

HSBC Bank USA v Murphy

2016 NY Slip Op 30850(U)

May 3, 2016

Supreme Court, Queens County

Docket Number: 701215/2015

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

HSBC BANK USA, etc.,
Plaintiff(s),

Index
No. 701215 2015

- against -

Motion
Date April 7, 2016

COLLEEN MURPHY, et al.,
Defendant(s).

Motion
Cal. No. 68

Motion
Seq. No. 2

The following papers read on this motion by plaintiff for an order, *inter alia*, granting it summary judgment against defendant Colleen Murphy (defendant Murphy), consolidating this action (Action No. 1) with the one pending under Index No. 708523/2015 (Action No. 2), and appointing a referee to compute.

	<u>Papers Numbered</u>
Notice of Motion - Affirmation - Exhibits.....	EF50-56 ¹
Answering Affirmation - Exhibits.....	1-3
Reply.....	EF57-59

Upon the foregoing papers it is ordered that the motion is determined as follows:

1. Plaintiff is reminded of Part 14 Rules which require that papers submitted be securely fastened (*see also* 22 NYCRR 202.5). The motion, which appears to be well over 100 pages, is held together by a clip. Furthermore, Part 14 Rules require that all exhibits annexed to a motion be preceded by numbered exhibit tabs which protrude from the papers.

Plaintiff commenced this action to foreclose a mortgage against real property known as 117-12 142nd Street, Jamaica, NY 11436. As per the complaint, on January 25, 2007, defendants Murphy and Janet Peters executed and delivered to Fremont Investment and Loan (Fremont) a note in the principal amount of \$327,200.00. On the same date, these defendants executed and delivered a mortgage in the same amount, securing the premises as collateral security for the note. On September 5, 2008 defendant Murphy entered into a Loan Modification Agreement with Wilshire Credit Corporation, servicer for the “owner” of the loan. On August 18, 2008 an assignment of the mortgage was executed between Mortgage Electronic Recording System (“MERS”) as nominee for Fremont, assignor, and plaintiff herein.

Plaintiff alleges that it is in possession of the original note with proper endorsement and/or allonge and is, therefore, the holder of both the note and mortgage, that defendant Murphy failed to comply with the conditions of the note, mortgage, and loan modification agreement by, *inter alia*, failing to make the monthly payment due on November 1, 2011, and that, as a result, plaintiff elected to accelerate the debt by commencing this action.

Plaintiff has demonstrated that all defendants have been served with process in this action and in Action No. 2, including “Kadeem Mundy,” sued herein as “John Doe #1,” and that each has failed to answer or otherwise appear herein, with the exception of defendant Murphy, who interposed an answer together with affirmative defenses. Plaintiff has not served “John Doe #2” through “John Doe #10,” as plaintiff seeks to discontinue the action against these defendants. The branch of the motion for an order amending the caption to substitute “Kadeem Mundy” in place of “John Doe #1,” and removing “John Doe #2” through “John Doe #10” from the caption is granted. Further, pursuant to CPLR § 3215, the branch of the motion for default judgment against those defendants who have failed to answer or appear herein is granted.

Pursuant to CPLR § 602 (a), consolidation is permitted when “actions involving a common question of law or fact are pending before a court.” Here, Action No. 2 was commenced after Action No. 1, as defendants in Action No. 2 are additional judgment creditors who were discovered by plaintiff after the filing of Action No. 1. In order to ensure compliance with RPAPL § 1311, requiring joinder of necessary parties in a foreclosure action, plaintiff commenced Action No. 2. Therefore, the branch of the motion for an order consolidating the two actions is granted.

In a mortgage foreclosure action, a plaintiff establishes its prima facie entitlement to judgment as a matter of law by producing the mortgage, the unpaid note, and evidence of default (*see Loancare v. Firshing*, 130 AD3d 787 [2015]; *Midfirst Bank v Agho*, 121 AD3d 343 [2014]). Where, as in the present case, plaintiff’s standing has been placed in issue by

reason of defendant's answer, plaintiff must additionally prove its standing as a prima facie showing (see *HSBC Bank USA, N.A. v Baptiste*, 128 AD3d 773 [2015]). A plaintiff establishes its standing by the production of a written assignment of the note (see *Aurora Loan Servs., LLC v Taylor*, 114 AD3d 627 [2014], *aff'd* 25 NY3d 355 [2015]; see *Homecomings Fin., LLC v Guldi*, 108 AD3d 506 [2013]), or by physical delivery to the plaintiff of the note (see *Kondaur Capital Corp. v McCary*, 115 AD3d 649 [2014]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95 [2011]) prior to commencement of the action.

In opposition to plaintiff's motion, defendant Murphy alleges that plaintiff lacks standing, specifically due to the validity of the original adjusted rate note endorsed in blank. Defendant Murphy contends that the copy of the original note and blank endorsement annexed to plaintiff's motion and affidavit as Exhibit A is invalid as it is on a separate, undated, otherwise blank page.

UCC 3-202 (2) provides that "[a]n indorsement must be written by or on behalf of the holder and on the instrument or on a paper so firmly affixed thereto as to become a part thereof." Further, evidence of possession of a blank endorsement with a note fails to establish, without more, that such endorsement was so firmly affixed as to become part of the note (see *HSBC Bank, USA, N.A. v Roumiantseva*, 130 AD3d 983 [2015]; *Slutsky v Blooming Grove Inn*, 147 AD2d 208 [1989]).

In support of its motion for summary judgment, plaintiff offered an affidavit of Diondra Doublin, Document Execution Specialist for Nationstar, Inc. (Nationstar), plaintiff's servicer asserting, *inter alia*, that it, as plaintiff's agent has physical possession of the original note endorsed in blank, and that it received the original note from plaintiff on September 5, 2013, and remains in possession of same. Attached to her affidavit is a copy of the original note endorsed in blank, which is insufficient on its face. The endorsement itself fails to contain any evidence that it was "so firmly affixed thereto as to become a part thereof"; rather, it is simply placed on separate, undated page following the note, leaving the court to assume that such endorsement in blank was firmly affixed thereto. Further, Ms. Doublin offers no other information as to the condition of the original note and whether the endorsement in blank was firmly affixed to the original note. Instead, the affidavit simply provides that Nationstar, as an agent for the plaintiff, received the original note on September 5, 2013 and remains in possession of the original note (see *id.*; *cf. JPMorgan Chase Bank, N.A. v Roseman*, 133 AD3d 704 [2016] [though indorsement undated, *the face of the note* indicated it was endorsed to plaintiff]). As such, plaintiff is not entitled to summary judgment herein.

Accordingly, the branches of the motion for an order granting plaintiff summary judgment against defendant Murphy, striking her answer, and appointing a referee to

compute are denied. The branch of the motion for an order granting plaintiff judgment by default against the remaining defendants is granted to the extent that they are in default in answering or otherwise appearing herein. The branches of the motion for an order consolidating Action No. 1 and Action No. 2, and amending the caption is granted. It is hereby

ORDERED that Action No. 1 and Action No. 2 are consolidated for all purposes under this Index No., and it is further

ORDERED that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

HSBC BANK USA, NATIONAL ASSOCIATION, as
Trustee for the Holders of The Ellington Loan Acquisition
Trust 2007-1, Mortgage Pass-Through Certificates, Series
2007-1,

Index No.
701215/2015

Plaintiff(s),

-against-

COLLEEN MURPHY, JANET PETERS, HSBC BANK
USA, NATIONAL ASSOCIATION, as Trustee for the
Holders of The Ellington Loan Acquisition Trust 2007-2,
Mortgage Pass-Through Certificates, Series 2007-2,
NATIONWIDE ACCEPTANCE, BOMBARDIER
CAPITAL, INC., CITIBANK (SOUTH DAKOTA), N.A.,
MIDLAND FUNDING, LLC a/p/o FIRST BANK OF
DELAWARE, NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE, SLOMIN'S, INC.
UNITED STATES OF AMERICA - INTERNAL
REVENUE SERVICE, NEW YORK CITY CRIMINAL
COURT, WORLDWIDE ASSET PURCHASING, LLC,
NEW YORK CITY ENVIRONMENTAL CONTROL
BOARD, NEW YORK CITY PARKING VIOLATIONS
BUREAU, NEW YORK CITY TRANSIT ADJUDICATION
BUREAU, KADEEM MUNDY, CENTRAL HUDSON
GAS & ELECTRIC CORP., PORTFOLIO RECOVERY
ASSOCIATES, LLC, FIA CARD SERVICES, N.A.,

CACH LLC, FAIRFIELD ON THE BAY, LLC, BACK
& BODY MEDICAL CARE, P.C. as assignee of MELINDA
WHITE,

Defendant(s).

Plaintiff is directed to serve a copy of this order with notice of entry upon defense counsel, the Clerk of Queens County, and the appropriate Clerk in Room 140 of this Courthouse, within thirty (30) days of entry of this order.

Dated: May 3, 2016

J.S.C.