

Citimortgage Inc. v Modica

2013 NY Slip Op 30766(U)

April 11, 2013

Sup Ct, Richmond County

Docket Number: 130376/09

Judge: Thomas P. Aliotta

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

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CITIMORTGAGE INC.,

Plaintiff,

Part C-2

Present:

Hon. Thomas P. Aliotta

-against-

JOHN MODICA, DINA MODICA, MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, INC, AS
NOMINEE FOR LEHMAN BROTHERS BANK, FSB
NEW YORK CITY ENVIRONMENTAL CONTROL
BOARD, NEW YORK CITY TRANSIT ADJUDICATION
BUREAU,

DECISION AND ORDER

Index No. 130376/09

Motion No. 2138-001

“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.

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The following papers numbered 1 to 6 were fully submitted on the 7th day of February, 2013:

Pages
Numbered

Notice of Motion for Summary Judgment and to Appoint Referee
to Compute and for Other Relief by Plaintiff,
with Supporting Papers and Exhibits
(dated July 10, 2012).....1

Affidavit of Defendant Dina Modica in Opposition
to Plaintiff’s Motion for Summary Judgment and Order of Reference,
with Supporting Papers and Exhibits
(dated August 8, 2012).....2

Defendant Dina Modica’s Brief in Opposition
to Plaintiff’s Motion for Summary Judgment
(dated August 8, 2012).....3

Affidavit in Further Support of Motion for Summary Judgment
and for Referee to Compute and for Other Relief,
with Supporting Papers and Exhibits
(dated September 21, 2012).....4

Memorandum of Law in Further Support
of Plaintiff’s Motion for Summary Judgment,
with Exhibit
(dated September 25, 2012).....5

Affidavit of Cassandra Leet
 (dated January 9, 2013).....6

Upon the foregoing papers, the motion for, inter alia, summary judgment and an order of reference is granted.

This is an action to foreclose a mortgage in which plaintiff claims that defendants John Modica and Dina Modica are in default as a result of their having failed to make the required payments since September 1, 2008. The action was commenced by the filing and service of a summons, complaint and notice of pendency on or about March 23, 2009. The Notice of Pendency was re-filed on February 3, 2012 (*see* Plaintiff's Exhibit "A").

To the extent relevant, it is alleged that on March 20, 2006, defendant John Modica executed a note in the principal amount of \$490,880.00 to Mortgage Electronic Registration Systems, Inc as Nominee for Lehman Brothers Bank, FSB. Said note was secured by a mortgage on the premises known as 52 Jeannette Avenue, Staten Island, New York. Subsequently, the note was endorsed "without recourse" from Lehman Brothers Bank, FSB to Lehman Brothers Holdings Inc, and thereafter endorsed in blank (*see* Plaintiff's Exhibit "C"). On or about July 3, 2006, the note was sold and transferred from Lehman Brothers Holdings Inc to plaintiff Citimortgage Inc. (*see* Affidavit of Heather Townsend, Document Control Officer of Citimortgage Inc. ; Affidavit of Gina Gray, Vice President of Selene RMOF LLC, para 15; Affidavit of Cassandra Leet). According to plaintiff, such transfer included the physical delivery of the note and mortgage (id.). However, it appears that this transfer was not recorded until March 5, 2009 (*see* Defendant's Exhibit "A"). Following the commencement of this action, the subject note and mortgage was sold and transferred to Selene Finance LP on April 28, 2010, and the same was further sold and transferred to SRMOF 2009-1 Trust on May 10, 2010 (*see* Affidavit of Gina Gray, Vice President of Selene RMOF LLC, para 2).

According to a Stipulation dated July 2, 2009, defendants' time to answer was extended to

August 15, 2009 (*see* Plaintiff's Exhibit "E"). Nevertheless, when defendant Dina Modica served an untimely Verified Answer on or about January 3, 2012 (*see* Plaintiff's Exhibit "B"), it was not rejected. Co-defendant John Modica is in default. Although the latter was the sole borrower on the subject note, both John and Dina Modica are signatories on the mortgage, and both are listed on the deed to the property being foreclosed. These defendants are now divorced, and defendant Dina Modica currently resides in the subject property with her two children. It is undisputed that defendants were given several opportunities to modify their loan in this Court's Foreclosure Settlement Part over the course of the last two years, but were unable to reach an agreement.¹

In the present application, dated July 10, 2012, plaintiff moves pursuant to CPLR 3212 for an order (1) directing the entry of summary judgment in its favor; (2) appointing a referee to compute the amount due; (3) striking the answer and dismissing the affirmative defenses of the answering defendant, Dina Modica; and (4) amending the caption to (a) substitute SRMOF 2009-1 Trust in the place and stead of Citimortgage Inc to properly reflect the name of the current holder/owner of the subject note and mortgage and (b) strike out the names "John Doe #1" through "John Doe #12", who are not necessary parties to the action.

The motion is granted.

Entitlement to a judgment of foreclosure and sale may be established, as a matter of law, where the mortgagee produces both the mortgage and the unpaid note, together with evidence of the mortgagor's default (*see Citibank, NA v. Van Brunt Props, LLC*, 95 AD3d 1158, 1159 [2nd Dept 2012]; *HSBC Bank USA, NA v. Schwartz*, 88 AD3d 961 [2nd Dept 2011]; *Zanfina v. Chandler*, 79 AD3d 1031 [2nd Dept 2010]). However, where, as here, the answer includes a challenge to

¹ Defendants John Modica and Dina Modica attended at least seven settlement conferences between March 2010 and February 2011. It is undisputed that defendant John Modica lost his job in the summer of 2008, resulting in the missed payments. The parties were divorced the following year.

plaintiff's standing to bring the action, the latter must also be established in order to succeed on a motion for summary judgment (*see Deutsche Bank Natl Trust Co v. Haller*, 100 AD3d 680, 682 [2nd Dept 2012]; *US Bank NA v. Collymore*, 68 AD3d 752, 753 [2nd Dept 2009]).

In this case, plaintiff's moving papers are sufficient to establish its prima facie right to judgment as a matter of law against the answering defendant through the submission of copies of the mortgage, the unpaid note and evidence of a default in payment. In addition, plaintiff has demonstrated its standing to prosecute the action by submitting an affidavit from its document control officer detailing the mechanics of the physical delivery of the note and mortgage prior to the commencement of this action (*cf. HSBC Bank USA v. Hernandez*, 92 AD3d 843 [2nd Dept 2012]). In a mortgage foreclosure action, a plaintiff has standing to commence the action where it is the holder or assignee of both the note and mortgage at the time the action is commenced (*see Deutsche Bank Natl Trust Co v. Spanos*, 102 AD3d 909, 911 [2nd Dept 2013]; *HSBC Bank USA v. Hernandez*, 92 AD3d 843, *supra*).

In opposition, Ms. Modica has failed to produce any competent evidence sufficient to raise a triable issue of fact as to any bona fide defense (*see Citibank, NA v. Van Brunt Props, LLC*, 95 AD3d at 1159).

Finally, the documents submitted by plaintiff establish that the subject note and mortgage were subsequently assigned to SRMOF 2009-1 Trust, which is now the real plaintiff-in-interest. Under these circumstances, the caption should be amended to substitute SRMOF 2009-1 Trust as the plaintiff in this action in the place and stead of Citimortgage Inc. (*see CPLR 1018, 3025[b]; Citibank, NA v. Van Brunt Props, LLC*, 95 AD3d at 1160).

Accordingly, it is

ORDERED that plaintiff's motion for, inter alia, summary judgment is granted in its entirety;
and it is further

ORDERED that the Clerk mark his records accordingly.

Order of Reference signed herewith.

ENTER,

/s/

Hon. Thomas P. Alliota

J.S.C.

DATED: April 11, 2013