

U.S. Bank, N.A. v Nassau County Pub. Admin.

2021 NY Slip Op 31570(U)

April 28, 2021

Supreme Court, New York County

Docket Number: 850323/2013

Judge: Francis A. Kahn III

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. FRANCIS A. KAHN, III PART IAS MOTION 32

Acting Justice

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U.S BANK, N.A., as Legal Title Trustee for TRUMAN 2013
SC4 TITLE TRUST,

Plaintiff,

INDEX NO. 850323/2013

MOTION DATE

MOTION SEQ. NO. 006

- v -

THE NASSAU COUNTY PUBLIC ADMINISTRATOR, as
Administrator of the Estate of KATHLEEN BESTANY,
Deceased, SHIRLEY BESTANY, 532 WEST 187 REALTY
LLC, NEW YORK CITY ENVIRONMENTAL CONTROL
BOARD, JOHNATHAN BRISTLER, ALENA BRISTLER,
KELLY BRISTLER and BRANDON BRISTLER

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 168-204
were read on the motion/cross motion to/for SUMMARY JUDGMENT

Upon the foregoing documents, the motion and cross-motion are decided as follows:

In this action, Plaintiff seeks to foreclose on a mortgage on residential real property located at 532 West 187th Street, New York, New York. On March 4, 2008, Kathleen Bestany executed and delivered a note to Wachovia Mortgage, FSB ("Wachovia"). Further, as security for this loan, Kathleen Bestany and Shirley Bestany ("Mortgagors") executed and delivered a mortgage to Wachovia encumbering the subject property.

On May 1, 2008, the Mortgagors deeded the entire premises to non-party Friendly Housing Rentals, LLC ("Friendly"). The Real Property Transfer Report recorded with the 2008 deed was certified by Defendant Shirley Bestany on behalf of buyer and Howard Smolen was listed as buyer's attorney. On October 12, 2008, Wachovia merged into Wells Fargo Bank, N.A. ("Wells Fargo"). On January 28, 2010, Friendly deeded the entire premises to Defendant 532 W 187 Realty LLC ("532"). The Real Property Transfer Report recorded with the 2010 deed was certified by non-party David Bestany, Kathleen Bestany's spouse¹, on behalf of both buyer and seller. Again, buyer's attorney was listed as Howard Smolen².

¹ David Bestany executed, apparently as part of an administration proceeding in Nassau County Surrogate's Court, an affidavit of heirship dated October 14, 2014 wherein he averred Kathleen Bestany was his spouse (NYSCEF Doc No 156).

² In his affirmation submitted in support of 532's motion to vacate its default, Smolen admits that in his capacity as counsel, he formed 532 in January 2010 (NYSCEF Doc No 82).

On July 16, 2011, Kathleen Bestany alone allegedly executed a loan modification agreement of the above note and mortgage with Wachovia as a division of Wells Fargo. Defendant Kathleen Bestany died on October 8, 2011 and the Public Administrator of Nassau County was granted limited letters of administration by decree dated May 19, 2015.

Plaintiff's predecessor, Wells Fargo, commenced this action on October 30, 2013 with the filing of a summons and complaint and asserted Bestany defaulted in repayment on or about July 1, 2012³. Wells Fargo allegedly assigned the mortgage to Plaintiff on March 3, 2014. Justice Shlomo Hagler granted, without opposition, Plaintiff's motions for a default judgment, to amend the caption and for a judgment of foreclosure and sale. By order dated June 29, 2017, Justice Hagler, upon the motion of Defendant 532, vacated the order of reference and the judgment of foreclosure and Sale and directed 532 to serve an answer. Issue was joined by 532 with an answer which raised numerous affirmative defenses and two counterclaims. Among the allegations in the answer included a claim that Wachovia issued a document discharging the mortgage dated January 6, 2010. Plaintiff denied issuing the satisfaction in its reply to the answer. Neither party disputes that this alleged discharge was never recorded.

Subsequently, the Appellate Division, First Department affirmed Justice Hagler's decision finding that 532 "showed that it had a potentially meritorious defense to the foreclosure action by submitting a discharge of mortgage that stated that the subject mortgage had been satisfied" (*see U.S. Bank, N.A., v Nassau County Public Admin.*, 171 AD3d 560, 561 [1st Dept 2019]).

Now, Plaintiff moves for summary judgment against 532, to strike 532's answer, for a default judgment against the non-appearing Defendants and for an order of reference. 532 cross-moves for summary judgment dismissing the Plaintiff's complaint.

In moving for summary judgment, Plaintiff was required to establish *prima facie* entitlement to judgment as a matter of law though proof of the mortgage, the unpaid note, and evidence of Mortgagor's default in payment under the note (*see U.S. Bank, N.A., v James*, 180 AD3d 594 [1st Dept 2020]; *Bank of NY v Knowles*, 151 AD3d 596 [1st Dept 2017]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1st Dept 2010]). Proof supporting a *prima facie* case on a motion for summary judgment must be in admissible form (*see CPLR §3212[b]*; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780 [1st Dept 2019]). Plaintiff was also required to demonstrate its standing as part of its motion based upon 532 raising lack of standing in the answer (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd Dept 2020]). Further, in seeking to dismiss 532's affirmative defense of accord and satisfaction based on the purported January 2, 2010 satisfaction, Plaintiff was obligated demonstrate that the defense was meritless (*see Emigrant Bank v Myers*, 147 AD3d 1027 [2d Dept 2017]).

Plaintiff demonstrated a *prima facie* case for foreclosure. Plaintiff's motion was supported with an affidavit of facts from Kevin Elliot ("Elliot"), a Senior Vice-President employed by Rushmore Loan Management ("Rushmore") the servicer and attorney-in-fact for Plaintiff. Contrary to 532's assertion, this affidavit complied with certificate of conformity

³ Presumably because she was dead.

requirements for out-of-state affidavits (*see* CPLR § 2309[c]; RPL §309-b; *Moccia v Carrier Car Rental, Inc.*, 40 AD3d 504 [1st Dept 2007]).

Elliot's affidavit sufficiently established proof of the mortgage, note, and evidence of mortgagor's default, was properly supported by annexed and admissible business records. Elliot averred he was familiar with Plaintiff's record keeping practices as well as that the records relied upon were received from their makers, incorporated into Rushmore's records and that Rushmore routinely relied upon such records in its business (*see eg U.S. Bank N.A. v Kropp-Somoza*, 191 AD3d 918 [2d Dept 2021]). Movant also established its standing, via physical receipt of the note prior to the commencement of the action, since a copy of the note, endorsed in blank, was affixed to the complaint (*see Bank of NY v Knowles*, supra at 597; *see also Federal Natl. Mtge. Assn. v Nugent*, 187 AD3d 716 [2nd Dept 2020]; *Wells Fargo Bank, N.A. v Tricario*, supra). Any reliance by 532 on RPAPL §1304 is unavailing as it is not a "natural person" and it a stranger to the note and mortgage (*see HSBC Bank USA, N.A. v Tigani*, 185 AD3d 796, 799 [2d Dept 2020]).

On the issue of 532's affirmative defense based on the purported discharge, Plaintiff submitted the affidavit of Charlotta Latia Douglas ("Douglas"), a Vice President Loan Documentation employed by Wells Fargo, which satisfactorily demonstrates the document is not authentic. Douglas averred that Wachovia "could not and did not execute the purported . . . document dated January 6, 2010" [emphasis added]. Douglas' reasoning was twofold; that since Wachovia merged in Wells Fargo in 2008, "any release, discharge or satisfaction" issued in 2010 would have been "issued and executed" in the name of Wells Fargo, not Wachovia and that the purported discharge was not prepared on the "lien release servicing system" of either Wells Fargo or Wachovia. Douglas' deductions were based upon her "personal review of the integrated business records" of Wells Fargo and Wachovia.

Defendant 532's assertion that an affidavit from a witness from Wachovia was necessary is without merit. This argument fails to consider "Banking Law § 602, which governs the effect of a merger, [and] provides that the receiving bank 'shall be considered the same business and corporate entity' as the bank merged into it, and that all of the property, rights, and powers of the merged bank shall vest in the receiving bank" (*Moxey v Payne*, 167 AD3d 594, 595-596 [2d Dept 2018] quoting *Ladino v Bank of Am.*, 52 AD3d 571, 572 [2d Dept 2008]; *see Barclay's Bank of N.Y. v Smitty's Ranch*, 122 AD2d 323, 324 [3d Dept 1986]).

Moreover, even assuming for arguments sake, the discharge was issued by Wachovia and recorded, which it plainly was not, a "mortgagor may have an erroneous discharge of mortgage, without concomitant satisfaction of the underlying mortgage debt, set aside, and have the mortgage reinstated where there has not been detrimental reliance on the erroneous recording" (*Deutsche Bank Trust Co. v Stathakis*, 90 AD3d 983, 984 [2d Dept 2011]; *see also New York Community Bank v Vermonty*, 68 AD3d 1074, 1076 [2d Dept 2009]). Only bona fide purchasers and lenders for value are entitled to protection from an erroneous discharge of a mortgage (*see Fischer v Sadow Realty Corp.*, 34 AD3d 630, 631 [2d Dept 2006]; *Karan v Hoskins*, 22 AD3d 638, 638 [2d Dept 2005]; *see also Beltway Capital, LLC v Soleil*, 104 AD3d 628, 631 [2d Dept 2013]). At worst, absent detrimental reliance, an inadvertent discharge of a mortgage, without attendant satisfaction of the underlying debt, leaves Plaintiff with an unrecorded, equitable lien,

that Plaintiff can enforce by way of foreclosure (*see Citibank, N.A. v Kenney*, 17 AD3d 305 [2d Dept 2005]).

Here, the affidavits of Elliot and Douglas and the annexed documents, demonstrate that the underlying debt has never been satisfied. The proffered evidence also established that Kathleen Bestany entered a loan modification with “Wachovia Mortgage, a division of Wells Fargo Bank, N.A.”, based upon her “financial hardship” wherein she reaffirmed the debt and made repayments thereunder. The documentary evidence and the public record also conclusively shows 532 was not a bona fide purchaser since the transfers to Friendly and 532 were no consideration transactions involving familial relationships negating any claim to lack of notice. Specifically, when Friendly acquired the property, Shirley Bestany, the transferor, certified the transaction for Friendly. When Friendly transferred the property to 532, Kathleen Bestany’s husband, David Bestany, certified the transaction for 532. Also, the same attorney that facilitated the creation of 532, represented both Friendly and 532 in the deed transfers.

In opposition, 532 failed to raise any issue of fact. Paul Kiernan, identified as “an officer” of 532, offered no proof in his affidavit that that the discharge was authentic or any facts concerning where, when and from whom it was received. Absent any corroborating evidence, the unauthenticated discharge is insufficient to raise an issue of fact (*see Yassin v Blackman*, 188 AD3d 62 [2d Dept 2020]; *Stock v Otis Elevator Co.*, 52 AD3d 816, 817 [2d Dept 2008]). The execution of the modification agreement after Kathleen Bestany transferred the premises is of no moment as the viability of the agreement was specifically conditioned on the veracity of Kathleen Bestany’s representations therein and her compliance with the repayment terms. One of the representations in the agreement, that there has been no “impermissible change in ownership” was, by 532’s own admission false. There is also no proof to contradict that Kathleen Bestany defaulted in repayment under the agreement. 532’s reliance on the Appellate Division, First Department’s description of the defense as “potentially meritorious” is unavailing as the proof needed to prevail on motion to vacate a default is *less than* that required when opposing a summary judgment motion (*see Goodwin v New York City Hous. Auth.*, 78 AD3d 550 [1st Dept 2010]).

Accordingly, the branch of Plaintiff’s motion for summary judgment is granted and 532’s affirmative defenses and counterclaims are dismissed. Also, the branch of Plaintiff’s motion for default judgment against all non-appearing Defendants is granted.

Defendant 532’s cross-motion for summary judgment is denied.

Accordingly, it is

ORDERED that **Elaine Shay, Esq.**, 800 3rd Avenue, Ste. 2800, New York, New York 10022 – elaine@shayesq.com is hereby appointed Referee in accordance with RPAPL § 1321 to examine whether the tax parcel can be sold in parcels; and it is further

ORDERED that the Referee is authorized, in her discretion, to take testimony pursuant to RPAPL §1321; and it is further

ORDERED that by accepting this appointment the Referee certifies that he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2 (c) ("Disqualifications from appointment"), and §36.2 (d) ("Limitations on appointments based upon compensation"), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

ORDERED that, pursuant to CPLR 8003(a), and in the discretion of the court, a fee of \$350 shall be paid to the Referee for the computation of the amount due and upon the filing of his report and the Referee shall not accept additional compensation for the computation unless it has been fixed by the court in accordance with CPLR 8003(b); and it is further;

ORDERED that the Referee is prohibited from accepting or retaining any funds for himself or paying funds to himself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that Plaintiff shall forward all necessary documents to the Referee and to Defendants who have appeared in this case within 30 days of the date of this order and shall promptly respond to every inquiry made by the referee (promptly means within two business days); and it is further

ORDERED that if Defendant(s) have objections, they must submit them to the referee within 14 days of the mailing of plaintiff's submissions; and include these objections to the Court if opposing the motion for a judgment of foreclosure and sale; and it is further

ORDERED the failure by Defendants to submit objections to the referee shall be deemed a waiver of objections before the Court on an application for a judgment of foreclosure and sale; and it is further

ORDERED that Plaintiff must bring a motion for a judgment of foreclosure and sale within 45 days of receipt of the referee's report; and it is further

ORDERED that if Plaintiff fails to meet these deadlines, then the Court may *sua sponte* vacate this order and direct Plaintiff to move again for an order of reference and the Court may *sua sponte* toll interest depending on whether the delays are due to Plaintiff's failure to move this litigation forward; and it further

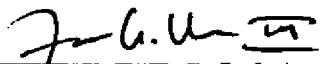
ORDERED that counsel for Plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being removed pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address (www.nycourts.gov/supctmanh)); and it is further

ORDERED that Plaintiff shall serve a copy of this Order with notice of entry on all parties and persons entitled to notice, including the Referee appointed herein.

All parties are to appear for a virtual conference via Microsoft Teams on **August 13, 2021 at 11:00 a.m.** If a motion for judgment of foreclosure and sale has been filed Plaintiff may contact the Part Clerk Tamika Wright (tswright@nycourt.gov) in writing to request that the conference be cancelled. If a motion has not been made, then a conference is required to explore the reasons for the delay.

4/28/2021
DATE


FRANCIS A. KAHN, III, A.J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NOTED AND DISPOSED
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input checked="" type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE

HON. FRANCIS A. KAHN III
J.S.C.