

HSBC Bank USA, N.A. v Pacifico

2016 NY Slip Op 30717(U)

April 18, 2016

Supreme Court, Suffolk County

Docket Number: 1625-12

Judge: John J. Leo

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SUPREME COURT - STATE OF NEW YORK
IAS PART 51 - SUFFOLK COUNTY

PRESENT: Hon. JOHN J. LEO
Justice of the Supreme Court

MOTION DATE 4-25-14 (001)
4-25-15 (002)

HSBC BANK USA, NATIONAL ASSOCIATION,
AS INDENTURE TRUSTEE FOR THE
REGISTERED NOTEHOLDERS OF RENAISSANCE
HOME EQUITY LOAN TRUST 2006-4,

ADJ. DATE _____
Mot. Seq. # 001-MD
#002-XMD

Plaintiff,

LEOPOLD & ASSOCIATES, PLLC
Attorneys for Plaintiff
80 Business Park Drive, Suite 110
Armonk, N. Y. 10504

-against-

JOSEPH H. PACIFICO JR., SUSAN OLIVA
PACIFICO, RICHARD BUTTINE, AVENTINE
PROPERTIES, LLC, ROBERT G. LUCAS; LUCAS
INVESTORS GROUP, FORD MOTOR CREDIT
COMPANY DBA VOLVO CAR FINANCE NORTH
AMERICA, NEW YORK STATE DEPARTMENT
OF TAXATION AND FINANCE, UNITED STATES OF
AMERICA, GMH PROPERTIES LTD.,

JOSEPH H. PACIFICO
SUSAN OLIVA PACIFICO
Defendants Pro Se
310 New York Avenue
Huntington, New York 11743

KELLY, LUCAS & PACIFICO
Attorneys for Defendants
Robert G. Lucas
Lucas Investor Group
23 Birch Hill Road
Locust valley, New York 11560

“JOHN DOE #1” through “JOHN DOE #12,” the
last twelve names being fictitious and unknown to
plaintiff, the persons or parties intended being the
tenants, occupants, persons or corporations, if any,
having or claiming an interest in or lien upon the
premises, described in the complaint,

Defendants.

x

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the plaintiff, dated March 21, 2014, and supporting papers; (2) Notice of Cross Motion by the defendant Joseph H. Pacifico Jr., dated April 18, 2014, and supporting papers; (3) Affirmation in Opposition/Reply by the plaintiff, dated April 24, 2014, and supporting papers; (and after hearing counsels' oral arguments in support of and opposed to the motion); and now

ORDERED that this motion (001) by the plaintiff for, inter alia, an order awarding summary judgment in its favor and against the defendants Joseph Pacifico and Susan Pacifico, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption is denied; and it is

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ORDERED that this cross motion (002) by the defendant Joseph Pacifico for, inter alia, an order pursuant to CPLR 3211 (a) (3) dismissing the complaint insofar as asserted against him on the grounds that the plaintiff lacks standing is denied in its entirety; and it is

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon the defendants Joseph Pacifico and Susan Pacifico by first-class regular mail and upon all other parties, if any, who have appeared herein and not waived further notice pursuant to CPLR 2103 (b) (1), (2) or (3) within thirty (30) days of the date herein, and shall promptly file the affidavits of service with the Clerk of the Court; and it is

ORDERED that the defendant Joseph Pacifico shall serve a copy of this order with notice of entry upon counsel for the plaintiff and all other parties, if any, who have appeared herein and not waived further notice pursuant to CPLR 2103 (b) (1), (2) or (3) within thirty (30) days of the date herein, and shall promptly file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on real property situate in Suffolk County, New York. On September 20, 2006, the defendant Joseph Pacifico executed a note in favor of Fidelity Mortgage a division of Delta Funding Corporation ("the lender") in the principal sum of \$645,000.00. To secure said note, Mr. Pacifico gave the lender a mortgage also dated September 20, 2006 on the property. The mortgage indicates that Mortgage Electronic Registration Systems, Inc. ("MERS") was acting solely as a nominee for the lender and its successors and assigns and that, for the purposes of recording the mortgage, MERS was the mortgagee of record.

By way of two allonges containing undated endorsements, the note was allegedly transferred by the lender to Delta Funding Corporation ("Delta"), and then by Delta to the plaintiff, HSBC Bank USA, National Association, as Indenture Trustee for the Registered Noteholders of Renaissance Home Equity Loan Trust 2006-4, prior to commencement. By an assignment of the mortgage executed on March 2, 2009, MERS as nominee for the lender purportedly transferred the mortgage "[together] with the bond or note(s) or obligation(s) described or referred to, in said mortgage and the moneys due to grow due thereon, with the interest and attorney's fees and all other charges..." to the plaintiff. Thereafter, the assignment was duly recorded in the Suffolk County Clerk's Office on April 2, 2009.

Mr. Pacifico allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on May 1, 2008, and each month thereafter. After Mr. Pacifico allegedly failed to cure said default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on January 10, 2012.

In response to the complaint, Mr. Pacifico and his wife, the defendant Susan Pacifico (collectively "the Pacifico defendants"), interposed a joint verified answer sworn to on February 15, 2012. By their answer, the Pacifico defendants deny some and admit other allegations set forth in the complaint, and assert four affirmative defenses, alleging, inter alia, the plaintiff's lack of standing. The defendants Robert G. Lucas and Lucas Investors Group appeared herein by counsel and demanded notice of all papers filed herein. The defendant United States of America appeared herein and waived notice of all, but certain,

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notices. The remaining defendants have neither answered nor appeared herein.

By way of background, a conference was scheduled to be held before the specialized mortgage foreclosure part on September 10, 2014. On the continued date, November 24, 2014, this action was dismissed from the conference program and referred as an IAS case because the Pacifico defendants failed to appear at, or otherwise participate in, the scheduled conference. Accordingly, no further conference is required under any statute, law or rule.

The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor against the Pacifico defendants and striking their joint answer and the affirmative defenses asserted therein; (2) pursuant to CPLR 3215 fixing the defaults of the non-answering defendants; (3) pursuant to RPAPL § 1321 appointing a referee to (a) compute amounts due under the subject mortgage; and (b) examine and report whether the subject premises should be sold in one parcel or multiple parcels; and (4) amending the caption.

Mr. Pacifico opposes the plaintiff's motion and moves for, inter alia, an order pursuant to CPLR 3211 (a) (3) dismissing the complaint insofar as asserted against him on the grounds that the plaintiff lacks standing. In his moving papers, Mr. Pacifico re-asserts the previously pleaded affirmative defense that the plaintiff lacks standing to prosecute its claims for foreclosure and sale. Mr. Pacifico argues that this action should be dismissed because of the plaintiff's purported lack of standing, contending that a question of fact exists with respect to the assignment of the note and mortgage. In response to the cross motion, the plaintiff has submitted opposition and reply papers.

Initially, to the extent that Mr. Pacifico, a self-represented defendant in this action, purports to move for dismissal of the complaint insofar as to his wife, Mrs. Pacifico, he is without standing to do so because he never filed a notice of appearance on behalf of his wife as her counsel, if he is in fact an attorney (*see*, CPLR 321 [a]; *Wehringer v Douglas Gibbons-Hollyday & Ives*, 49 AD2d 109, 373 NYS2d 347 [1st Dept 1975]; *see also*, *Lipstick, Ltd. v Grupo Tribasa, S.A. de C.V.*, 304 AD2d 482, 758 YS2d 317 [1st Dept 2003]). Parenthetically, there are no statements, sworn or unsworn, in the Pacifico defendants' joint answer or in Mr. Pacifico's moving papers that Mr. Pacifico is an attorney, or that he has appeared herein as his own or his wife's counsel. In any event, the notice of cross motion submitted by Mr. Pacifico specifically indicates that he is "the undersigned" movant without an attorney designation, and his name alone appears in the notice of motion. Thus, the cross motion is fatally defective as to Mrs. Pacifico.

To the extent that the cross motion is predicated upon dismissal pursuant to CPLR 3211 subdivision (a) (3), it was not timely interposed because it was made after joinder of issue and service of the answer cut off the Pacifico defendants' right to make a CPLR 3211 motion to dismiss on this ground (*see generally*, CPLR 3211 [e]; *see also*, CPLR 3018 [b]). It is well-settled that motions under CPLR 3211 (a) are to be made at any time before service of the responsive pleading (*see*, CPLR 3211 [e]; *Hendrickson v Philbor Motors, Inc.*, 102 AD3d 251, 955 NYS2d 384 [2d Dept 2012]; *Cremona Food Co., LLC v Elwood Catering, LLC*, 2013 NY Misc. LEXIS 4746, 2013 WL 5761461, 2013 NY Slip Op 32556 [U] [Sup Ct, Suffolk County 2013]; *U.S. Bank, N.A. v Arias*, 2012 NY Misc LEXIS 3621, 2012 WL 3135064, 2012 NY Slip Op 31999 [U] [Sup Ct, Queens County 2012]; *see also*, *EMC Mtge. Corp.*

v *Gass*, 114 AD3d 1074, 981 NYS2d 814 [3d Dept 2014]; *Hertz Corp. v Luken*, 126 AD2d 446, 510 NYS2d 590 [1st Dept 1987]). Therefore, Mr. Pacifico's post-answer demand for dismissal of the complaint, to the extent it is premised upon the ground embraced by CPLR 3211 subdivision (a) (3), is untimely by approximately 26 months and will not be considered as an independent basis for dismissal.

Even though CPLR 3211 (c) empowers the court to treat a motion to dismiss a motion for summary judgment, in this case, conversion is inappropriate because, inter alia, this action does not exclusively involve issues of law which were fully appreciated and argued by the parties, and since notice has not been provided to the parties (see, *Bennett v Hucke*, 64 AD3d 529, 881 NYS2d 335 [2d Dept 2009]; *Bowes v Healy*, 40 AD3d 566, 833 NYS2d 400 [2d Dept 2007]; *Moutafis v Osborne*, 18 AD3d 723, 795 NYS2d 716 [2d Dept 2005]; *Matter of Weiss v N. Shore Towers Apts., Inc.*, 300 AD2d 596, 751 NYS2d 868 [2d Dept 2002]; cf., *Bank of N.Y. Mellon v Green*, 132 AD3d 706, 17 NYS3d 651 [2d Dept 2015]). While a defense asserting the lack of standing is preserved in the answer, adjudication of such defense must be made at trial or its procedural equivalent, namely a motion for summary judgment (see, *Diaz v DiGiulio*, 29 AD3d 623, 816 NYS2d 125 [2d Dept 2006]; *US Bank, NA v Reed*, 38 Misc3d 1206 [A], 967 NYS2d 870 [Sup Ct, Suffolk County 2013]). Accordingly, the cross motion is denied in its entirety.

The court next turns to the plaintiff's motion-in-chief. Where, as here, an answer served includes the defense of standing, the plaintiff must prove its standing in order to be entitled to relief (see, *CitiMortgage, Inc. v Rosenthal*, 88 AD3d 759, 931 NYS2d 638 [2d Dept 2011]). The standing of a plaintiff in a mortgage foreclosure action is measured by its ownership, holder status or possession of the note and mortgage at the time of the commencement of the action (see, *Bank of N.Y. v Silverberg*, 86 AD3d 274, 926 NYS2d 532 [2d Dept 2011]; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]). A mortgage "is merely security for a debt or other obligation, and cannot exist independently of the debt or obligation" (*Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909, 911, 961 NYS2d 200 [2d Dept 2013] [internal quotation marks and citations omitted]). Holder status is established where the plaintiff is the special indorsee of the note or takes possession of a mortgage note that contains an endorsement in blank on its face or attached thereto, as the mortgage follows an incident thereto (see, *Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674, 838 NYS2d 622 [2d Dept 2007]; *First Trust Natl. Assn. v Meisels*, 234 AD2d 414, 651 NYS2d 121 [2d Dept 1996]). "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 752, *supra* at 754 [internal quotation marks and citations omitted]).

In the instant case, the plaintiff failed to establish, prima facie, that it had standing as its evidence did not adequately demonstrate that the note was physically delivered to it prior to the commencement of the action (see, *Wells Fargo Bank, NA v Burke*, 125 AD3d 765, 5 NYS3d 107 [2d Dept 2015]; *US Bank N.A. v Faruque*, 120 AD3d 575, 991 NYS2d 630 [2d Dept 2014]; *Bank of N.Y. Mellon v Gales*, 116 AD3d 723, 982 NYS2d 911 [2d Dept 2014]; *Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680, 954 NYS2d 551 [2d Dept 2012]; *Deutsche Bank Natl. Trust Co. v Rivas*, 95 AD3d 1061, 945 NYS2d 328 [2d Dept 2012]; *HSBC Bank USA v Hernandez*, 92 AD3d 843, 939 NYS2d 120 [2d Dept 2012]). In support of the motion, the plaintiff submitted, inter alia, the affidavit of Pamela Ballard, a Vice

President of the plaintiff's servicer, Ocwen Loan Servicing, LLC. In her affidavit, Ms. Ballard alleges, among other things, that the plaintiff was in possession of the note at the time of commencement and is the mortgagee of record. The plaintiff's representative, however, did not provide any factual details concerning when the note was endorsed or when the plaintiff received physical possession of the note, and, thus, the plaintiff failed to establish that it had physical possession of the note prior to commencing this action (*see, Bank of Am., N.A. v Paulsen*, 125 AD3d 909, 6 NYS3d 68 [2d Dept 2015]; *Deutsche Bank Natl. Trust Co. v Barnett*, 88 AD3d 636, 931 NYS2d 630 [2d Dept 2011]).

Furthermore, in this case, the allonges to the note contain two undated endorsements, and the plaintiff's representative did not allege when the endorsements were placed on the allonges to the note. It is, therefore, not clear whether the endorsements were effectuated prior to the commencement of this action (*see, Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680, *supra*; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, *supra*). In any event, if MERS, as nominee of the lender was not the owner of the note, as it appears, it would have lacked the authority to assign the note to the plaintiff, and absent an effective transfer of the note, the assignment of the mortgage to the plaintiff would be a nullity (*see, US Bank N.A. v Faruque*, 120 AD3d 575, *supra*; *Bank of N.Y. v Silverberg*, 86 AD3d 274, *supra*; *Kluge v Fugazy*, 145 AD2d 537, 536 NYS2d 92 [2d Dept 1988]; *cf., Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674, *supra*). Thus, the issue of standing cannot be determined as a matter of law on this record. In view of the plaintiff's incomplete evidentiary submissions, an issue of fact remains as to whether it had standing to commence this action.

Thus, the plaintiff failed to establish its prima facie entitlement to judgment as a matter of law with respect to the Pacifico defendants. The plaintiff's failure to make a prima facie showing requires the denial of the motion, regardless of the sufficiency of the opposing papers (*see, Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). In view of the open question of whether the plaintiff has standing, the remaining branches of the plaintiff's motion are denied at this juncture.

Accordingly, the motion by the plaintiff and the cross motion by Mr. Pacifico are each denied. The proposed order submitted by the plaintiff has been marked "not signed."

Dated: April 18, 2016
Central Islip New York



Hon. JOHN J. LEO, J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION