US Bank N.A. v Priftakis
2016 NY Slip Op 32544(U)
November 18, 2016
Supreme Court, Suffolk County
Docket Number: 30510/12
Judge: Thomas F. Whelan
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[* 1]

SHORT FORM ORDER

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INDEX No. 30510/12

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE: 06/20/16
SUBMIT DATE: 10/28/16
Mot. Seq. # 002 - MD
CDISP: No

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US BANK NATIONAL ASSOCIATION, not in its individual capacity, but solely as Legal Title Trustee for LVS Title Trust I,

Plaintiff,

-against-

LEONIDIAS PRIFTAKIS, ANNA PRIFTAKIS, BRADCO SUPPLY CORP., MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AMERICAN HOME MORTGAGE, ASSOCIATED MATERIALS, LLC, RIVERHEAD BUILDING SUPPLY CORP., ALLIED BUILDING PRODUCTS CORPORATION, FORD MOTOR CREDIT COMPANY, LLC, KLEET LUMBER CO., INC., PETRO, INC., ET AL,

Defendants.

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Upon the following papers numbered 1 to 7 read on this motion by defendant for summary judgment dismissing the complaint; Notice of Motion/Order to Show Cause and supporting papers 1 - 3; Notice of Cross Motion and supporting papers ; Answering papers 4-5; Reply papers 6-7; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#002) by defendants, Leonidias Priftakis and Anna Priftakis, for summary judgment dismissing the complaint served in this mortgage foreclosure action is considered under CPLR 3212 and 3211(a) (3) and (5) and is denied.

The plaintiff commenced this action to foreclose the lien of a February 9, 2007 mortgage given by the Priftakis defendants to American Home Mortgage to secure a mortgage note in the principal amount of $999,999.00 likewise given by defendant, Leonidas Priftakis, on that date. In response to

the plaintiff's service of the summons and complaint and other initiatory papers, the Priftakis defendants appeared herein by answer. Therein, the Priftakis defendants admit that they defaulted in their payment obligations under the terms of the note and mortgage, while reserving a challenge to the exact amount of the delinquent debt. They also asserted three affirmative defenses, two of which challenge the standing of the plaintiff to maintain this action for foreclosure and sale and challenge the plaintiff's compliance with the ninety day notice provisions imposed by RPAPL § 1304.

By the instant motion (#002), defendants, Leonidas Priftakis and Anna Priftakis, demand an award of summary judgment dismissing the complaint on the following grounds: 1) that the plaintiff lacks standing because "the plaintiff has failed to establish its ownership of the note" and "failed to establish its ownership of the mortgage"; 2) that the plaintiff failed to establish compliance with the RPAPL § 1303 separate notice; 3) that the plaintiff failed to establish compliance with RPAPL § 1304; and 4) the plaintiff failed to engage in good faith negotiations to resolve its claim by way of a loan modification or other resolution thereby warranting a court imposed loan modification or sanctions. The plaintiff opposed the motion to which the moving defendants have replied.

For the reasons stated, the defendants' motion (#002) for summary judgment is denied.

Accelerated judgment remedies are provided in Article 32 of the CPLR. The remedy of summary judgment is available only after the joinder of issue (*see* CPLR 3212[a]). It may thus be predicated upon the grounds which provide for a dismissal of the complaint by way of pre-answer motion of the type contemplated by CPLR 3211(a), provided those grounds have not been waived pursuant to CPLR 3211(3).

Because of its drastic nature, the remedy of summary judgment should issue only where the movant demonstrates his or her entitlement to judgment as a matter of law by the tender of proof in admissible form sufficient to eliminate all questions of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557,427 NYS2d 595 [1980]; ***Bonaventura v Galpin***, 119 AD3d 625, 988 NYS2d 886 [2d Dept 2014]; ***Dina v Olsen***, 106 AD3d 903, 965 NYS2d 352 [2d Dept 2013]; ***Krupp v Aetna Life & Cas. Co.***, 103 AD2d 252, 479 NYS2d 992 [2d Dept 1984]). A failure to do so warrants a denial of the motion without regard to the sufficiency of opposing papers (*see* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 503, 942 NYS2d 13 [2012]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, *supra*; ***Carlucci v Village of Scarsdale***, 104 AD3d 797,961 NYS2d 318 [2d Dept 2013]). Controlling appellate case authorities have made it abundantly clear that a defendant moving for summary judgment may not rely on perceived gaps in the plaintiff's proof to sustain its prima facie burden (*see* ***Strough v Incorporated Vil. of West Hampton Dunes***, 98 AD3d 607, 949 NYS3d 737 [2d Dept 2012]; *see also* ***Cox v Consolidated Edison, Inc.***, 125 AD3d 923, 5 NYS3d 923 [2d Dept 2015]; ***Martinez v 1261 Realty Co., LLC***, 121 AD3d 955, 995 NYS2d 581 [2d Dept 2014]).

A review of the moving papers of the defendants reveals that they are insufficient to sustain the burden of proof required to obtain an award of summary judgment dismissing the plaintiff's complaint. The defendants' moving papers are principally premised upon perceived gaps in the ability

of the plaintiff to establish its standing or its compliance with the notice provisions of RPAPL §1304 or those imposed by RPAPL § 1303, neither of which are jurisdictional in nature (*see* ***Flagstar Bank, FSB v Jambelli***, 140 AD3d 829, 32 NYS3d 625 [2d Dept 2016]; *see* ***Citimortgage v Baser***, 137 AD3d 735, 26 NYS3d 352 [2d Dept 2016]). Under the appellate case authorities cited above, that reliance upon said gaps provides no basis for an award of summary judgment in favor of the moving defendants (*see* ***Cox v Consolidated Edison, Inc.***, 125 AD3d 923, *supra*; ***Martinez v 1261 Realty Co., LLC***, 121 AD3d 955, *supra*; ***Strough v Incorporated Vil. of West Hampton Dunes***, 98 AD3d 607, *supra*).

Even if it were otherwise, the moving papers failed to establish under a substantive analysis, that the plaintiff is without standing to prosecute its claims for foreclosure and sale by the tender of proof in admissible form. The declaratory statement of the defendants' purported expert annexed to the moving papers is not sworn to under oath and contains unsubstantiated allegations and unsupported conclusions that are irrelevant to the issue of standing. It is well settled that the plaintiff's possession of the mortgage note, which alone is the dispositive document, at or prior to the commencement of the action is all that is needed to establish the plaintiff's standing (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, 12 NYS3d 612 [2015]; ***JPMorgan Chase Bank, Natl. Ass'n v Weinberger***, 142 AD3d 643, 37 NYS3d 286 [2d Dept 2016]; ***U.S. Bank Natl. Ass'n v Godwin***, 137 AD3d 1260, NY Slip Op. 02363 [2d Dept 2016]; ***Well Fargo Bank, N.A. v Joseph***, 137 AD3d 896, 26 NYS3d 583 [2d Dept 2016]).

Indeed, the establishment of the plaintiff's possession of the mortgage note on a date prior to the commencement of the action is so conclusive that it renders, unavailing, all claims of defects in allonges (*see* ***US Bank v Askew***, 138 AD3d 402, 27 NYS3d 856 [1st Dept 2016]), and claims of defects in mortgage assignments (*see* ***Deutsche Bank Natl. Trust v Naughton***, 137 AD3d 1199, 28 NYS3d 444 [2d Dept 2016]; ***Wells Fargo Bank v Charlaff***, 134 AD3d 1099, 24 NYS3d 317 [2d Dept 2016]; ***HSBC Bank USA, Natl. Ass'n v Sage***, 112 AD3d 1126, 977 NYS2d 446 [3d Dept 2013]; ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]; *see also* ***Tuthill Fin. v Abundant Life Church, U.P.C.***, 122 AD3d 918, 998 NYS2d 387 [2d Dept 2014]). The moving papers failed to demonstrate a lack of standing on the part of the plaintiff due to its non-possession of the mortgage note duly indorsed in blank by allonge, by the defendants' submission of due proof in admissible form sufficient to establish that as a matter of law the plaintiff lacks standing to pursue its claims.

Nor did the defendants' moving papers establish by like proof the plaintiff's non-compliance with the notice provisions of either RPAPL §§ 1304 or 1303 . The allegations of non-compliance come solely from defense counsel who is without first hand knowledge as to the issuance and service of said notices. The additional claims that neither the summons or complaint which were served upon defendant, Leonidas Priftakis, are equally unavailing (*see* ***Wells Fargo Bank v Bowie***, 89 AD3d 931, 932 NYS2d 702 [2d Dept 2011]).

Finally, the claims for relief in the form of the imposition of sanctions or a judicially imposed loan modification or a return of this action to the conference part on the grounds that the plaintiff failed to engage in good faith in negotiations aimed at achieving a loan modification are without merit. The

record reflects that the parties participated in one CPLR 3408 settlement conference in July of 2013, after which, the action was marked "not settled" by a presiding quasi judicial employee assigned to the specialized mortgage foreclosure conference part and thereafter referred to the civil case inventory of this court. No further conferences are required under CPLR 3408 and the defendants failed to allege, let alone demonstrate, that the plaintiff failed to engage in good faith negotiations at the July 3, 2013 conference (*see* CPLR 3408; ***PNC Bank Natl. Ass'n. v Campbell***, 142 AD3d 1147, 38 NYS3d 234 [2d Dept 2016]; ***Aurora Loan Servs., LLC v Chirinkin***, 135 AD3d 676, 24 NYS3d 119 [2d Dept 2016]***; JP Morgan Chase Bank, N.A. v Butler***, 129 AD3d 777, 12 NYS3d 145 [2d Dept 2015]; ***Federal Natl. Mtge. Assn. v Cappelli***, 120 AD3d 621, 990 NYS2d 856 [2d Dept 2014]). Neither the imposition of sanctions nor a return of this action to the specialized mortgage foreclosure conference part is warranted pursuant to CPLR 3408.

It appears, especially from the defendants' reply papers, that the focus of the defendants' complaints regarding a purported lack of good faith in negotiating a loan modification are written communications with the plaintiff's agent that occurred well after the CPLR 3408 settlement processes were concluded. These communications appear to have begun in November of 2015 and terminated in January of 2016. However, this court is unaware of any statutory or controlling appellate case authorities that continues the requirement to negotiate in good faith imposed by CPLR 3408 to extra-judicial, communications occurring after the CPLR 3408 conference processes are concluded and the defendants have pointed to none in their submissions on this motion. The defendants' complaints about the plaintiff's purported wrongful conduct are thus rejected as lacking in merit.

Even if a continuing requirement to negotiate in good faith after the conclusion of the CPLR 3408 processes does exist, the moving papers failed to demonstrate any lack of good faith on the part of the plaintiff. The conclusory and unsubstantiated claims that the plaintiff failed to negotiate in good faith at such conferences are belied by the plaintiff's offer of a trial modification which the defendants chose to reject. These circumstances and others apparent from the submissions on this motion render the defendants' claims unmeritorious (*see* ***Wells Fargo Bank, N.A. v Miller***, 136 AD3d 1024, 26 NYS3d 176 [2d Dept 2016]; *see also* ***PNC Bank, Natl. Ass'n. v Campbell***, 142 AD3d 1147, 38 NYS3d 234 [2d Dept 2016]; ***Citimortgage Inc. v Pugliese***, 138 AD3d 576, 2015 WL 5795577 [2d Dept 2016]; ***Bank of New York Trust Co., N.A. v Chiejina***, 142 AD3d 570, 36 NYS3d 512 [2d Dept 2016]; ***Retained Realty, Inc. v Syed***, 137 AD3d 1099, 26 NYS3d 889 [2d Dept 2016]).

Likewise lacking in merit are the defendants' demands for a judicially imposed loan modification. It is well settled law that neither this court nor any others may direct a party to a contract to rewrite its contract or to enter upon new or modified terms or other agreements as such a direction would clearly violate the Contract Clause of the United States Constitution (*see* ***Wells Fargo Bank, N.A. v Meyers***, 108 AD3d 9, 966 NYS2d 108 [2d Dept 2013]; *see also* ***PNC Bank v Campbell***, 142 AD3d 1147, *supra*; ***PHH Mtge. Corp. v Hepburn***, 128 AD3d 659, 10 NYS3d 102 [2d Dept 2015]; ***Citibank, N.A. v Barclay***, 124 AD3d 174, 999 NYS2d 375 [1st Dept 2014]; ***U.S. Bank Natl. Ass'n v Williams***, 121 AD3d 1098, 995 NYS2d 172 [2d Dept 2014]; ***Flagstar Bank, FSB v Walker***, 112 AD3d 885, 977 NYS2d 359 [2d Dept 2013]; ***Wells Fargo Bank, N.A. v Van Dyke***, 101 AD3d 638, 958 NYS2d 331 [1st Dept 2012]). There is thus no duty on the part of a lender to modify the terms of a loan and the court remains without "authority to force parties to reach an agreement" (***U.S. Bank***

Natl. Ass'n v Williams, 121 AD3d 1098, 1102, *supra*; *see also* ***Flagstar Bank, FSB v Walker***, 112 AD3d 885, *supra*; ***Wells Fargo Bank, N.A. v Van Dyke***, 101 AD3d 638, *supra*; ***Wells Fargo Bank, N.A. v Meyers***, 108 AD3d 9, *supra*). This court thus declines to compel the plaintiff to modify its loan and thereby forgo any of the rights or remedies it possesses under the terms of any loan documents, which rights and remedies the borrower willingly conferred upon the lender in exchange for the lender's advancement of the loan monies (*see* ***Emigrant Mtge. Co., Inc. v Fisher***, 90 AD3d 823, 935 NYS2d 313 [2d Dept 2011]).

The court has considered the remaining contentions and demands for relief advanced in the defendants' moving papers and finds them all to be lacking in merit. Accordingly, the instant motion (#002) by the Priftakis defendants for summary judgment dismissing the complaint served and the other relief demanded, including the imposition of sanctions, is in all respects denied.

DATED: 11/18/16

THOMAS F. WHELAN, J.S.C.