

US Bank v Idowu

2024 NY Slip Op 33193(U)

June 25, 2024

Supreme Court, Kings County

Docket Number: Index No. 531622/22

Judge: Lawrence Knipel

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This opinion is uncorrected and not selected for official publication.

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 ~~14~~ 25 day of ~~March~~ June 2024.

PRESENT:

HON. LARRY D. ~~MARTIN~~ *Knytel*
J.S.C.

Index No.: 531622/22

US BANK,

Plaintiff,

DECISION AND ORDER

-against-

IDRIS IDOWU et al,

Defendant,
_____ x

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

Papers	Numbered
Motion (MS 1)	<u>1</u>
Opp/Cross (MS 2)	<u>2</u>
Reply/Opp to Cross	<u>3</u>
Cross-Reply	<u>4</u>

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

Plaintiff moves for summary judgment and an order of reference. Defendant opposes and cross-moves for dismissal of this action in light of the stipulation ending the prior action. Plaintiff opposes.

Whether Defendant’s argument is that the discontinuance of the prior action bars this action based upon res judicata or that Plaintiff failed to comply with the terms of that agreement, his position is unavailing. It appears undisputed that the 2020 action was discontinued without prejudice and that “Plaintiff ... reinstate[d] the loan as an installment contract.” Put differently, Plaintiff revoked the acceleration and agreed to take installment payments – but the loan

remained in default. Though Defendant's counsel argues in reply that Plaintiff did not actually restore the loan to installment status and, thus, cannot reaccelerate, neither supporting factual evidence nor legal precedent for his argument has been proffered.

It is undisputed that three pre-settlement conferences were scheduled and that the matter was released therefrom upon Defendant's failure to appear. As such, the filing of the instant motion did not violate CPLR 3408.

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.

Plaintiff has also demonstrated its standing. "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 certificate of merit filed with the complaint demonstrating 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]).

Defendant waived his defense of lack of personal jurisdiction as he failed to move to dismiss on that ground within 60 days after serving his answer and has did not demonstrate the necessary "strict undue hardship" such to allow a late motion (see, *Wilmington Trust v Meyerhoeffer*, 219 AD3d 549, 553 [2d Det 2023]).

The Serrato Affidavit and appended exhibits suffice to demonstrate that the RPAPL 1304 notices were appropriately mailed. The affiant sets forth Fay's mailing procedures and proffers documentary evidence that they were followed herein.

Defendant has abandoned her 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]).

Motion granted (see accompanying order). Cross-motion denied.

This constitutes the decision and order of the Court.

ENTER:



Hon. Larry D. ~~M...~~ JSC

Justice Lawrence Knipel

KINGS COUNTY CLERK
FILED
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