceleration date (and therefore the date which would commence the six year statute of limitations period to run) is either the date of the original default letter (December 3, 2007), or the date of the filing of summons and complaint in the June 24, 2008 proceeding, which in either case would cause the instant action filed on August 31, 2015 to be time barred. The terms of the mortgage and promissory note clearly provide that the mortgagee retained the option to accelerate the mortgage debt and therefore the *earliest* date upon which the statute of limitations period began to run would have been upon the filing of the original summons and complaint in the earlier action on June 24, 2008 (*see Wells Fargo Bank, N.A. v. Burke,* 94 AD3d 980, 943 NYS2d 540 (2nd Dept., 2012); *EMC Mortgage Corp. v. Patella,* 279 AD2d 604, 720 NYS2 161 (2nd Dept., 2001); *City Sts. Realty Corp., v. Jan Jay Construction Enterprises Corp.,* 88 AD2d 558, 450 NYS2d 492 (1st Dept., 1982); *Albertina Realty Co. v. Rosbro Realty Corp.,* 258 NY 472, 180 NE 176 (1932)). This Court deems the voluntary discontinuance of this action by Order (Doyle, J.) dated December 14, 2011, and the subsequent voluntary discontinuance Order (Emerson, J.) dated March 22, 2012 as an affirmative act of revocation resulting in the deceleration of the mortgage (*see NMNT Realty Corp. V. Knoxville 2012 Trust,* 151 AD3d 1068, 58 NYS3d 118 (2nd Dept., 2017); *EMC Mortgage Corp., v. Patella,* 279 AD2d 604, 720 NYS2d 161 (2nd Dept., 2001); *U.S. Bank, N.A. v. Wongsonadi,* 55 Misc3d 1207(A)(Sup.Ct. Qns. Cty., 4/5/2017); *see also Yonkers Fur Dressing Co., Inc. v. Royal Insurance Co., Ltd.,* 247 NY 435 (1928); *Loeb v. Willis,* 100 NY 231, 235, 55 Sickels 231 (1885)).. Accordingly, plaintiff's commencement of this action on August 31, 2015, is within the six year statute of limitations period given the fact that the mortgage had previously been decelerated as a result of the prior orders granting the previous mortgagee's two unopposed motions discontinuing both actions.

Moreover and equally on point and determinative in this case is the fact that there is no dispute that the prior plaintiff did not have standing to commence the original foreclosure actions, and based upon those circumstances the statute of limitations period was never commenced as a result of the prior actions since the prior plaintiff did not have the authority to accelerate the debt or to sue to foreclose at that time (*see U.S. Bank, N.A. v. Gordon,* 158 AD3d 832, 72 NYS3d 156 (2nd Dept., 2018); *21st Mortgage Corp. v. Adames,* 153 AD3d 474, 60 NYS3d 198 (2nd Dept., 2017); *Wells Fargo Bank, N.A. v. Burke,* 94 AD3d 980, 943 NYS2d 540 (2nd Dept., 2012); *EMC Mortgage Corp. v. Suarez,* 49 AD3d 502, 852 NYS2d 791 (2nd Dept., 2008)). Under all circumstances therefore this action is timely and not barred by the six year statute of limitations period.

With respect to plaintiff's summary judgment motion, the bank has submitted sufficient proof to establish its entitlement to summary judgment based upon submission of copies of the executed note and mortgage, together with an affidavit from a person with knowledge of the business records underlying the transaction, which confirm the obligations of the borrowers and their continuing default for the past nine and a half years. The bank, having proven entitlement to summary judgment, it is incumbent upon the defendants to submit relevant, evidentiary proof sufficiently substantive to raise genuine issues of fact concerning why the lender is not entitled to foreclose the mortgage. Defendants have wholly failed to do so.

Finally, as the defendants have failed to raise any evidence to address their remaining affirmative defenses, those affirmative defenses must be deemed abandoned and are hereby dismissed (*see Kronick v. L.P. Therault Co., Inc.,* 70 AD3d 648, 892 NYS2d 85 (2nd Dept., 2010); *Citibank, N.A. v. Van Brunt Properties, LLC,* 95 AD3d 1158, 945 NYS2d 330 (2nd Dept., 2012); *Flagstar Bank v. Bellafiore,* 94 AD3d 1044, 943 NYS2d 551 (2nd Dept., 2012); *Wells Fargo Bank Minnesota, N.A. v. Perez,* 41 AD3d 590, 837 NYS2d 877 (2nd Dept., 2007)).

Accordingly, plaintiff's motion seeking an order granting summary judgment and for the appointment of a referee must be granted. The proposed order for the appointment of a referee has been signed simultaneously with the execution of this order.

Dated: July 16, 2018

J.S.C.

Hon. Howard H. Heckman Jr.