

Wells Fargo Bank, N.A. v Ki Won Kim

2017 NY Slip Op 30609(U)

March 30, 2017

Supreme Court, Queens County

Docket Number: 10255/2012

Judge: Bernice D. Siegal

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This opinion is uncorrected and not selected for official publication.

MEMORANDUM

NEW YORK STATE SUPREME COURT – QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 25
Justice

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Wells Fargo Bank, N.A., as Trustee, for Carrington
Mortgage Loan Trust, Series 2006-NC1 Asset-Backed
Pass-Through Certificates,
Plaintiff,

Index No.: 10255/12
Motion Date: 1/31/17
Motion Cal. No.: 203
Motion Seq. No.: 2

-against-

Ki Won Kim; Hae Sook Kim;
New York City Transit Adjudication Bureau;
New York City Environmental Control Board;
New York City Parking Violations Bureau;
Janet Kim,
Defendants.

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The following papers numbered 1 to 12 read on this motion for an order granting judgment of foreclosure and sale; and award of legal fees.

	PAPERS NUMBERED
Notice of Motion - Affidavits-Exhibits.....	1 - 4
Affirmation in Opposition.....	5 - 9
Reply Affirmation.....	10 - 12

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Plaintiff, Wells Fargo Bank N.A., As Trustee, for Carrington Mortgage Loan Trust ("Plaintiff"), moves for an order against Defendants, Ki Won Kim and Hae Sook Kim ("Defendants") granting Plaintiff's application for a judgment of foreclosure and sale seeking inter alia to confirm the Referee's Report and to sell the property at Public Auction.

Facts

The undisputed facts show that on October 19, 2005, Defendant executed a Note and Mortgage in favor of Plaintiff's predecessor in interest, New Century Mortgage Corporation, for the sum of \$650,000.00. The Mortgage was recorded in the Office of the City Register of the City of New York, County of Queens on December 20, 2005, in CRFN 2005000700242. The Mortgage Tax was paid upon recording.

In January 2011, Defendants were offered a Loan Modification with the first payment due on February 1, 2011. Defendants breached their obligations to Plaintiff by failing to make the first payment on February 1, 2011 and all other payments thereafter. On or about December 27, 2011, the Note and Mortgage were assigned to Plaintiff by memorializing, in writing, the physical delivery of the Note and Mortgage to Plaintiff. The Mortgage was recorded in the Office of the City Register of the City of New York, County of Queens on February 16, 2012 in CRFN 2012000066038.

On May 15, 2012, the Plaintiffs filed a Complaint in the Office of the Clerk of the County of Queens. Notice of Pendency ("Notice") was duly filed on the same day and re-filed on July 7, 2015. On or about January 26, 2015, Hon. Robert L. Nahman granted Plaintiff's Motion for an Order of Reference and appointed a referee. The order entered the County Clerk Records of Queens County on or about January 29, 2016. Plaintiff served Notice of Entry on February 11, 2016.

On or about August 17, 2016, the referee reviewed documentary evidence and issued a Referee Report, which states that Defendants owe Plaintiff \$1,020,646.22. (See Plaintiff's Reply Affirmation Exhibit "G".) On or about September 12, 2016, Plaintiff commenced the within action to move for Judgment of Foreclosure and Sale seeking inter alia to confirm the Referee's Report and to sell the property at public auction.

For the reasons set forth below, Plaintiff's motion for Judgment of Foreclosure and Sale seeking inter alia to confirm the Referee's Report and to sell the property at public auction is granted.

Discussion

In an action to foreclose a mortgage, a plaintiff must establish a prima facie case through the production of the Mortgage, the unpaid Note, and evidence of default. (See *Deutsche Bank Natl. Trust Co. v. Brewton*, 142 AD3d 683, 684 [2nd Dept., 2016]; *Midfirst Bank v. Agho*, 121 A.D.3d 343, 348 [2nd Dept., 2014]; *U.S. Bank, N.A. v. Collymore*, 68 AD3d 752,753 [2nd Dept., 2009].) "If the plaintiff makes a prima facie showing, the burden shifts to the defendants to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action." (*Midfirst Bank v. Agho*, 121 AD3d 343, 344 [2nd Dept., 2014]; *Washington Mut. Bank v. Schenk*, 112 AD3d 615, 616 [2nd Dept., 2013].) Here, Plaintiff submitted the unpaid Note and Mortgage as Exhibit A as well as evidence of the Defendant's default as Exhibit B. Defendant has been in Default since February 2001.

Standing

A plaintiff may establish standing to bring a foreclosure action through the production of the Mortgage, Note and evidence of default. (See *Deutsche Bank Natl. Trust Co. v. Brewton*, 142 AD3d 683, 684 [2nd Dept.,2016]; *Midfirst Bank v. Agho*, 121 A.D.3d 343, 348 [2nd Dept.,2014]; *U.S. Bank, N.A. v. Collymore*, 68 AD3d 752,753 [2nd Dept.,2009].) Where a defendant puts standing into issue, the plaintiff must prove its standing. (Id.) A plaintiff has standing in a mortgage foreclosure action where it is the holder or assignee of the Note prior to the time the action is commenced. Id. (See *U.S. Bank N.A. v. Handler*, 140 AD3d 463, 465 [2nd Dept.,2016]; *Aurora Loan Servs., LLC v. Taylor*, 114 AD3d 627 [2nd Dept.,2014].) A plaintiff can prove standing by a written assignment of the Note, in blank, or physical delivery of the Note prior to the commencement of the foreclosure action; the Mortgage passes incident to the Note. (See *Deutsche Bank Natl. Trust Co. v. Brewton*, 142 AD3d at 684; *Mtge. Elec. Registration Sys., Inc. v. Coakley*, 41 AD3d 674 [2nd Dept.,2007]; *Maccarone v. Hayes*, 85 AD 41,45 [2nd Dept.,1903].) A Note in blank specifies no indorsee and may consist of a

mere signature. (UCC 3-204[2]; *JPMorgan Chase Bank, N.A. v. Weinberger*, 142 AD3d 643, 645 [2nd Dept. 2016].) An instrument payable to order and indorsed in blank becomes payable to bearer and may be negotiated by delivery alone until specially indorsed. (UCC 3-204[2]; *Coakley*, 41 AD3d at 674.) A bearer is a person in possession of a negotiable instrument. (see UCC 1-201[b][5].) Furthermore, there is no requirement that an entity in possession of a negotiable instrument that has been indorsed in blank must establish details of how it came into possession of the instrument to be able to enforce it. (see UCC 3-204[2]; *Deutsche Bank Natl. Trust Co. v. Logan*, 146 AD3d 861 [2nd Dept.,2017]; *Aurora Loan Servs., LLC v. Taylor*, 25 NY3d at 362; *Weinberger*, 142 AD3d at 645.)

In opposition, Defendant alleges that Plaintiff lacks standing to bring the within action because upon a review of the Note there was blank indorsement and, thus, one cannot tell who the Note was transferred to or whether it was properly transferred. However, a Note in blank is payable to the bearer, in this case, Plaintiff. (*JPMorgan Chase Bank, N.A.* at 142.) There is no requirement that the blank be filled or that the holder of the Note must establish how it came into possession. *Id.* Here, Plaintiff has shown possession of the Note, which can be found in Plaintiff's Reply Affirmation (see Exhibit "C".) Additionally, a plaintiff may prove it has standing by producing an affidavit from an employee, which establishes that the Note, indorsed in Blank, was transferred to the plaintiff before the action was commenced. (See *U.S. Bank N.A. v. Godwin*, 137 AD3d 1260, 1262 [2nd Dept.,2016]; *Aurora Loan Servs., LLC v. Taylor*, 25 NY3d 355, 360 [2015]; *Kondaaur Capital Corp. v. McCary*, 115 AD3d 649 [2nd Dept.,2014].) Here, Plaintiff included an employee affidavit, which establishes that Plaintiff was in possession of the Note and Mortgage prior to the date this action was commenced. (See Plaintiff's Exhibit I.) Plaintiff's employee affidavit was made by Elizabeth A. Ostermann, Vice President of Carrington Mortgage Services, LLC, Servicer and Attorney in Fact for Wells Fargo. The affidavit, made with the affiant's personal knowledge, states Defendant's status with

regards to defaulted payments, the date Plaintiff came into possession of the Note, the fact that the affiant had access to the records, and that such records are kept in Plaintiff's ordinary course of business, which is sufficient to establish possession of the Note prior to commencement of the action. (See *Deutsche Bank Natl. Trust Co. v. Naughton*, 137 AD3d 1199, 1200 [2nd Dept.,2016]; *HSBC Bank USA, N.A. v. Spitzer*, 131 AD3d 1206,1207 [2nd Dept.,2015]; (*Emigrant Mtge. Co., Inc. v. Beckerman*, 105 AD3d 895 [2nd Dept.,2013].) Thus, Plaintiff has standing to bring the within action.

Good Faith

Parties in a Foreclosure action are required to hold a settlement conference procedure whereby the parties must negotiate in good faith to agree on a loan modification. (CPLR 3408[a],[f]); (See *Bank of NY Mellon v. Arif Izmirligil*, 144 AD3d 1063, 1064 [2nd Dept. 2016]; *US Bank N.A. v. Sarmiento*, 121 AD3d 187, 200 [2nd Dept. 2014].) Whether a party failed to negotiate in good faith is determined by considering the totality of the circumstances. (See *US Bank N.A. v. Sarmiento*, 121 AD3d at 203; *PNC Bank, N.A. v. Campbell*, 142 AD3d 1147,1184 [2nd Dept.,2016]; *Fed. Natl. Mtge. Assn. v. Cappelli*, 120 AD3d 62, 622 [2nd Dept. 2014].) An indication of good faith could include, "if possible," a loan modification. (*US Bank N.A. v. Sarmiento*, 121 AD3d at 204.) (*Wells Fargo Bank, N.A. v. Meyers*, 108 AD3d 9, 10 [2nd Dept.,2013].) However, good faith does not require a plaintiff to make the exact settlement offer desired by the defendants. (*US Bank N.A. v. Sarmiento*, 121 AD3d at 204.) Parties cannot be obligated to reach an agreement. (See *PNC Bank, N.A. v. Campbell*, 142 AD3d at 1148; *Wells Fargo Bank, N.A. v. Meyers*, 108 AD3d at 20; *Flagstar Bank, FSB v. Walker*, 112 AD3d 885, 886 [2nd Dept.,2013].)

Here, in opposition, the Defendants claim that the Plaintiff did not negotiate in good faith because Defendants have attempted to rectify the instant foreclosure proceeding and Plaintiff has not been cooperative. However, a loan modification is only required "if possible". (*US Bank N.A. v.*

Sarmiento, 121 AD3d at 204.) On January of 2011, Plaintiff's predecessor offered Defendant a Loan Modification, which Defendant defaulted on the first payment. Additionally, on July 2, 2013, Plaintiff generated a Home Affordable Modification Program ("HAMP") which was denied on the basis that Defendant owed a higher amount than the program's limit permitted for a single-family home. Plaintiff sent Defendants a denial letter, explaining that Defendants loan did not qualify for the program. Plaintiffs are not obligated to meet the desires of defendants. (See *PNC Bank, N.A. v. Campbell*, 142 AD3d at 1148; *Wells Fargo Bank, N.A. v. Meyers*, 108 AD3d at 20; *Flagstar Bank, FSB v. Walker*, 112 AD3d 885, 886 [2nd Dept.,2013].) Defendants make no other allegations of bad faith during negotiations, and have submitted no documentation of any additional payment modification requests that may have been submitted to Plaintiff. Thus, Plaintiff's conduct did not constitute bad faith.

Conclusion

For the reasons set forth above, Plaintiff's application for a judgment of foreclosure and sale seeking inter alia to confirm the Referee's Report and to sell the property at Public Auction is granted.

Settle Order.

Dated: March 30, 2017

Bernice D. Siegal, J. S. C.