

Jute v U.S. Bank N.A.
2020 NY Slip Op 34320(U)
November 13, 2020
Supreme Court, Queens County
Docket Number: 713637/2020
Judge: Cheree A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

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MARTIN W. JUTE,

Index No.: 713637/2020

FILED

11/16/2020
10:05 AM

Plaintiff,

Motion

Date: November 4, 2020

COUNTY CLERK
QUEENS COUNTY

-against-

Motion Cal. No.: 18

U.S. BANK NATIONAL ASSOCIATION, AS
TRUSTEE FOR RESIDENTIAL ASSET
SECURITIES CORPORATION HOME EQUITY
MORTGAGE ASSET-BACKED PASS-THROUGH
CERTIFICATES, SERIES 2007-KS3, ELPINIKI M.
BECHAKAS, ESQ., JAMIE CANELLA, NOTARY,
JOHN DOE 1 TO JOHN DOE 10,

Motion Sequence No.: 3

Defendants.

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The following efile papers numbered 4-21 submitted and considered on this motion by defendant U.S. Bank National Association, as Trustee for Residential Asset Securities Corporation Home Equity Mortgage Asset-Backed Pass-Through Certificates, Series 2007-KS3 (hereinafter "defendant") seeking an Order pursuant to CPLR 3211(a)(1), (a)(3), (a)(5), (a)(7) and (a)(8), dismissing the verified complaint of plaintiff Martin Jute dated September 10, 2019; pursuant to CPLR §6501 canceling plaintiff's notice of pendency of action dated September 10, 2019 and for such other and further relief as this Court may deem just and proper.

Papers
Numbered

Notice of Motion-Affidavits-Exhibits..... EF 4-21

This litigation was commenced by plaintiff Martin W. Jute, self represented, with the filing of a summons and verified complaint and notice of pendency in the Supreme Court of the State of New York, County of Queens under Index No. 5582/2019 on or about September 10, 2019. Plaintiff seeks cancellation and expungement of void instruments on Plaintiff's Land Record/Title as a Cloud on Title; and declaratory relief, a Judicial determination that the four "Assignments of Mortgage are 'void' instruments) in relation to property known as 173-11 110th Avenue, Jamaica, New York 11433, Block

10265 Lot 7. The matter has been now transferred to the e filing system under Index number 713637/2020. Defendant alleged that this plenary action arises from a contested residential mortgage foreclosure action which was filed in Queens County under Index number 15036/2013. Defendant claimed that this action must be dismissed upon several grounds, including lack of jurisdiction. Plaintiff seeks to void several valid assignments of mortgage, and defendant asserted that this relief is unwarranted. According to defendant, plaintiff has been unsuccessful in vacating the Judgment of Foreclosure and Sale which was entered in the foreclosure action, and that this action is a collateral attack on the foreclosure action.

Relevant Facts/Pre-Foreclosure

On July 25, 2006, in consideration for a loan in the amount of \$504,560.00 plaintiff executed a mortgage on the subject property located at 173-11 110th Avenue, Jamaica, New York 11433 in favor of nonparty Mortgage Electronic Registration Systems, Inc., (hereinafter "MERS") as nominee for Columbia Home Loans, LLC, d/b/a Brokers Funding Services, Co. The mortgage was recorded on September 13, 2006 in the Office of the City Register of the City of New York in City Register File Number ("CFRN") 2006000516063. A copy of the recorded mortgage was annexed to defendant's motion papers.

MERS subsequently assigned the mortgage to Residential Funding Corporation (First Assignment) which was recorded in the Office of the City Register of the City of New York in CRFN 2008000334486 on or about August 21, 2008. Residential Funding Corporation subsequently assigned the mortgage to U.S. Bank National Association as Trustee (Second Assignment) which was recorded in the Office of the City Register of the City of New York in CRFN 2010000368425 on November 4, 2010. Copies of the First and Second Assignments were annexed to the papers.

On January 7, 2013 Residential Funding Company, LLC formerly known as Residential Funding Corporation recorded a Correction Assignment of Mortgage in the Office of the City Register of the City of New York in CRFN 2013000006554 (the First Correction Assignment). The First Correction Assignment, according to defendant, correctly identified the assignor of the Second Assignment as Residential Funding Company, LLC f/k/a Residential Funding Corporation, and assigned the mortgage to U.S. Bank National Association as Trustee for RASC 2007KS3. A copy of the recorded First Correction Assignment was annexed to the moving papers.

Then, according to defendant, on August 26, 2013, Residential Funding Company, LLC f/k/a Residential Funding Corporation recorded a Second Correction Assignment of Mortgage in the Office of the City Register of the City of New York in CRFN 2013000339358 (the Second Correction Assignment). The Second Correction Assignment was recorded for the purpose of correcting the name of the assignee in the First Correction Assignment from U.S. Bank National Association as Trustee for RASC 2007KS3 to defendant U.S. Bank National Association, as Trustee for Residential Asset Securities Corporation Home Equity Mortgage Asset-Backed Pass-Through Certificates, Series 2007-KS3. A copy of the Second Correction Assignment was annexed.

Prior Foreclosure Action

According to defendant, plaintiff defaulted under the terms of the mortgage and foreclosure proceedings were commenced in the Supreme Court of the State of New York, County of Queens under Index number 15036/2013. On September 21, 2013, plaintiff filed a verified answer in the foreclosure action, and he alleged various affirmative defenses and counterclaims, including claims that the defendant lacked standing to foreclose due to claimed invalid assignments of the mortgage. Copies of the defendants filed notice of pendency, summons and complaint, plaintiff's verified answer in the prior foreclosure action were annexed to the papers.

On or about January 28, 2015, defendant filed and served a motion for summary judgment in the prior foreclosure action which was granted by Order of the Hon. Allan B. Weiss dated July 17, 2015. Justice Weiss granted defendant summary judgment and dismissed plaintiff's affirmative defenses and counterclaims, including plaintiff's claim related to defendant's standing. The July 17, 2015 Order was served with Notice of Entry on July 31, 2015, a copy of which also annexed to defendant's papers.

On September 28, 2017 plaintiff made a motion to set aside Justice Weiss' July 17, 2015 Order and defendant opposed the motion and also moved for a Judgment of Foreclosure and Sale. Defendant's motion was granted by Justice Weiss by Memorandum dated January 8, 2018 and plaintiff's motion was denied. A Judgment of Foreclosure and Sale was signed on June 19, 2018. Copies of the Memorandum and Judgment of Foreclosure and Sale were annexed. According to defendant, plaintiff did not appeal the Judgment and his time to do so has now expired.

However, on two occasions, plaintiff moved to vacate the Judgment. On March 2, 2018 Justice Weiss declined to sign plaintiff's first Order to Show Cause and on March 21, 2019, Hon. Mojgan C. Lancman denied plaintiff's second Order to Show Cause seeking to vacate the Judgment. Copies of the Orders to Show Cause were annexed.

Pursuant to a Referee's Deed in foreclosure of Referee Dominic A. Villoni Esq. dated September 26, 2019 and recorded on September 30, 2019, a sale of the subject property was held which resulted in defendant taking title to the property. A copy of same was also annexed to the papers.

Thus, based upon the foregoing, defendant claimed that this is the plaintiff's latest attempt to relitigate the prior foreclosure action. Defendant alleged that it was never served with plaintiff's pleadings. Plaintiff attempted to serve it by mailing the papers to defendant and to the New York Department of State. This demonstrates a failure by plaintiff to effectuate proper service upon defendant pursuant to CPLR §311. On November 22, 2019 despite never serving defendant, plaintiff moved for a default judgment which was denied by Hon. Chereé A. Buggs on February 6, 2020 as the motion was defective. Plaintiff moved again for the same relief on December 16, 2019 despite the fact that the first motion was still pending, and on February 6, 2020 the motion was denied by the undersigned for failure to demonstrate that the motion was served. Copies of the Orders were annexed to defendant's papers.

Law and Application

Under CPLR (a)(1), a party may move for judgment dismissing one or more causes of action asserted against him on the basis that a defense is founded upon documentary evidence. “To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim.” (*Teitler v Pollack & Sons*, 288 AD2d 302 [2d 2001]; *see also Held v Kaufman*, 91 NY2d 425 [1998]; *Hoeg Corp. v Peebles Corp.*, 153 AD3d 607 [2d Dept 2017]). “To qualify as documentary evidence, the evidence ‘must be unambiguous and of undisputed authenticity’ ” (*Fontanetta v Doe*, 73 AD3d 78 [2d Dept 2010].) “Judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other paper, the contents of which are essentially undeniable,’ qualify as documentary evidence in proper cases...” (*Hartnagel v FTW Contr.*, 147 AD3d 819 [2d Dept 2017].)

Defendant alleged that pursuant to CPLR 3211(a)(3) the matter should be dismissed because plaintiff lacks standing to assert the claims made in his complaint because he is not a party to the underlying assignments of mortgage that he seeks to challenge (*see Matter of Melrose Credit Union*, 161 AD3d 742 [2d Dept 2018]). Here the burden is on the defendant to establish plaintiff’s lack of standing (*see BAC Home Loans Servicing, LP v Rychik*, 161 AD3d 924 [2d Dept 2018]). It is well settled that only a signatory has standing to challenge the validity of an assignment of mortgage, and that a borrower or any third-party non-signatory lacks standing to challenge the assignment. (*See In re Holden*, 271 NY 212 [1936]).

“Under the doctrine of res judicata, a final adjudication of a claim on the merits precludes relitigation of that claim and all claims arising out of the same transaction or series of transactions by a party or those in privity with a party.” (*See Ciraldo v JP Morgan Chase Bank, N.A.*, 140 AD3d 912 [2d Dept 2016]; *see also Archibald v Wells Fargo Bank, N.A.*, 166 AD3d 573 [2d Dept 2018]). The issue of defendant’s standing has already been decided in the prior foreclosure action. (*See Deutsche Bank Natl. Trust Co. v Jackson*, 68 AD3d 805 [2d Dept 2009]; *Flagstar Bank, FSB v Jambelli*, 140 AD3d 829 [2d Dept 2016]; *Nationstar Mtge, LLC v Silveri*, 126 AD3d 864 [2d Dept 2015]; *Flagstar Bank v Bellafigiore*, 94 AD3d 1044 [2d Dept 2012]). It is well settled that a Judgment of Foreclosure and Sale is final as to all questions at issue between the parties, and concludes all matters which were or could have been litigated in the foreclosure action (*Itzkowitz v JP Morgan Chase Bank, N.A.*, 175 AD3d 1508 [2d Dept 2019]; *Tromba v East Fed. Sav. Bank, FSB*, 148 AD3d 753 [2d Dept 2017]; *Ciraldo v JP Morgan Chase Bank, N.A.*, 140 AD3d 912 [2d Dept 2016]). Therefore, defendant alleged that this action is barred by the doctrine of res judicata and/or collateral estoppel thus pursuant to CPLR 3211(a)(5).

Pursuant to CPLR 3211(a)(7) defendant claimed the the action should be dismissed because plaintiff has failed to plead a cause of action. Defendant stated that plaintiff’s complaint should be dismissed pursuant to CPLR 3211(a)(7) because the facts alleged do not fit within any cognizable legal theory, lacking any merit (*see generally Hecht v Andover Assocs. Mgmt. Corp., etal.*, 114 AD3d 638 [2d Dept 2014]; *Salvatore v Bd. of Educ. of Mineloa Union Free School Dist.*, 89 AD3d 1078 [2d Dept 2011]; *Treeline 1 OCR, LLC v Nassau County Indus. Dev. Agency*, 82 AD3d 748 [2d Dept

2011]). “If from the four corners of the complaint factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion to dismiss will fail” (*Cooper v 620 Prop. Assocs*, 242 AD2d 359 [1997]). “On a motion to dismiss pursuant to CPLR 3211 (a) (7), the claim must be afforded a liberal construction, the facts therein must be accepted as true, and the [plaintiff] must be accorded the benefit of every favorable inference” (*Leon v Martinez*, 84 NY2d 83 [1994]; *see also Sawitsky v State*, 146 AD3d 914 [2d Dept 2017]).

CPLR 3211(a)(8) states the following in relevant part:

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that... (8) the court has not jurisdiction of the person of the defendant; ...

The burden of establishing that personal jurisdiction has been acquired over a defendant lies with the plaintiff (*see Wells Fargo Bank, N.A. v Chaplin*, 65 AD3d 588 [2d Dept 2009]). According to defendant the matter should be dismissed pursuant to CPLR 3211 (a)(8) because the plaintiff never served his verified complaint, failing to establish the Court’s jurisdiction over the defendant. CPLR §306-b titled “Service of the summons and complaint, summons with notice, third-party summons and complaint, or petition with a notice of petition or order to show cause” states the following:

Service of the summons and complaint, summons with notice, third-party summons and complaint, or petition with a notice of petition or order to show cause shall be made within one hundred twenty days after the commencement of the action or proceeding, provided that in an action or proceeding, except a proceeding commenced under the election law, where the applicable statute of limitations is four months or less, service shall be made not later than fifteen days after the date on which the applicable statute of limitations expires. If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service.

Pursuant to CPLR 311 personal service upon a corporation shall be made by delivering the summons

“1. upon any domestic or foreign corporation, to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service. A business corporation may also be served pursuant to section three hundred six or three hundred seven of the business corporation law. ...”

Here, service of process upon the defendant was not properly effectuated (*see* CPLR §311; *see also* BCL §306; *see generally* *Perkins v 686 Halsey Food Corp.*, 36 AD3d 881 [2d Dept 2007]).

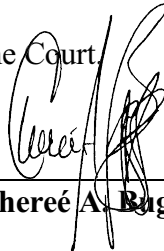
Thus, without service of process or a viable action to affect the title to, possession, use or enjoyment of real property, the Notice of Pendency that was filed with the verified complaint must also be canceled (*see* CPLR §6501). Therefore, upon the foregoing papers and there being no opposition submitted, it is

ORDERED, the defendant’s motion to dismiss is granted in its entirety without opposition; and it is further

ORDERED, the Clerk of the County of Queens is directed to cancel and discharge a Notice of Pendency filed in this action against the property located at 173-11 110th Avenue, Jamaica, New York 11433, Block 10265 Lot 7.

The foregoing constitutes the decision and Order of the Court.

Dated: November 13, 2020



Hon. Chereé A. Baggs, JSC

FILED

**11/16/2020
10:05 AM**

**COUNTY CLERK
QUEENS COUNTY**