

U.S. Bank N.A. v Gordon

2022 NY Slip Op 33490(U)

October 6, 2022

Supreme Court, Kings County

Docket Number: Index No. 506363/2013

Judge: Richard Velasquez

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At an IAS Term, Part 66 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 6th day of OCTOBER, 2022.

PRESENT:

HON. RICHARD VELASQUEZ,

Justice.

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U.S. BANK NATIONAL ASSOCIATION, as Trustee for
J.P. MORGAN MORTGAGE ACQUISITION CORP.
2006-FRE2, ASSET BACKED PASS-THROUGH
CERTIFICATES, SERIES 2006-FRE2,

Plaintiff,

- against -

MARSHA ROSE GORDON, A/K/A MARSHA ROSE-GORDON,
DYCK-O'NEAL, INC.; NY STATE DEPARTMENT OF
TAXATION AND FINANCE; CITY OF NEW YORK TRANSIT
ADJUDICATION BUREAU; NYC DEPARTMENT OF
FINANCE-PARKING VIOLATIONS BUREAU; NEW YORK
CITY ENVIRONMENTAL CONTROL BOARD; "JOHN DOE"
AND "JANE DOE" said names being fictitious, it being the
intention of Plaintiff to designate any and all occupants
of premises being foreclosed herein,

Defendants.

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The following e-filed papers read herein:

Notice of Motion/Amended Notice of Motion/
Notice of Cross Motion, Affidavits (Affirmations),
Memorandum of Law in Support, and Exhibits Annexed _____

Memorandum of Law in Opposition to Cross Motion and
in Further Support of Motion _____

DECISION AND ORDER

Index No. 506363/2013

Motion Seq. Nos. 5-6

NYSCEF #:

111-131; 135-139

140

In this action to foreclose a mortgage secured by residential real property located in Brooklyn, New York (the underlying property), plaintiff U.S. Bank National Association, as trustee for J.P. Morgan Mortgage Acquisition Corp. 2006-FRE2, Asset Backed Pass-Through Certificates, Series 2006-FRE2 (the plaintiff), moves, by amended

notice of motion (NYSCEF #131), for an order (1) pursuant to RPAPL 1321, appointing a referee to compute the amount due to the plaintiff, to determine whether the underlying real property may be sold as one parcel, and to make his/her computation and submit his/her report; (2) pursuant to RPAPL 1311, adding names of tenant(s) residing at the underlying mortgaged property as named defendants, and amending the caption to add “Jason Doe” and to remove “John Doe” and “Jane Doe” as defendants; and (3) pursuant to CPLR 3215, holding in default defendant Marsha Rose Gordon, also known as Marsha Rose-Gordon (the defendant), and the other defendants (Seq. No. 5). The defendant opposes and cross-moves for an order (1) pursuant to CPLR 2004 and 3012, directing that her time to answer the complaint be extended on the ground that she has a meritorious defense and a reasonable excuse for her default, and that the ends of justice will be served thereby; and (2) pursuant to CPLR 3408, calendaring this action for one or more settlement conferences (Seq. No. 6).

Background

On Nov. 17, 2005, the defendant borrowed \$412,000 from Fremont Investment & Loan (Fremont) pursuant to a note that is secured by the underlying property. The back page of the last page of the note contains an undated endorsement which reads, in relevant part, “Pay to the order of U.S. Bank National Association without recourse.”

Also on Nov. 17, 2005, the defendant executed and delivered the first-lien mortgage to secure the note. The mortgage lists Mortgage Electronic Registration Systems, Inc. (MERS) as a nominee and mortgagee for the purpose of recording.

In 2007, less than two years after the “loan” (a collective term for the note and mortgage) was issued, an action to foreclose the mortgage was commenced under Index No. 24682/07 (the 2007 action) against the defendant by “U.S. Bank National Association c/o Chase Home Finance, LLC 10790 Rancho Bernardo Road San Diego, CA 92127” (the prior plaintiff). The complaint in the 2007 action alleged that the defendant had defaulted by failing to make a required monthly payment when it became due, and stated that the prior plaintiff was electing to call due the entire amount secured by the mortgage. Thereafter, the defendant moved to dismiss the prior action on the ground that the prior plaintiff lacked standing. The prior plaintiff opposed and moved for leave to amend the caption of the 2007 action to reflect that the plaintiff herein (*i.e.*, U.S. Bank N.A., as Trustee of J.P. Morgan Acquisition Corp. 2006-FRE2, Asset Backed Pass-Through Certificates, Series 2006-FRE2) was the successor to the prior plaintiff. By Decision, Order, and Judgment, dated May 16, 2013, the Court ruled that the prior plaintiff was not the holder of the note when the 2007 action was commenced and granted that branch of the defendant’s motion which was to dismiss the 2007 action for lack of standing. The Court denied, as academic, the remaining branch of the prior plaintiff’s motion which sought leave to amend the caption to reflect the name of the successor plaintiff. The foregoing order concluded the 2007 action.

On Oct. 22, 2013, the plaintiff herein (*i.e.*, U.S. Bank National Association, as Trustee for J.P. Morgan Acquisition Corp. 2006-FRE2, Asset Backed Pass-Through Certificates, Series 2006-FRE2) commenced this action, alleging that the mortgage had

been assigned to it in 2009, and that it was the current holder of the note and the mortgage (the 2013 action). A copy of the note and endorsement, as quoted above, is attached to the complaint in the 2013 action (NYSCEF #1 [Schedule C]).¹ The complaint in the 2013 action alleges that the defendant defaulted by failing to make monthly payments beginning on Mar. 1, 2007, and that the plaintiff was exercising its option to accelerate the debt and call due the entire amount secured by the mortgage.

Thereafter, the defendant served her pre-answer motion for, among other things, dismissal of the 2013 action on the ground that it was time-barred or, in the alternative, for an order extending her time in which to respond to the complaint (NYSCEF #121). The defendant contended that the filing of the 2007 action accelerated the mortgage as of Mar. 1, 2007.

Plaintiff, in opposition to the defendant's motion, maintained that the statute of limitations did not begin to run on the entire loan until that loan was accelerated and that the defendant's motion should be denied because the 2013 action was timely commenced. The plaintiff further argued that, pursuant to CPLR 205, it was entitled to commence the 2013 action within six months following the dismissal of the 2007 action. By short-form order, dated Sept. 17, 2015 (NYSCEF #36), the Court ruled that the complaint in the 2007 action reflected that the entire loan had been accelerated as of Mar. 2007 (the Sept. 17, 2015 order). Therefore, the Court granted the branch of the

¹ In the 2007 action, a copy of the note and endorsement was not attached to the complaint in that action. The prior plaintiff's failure to include the note and endorsement with the complaint in the 2007 action was one of the grounds for the Court's dismissal of that action.

defendant's motion which was to dismiss the 2013 action as time-barred. The Court did not address the alternative branch of the defendant's motion which was to extend her time to answer the complaint in the 2013 action.

On Feb. 28, 2018, the Second Judicial Department, in a 3-2 memorandum decision, reversed the Sept. 17, 2015 order (*see U.S. Bank Natl. Assn. v Gordon*, 158 AD3d 832 [2018]). The majority of the panel held, in relevant part, that:

“As the assignee and subsequent holder of the note and mortgage, the plaintiff in the 2013 action [i.e., U.S. Bank National Association, as Trustee for J.P. Morgan Acquisition Corp. 2006-FRE2, Asset Backed Pass-Through Certificates, Series 2006-FRE2] had a statutory right, pursuant to CPLR 1018, to continue the 2007 action in the place of the prior plaintiff [i.e., U.S. Bank National Association c/o Chase Home Finance, LLC 10790 Rancho Bernardo Road San Diego, CA 92127] once the assignment occurred in 2009, even in the absence of a formal substitution. Indeed, the plaintiff in this action, as the current holder of the note and mortgage, is not seeking to enforce any rights separate and independent from those asserted in the 2007 action. Rather, it is seeking to enforce the rights under the note and mortgage by obtaining a judgment of foreclosure and sale, the same rights that the plaintiff in the 2007 action sought to enforce. Under these circumstances, the plaintiff was entitled to the application of the savings provision contained in CPLR 205 (a), and that branch of [the defendant's] motion which was to dismiss the complaint as time-barred should have been denied on this ground. . . .”

(*U.S. Bank Natl. Assn. v Gordon*, 158 AD3d at 838-839 [internal citations omitted; emphasis added]).

The dissent disputed the majority's conclusion that the plaintiffs in both actions were essentially the same. According to the dissenting opinion:

“[T]he conclusory assertion by the plaintiff’s attorney, who did not claim to have any personal knowledge of the facts, made in an affirmation in surreply, that the two entities were legally the same, was insufficient to raise a question of fact as to whether the statute of limitations was tolled pursuant to CPLR 205 (a).

* * *

[T]he only evidence in the record that the mortgage and note were assigned to the plaintiff is a January 26, 2009, written mortgage assignment, which the plaintiff [in the 2013 action] concedes was a ‘legal nullity’ since it originated from an assignment by MERS, which was never the actual holder or assignee of the underlying note and thus lacked authority to assign it. . . . *[T]he record here fails to establish that the plaintiff [in the 2013 action] became the holder of the note and mortgage while the 2007 action was pending, and that the plaintiff was essentially the plaintiff in the prior action when it was dismissed. The record otherwise fails to establish that the plaintiff is the current holder or assignee of the note and, thus, a successor in interest to the plaintiff in the 2007 action.*

(*U.S. Bank Natl. Assn. v Gordon*, 158 AD3d at 843-844 [dissenting opinion; internal citations and quotations omitted; emphasis added]).

By order, dated July 11, 2018, the Clerk of the Court of Appeals noted that the defendant, by stipulation dated June 21, 2018 (NYSCEF #126), withdrew her appeal to the Court of Appeals (*see U.S. Bank Natl. Assn. v Gordon*, 31 NY3d 1144 [2018]). Thus, the Second Judicial Department’s majority holding that the plaintiff in the 2013 action is the assignee and subsequent holder of the note and mortgage of the prior plaintiff in the 2007 action constitutes the law of the case.²

² In this regard, the majority’s holding, handed down on Feb. 28, 2018, has superseded the Court’s ruling to the contrary in its decision and order, dated June 1, 2017, issued on the plaintiff’s motion for leave to renew while the appeal from the underlying order remained pending (NYSCEF #104). There, the Court ruled that:

“The plaintiff has failed to proffer in admissible form any evidence supporting its claim that the plaintiff, U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR J.P.

MORGAN ACQUISITION CORP. 2006-FRE2 is the same entity as the previous plaintiff, US NATIONAL BANK ASSOCIATION C/O CHASE HOME FINANCE, LLC, A BANKING ORGANIZATION. *This court finds that the plaintiff, in this action is simply not the same plaintiff as in the subsequent action.* Therefore, the tolling provision in N.Y. C.P.L.R. § 205 does not apply to the present case.”

(Decision and Order, dated June 1, 2017, at 6 [NYSCEF #104] [emphasis added]). The plaintiff did not appeal the June 1, 2017 decision and order.

On Jan. 3, 2019, the plaintiff served the defendant, among others, with its amended motion for the appointment of a referee to compute and for a default judgment against her (NYSCEF #132). On Mar. 12, 2019, the plaintiff served the defendant, among others, with a notice of the upcoming court appearance (Apr. 17, 2019) (NYSCEF #134). The notice invited the defendant to “request pay-off and reinstatement figures for [her] loan” (NYSCEF #134). The defendant did not respond to the plaintiff’s invitation. Rather, on Apr. 15, 2019, or two days before the scheduled court appearance, the defendant objected to the plaintiff’s amended motion and cross-moved for leave to interpose her late answer and for an order scheduling settlement conferences. After several adjournments of the parties’ appearances, the Court heard oral argument on the plaintiff’s amended motion and the defendant’s cross motion on July 31, 2019, and reserved decision.

Discussion

CPLR 3215 (f) requires that an applicant for a default judgment file “proof of the facts constituting the claim . . . by affidavit made by the party.” To satisfy this requirement, an affidavit submitted in support of a motion pursuant to CPLR 3215 “need[s] only allege enough facts to enable a court to determine that a viable cause of action exists” (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]). “Where, as here, a foreclosure complaint is not verified, CPLR 3215 (f) states, among other things, that upon any application for a judgment by default, proof of the facts constituting the claim, the default, and the amount due are to be set forth in an affidavit ‘made by the party’” (*HSBC Bank USA, N.A. v Betts*, 67 AD3d 735, 736 [2d Dept 2009]).

In support of its motion, the plaintiff has proffered, among other documents, a copy of the summons and complaint, proof of service of process on the defendant in the form of an affidavit of service, and the note and mortgage. The plaintiff's submissions include an Affidavit of Support sworn to by Mark Syphus (Syphus), employed by Select Portfolio Servicing, Inc. (SPS) as a Document Control Officer. Syphus avers in his affidavit that (1) he reviewed SPS's business records maintained for the purpose of servicing mortgage loans; (2) he is familiar with such business records in the regular performance of his job functions; and (3) based upon his review, the loan has been in default since Mar. 1, 2007, with the principal amount due of \$409,952.08 as of that date (NYSCEF #113). Also annexed to the plaintiff's motion are copies of (1) a Limited Power of Attorney appointing SPS "by and through its officers" as a "true and lawful Attorney-in-Fact" for JPMorgan Chase Bank, National Association (JP Morgan Chase), as the Master Servicer; and (2) a Limited Power of Attorney appointing JP Morgan Chase as the Master Servicer for the trusts, including the subject trust, for which US Bank National Association acts as the trustee (NYSCEF #114).

"[T]he affidavit of merit from a representative of the plaintiff's servicing agent, accompanied by a power of attorney demonstrating the authority of the agent to act on behalf of the plaintiff, in which the representative averred that [he or] she had acquired personal knowledge of the matters discussed in [his or] her affidavit by reviewing the loan servicer's business records, [is] competent evidence to establish the plaintiff's entitlement to a default judgment against [the defendant] and [for] an order of reference"

(*U.S. Bank N.A. v Louis*, 148 AD3d 758, 758-759 [2d Dept 2017]; *see also Deutsche Bank National Trust Co. v Silverman*, 178 AD3d 898, 900 [2d Dept 2019]). Here, Syphus, an employee of SPS, has attested to his familiarity and knowledge of the record-keeping practices of SPS which, in place of JP Morgan Chase pursuant to a Limited Power of Attorney, has acted as the servicer for the plaintiff with respect to the loan at issue.

“To defeat a facially adequate CPLR 3215 motion, a defendant must show either that there was no default, or that it has a reasonable excuse for its delay and a potentially meritorious defense” (*Fried v Jacob Holding, Inc.*, 110 AD3d 56, 60 [2d Dept 2013]). Here, in opposition to the plaintiff’s motion and in support of her cross motion to compel the plaintiff to accept her late answer, the defendant has failed to demonstrate a potentially meritorious defense (NYSCEF #136). The defendant’s contention, advanced by her counsel in ¶ 5 of his affirmation, regarding the plaintiff’s lack of standing was thoroughly addressed and rejected by the majority decision of the Second Judicial Department which, as quoted above, held that the plaintiff in this action is the assignee and subsequent holder of the note and mortgage of the prior plaintiff in the 2007 action (*see U.S. Bank Natl. Assn. v Gordon*, 158 AD3d 832, 838 [2d Dept 2018], *appeal withdrawn* 31 NY3d 1144 [2018]). The unsigned and unverified proposed answer (NYSCEF #139) is insufficient to demonstrate a potentially meritorious defense (*see Bekker v Fleischman*, 35 AD3d 334, 335 [2d Dept 2006]). The two items of documentary evidence annexed to the defendant’s combined opposition and cross motion

– (1) the Sept. 17, 2015 order which was subsequently reversed by the Second Judicial Department (NYSCEF #137); and (2) the Decision, Order, and Judgment, dated May 16, 2013, which concluded the 2007 action (NYSCEF #138) – fail to reveal a potentially meritorious defense (*see First Fed. Sav. & Loan Assn. of Rochester v 1220 Richmond Rd. Corp.*, 123 AD2d 418, 419 [2d Dept 1986]).

Conclusion

Based on the foregoing and after oral argument, it is

ORDERED that the plaintiff’s motion in Seq. No. 5 is granted; and it is further


ORDERED that the defendant’s cross motion in Seq. No. 6 is denied; and it is further

ORDERED that the plaintiff is directed to electronically serve a copy of this decision and order with notice of entry on the defendant’s counsel and on the other defendants, and to electronically file an affidavit of said service with the Kings County Clerk.

The plaintiff’s proposed order of reference (NYSCEF #130), as modified by the Court, is entered herewith.

This constitutes the decision and order of the Court.

ENTER FORTHWITH:



HON. RICHARD VELASQUEZ

Hon. Richard Velasquez, JSC

OCT 06 2022