Wilmington v Budnitz
2022 NY Slip Op 32010(U)
June 15, 2022
Supreme Court, Kings County
Docket Number: Index No. 503442/19
Judge: Larry D. Martin
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At an IAS Term, Part FSMP, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 15th day of June 2022.

P R E S E N T:

HON. LARRY D MARTIN,
J.S.C.

Index No.: 503442/19

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WILMINGTON,

Plaintiff,

DECISION AND ORDER

-against-

WILLIAM BUDNITZ et al,

Defendant,

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Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion:

Papers	**Numbered**
Motion (MS 1)	1
Opposition	2
Reply	3

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Plaintiff moves for summary judgment and an order of reference. Defendants oppose on a variety of grounds.

Defendants' argument that the Notice of Motion fails to state the grounds for the motion and, thus, is defective pursuant to CPLR 2214[a] is unavailing. As noted by Plaintiff, the NoM specifies the relief sought and the relevant CPLR sections. No more is required on a motion for summary judgment.

While Plaintiff omitted the exhibits from the copy of the complaint attached to the motion (and explicitly stated in its moving papers that it had done so), it attached the relevant exhibits separately. Though the reply to counterclaims was not attached, Plaintiff does not appear to be

relying on its contents, addressing Defendants' counterclaim as an outgrowth of the affirmative defense that the instant action is untimely. Further, as this is an e-filed case, all previously filed pleadings are readily available within the electronic record.

It is well established that "[i]n a mortgage foreclosure action, a plaintiff establishes its prima facie entitlement to judgment as a matter of law by producing the mortgage and the unpaid note, and evidence of the default" (*Loancare v. Firshing*, 130 A.D.3d 787 [2d Dept 2015]). Plaintiff has done so.

I. Statute of Limitations

Defendants argue that the instant action was filed beyond the six-year statute of limitations applicable to foreclosure claims. This is the third action seeking to foreclose on the same lien. The first was commenced on September 10, 2010 and dismissed by order dated January 22, 2014. The parties agree that Plaintiff's filing of suit was an acceleration (and thus that, absent deacceleration or a toll, the instant action filed in 2019 is untimely). The second action was commenced on January 21, 2016. Upon Defendants' motion, the matter was referred to a special referee for a traverse hearing at which service was found to be deficient. The Court subsequently dismissed the action on that basis. While the 2016 action was active, however, Plaintiff alleges that its predecessor sent a deacceleration letter to Defendants. It also moved for discontinuance of the action which was subsequently denied in light of the referee's findings. Defendants do not contest that the letter was sent but argue that it was pretextual, that the 2016 action was still pending when the "deacceleration" was attempted, and that the letter should have been sent to counsel and/or separately to each borrower.

Defendants assert that the letter was pretextual and, thus, did not serve as a valid deacceleration of the loan. "[A] de-acceleration letter is not pretextual if … it contains an express demand for monthly payments on the note … In contrast, a "bare" and conclusory de-acceleration letter, without a demand for monthly payments toward the note, or copies of invoices, or other evidence, may raise legitimate questions about whether or not the letter was sent as a mere pretext to avoid the statute of limitations" (*Milone v. US Bank NA*, 164 A.D.3d 145, 154 [2d Dept 2018][internal citations omitted]). Defendants agree that the necessary language is present herein but argue that the notice is nonetheless pretextual as it was sent just before the expiration of the statute of limitations with the purpose of allowing the plaintiff to

refile. The Court notes that there is no other reason to send a deacceleration letter – and that the Second Department permits it under circumstances like these.

It is true that the 2016 action was technically still pending at the time that the deacceleration letter was sent. However, the plaintiff therein had already moved to discontinue that action and no further action was taken to advance the case. As such, the pendency of the 2016 action does not render the deacceleration letter ineffective.

The deacceleration letter was properly sent to Defendants rather than to counsel. Though they were represented by counsel in the litigation, the notice was not a pleading (and indeed was not within the ambit of the litigation at all) and, thus, the terms of the mortgage governed. It, like all notices under the mortgage, was required to be sent to their "notice address" (which, unless explicitly changed) was the property address (see ¶15 of the mortgage). Likewise, "[n]otice to one Borrower [was] notice to all Borrowers" (*Id.*) and there was no obligation to send the letter separately to each Defendant.

In light of the foregoing, the Court finds that the instant action was timely filed.

II. Other Defenses

RPAPL 1304 notices may be mailed by counsel (see, for example, *Flagstar Bank, FSB v Mendoza*, 139 AD3d 898 [2d Dept 2016]) and it is undisputed that Plaintiff has demonstrated that its counsel did so in this case. Though the notices appear to use a default date in 2013 (as in the complaint) rather than the earlier date previously asserted, Plaintiff argues that the notice reflects the date from which it was seeking to collect (and, thus, the "default" for the purpose of 1304). In this Court's view, that is sufficient (cf. *US Bank v Cox*, 203 AD3d 1206 [2d Dept 2022][contradictory dates of default between 1304 notice and default notice/complaint]; *Hudson City v DePasquale*, 112 AD3d 595, 596 [2d Dept 2014][plaintiff conceded that default date in 1304 notice was erroneous]). The Court need not address the amount alleged to be due (*Emigrant Bank v Cohen*, 205 AD3d 103, 110 [2d Dept 2022]).

"A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced" (*Bank of America, NA v Paulsen*, 125 AD3d 909, 910 [2d Dept 2015]). "Either a written assignment of the underlying note or the

physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident" (*US Bank, NA v Collymore*, 68 AD3d 752, 754 [2d Dept 2009] [citations omitted]). Plaintiff attached a copy of the note (endorsed to blank) to the complaint creating a presumption that it has standing (*Deutsche Bank v Logan*, 146 AD3d 861, 862-863 [2d Dept 2017]; *Nationstar Mtge., LLC v. Catizone*, 127 AD3d 1151, 1152 [2d Dept 2015]). That presumption is, however, rebuttable (*Deutsche Bank Nat. Trust Co. v. Webster*, 142 A.D.3d 636, 638 [2d Dept 2016]) and Defendants have done so by recourse to Plaintiff's proffered records. Plaintiff's affiant appears to be relying on screenshots from her employer's computer system as a basis for her contention that Plaintiff was in possession of the original note prior to the commencement of this action – however, the screenshot appears to reflect that the location of the note was "undetermined," not in the collateral file and, at that time, unknown. A hearsay statement on the same page, "Per WF the date of Note deposit is 12/28/2016," is unexplained and does not remedy the deficiency. As such issues of fact remain as to whether Plaintiff has standing.

Defendants take issue with the changed date of default and lowered principal balance. However, it appears that Plaintiff merely elected to no longer seek to collect installment payments that were due prior to March 1, 2013 (and thus more than six years before the instant action was filed). That change, accruing to Defendants' benefit, does not preclude summary judgment.

Defendants have abandoned their remaining affirmative defenses by failing to address them in opposition to Plaintiff's motion (*114 Woodbury Realty, LLC v. 10 Bethpage Rd., LLC*, 178 AD3d 757, 761 [2d Dept 2019]).

III. Conclusions

Plaintiff's motion is granted to the extent that Defendants' second through fourth and sixth through fourteenth affirmative defenses and first counterclaim are stricken. Default judgment is granted against all non-appearing defendants. The caption is amended to substitute Aviva Budnitz, Aliza Bleier, and Aryeh Bleier in place of the "Doe" defendants and should now read:

WILMINGTON SAVINGS FUND SOCIETY, FSB, D/B/A

CHRISTIANA TRUST, NOT INDIVIDUALLY BUT AS TRUSTEE FOR PRETIUM MORTGAGE ACQUISITION TRUST,

Plaintiff,

-against-

WILLIAM BUDNITZ; PHYLLIS BUDNITZ; M&T BANK CORPORATION F/K/A M&T BANK; JPMORGAN CHASE BANK, NATIONAL ASSOCIATION F/K/A JPMORGAN CHASE BANK F/K/A THE CHASE MANHATTAN BANK; WELLS FARGO BANK N.A.; NEW YORK CITY PARKING VIOLATIONS BUREAU; AVIVA BUDNITZ; ALIZA BLEIER; ARYEH BLEIER,

Defendants.

Plaintiff's motion is otherwise denied. The parties are directed to complete discovery and proceed to trial.

This constitutes the decision and order of the Court.

ENTER:

Hon. Larry D. Martin, JSC

HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT