

Mortgage Assets Mgt., LLC v Pujara

2024 NY Slip Op 32530(U)

July 12, 2024

Supreme Court, Rockland County

Docket Number: Index No. 032574/2022

Judge: Thomas P. Zugibe

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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MORTGAGE ASSETS MANAGEMENT, LLC,

Plaintiff,

- against -

CHANDRIKA PUJARA A/K/A CHANDRIKA N. PUJARA;
UNITED STATES OF AMERICA ACTING ON BEHALF
OF THE SECRETARY OF HOUSING AND URBAN
DEVELOPMENT; MIDLAND FUNDING LLC; JOHN
DOE #1” through “JOHN DOE #10,” said names being
fictitious and unknown to plaintiff, intended to be possible
tenants or occupants of the premises, or corporations,
persons, or other entities having or claiming a lien upon
the mortgaged premises,

Defendants.

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ZUGIBE, J.

The papers filed electronically as NYSCEF Document numbers 28-40 and 46-55 were read on: (1) Plaintiff’s motion (designated as Mot. Seq. 001) for an Order (i) pursuant to CPLR § 3212 granting Plaintiff summary judgment as against answering Defendant CHANDRIKA PUJARA A/K/A CHANDRIKA N. PUJARA (hereinafter “Borrower”) and striking her Answer with prejudice; (ii) granting a default judgment against non-answering Defendants; (iii) appointing a referee to compute; and (iv) amending the caption of this action and on (2) Borrower’s Cross-Motion (designated as Mot. Seq. 002) for an Order permitting Borrower to amend her Answer pursuant to CPLR 3025(a).

Now, upon the foregoing papers, and all prior papers and proceedings in this action, the motions are consolidated for purposes of this Decision and are hereby determined as follows:

In this residential foreclosure action concerning real property located at 23 S. Park Drive, Congers, New York 10920, (“Mortgaged Premises”), it is alleged that Borrower duly executed a Fixed Rate Home Equity Conversion Mortgage (hereinafter the “Mortgage and Loan Agreement”) dated November 6, 2012, that granted Borrower the right to withdraw a maximum sum of \$735,000.00 (NYSCEF Doc. No. 1) and simultaneously executed a Home Equity Conversion Loan Agreement (hereinafter “Loan Agreement”) that is incorporated by reference. The Loan Agreement and the Mortgage and Loan Agreement names Advisors Mortgage Group,

LLC as the Lender. The Loan Agreement contains a special indorsement payable to the order of Generation Mortgage Company, and is further indorsed in blank by Generation Mortgage Company. The endorsed Loan Agreement and Mortgage and Loan Agreement are attached to the Complaint filed in this matter (NYSCEF Doc. 1). Also attached to the Complaint as NYSCEF Doc 6 is an Assignment of Mortgage dated September 15, 2021, assigning the Mortgage to Plaintiff herein.

Plaintiff alleges that a 90-day notice pursuant to RPAPL § 1304 dated February 2, 2021 (NYSCEF Docs. 1 and 37) was served upon Borrower by certified mail placing her on notice of the default based upon her failure to pay property taxes and insurance on the Mortgaged Premises. Plaintiff also proves service on all Defendants, and the additional mailing required by CPLR 3215(g) which is necessary to proceed on a default judgment with respect to the non-answering Defendants.

A foreclosure plaintiff carries its burden to prove entitlement to judgment by producing the mortgage, the unpaid note and competent evidence of borrowers' default on the loan (*see e.g. Bank of New York Mellon v Gordon*, 171 A.D.3d 197, 203 (2d Dept. 2019); *U.S. Bank Nat. Ass'n v Denaro*, 98 A.D.3d 964 (2d Dept. 2012)).

In the present action, as noted hereinabove, Plaintiff attaches the Loan Agreement and Mortgage and Loan Agreement to the Complaint. Plaintiff's affiant also attests to Borrower's default through the Affidavit of Talya Lopez ("Lopez Affidavit"). NYSCEF Doc. 37. Ms. Lopez serves as a Contract Management Coordinator of PHH Mortgage Corporation, the loan servicer for Plaintiff. Plaintiff attaches and authenticates primary evidence of Borrower's default in the form of loan payment records under *Gordon, supra*. Plaintiff further produces proof that Plaintiff is the holder of the Loan Agreement and Mortgage and Loan Agreement which was delivered to Plaintiff prior to the commencement of this action and has continuously remained in its possession since delivery. The Lopez Affidavit evidences the service of the 90-day notice sent via certified mail to Borrower's last known address on February 17, 2022, at least 90 days prior to commencement of this action. The 90-day notice is attached to the Lopez Affidavit as Exhibit "C". This notice contains a typewritten notation similarly indicating that it was sent to the Borrower by certified mail. The certified mail registration number is set forth thereon.

Defendants oppose summary judgment on the bases of standing, and the purported failure to comply with the mandates of RPAPL § 1304, a condition precedent to the maintenance of a residential foreclosure action. As defendants oppose this relief only on the grounds of standing and service of the 90-day notice, all other affirmative defenses and counterclaims are waived as a matter of law (*see e.g., New York Comm'l Bank v J Realty F. Rockaway Ltd.*, 108 A.D.3d 756, 757 (2d Dept. 2013); *Starkman v City of Long Beach*, 106 A.D.3d 1076, 1078 (2d Dept 2013)).

A lender must provide a borrower a 90-day notice in accordance with the strict dictates of RPAPL § 1304. Subdivision (2) of this statutory mandate further provides that "[t]he notices required by this section shall be sent by such lender, assignee (including purchasing investor) or mortgage loan servicer to the borrower, by registered or certified mail *and also by first-class mail to the last known address of the borrower*, and to the residence that is the subject of the mortgage. RPAPL § 1304 (2) (emphasis added). Strict compliance with RPAPL § 1304 is a

condition precedent to the commencement of a foreclosure action (*see Bank of Am. v Kessler*, 202 A.D.3d 10, 14 (2d Dept. 2021); *CV XVII, LLC v Trippiedi*, 187 A.D.3d 847, 850 (2d Dept 2020); *U.S. Bank, N.A. v Haliotis*, 185 A.D.3d 756, 758 (2d Dept. 2020); *Citibank, N.A. v Conti-Scheurer*, 172 A.D.3d 17, 20 (2d Dept 2019)). Where, as here, a defendant borrower raises an RPAPL § 1304 affirmative defense, plaintiff has the burden to establish satisfaction of that condition precedent (*Deutsche Bank Nat'l Trust Co. v Loayza*, 204 A.D.3d 753, 754 (2d Dept. 2022)).

In this matter, the Borrower contends that although the Lopez Affidavit outlining the procedural steps undertaken with respect to the 90-day notice references affiant's reliance on certain business records, the foundational assertions concerning service of the 90-day notice constitute inadmissible hearsay since the pertinent records were not attached. The Appellate Division, Second Department, instructs that "it is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted[.]" *Gordon*, supra, at 205 (internal citations omitted). "Evidence of the contents of business records is admissible only where the records themselves are introduced[.]" *Id.* at 205-06 (internal citations omitted). "Without their introduction, a witness's testimony as to the contents of the records is inadmissible hearsay[.]" *Id.* at 206 (internal citations omitted).

A review of the business records attached to the moving papers in support of the motion for summary judgment reveals that Plaintiff has failed to provide legally sufficient non-hearsay evidence establishing compliance with RPAPL § 1304. Notwithstanding the clear and unequivocal mandate that the notices must be sent "by registered or certified mail and also by first-class mail to the last known address of the borrower, and to the residence that is the subject of the mortgage", the Lopez Affidavit relied upon by Plaintiff at ¶10 merely avers that "[t]he 90-day notices were mailed by certified mail to the last known address of the borrower(s) and if different, to the address of the property being foreclosed".¹ In sum, Plaintiff fails to allege strict compliance with the express mailing requirements imposed by the statute.

Even assuming, *arguendo*, that the sworn allegations satisfied the minimum pleading requirements, Plaintiff fails to demonstrate that the purported business records offered in support satisfy Plaintiff's burden pursuant to RPAPL § 1304. The A review of the purported business records attached to this application in support of the service mandates of RPAPL § 1304 and relied upon in the Lopez Affidavit appears to refer to certified mail only with not even a passing reference as to service by regular mail. Indeed, it is only the 90-day notice that even remotely addresses certified mail. The Court was unable to glean from any of the attached business records reference to any service by regular mail and any proof that the document was indeed sent or received by Borrower.

¹ Plaintiff memorandum of law submitted in support of this application asserts that "Ms. Lopez's (sic) testifies that, based upon a review of her employer's business records—for which she lays a proper foundation—notice pursuant to RPAPL 1304, dated February 17, 2022, were sent to Borrower at the Property address by **regular** and certified mail, all in accordance with Plaintiff's standard mailing practices." NYSCEF Doc. 38, pg. 8 (emphasis supplied). There is, however, no reference to service by regular mail in the Lopez affidavit, merely "certified mail".

The sufficiency of the records necessary to satisfy Plaintiff's *prima facie* showing was addressed in *U.S. Bank Nat'l Ass'n v. Ahmed*, 174 A.D.3d 661 (2d Dept. 2019). Determining that the foundational requirements were not satisfied, the Court opined as follows:

The statute requires that such notice must be sent by registered or certified mail, and also by first-class mail, to the last known address of the borrower (*see* RPAPL 1304[2]). 'Proof of the requisite mailing is established with proof of the actual mailings, such as affidavits of mailing or domestic return receipts with attendant signatures, or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure... Further, although the plaintiff submitted a certified mail receipt and tracking information from the United States Postal Service, under the circumstances, these documents did not prove that the RPAPL 1304 notice was actually mailed. In particular, the certified mail receipt did not contain a postmark indicating that it was sent. Further, there was no tracking number on the RPAPL notice ,or any other information on either the notice or the certified mail receipt to show that the receipt pertained to the mailing of the RPAPL notice, as opposed to some other document sent to the defendant. Similarly, the tracking information the plaintiff submitted did not contain any information linking the tracking information to the RPAPL notice and did not contain a delivery address. Thus, the documents submitted merely proved that a mailing was delivered on a particular date to an address in Astoria, Queens. Finally, the affidavit of the plaintiff's representative was insufficient to establish that the notice was sent to the Defendant in the manner required by RPAPL 1304, 'as the representative did not provide proof of a standard office mailing procedure[.]'

U.S. Bank Nat'l Ass'n v. Ahmed, *supra*, at 663 (internal citations omitted).

The Appellate Division, Second Department provided further guidance as to the threshold showing necessary in *Wells Fargo Fin. Credit Servs. New York, Inc. v. Mammen*, 191 A.D.3d 737 (2d Dept. 2021) explaining "[t]he plaintiff can establish strict compliance with RPAPL 1304 by submitting domestic return receipts, evidence of a standard office procedure designed to ensure that items are properly addressed and mailed, or an affidavit from someone with personal knowledge that the mailing of the RPAPL 1304 notice actually happened[.]" Clearly, the Plaintiff has failed to provide legally sufficient non-hearsay evidence establishing compliance with RPAPL § 1304.

Defendant further avers that the Plaintiff lacks the requisite standing to commence this action. Where, as here, a foreclosure defendant raises the affirmative defense that the plaintiff lacks standing, such plaintiff must affirmatively "prove its standing in order to be entitled to relief" (*HSBC Bank, N.A. v Roumiantseva*, 130 A.D.3d 983, 983-984 (2d Dept 2015); *HSBC Bank USA, N.A. v Calderon*, 115 A.D.3d 708, 709 (2d Dept 2014)). "A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it is either the holder or assignee of the underlying note at the time the action is commenced" (*Wells Fargo Bank, N.A. v Gallagher*, 137 A.D.3d 898, 899 (2d Dept 2016), *see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 360-362 (2015)). "Either a written assignment of the underlying note or the physical

delivery of the note prior to commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident" (*U.S. Bank, N.A. v Collymore*, 68 A.D.3d 752, 754 (2d Dept. 2009); *JPMorgan Chase Bank, N.A. v Weinberger*, 142 AD3d 643, 64 (2d Dept. 2016)); *Gordon, supra*, 171 A.D.3d at 203-204).

Defendant argues that Plaintiff lacks standing in this action based upon the contention that the reverse mortgage merely creates a security interest governed by UCC Article 9, and is not a negotiable instrument as defined under UCC Article 3, since it does not "contain an unconditional promise or order to pay a sum certain in money." UCC § 3-104(1)(b). This Court agrees.

The obligation to pay contained in the Mortgage and Loan Agreement plainly establishes that the instrument creates a line of credit available for discretionary withdrawal by the Borrower. While this loan document establishes a maximum principal available for withdrawal, a sum certain loan is plainly not articulated therein. The loan document states as follows: "Borrower has agreed to repay to Lender amounts which Lender is obligated to advance, including future advances, under the terms of a Home Equity Conversion Loan Agreement dated the same date as this Security Instrument". The agreement to repay is evidenced by Borrower's Note dated the same date as this Security Instrument ("Note"). This Security Instrument secures to Lender: (a) the repayment of the debt evidenced by the Note, with interest, and all renewals, extensions and modifications of the Note, up to a maximum principal amount of SEVEN HUNDRED THIRTY- FIVE THOUSAND AND NO/100 (U.S. \$735,000.00) ..."

This issue was recently addressed in *OneWest Bank, N.A. v FMCDH Realty, Inc.* 165 A.D.3d 128 (2d Dept. 2018) that involved an open-ended line of credit legally indistinguishable from the loan document *sub judice* authorizing a borrower to draw up to a maximum principal amount with the concomitant obligation to pay "all amounts advanced". Finding that the instrument was not a negotiable instrument because of the lack of a sum certain, the Court held that the instrument did not constitute a negotiable instrument within the meaning of UCC § 3-104 hence "plaintiff cannot establish its standing merely by demonstrating that it was in possession of the original Cash Account Agreement, indorsed in blank, at the time the instant action was commenced...". *Id.* at 132.

This Court similarly concludes that the Security Agreement and Mortgage and Security Agreement constitute nonnegotiable instruments and that the reverse mortgage herein creates a security interest governed by Article 9 of the UCC. The Court must, therefore, look to the criteria as to when a security interest is enforceable as propounded in UCC § 9-203. As cogently explained by the Court in *Bank of New York Mellon Tr. Co., N.A. as Tr. for Mortg. Assets Mgmt. Series I Tr. v. Hendrickson*, 79 Misc. 3d 540, (N.Y. Sup. Ct. 2023) a plaintiff can only enforce its interest in the nonnegotiable instrument if "(1) value has been given; (2) the seller of the note had rights in the note or the power to transfer rights in the note to plaintiff; and (3) one of four conditions is met: (a) the seller of the note has authenticated an agreement for the sale of promissory notes that include the note, and the agreement provides a description of the note, (b) the note, if not a certificated security, is in plaintiff's possession under UCC 9-313 pursuant to the security agreement, (c) the note, if a certificated security, is in registered form and has been delivered to the plaintiff under UCC 8-301 pursuant to the security agreement, or (d) the note is a

deposit account, electronic chattel paper, investment property, letter-of-credit rights, or electronic documents, and plaintiff has control over the note under UCC 7-106, 9-104, 9-105, 9-106, or 9-107 pursuant to the security agreement. (UCC 9-203 [b].)” As in *Hendrickson, supra*, this Court finds that the Plaintiff has failed to *prima facie* establish the requisite criteria.

Accordingly, for all of the reasons set forth hereinabove, Plaintiff’s Motion for Summary Judgment is denied, and the Complaint is dismissed.

While the Borrower cross-moves to amend the Answer, this application is denied as moot.

Accordingly, based on the foregoing, it is hereby

ORDERED, that Plaintiff’s motion for Summary Judgment is denied, and the Court, based on the record, grants summary judgment in favor of the Defendant and dismisses the Complaint in this action without prejudice; and it is further

ORDERED, that Defendant’s cross-motion is denied as moot in light of the foregoing.

The foregoing constitutes the Decision and Order of this Court.

Dated: New City, New York
July 12, 2024



THOMAS P. ZUGIBE
Justice of the Supreme Court

To: All counsel of record via NYSCEF