

Bank of N.Y. Mellon Trust Co., N.A. v Hendrickson

2025 NY Slip Op 31432(U)

April 21, 2025

Supreme Court, Rockland County

Docket Number: Index No. 034527/2023

Judge: Thomas P. Zugibe

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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BANK OF NEW YORK MELLON TRUST COMPANY,
N.A. AS TRUSTEE FOR MORTGAGE ASSETS
MANAGEMENT SERIES I TRUST,

Plaintiff,

DECISION & ORDER

Index No. 034527/2023

- against -

Mot. Seq. 2

REGINA HENDRICKSON AS CO-EXECUTOR TO THE
ESTATE OF MARGARET M. FITTON WHO WAS
SURVIVING SPOUSE OF JOHN J. FITTON,
CHRISTOPHER FITTON AS CO-EXECUTOR TO THE
ESTATE OF MARGARET M. FITTON WHO WAS
SURVIVING SPOUSE OF JOHN J. FITTON, PEOPLE
OF THE STATE OF NEW YORK, UNITED STATES
OF THE AMERICA ON BEHALF OF THE
SECRETARY OF HOUSING AND URBAN
DEVELOPMENT

JOHN DOE (Those unknown tenants, occupants, persons
or corporations or their heirs, distributees, executors,
administrators, trustees, guardians, assignees, creditors
or successors claiming an interest in the mortgaged
premises.),

Defendants.

-----X
ZUGIBE, J.

The papers filed electronically as NYSCEF Document numbers 56-81 were read on the motion of Plaintiff, Bank of New York Mellon Trust Company, N.A., as Trustee for Mortgage Assets Management Series I Trust, its successors and assigns, for an Order: (i) pursuant to CPLR § 3212 granting summary judgment in its favor against Defendants REGINA HENDRICKSON AS CO-EXECUTOR TO THE ESTATE OF MARGARET M. FITTON WHO WAS SURVIVING SPOUSE OF JOHN J. FITTON, CHRISTOPHER FITTON AS CO-EXECUTOR TO THE ESTATE OF MARGARET M. FITTON WHO WAS SURVIVING SPOUSE OF JOHN J. FITTON (collectively referred to herein as “Fitton”); (ii) striking all affirmative defenses and counterclaims asserted in the Answer; and (iii) permitting the answer to be treated

as a limited notice of appearance requiring Plaintiff to serve the answering Defendants, without prior notice, a copy of the entered Judgment of Foreclosure and Sale, notice of sale, notice of discontinuance, and notice of surplus money proceedings; (iv) granting an order of reference and appointing a referee to compute; and, (v) amending the caption to substitute Mike Fitton as a party Defendant in place of “John Doe. This application is opposed by Defendants Regina Hendrickson and Christopher Fitton. The Court, upon its review of the above documents, and based on all prior papers and proceedings had herein, hereby determines the motion as follows:

In this action to foreclose on a reverse mortgage concerning real property located at 11 Spruce Lane, West Nyack, NY 10994 (“Mortgaged Premises”), it is alleged that Fitton encumbered the mortgaged premises with a reverse mortgage on October 26, 2005 by the execution of an Adjustable Rate Promissory Note secured by an Adjustable Rate Home Equity Conversion Mortgage, and a Home Equity Conversion Loan Agreement (hereinafter the “Reverse Mortgage”) executed and delivered by Fitton to Financial Freedom Senior Funding Corporation, a subsidiary of IndyMac Bank, F.S.B., in the principal amount of \$469,342.50. This debt was thereafter purchased from the note holder by Fannie Mae on November 16, 2006. The Reverse Mortgage was subsequently assigned to Plaintiff by the execution of an Assignment of Mortgage (NYSCEF Doc. 58). The authenticated record evidence in this case establishes that the Plaintiff was the owner and holder of the adjustable rate note prior to commencement of this action and continues to own and hold the original Note. An allonge is firmly attached to the promissory Note containing a blank endorsement (NYSCEF Doc. 58, Ex. 3). Plaintiff alleges that based upon the death of the surviving borrower on December 3, 2017, a default occurred and the loan was automatically accelerated pursuant to the terms and conditions of the loan documents that require the premises to be occupied as the principal residence of a surviving borrower.

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 Note that is endorsed in blank to the Complaint. Plaintiff’s affiant also attests to Fitton’s default through the affidavit of Carlene Reid (“Reid Affidavit”) a Contract Management Coordinator of PHH Mortgage Corporation, the mortgage loan servicer for Plaintiff who attests that she is duly authorized to make this affidavit. Plaintiff attaches and authenticates primary evidence of Fitton’s default under *Gordon, supra*. Plaintiff further produces proof that Plaintiff is the holder of the Note and Mortgage which was delivered to Plaintiff prior to the commencement of this action, and that the Note has continuously remained in its possession since delivery.

The sole legal basis advanced by the Defendant in opposition to the motion herein for an Order granting summary judgment and an order of reference is that the Plaintiff has failed to establish the requisite standing to enforce the reverse mortgage note. Inasmuch as the Defendant opposes this relief only on this stated ground, 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).

While simple possession of a standard forward-looking note and mortgage for a sum certain debt obligation confers standing, when the instrument is a reverse mortgage, only a security interest governed by UCC Article 9 is created since the instrument does not constitute a negotiable instrument as defined under UCC Article 3. A negotiable instrument must “contain an unconditional promise or order to pay a sum certain in money.” UCC § 3-104(1)(b). The obligation to pay contained in the Reverse Mortgage instead 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.

This issue was recently addressed in *OneWest Bank, N.A. v FMCDH Realty, Inc.* 165 A.D.3d 128 (2d Dept. 2018). *OneWest Bank* involved an open-ended line of credit legally indistinguishable from the loan document *sub judice* which authorized the 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.

The procedural history of the instant case reveals that this Court (Marx, J., presiding) dismissed the first filed complaint seeking to foreclose on the Mortgaged Premises based upon the lack of standing. *See, 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., Rockland Cnty., 2023). The Court in *Hendrickson* determined that the Reverse Mortgage at issue in this action was indeed a nonnegotiable instrument creating a security interest governed by Article 9 of the UCC, and that Plaintiff failed to satisfy any of the four conditions under UCC §9-203(b)(3). The Court cogently explained that a plaintiff can only enforce its interest in the nonnegotiable instrument and establish the requisite standing 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.

Hendrickson, supra, at 545-46 (emphasis supplied).

In the application presently pending before this Court, the moving papers establish that there were three successive assignments of the note, each of which must meet the standing requirements of UCC 9-203(b). It is clear “[t]o viably establish standing an assignee must provide in proper evidentiary form, specific, exacting, itemized, enumerated, precise complete chain of title of each assignment beginning with original creditor and continuing to the current Assignee.” *Cach LLC v. George*, 56 Misc. 3d 591 (Distr. Ct., Nassau Cnty., 2017). An assignee must also establish in admissible form that defendant's specific account was included in the assignment. *Credit Corp. Sols., Inc. v Christie*, 63 Misc. 3d 1207(A) (N.Y. Civ. Ct., Kings Cnty., 2019).

Plaintiff posits that it has satisfied the statutory criteria of UCC 9-203(b). The possession and ownership by the first two holders of the note are authenticated by the affidavit of John O’Shaughnessy, a Senior Director at Fannie Mae (“O’Shaughnessy affidavit”) who attests that the loan was originated by the execution and delivery of a variable rate promissory note on October 26, 2005 by Fitton to Financial Freedom Senior Funding Corporation (“Financial Freedom”), a subsidiary of IndyMac Bank, F.S.B. in the maximum principal amount of \$469,342.50 bearing interest at the rate of 6.3% or such other variable rate stated in the promissory note. NYSCEF Doc. 60. According to the O’Shaughnessy affidavit, this debt was thereafter purchased from Financial Freedom by Fannie Mae on November 16, 2006, and further transferred on September 13, 2019 by Fannie Mae to Mortgage Asset Management, LLC.

Plaintiff further proffers the affidavit of Carlene Reid, Contract Management Coordinator for PHH Mortgage Corporation, the loan servicer, that establishes that Plaintiff is the holder of the Note and Mortgage which was delivered to Plaintiff prior to the commencement of this action, and that the Note has continuously remained in its possession since delivery. The affiant produces and authenticates the Memorandum of Sale setting forth the terms of the transfer from Fannie Mae to Mortgage Assets Management, LLC, as well as the Trust Agreement between Mortgage Assets Management LLC and Plaintiff. Plaintiff properly authenticates the promissory note that is endorsed in blank and attached to the Complaint. This nonnegotiable security instrument on its face demonstrates that “value” was advanced as a part of the bargained for

exchange and that the seller clearly had rights in the note or the power to transfer rights in the note to Plaintiff. It is the Court’s determination that the evidence adduced by the Plaintiff establishes each of the requisite elements set forth in UCC 9-203(b).

For all of the foregoing reasons, it is hereby

ORDERED, that Plaintiff’s motion for summary judgment is granted: and it is further

ORDERED, that Plaintiff’s motion to strike all affirmative defenses and counterclaims is granted; and it is further

ORDERED, that Plaintiff’s motion for an order of reference and appointment of a referee to compute is granted; and it is further

ORDERED, that Plaintiff’s motion for an Order permitting the answer to be treated as a limited notice of appearance requiring Plaintiff to serve the answering Defendants, without prior notice, a copy of the entered Judgment of Foreclosure and Sale, notice of sale, notice of discontinuance, and notice of surplus money proceedings is granted; and it is further

ORDERED, that default judgment is granted against the People of the State of New York and Mike Fitton, and the defaults are fixed and determined pursuant to CPLR § 3215; and it is further

ORDERED, that Plaintiff’s motion for an Order amending the caption to substitute Mike Fitton as a party Defendant in place of “John Doe” is granted, and it is further

ORDERED, that the caption shall hereby read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
BANK OF NEW YORK MELLON TRUST COMPANY,
N.A. AS TRUSTEE FOR MORTGAGE ASSETS
MANAGEMENT SERIES I TRUST,

Plaintiff,

Index No. 034527/2023

- against -

REGINA HENDRICKSON AS CO-EXECUTOR TO THE
ESTATE OF MARGARET M. FITTON WHO WAS
SURVIVING SPOUSE OF JOHN J. FITTON,
CHRISTOPHER FITTON AS CO-EXECUTOR TO THE

ESTATE OF MARGARET M. FITTON WHO WAS
SURVIVING SPOUSE OF JOHN J. FITTON, PEOPLE
OF THE STATE OF NEW YORK, UNITED STATES
OF THE AMERICA ON BEHALF OF THE
SECRETARY OF HOUSING AND URBAN
DEVELOPMENT, MIKE FITTON,

Defendants.

-----X

It is further

ORDERED, that the legal description in the Mortgage recorded on November 21, 2005 in Instrument Number 2005-00065744 in the Office of the Rockland County Clerk is hereby reformed so that the property reads as follows:

ALL that certain plot, piece, or parcel of land with the buildings and improvements thereon erected, situate, lying and being in the Hamlet of West Nyack, Town of Clarkstown, County of Rockland and State of New York, known and designated as Lot No. 1 in Block D on a certain map entitled, "Blue Spruce Estates, Section Two made by William A. Yuda, P.E., dated July 24, 1959 and filed in the Office of the Clerk of the Rockland County on October 29, 1959 in Block 61 of Mans, Page 3, as Map #2718.

Together with an easement of ingress and egress from the nearest public highway over all roads shown on said subdivision map to the premises herein conveyed.

Specifically excepting and reserving to the part of the first part the land lying in the bed of the street, road or avenue in front of and adjoining said premises.;

It is further

ORDERED, that, within five (5) days hereof, plaintiff shall serve via NYSCEF and U.S. Mail on the borrower defendants, and file via NYSCEF an affidavit of such service, an instrument consistent with RPAPL 1321(1) specifying the name and telephone number of plaintiff's current loan servicer; and it is further

ORDERED, that Robert Hertman, Esq., whose address is 210 Main Street, Goshen, New York 10924, and whose phone number is (845) 551-5329, is hereby appointed Referee to ascertain and compute the amount due to plaintiff for principal and interest on the note and mortgage sued upon and set forth in the complaint for payments made by plaintiff for taxes,

assessments, water charges, insurance premiums and any other expenses that plaintiff has paid or may pay in connection with the protection of its security hereunder against the mortgaged premises, including, but not limited to, watchman or caretaker fees, water and sewer rents, insurance premiums, and any other advances to protect the lien of the subject mortgage during the pendency of this action and to examine whether the mortgaged premises can be sold in one parcel; and it is further

ORDERED, that by accepting this appointment, the said Referee certifies that he or she is in compliance with Part 36 of the Rules of the Chief Judge, including, but not limited to, 22 NYCRR sections 36.2(c) and 36.2(d), and if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify this Court; and it is further

ORDERED, that pursuant to CPLR 8003(a), the fee of \$350.00 shall be paid to the Referee for the computation of the amount due and upon the filing of his or her report, plus an additional fee of \$750.00 upon sale of the property; provided, however, that if a scheduled sale is cancelled by any party to this action within 24 hours of such scheduled sale, the Referee will be entitled to a cancellation fee of \$250.00. The Referee shall not request or accept additional compensation for the computation unless it has been fixed by the Court in accordance with CPLR 8003(b); and it is further

ORDERED, that the Referee is prohibited from accepting or retaining any funds for himself or herself or paying funds to herself without compliance with Part 36 of the Rules of the Chief Judge; and it is further

ORDERED, that within thirty (30) days of the date of entry of this Order, plaintiff shall serve upon the Referee all documents necessary for the Referee to ascertain and compute the amounts due plaintiff; and it is further

ORDERED, that the Referee shall ascertain and compute the amounts due Plaintiff within sixty (60) days of entry of this Order, unless extension is granted by the Court for good cause shown; and it is further

ORDERED, that Plaintiff shall make application for Judgment of Foreclosure and Sale within ninety (90) days of the date of entry of this Order of Reference, unless extension is granted by the Court for good cause shown; and it is further

ORDERED, that the Referee shall complete and submit to the County Clerk, with a copy to the chambers of the undersigned a "FORECLOSURE ACTION SURPLUS MONIES FORM" within thirty (30) days of the sale; and it is further

ORDERED, that, within ten (10) days of the date hereof, Plaintiff shall serve a copy of this Decision and Order, with notice of entry, on all parties, each owner of the equity of redemption, any tenants named in the action, the Referee appointed herein, and any other party entitled to notice, and by such date file by NYSCEF a suitable affirmation of such service.

The foregoing constitutes the Decision and Order of this Court.

Dated: New City, New York
April 21, 2025


THOMAS P. ZUGIBE
Justice of the Supreme Court

To: All counsel of record via NYSCEF