U.S. Bank, N.A. v Murray
2017 NY Slip Op 31595(U)
July 28, 2017
Supreme Court, Tioga County
Docket Number: 47307
Judge: Eugene D. Faughnan
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[* 1]

At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tioga County Courthouse, Owego, New York, on the 9th day of June, 2017.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : COUNTY OF TIOGA

U.S BANK, N.A., AS TRUSTEE FOR LEHMAN ABS MANUFACTURED HOUSING CONTRACT 2002-A

Plaintiff,

vs.

DOUGLAS R. MURRAY, TAMMY M. MURRAY, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, and "JOHN DOE #1" through "JOHN DOE #10", the last ten names being fictitious and unknown to the Plaintiff, the person or parties intended being the persons or parties, if any, having or claiming an interest in or lien upon the mortgage premises described in the verified complaint,

Defendants.

DECISION

Index No. 47307
RJI No.

APPEARANCES:

COUNSEL FOR PLAINTIFF: COHN & ROTH
100 E. Old Country Road
Mineola, NY 11501

COUNSEL FOR DEFENDANT TAMMY MURRAY: EDWARD Y. CROSSMORE, ESQ.
115 West Green Street
Ithaca, NY 14850

EUGENE D. FAUGHNAN, J.S.C.

This matter comes before the Court on the motion of Defendant Tammy M. Murray[1] ("Murray") for an Order dismissing the Verified Complaint because U. S. Bank N.A. ("Plaintiff") has failed to comply with UCC Section 3-804, or alternatively, dismissing the Verified Complaint unless the Plaintiff posts security of no less than twice the amount allegedly due under the debt instrument. In support of the motion, Murray has submitted an Affidavit of Edward Y. Crossmore, sworn to on April 17, 2017, with attached Exhibits "A" through "D", and a Memorandum of Law dated April 17, 2017.

Plaintiff filed a cross-motion seeking to strike Murray's answer, grant summary judgment to the Plaintiff, and grant an Order of Reference to compute the amount due to the Plaintiff. In support of the cross-motion, Plaintiff submitted an Affirmation in support from Edward C. Klein, Esq., dated May 12, 2017, with Exhibits "A" through "L", and Memorandum of Law dated May 12, 2017.

BACKGROUND FACTS

Plaintiff commenced the instant action on February 28, 2017, to foreclose on a mortgage on certain real property located in Tioga County. The Note and Mortgage were signed on January 3, 2002, and according to Plaintiff, Defendant borrowers failed to make payments after April 3, 2015. Murray served an Answer in April, 2017 raising affirmative defenses relating to the fact that the original Note was lost, and that certain provisions of the New York Uniform Commercial Code apply in this instance.

MURRAY'S MOTION TO DISMISS

Murray points to the Plaintiff's complaint, including a "lost note" affidavit, which

[1]Borrowers are Defendants Douglas R. Murray and Tammy M. Murray, but the current motion was made on behalf of Tammy Murray only, and unless otherwise specifically noted, references made herein will be to Tammy Murray.

[* 3]

claimed that the Plaintiff is the owner of the Note in this transaction, but that the Note has been lost. Murray contends that the Note is a "debt instrument", and if it is lost, Plaintiff is requried to comply with UCC Section 3-804, which provides that the owner must give proof of "the facts which prevent his production of the instrument and its terms." That section goes on to state that the court shall require Plaintiff to submit security in twice the unpaid amount, which has not been provided in this case. Murray argues that the lost note affidavit only states that the business records show that the Note is lost, but the business records have not been produced, and no other facts are alleged. Therefore, there is no way to conclude it is lost, as opposed to being in the hands of a third party.

PLAINTIFF'S OPPOSITION TO MURRAY'S MOTION AND CROSS MOTION FOR SUMMARY JUDGMENT

Plaintiff points out that Murray's answer admits the paragraphs of the Verified Complaint with respect to the signing of the Mortgage and Note. The borrowers also made payment pursuant to the terms of the Mortgage and Note for a period of time, before defaulting. With respect to the sufficiency of "facts" concerning the lost Note, Plaintiff contends that since Murray admits that there was a signed Mortgage and Note, the lost note affidavit from lender's servicer, attesting that the Note was not transferred or lawfully seized, constitutes sufficient facts. Therefore, Plaintiff opposes Murray's motion, and also argues that it has submitted sufficient evidence to support its own claim for summary judgment.

DISCUSSION

As correctly pointed out by the Plaintiff, there is no dispute about the existence of the debt, as Murray has admitted that in her Answer. There is no question of fact as to the execution and delivery of the Note and Mortgage, and the subsequent default in payments.

The first issue, then, for the Court is whether the lost Note affidavit contains sufficient facts to satisfy UCC 3-804. Plaintiff submitted a Certificate of Merit with its Complaint, and

included an Affidavit of Lost Note from Edward Born, sworn to on October 9, 2015. In that affidavit, Mr. Born attests that he is an Assistant Vice President for Ditech Financial LLC, which was the servicing agent for GreenPoint Credit, LLC, ("GreenPoint") the original lender.[2] He states that GreenPoint cannot obtain possession of the original Note because its whereabouts are unknown, and that the loss of possession was not the result of a transfer or lawful seizure.

Murray contends that the "facts" presented in the Born affidavit are insufficient because they are lacking in detail, and there are no business records supplied with the affidavit. However, as Murray is the moving party, she bears the burden on this point. "A party moving for summary judgment must demonstrate that the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment' in the moving party's favor (CPLR 3212 [b]). Thus, 'the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.'" *Jacobsen v. New York City Health & Hosps. Corp.*, 22 NY2d 824, 833 (2014) *quoting Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986). If she fails to present a prima facie case, the motion must be denied, regardless of the sufficiency of the responding papers. *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 (2013).

Contrary to Murray's argument, the Born affidavit does contain sufficient facts. It states that the original Note was executed by borrowers to GreenPoint, and that the Note was not transferred at any time before Born's affidavit, and that there was no lawful seizure of the Note. The conclusion being that GreenPoint remained the owner and could enforce the Note, but that the Note could not be located, because it was lost. The Court agrees with Plaintiff that UCC 3-804 cannot imply a full recitation of facts as to how the document was lost, because if that detail was available, the document could be located, and would not, in fact, be lost. GreenPoint has documented its initial ownership of the debt, and that the debt was not transferred or lawfully seized. GreenPoint thereafter assigned the Mortgage and Debt to the Plaintiff. Although Murray asserts that the evidence does not establish that the Note is not in the hands of a third party, no

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[2]GreenPoint assigned the Note and Mortgage to Plaintiff on October 7, 2015.

admissible evidence has been submitted, and in fact, the Born affidavit states the Note has not been transferred. Thus, the Court concludes that Murray has not established a prima facie case for dismissal on a theory that the "facts" in the lost Note affidavit are insufficient.

Murray's second point is that Plaintiff should be required to post a bond pursuant to UCC 3-804. However, Murray has not established that, even if a bond is required, failure to procure the bond merits dismissal. The statute simply talks of the need for a bond, but does not indicate that it is a pre-condition to commencing the action. Therefore, even if a bond were required, the Court does not find that dismissal would be appropriate for failure to post the bond.

Further, given the particular facts of this case, the Court concludes that a bond is not required. As correctly pointed out by Plaintiff, this action is to foreclose on the mortgage, and given Murray's prior discharge in bankruptcy in 2005, a deficiency judgment cannot be pursued. Moreover, once the foreclosure has been commenced, no other action is permitted on the mortgage debt. RPAPL §1301. Thus, Murray cannot be pursued on the debt because of the foreclosure, and in any event, would not be subject to a judgment on the Note because of the bankruptcy discharge.

Accordingly, Murray's Motion to Dismiss is DENIED, and Murray's Motion to require the posting of a bond is also DENIED.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND AN ORDER OF REFERENCE

"Entitlement to a judgment of foreclosure may be established, as a matter of law, where a mortgagee produces both the mortgage and unpaid note, together with evidence of the mortgagor's default, thereby shifting the burden to the mortgagor to demonstrate, through both competent and admissible evidence, any defense which could raise a question of fact." *HSBC Bank USA v. Merrill*, 37 A.D.3d 899, 900 (3rd Dept. 2007). Here, Plaintiff has submitted the Mortgage and Note, the existence of which have been admitted by Murray, and the authenticity of which have not been challenged. Plaintiff has also submitted an affidavit of facts, attesting to the default in payments. Thus, the burden has been shifted to Murray to demonstrate any

questions of fact. Murray has failed to produce any evidence to dispute Plaintiff's prima facie case, and as found above, has failed to make a prima facie case of her own on the affirmative defenses, or submitted any admissible evidence in opposition to the motion. Therefore, she has failed to rebut Plaintiff's case for summary judgment. Accordingly, Plaintiff's Motion is GRANTED.

CONCLUSION

This Decision resolves the pending Motions before the Court. Plaintiff's Proposed Order to Appoint a Referee is also being signed at this time. All the papers will be returned to the Plaintiff to be filed and served.

THIS CONSTITUTES THE DECISION OF THIS COURT.

Dated: July 28, 2017
Owego, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice