

Sterling Natl. Bank v Vacalopoulos
2019 NY Slip Op 33983(U)
October 29, 2019
Supreme Court, Rockland County
Docket Number: 030877/2016
Judge: Robert M. Berliner
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Foreclosure Court - Part 3
At an _____ of the Supreme Court of the State
of New York, held in and for the County of
Rockland at the Courthouse thereof, Supreme
Court Building, 1 South Main St, New City,
NY on the 29 day of October
2019.

PRESENT: Hon. Robert M. Berliner

~~Hon. Honorable Paul I. Marx~~

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STERLING NATIONAL BANK FORMERLY KNOWN AS
PROVIDENT BANK FORMERLY KNOWN AS
PROVIDENT SAVINGS

Index No: 030877/2016

Plaintiff.

-against-

STEVEN VACALOPOULOS, if living, and if dead, the
respective heirs at law, next of kin, distributees, executors,
administrators, trustees, devisees, legatees, assignors, lienors,
creditors and successors in interest and generally all persons
having or claiming under, by or through said defendant who
may be deceased, by purchase, inheritance, lien or otherwise
of any right, title or interest in and to the premises described in
the complaint herein, and their respective husbands, wives or
widow, if any, and each and every person not specifically
named who may be entitled to or claim to have any right, title
or interest in the property described in the verified complaint;
all of whom and whose names and places of residence
unknown, and cannot after diligent inquiry be ascertained by
the Plaintiff, RUSHMORE RECOVERIES VIII, LLC,
COUNTY OF ROCKLAND AND PATRICIA SCHNABEL
RUPERT, DO., FAAP AS COMMISSIONER OF HEALTH
OF THE ROCKLAND COUNTY DEPARTMENT OF
HEALTH, NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE, UNITED STATES OF
AMERICA, INTERNAL REVENUE SERVICES
and "JOHN DOE #1" to "JOHN DOE #10," the last 10 names
being fictitious and unknown to plaintiff, the persons or parties
intended being the persons or parties, if any, having or
claiming an interest in or lien upon the mortgaged premises
described in the verified complaint,

ORDER OF REFERENCE

Motion Seq. No. 4

Defendants.

X

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The following papers were read on plaintiff's unopposed motion for an Order granting default judgment, amending the caption, and an Order of Reference:

Notice of Motion, Affirmation of José O. Hasbún, Esq., Exhibits A-G; Affidavit of Teresa Magana, Exhibits A-O, Proposed Order

Upon the foregoing papers, the motion is determined as follows:

HISTORY

Plaintiff contends that on February 10, 1988, Steve Vacalopoulos borrowed \$76,950 and executed a note and mortgage from Provident Savings, concerning the real property located at 182 G Kearsing Pkwy, Monsey, New York 10952. (Exhibit B, NYSCEF Doc. 99).

Plaintiff commenced this residential foreclosure action by Summons and Complaint filed on March 15, 2016 (NYSCEF Doc. 1). Plaintiff alleged that Mr. Vacalopoulos defaulted starting June 1, 2012. Through counsel, on April 4, 2016, defendants County of Rockland and Patricia Schnabel Rupert, DO, FAAP as Commissioner of Health of the Rockland County Department of Health appeared. (Exhibit N, NYSCEF Doc. 111).

By Order of the Court (Marx, J.) dated January 16, 2018 (Exhibit G, NYSCEF Doc. 104), a *Guardian Ad Litem* was appointed, and plaintiff was permitted to serve via publication, file an amended notice of pendency, supplemental summons and amended complaint

By Order of the Court (Marx, J.) dated October 9, 2018 (Exhibit O, NYSCEF Doc. 112), plaintiff's motion for default judgment and an Order of Reference was denied. The Court determined that plaintiff's lost note affidavit was insufficient.

By Order of the Court (Marx, J.) dated June 13, 2019 (Exhibit O, NYSCEF Doc. 112), plaintiff's motion for default judgment and an Order of Reference was denied. The Court determined that plaintiff did not prove proper service on the New York State Department of Taxation and Finance with the supplemental summons, amended complaint and certificate of merit.

DISCUSSION

A. AMENDING CAPTION

Plaintiff's motion to strike John Doe #1 to John Doe #10 is granted. Plaintiff's motion to amend defendant's name to Sonia B. Carnage, Esq., As Guardian ad Litem and Military Attorney on behalf of Steven Vacalopoulos is granted. Further plaintiff's motion to amend its name in the caption is granted.

B. DEFAULT JUDGMENT AND ORDER OF REFERENCE

Plaintiff now moves unopposed for default judgment, amendment of the caption and an Order of Reference. 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 Nationstar Mtge., LLC v. Medley, 168 A.D.3d 959 (2nd Dept 2017).

In support, plaintiff provides a lost note affidavit from John Marchese, Assistant Vice President of Sterling National Bank (Exhibit A, NYSCEF Doc. 98), who attests that plaintiff is the record owner of the note and it has been lost. In pertinent part, Mr. Marchese further attests that plaintiff “made a diligent and extensive search of its records”, without success.

Plaintiff also provided an affidavit from Teresa Magana, Authorized Signer of Sterling National Bank (NYSCEF Doc. 97). Ms. Magana attests that the prior lost note affiant (NYSCEF Doc. 62) affirmed the note was attached, and plaintiff’s lost note procedures were followed, and plaintiff was the holder of the Note. However, as the Court already indicated in its October 9, 2018 decision, none of this information was provided within the prior affidavit (NYSCEF Doc. 112). Further, the Court notes that plaintiff’s affidavit is silent as to its strict compliance with RPAPL §1304, a necessary condition precedent.

The Appellate Division, Second Department held that “[p]ursuant to UCC 3-804, which is intended to provide a method of recovery on instruments that are lost, destroyed, or stolen, a plaintiff is required to submit due proof of [the plaintiff’s] ownership, the facts which prevent [its] production of [the note,] and its terms. Here, the Supreme Court properly concluded that, although the plaintiff was unable to produce the note, a copy of the note submitted by the plaintiff provided sufficient evidence of its terms.” Deutsche Bank Natl. Tr. Co. v. Anderson, 161 A.D.3d 1043 (2d Dept 2018). The court further explained that to prove ownership, Plaintiff must provide when the Plaintiff, loan servicer or its agent acquired ownership of the note or acquired physical possession of the note. Additionally, Plaintiff must “provide sufficient facts as to when the search for the note occurred, who conducted the search, the steps taken in the search for the note, or when or how the note was lost.” Id.

The Court finds that plaintiff’s submissions are insufficient to prove standing and thus its *prima facie* entitlement to summary judgment. Plaintiff’s proffered affidavits do not indicate approximately when the note was lost or the details of the search. Therefore, the lost note affidavit is insufficient to establish standing.

“It is well settled that an action to foreclose a mortgage is equitable in nature and triggers the equitable powers of this Court” PHH Mortgage Corp. v. Hepburn, 128 A.D.3d 659, 661 (2nd Dept 2015). “Once equity is invoked, this Court’s power is as broad as equity and justice require” Id. In the interim, lest defendants be required wrongly to bear the burden of the litigation delay associated with plaintiff’s third attempt herein, and because plaintiff is being given an additional opportunity to file for an Order of Reference, interest will be tolled *nunc pro tunc* from August 30, 2019, the date of the filing of plaintiff’s instant motion, until further order of this Court.

Accordingly, it is hereby

ORDERED that plaintiff’s motion to amend its name in the caption is granted; and it is further

ORDERED that plaintiff's motion to amend Defendant's name to Sonia B. Crannage, Esq., as Guardian Ad Litem and Military Attorney for Steven Vacalopoulos is granted; and it is further

ORDERED that plaintiff's motion to strike "JOHN DOE #1" to "JOHN DOE #10" is granted; and it is further

ORDERED that the caption is amended to read as follows:

SUPREME COURT: STATE OF NEW YORK
FORECLOSURE COURT, COUNTY OF ROCKLAND

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STERLING NATIONAL BANK FKA PROVIDENT
BANK FKA PROVIDENT SAVINGS BANK, F.A. FKA
PROVIDENT SAVINGS, A FEDERAL SAVINGS AND
LOAN ASSOCIATION,

Plaintiff,

Index Number: 030877/2016

-against-

SONIA B. CARNNAGE, ESQ., AS GUARDIAN AD
LITEM AND MILITARY ATTORNEY ON BEHLAF OF
STEVEN VACALOPOULOS, STEVEN
VACALOPOULOS, if living, and if dead, the respective
heirs at law, next of kin, distributees, executors,
administrators, trustees, devisees, legatees, assignors,
lienors, creditors and successors in interest and generally all
persons having or claiming under, by or through said
defendant who may be deceased, by purchase, inheritance,
lien or otherwise of any right, title or interest in and to the
premises described in the complaint herein, and their
respective husbands, wives or window, if any, and each and
every person not specifically named who may be entitled to
or claim to have any right, title or interest in the property
described in the verified complaint; all of whom and whose
names and places of residence unknown, and cannot after
diligent inquiry be ascertained by the Plaintiff
RUSHMORE RECOVERIES VII, LLC, COUNTY OF
ROCKLAND AND PATRICIA SCHNABEL RUPERT,
DO., FAAP AS COMMISIONER OF HEALTH OF THE
ROCKALND COUNTY DEPARTMENT OF HEALTH,
NEW YORK STATE DEPARTMENT OF TAXATION
AND FINANCE,
UNITED STATES OF AMERICA, INTERNAL
REVENUE SERVICES,

Defendants.

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and it is further

ORDERED that plaintiff's motion for default judgment and an Order of Reference is

denied, with leave to renew within ninety (90) days; and it is further

ORDERED that interest be tolled *nunc pro tunc* from August 30, 2019, until further Order of this Court; and it is further;

ORDERED that within 10 days of the date of entry hereof the plaintiff shall serve a copy of this Decision and Order, with notice of entry, upon all parties, each owner of the equity of redemption, any tenants named in the action, the Referee appointed herein, and any other party entitled to notice; and by such date shall upload to NYSCEF an affirmation of such service; and it is further

ORDERED that counsel shall appear in the Foreclosure Court – Mandatory Appearance Part, Courtroom 3 of this Courthouse, at 2:00 p.m. on February 4, 2020, for a status conference consistent herewith.

Dated: New City, New York
October 29, 2019


HON. ROBERT M. BERLINER, J.S.C.
Justice, Foreclosure Court