

Metlife Home Loans v Pfeffer
2020 NY Slip Op 33011(U)
September 11, 2020
Supreme Court, Suffolk County
Docket Number: 9987/2012
Judge: Howard H. Heckman, Jr.
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SUPREME COURT - STATE OF NEW YORK
IAS PART 18 - SUFFOLK COUNTY

PRESENT:

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

INDEX NO.: 9987/2012
MOTION DATE: 9-11-2020
MOTION SEQ. NO.: #003 MG

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METLIFE HOME LOANS,

Plaintiff,

PLAINTIFF'S ATTORNEY:
RAS BORISKIN, LLC
900 MERCHANTS CONCOURSE
WESTBURY, NY 11590

-against-

STEVEN PFEFFER, et al.,

Defendants.

DEFENDANTS' ATTORNEY:
RAND P. SCHWARTZ, ESQ.
1000 PARK BOULEVARD #205
MASSAPEQUA PARK, NY 11762

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Upon the following papers numbered 1 to 20 read on this motion 1-13 ; Notice of Motion/ Order to Show Cause and supporting papers ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 14-18 ; Replying Affidavits and supporting papers 19-20 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff Metlife Home Loans, A Division of Metlife Bank, N.A. seeking an order: 1) granting summary judgment striking the answer asserted by defendants Steven Pfeffer as Heir at Law and Next of Kin of Morton Pfeffer and Wendy Pfeffer as Heir at Law and Next of Kin of Morton Pfeffer; 2) substituting Nationstar Mortgage d/b/a Champion Mortgage Company as the named party plaintiff in place and stead of Metlife Home Loans, A Division of Metlife Bank, N.A.; 3) discontinuing the action against defendants designated as "John Does" and "Jane Does"; 4) deeming all appearing and non-appearing defendants in default; 5) amending the caption; and 6) 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 home equity conversion (reverse) mortgage in the maximum principal sum of \$938,250.00 executed by Morton Pfeffer on March 27, 2009 in favor of WCS Lending LLC . On the same date the mortgagors/borrower executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. The reverse mortgage and note were assigned to Metlife Home Loans, A Division of Metlife Bank, N.A. by assignment dated March 31, 2009. The mortgagor/borrower Morton Pfeffer died on January 30, 2011 and as a result the plaintiff declared a default under the terms of the reverse mortgage. Plaintiff commenced this action by filing a summons, complaint and notice of pendency in the Suffolk County Clerk's Office on April 30, 2012. Defendants Steven Pfeffer and Wendy Pfeffer as Heir at

Law and Next of Kin of the decedent/mortgagor served an answer dated May 23, 2012 asserting four (4) affirmative defenses. By assignment dated February 8, 2013 the reverse mortgage and note were assigned to Nationstar Mortgage d/b/a Champion Mortgage Company.

Plaintiff's motion seeks an order granting summary judgment, substituting the named party plaintiff, amending the caption, and for the appointment of a referee to compute the sums due and owing to the mortgage lender. In opposition, defendants claim that plaintiff has failed to submit sufficient admissible evidence to prove it has standing to maintain this action. Defendants do not contest any other issue with respect to this action either relating to the default under the terms of the note and mortgage or relating to any of their remaining three affirmative defenses.

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. Erobo*, 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. Mandrin*, 160 AD3d 1014 (2nd Dept., 2018) *Tribeca Lending Corp. v. Lawson*, 159 AD3d 936 (2nd Dept., 2018); *Deutsche Bank National Trust Co. v. Iarrobino*, 159 AD3d 670 (2nd Dept., 2018); *Central Mortgage Company v. Davis*, 149 AD3d 898 (2nd Dept., 2017); *U.S. Bank, N.A. v. Ehrenfeld*, 144 AD3d 893, 41 NYS3d 269 (2nd Dept., 2016); *JPMorgan Chase Bank v. Weinberger*, 142 AD3d 643, 37 NYS3d 286 (2nd Dept., 2016); *CitiMortgage, Inc. v. Klein*, 140 AD3d 913, 33 NYS3d 432 (2nd Dept., 2016); *U.S. Bank, N.A. v. Godwin*, 137 AD3d 1260, 28 NYS3d 450 (2nd Dept., 2016); *Wells Fargo Bank, N.A. v. Joseph*, 137 AD3d 896, 26 NYS3d 583 (2nd Dept., 2016); *Emigrant Bank v. Larizza, supra.*; *Deutsche Bank National Trust Co. v. Whalen*, 107 AD3d 931, 969 NYS2d 82 (2nd Dept., 2013); *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

note to its complaint or to the certificate of merit required pursuant to CPLR 3012(b), has been held to constitute due proof of the plaintiff's standing to prosecute its claims for foreclosure and sale (*Nationstar Mortgage, LLC v. LaPorte*, 162 AD3d 784, 75 NYS3d 432 (2nd Dept., 2018); *Bank of New York Mellon v. Theobalds*, 161 AD3d 1137 (2nd Dept., 2018); *HSBC Bank USA, N.A. v. Oscar*, 161 AD3d 1055, 78 NYS3d 428 (2nd Dept., 2018); *CitiMortgage, Inc. v. McKenzie*, 161 AD3d 1040, 78 NYS3d 200 (2nd Dept., 2018); *U.S. Bank, N.A. v. Duthie*, 161 AD3d 809, 76 NYS3d 226 (2nd Dept., 2018); *Bank of New York Mellon v. Genova*, 159 AD3d 1009, 74 NYS3d 64 (2nd Dept., 2018); *Mariners Atl. Portfolio, LLC v. Hector*, 159 AD3d 686, 69 NYS3d 502 (2nd Dept., 2018); *Bank of New York Mellon v. Burke*, 155 AD3d 932, 64 NYS3d 114 (2nd Dept., 2017); *JPMorgan Chase Bank, N.A. v. Weinberger*, 142 AD3d 643, 37 NYS3d 286 (2nd Dept., 2016); *FNMA 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*, 127 AD3d 1151, 9 NYS3d 315 (2nd Dept., 2015)).

At issue is whether the evidence submitted by the plaintiff is sufficient to establish its right to foreclose. The defendants do not contest the default under the terms of the reverse mortgage as a result of the borrower's death. Rather, the only issue raised by the defendants concern whether the proof submitted by the mortgage lender provides sufficient admissible evidence to prove the lender's standing to maintain and to prosecute this action.

With respect to the issue of standing, there are generally three methods of proving the mortgage lender's standing to prosecute a mortgage foreclosure action. The method most frequently recited is proof of the lender's physical possession of a promissory note either indorsed or with an attached allonge(s) which is either indorsed in blank or indorsed to the plaintiff who is commencing the action (*Aurora Loan Services LLC v. Taylor, supra.*; *Deutsche Bank National Trust Company v. Gordon*, 181 AD3d 645, 120 NYS3d 366 (2nd Dept., 2019); *U.S. Bank, N.A. v. Wiener*, 171 AD3d 1241, 99 NYS3d 51 (2nd Dept., 2019); *Wells Fargo Bank, N.A. v. Parker, supra.*)) The second method most often recited in case law is the plaintiff's attachment of a copy of the indorsed in blank promissory note to the filed complaint, together with submission of a certificate of merit (*HSBC Bank USA v. Olivier*, 179 AD3d 648, 113 NYS3d 590 (2nd Dept. 2020); *U.S. Bank, N.A. v. Nathan*, 173 AD3d 1112, 104 NYS3d 144 (2nd Dept., 2019); *U.S. Bank, N.A. v. Fisher*, 169 AD3d 1089, 95 NYS3d 114 (2nd Dept., 2019); *Wells Fargo Bank, N.A. v. Frankson*, 157 AD3d 844, 66 NYS3d 529 (2nd Dept. 2018)). While these two methods of proof are the most frequently recited as evidence of standing, the third method of proving standing is the submission of documentary proof of the assignment of the mortgage and note to the plaintiff prior to the commencement of the foreclosure action. The proof required to establish standing by this method consists of a review of the language set forth in the assignment to determine whether the assignment was clearly intended to transfer the entire assignor's beneficial interest in the mortgage as well as the underlying indebtedness since the assignment of a mortgage without an effective assignment of the underlying note is a nullity (*see U.S. Bank, N.A. v. Collymore*, 68 AD3d 752, 890 NYS2d 578 (2nd Dept., 2009) *citing Merritt v. Bartholick*, 9 Tiffany 44, 36 NY 44 (1867) & *Kluge v. Fugazy*, 145 AD2d 537, 536 NYS2d 92 (2nd Dept., 1988)).

The March 31, 2009 assignment in this case provides for the transfer of the mortgage...:

“TOGETHER with the note or notes therein described or referred to, the money due and to become due thereon with interest, and all rights accrued or to accrue

under said Deed of Trust.”

A fair reading of the language contained in the assignment evidences a clear intent to transfer the assignor’s entire interest in the mortgage including the mortgagor/decedent’s underlying indebtedness. Based upon the submission of this documentary evidence, together with the mortgage and promissory note, plaintiff has established its standing to maintain this action (*see Bank of New York Mellon Trust Company v. Sukhu*, 163 AD3d 748, 83 NYS3d 70 (2nd Dept., 2018); *Wells Fargo Bank, N.A. v. Archibald*, 150 AD3d 937, 54 NYS3d 439 (2nd Dept., 2017); *DLJ Mortgage Capital, Incorporated v. Pittman*, 150 AD3d 818, 56 NYS3d 120 (2nd Dept. 2017); *Deutsche Bank National Trust Company v. Romano*, 147 AD3d 1021, 48 NYS3d 237 (2nd Dept., 2017); *U.S. Bank, N.A. v. Akande*, 136 AD3d 887, 26 NYS3d 164 (2nd Dept., 2016)).

With respect to the issues raised by defense counsel concerning possession of the underlying promissory note, the evidence submitted shows that “Champion” and “Nationstar” are the same entity, and that based upon the testimony submitted the assignee seeking to be substituted as the named party plaintiff, Champion/Nationstar, obtained physical possession of the underlying promissory note on July 1, 2012. While defense counsel asserts that affidavit submitted by the Nationstar/Champion assistant secretary erroneously refers to the “plaintiff” having possession of the note “prior to commencement of this action”, the erroneous reference to Nationstar/Champion as “plaintiff” in the affidavit remains irrelevant to the issue of the actual plaintiff’s (Metlife’s) standing—since the March 31, 2009 assignment to Metlife provided sufficient evidence to establish Metlife’s standing when this action was commenced on April 30, 2012.

With respect to the issue of substitution, plaintiff’s reference to “Metlife as Successor to Everbank Reverse Mortgage LLC” as the named party plaintiff was clearly an error which in no way prejudices the defendants’ ability to oppose plaintiff’s motion. Moreover, CPLR 1018 clearly provides the procedural mechanism for substitution so that the current assignee can be the named as the party plaintiff in the caption of this action.

With respect to the issue of the mortgagor’s default, in order to establish prima facie entitlement to judgment as a matter of law in a foreclosure action, the plaintiff must submit the mortgage, the note and admissible evidence to show default (*see Property Asset Management, Inc. v. Souffrant et al.*, 162 AD3d 919, 75 NYS3d 432 (2nd Dept., 2018); *PennyMac Holdings, Inc. V. Tomanelli*, 139 AD3d 688, 32 NYS3d 181 (2nd Dept., 2016); *North American Savings Bank v. Esposito-Como*, 141 AD3d 706, 35 NYS3d 491 (2nd Dept., 2016); *Washington Mutual Bank v. Schenk*, 112 AD3d 615, 975 NYS2d 902 (2nd Dept., 2013)). Plaintiff has provided admissible evidence in the form of a copy of the note and mortgage, together with a copy of the mortgagor’s death certificate to sustain its burden to prove the default under the terms of the reverse mortgage. Accordingly, and in the absence of any proof to raise an issue of fact concerning the default, plaintiff’s application for summary judgment must be granted.

Finally, defendants have failed to submit any admissible evidence to support their remaining affirmative defenses in opposition to plaintiff’s motion. Accordingly, those 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 0144, 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 is granted and the proposed order of reference has been signed simultaneously with execution of this order.

HON. HOWARD H. HECKMAN, JR.

Dated: September 11, 2020

J.S.C.