Federal Natl. Mtge. Assn. v Berquin

2024 NY Slip Op 33011(U)

August 26, 2024

Supreme Court, Kings County

Docket Number: Index No. 507882/2014

Judge: Carolyn Walker-Diallo

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This opinion is uncorrected and not selected for official publication.

PRESENT:

HON. CAROLYN WALKER-DIALLO, J.S.C.

At an IAS Term, Part FRP4, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse at 320 Jay Street, Brooklyn, New York, on the 26th day of August 2024.

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FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Plaintiff,

Index No.: 507882/2014

- against -

DECISION AND ORDER

JUDE BERQUIN et al.,

Defendants.

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

Papers Numbered

Plaintiff's Notice of Motion, Affirmation, Exhibits	NYSCEF Doc. No(s). 195-218
Affirmation in Opposition	NYSCEF Doc. No(s). 226
Affirmation in Reply	NYSCEF Doc. No.(s) 227

Papers considered: Motion Sequence 7

INTRODUCTION

Plaintiff Federal National Mortgage Association ("Plaintiff") moves for an order pursuant to CPLR 3215 and RPAPL 1321 seeking to: (1) discontinue the action solely against Defendant Jude Berquin ("Defendant Berquin"); (2) grant Plaintiff's default judgment against all non-appearing defendants; (3) appoint a Referee to compute sums due under the mortgage; and (4) amend the case caption. Defendant opposes Plaintiff's motion, asserting that Plaintiff cannot discontinue the action against the borrower Berquin without substituting the current owner of the property. Upon the foregoing papers and for the reasons set forth below, Plaintiff's motion is DENIED in its entirety.

FACTUAL AND PROCEDURAL HISTORY

This residential mortgage foreclosure proceeding was commenced on August 27, 2014, with the filing of a Summons and Complaint, Notice of Pendency, and Certificate of Merit. (NYSCEF Doc. Nos. 1-3). Original plaintiff Wall Street Mortgage Bankers Ltd. dba Power Express filed the action seeking to foreclose on the mortgage for 1057 East 83rd Street, Brooklyn, New York 11236 ("subject premises"). Defendant Berquin filed an answer on September 23, 2014; all the remaining defendants did not. (NYSCEF Doc. No. 27). Subsequently, Federal National Mortgage Association was substituted as plaintiff because of its assumption of the mortgage. *See* Order of the Hon. Noach Dear dated October 10, 2019 (NYSCEF Doc. No. 125).

The instant action was commenced after Defendant Berquin defaulted on his mortgage repayment obligations by failing to make a monthly payment on December 1, 2013. *See* Notice of Breach (NYSCEF Doc. No. 205). The unpaid principal balance is $741,793.25. *See* complaint at ¶ 4 (NYSCEF Doc. No. 1). Defendant Berquin executed a promissory note and mortgage for the subject premises with Wall Street Mortgage Bankers, Ltd, d/b/a Power Express ("Wall Street"), on October 16, 2007, in the amount of $620,100.00. *See* Mortgage (NYSCEF Doc. Nos. 197-198). Defendant Berquin obtained three subsequent modification agreements on July 7, 2010, June 2, 2011, and October 19, 2012, respectively. *See* Mortgage Modification Agreements (NYSCEF Doc. Nos. 200-202).

The mortgage was assigned by Wall Street to Fannie Mae on October 28, 2014, from Fannie Mae to Rushmore Loan Management Services LLC on May 10, 2019, and finally to Specialized Loan Servicing LLC ("SLS") on September 7, 2023 (NYSCEF Doc. No. 203). Additionally, Defendant Berquin deeded the subject premises to 1057 East 83rd St LLC on February 2, 2015, during the pendency of this action. *See* Deed (NYSCEF Doc. No. 210). Plaintiff filed the instant

motion on March 20, 2024 (NYSCEF Doc. No. 195). Defendant Berquin filed an affirmation in opposition on May 14, 2024, and Plaintiff filed a reply affirmation on May 20, 2024 (NYSCEF Doc. Nos. 226-227).

DISCUSSION

PLAINTIFF'S MOTION IS DENIED IN ITS ENTIRETY

I. Plaintiff's Motion to Discontinue as Against Jude Berquin is Denied.

Plaintiff moves to discontinue Defendant Berquin as an unnecessary party given that he conveyed his title interest in the property. *See* Affirmation of Ronald P. Labek in Support of Motion, dated March 20, 2024 ("Labeck Aff.") at ¶ 11 (NYSCEF Doc. No. 196). Plaintiff relies upon a slew of cases for the proposition that an unnecessary party can be discontinued from a foreclosure. *See JPMorgan Chase Bank, Nat'l Ass'n v. Joseph*, 193 A.D.3d 703 (2d Dep't 2021); *DLJ Mortg. Capital, Inc. v. 44 Brushy Neck, Ltd.*, 51 A.D.3d 857, 859 (2d Dep't 2008). While this proposition is true, it is not true in isolation: rather, "[t]he rule is that a mortgagor who has made an absolute conveyance of all his [or her] interest in the mortgaged premises, including his [or her] equity of redemption, is not a necessary party to foreclosure, unless a deficiency judgment is sought on his [or her] bond." *Federal Natl. Mtge. Assn. v. Connelly*, 84 A.D.2d 805, 805 (1981); *see Bank of N.Y. Mellon Trust Co. v. Ungar Family Realty Corp.*, 111 A.D.3d 657, 658, 974 N.Y.S.2d 584 (2013); *see also* RPAPL 1311 (1); CPLR 1001; *JPMorgan Chase Bank, Nat'l Ass'n v. Joseph*, 193 A.D.3d 703 (2d Dep't 2021).

Here, Plaintiff has made no showing that it does not intend to seek a deficiency judgment against Defendant Berquin should the foreclosure and sale it seeks of the subject premises not make it whole. Although Defendant Berquin is no longer the title owner to the subject premises, he remains liable as a mortgagor. Accordingly, Plaintiff has not made its required showing to have

Defendant Berquin discontinued from this action. Therefore, this prong of Plaintiff's motion to discontinue as against Defendant Berquin is DENIED.

II. Plaintiff's Motion for Default as Against Defaulting Defendants is Denied.

"On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting its claim, and proof of the defaulting party's default in answering or appearing." *Atlantic Cas. Ins. Co. v. RJNJ Servs., Inc.*, 89 A.D.3d 649, 651 (2d Dep't 2011). The affidavit 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, may provide proof of the facts constituting the claim and proof of the defendants' default. *See U.S. Bank Nat. Ass'n v. Poku*, 118 A.D.3d 980, 981 (2d Dep't 2014).

Here, Plaintiff has submitted proof of service of the pleadings and RPAPL 1303 Tenant Foreclosure Notices on the defaulting defendants. *See* Affidavits of Service (NYSCEF Doc. Nos. 4-5, 7-12, 14-16, 18-21, 23-25). However, the affidavit from the servicing agent Steven B. Ross is defective because it does not contain a power of attorney. *See* Affidavit of Steven B. Ross in Support of Motion for Summary Judgment, dated November 17, 2023 ("Ross Aff.") and supporting exhibits (NYSCEF Doc. No. 216). Although Ross's affidavit provides that a "limited Power of Attorney between SLS and Plaintiff [Fannie Mae] is attached," the document is not provided to the Court. *Id.* at ¶ 1. Therefore, Ross's authority to act on behalf of Fannie Mae is not established. *see HSBC Bank USA, N.A. v. Betts*, 67 A.D.3d 735, 736 (2d Dep't 2009). Such proofs are integral to Plaintiff's prima facie showing in support of its motion for default. As such, this prong of Plaintiff's motion for default against the non-appearing defendants is DENIED.

III. Plaintiff's Motion to Appoint a Referee to Compute Sums is Denied.

As Plaintiff's motion for default against the non-appearing defendants is denied, this prong of the motion must be denied as well because there are no sums ordered for a referee to compute. Therefore, this prong of Plaintiff's motion for a referee to compute sums is DENIED.

IV. Plaintiff's Motion to Amend the Caption is Denied.

Generally, "[l]eave to amend a pleading should be freely given (*see* CPLR 3025[b]), provided the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit." *See Maspeth Fed. Sav. and Loan Ass'n v. Simon-Erdan*, 67 A.D.3d 750, 751 (2d Dep't 2009), *citing Ruby Land Dev. v. Toussie,* 4 A.D.3d 518, 519 (2d Dep't 2004). Further, "[l]eave to amend a caption to substitute an assignee for the plaintiff may properly be granted upon proof that the mortgage and underlying debt were assigned to the assignee." *Nationstar Mtge., LLC v. Grunwald*, 203 A.D.3d 1170 (2d Dep't 2022); *see also* CPLR 1018. Here, although Plaintiff attaches ACRIS printouts showing the chain of assignments from Wall Street to SLS and a supporting affidavit from Steven Ross, Second Assistant Vice President of SLS as attorney-in-fact, these submissions are insufficient to prove the chain of custody of assignments from the signing of the mortgage and its servicing through its assignment to SLS.

Ross's affidavit provides that a "limited Power of Attorney between SLS and Plaintiff [Fannie Mae] is attached." Ross Aff., at ¶ 1, ACRIS printouts (NYSCEF Doc. No. 216). The power of attorney is not contained within Plaintiff's motion papers. As such, Ross's authority to speak on Fannie Mae's behalf is not established. Regarding the ACRIS printouts, self-authentication of a copy of a public record requires attestation and certification; "attestation" is assurance given by an officer of the state that the copy submitted is accurate and genuine as compared to the original; "certification" is a demonstration of the legal authority of the officer who has so attested. *See*

CPLR 4540; *see also People v. Mogrovejo*, 77 Misc. 3d 1228(A) (Sup. Ct. Queens Co. 2023). The multiple ACRIS records here contain no attestation or certification, and as such, are inadmissible hearsay since the Ross affidavit is not being considered.

As the proffered affidavit does not establish Plaintiff's required showing to amend the caption, its motion cannot be granted. Notwithstanding, pursuant to CPLR 1018, "upon any transfer of interest, the action may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action." Therefore, substitution is not required. *See Copeland v. Salomon,* 56 N.Y.2d 222 (1982). Accordingly, this prong of Plaintiff's motion to amend the caption is DENIED.

CONCLUSION

Based on the foregoing, Plaintiff's motion sequence 7 is denied in its entirety. Plaintiff is directed to serve a copy of this order with notice of its entry within twenty (20) days of the date of this order.

This constitutes the Decision and Order of the Court.

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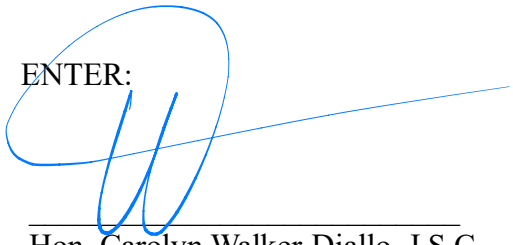

Hon. Carolyn Walker-Diallo, J.S.C.