

**Lehman XS Trust Mtge. Pass-Through Certificates
Series 2007-15N v Blackman**

2021 NY Slip Op 30842(U)

March 4, 2021

Supreme Court, Kings County

Docket Number: 509127/2014

Judge: Bernard J. Graham

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS _____ x

LEHMAN XS TRUST MORTGAGE PASS-THROUGH
CERTIFICATES SERIES 2007-15N U.S. BANK
NATIONAL ASSOCIATION AS TRUSTEE,

Index No.: 509127/2014

Plaintiff

DECISION AND ORDER

-against-

NICOLE P. BLACKMAN, DEAN FELIX, NEW
YORK CITY ENVIRONMENTAL CONTROL BOARD,
NEW YORK STATE DEPARTMENT OF TAXATION
AND FINANCE, NEW YORK CITY PARKING
VIOLATIONS BUREAU,

"JOHN DOE #1" through

Defendant (s).

_____ x

Decision:

A non-jury trial of the captioned foreclosure action was tried before the undersigned on December 21, 2020 and December 22, 2020. The trial was conducted virtually on the Microsoft Teams program. The plaintiff was represented by James W. Creech, Esq., of RAS Boriskin, LLC; and the defendants, Nicole P. Blackman and Dean Felix, were represented at trial by Steven A. Biolsi of Biolsi Law Group, P.C.

Plaintiff, Lehman XS Trust Mortgage Pass Through Certificates Series 2007-15N US Bank National Association As Trustee ("Lehman XS Trust"), by its attorneys, has brought the instant lawsuit seeking a judgment of foreclosure and sale of the real property located at 1511 Park Place, Brooklyn, New York (the "subject property").

Plaintiff, by its attorneys, additionally moves for leave of this Court to serve a supplemental summons to include the current owner of the subject premises (Park and Prospect, LLC) in this litigation as a necessary party pursuant to CPLR sec.'s 305 and 1001 as the subject property had been transferred to Park and Prospect, LLC, during the pendency of this action. The defendant's counsel opposes the motion, inter alia, as the motion is made after the completion of trial and is said to be untimely.

Background:

A mortgage loan was made to the defendant borrower Nicole P. Blackman ("Ms. Blackman") on or about May 8, 2007 in an amount of \$540,000., by MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR COUNTRYWIDE BANK, FSB (hereinafter "the mortgage loan"). The mortgage loan was endorsed for the benefit of plaintiff, Lehman XS Trust.

The mortgage loan was transferred to Nationstar Mortgage LLC for servicing. The servicing, according to the trial testimony, was performed by "Mr. Cooper" on behalf of Nationstar Mortgage, LLC.

On or about September 1, 2008, defendants failed to make the required payment and plaintiff commenced mortgage foreclosure proceedings. A summons and complaint were filed on October 4, 2014 together with a notice of pendency.

An answer was interposed on behalf of defendants on or about October 15, 2014.

Two motions for summary judgment were filed on behalf of plaintiff. The first motion for summary judgment was filed on or about October 26, 2015, and the motion was denied by Hon. Justice Partnow, without prejudice, on September 5, 2017. A second motion for summary judgment was filed by plaintiff and was denied on May 16, 2019 by Hon. Justice Partnow.

Defendant had filed a motion to dismiss the action which was granted upon the default of plaintiff's counsel to appear. The dismissal was vacated on December 24, 2018.

It is undisputed that title to the subject premises had been transferred by the defendants prior to the commencement of trial. Evidence was submitted that defendants transferred the subject premises to Park Place Bapaz LLC on November 30, 2015 at which time a notice of pendency was in effect due to the foreclosure. A second transfer occurred in which Park Place Bapaz LLC transferred the subject premises to Park and Prospect LLC, on January 29, 2018 (See Aff. of Jeremy D. Kaufman, Esq., in Support of Plaintiff's Motion, par's. 19, 21, in evidence as Defendant's Ex. B at trial). The notice of pendency was not in effect on the date of the transfer to Park and Prospect LLC.

A note of Issue was filed on September 6, 2019. Prior to this matter being assigned to the undersigned for a non-jury trial, plaintiff's counsel had filed an order to show cause to add the current owner of the subject property, Park and Prospect, LLC ("Prospect") arguing that Prospect was a necessary party to the action. The order to show cause was denied by Hon. Justice Knipel on October 1, 2020.

Discussion:

At trial, plaintiff's attorney called Ellen Brandt, a "Senior Litigation Ambassador", as their primary witness. Ms. Brandt testified that she is employed by "Mr. Cooper", the company that handles the servicing of mortgages on behalf of Nationstar Mortgage. It was Ms. Brandt's testimony that Mr. Cooper began servicing the mortgage loan obtained by defendants Nicole P. Blackman and Dean Felix. According to Ms. Brandt, the mortgage loan was "onboarded" by Mr. Cooper in 2014. The witness detailed the record keeping that is maintained by Mr. Cooper as well as the power of attorney documents which allowed for the servicing of the mortgage loan. Ms. Brandt also described the power of attorney between U.S. Bank National and Nationstar Mortgage which authorized Mr. Cooper to service the mortgage loan on behalf of the Trust now holding the mortgage.

Copies of the Mortgage Note and Mortgage were admitted into evidence as Plaintiff's Exhibits "4" and "5". The loan documents, according to the testimony of the witness are maintained in a facility operated by Nationwide Mortgage in Scott's Bluff, Nebraska.

Ms. Brandt was able to lay a foundation for the default of the defendant borrowers by the use of Bank of America records which document the non-payment of the loan. As to the mailing of the default notice, the testimony of Ms. Brandt was that the 30 day notice (notice of default) and the 90 day notice (pre-foreclosure notice) are mailed, and the mailings are tracked and the status of the mail is noted in the records maintained by the company which sends the notices and this proof was admitted into evidence (Ex. "12" in evidence).

Through the testimony offered by Ms. Brandt of the loan servicing company, the plaintiff has established that the plaintiff had standing to foreclose as the loan servicer (Nationstar Mortgage) was in possession of the mortgage and mortgage note when the foreclosure action was commenced (see *Aurora Loan Servs, LLC v Taylor*, 25 NY3d 355 [2015]). The fact that Nationstar, as the loan servicer, held the loan documents on behalf of the plaintiff is sufficient to establish standing to foreclose by the plaintiff. (See *HSBC Bank USA, Nat'l Ass'n v Vivorito*, 133 NYS3d 486 [2d Dept, 2020]).

It is worth noting that defendants had not offered any evidence which challenges the default shown by the plaintiff at trial or a failure to serve any requisite default notices. The Court finds that the defendants have not offered any evidence in support of the affirmative defenses that were raised by defendants and, as a result, defendants have failed to meet their burden as to the affirmative defenses raised. (See *Ausch v St. Paul Fire & Marine Ins. Co.*, 125 AD2d 43 [2d Dept. 1987]).

By the testimony of Ms. Brandt and the documents entered into evidence, the plaintiff has demonstrated that plaintiff possessed the mortgage note at the time the action was commenced and that the defendants had defaulted in their obligations to make payment. Accordingly, plaintiff would be entitled to a judgment of foreclosure (see *New York Community Bank v Fessler*, 88 AD3d 667 [2d Dept. 2011]).

Defendants, by their counsel, oppose the award of a judgment of foreclosure arguing, inter alia, that the plaintiff is not entitled to a judgment of foreclosure as a matter of law due to the failure by the plaintiff to include a necessary party in this lawsuit. It is plaintiff's contention that a judgment of foreclosure rendered in this case would be a nullity as it would be unenforceable against the current owner.

The Court has considered the defense raised by defendants' counsel and rejects the argument that there can be no foreclosure judgment issued in this case.

The Court agrees with the reasoning of plaintiff's counsel as it concerns a lawsuit, such as the instant case, in which a "necessary party" has not been served with process. A dismissal of the case is not the proper remedy as advocated by the defendant, and instead, the proper remedy is for this Court to issue an order that the necessary party be joined in the action. (See *Dime Savings Bank of New York v Johnas*, 172 AD2d 1082 [4th Dept. 1991]; see also *Central Mortgage Company v Davis*, 149 AD3d 898 [2d Dept. 2017]). It is this Court's opinion that the only true consequence of the failure to include a necessary party in a case like the instant case, is that any foreclosure order issued by this Court would have no legal effect on the unnamed party. This Court's opinion is consistent with the Second Department Appellate Division decision in *Polish Nat. Alliance of Brooklyn v White Eagle Hall Co.*, 98 AD2d 400. In the *White Eagle* decision (which has been cited by both defendant and plaintiff in support of their legal positions) the Appellate Division had found that the contract vendee, who had not been named in the foreclosure, was a necessary party. However, in addressing the failure to include the necessary party the Appellate Division stated the following: "Nevertheless, the fact that White Eagle vendees were necessary parties to the foreclosure action does not make them indispensable parties whose absence mandates dismissal of the action (see CPLR 1001, sub. [b]). The absence of a necessary party in a

foreclosure action simply leaves that party's rights unaffected by the judgment of foreclosure and sale (citations omitted)". *Polish Nat. Alliance of Brooklyn*, 98 AD2d at 406. It is clear that the plaintiff may obtain a judgment of foreclosure in the instant action but such judgment would be unenforceable against the subject property unless and until the current property owner is made a party to this action.

As pointed out by plaintiff's counsel in the post-trial memorandum, the transfer of the subject property took place subject to the mortgage which was recorded as of record. As a result, the new owner, Prospect, took ownership subject to the mortgage and it would be fully apprised that the mortgage was still a lien on the premises. These facts demonstrate that Prospect would not be a bona fide purchaser and should be brought into this action as a material and relevant party.

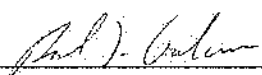
It is also relevant in this action that the plaintiff had sought to include the new owner of the subject property prior to trial. Plaintiff's counsel had learned of the transfer of ownership by reviewing a title search and attempted to include the new owner (Prospect) as a necessary party. (See Affidavit of Jeremy D. Kaufman, Esq. in Support of Plaintiff's Motion, par. 18, Defendant's Ex. B at Trial). According to the record, plaintiff's order to show cause seeking that relief was denied by Hon. Justice Knipel prior to the start of the trial. The fact that Justice Knipel denied the order to show cause to include additional parties would most likely be an exercise of the Court's discretion in having the trial begin in a timely manner. It does not, however, result in a preclusion or an estoppel of plaintiff's right to litigate the foreclosure against the appropriate party because no final determination was reached.

Upon hearing the evidence in this case, it is clear to this Court that the plaintiff's motion for an order allowing service of a summons on the current owner, Prospect, is the proper equitable decision and is required in the interest of justice. The transfer of the subject property by the defendants without satisfying the existing mortgage shows the defendants have unclean hands and the current owners would realize an undeserved gain at the expense of the plaintiff. Accordingly, the plaintiff's motion for an order permitting service of process on the current owner of the subject premises (Prospect) is granted. Plaintiff's counsel is directed to serve a summons and complaint upon the current owner of the subject property within thirty (30) days of the date of entry of this decision. The note of issue that was previously filed is hereby vacated.

This shall constitute the decision and order of this Court.

Dated: March 4, 2021

ENTER:



Bernard J. Graham, JSC

HON. BERNARD J. GRAHAM

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