

Wells Fargo Fin. Credit Servs. N.Y., Inc. v Tamargo-Rivera
2019 NY Slip Op 30101(U)
January 8, 2019
Supreme Court, New York County
Docket Number: 850218/2016
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 10

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WELLS FARGO FINANCIAL CREDIT
SERVICES NEW YORK, INC.,

Index № 850218/2016
Motion Seq. №. 001

DECISION & ORDER

Plaintiff,

-against-

CORAZON TAMARGO-RIVERA, WELLS
FARGO BANK, N.A. AS SUCCESSOR BY
MERGER TO WELLS FARGO FINANCIAL
BANK, UNITED STATES OF AMERICA
ACTING THROUGH THE IRS, BOARD OF
MANAGERS OF THE ILE ST. LOUIS
CONDOMINIUM, BOARD OF MANAGERS
OF THE PORT LIBERTE II CONDOMINIUM
ASSOCIATION INC., NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD,
CITY REGISTER OF THE CITY OF NEW YORK,
NEW YORK COUNTY

JOHN DOE (being fictitious, the names
unknown to Plaintiff intended to be tenants,
occupants, persons or corporations having or
claiming an interest in or lien upon the property
described in the complaint or their heirs at law,
distributees, executors, administrators, trustees,
guardians, assignees, creditors or successors.)

Defendants

-----X
GEORGE J. SILVER, J.S.C.:

This action is brought to foreclose on a mortgage held by plaintiff WELLS FARGO
FINANCIAL CREDIT SERVICES NEW YORK, INC., (“plaintiff”) and executed by defendant
CORAZON TAMAGRO-RIVERA (“defendant”) on a premises located at 245 East 50th Street, Apt.
4A, New York, NY 10027, recorded at CRFN 2005000014011 in the Office of the City Register of
the City of New York, New York County on January 7, 2005. This action was filed on November

14, 2016 in the New York County Clerk's Office, this being the County where the mortgaged property is located. Plaintiff filed and served the summons, complaint and notice of pendency in the form prescribed by all applicable statutes, including RPAPL § 1320.

Following defendant's answer, foreclosure settlement conferences were held on February 22, 2017, March 22, 2017, May 10, 2017, May 24, 2017, June 14, 2017 and July 26, 2017. At the July 26, 2017 conference, it was determined that no settlement or other resolutions to the action had occurred and the matter was released. At that time, plaintiff was allowed to proceed with its foreclosure action.

BACKGROUND

Following defendant's acquisition of the subject property, plaintiff extended a loan to defendant. To secure that loan, defendant executed and delivered a mortgage dated August 22, 2003, in the amount of \$374,618.30 against the subject property. On or about October 25, 2004, plaintiff made an additional loan to defendant. To secure that loan, defendant executed and delivered a mortgage dated October 25, 2004, in the amount of \$114,274.31 against the subject property. Those two mortgages were consolidated by a Consolidation, Extension and Modification Agreement executed by defendant dated October 25, 2004 to form a single lien against the premises in the amount of \$458,366.10. The terms of this loan are evidenced by a promissory note, loan statement, and the HUD Settlement Statement signed by defendant on October 25, 2004, and annexed to plaintiff's moving papers. The mortgage dated October 25, 2004 and the Consolidation, Extension and Modification Agreement dated October 25, 2004, were intended to be recorded in the regular course in the office of the City Register of the City of New York, New York County, so as to afford plaintiff, and its successors in interest, a complete mortgage lien in the amount of \$458,366.10 against the subject property. Following the closing of that

transaction, the mortgage dated October 25, 2004 and the Consolidation, Extension and Modification Agreement dated October 25, 2004, were entrusted to the settlement or title agent who handled the closing, and/or was delivered to the County Clerk or Recorder to be so recorded. For unknown reasons, the original mortgage dated October 25, 2004 and the Consolidation, Extension and Modification Agreement dated October 25, 2004, were not recorded in the Office of the City Register of the City of New York, New York County, or Recorder. Plaintiff believes that the mortgage dated October 25, 2004 and the Consolidation, Extension and Modification Agreement dated October 25, 2004 have been lost and/or inadvertently destroyed.

Because the mortgage dated October 25, 2004 and the Consolidation, Extension and Modification Agreement dated October 25, 2004 cannot be located and presumably have been lost or inadvertently destroyed, the mortgage evidencing plaintiff's security interest in the amount of \$458,366.10 is not secured as a first lien against the subject property.

However, any claim which any of the defendants, or any person claiming through or under them, may assert against 245 East 50th Street 4A, New York, New York 10022 is invalid, inferior, subject and subordinate to the interest of plaintiff in and to that real property.

In spite of the foregoing, it is undisputed that plaintiff and defendant have a fiduciary relationship. Indeed, the settlement documents and note show that a mutually beneficial promise was made on account of that relationship, namely that the property would be transferred in the event that defendant failed to uphold her promise to re-pay the loan.

If the lien in the mortgage dated October 25, 2004 and the Consolidation, Extension and Modification Agreement dated October 25, 2004 are not enforced, plaintiff argues that plaintiff will be irreparably injured, and the defendants will be unjustly enriched. To that end, plaintiff requests that this court issue an order declaring that it holds a valid and equitable mortgage on the property

in the principal amount of \$458,366.10, plus interest and other charges, in order to secure the aforementioned promissory note evidencing plaintiff's mortgage loan, superior to the claims and interests of all defendants herein.

In opposition, defendant contends that plaintiff is not entitled to judgment in its favor because plaintiff has not submitted all documents reflecting that it is the owner of the note and mortgage in this action. Originally, defendant highlights that Country Wide Home Loans, Inc., was the owner of the note and mortgage. Defendant contends that plaintiff's motion does not marshal the purported assignments that would have led to its acquisition of the note and mortgage from County Wide Home Loans, Inc. Since defendant argues that plaintiff does not even retain physical possession of the note and mortgage, defendant contends that plaintiff has not presented, and cannot present, any admissible evidence that it has standing to receive judgment in its favor.

In moving for summary judgment in a mortgage foreclosure action, plaintiff establishes a *prima facie* right to foreclose by producing the mortgage, the assignment, if any, the unpaid note and evidence of default (*see CitiFinancial Co. (DE) v. McKinney*, 27 AD3d 224 [1st Dept. 2006]; *LPP Mortgage, Ltd v. Card Corp.*, 17 AD3d 103 [1st Dept], *lv app den*, 6 NY3d 702 [2005]); *Hypo Holdings, Inc v. Chalasani*, 280 AD2d 386 [1st Dept], *lv app den* 96 NY2d 717 [2001]). Once plaintiff satisfies that burden, it is incumbent on the party opposing foreclosure to come forward with evidence sufficient to raise a triable issue of fact as to a bona fide defense such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff (*see Nassau Trust Co. v. Montrose Concrete Products Corp.*, 56 NY2d 175, *reargmt den* 57 NY2d 674 [1982]; *CitiFinancial Co. (DE) v. McKinney*, *supra*; *Mahopac National Bank v. Baisley*, 244 AD2d 466 [2nd Dept 1997], *lv app dismiss* 91 NY2d 1003 [1998]).

Here, plaintiff admittedly does not have physical possession of the subject mortgage. Indeed, the original mortgage dated October 25, 2004 and the Consolidation, Extension and Modification Agreement dated October 25, 2004, were not recorded in the Office of the City Register of the City of New York, New York County, or Recorder. Moreover, plaintiff believes that the mortgage dated October 25, 2004 and the Consolidation, Extension and Modification Agreement dated October 25, 2004 have been lost and/or inadvertently destroyed. Nevertheless, if one who is deemed to be “[t]he holder of the note” then one is also deemed to be “the owner of the underlying mortgage loan with standing to foreclose” (*Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 362 [2015]). Indeed, “[t]he note and not the mortgage, is the dispositive instrument that conveys standing to foreclose under New York law” (*Deutsche Bank Natl. Trust Co. v Monica*, 131 AD3d 737, 738 [3d Dept 2015]). The mortgage passes incident to the note (*JPMorgan Chase Bank, N.A. v Weinberger*, 142 AD3d 643, 644-45 [2d Dept 2016] citing *Aurora Loan Servs., LLC v Taylor*, 25 NY3d at 361, *supra*).

In this case, plaintiff was the holder of the note when it commenced this action, and therefore has standing to pursue the instant relief sought. The term “‘holder’ means the person in possession of a negotiable tangible document of title if the goods are deliverable either to bearer or to the order of the person in possession” (UCC § 1-201[b] [21]). The term “bearer” means “a person in possession of a negotiable instrument, document of title, or certificated security that is payable to bearer or indorsed in blank” (UCC § 1-201 [b] [5]). The term “person” means “an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity” (UCC § 1-201 [b] [27]). In accordance with the definition of those terms, when it filed the lawsuit, plaintiff was in possession of the original note. “[W]here the note is affixed to the complaint, it is unnecessary to give factual details of the delivery in order to

establish that possession was obtained prior to a particular date (*Deutsche Bank Natl. Trust Co. v Logan*, 146 AD3d 861 [2nd Dept 2017]). In the instant action, plaintiff's attachment of the certified note to the complaint filed at the commencement of this action, together with plaintiff's affidavit in support of the instant motion, provide requisite proof of plaintiff's possession of the note at the time of the commencement of this action.

In addition, plaintiff is the original payee on the note, and the record is devoid of any evidence of a transfer from origination of the loan until commencement of this action. Defendant has failed to proffer credible evidence suggesting otherwise. After the origination of the loan and defendant's default, plaintiff commenced this action on November 14, 2016. At the time, the complaint bore plaintiff's name and included original loan documents bearing plaintiff's name as lender. As the original payee and holder of the note at the time it commenced this action, plaintiff has standing to pursue the relief requested herein (*Aurora Loan Servs. v. Taylor*, 25 NY3d at 362, *supra*). Indeed, when a plaintiff demonstrates that upon commencement of the action it possessed a note, indorsed in blank, by way of physical delivery, New York has consistently found a plaintiff to have sufficient interest in the enforcement of the debt to support standing in a foreclosure action (*see, e.g., Aurora Loan Servs. v. Taylor*, 25 NY3d at 361-62, *supra*). Accordingly, this court finds that plaintiff has sufficiently established its *prima facie* entitlement to judgment as a matter of law by uncontested proof of the note, and defendant's default. Nowhere in defendant's opposition does defendant deny executing the note and mortgage or defendant's default thereunder. Moreover, to rebut plaintiff's *prima facie* showing, defendant has failed to come forward with evidence sufficient to raise a triable issue of fact as to a bona fide defense such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff (*see Nassau Trust Co. v. Montrose Concrete Products Corp.*, 56 NY2d 175, *supra*).

The court has considered defendant's remaining arguments in opposition to plaintiff's motion, and finds them unpersuasive. As such, based on the foregoing, plaintiff's motion is granted, and plaintiff is entitled to summary judgment, amendment of the caption, dismissal of the answer and the appointment of a Referee to compute. Considering this conclusion, defendant is not entitled to dismissal on account of plaintiff's alleged want of standing.

Accordingly, upon the affidavit in support of summary judgment submitted on behalf of plaintiff setting forth the facts which entitle plaintiff to the relief prayed for and plaintiff's memorandum of law in support of summary judgment, and upon proof of compliance with all statutory conditions precedent to a foreclosure action, and it appearing to the satisfaction of this court from said documents that this action was brought to foreclose a mortgage on real property located in the County of New York, State of New York, that the entire unpaid balance secured thereby is due and owing, it is hereby

ORDERED, that defendants Wells Fargo Bank, N.A. as successor by merger to Wells Fargo Financial Bank, Board of Managers of the Ile St. Louis Condominium, Board of Managers of the Port Liberte II Condominium Association Inc., New York City Environmental Control Board, City Register of the City of New York, New York County and Bone Tierra Real Estate have not appeared or answered in this matter and are deemed in default; and it is further

ORDERED that summary judgment is granted in favor of plaintiff; that the affirmative defenses asserted in defendant's answer are dismissed; and it is further

ORDERED, that this action be and the same hereby is referred to Robert Finkelstein, Esq., with an address of 99 Hudson Street Floor 5, New York, NY 10013 (212) 964-8700 who is hereby appointed Referee to ascertain and compute the amount due except for attorney's fees upon the bond/note and mortgage being foreclosed in this action, and to determine whether the mortgaged

premises can be sold in parcels and the Referee to report to the Court with all convenient speed; and it is further;

ORDERED, that, if required, the Referee take testimony pursuant to RPAPL §1321, and it is further

ORDERED, that by accepting this appointment the Referee certifies that he/ is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to 36.2 (c) ("Disqualifications from appointment"), and 36.2 (d) ("Limitations on appointments based upon compensation"); and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge, and it is further

ORDERED, that pursuant to CPLR § 8003(a)(the statutory fee of \$50.00)(in the discretion of the Court, a fee of \$250.00), shall be paid to the Referee for the computation stage and upon the filing of his report; and it is further

ORDERED, that the Referee is prohibited from accepting or retaining any funds for him/herself or paying funds to him/herself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED, that the name of Bone Tierra Real Estate be substituted in the caption of this action in place of "John Doe" and that the caption be amended to reflect this substitution; and it is further

ORDERED, that the caption be amended to reflect the plaintiff as Wells Fargo USA Holdings, Inc.; and it is further

ORDERED, that Plaintiff is declared holder of a valid and equitable mortgage on the property in the principal amount of \$458,366.10, plus interest and other charges; and it is further

ORDERED, that, upon presentation of a certified copy of the Order of this Court, and upon payment of the customary and usual fees, the Office of the City Register of the City of New York, New York County be directed to record a certified copy of the Order of this Court in the land records evidencing such lien; and it is further

ORDERED, that all defendants, and every person or entity claiming under them by title accruing after the filing of the judgment roll, or of the Notice of Pendency of this action, as prescribed by law, be and hereby are forever barred and precluded from asserting such claim, the invalidity of which is established in this action, to an estate or interest in the subject premises, of any kind or nature whatsoever; and it is further

ORDERED, that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

WELLS FARGO USA HOLDINGS, INC.

INDEX No: 850218/2016

Plaintiff,

vs.

MORTGAGES PREMISES
245 EAST 50TH STREET 4A
NEW YORK, NY 10022

CORAZON TAMARGO-RIVERA, WELLS FARGO BANK, N.A. AS SUCCESSOR BY MERGER TO WELLS FARGO FINANCIAL BANK, UNITED STATES OF AMERICA ACTING THROUGH THE IRS BOARD OF MANAGERS OF THE ILE ST. LOUIS CONDOMINIUM, BOARD OF MANAGERS OF THE PORT LIBERTE II CONDUMINIUM ASSOCIATION INC., NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, CITY REGISTER OF THE CITY OF NEW YORK, NEW YORK COUNTY, BONE TIERRA REAL ESTATE,

BL#: 1324-1006

Defendants

; and it is further

ORDERED, that a copy of this Order shall be served upon any party entitled thereto

; and it is further

ORDERED, that plaintiff's counsel will serve a conformed copy of this Order upon the Trial Support Office and County Clerk for amendment of court records

; and it is further

ORDERED that the parties are directed to appear for a status conference on March 26, 2019 in Part 10 located at 111 Centre Street, Room 1227, at 9:30 AM to report the status of compliance with this order.

The foregoing constitutes the decision and order of the court.

DATE: January 8, 2019

ENTER:

George J. Silver

GEORGE J. SILVER