

BAC Home Loans Serv., LP v Rodriguez

2013 NY Slip Op 32185(U)

August 14, 2013

Sup Ct, Suffolk County

Docket Number: 21920-10

Judge: Peter H. Mayer

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
IAS PART 17 - SUFFOLK COUNTYPRESENT: Hon. Peter H. Mayer
Justice of the Supreme Court

BAC Home Loans Servicing, LP fka Countrywide
Home Loans Servicing LP,

Plaintiff,

-against-

George Rodriguez, Jessica Colon Rodriguez,
Commissioner of Taxation and Finance, Asset
Acceptance LLC, as assignee of Citibank,
Asset Acceptance LLC, as assignee of RNB
Target, Ford Motor Credit Company, People
of the State of New York, Vinny DeMartino,
Midland Funding LLC dba Midland Funding
of Delaware LLC, 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.

xMotion Date: 11-20-12
Adj. Date: _____
Mot. Seq.001 - MGFRENKEL, LAMBERT, WEISS,
WEISMAN & GORDON, LLP
Attorneys for Plaintiff
53 Gibson Street
Bay Shore, N. Y. 11706GEORGE RODRIGUEZ
55 Laurie Road
Brentwood, N. Y. 11717-7316Jessica Colon Rodriguez
1109 Martinstein Avenue
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Finance
Harriman State Office
Campus-Building 9
Albany, N. Y. 12207Asset Acceptance LLC,
as assignee of Citibank
111 Eighth Avenue
New York, N. Y. 10011Asset Acceptance LLC,
as assignee of RNB Target
111 Eighth Avenue
New York, N. Y. 10011Ford Motor Credit Company
111 Eighth Avenue
New York, N. Y. 10011

Upon the following papers numbered 1 to 9 read on this motion for summary judgment and an order of reference; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9; ~~Notice of Cross Motion and supporting papers _____~~; ~~Answering Affidavits and supporting papers _____~~; ~~Replying Affidavits and supporting papers _____~~; ~~Other _____~~; (and after hearing counsel in support and opposed to the motion) it is,

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that this unopposed motion by plaintiff BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing LP (BAC) pursuant to CPLR 3212 for summary judgment on its complaint, to strike the answer and defenses of the defendant Jessica Colon Rodriguez, for an order granting a default judgment against all non-answering, non-appearing defendants, for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321 and, for leave to amend the caption of this action pursuant to CPLR 3025 (b), is granted; and it is further

ORDERED that the caption is hereby amended by substituting Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing LP in place of plaintiff BAC; and it is further

ORDERED that the caption is hereby amended by substituting Lilian Rodriguez in place of defendant "John Doe #1"; and it is further

ORDERED that the caption is hereby amended by striking therefrom the names of defendants "JOHN DOE #2" through "JOHN DOE #10"; and it is further

ORDERED that the caption of this action hereinafter appear as follows:

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

**Bank of America, N.A., successor by merger to BAC
Home Loans Servicing, LP fka Countrywide Home
Loans Servicing LP,**

Plaintiff,

-against-

**George Rodriguez, Jessica Colon Rodriguez,
Commissioner of Taxation and Finance, Asset
Acceptance LLC, as assignee of Citibank,
Asset Acceptance LLC, as assignee of RNB
Target, Ford Motor Credit Company, People
of the State of New York, Vinny DeMartino,
Midland Funding LLC dba Midland Funding
of Delaware LLC, Liliana Rodriguez**

Defendants.

X

This is an action to foreclose a mortgage on premises known as 1109 Martinstein Avenue, Bay Shore, New York. On February 13, 2006, defendants George Rodriguez and Jessica C. Rodriguez (Rodriguez) executed a note in favor of GreenPoint Mortgage Funding, Inc. (GreenPoint) agreeing to pay \$356,000.00 with interest at 6.375 percent. On February 13, 2006, defendants George Rodriguez (Rodriguez) and Jessica Colon Rodriguez (Rodriguez) also executed a first mortgage in the principal sum of \$356,000.00 on their home, the subject property. The mortgage indicated GreenPoint to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of GreenPoint as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on March 16, 2006 in the Suffolk County Clerk's Office. Thereafter, the mortgage was transferred by assignment of mortgage dated May 3, 2010 from MERS to BAC, the plaintiff herein. The assignment of mortgage was recorded on August 11, 2010 with the Suffolk County Clerk's Office. An allonge to the note contains an indorsement by Thomas K. Mitchell, vice president to GreenPoint transferring the note to Countrywide Bank, NA, an indorsement by Laurie Meder, senior vice president to Countrywide Bank, NA transferring the note to Countrywide Home Loans, Inc. and, an indorsement in blank by Michele Sjolander, EVP to Countrywide Home Loans.

A notice of default dated July 20, 2009 was sent to defendants Rodriguez stating that they had defaulted on their mortgage loan and that the amount past due was \$5,719.45. As a result of defendants' continuing default, plaintiff commenced this foreclosure action on June 10, 2010. In its complaint, plaintiff alleges in pertinent part that defendants breached their obligations under the terms of the note and mortgage by failing to make monthly payments commencing on June 1, 2009. Defendant Jessica Colon Rodriguez appeared by interposing and answer with four affirmative defenses.

The Court's computerized records indicate that a foreclosure settlement conference was held on November 30, 2010 at which time this matter was referred as an IAS case since a resolution or settlement had not been achieved. Thus, there has been compliance with CPLR 3408 and no further settlement conference is required.

Plaintiff now moves for summary judgment on its complaint contending that defendants Rodriguez failed to comply with the terms of the loan agreement and mortgage and, that defendant Jessica Colon Rodriguez's general denial and unsupported affirmative defenses raised no issues of fact for trial. In support of its motion, plaintiff submits among other things: the sworn affidavit of Rhonda Renee Lockard, assistant vice president to Bank of America, NA, as successor by merger to BAC Home Loans Servicing LP (BANA); the pleadings; the note, mortgage and assignment; notice of default; notices pursuant to RPAPL §§ 1320, 1303 and 1304; the affirmation of Nancy G. Burlingame, Esq. in support of the instant motion; the affirmation of Nancy G. Burlingame, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); affidavits of service for the summons and complaint; and, an affidavit of service for the instant summary judgment motion.

Defendants Rodriguez did not oppose the summary judgment motion.

“[I]n an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default” (see *Republic Natl. Bank of N.Y. v O’Kane*, 308 AD2d 482, 482, 764 NYS2d 635 [2d Dept 2003]; *Village Bank v Wild Oaks Holding*, 196 AD2d 812, 601 NYS2d 940 [2d Dept 1993]; see also *Argent Mtge. Co., LLC v Mentosana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Once a plaintiff has made this showing,

the burden then shifts to defendant to produce evidentiary proof in admissible form sufficient to require a trial of their defenses (*see Aames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]; *Household Fin. Realty Corp. of New York v Winn*, 19 AD3d 545, 796 NYS2d 533 [2d Dept 2005]; *see also Washington Mut. Bank v Valencia*, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]).

Where, as here, standing is put into issue by the defendant, the plaintiff is required to prove it has standing in order to be entitled to the relief requested (*see Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680, 954 NYS2d 551 [2d Dept 2011]; *US Bank, NA v Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; *Wells Fargo Bank Minn., NA v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). In a mortgage foreclosure action “[a] plaintiff has standing where it is the holder or assignee of both the subject mortgage and of the underlying note at the time the action is commenced” (*HSBC Bank USA v Hernandez*, 92 AD3d 843, 939 NYS2d 120 [2d Dept 2012]; *US Bank, NA v Collymore*, 68 AD3d at 753; *Countrywide Home Loans, Inc. v Gress*, 68 AD3d 709, 888 NYS2d 914 [2d Dept 2009]). “Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation” (*HSBC Bank USA v Hernandez*, 92 AD3d 843). Here, plaintiff has established, *prima facie*, that it had standing to commence this action. The uncontroverted evidence submitted by the plaintiff in support of its motion demonstrated that the note and mortgage were assigned to it prior to the commencement of the action. The affidavit of Rhonda Renee Lockard, assistant vice president to BANA, supports the proffered documentary evidence that BAC was the holder of the note and the mortgagee of record at the time of commencement of this action.

As to the other unsupported affirmative defenses raised in defendant Jessica Colon Rodriguez’s answer, since no opposition to the instant motion was filed by defendant, no triable issue of fact was raised in response to plaintiff’s *prima facie* showing (*see Flagstar Bank v Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Wells Fargo Bank Minnesota v Perez*, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]).

Based upon the foregoing, the motion for summary judgment is granted against defendant Jessica Colon Rodriguez and the defendant’s answer is stricken. That branch of the motion for a default judgment against the remaining defendants who have not answered or appeared herein is granted.

In addition, plaintiff’s request for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is granted (*see Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *Bank of East Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

The proposed order appointing a referee to compute pursuant to RPAPL §1321 is signed simultaneously herewith as modified by the court.

Plaintiff is directed to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court.

Dated: 8/14/13

Peter H. Meyer
J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION

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Albany, N. Y. 12207**

**Vinny DeMartino
401 Beechmont Avenue
Lindenhurst, N.Y. 11757**

**Midland Funding LLC
dba Midland Funding of Delaware LLC
80 State Street
Albany, N. Y. 12207**

**Liliana Rodriguez s/h/a
John Doe #1
1109 Martinstein Avenue
Bay Shore, N. Y. 11706**