US Bank Natl. Assoc. v Davis-Clarke
2014 NY Slip Op 33142(U)
July 17, 2014
Supreme Court, Queens County
Docket Number: 18617/09
Judge: Howard G. Lane
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IA PART 6**
Justice

US BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE STRUCTURED ASSET INVESTMENT LOAN TRUST, 2006-2
3476 Stateview Boulevard
Ft. Mill, SC 29715
Plaintiff,

-against-

ALVIN DAVIS-CLARKE, et al.,
Defendants.

Index Number 18617/09

Motion Date March 3, 2014

Motion Seq. No. 5

Motion Cal. No. 180

The following papers numbered 1 to 13 read on this motion by plaintiff for an order granting summary judgment and dismissing defendant Alvin Davis-Clarke's affirmative defenses; granting permission to treat defendant's answer as a limited notice of appearance entitling defendant to receive, without prior notice, a copy of the notice of sale, notice of discontinuance, and notice of surplus monies proceedings; appointing a referee to compute the amount due and to ascertain whether the premises can be sold in parcels; deleting the John Doe defendant, as no tenants reside in the premises and amending the caption accordingly; ordering that all non-appearing and non-appearing defendants be deemed in default, and fixing and determining the defaults. Self-represented defendant Alvin Davis-Clarke cross-moves in opposition and seeks an order granting summary judgment dismissing the complaint on the grounds of lack of standing.

	Papers Numbered
Notice of Motion- Affirmations-Affidavit-Exhibits.....	1-6
Affidavit.....	7
Notice of Cross Motion-Affidavit.....	8-9
Additional Affidavit.....	10
Reply Affirmation-Exhibits.....	11-13

Upon the foregoing papers the motion is determined as follows:

This is an action to foreclose a mortgage on the real property located at 219-02 114th Avenue, Cambria Heights, New York 11411. Plaintiff US Bank National Association as Trustee for the Structured Asset Investment Loan Trust, 2006-2 (US Bank) commenced this mortgage foreclosure action on July 14, 2009, and filed a notice of pendency on the same date. Defendant Alvin Davis-Clarke was personally served with process on July 17, 2009, pursuant to CPLR 308(1), an additional copy of the pleadings was mailed to this defendant on July 20, 2009. Mr. Davis-Clarke did not serve an answer or otherwise appear in the action at that time. The defendants failed to appear at a settlement conference on December 23, 2009, and the court in an order of said date permitted the plaintiff to proceed in this action. Plaintiff was granted an order of reference on April 19, 2010, and a referee was appointed to compute the amount due. Plaintiff was thereafter granted a judgment of foreclosure and sale dated July 20, 2010.

Plaintiff was previously represented in this action by Steven J. Baum, P.C., a now defunct law firm, and a consent to change attorney form was filed on December 30, 2011. Plaintiff's present counsel thereafter moved to substitute the affidavit of merit and amount due that had previously been filed with the court, to "validate" the order of reference, and for leave to proceed to a foreclosure sale. Self-represented defendant Alvin Davis-Clarke appeared in opposition to said motion, and requested leave to serve a late answer but did not cross-move for such relief. Said motion was fully submitted on February 5, 2013 and this court, in an order dated February 25, 2013, denied said motion and sua sponte vacated the order of reference "because the propriety of the execution and notarization of the original affidavit of merit and amount due cannot be confirmed."

Self-represented defendant Alvin Davis-Clarke's motion to vacate his default in answering the complaint and for leave to serve a late answer, was granted by this court in an order dated September 20, 2013. Mr. Davis-Clarke thereafter served an answer, and interposed the affirmative defenses of lack of standing: a violation of General Business Law § 349, and unconscionability.

Co-defendant Dellyn Davis-Clarke was personally served with process on July 17, 2009, pursuant to CPLR 308(2). Ms. Davis-Clarke has not appeared or served an answer and her time in which to do so has expired. In addition, Ms. Davis-Clarke has not moved to vacate her default. Co-defendants Asset Acceptance, LLCs Mortgage Electronic Registration Systems, Inc., as Nominee for Lehman Brothers Bank, FSB, New York City Environmental Control Board, New York City Environmental Control Board, New York City Parking Violations Bureau, New York City Transit Adjudication Bureau, Portfolio Recovery Associates LLC, and the United States of America Acting Through the IRS, were all served with process in July 2009. Defendant United States of America served a notice of appearance and a limited waiver of the service of all papers and notices. None of the other defendants have appeared in the action and none of these defendants have served an answer and their time in which to do so has long expired.

Plaintiff now seeks an order granting summary judgment in its favor, and dismissing defendant Alvin Davis-Clarke's affirmative defenses; granting permission to treat defendant's answer as a limited notice of appearance entitling defendant to receive, without prior notice, a copy of the notice of sale, notice of discontinuance, and notice of surplus monies proceedings; appointing a referee to compute the amount due and to ascertain whether the premises can be sold in parcels; deleting the John Doe defendant, as no tenants reside in the premises and amending the caption accordingly; ordering that all non-appearing and non-appearing defendants be deemed in default, and fixing and determining the default.

Self-represented defendant Alvin Davis-Clarke cross-moves in opposition and seeks an order granting summary judgment dismissing the complaint on the grounds of lack of standing.

It is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). To establish a prima facie case in an action to foreclose a mortgage, the plaintiff must produce the mortgage, the unpaid note, bond or obligation and evidence of default (*see Baron Assoc., LLC v Garcia Group Enters., Inc.*, 96 AD3d 793 [2d Dept 2012]; *Citibank, N.A. v Van Brunt Props., LLC*, 95 AD3d 1158 [2d Dept 2012]).

When moving to dismiss an affirmative defense, plaintiff bears the burden of demonstrating that the affirmative defense is "without merit as a matter of law" (*see* CPLR 3211 [b]; *Vita v New York Waste Servs., LLC,* 34 AD3d 559, 559 [2d Dept 2006]). In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference (*see Fireman's Fund Ins. Co. v Farrell*, 57 AD3d 721 [2d Dept 2008]). Moreover, if there is any doubt as to the availability of a defense, it should not be dismissed (*see id.*). In order for a defendant to successfully oppose such a motion, defendant must show his or her possession of a bona fide defense, i.e., one having "a plausible ground or basis which is fairly arguable and of substantial character" (*Feinstein v Levy*, 121 AD2d 499, 500 [2d Dept 1986]). Self-serving and conclusory allegations do not raise issues of fact (*see Rosen Auto Leasing, Inc. v Jacobs*, 9 AD3d 798 [3d Dept 2004]), and do not require plaintiff to respond to alleged affirmative defenses which are based on such allegations (*Charter One Bank, FSB v Leone*, 45 AD3d 958, 959[3d Dept 2007]).

Where, as here, standing is put into issue by the defendant, the plaintiff must prove its standing in order to be entitled to relief (*see Deutsche Bank Nat. Trust Co. v Haller*, 100 AD3d 680 [2d Dept 2012]; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 753 [2d Dept 2009]; *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 242 [2d Dept 2007]). 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 *(see Deutsche Bank Natl. Trust Co. v Rivas*, 95 AD3d 1061,

1061-1062 [2d Dept 2012]; *Bank of N.Y. v Silverberg*, 86 AD3d 274, 279 [2d Dept 2011]; *see Homecomings Fin., LLC v Guldi*, 108 AD3d 506 [2d Dept 2013]; *US Bank N.A. v Cange*, 96 AD3d 825, 826 [2d Dept 2012]; *U.S. Bank, N.A. v Collymore*, 68 AD3d at 753-754; *Countrywide Home Loans, Inc. v Gress*, 68 AD3d 709 [2d Dept 2009]). "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" (*U.S. Bank, N.A. v Collymore,* 68 AD3d at 754; *see HSBC Bank USA v Hernandez*, 92 AD3d 843 [2d Dept 2012]; *see Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 108 [2d Dept 2011]). Where a mortgage is represented by a bond or other instrument, an assignment of the mortgage without assignment of the underlying note or bond is a nullity" (*U.S. Bank, N.A. v Collymore*, 68 AD3d at 754).

A plaintiff may establish its standing as the holder of the note and mortgage by physical delivery prior to commencement of the action by submitting evidence that its custodian received the original note and safeguarded those original documents in a secure location prior to the commencement of the action (*see Deutsche Bank Natl. Trust Co. v Whalen*, 107 AD3d 931 [2d Dept 2013]; *US Bank N.A. v Cange*, 96 AD3d 825, 827 [2d Dept 2012]; *cf. HSBC Bank USA v Hernandez*, 92 AD3d at 844).

Holder status of a note and mortgage is established where the plaintiff possesses the mortgage note which bears, on its face or by allonge, a special indorsement payable to the order of the plaintiff or where it takes possession of a mortgage note that contains an indorsement similarly affixed (see UCC §1-201 [20]; §3-202; §3-204; §9-203[g]*; Spielman v Manufacturers Hanover Trust Co.*, 60 NY2d 221 [1983]; *Citimortgage, Inc. v Friedman*, 109 AD3d 573 [2d Dept 2013]; *US Bank Natl. Ass'n v Cange*, 96 AD3d 825, *supra*; *Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674 [2d Dept. 2007]; *First Trust Natl. Ass'n v Meisels*, 234 AD2d 414 [2d Dept 1996]; *Deutsche Bank Natl. Trust Co. v Pietranico*, 33 Misc3d 528 [Sup Ct, Suffolk County 2011], *affirmed*, 102 AD3d 724 [2d Dept 2013]).

Uniform Commercial Code (UCC) §1-201(20) defines "holder" as "a person who is in possession of a document of title, an instrument or an investment security drawn, issued or indorsed to him or to his order or to bearer or in blank." A person becomes the holder of an instrument through its negotiation to him or her (*see* UCC §3-202[1]). Where the instrument is payable to order, it is negotiated by delivery and all necessary indorsements and where it is payable to the bearer by virtue of an indorsement in blank or otherwise, delivery alone is sufficient (*see id*.). Constructive delivery of an instrument such as a promissory note to an agent has been recognized as constituting a valid transfer by delivery (*see Deutsche Bank Natl. Trust Co. v Whalen*, 107 AD3d 931, *supra*; *Depew Dev., Inc. v AT&A Trucking Corp*., 210 AD2d 974, 621 NYS2d 242 [4th Dept 1994]; *Wolfin v Security Bank*, 170 AD 519 [1st Dept 1915]; *see also Corporacion Venezolana de Fomento v Vintero Sales Corp*., 452 FSupp. 1108 [SDNY 1978]). The essential element of a constructive delivery is that it be made with the unmistakable intention of transferring title to the instrument (*see id* at 1117).

Plaintiff, in its complaint, does not allege that the note was assigned or physically delivered to it prior to the commencement of this action. Rather, plaintiff only alleges that the subject note and mortgage were executed by Alvin Davis-Clarke and Dellyn Davis-Clarke, and that the mortgage was thereafter recorded on March 17, 2006 and subsequently assigned to the plaintiff. The documentary evidence submitted demonstrates that the mortgage was recorded by MERS as nominee for BNC Mortgage Inc., the lender, and that MERS, as nominee for BNC Mortgage Inc., assigned the mortgage to to the plaintiff on October 8, 2008 and said assignment was recorded on October 22, 2008. There is no evidence that MERS ever assigned, or had the authority to assign, the note. Notably, plaintiff no longer seeks to rely upon the assignment of the mortgage, and now asserts that the note and mortgage was in its possession prior to the commencement of this action.

In support of the within motion, plaintiff has submitted a copy of the note and mortgage, an affidavit from Bradley Richard, "Vice President Loan Documentation" of Wells Fargo Bank, N.A., doing business as America's Servicing Company, (its servicing agent) and an affidavit of regularity from its counsel. The subject adjustable rate balloon note, dated January 31, 2006 was given by Alvin Davis-Clarke and Dellyn Davis Clarke to the lender, BNC Mortgage Inc. Said note contains a blank undated allonge, on a separate unnumbered page, from BNC Mortgage Inc., executed by Eleanora Martino "Vice President of Quality Assurance".

Plaintiff's evidence is insufficient to demonstrate that the note was physically delivered to it prior to the commencement of the within action. The affidavit from the plaintiff's servicing agent does not give any factual details as to when a physical delivery of the note occurred and, thus, fails to establish that the plaintiff had physical possession of the note prior to commencing this action (*see Bank of N.Y. Mellon v Gales*, 116 AD3d 723, 724-725 [2d Dept 2014]; *HSBC Bank USA v Hernandez*, 92 AD3d at 844 ; *Citimortgage, Inc. v Stosel*, 89 AD3d 887, 888 [2d Dept 2011]; *Deutsche Bank Natl. Trust Co. v Barnett*, 88 AD3d 636, 637 [2d Dept 2011]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d at 108; *U.S. Bank, N.A. v Collymore*, 68 AD3d at 754).

The court further finds that plaintiff improperly submitted for the first time in its reply papers an affidavit which it claims to comply with Administrative Order 431/11. Said affidavit, however, is dated July 6, 2012, refers to a communication with the plaintiff's servicing agent on June 28, 2012, and refers to the order of reference and judgment of foreclosure and sale that have since been vacated. Plaintiff's failure to submit an affidavit contemporaneous with the within motion is unacceptable, and constitutes a failure to comply with Administrative Order 431/11.

Therefore, that branch of plaintiff's motion which seeks summary judgment dismissing the defendant's affirmative defense is denied as to the first affirmative defense of lack of standing. That branch of plaintiff's motion which seeks summary judgment and the appointment of a referee is denied.

That branch of the plaintiff's motion which seek to dismiss the second affirmative defense which alleges a violation of General Business Law § 349, is granted as the conduct alleged by the defendant does not have a "broad impact on consumers at large"(*U.S. Bank N.A. v Pia*, 73 AD3d 752, 754 [2d Dept 2010], *quoting New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320 [1995]; *Golden Eagle Capital Corp. v Paramount Mgt. Corp.*, 88 AD3d 646, 648 [2d Dept 2011]).

That branch of the plaintiff's motion which seeks to dismiss the third affirmative defense of unconscionability, is denied. "In general, an unconscionable contract has been defined as one which is so grossly unreasonable as to be unenforceable because of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party" (*King v Fox*, 7 NY3d 181, 191 [2006]; *see Gillman v Chase Manhattan Bank*, 73 NY2d 1, 10 [1988]; *Simar Holding Corp. v GSC*, 87 AD3d 688, 689 [2d Dept 2011]). This definition has been broken down into two elements: procedural and substantive unconscionability (*see Gillman v Chase Manhattan Bank*, 73 NY2d at 10; *Emigrant Mtge. Co., Inc. v Fitzpatrick*, 95 AD3d 1169, 1169-1171 [2d Dept 2012]; *Simar Holding Corp. v GSC,* 87 AD3d at 689; *Gendot Assoc., Inc. v Kaufold*, 56 AD3d 421, 423 [2d Dept 2008]; *Matter of Friedman*, 64 AD2d 70, 84-85 [2d Dept 1978]).

"Substantive elements of unconscionability appear in the content of the contract per se; procedural elements must be identified by resort to evidence of the contract formation process" and meaningfulness of the choice (*Matter of Friedman*, 64 AD2d at 85; *see Gillman v Chase Manhattan Bank*, 73 NY2d at 10-11; *Simar Holding Corp. v GSC*, 87 AD3d at 689). " 'Examples of unreasonably favorable contractual provisions are virtually limitless but include inflated prices, unfair termination clauses, unfair limitations on consequential damages and improper disclaimers of warranty'" (*Simar Holding Corp. v GSC*, 87 AD3d at 690, *quoting State of New York v Wolowitz*, 96 AD2d 47, 67-68 [2d Dept 1983]; *see Matter of Friedman*, 64 AD2d at 85). With respect to procedural unconscionability, examples include, but are not limited to, " 'high pressure commercial tactics, inequality of bargaining power, deceptive practices and language in the contract, and an imbalance in the understanding and acumen of the parties' " (*Simar Holding Corp. v GSC*, 87 AD3d at 689-690, *quoting State of New York v Wolowitz*, 96 AD2d at 67; *see Gillman v Chase Manhattan Bank*, 73 NY2d at 10-11; *Matter of Friedman*, 64 AD2d at 85). "[I]n general, it can be said that procedural and substantive unconscionability operate on a 'sliding scale'; the more questionable the meaningfulness of choice, the less imbalance in a contract's terms should be tolerated and vice versa" (*State of New York v Wolowitz*, 96 AD2d at 68, *quoting* Eddy, On the "Essential" Purposes of Limited Remedies: The Metaphysics of UCC Section 2-719[2], 65 Cal L Rev 28, 41-42, n 56 [1977]; *see Simar Holding Corp. v GSC*, 87 AD3d at 690).

" 'The determination of unconscionability is a matter of law for the court to decide'" (*Simar Holding Corp. v GSC*, 87 AD3d at 690, *quoting Industralease Automated & Scientific Equip. Corp. v R. M. E. Enters*., 58 AD2d 482, 488 [2d Dept 1977]; *see Laidlaw Transp. v Helena Chem. Co.*, 255 AD2d 869, 870 [1998]; *State of New York v Wolowitz*, 96 AD2d at 68).

"Where there is doubt . . . as to whether a contract is fraught with elements of unconscionability, there must be a hearing where the parties have an opportunity to present evidence with regard to the circumstances of the signing of the contract, and the disputed terms' setting, purpose and effect'" (*Simar Holding Corp. v GSC*, 87 AD3d at 690*, quoting Davidovits v De Jesus Realty Corp*., 100 AD2d 924, 925 [2d Dept 1984]). " ' However, [w]here the significant facts germane to the unconscionability issue are essentially undisputed, the court may determine the issue without a hearing'" (*Simar Holding Corp. v GSC*, 87 AD3d at 690, *quoting Scott v Palermo*, 233 AD2d 869, 870 [4th Dept 1996]). "'Thus, on a motion for summary judgment, [t]he question . . . then is whether the record presents an issue as to the existence of unconscionability which should not be resolved without a hearing'" (*Simar Holding Corp. v GSC*, 87 AD3d at 690, *quoting State of New York v Wolowitz*, 96 AD2d at 69; *see David v #1 Mktg. Serv., Inc*., 113 AD3d 810, 812-813 [2d Dept 2014]).

Plaintiff US Bank has not established that Mr. Davis-Clarke was fully informed of the terms of the loan, that the parties to the loan transaction were on an equal footing, and that the terms of the loan are not unconscionable. Plaintiff, thus, has failed to meet its burden of demonstrating that this affirmative defense is without merit, as a matter of law.

That branch of the plaintiff's motion which seeks to treat defendant's answer as a limited notice of appearance, is denied.

That branch of the plaintiff's motion which seeks to deem the non-appearing and non-answering defendants in default, and to fix and determine the default, is denied as to defendants Dellyn Davis-Clarke Asset Acceptance, LLCs Mortgage Electronic Registration Systems, Inc., as Nominee for Lehman Brothers Bank, FSB, (MERS), New York City Environmental Control Board, New York City Environmental Control Board, New York City Parking Violations Bureau, New York City Transit Adjudication Bureau, and Portfolio Recovery Associates LLC. These defendants all defaulted in appearing in 2009, and as more than a year has elapsed since their default, plaintiff was required to serve a copy of the motion and supporting papers on said defendant (CPLR 3215[g][1]). The affidavit of service submitted with the motion establishes that service was made only on defendant Alvin Davis-Clarke.

With respect to defendant United States of America Acting Through the IRS, plaintiff's request for a default judgment is denied, at this juncture, with leave to renew upon proper papers establishing that this defendant holds any lien with respect to the mortgaged property.

That branch of the plaintiff's motion which seeks to amend the caption deleting defendant "John Doe", is granted. The new caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

US BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE STRUCTURED ASSET INVESTMENT LOAN TRUST, 2006-2
3476 Stateview Boulevard
Ft. Mill, SC 29715

Plaintiff,

-against-

Index No. 18617/09

ALVIN DAVIS-CLARKE, DELLYN DAVIS-CLARKE
ASSET ACCEPTANCE, LLC, MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, INC. AS
NOMINEE FOR LEHMAN BROTHERS BANK, FSB,
NEW YORK CITY ENVIRONMENTAL CONTROL
BOARD, NEW YORK CITY PARKING VIOLATIONS
BUREAU, NEW YORK CITY TRANSIT ADJUDICATION
BUREAU, PORTFOLIO RECOVERY ASSOCIATES, LLC,
UNITED STATES OF AMERICA ACTING THROUGH
THE IRS,

Defendants.

Defendant's cross motion to dismiss the complaint is denied, as the parties' submissions are insufficient to establish that the plaintiff lacks standing to commence this action, as a matter of law. Plaintiff's failure to submit a proper affidavit in compliance with Administrative Order 431/11 does not warrant the dismissal of the action. The court further finds that even if the note and mortgage were acquired by plaintiff in violation of the Pooling and Servicing Agreement, defendant cannot challenge the foreclosure action on this basis (*see generally Bank of N.Y. Mellon v Gales*, 116 AD3d 723 [2d Dept 2014]).

In view of the foregoing, plaintiff's motion is granted solely to the extent that defendant's second affirmative defense is dismissed and the caption is amended as stated above, and is denied in all other respects. Defendant's cross motion is denied. Plaintiff is directed to file a copy of this order with the Clerk of the Court.

This constitutes the decision and order of the court.

Dated: July 17, 2014

.....
Howard G. Lane, J.S.C.