Samet v Countrywide Home Loans, Inc.
2020 NY Slip Op 30659(U)
February 26, 2020
Supreme Court, Kings County
Docket Number: 514689/17
Judge: Peter P. Sweeney

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
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JACOB SAMET, MAX H. SAMET and EDITH SAMET

Plaintiff,

-against-

COUNTRYWIDE HOME LOANS, INC. and WILMINGTON TRUST, NA NOT IN ITS INDIVIDUAL CAPACITY BUT AS TRUSTEE OF ARLP SECURITIZATION TRUST, SERIES 2014-1,

Defendants.

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Index No.: 514689/17
Motion Date: 2-3-20
Mot. Cal. No.:39

DECISION/ORDER

The following papers numbered 1 to 3 were read on this motion:

Papers:	**Numbered:**
Notice of Motion/Order to Show Cause Affidavits/Affirmations/Exhibits/Memos of Law.....	1
Answering Affirmations/Affidavits/Exhibits/Memos of Law.....	2
Reply Affirmations/Affidavits/Exhibits/Memos of Law.....	3
Other.....	

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

In this action pursuant to RPAPL § 1501(4) to discharge a mortgage on real property located at 266 Penn Street, Brooklyn, New York, the defendant, WILMINGTON TRUST, NA NOT IN ITS INDIVIDUAL CAPACITY BUT AS TRUSTEE OF ARLP SECURITIZATION TRUST, SERIES 2014-1 ("Wilmington"), moves for an order pursuant to CPLR § 3212 granting it summary judgment dismissing plaintiff's complaint.

MS #02
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Background:

The plaintiff, JACOB SAMET, secured a loan from Fairmont Funding, LTD ("Fairmont") in the amount of $531,900.00 for the purpose of purchasing real property located at 266 Penn Street, Brooklyn, New York. On July 28, 2005, he executed a Note agreeing to repay the loan by making monthly installment payments to Fairmont in the amount of $3,061.92 from October 1, 2005 to September 1, 2035. On that the same day, as security for the repayment of the loan, Jacob Samet and Max H. Samet gave Fairmont a mortgage ("the mortgage") on the property. In the mortgage agreement, Fairmont appointed Mortgage Electronic Registration Systems, Inc. ("MERS") as its nominee for the purpose of recording the mortgage and designated MERS to be the mortgagee of record.

On August 19, 2008, MERS commenced a foreclosure action against the plaintiffs Jacob Samet, Max H. Samet and Edith Samet seeking to foreclose the mortgage. By order dated December 18, 2013, the action was dismissed. To date, no other action has been commenced to foreclose the mortgage.

Plaintiffs commenced this action claiming that the mortgage should be discharged pursuant to RPAPL § 1501(4) because any action commenced in the future to foreclose the mortgage would be time barred pursuant to the six year statute of limitations applicable to foreclosure actions set forth in CPLR § 213[4]. Plaintiffs maintain that the commencement of the foreclosure action on August 19, 2008 accelerated the Note and that since more than six years have elapsed since then, any future action to foreclose the mortgage would be untimely.

Defendant Wilmington, the current holder of the Note, now seeks summary

judgment dismissing the action claiming that since MERS lacked standing to commence the foreclosure action, the Note was never accelerated and that it still has the legal right to commence a foreclosure action based on any defaults under the Note that have may occur in the six year period prior to the commencement of any new action.

Analysis:

"RPAPL 1501(4) provides that '[w]here the period allowed by the applicable statute of limitation for the commencement of an action to foreclose a mortgage ... has expired,' any person with an estate or interest in the property may maintain an action 'to secure the cancellation and discharge of record of such encumbrance, and to adjudge the estate or interest of the plaintiff in such real property to be free therefrom' " (*NMNT Realty Corp. v. Knoxville 2012 Trust,* 151 A.D.3d 1068, 1069, 58 N.Y.S.3d 118, quoting RPAPL 1501[4]). Actions to foreclose a mortgage are governed by the six-year Statute of Limitations (*see* CPLR § 213[4]) which begins to run six years from the due date of each unpaid installment or the time the mortgagee is entitled to demand full payment, or when the mortgage has been accelerated by a demand or by the commencement of an action (*see, Serapilio v. Staszak,* 255 A.D.2d 824, 680 N.Y.S.2d 296; *Loiacono v. Goldberg,* 240 A.D.2d 476, 477, 658 N.Y.S.2d 138; *Pagano v. Smith,* 201 A.D.2d 632, 63 608 N.Y.S.2d 268). An acceleration of mortgaged debt by the commencement of an action is only valid, however, if the party who commenced the action had standing (*see Deutsche Bank Natl. Trust Co. v. Board of Mgrs. of the E. 86th St. Condominium*, 162 A.D.3d 547, 75 N.Y.S.3d 424; [purported acceleration of mortgage by plaintiff lacking standing was a nullity and did not trigger statute of limitations]; *Wells Fargo Bank N.A. v. Burke*, 94 A.D.3d 980, 982–983,

943 N.Y.S.2d 540 [since plaintiff's predecessor lacked standing to commence the prior foreclosure action, commencement of that action did not operate to validly accelerate the debt]). Wilmington contends that since MERS lacked standing, the Note was never accelerated when the foreclosure action was commenced on August 19, 2008. Wilmington further contends that as the current holder of the Note, it is legally entitled to commence a foreclosure action based on any unpaid installments which were or may become due during the six-year period immediately preceding the commencement of a new action (*see generally Lavin* v *Elmakiss,* 302 AD2d 638 [2003]; *Loiacono v Goldberg,* 240 AD2d 476). In this case, there will be installments due on the Note up until September 1, 2035.

The proponent of a motion for summary judgment has the initial burden of making a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient proof eliminating any material issues of fact (see, *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404). If the proponent meets this burden, the burden shifts to any party opposing the motion to come forward with proof in admissible form raising a triable issue of fact (*see Alvarez v. Prospect Hosp.,* 68 N.Y.2d 320, 324; *Zuckerman,* 49 N.Y.2d at 562; *Friends of Animals v. Associated Fur Mfrs.,* 46 N.Y.2d at 1068). If the proponent fails to meet its initial burden, the Court must deny the motion regardless of the sufficiency of the opposition papers (*see Winegrad,* 64 N.Y.2d at 853; *New York & Presbyt. Hosp. v. Allstate Ins. Co.,* 29 A.D.3d 547). The determinative issue on this motion is whether Wilmington met its burden of demonstrating as a matter of law that MERS lacked standing to commence the foreclosure action on August 19, 2008.

A plaintiff has standing in a mortgage foreclosure action when it is the holder or assignee of the underlying note at the time the action is commenced (*see Aurora Loan Servs., LLC v. Taylor,* 25 N.Y.3d at 361, 12 N.Y.S.3d 612, 34 N.E.3d 363; *Deutsche Bank Natl. Trust Co. v. Brewton,* 142 A.D.3d at 684, 37 N.Y.S.3d 25). "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 A.D.3d 752, 754, 890 N.Y.S.2d 578; *see Aurora Loan Servs., LLC v. Taylor,* 25 N.Y.3d at 361–362, 12 N.Y.S.3d 612, 34 N.E.3d 363; *Dyer Trust 2012–1 v. Global World Realty, Inc.,* 140 A.D.3d 827, 828, 33 N.Y.S.3d 414). While the mortgage agreement executed on August 19, 2008 contains language to the effect that Fairmont appointed MERS as its nominee for the purpose of recording the mortgage and refers to MERS as the mortgagee of record, in seminal case of *Bank of New York v. Silverberg*, 86 A.D.3d 274, 282, 926 N.Y.S.2d 532, 539, that Court of Appeals held that such language is insufficient to demonstrate that MERS had standing to commence a foreclosure action on behalf of the lender. Notwithstanding the above, if MERS was in possession of the Note when the action was commenced, MERS would have had the requisite standing to commence the action (*Mortgage Elec. Registration Sys., Inc. v. Coakley*, 41 A.D.3d 674, 838 N.Y.S.2d 622). Thus, to prevail on its motion, Wilmington had the burden of demonstrating that MERS was not in possession of the note when the foreclosure action was commenced. Wilmington did not meet this burden.

Wilmington attempted to establish that MERS was not in possession of the Note on

August 19, 2008 by submitting the affidavit of Nicole Williams, an Assistant Vice President of Bank of America, N.A. (BANA), who averred that on September 1, 2005, the original wet ink Note was delivered to and accepted by ReconTrust Company, N.A., as document custodian for Countrywide Home Loans, and that this entity maintained possession of the Note until February24, 2014, at which time was transferred to Ocwen Loan Servicing, LLC. Ms. Williams' affidavit, however, was based on her review of BANA's business records. She did not, however, submit copies of the BANA business records that she reviewed. "[T]he business record exception to the hearsay rule applies to a 'writing or record' (CPLR 4518[a]) ... [and] it is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted" (*Bank of N.Y. Mellon v. Gordon*, 171 A.D.3d 197, 205, 97 N.Y.S.3d 286 [citation omitted]; *cf.* 9 Weinstein–Korn–Miller, N.Y. Civ. Prac. CPLR 4518.20; *see generally Great Am. Ins. Co. v. Auto Mkt. of Jamaica, N.Y.*, 133 A.D.3d 631, 632–633, 19 N.Y.S.3d 329; 35 Carmody–Wait 2d § 194:94). "While a witness may read into the record from the contents of a document which has been admitted into evidence (*see HSBC Bank USA, N.A. v. Ozcan*, 154 A.D.3d 822, 826–827, 64 N.Y.S.3d 38), a witness's description of a document not admitted into evidence is hearsay" (*U.S. Bank N.A. v. 22 S. Madison, LLC*, 170 A.D.3d 772, 774, 95 N.Y.S.3d 264; *see Bank of N.Y. Mellon v. Gordon*, 171 A.D.3d 197, 97 N.Y.S.3d 286; *Great Am. Ins. Co. v. Auto Mkt. of Jamaica, N.Y.*, 133 A.D.3d at 632–633, 19 N.Y.S.3d 329; *People v. Barnes*, 177 A.D.2d 989, 578 N.Y.S.2d 9). Thus, Williams' assertions as to the contents of the BANA business records were "inadmissible hearsay to the extent that the records [she] purport[ed] to describe were not submitted with [her]

affidavit" (*U.S. Bank N.A. v. 22 S. Madison, LLC*, 170 A.D.3d at 774, 95 N.Y.S.3d 264, *see also JPMorgan Chase Bank, Nat'l Ass'n v. Grennan*, 175 A.D.3d 1513, 1516–17, 109 N.Y.S.3d 436, 441). Accordingly, her assertion that Countrywide Home Loans and not MERS was in a possession of the Note when the foreclosure action was commenced on August 18, 2008 is hearsay.

In sum, Wilmington did not demonstrate as a matter of law that MERS lacked standing to commence the foreclosure action. Wilmington's motion for summary judgment must therefore be denied regardless of the sufficiency of the plaintiffs' opposing papers (*see Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d at 853, 487 N.Y.S.2d 316, 476 N.E.2d 642).

Accordingly, it is hereby

ORDERED that defendant Wilmington's motion for summary judgment is **DENIED.**

This constitutes the decision and order of the Court.

Dated: February 26, 2020

KINGS COUNTY CLERK
FILED
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PETER P. SWEENEY, J.S.C.

Hon. Peter P. Sweeney, J.S.C.