Bank of Am., N.A. v Hogan
2014 NY Slip Op 31828(U)
June 24, 2014
Supreme Court, Suffolk County
Docket Number: 27312/2012
Judge: William B. Rebolini
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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Bank of America, N.A.,

Plaintiff,

-against-

Daniel M. Hogan, Madelon E. Hogan, and "John Doe #1" through "John Doe #10", the last 10 names being fictitious and unknown to the Plaintiff, the persons or parties intended being the persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the verified complaint,

Defendants,

Motion Sequence No.: 001; MG
Motion Date: 5/9/13
Submitted:

Index No.: 27312/2012

Attorney for Plaintiff:

Cohn & Roth
100 E. Old Country Road
Mineola, NY 11501

Defendants Pro Se:

Daniel M. Hogan
Madelon E. Hogan
12 Sandpiper Lane
Centereach, NY 11720

Clerk of the Court

Upon the following papers numbered 1 to 21 read upon this motion for summary judgment and an order of reference: Notice of Motion and supporting papers, 1 - 17; Answering Affidavits and supporting papers, 18 - 19; Replying Affidavits and supporting papers, 20 - 21; it is

ORDERED that this motion by plaintiff, Bank of America, N.A., (Bank of America), for an order pursuant to CPLR 3212 granting summary judgment on its complaint against defendants Daniel M. Hogan and Madelon E. Hogan (collectively Hogan), fixing the defaults of the 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 to amend the caption by striking defendants "John Doe #1" through "John Doe #10", is granted; and it is further

ORDERED that the caption is hereby amended by striking defendants "John Doe #1" through "John Doe #10"; 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
______________________________________x
Bank of America, N.A.,

Plaintiff,

-against-

Daniel M. Hogan and Madelon E. Hogan,

Defendants.
______________________________________x

This is an action to foreclose a mortgage on premises known as 12 Sandpiper Lane, Centereach, New York. On February 1, 2007, defendants Hogan executed a fixed rate note in favor of Quicken Loans, Inc. agreeing to pay the sum of $167,000.00 at the yearly rate of 8.000 percent. On the same date, defendants Hogan executed a first mortgage in the principal sum of $167,000.00 on their home, the subject property. The mortgage indicated Quicken Loans, Inc. to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of Quicken Loans Inc as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on April 12, 2007 in the Suffolk County Clerk's Office. Thereafter, the mortgage was transferred by an assignment of mortgage dated January 30, 2012 from MERS, as nominee for Quicken Loans, Inc. to plaintiff Bank of America. The subject note contains the indorsement, without recourse, of Scott Johnson of Quicken Loans, Inc. transferring the note to Bank of America.

Green Tree Servicing LLC, the servicer of the mortgage loan, sent notices of default dated October 12, 2011 to defendants Hogan stating that their loan was in default and that the amount past due was $11,363.04. As a result of defendants' continuing default, plaintiff commenced this foreclosure action. In its complaint, plaintiff alleges in pertinent part that the mortgagors breached their obligations under the terms of the note and mortgage by failing to make monthly payments commencing with their April 1, 2011 payment and subsequent monthly payments thereafter. Defendants Hogan interposed an answer with 17 affirmative defenses and six counterclaims.

The Court's computerized records indicate that a foreclosure settlement conference was held on November 30, 2012 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 Hogan defaulted under the terms of the loan agreement and mortgage for failure to pay the April 1, 2011 payment and that defendants' answer is without merit. In support of its motion, plaintiff submits among other things: the sworn affidavit of Ruth Hernandez, of Green Tree Servicing LLC as attorney in fact for Bank of America, N.A.; the affirmation of Michael H. Cohn, Esq. in support of the application; the summons and complaint; defendants' answer; the note, mortgage and an assignment of mortgage; proof of notices pursuant to RPAPL §§ 1320, 1303 and 1304; the affirmation of Michael C. Nayar, 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 upon defendants Hogan; and a proposed order appointing a referee to compute. Defendants Hogan through their attorney 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]). 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 on 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]). 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]).

Here, plaintiff has established its entitlement to summary judgment against the answering defendants as such papers included a copy of the mortgage, a copy of the assignment of mortgage, the unpaid note together with due evidence of their defaults in payment under the terms of the loan documents (*see* CPLR 3212; RPAPL §1321; ***Neighborhood Hous. Serv. of New York City v Hawkins***, 97 AD3d 554, 947 NYS2d 321 [2d Dept 2012]; ***Baron Assoc., LLC v Garcia Group Enter.***, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; ***Citibank, N.A. v Van Brunt Prop., LLC***, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]; ***Archer Capital Fund, L.P. v GEL, LLC***, 95 AD3d 800, 944 NYS2d 179 [2d Dept 2012]; ***Swedbank, AB v Hale Ave. Borrower, LLC.***, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]; ***Rossrock Fund II, L.P. v Osborne***, 82 AD3d 737, 918 NYS2d 514 [2d Dept 2011]).

The standing of a plaintiff in a mortgage foreclosure action is measured by its ownership, holder status or possession of the note and mortgage at the time of the commencement of the action (*see* ***U.S. Bank of N.Y. v Silverberg***, 86 AD3d 274, 279, 926 NYS2d 532 [2d Dept 2011]; ***U.S. Bank, N.A. v Adrian Collymore,*** 68 AD3d 752; ***Wells Fargo Bank, N.A. v Marchione***, 69 AD3d 204, 887 NYS2d 615 [2d Dept 2009]). Because "a mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation" (***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, 961 NYS2d 200 [2d Dept 2013] [internal citations omitted]), a mortgage passes as an incident of the note upon its physical delivery to the plaintiff. Holder status is established where the plaintiff is the special indorsee of the note as is the case here (*see* UCC § 3–202; § 3–204; § 9–203[g]). Here, the plaintiff established that it took possession of the note containing a special endorsement prior to the commencement of the action. Thus, plaintiff thus established, *prima facie*, its has standing to prosecute this action.

It was thus incumbent upon the answering defendants to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's *prima facie* showing or in support of the affirmative defenses asserted in their answer or otherwise available to them (*see* ***Flagstar Bank v Bellafiore,*** 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***Grogg Assocs. v South Rd. Assocs.***, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; ***Wells Fargo Bank v Karla,*** 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; ***Washington Mut. Bank v O'Connor,*** 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]; ***J.P. Morgan Chase Bank, N.A. v Agnello,*** 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; ***Aames Funding Corp. v Houston,*** 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]).

In their opposing papers, the Hogans re-assert their pleaded affirmative defense that the plaintiff lacks standing to prosecute its claims for foreclosure and sale. Neither the defenses raised in their answer nor those asserted in opposition to this motion rebut the plaintiff's *prima facie* showing of its entitlement to summary judgment. The defendants contend that a question of fact exists with respect to the plaintiff's standing by reason of the assignment made from MERS, acting as nominee for Quicken Loans, Inc. to plaintiff, Bank of America, N.A. and that a power of attorney was not provided. Defense counsel further questions the chain of title of the borrowers' mortgage.

The court finds, however, that none of these allegations give rise to questions of fact that implicate a lack of standing on the part of the plaintiff. Here, the plaintiff established that at the time of the commencement of this action it possessed the requisite standing to prosecute its pleaded claims for foreclosure and sale of the mortgaged premises. The defendants' contentions are thus unavailing.

Also unavailing are the defendants' assertion that plaintiff has not satisfied the statutory conditions as required under RPAPL §1304. Appellate case authorities have determined that service of the statutory notices required by RPAPL § 1303 and § 1304 are conditions precedent to a mortgage foreclosure action (*see* ***Aurora Loan Servs., LLC v. Weisblum***, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]; ***First Natl. Bank of Chicago v. Silver***, 73 AD3d 162, 899 NYS2d 256 [2d Dept 2010]). It has further been established that, unlike the affirmative defenses contemplated by CPLR 3015(a), 3018(b) and 3211(a)(5), which are waived if not timely raised, the failure to comply with

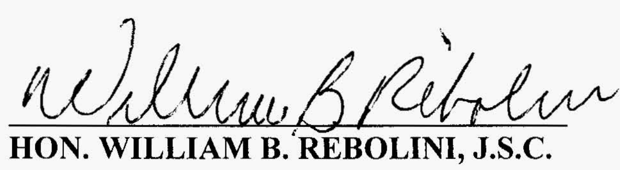
these statutory conditions precedent may be raised at any time during the action (***Silver***, 73 AD3d 162). In any event, RPAPL 1304 requires, in pertinent part, that at least 90 days before a lender or mortgage loan servicer commences legal action against the borrower, including a mortgage foreclosure action, the lender or mortgage loan servicer must give the borrower a specific, statutorily prescribed notice. In essence, the notice warns the borrower that he or she may lose his or her home because of the loan default, and provides information regarding assistance for homeowners who are facing financial difficulty. The specific language and type-size requirements of the notice are set forth in RPAPL 1304(1). The foreclosing party has the burden of showing compliance with the notice requirements.

Here, plaintiff has tendered sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL 1304 (*see* ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95). Plaintiff's evidence establishes appropriate mailing of the required notice, which creates a rebuttable presumption that the intended recipient actually received it (*see* ***Nassau Ins. Co. v Murray***, 46 NY2d 828, 414 NYS2d 117 [1978], ***Sendel v Diskin***, 277 AD2d 757, 716 NYS2d 471 [3d Dept 2000]; ***Matter of Rapuzzi v City of New York, Civ. Serv. Commn.***, 161 AD2d 715, 555 NYS2d 856 [2d Dept 1999]. Defendants' unsupported denial of receipt through an attorney's affirmation, is insufficient to rebut this presumption of delivery since there is no evidence which would cast doubt on the mailing of the notice to the proper address (*see* ***Law v Benedict***, 197 AD2d 808, 603 NYS2d 75 [3d Dept 1993]).

Accordingly, the motion for summary judgment is granted against defendants Hogan. In addition, plaintiff's request for an order fixing the default of the non-appearing, non-answering defendants and an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is granted (*see* ***Green Tree Serv. v Cary***, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]; ***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.

Dated: 6/24/2014



HON. WILLIAM B. REBOLINI, J.S.C.

______ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**