SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9

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U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR CREDIT SUISSE FIRST BOSTON 2005-10,

Plaintiff,

DECISION AFTER TRIAL

Index No. 20981/2008E

-against-

MARK H. KAPLAN, BETH E. KAPLAN, et al,

Defendants.

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DEBRA SILBER, J.S.C.:

On, May 17, 2022, a non-jury trial was held in this mortgage foreclosure action. Plaintiff and defendant Beth E. Kaplan were represented by counsel. Defendant Mark H. Kaplan is *pro se*, and he notified the court in writing that he would not be coming to court for the trial. Plaintiff introduced twelve exhibits into evidence; defendant Beth Kaplan introduced one. Plaintiff called two witnesses to testify. Defendants called none, and introduced one exhibit. Both parties then rested. Defendant then moved, orally, to dismiss the action on the grounds that plaintiff failed to make out a prima facie case. The court reserved decision.

The mortgage at issue was taken by defendants on August 3, 2005, when they were married. They have since been divorced, in 2013. The lender on the original documents is Meridian Residential Capital, LLC. and the principal amount of the mortgage was $449,500. This was a refinance, as they had purchased the home in 1996.[1] The subject mortgage was, according to counsel for plaintiff, assigned to the

[1] The homeowners took out another, second mortgage on March 6, 2006 with Citibank N.A., in the sum $135,000. That junior mortgage is still a lien on the property, and Citibank N.A. is a

named plaintiff by Meridian in 2007. This action was commenced by filing a summons and complaint and Notice of Pendency on or about July 16, 2008. The plaintiff in the caption, for brevity, will be referred to herein as "U.S. Bank". The property is located at 1483 East 16th Street, Brooklyn, NY 11230, Block 6754, Lot 58. It is a one or two-family house. The complaint alleges that the last payment made was the one due on February 1, 2008. The note and mortgage are not exhibits to the complaint. A stipulation was filed which extended defendants' time to answer the complaint. An Answer was filed by then-counsel for both defendants, dated September 29, 2008. It is not verified, and asserts one affirmative defense, that "Estoppel. Plaintiff refused to accept tender of mortgage payments." Plaintiff then filed an RJI and a motion for summary judgment on 2/2/2009. This motion was "marked off" about six months later after being "held in abeyance" pursuant to CPLR 3408(n). On 1/11/12, plaintiff changed counsel.

The Notice of Pendency was extended on June 15, 2011, but there was no activity in the case. The Notice of Pendency was again extended on June 12, 2014, April 6, 2017, and August 19, 2020.

The case was eventually referred to the Foreclosure Settlement Conference Part, where a conference was held on 9/19/2012, and it was released on December 16, 2013 and referred to an IAS Judge. On March 26, 2014, plaintiff filed MS #2, a motion for summary judgment and an order of reference. The motion was denied by Justice Sweeney, who issued a decision dated February 9, 2016, which found that the plaintiff had not established that it had standing to commence the action. The decision states

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named defendant herein. It has not appeared and a default has not been taken, thereby abandoning the action as against Citibank, N.A. The court notes that the plaintiff requested a default order in the notice of motion for MS #2, but it was filed in 2014, more than a year from the default, and the court did not address the plaintiff's request in the order.

"Plaintiff did not submit a valid assignment of the note. Moreover, plaintiff failed to demonstrate that the note was physically delivered to it prior to the commencement of the action." In response to plaintiff's claim that the defendants had not raised standing as an affirmative defense, the decision states "the defendants put the plaintiff's standing into issue by the specific denials in their answer regarding the note and mortgage, and under such circumstances, they were not required to plead lack of standing as an affirmative defense," citing CPLR 3018 [b]. In 2019, it is noted, new RPAPL § 1302-a was enacted, which expressly provides that "any objection or defense based on the plaintiff's lack of standing in a foreclosure proceeding related to a home loan . . . shall not be waived if a defendant fails to raise the objection or defense in a responsive pleading or pre-answer motion to dismiss." This new statute is not retroactive. Nonetheless, Justice Sweeney's decision is the law of the case with regard to this action.

On December 28, 2017, plaintiff's same attorneys made another motion for summary judgment and an order of reference. They did not say they were renewing the prior motion with new evidence. Just a subsequent motion for the same relief. A different justice of this court decided the motion, by order dated May 14, 2018, and came to the same conclusion as the first justice, that plaintiff had not established that it had standing to commence the action when it was commenced. In support of the motion, an affidavit was provided from Jack Whitmarsh, Vice President Loan Documentation of Wells Fargo Bank, N.A., the (then) servicing agent to plaintiff, dated 4/25/17. Therein, he states that the plaintiff, U.S. Bank, has been in possession of the Promissory Note, which was indorsed in blank, since 12/22/2005. Justice Dear determined that this statement was hearsay, and "such hearsay is insufficient to prove

standing."

A year later, a Note of Issue was filed, and almost a year after that, plaintiff retained a new law firm. The action was then adjourned a number of times until it was finally sent to this court for trial.

Plaintiff's first witness, who testified virtually, was Lauren Haberlan, second assistant vice president of Specialized Loan Servicing LLC (hereafter "SLS"), located in Colorado. She started with this company in 2018. When this action started in 2008, she worked for Washington Mutual, which was taken over by Chase some time afterwards. Plaintiff's Exhibit 1 admitted into evidence is a Limited Power of Attorney between U.S. Bank as Trustee and SLS, executed in October of 2019. Ms. Haberlan testified that the plaintiff in the caption is the same entity as the lender listed in the power of attorney, although she acknowledged that the name in the caption was "shortened." [2] She testified that SLS became the servicer for this mortgage on December 1, 2018. The prior servicer was Wells Fargo. Plaintiff's Ex 2 in evidence is a copy of a letter dated December 7, 2018 from SLS to defendants notifying them that the servicer of the mortgage had changed. This is known at her company as a "hello" letter. She said that the actual contract between plaintiff and SLS was not going to be offered into evidence, as it is "proprietary."

Plaintiff's Ex 4 is the Note. The original was presented to the court by plaintiff's counsel and a copy was admitted into evidence. It was signed on August 3, 2005 by both defendants. The lender is listed as Meridian Residential Capital, LLC (hereafter "Meridien"). Ms. Haberlan did not know if she had ever seen the original. It has a

[2] The name in the caption is U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR CREDIT SUISSE FIRST BOSTON 2005-10. The name in the document is CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP., CSFB MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES 2005-10, U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE.

separate allonge stapled to the note with two endorsements. The allonge page looked equally as yellowed as the note itself. The first endorsement is undated, and states that Joseph Shapiro, Vice President of Meridian Residential Capital, LLC, "Without recourse pay to the order of: US Bank National Association, as Trustee for Credit Suisse First Boston 2005-10." Below that endorsement is one which is a stamp, "without recourse pay to the order of" and US Bank National Association as Trustee is filled in, the stamp then states it is signed "by Wells Fargo Bank, N.A., Attorney in Fact by Samuel C. Shelley, Senior Vice President." There is a signature above the stamped name. It is undated. The allonge is identical to the one annexed to the affidavit of merit filed with the plaintiff's motion for an order of reference. The witness said she was unable to describe the chain of custody of the Note, which was to be addressed by the next witness.

A copy of the mortgage is plaintiff's Ex 5. It identifies Meridian as the lender, and states that Meridian "exists under the laws of New Jersey." It is signed by both defendants and was recorded. It reflects that MERS is the "mortgagee of record."

The assignment of the mortgage from MERS "as nominee for Meridian" to plaintiff was admitted as plaintiff's Ex 6. It is dated and notarized/acknowledged on January 5, 2007 in South Carolina. It was recorded a few weeks later.

Ms. Haberlan then identified plaintiff's Ex 7 as "screenshots" of SLS's "Fiserd" program, captured and printed on December 26, 2018 by someone other than her. Plaintiff's Ex 8 is a document she identified as the payment history of the loan, from Wells Fargo, the former servicer. Each page says at the top "ASC, a division of Wells Fargo, NA." She testified that she believed it was created in 2017, and that ASC is "America's Servicing Company." It reflects that the last payment made by defendants

was the payment which was due on February 1, 2008. She stated that these were now the business records of SLS, her employer.

Plaintiff's Ex 9 is a notice of default dated May 25, 2008 from ASC ("America's Servicing Company"). It does not state that ASC is related to Wells Fargo. It is addressed solely to Beth Kaplan, at the property address. The letter states that the loan is delinquent, and unless it is brought current by June 24, 2008, "it will become necessary to accelerate your Mortgage Note and pursue the remedies provided for in your Mortgage." The witness was asked about the mailing of this letter and she said she does not know anything about the prior servicer's mailing procedures, and that she does not know if they mailed the notices themselves or if they used a mailing company. This was addressed by the next witness.

Plaintiff's Ex 10 was identified by the witness as a "letter log" printed in 2017 by an unidentified person from Wells Fargo's computer program. She opined that the May 28, 2008 entry reflected the mailing of the letter admitted as Ex 9.

Plaintiff's second witness was Zachary Chromiak, who testified remotely from Pennsylvania. He is an assistant vice president at Bank of America NA, and has been employed in that position since 2012. He testified that in 2008, Bank of America merged with La Salle Bank. He admitted, as plaintiff's Ex 11, a document signed by an officer of Bank of America, that reflects this merger, effective October 17, 2008. Prior to this merger, La Salle Bank was the document custodian. It is not clear whether they were the document custodian for ASC, Wells Fargo, Meridian, MERS, U.S. Bank, Credit Suisse, or another business. There was no document offered into evidence on this issue. He testified a few moments later that they were custodian for plaintiff U.S. Bank.

Plaintiff's Ex 12 was described by Mr. Chromiak as a "tracking document" which

consists of a printout of a screenshot from a "collateral tracking system." He testified that "they" had documents in a La Salle vault, which became a Bank of America vault. He then said the screen shot reflects that La Salle as custodian for U.S. Bank "received the collateral file in August 2005." Yes, this is what he said. The court notes that the assignment was executed in 2007. Asked about this discrepancy, he said the Note was transferred to US Bank in 2005 "as a trust deal." He then testified that when this action was commenced in July of 2008, the Note was still in the vault, as the screenshot in plaintiff's Ex 12 states that it was released from the vault on September 19, 2008. The document indicates that whatever it is referring to is in a vault in Jacksonville, Florida. There is an entry with the property address, and one with the initial mortgage amount, interest rate and monthly payment. The "activity" tab is one (of ten) that was printed, along with the one called "documents." The information conveyed is not easy to understand. For "activity" it lists three "certifications" for this loan on 8/25/05, one "update," one "deposit," and one "location move." For 10/27/2007, it lists a "transfer out" and a "transfer in", both at 6:16 p.m. There is a "location move" on 2/15/2007 and another on 4/25/08. On 9/9/2008, it says "release" and on 11/5/2008, "return." The "document" screen states that the Note, mortgage, and other documents for this "collateral id" number have a "pool number," a "customer number" and an "account number."

Plaintiff's attorney then rested. Defendant Beth Kaplan's attorney submitted into evidence as Defendant's Exhibit A the affidavit that had been submitted in support of plaintiff's prior motion for summary judgment, from Mr. Whitmarsh at Wells Fargo, discussed above. He then rested.

The affidavit signed by Jack Whitmarsh states that he was (on 4/25/2017) "Vice

President of Loan Documentation at Wells Fargo Bank, N.A., the servicing agent to Plaintiff." It goes on to say that "pursuant to Wells Fargo's business records and correspondence with the Wells Fargo document custodian," plaintiff "had possession of the Promissory Note on December 22, 2005 . . . so it had possession of the Promissory Note on or before July 17, 2008, the date that this action was commenced." He does not identify the name of the "Wells Fargo document custodian."

Defendant Beth Kaplan's attorney, as stated above, moved to dismiss the complaint on the grounds that plaintiff had failed to make a prima facie case, in particular, that plaintiff failed to establish that it had standing when it commenced the action.

Discussion

Generally, a "plaintiff establishe[s] its *prima facie* entitlement to [summary] judgment as a matter of law by submitting the mortgage, unpaid note (endorsed in blank) and evidence of defendants' default" (*U.S. Bank Nat. Ass'n v Sabloff, 153 AD3d 879, 880* [2nd Dept 2017]; *Green Tree Servicing LLC v Bormann*, 157 AD3d 1112 [3d Dept 2018]). Plaintiff has done so here. When a defendant raises standing as a defense in a mortgage foreclosure action, the plaintiff must also prove that it was the holder or assignee of the promissory note at the time of commencement of the action (*Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361 [2015]; *HSBC Bank USA, N.A. v Roumiantseva*, 130 AD3d 983, 983-984; *HSBC Bank USA, N.A. v Calderon*, 115 AD3d 708, 709; *Bank of NY v Silverberg*, 86 AD3d 274, 279).

An endorsement in blank renders the note a bearer instrument, but does not provide evidence of possession (NY UCC § 3-202 [1]; *Wells Fargo Bank, N.A. v Walker*, 141 AD3d 986, 987 [3d Dept 2016]). When a plaintiff alleges in the complaint that it

possesses the note and attaches a copy of the note to the complaint, it has proven prima facie that it possessed the note at commencement (*U.S. Bank Nat. Ass'n v Sabloff, 153 AD3d 879, 880* [2nd Dept 2017]*; JP Morgan Chase Bank, N.A. v Venture*, 148 AD3d 1269, 1270-1271 [3d Dept 2017]). Here, the note was not attached to the complaint when the action was commenced. A plaintiff can also prove prima facie possession of the note at commencement with an affidavit of merit stating that, based on a record review, plaintiff came into possession of the note on a specific date and continued to possess it at commencement (*Bank of America National Association v Masri*, 158 AD3d 660 [2nd Dept 2018]; *Bormann*, 157 AD3d 1112). Here, plaintiff attached a copy of the note to the affidavit of merit submitted with the motion for summary judgment and an order of reference. This is sufficient.

The court finds that the plaintiff has established that it had standing when it commenced the action. The original note was produced in court and a copy was introduced into evidence, as was a certified copy of the mortgage. The affidavit of merit, which was filed with the 2014 motion (#2) for an order of reference, contains as an exhibit the identical note and allonge. As described above, the note and mortgage were assigned to plaintiff by a written and recorded assignment, which was recorded before the action was commenced.

The court finds that plaintiff had possession of the note when the action was commenced, and thus had standing to commence the action of the date the action was commenced. Further, the plaintiff has made a prima facie case with regard to the "liability" aspect of this foreclosure action, which is the issue which was tried before the court. The defendant's arguments with regard to the default notice and other issues were not raised in defendant's affirmative defenses in their answer to the complaint,

and, as such, were waived.

Accordingly, it is

ORDERED that plaintiff is entitled to an Order of Reference, appointing a referee to compute the amount owing under the mortgage and striking the defendants' answer, and then, upon moving before the undersigned to confirm the referee's report, plaintiff will be entitled to a judgment of foreclosure and sale, for the premises located at 1483 East 16th Street, Brooklyn (Block 6754, Lot 58, Kings County).

Settle an Order of Reference on notice.

Dated: August 22, 2022

E N T E R :

Hon. Debra Silber, J.S.C.