

Flushing Bank v 609 Kent Ave. Realty, Inc.

2021 NY Slip Op 31633(U)

May 5, 2021

Supreme Court, Kings County

Docket Number: 522580/18

Judge: Lawrence S. Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part Comm 6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 5th day of May, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X

FLUSHING BANK F/K/A FLUSHING SAVINGS BANK, FSB,

Plaintiff,

- against -

Index No. 522580/18

609 KENT AVENUE REALTY, INC.;

JOHN DOE (Those unknown tenants, occupants, persons or corporations or their heirs, distributees, executors, administrators, trustees, guardians, assignees, creditors or successors claiming an interest in the mortgaged premises),

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

60, 62, 64-82 85-96

Opposing Affidavits (Affirmations) _____

86-96 97-100

Reply Affidavits (Affirmations) _____

102

Upon the foregoing papers in this action to foreclose a mortgage on the property at 609 Kent Avenue, Unit 247, in Brooklyn (Block 2180, Lot 1034) (Property), plaintiff Flushing Bank f/k/a Flushing Savings Bank, FSB (Flushing) moves (in motion sequence [mot. seq.] three) for an order: (1) granting it summary judgment, pursuant to CPLR

3212; (2) dismissing the defenses asserted in the answer of defendant 609 Kent Avenue Realty, Inc. (609 Kent) and treating 609 Kent's answer as a limited notice of appearance entitling 609 Kent to receive, without prior notice, a copy of the entered Judgment of Foreclosure and Sale, a copy of the notice of sale, notice of discontinuance and notice of surplus money proceedings, if any, pursuant to CPLR 3211 (b); (3) appointing a referee to determine the amount due and to ascertain whether the Property may be sold in parcels, pursuant to RPAPL 1321; and (4) amending the caption to delete "John Doe" as a defendant.

Defendant 609 Kent cross-moves (in mot. seq. four) for an order: (1) dismissing the complaint due to two prior pending actions, pursuant to RPAPL 1301 (3) and CPLR 3211 (a) (4), or alternatively, (2) granting it summary judgment dismissing the complaint based on Flushing's lack of standing and its failure to comply with the notice provision required under the terms of the mortgage as a condition precedent to acceleration.

Background

On November 8, 2018, Flushing commenced this foreclosure action by filing a summons, a complaint and a notice of pendency against the Property. The complaint alleges that on or about March 21, 2005, 609 Kent executed and delivered a note in the amount of \$200,000.00 secured by a mortgage encumbering the Property, which was recorded on April 5, 2005 (complaint at ¶¶ 2-3). The complaint alleges that "[t]he mortgage was subsequently assigned to Flushing . . ." which is "the owner and holder of the subject note and mortgage or has been delegated authority to institute this mortgage

foreclosure action by the owner and holder of the subject note and mortgage and has the right to foreclose” (*id.* at ¶¶ 3 and 1). The complaint alleges that 609 Kent “failed to comply with the conditions of the note and mortgage by not making the payment that was due on April 1, 2013 and subsequent payments” and that there is a principal balance of \$181,198.92 due and owing under the note and mortgage (*id.* at ¶¶ 5 and 6).

Notably, the complaint further alleges that there is a prior 2013 action pending to foreclosure the mortgage on the Property (2013 Prior Pending Foreclosure Action):

“Flushing Savings Bank, FSB v Board of Managers of Brooklyn Villas Condominium et al., Kings County Supreme Court index number 4039-2013 is a pending action brought to recover the mortgage debt. Final judgment for Plaintiff was not rendered, the action was dismissed as against 609 Kent ... by Order dated September 28, 2017 and entered in the Kings County Clerk’s Office on October 30, 2017, and the Plaintiff will move to consolidate this action with the action commenced under index number 4039-2013 for joint trial” (*id.* at ¶ 10).

To date, Flushing has not moved to consolidate this foreclosure action with the 2013 Prior Pending Foreclosure Action.

On January 31, 2019,¹ defendant 609 Kent answered the complaint and asserted affirmative defenses, including that Flushing “lacks standing to commence this action” and “failed to provide notice of default and [an] opportunity to cure as per the terms of

¹ Flushing rejected and returned 609 Kent’s answer to the complaint. However, by a July 17, 2019 order, the court (Vaughan, J.) granted 609 Kent’s cross motion to compel acceptance of the previously served answer and denied Flushing’s motion for a default judgment.

the note and mortgage” (answer at ¶¶ 9 and 15).

Flushing’s Instant Summary Judgment Motion

Flushing now moves for summary judgment, an order of reference and other relief. Flushing submits a November 15, 2019 affidavit from Cindy Holmes (Holmes), Vice President Loan Documentation of Wells Fargo Bank, N.A. (Wells Fargo), Flushing’s servicing agent. Holmes describes the note and mortgage and 609 Kent’s April 1, 2013 payment default. Regarding Flushing’s standing to foreclose, Holmes attests that:

“Flushing . . . is in possession of the Promissory Note. The Promissory Note was indorsed in blank. I confirm that Flushing . . . had possession of the Promissory Note on October 5, 2012. I confirm that Flushing . . . had possession of the Promissory Note on or before the date that this action was commenced.

“To secure the Promissory Note, 609 Kent . . . by Aron Haver (‘Mortgagor[s]’) executed and delivered a Mortgage on March 21, 2005 . . . The Mortgage has been assigned by an Assignment of Mortgage, dated March 28, 2012 from Mortgage Electronic Registration Systems, Inc. as nominee for Greenpoint Mortgage Funding, Incorporated, its successors and assigns to Flushing . . . and recorded in the City Register of the City of New York, Kings County on April 5, 2012 in CRFN 2012000134313.”

Holmes further attests that Wells Fargo sent 609 Kent a September 17, 2018 notice of default:

“I hereby certify and affirm that in accordance [with] Wells Fargo’s standard business practice and procedure and the provisions of the Mortgage, a Notice of Default dated September 17, 2018, was mailed, by first class mail to 609 Kent . . . at 609 Kent Ave Unit 247, Brooklyn, NY 11249, the notice address provided to Wells Fargo by the mortgagor. A

Notice of Default dated September 17, 2018, was mailed by first class mail to Michael Dachs at 400 Rella Blvd Suite 190, Montebello, NY 10901, the notice address provided to Wells Fargo by the mortgagor. . . .”

In addition, Flushing submits an “Affidavit of Mailing of Notice of Default” from Allen Karee Lowery (Lowery), the Vice President Loan Documentation of Wells Fargo, who similarly attests that the September 17, 2018 notice of default was mailed to 609 Kent at the Property address and to Michael Dachs at 400 Rella Blvd., Suite 190, in Montibello, New York.

609 Kent’s Opposition and Cross Motion

609 Kent opposes Flushing’s motion and cross-moves to dismiss the complaint due to two prior pending actions, pursuant to RPAPL 1301 (3) and CPLR 3211 (a) (4), or alternatively, granting it summary judgment dismissing the complaint based on Flushing’s lack of standing and its failure to comply with the notice provision required under the mortgage.

Defense counsel describes the 2013 Prior Pending Foreclosure Action, which Flushing commenced against 609 Kent on or about March 6, 2013. In the 2013 Prior Pending Foreclosure Action, Flushing moved for summary judgment and 609 Kent cross-moved to dismiss the complaint. By a September 28, 2017 decision and order, the court (Partnow, J.) denied Flushing’s summary judgment motion and granted 609 Kent’s cross motion dismissing the complaint as against 609 Kent based on Flushing’s failure to send 609 Kent a default notice, as required under the terms of the mortgage.

Defense counsel also describes another prior pending foreclosure action captioned *Flushing Bank f/k/a Flushing Savings Bank, FSB v 609 Kent Avenue Realty, Inc.*, Kings County index No. 511267/18 (2018 Prior Pending Foreclosure Action), which Flushing commenced on May 31, 2018, after the dismissal in the 2013 Prior Pending Foreclosure Action and before the commencement of the instant foreclosure action. 609 Kent asserts that the instant foreclosure action should be dismissed, pursuant to RPAPL 1301 and 3211 (a) (4), due to the 2013 and 2018 Prior Pending Foreclosure Actions in which the parties and causes of action are identical.

Alternatively, 609 Kent cross-moves for summary judgment dismissing the complaint based on Flushing's lack of standing. Defense counsel asserts that:

"Here, although Plaintiff annexed a copy of the Note to [the] complaint, which creates a rebuttable presumption that it possessed the Note at the time this action was commenced, Plaintiff failed to show that the Note was properly endorsed and thus validly transferred to it as a 'holder' of the Note for purposes of enforcing it.

"Specifically, the subject Note is payable to the original lender, GreenPoint Mortgage Funding Inc. *See* Exhibit 1. Although, Plaintiff's affiant states that the Note was 'indorsed in blank' . . . the indorsement is not on the face of the Note itself, but rather on a separate paper entitled Allonge for the Purpose of Endorsement ('Allonge'). *See* Exhibit 1.

"The Allonge, however, does not meet the Uniform Commercial Code requirements necessary to constitute an endorsement, since Plaintiff failed to submit any evidence to indicate that the Allonge was firmly affixed to the Note as required under UCC 3-202 (2). *See Moulton*, 2020 NY Slip Op 00171, at *6-7."

609 Kent also asserts that the Assignment of Mortgage submitted with Flushing's summary judgment motion only purports to assign the mortgage and not the note.

As an additional, alternative basis for dismissal, 609 Kent asserts that Flushing failed to comply with paragraph 22 of the mortgage, which "specifically requires the lender to send the Defendant a 'Notice of Default' containing certain specified content as a condition precedent prior to accelerating the mortgage debt." 609 Kent submits an affidavit from Baruch Spira (Spira), 609 Kent's principal and the occupant of the Property since 1992, who attests that "I am certain that I never received the purported Notice of Default in the mail at the Property" and "[t]herefore, the Plaintiff's assertion that it mailed 609 K[ent] a Notice of Default addressed to the Property on September 17, 2018 is not true." Spira further attests that a September 17, 2018 notice of default was purportedly sent to Michael Dachs at 400 Rella Blvd., Suite 190, in Montibello, New York, but "Michael Dachs is not a member of 609 K[ent] nor have I, or any other member of 609 K[ent], ever authorized him to receive notices with respect to the subject mortgage on behalf of 609 K[ent]." 609 Kent argues that Lowery's moving affidavit is hearsay "because Lowery failed to attach[] any business records to her affidavit establishing Plaintiff's alleged mailing of the Notice of Default . . ." and "fails to establish proof of a standard office practice and procedure designed to ensure that items are properly addressed *and mailed*."

Flushing's Opposition to the Cross Motion

Flushing, in opposition to the cross motion, asserts that 609 Kent is not entitled to

dismissal, pursuant to CPLR 3211 (a) (4) or RPAPL 1301, based on the 2013 Prior Pending Foreclosure Action because “Plaintiff will be consolidating the two actions under CPLR § 602 [a] once the actions are at the same stage . . .” Flushing claims that the 2018 Prior Pending Foreclosure Action “was abandoned and should be treated with a ‘de facto discontinuance.’”

Regarding Flushing’s standing to foreclose, plaintiff’s counsel asserts that “by attaching the indorsed note to the complaint when filed, plaintiff presents sufficient evidence to establish a prima facie showing that it held the note at the time of commencement . . .” and “it is unnecessary to give factual details of the delivery in order to establish that possession was obtained prior to a particular date.” Flushing further asserts that Holmes of Wells Fargo attested that the original note, indorsed in blank, was physically delivered to Flushing on October 5, 2012, prior to the November 8, 2018 commencement of this action. Flushing argues that “[d]efects in the allonges are irrelevant” if it sufficiently demonstrates physical delivery of the note prior to commencement.

Regarding the notice of default, Flushing contends that “mere denial of receipt of the Notice of Default is insufficient to create a triable issue of fact . . .” Flushing asserts that Lowery’s affidavit is sufficient to demonstrate that the notice of default was mailed to Defendant in accordance with the Mortgage.”

609 Kent’s Reply

609 Kent, in reply, asserts that dismissal is warranted due to the 2013 and 2018

Prior Pending Foreclosure Actions because Flushing “did not seek leave of the Court prior to [commencing this action] as required by RPAPL § 1301 (3) nor did it claim that its abandonment, and hence discontinuance of the 2018 Action, occurred prior to the commencement of this action.” 609 Kent asserts that Flushing’s claim that it “abandoned” the 2018 Prior Pending Foreclosure Action, which was “commenced only five months prior to the commencement of the instant action” is incredible since “the evidence establishes the opposite – that Plaintiff did not abandon that action as it refiled a notice of pendency months after commencing the action.”²

609 Kent argues that dismissal is warranted for lack of standing because Flushing “completely neglects to address the fact that the indorsement is printed on [an] allonge that, based on the evidence submitted, is not affixed to the Note.”

In addition, 609 Kent contends that dismissal is warranted based on Flushing’s failure to mail a notice of default because Flushing “fails to address the fact that the affidavit from its loan servicer attesting to the alleged mailing is hearsay and fails . . . to rebut Defendant’s sworn detailed denial of receipt . . .” 609 Kent also notes that Flushing’s affiant “failed to annex any business records he claimed to have reviewed in support of his testimony regarding the alleged mailing . . .”

Discussion

² The electronic filing printout for the 2018 Prior Pending Foreclosure Action reflects that Flushing filed a second notice of pendency against the Property in the 2018 Prior Pending Foreclosure Action on July 6, 2018, four months before Flushing commenced the instant action.

RPAPL 1301 (3) “prohibits a party from commencing an action at law to recover any part of the mortgage debt while the foreclosure proceeding is pending or has not reached final judgment, without leave of court in which the foreclosure action was brought” (*VN New York Corp. v Paskesz*, 131 AD3d 1235, 1236 [2015]; *see also Aurora Loan Services, LLC v Reid*, 132 AD3d 788, 789 [2015] [holding that “Supreme Court providently exercised its discretion in granting that branch of the motion of the defendant . . . which was to dismiss the complaint insofar as asserted against him pursuant to CPLR 3211 (a) (4), since it is undisputed that there was a pending foreclosure action on the same mortgage . . .]). Furthermore, RPAPL 1301 (2) provides that “[t]he complaint shall state whether any other action has been brought to recover any part of the mortgage debt, and, if so, whether any part has been collected.” The Second Department has recently held that “[t]he object of the statute is to shield the mortgagor from the expense and annoyance of two independent actions at the same time with reference to the same debt” (*Bayview Loan Servicing, LLC v Starr-Klein*, ___ AD3d ___, 142 NYS3d 414 [2021] [holding that dismissal was warranted under RPAPL 1301 (3) “since the plaintiff commenced the instant action without leave of court in which the prior action was brought . . .”] [internal quotation marks omitted]).

Here, there is no dispute that Flushing commenced the instant foreclosure action without first obtaining leave of court in violation of RPAPL 1301 (3), despite the pendency of both the 2013 and 2018 Prior Pending Foreclosure Actions. While the complaint identifies the 2013 Prior Pending Foreclosure Action, it fails to identify the

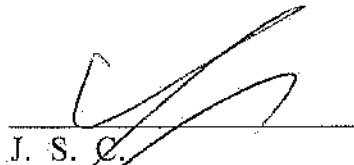
2018 Prior Pending Foreclosure Action, as required by RPAPL 1301 (2), 609 Kent should not have to defend itself in multiple actions to foreclose the same mortgage on the Property. Accordingly, it is hereby

ORDERED that Flushing's motion (mot. seq. three) is denied as moot; and it is further

ORDERED that 609 Kent's cross motion (mot. seq. four) is granted and the complaint is hereby dismissed, pursuant to CPLR 3211 (a) (4) and RPAPL 1301 (3).

This constitutes the decision, order and judgment of the court.

E N T E R,



J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE