SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

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310 WEST 115 ST LLC,

Plaintiff,

-against-

GREENPOINT MORTGAGE FUNDING, INC., BANK OF AMERICA, N.A., US BANK N.A., US BANK NATIONAL ASSOCIATION, and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

Defendants.

INDEX NUMBER 156309/2014
Motion Sequence 001
DECISION & ORDER

DONNA MILLS, J.:

In this action for a declaratory judgment declaring who is the proper mortgagee of a property at 310 West 115th Street, New York County (the Property), plaintiff 310 West 115 St LLC moves, pursuant to CPLR 3212, for summary judgment in its favor on the complaint. In turn, defendants Bank of America, N.A. (BOA), US Bank N.A., US Bank National Association (USB),[1] and Mortgage Electronic Registration Systems, Inc. (MERS) (together, Lenders) oppose and cross-move, pursuant to CPLR 3212, for summary judgment dismissing the complaint in its entirety.[2] Additionally, BOA cross-moves, pursuant to CPLR 3211 (a) (7), to dismiss the complaint as

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[1] US Bank N.A. and US Bank National Association are apparently the same enterprise.

[2] USB identifies itself "as indenture trustee for Greenpoint Mortgage Funding Trust 2006-HE1." Light affirmation, ¶ 1. This identity was also expressed in answering the complaint. *Id.*, exhibit B. Greenpoint Mortgage Funding, Inc. itself is not heard from in this action or motion sequence.

against it.

FACTUAL BACKGROUND

Plaintiff acquired the Property on May 29, 2014. The previous owner, Terry Gray (Gray), received a $1 million loan from Greenpoint Mortgage Funding, Inc. (Greenpoint) on January 26, 2006, for which Greenpoint received a mortgage. Rivera-Maissonet affirmation, exhibit A. Greenpoint gave Gray another loan for $100,000, on March 2, 2006, and received a second mortgage on the Property. *Id.*, exhibit B. Greenpoint commenced a foreclosure proceeding on both mortgages in February 2007, and filed an action on July 19, 2007, *Greenpoint Mortgage Funding, Inc. v Terry Gray et al.* (New York County index No. 109942/07) (the Greenpoint Action). Itah aff, exhibit A. The Greenpoint Action was discontinued on or about July 15, 2013. *Id.*, exhibit B.

Meanwhile, MERS, as nominee for Greenpoint, assigned the $100,000 mortgage to USB, on November 5, 2009, and the $1 million mortgage to BOA, on February 27, 2012. BOA later assigned the $1 million mortgage to USB, on November 27, 2012.

The instant action commenced on June 27, 2014, with the filing of a complaint asserting causes of action for a declaratory judgment that a foreclosure action is time-barred, to discharge the mortgage,[3] and for a declaratory judgment as to the proper mortgagee. Itah aff, exhibit C.

DISCUSSION

Plaintiff's Summary Judgment Motion

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[3] The word mortgage appears once in the three decretal paragraphs of the complaint, and it is singular. However, all other parts of the complaint address both mortgages. Plaintiff's motion requests "judgment as a matter of law declaring that the subject mortgages are invalid." Lanza affirmation in support, ¶ 19. On the other hand, plaintiff's proposed order granting summary judgment, attached to his motion, refers only to the $1 million mortgage. It proposes that that mortgage "is hereby canceled, discharged, declared [sic], and void against" the Property.

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "If there is any doubt as to the existence of a triable issue, the motion should be denied." *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1st Dept 2002). "But only the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment." *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

Plaintiff contends that its motion is brought pursuant to New York's Real Property Actions and Proceedings Law (RPAPL) § 1501 (4), allowing the "cancellation and discharge" of a mortgage where the statute of limitations to commence a foreclosure action against that mortgage has expired. As stated, Greenpoint filed an action to foreclose both mortgages on July 19, 2007, that was discontinued on or about July 15, 2013. The statute of limitations for a mortgage note is six years, under CPLR 213 (4). Plaintiff concludes that June 27, 2014 is too late to bring a new foreclosure action.

> "[P]laintiff property owner made a prima facie showing of its entitlement to judgment as a matter of law declaring that the subject mortgage is invalid by establishing that a foreclosure action commenced by the defendant mortgagee in 2001 was dismissed by this Court as abandoned . . . , and that the commencement of a new foreclosure action would be time-barred by the applicable six-year statute of limitations."

JBR Constr. Corp. v Staples, 71 AD3d 952, 953 (2d Dept 2010) (citations omitted); *LePore v Shaheen*, 32 AD3d 1330, 1331 (4th Dept 2006) ("Plaintiff established his entitlement to judgment as a matter of law by submitting evidence establishing that more than six years had elapsed since he defaulted on the mortgage. Plaintiff thereby established that a mortgage foreclosure action commenced by defendant would be time-barred").

Despite the claim in the discontinued foreclosure action that plaintiff was in default, thus accelerating the loan, the Lenders maintain that there has been no default, and that neither mortgage has ever been accelerated, and, therefore, the six- year statute of limitations has not yet expired. While the complaint alleges that Greenpoint's commencement of the foreclosure proceeding, in February 2007, accelerated both mortgages (Complaint, ¶ 17), the Lenders contend that Greenpoint had no standing to commence that proceeding, because Greenpoint allegedly endorsed the $1 million mortgage note in blank, on March 6, 2006, and delivered it to USB. Lucas aff, exhibit 1. Lenders contend that "by endorsing the Note in blank, GreenPoint made the Note bearer paper, providing presumptive ownership to its current owner." Light affirmation, ¶ 10. In support, Lenders cite *Deutsche Bank Natl. Trust Co. v Pietranico* (33 Misc 3d 528, 531 [Sup Ct, Suffolk County 2011]), *affd* 102 AD3d 724 (2d Dept 2013) (Foreclosure is permitted where "plaintiff was assigned the note and mortgage and . . . the 'plaintiff is also in possession of the original note with proper endorsement and/or allonge and is therefore, the holder of both the note and mortgage, which passes as incident to the note'"). In that instance, the court only stated that "the underlying note was properly endorsed." 33 Misc 3d at 535.

If it did not hold the note, Greenpoint lacked standing to bring a foreclosure action. *Bank of N.Y. Mellon Trust Co. NA v Sachar*, 95 AD3d 695, 695 (1st Dept 2012) ("Plaintiff proved its

standing to commence this foreclosure action by demonstrating that it was both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action was commenced"); *Bank of N.Y. v Silverberg*, 86 AD3d 274, 283 (2d Dept 2011) ("plaintiff cannot overcome the requirement that the foreclosing party be 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").

Lenders' position rests on the purported endorsement in blank of the mortgage note, which allegedly eliminated Greenpoint as an interested party. The evidence submitted for this is a plain piece of paper inserted after a copy of the four-page $1 million note. The note seemingly bears Gray's signature, dated January 26, 2006, and is attached to the affidavit of Kyle Lucas (Lucas), a senior loan analyst at Ocwen Financial Corporation (Ocwen), the loan servicer for both mortgage loans. Lucas aff, exhibit 1. Lucas states that the $1 million note "was endorsed in blank and delivered to [USB] . . . on or before May 1, 2006." *Id.*, ¶ 6. Lucas's "personal knowledge is based on my review of the Servicing Records" maintained by Ocwen. *Id.*, ¶ 2.

The unnumbered fifth page bears no date and reads:

WITHOUT RECOURSE
PAY TO THE ORDER OF:

_____
GreenPoint Mortgage Funding, Inc.

_____
Thomas K. Mitchell
Vice President

Two or three handwritten letters appear above Mitchell's name. This otherwise blank page is followed by a preprinted Prepayment Fee Allonge, "incorporated into and intended to form part of the note dated the same date as this Allonge," dated January 26, 2006, and bearing Gray's signature. The four-page note and the one-page Allonge carry footers identifying them as

GreenPoint Mortgage Funding documents; the alleged "endorsement" page carries no identification of any kind. Plaintiff ignores these troublesome facts. The questions surrounding these documents make them inadequate to determine the disposition of a $1 million mortgage. There is a material factual dispute as to who was the holder of the $1 million mortgage at the time Greenpoint commenced its foreclosure action against Gray.

The status of the $100,000 mortgage is also uncertain for somewhat different reasons. No blank endorsement of the $100,000 note is provided or even alleged. Plaintiff essentially treats the two notes as a set. The complaint in the Greenpoint Action refers to "a Subordinate Mortgage in the sum of $100,000, recorded March 31, 2006." Itah aff, exhibit A, ¶ 9. The instant complaint asks for relief regarding "its Mortgage," "said Mortgage," and "the Note(s) and Mortgage(s)". The Lenders contend that the $100,000 note was never accelerated. They claim that the Greenpoint Action did not "affirmatively foreclose the 2nd Mortgage or accelerate said Mortgage." Light affirmation, ¶ 35.

The $100,000 mortgage is treated vaguely, as an afterthought or not at all, throughout this dispute. Under these circumstances, a dispositive determination of its status is unwarranted. Plaintiff's summary judgment motion is denied.

Lenders' Cross Motion for Summary Judgment

For the reasons stated above concerning plaintiff's summary judgment motion, Lenders' cross motion for summary judgment dismissing the complaint is denied.

BOA's Cross Motion to Dismiss

In addition to joining the other Lenders in requesting summary judgment, pursuant to CPLR 3212, BOA cross-moves to dismiss the complaint as against it, pursuant to CPLR 3211 (a)

(7), failure to state a cause of action. On a motion to dismiss for failure to state a cause of action, pursuant to CPLR 3211 (a) (7), the pleading is afforded a liberal construction. "Although on a motion to dismiss plaintiffs' allegations are presumed to be true and accorded every favorable inference, conclusory allegations – claims consisting of bare legal conclusions with no factual specificity – are insufficient to survive a motion to dismiss." *Godfrey v Spano*, 13 NY3d 358, 373 (2009); *Leon v Martinez*, 84 NY2d 83, 87-88 (1994).

MERS, having joined with Greenpoint on the $1 million mortgage, assigned it to BOA on February 27, 2012. This transaction was recorded in the City Register on March 15, 2012. Rivera-Maissonet affirmation, exhibit D. On June 12, 2013, the assignment of the $1 million mortgage from BOA to USB was recorded. *Id.*, exhibit E. There is no evidence that BOA has had any connection with the $100,000 mortgage.

BOA argues that plaintiff fails to show how BOA is adverse to plaintiff's interest. RPAPL § 1515 (1) (b) requires that a complaint in an action to determine a claim for real property must set forth facts showing "[t]hat the defendant claims, or that it appears from the public records or from the allegations of the complaint, that the defendant might claim an estate or interest in the real property, adverse to that of the plaintiff, and the particular nature of such estate or interest."

BOA contends that the complaint itself and the documents recording the assignment of the $1 million mortgage establish that BOA "has no interest in the subject property or loan [and is] thus not a necessary party to the action." Rivera-Maissonet affirmation, ¶ 23. Plaintiff opposes BOA's position, because BOA's holding of the mortgage in 2012-2013 "is still clouding title to Plaintiff's property and . . . if that assignment [to USB] is deemed to be ineffective Defendant [BOA] has an interest in the mortgage."

Since RPAPL § 1515 (1) (b) allows a complaint where "it appears from the public records or from the allegations of the complaint, that the defendant might claim an estate or interest in the real property," BOA must remain as a defendant. Lanza affirmation in opposition, ¶ 28. Its cross motion for dismissal is denied.

Accordingly, it is

ORDERED that the motion by plaintiff 310 West 115 St LLC, pursuant to CPLR 3212, for summary judgment in its favor on the complaint is denied; and it is further

ORDERED that the cross motion by defendants Bank of America, N.A., US Bank N.A., US Bank National Association, and Mortgage Electronic Registration Systems, Inc., pursuant to CPLR 3212, for summary judgment dismissing the complaint in its entirety is denied; and it is further

ORDERED that the cross motion by defendant Bank of America, N.A., pursuant to CPLR 3211 (a) (7), to dismiss the complaint as against it is denied.

DATED: ~~July~~ Aug 27, **2015**

ENTER:

J.S.C.

DONNA M. MILLS, J.S.C.