

Nationstar Mtge. LLC v Rodriguez
2015 NY Slip Op 32277(U)
November 25, 2015
Supreme Court, Queens County
Docket Number: 702591/14
Judge: Valerie Brathwaite Nelson
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MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART

NATIONSTAR MORTGAGE LLC,

X Index No. 702591/14

Plaintiff,

Motion Date: 6/2/15

-against-

Motion Seq. No.: 1

JUAN RODRIGUEZ a/k/a JOHN RODRIGUEZ
A/K/A JUAN JOHN RODRIGUEZ, ET AL.,

Motion Cal. No.: 119

Defendants.

X

By:

HON. VALERIE BRATHWAITE
NELSON

Dated: 11/25/15

Plaintiff commenced this action on April 16, 2014 to foreclose a mortgage against real property known as 88-45 240th Street, Bellrose, New York, given by defendants Juan Rodriguez and Martha Vasquez-Rodriguez to secure a note evidencing a loan in the principal amount of \$190,800.00, plus interest. Plaintiff alleges it is the holder of the of the mortgage and underlying note, and that the Rodriguez defendants defaulted under the terms of the mortgage and note by failing to make the mortgage installment payment due on December 1, 2013. As a consequence, it elected to accelerate the entire mortgage debt.

On May 15, 2014, the Rodriguez defendants filed an answer wherein they essentially deny the material allegations of the complaint and raise various affirmative defenses including, inter alia, plaintiff's lack of standing to commence the action and a violation of

the Federal Truth in Lending Act, 15 USC § 1601 et. seq. None of the remaining defendants have answered.

A residential foreclosure conference was held on October 8, 2014. Upon defendants failure to appear for the conference, the Court Attorney Referee directed plaintiff to file an application seeking an Order of Reference. Hence, plaintiff moves herein for an order appointing a referee to compute, granting summary judgment against defendants Juan Rodriguez and Martha Vasquez-Rodriguez, granting a default judgment against all other defendants, and amending the caption to reflect the correct name of “John Doe” to read “Jane Doe.”

In support of the motion, plaintiff has provided a summons and complaint, proof of service and an affidavit of merit executed by Jerrell Merryweather, Documentation Execution Specialist of plaintiff Nationstar Mortgage LLC, affirming the default in payment and amounts due, in compliance with CPLR 3215(f). Furthermore, plaintiff has made a *prima facie* showing of entitlement to an order of reference by submission of a copy of the mortgage, the indorsed in blank note, and proof of default by an affidavit of merit (see HSBC Bank USA v Hernandez, 92 AD3d 843, 844 [2d Dept 2012], U.S. Bank, N.A. v Adrian Collymore, 68 AD3d 752 [2d Dept 2009]). Plaintiff has also produced an assignment of mortgage to plaintiff, an affirmation of regularity, proof of compliance with the notice requirements of RPAPL 1303 and 1304, and proof that a settlement conference took place pursuant to CPLR 3408 (see GRP Loan, LLC v Taylor, 95 AD3d 1172 [2012]).

In opposition, the Rodriguez defendants contend that the plaintiff does not have standing to maintain the action and that it is in violation of the Federal Truth in Lending Act, 15 USC § 1601 et. seq. Defendants also dispute the amount due to plaintiff.

Standing is not an element of a plaintiff's claim for foreclosure and sale, but when challenged as it is here by an affirmative defense set forth in the answer, it must be established by the plaintiff to be entitled to any relief requested in the complaint (see Bank of New York v Silverberg, 86 AD3d 274, 280 [2d Dept 2100]; Wells Fargo Bank Minnesota v Mastrolpaolo, 42 AD3d 239 [2d Dept 2007]). A plaintiff has standing in a mortgage foreclosure action by demonstrating that it is the holder or assignee of both the subject mortgage and the underlying note, "either by physical delivery or execution of a written assignment prior to the commencement of the action" (Deutsche Bank Nat. Trust Co. v Rivas, 95 AD3d 1061 [2d Dept 2012] quoting Aurora Loan Servs. LLC v Weisblum, 85 AD3d 95 [2d Dept 2011]). An assignment of the mortgage without an assignment of the underlying note or bond is a nullity, and no interest is acquired by it (see Deutsche Bank Nat. Trust Co. v Barnett, 88 AD3d 636 [2d Dept 2011] HSBC Bank USA v Hernandez, 92 AD3d 843 [2d Dept 2012]; Bank of New York v Silverberg, *supra*). However, a written assignment of the underlying note or the physical delivery of the note prior to commencement of the foreclosure action is sufficient to transfer the obligation and vest standing in the plaintiff (see US Bank NA v Sharif, 89 AD3d 723, 725 [2d Dept 2011]; Deutsche Bank Nat. Trust Co. v Barnett, 88 AD3d 636, 637-638 *supra*; Bank of New York v Silverberg, *supra*). Here, the

evidence establishes that, as of 2013, plaintiff Nationstar Mortgage LLC became the lawful owner of the note. A note secured by a mortgage is a negotiable instrument and in order to effectuate a valid assignment of the entire instrument an endorsement on the note itself or "on a paper so firmly affixed thereto as to become a part thereof" (UCC 3-202[2]) is required (Slutsky v Blooming Grove Inn, Inc., 147 AD2d 208 [2d Dept 1989]). The note submitted herein is endorsed in blank. The Merryweather Affidavit establishes that Nationstar came into possession of the note on August 7, 2013, prior to the April 16, 2014 commencement of the foreclosure action. Thus, "[i]t can reasonably be inferred . . . that physical delivery of the note was made to the plaintiff" before the action was commenced (see Aurora Loan Servs., LLC v Taylor, 25 N.Y.3d 355 [2015][internal citations omitted]). Furthermore, to have standing, it is not necessary to have possession of the mortgage at the time the action is commenced, as it is the note, and not the mortgage, that is the dispositive instrument that conveys standing to foreclose under New York law (id.). In addition, with respect to defendants' contention that they are entitled to rescind the mortgage and note pursuant to the Federal Truth-in-Lending Act (15 USC §1601 et seq., hereinafter TILA), defendants have failed to demonstrate that they are entitled to rescind the loan transaction pursuant to TILA (see U.S. Bank Natl. Assn v Pia, 73 AD3d 752 [2nd Dept 2010]). Defendants' remaining arguments with regard to the proper amount owed to plaintiff on the mortgage can be resolved by the parties presenting evidence to the referee for computation.

Accordingly, plaintiff's motion is granted to the extent that summary judgment in favor of plaintiff against defendants Juan Rodriguez and Martha Vasquez-Rodriguez is granted, the caption is amended to reflect the correct name of "John Doe" to read "Jane Doe," and a referee to compute shall be appointed by the Court. The name of the referee shall be inserted by the Court in the order to be settled.

Settle Order.

VALERIE BRATHWAITE NELSON, J.S.C.