Supreme Court of the State of New York
County of Kings
Part 91

Index Number 29200/2009

BANK OF AMERICA, N.A. SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION, AS TRUSTEE, *ON BEHALF OF SAIL 2005-1 TRUST FUND*
400 COUNTRYWIDE WAY
SIMIVALLEY CA 93065,

Plaintiff,

against

PEDRO HERNANDEZ, REGINA A. HERNANDEZ, FIRST AMERICAN ACCEPTANCE CO LLC, FIRST SELECT INC. SUCCESSOR TO DISCOVER, MIDLAND FUNDING NCC-2 CORP., MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR COUNTRYWIDE HOME LOANS, INC., NEW YORK CITY CRIMINAL COURT, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY *PARKING VIOLATIONS BUREAU, NEW YORK* STATE DEPARTMENT OF TAXATION AND FINANCE, PEOPLE'S ALLIANCE FEDERAL CREDIT UNION, UNITED STATES OF AMERICA ACTING THROUGH THE IRS,

JOHN DOE (SAID NAME BEING FICTITIOUS, IT BEING THE INTENTION OF PLAINTIFF TO DESIGNATE ANY AND ALL OCCUPANTS OF *THE PREMISES BEING FORECLOSED* HEREIN, AND ANY PARTIES, CORPORATIONS OR ENTITIES, IF ANY, HAVING OR CLAIMING AN INTEREST OR LIEN UPON THE MORTGAGED PREMISES.),

Defendants.

TRIAL DECISION

FILED
KINGS COUNTY CLERK
2022 JAN 10 AM 9:2

After trial for the above matter, in which the court had sufficient opportunity to assess the credibility of witnesses and the weight of the admitted testimony and exhibits, the court finds as follows, based upon the preponderance of the credible evidence:

Introduction

Plaintiff commenced this action against defendants to foreclose on a mortgage issued to Pedro

and Regina Hernandez that secured a loan issued to Pedro Hernandez. To establish prima facie entitlement to judgment as a matter of law in a mortgage foreclosure action, the plaintiff must produce the mortgage, the unpaid note, and evidence of default (*CitiMortgage, Inc. v McKenzie*, 161 AD3d 1040, 1040 [2d Dept 2018]). Defendant Hernandez also contends that, because this is a residential foreclosure, Bank of America must also prove that it complied with RPAPL § 1304 (*Bank of Am., N.A. v Wheatley*, 158 AD3d 736, 738 [2d Dept 2018]).

Notice of Default

In order to establish default, Bank of America must prove that it complied with the notice of default provision in its mortgage agreement with Pedro and Regina Hernandez (*HSBC Mortg. Corp. (USA) v Gerber*, 100 AD3d 966, 966-67 [2d Dept 2012]). Here, the mortgage agreement (stipulated into evidence as Plaintiff's Exhibit 8) states, in paragraph 22:

> Lender may require Immediate Payment In Full under this Section 22 only if all of the following conditions are met:
>
> (a) I fail to keep any promise or agreement made in this Security Instrument or the Note, including, but not limited to, the promises to pay the Sums Secured when due, or if another default occurs under this Security Instrument;
>
> (b) Lender sends to me, in the manner described in Section 15 of this Security Instrument, a notice that states:
>
> (1) The promise or agreement that I failed to keep or the default that has occurred;
>
> (2) The action that I must take to correct that default;
>
> (3) A date by which I must correct the default. That date will be at least 30 days from the date on which the notice is given;
>
> (4) That If I do not correct the default by the date stated in the notice, Lender may require Immediate Payment In Full, and Lender or another Person may acquire the Property by means of Foreclosure and Sale;

> (5) That if I meet the conditions stated in Section 19 of this Security Instrument, I will have the right to have Lender's enforcement of this Security Instrument stopped and to have the Note and this Security Instrument remain fully effective as if Immediate Payment in Full had never been required; and
>
> (6) That I have the right in any lawsuit for Foreclosure and Sale to argue that I did keep my promises and agreements under the Note and under this Security Instrument, and to present any other defenses that I may have; and
>
> (c) I do not correct the default stated in the notice from Lender by the date stated in that notice.

The notice of default was admitted into evidence as Plaintiff's Exhibit 11, although not for the purposes of showing mailing. The text of the notice appears to include the information described in the subparagraphs of paragraph 22 of the mortgage agreement. However, the notice was sent only to Pedro Hernandez and not to Regina Hernandez. Accordingly, the notice does not comply with the mortgage agreement.

Plaintiff must also prove that it sent the notice to Mr. Hernandez. Plaintiff claims it mailed the notice to him. Typically, mailing is proven by submission of an affidavit or other testimony from the person who performed the mailing, or by testimony about the procedures that an office employs to mail documents, or by other documentary proof of mailing (*Aurora Loan Services, LLC v Vrionedes*, 167 AD3d 829, 832 [2d Dept 2018]; *HSBC Bank USA, Nat. Ass'n. v Ozcan*, 154 AD3d 822, 825-26 [2d Dept 2017]).

Plaintiff's witness, Zachary Chromiak, testified that the CEO of the vendor retained to mail this notice previously explained to him the procedure for mailing the notice (tr. at 72–81). However, as I held during the trial of this matter, Mr. Chromiak's testimony was not sufficient to establish mailing. Mr. Chromiak was never an employee of Walls and has never seen an employee of Walls perform the mailing procedures. Mr. Chromiak's familiarity with the

procedures gained in conversation from the vendor's CEO, who also did not perform the mailing, was not sufficient to establish that the mailing occurred (tr. at 84–85). Additionally, it also appears from Mr. Chromiak's testimony that he learned of Walls' mailing procedures not at the time the notice was actually mailed, but many years after (*id.* at 75–78).

Compliance with RPAPL § 1304

Lastly, Mr. Hernandez contends that plaintiff was required to comply with RPAPL § 1304. As a condition precedent to commencing a foreclosure action, RPAPL § 1304 requires the mortgage holder to mail to the last known address of the borrower, by first class and by certified or registered mail, a certain form notice printed verbatim in the statute (*Wells Fargo Bank, N.A. v Moran*, 168 AD3d 1128, 1128 [2d Dept 2019]; *Aurora Loan Services, LLC v Vrionedes*, 167 AD3d 829, 832 [2d Dept 2018]; *Wells Fargo Bank, N.A. v Lewczuk*, 153 AD3d 890, 892 [2d Dept 2017]). The notice must be mailed at least 90 days before commencing the foreclosure action (*Moran*, 168 AD3d at 1128).

Bank of America argues that this statute does not apply because the loan was not a "home loan" as defined by that statute in effect at the time Bank of America commenced this action. Bank of America claims that the loan does not meet the definition because the amount of the loan exceeded certain conforming loan limits. In support, Bank of America submitted Exhibit 15, which was a printout of a website from the Federal Housing Finance Agency showing conforming loan limits for single-family homes based on the year of the loan and the number of units in the building (between 1 and 4 units). Bank of America's witness testified that the building was a single-family home, but did not testify about the number of units in the building (tr. at 107). However, the Department of Buildings' printout about the property, admitted as

Exhibit 16, suggests that the building contains a single unit.

The plaintiff in *U.S. Bank Tr., N.A. v Sadique* (178 AD3d 984 [2d Dept 2019]) made a similar argument. In that case, like Bank of America here, the plaintiff submitted similar historical "conforming" loan limits from the website of the Federal National Mortgage Association. The Second Department held that this information was not sufficient evidence of limits for "a 'conforming' loan under former RPAPL 1304 (5) (b)" (*id.* at 986). The plaintiff in *Sadique* also did not submit any evidence as to any Fannie Mae limits for "jumbo" mortgages as of the date of origination of the subject loan (*id.*). Accordingly, the Second Department concluded that there was no proof that RPAPL 1304 did not apply (*id.*).

Here, as in *Sadique*, Bank of America did not prove the limits it offered met the definition of a "non-conforming" loan under former RPAPL § 1304(5)(b) or any limits for jumbo mortgages at the time. It is also worth noting that former RPAPL § 1304 required notice for "subprime home loans" and "non-traditional home loans". Bank of American submitted no evidence about whether the subject loan met the criteria for these types of loans. Accordingly, I find that notice pursuant to RPAPL § 1304 was required. Because the parties stipulated that Bank of America did not send the required notice under section 1304, Bank of America failed to comply with the statutory conditions precedent to a mortgage foreclosure action.

Furthermore, there seems to be no dispute that this loan and mortgage was used to purchase property that was clearly meant to be used as a home. There is also no dispute about the policy for requiring notice to the debtor before commencing a residential foreclosure action. There is no reason that the size of the loan should have any bearing on this policy or the need for the debtor to receive notice of possible foreclosure. Thus, Mr. Hernandez, like all debtors,

should have received notice prior to the commencement of this action.

Conclusion

For the foregoing reasons, Bank of America's claims against Pedro and Regina Hernandez, together with the derivative claims against the remaining defendants, are dismissed.

December 10, 2021
DATE

DEVIN P. COHEN
Justice of the Supreme Court