

Deutsche Bank Natl. Trust Co. v Kent

2013 NY Slip Op 32661(U)

October 8, 2013

Supreme Court, Suffolk County

Docket Number: 09-18755

Judge: Joseph C. Pastoressa

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 12-19-12
ADJ. DATE _____
Mot. Seq. # 002 - MG
003 - XMD

-----X
DEUTSCHE BANK NATIONAL TRUST
COMPANY, AS TRUSTEE FOR BCAPB LLC
TRUST 2007-AB1

Plaintiff,

KOZENY, McCUBBIN & KATZ, LLP
Attorneys for Plaintiff
395 N. Service Road, Suite 401
Melville, New York 11747

- against -

ROBERT F. KENT, JAWS BROKERAGE INC.,
WORKER COMPENSATION BOARD OF THE
STATE OF NEW YORK,

ELIAS N. SAKALIS, ESQ.
Attorney for Defendant
430 West 259th Street
Bronx, New York 10471

JOHN DOE (Said name being fictitious, it being
the intention of Plaintiff to designate any and all
occupants of premises being foreclosed herein,
and any parties, corporations or entities, if any,
having or claiming an interest or lien upon the
mortgaged premises.)

Defendants.

-----X
Upon the following papers numbered 1 to 23 read on this motion for summary judgment and an order of reference; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers 13 - 21; Answering Affidavits and supporting papers 22 - 23; 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 motion (002) by plaintiff Deutsche Bank National Trust Company, as Trustee for BCAPB LLC Trust 2007-AB1 (Deutsche Bank) pursuant to CPLR 3212 for summary judgment on its complaint, to strike the answer of defendant Robert F. Kent (Kent), 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

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ORDERED that the caption is hereby amended by substituting defendant Maria Conceias in place of defendants "John Doe"; and it is further

ORDERED that plaintiff is directed to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court; 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**

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS
 TRUSTEE FOR BCAPB LLC TRUST 2007-AB1

Plaintiff,

- against -

ROBERT F. KENT, JAWS BROKERAGE INC., WORKER
 COMPENSATION BOARD OF THE STATE OF NEW YORK,
 MARIA CONCEIAS,

Defendants.

ORDERED that the cross motion (003) by defendant Kent for an order pursuant to CPLR 3211 and 3212 dismissing the action on the grounds that plaintiff lacks standing and personal jurisdiction over the defendant or in the alternative, for an order denying plaintiff's summary judgment motion and reinstating this matter to the foreclosure settlement conference calendar is denied.

This is an action to foreclose a mortgage on premises known as 37 Riverdale Avenue, Oakdale, New York. On November 27, 2006, defendant Kent executed a fixed rate note in favor of Wells Fargo Bank, N.A. agreeing to pay \$300,000.00 at the yearly rate of 6.625 percent. On November 27, 2006, defendant Kent also executed a first mortgage in the principal sum of \$300,000.00 on his home, the subject property. The mortgage was recorded on February 1, 2007 in the Suffolk County Clerk's Office. Thereafter, the mortgage and note were transferred by assignment of mortgage dated May 4, 2009 from Wells Fargo Bank, N.A. to plaintiff Deutsche Bank. The assignment of mortgage was recorded on June 5, 2009 with the Suffolk County Clerk's Office. The subject note contains an indorsement in blank by Joan M. Mills, vice president of Wells Fargo Bank, N.A.

Wells Fargo Home Mortgage sent a notice of default dated January 4, 2009 to defendant stating that his loan was in default and that the amount past due was \$11,384.63. As a result of defendant Kent's continuing default, plaintiff commenced this foreclosure action on May 13, 2009. In its complaint, plaintiff

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alleges in pertinent part that defendant Kent breached his obligations under the terms of the note and mortgage by failing to make monthly payments commencing with his January 1, 2009 payment. Defendant Kent interposed an answer with seven affirmative defenses.

The Court's computerized records indicate that a foreclosure settlement conference was held on September 29, 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 defendant defaulted under the terms of the loan agreement and mortgage for failure to pay the January 1, 2009 payment and subsequent payments thereafter and that defendant's answer is without merit. In support of its motion, plaintiff submits among other things: the sworn affidavit of Leon Mirasol, vice president loan documentation of Wells Fargo Bank, N.A., the servicer for plaintiff herein; the affirmation of Lauren Currie, Esq.; the summons and complaint; defendant's answer; the note, mortgage and assignment; a notice of default; notices pursuant to RPAPL §§ 1320, 1303 and 1304; the affirmation of Lauren Currie, 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; an affidavit of service for the instant summary judgment motion; and a proposed order appointing a referee to compute.

Defendant Kent cross-moves seeking summary judgment in his favor and dismissing the action pursuant to CPLR 3211 and 3212 or in the alternative, a denial of plaintiff's summary judgment application with a restoral of this matter to the foreclosure settlement conference calendar. Plaintiff in reply opposes defendant's cross-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" (Republic Natl. Bank of N.Y. v O'Kane, 308 AD2d 482 [2d Dept 2003]; see also Village Bank v Wild Oaks Holding, 196 AD2d 812 [2d Dept 1993]; Argent Mtge. Co., LLC v Mentasana, 79 AD3d 1079 [2d Dept 2010]). 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 [2d Dept 2011]; US Bank, NA v Collymore, 68 AD3d 752 [2d Dept 2009]; Wells Fargo Bank Minn., NA v Mastropaolo, 42 AD3d 239 [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 [2d Dept 2012]; US Bank, NA v Collymore, 68 AD3d at 753; Countrywide Home Loans, Inc. v Gress, 68 AD3d 709 [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 the mortgage were assigned to it prior to the commencement of the action. Furthermore, the affidavit of Leon Mirasol provided factual details as to the note and plaintiff's physical possession of same. Plaintiff produced the note and mortgage executed by defendant Kent, the assignment of mortgage, as well as

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evidence of defendant's nonpayment, thereby establishing a *prima facie* case as a matter of law (see Wells Fargo Bank Minnesota, Natl. Assn. v Mastropaolo, 42 AD3d 239 [2d Dept 2007]). In addition to producing the note, mortgage and assignment of mortgage, plaintiff produced evidence of defendant Kent's nonpayment. Leon Mirasol averred that defendant Kent defaulted on paying his monthly payment due January 1, 2009 and monthly payments thereafter; that a notice of default was sent to the defendant; that defendant failed to timely cure; that a 90 day pre-foreclosure notice was mailed to defendant by certified mail and first class mail; and, that plaintiff is in possession of the original note.

Once plaintiff has made a *prima facie* showing, it is incumbent on defendant "to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff" (see Cochran Inv. Co., Inc. v Jackson, 38 AD3d 704 [2d Dept 2007] quoting Mahopac Natl. Bank v Baisley, 244 AD2d 466 [2d Dept 1997]). Here, answering defendant has failed to demonstrate, through the production of competent and admissible evidence, a viable defense which could raise a triable issue of fact (Deutsche Bank Natl. Trust Co. v Posner, 89 AD3d 674 [2d Dept 2011]). "Motions for summary judgment may not be defeated merely by surmise, conjecture or suspicion" (see Shaw v Time-Life Records, 38 NY2d 201 [1975]). Notably, defendant does not deny that he has not made payments of interest or principal on the note (see Citibank, N.A. v Souto Geffen Co., 231 AD2d 466 [1st Dept 1996]).

Likewise, defendant's assertion attacking the validity of the affidavit of service based upon a dispute in the physical description of the person served is rejected by the court. Here, the process server's affidavit of service pursuant to CPLR 308 (2) by delivery to Maria Conceias, a co-occupant at the subject premises, constituted *prima facie* evidence of proper service upon defendant Kent (see Wachovia Bank, Natl. Assn. v Carcano, 2013 NY Slip Op 03083 [2d Dept 2013]). Defendant's conclusory and unsubstantiated denial of receipt of the summons and complaint was insufficient to rebut the presumption of proper service created by said affidavit (see Beneficial Homeowner Service Corp. v Girault, 60 AD3d 984 [2d Dept 2009]; Mauro v Mauro, 13 AD3d 345 [2d Dept 2004]). Lastly, defendant's assertion of lack of personal jurisdiction must be denied on the basis that defendant failed to move to dismiss the complaint upon such ground within 60 days of service of a copy of the answer, and have made no showing of undue hardship. As a consequence, the defense is deemed waived (see CPLR 3211[e]; DeSena v HIP Hosp., Inc., 258 AD2d 555 [2nd Dept 1999]; Wade v Byung Yang Kim, 250 AD2d 323 [2nd Dept 1998]; Fleet Bank, N.A. v Riese, 247 AD2d 276 [1st Dept 1998]).

The defendant has also cross-moved seeking to restore the instant matter to the court's residential mortgage foreclosure settlement conference calendar. Defendant, in pertinent part, contends that his attorney has informed him that he is a candidate for a loan modification and that he will be reapplying for a loan modification through his attorneys. However, in support of his application, defendant has failed to submit any evidence or documentation suggesting that he has commenced the loan modification application process. As such, it would appear that no efforts have been made by the defendant to attempt to obtain a loan modification at this juncture. Furthermore, the court's computerized records indicate that this matter appeared on the foreclosure settlement conference calendar on thirteen occasions and was finally marked "not settled" on May 23, 2013. Here, the evidence in support of the cross-motion as offered by defendant is patently insufficient to warrant this court to grant the relief requested. As such, the court denies such application.

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Accordingly, the motion for summary judgment is granted against defendant Kent and the defendant's answer is stricken.

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 [3d Dept 1996]; Bank of East Asia, Ltd. v Smith, 201 AD2d 522 [2d Dept 1994]).

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

The defendant's cross-motion seeking, *inter alia*, dismissal of the complaint, is denied in its entirety.

To the extent that either plaintiff or defendant have requested other forms of relief but have not supported such noticed forms of relief with any allegations of law or fact, the court denies such applications.

Dated: October 8, 2013



HON. JOSEPH C. PASTORESSA, J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION