

BAC Home Loans Serv. LP v Findley

2013 NY Slip Op 31041(U)

May 1, 2013

Sup Ct, Richmond County

Docket Number: 131896/09

Judge: Thomas P. Aliotta

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

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**BAC HOME LOANS SERVICING LP fka
COUNTRYWIDE HOME LOANS SERVICING LP,**

Plaintiff,

-against-

**KARLENE FINDLEY, DELCETA FINDLEY,
NEW YORK CITY ENVIRONMENTAL CONTROL
BOARD, NEW YORK CITY PARKING VIOLATIONS
BUREAU, NEW YORK CITY TRANSIT
ADJUDICATION BUREAU and "JOHN DOE"
#1 through "JOHN DOE" #10, the last ten
names being fictitious and unknown to
the plaintiff, the person or parties,
if any, having or claiming an interest
in or lien upon the mortgage premises
described in the complaint,**

Defendants.

-----X

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Present:

HON. THOMAS P. ALIOTTA

DECISION AND ORDER

Index No. 131896/09

**Motion Nos. 2870-001
303-002**

The following papers numbered 1 to 4 were fully submitted the 27th day of February, 2013.

Papers
Numbered

Notice of Motion for Summary Judgment of Plaintiff BAC HOME LOANS
SERVICING LP fka COUNTRYWIDE HOME LOANS SERVICING LP,
with Supporting Papers, and Exhibits
(dated September 26, 2012) _____ 1

Notice of Cross Motion for Leave to Amend Answer, with Supporting Papers,
and Exhibits
(dated January 18, 2013) _____ 2

Affirmation in Opposition to Cross Motion and in Further Support of Motion for
Summary Judgment with Supporting Papers, and Exhibits
(dated January 25, 2013) _____ 3

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Reply Affirmation of Defendant DELCETA FINDLEY
(dated February 25, 1013)

4

Upon the foregoing papers, plaintiff's motion (No. 2870) for summary judgment is granted; defendant's cross motion (No. 303) for leave to amend her answer is denied.

Plaintiff commenced this foreclosure action after defendants KARLENE FINDLEY and DELCETA FINDLEY failed to make the required monthly payment due on a note and mortgage originally obtained from non-party Precision Financial, Inc. on March 7, 2008 in connection with their purchase of the premises located at 42 Pine Street on Staten Island. On September 25, 2009, the note and mortgage were assigned to plaintiff, BAC HOME LOANS SERVICING LP f/k/a COUNTRYWIDE HOME LOANS SERVICING LP (hereinafter "plaintiff").

To the extent relevant, plaintiff alleges that (1) defendants failed to make the monthly installment payment due on March 1, 2009 and thereafter; (2) on May 6, 2009, a Notice of Intent to Accelerate was sent to defendants advising them of their default; (3) they were informed therein that they could cure their default by June 10, 2009 by sending plaintiff the sum of \$10,025.25; and (4) if the default was not cured, the mortgage would be accelerated and foreclosure proceedings commenced. Upon defendants' failure to cure their default, plaintiff commenced this foreclosure action on October 28, 2009.

On or about November 6, 2009, defendant DELCETA FINDLEY (hereinafter, defendant), appearing *pro se*, served an answer to the complaint wherein she explained that she could not make her monthly payments due to financial hardship. After obtaining counsel, this same defendant served

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a “second” answer dated November 17, 2009 raising lack of jurisdiction as an affirmative defense based on the alleged improper service of process under CPLR 308.¹ More specifically, defendant claimed that there was no proof of due diligence in the attempt to serve her by personal delivery, and that the delivery of a copy of the summons and complaint upon a person of suitable age and discretion at her residence was not followed-up by the requisite mailing.

In addition, defendant alleged that she did not receive a copy of the 90-day pre-foreclosure notice required by RPAPL §1304, and that plaintiff’s predecessor violated various sections of the New York State Banking Act by, *inter alia*, extending her credit without checking on her ability to repay the obligation; failing to properly advise her that she should have her own attorney at the closing; charging excessive fees; and failing to provide her at the closing with the written disclosures required by New York State Banking Law.

In the current application, plaintiff contends that it is entitled to summary judgment since it has established that it is both the owner and holder of the subject note and mortgage executed by defendant, and that the latter is in default. In addition, plaintiff contends that the first answer submitted by defendant contains no affirmative defenses, but merely explains the reason for her default. Plaintiff also argues that “financial hardship” is not a cognizable defense to foreclosure, and that despite attempts to modify the subject loan, no such settlement could be reached.

¹ Pursuant to CPLR 3025(a), “[a] party may amend his pleadings once without leave of court within twenty days after its service ...”.

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With regard to the service issue raised in the second answer, plaintiff has produced the affidavit of a process server who states that personal service of the summons, complaint and required notices was made by personal delivery to defendant's brother-in-law at defendant's residence, and that a copy thereof was subsequently mailed to defendant at the same address. Moreover, plaintiff argues that defendant has failed to produce any authority supportive of her claim that such service was improper.

As for the purported absence of the 90-day notice required by RPAPL §1304, plaintiff argues that the affidavit of Jennifer Kay Watson, an officer of the BANK OF AMERICA, NA, its successor by merger, confirms that a 90-day notice was sent to defendant under date of March 16, 2009. Addressing defendant's claim of "deceptive practices", plaintiff argues that the subject loan was not a "high-cost loan" since the mortgage secured the principal amount of \$426,300 at a fixed interest rate of 7%. Thus, the interest rate does not exceed the threshold contained in the Banking Law. Neither did the points and fees exceed the threshold of 5% of the total loan amount. Finally, in view of its July 1, 2011 merger with the BANK OF AMERICA, N.A., plaintiff seeks to amend the caption by changing the plaintiff's name to "BANK OF AMERICA, N.A., successor by merger to BAC HOME LOANS SERVICING LP fka COUNTRYWIDE HOME LOANS SERVICING LP".

In cross-moving for leave to amend her answer, defendant seeks to raise plaintiff's lack of standing as an affirmative defense, and to add an allegation to the effect that she never received any notice that the note had been transferred to another party. According to defendant, plaintiff will suffer no prejudice should the court allow her to amend her pleadings. In the alternative, defendant

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requests that plaintiff's motion for summary judgment be denied on the ground that triable issues of fact exist regarding its standing, *i.e.*, whether plaintiff held the subject note on the date this foreclosure action was commenced. In support, defendant argues that while the mortgage was apparently assigned to plaintiff on September 25, 2009, there is no proof that plaintiff held the note at the time the action was commenced.

Plaintiff's motion is granted.

It is well settled that in order to establish a prima facie case in an action to foreclose a mortgage, the plaintiff must establish its ownership of the relevant mortgage, the underlying note, and evidence of defendant's default in payment (*see Household Fin Realty Corp. of NY v. Wynn*, 19 AD3d 545). An action to foreclose a mortgage may not be brought by one who has no title to it, and absent a transfer of the debt, the assignment of the mortgage is a nullity (*see Kluge v. Fugazy*, 145 AD2d 537). However, "[e]ither a written assignment of the underlying note or physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident" (*Bank of NY v. Silverberg*, 86 AD3d 274, 281 [citations and internal quotation marks omitted]). Here, plaintiff has established its prima facie right to judgment as a matter of law through the submission of affidavits and documents demonstrating that it is the owner of the note, that the mortgagors are in default, and that the default remains uncured (*see Coppa v. Fabozzi*, 5 AD3d 718). In particular, plaintiff has produced a copy of the subject mortgage with a written assignment dated September 25, 2009, and a copy of the note together with an allonge indicating that ownership of the debt was subsequently

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assigned by the original lender to Countrywide Bank, FSB and thereafter endorsed in blank. In opposing the motion, defendant has failed to submit proof sufficient to rebut plaintiff's prima facie showing.

Insofar as the propriety of service is concerned, the affidavit of service submitted by plaintiff indicates that a copy of the summons and complaint was served upon defendant's brother-in-law at defendant's residence on October 29, 2009 and that a second copy of each was mailed to her on November 9, 2009 at the same address (Plaintiff's Exhibit E). Accordingly, defendant's mere claim of improper service, unaccompanied by any allegations of fact rebutting the statements made in the process server's affidavit, is legally insufficient to overcome the presumption that she was properly served (*see e.g. Carrenard v. Mass*, 11 AD3d 501). In any event, defendant waived the defense of improper service by failing to move for judgment on that ground within 60 days after service of the pleading which raised the defense (CPLR 3211[e]).

As for proof of the default, defendant admitted same in her first answer. While this Court is not unsympathetic to her claim of financial hardship, her inability to repay the loan as promised is not cognizable as a defense to a foreclosure action. Moreover, the affidavit of Ms. Watson, based on information contained in the business records of plaintiff's successor-by-merger, BANK OF AMERICA, N.A., unequivocally demonstrates both defendant's default and the mailing of a 90-day notice dated March 16, 2009 (Plaintiff's Exhibit 4). Finally, this Court finds plaintiff's conclusory allegations of impropriety under the New York State Banking Law to be without merit.

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Turning to defendant's cross motion for leave to amend her answer, it is well settled that a party may amend a pleading at any time with leave of court, and that such leave shall be freely given in the absence of prejudice to the nonmoving party so long as the proposed amendment is not plainly lacking in merit (*see* CPLR 3025[b]; Siegel, NY Prac [4th ed.], §238; 3 Weinstein-Korn-Miller, NY Civ Prac §3025.23). Here, it is the opinion of this Court that the affirmative defense of lack of standing which defendant seeks leave to interpose is without merit since plaintiff has established to the satisfaction of this Court that it was holder and owner of the note and mortgage at the time it commenced this action. While defendant argues that endorsements appearing on the "Allonge to Note" submitted by plaintiff are undated and, therefore, ineffective to conclusively establish when plaintiff became the holder of the note, that document specifically addresses the note executed by defendants KARLENE FINLEY and DELCETA FINDLEY on March 7, 2008 in the principal amount of \$426,300; recites the property address which is the subject of this foreclosure action; references the original lender, Precision Financial, Inc.; and bears an endorsement by Precision in favor of Countrywide Bank, FSB and a subsequent endorsement in blank. In addition, the affidavit by Jennifer Kay Watson, an officer of plaintiff's successor, BANK OF AMERICA, N. A., based on business records maintained by the latter, is sufficient to rebut, *prima facie*, defendant's speculative assertion that plaintiff may not have been the holder of the note prior to the commencement of this action.

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Accordingly, it is

ORDERED that the motion for summary judgment of plaintiff BAC HOME LOANS SERVICING, LP fka COUNTRYWIDE HOME LOANS SERVICING LP, is granted in its entirety; and it is further

ORDERED that the cross motion of defendant DELCETA FINDLEY, for leave to amend her answer, is denied; and it is further

ORDERED that the caption be amended to reflect the name of the real plaintiff-in-interest, “Bank of America, N.A., as successor by merger to BAC Home Loan Servicing LP fka Countrywide Home Loan Servicing LP”; and it is further

ORDERED that the Clerk mark his records and enter judgment in accordance herewith.

E N T E R,

/s/
Hon. Thomas P. Aliotta
J.S.C.

Dated: May 1, 2013