Bank of N.Y. Mellon v Redavid
2014 NY Slip Op 32239(U)
August 6, 2014
Supreme Court, Suffolk County
Docket Number: 12-1734
Judge: Joseph Farneti
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ORIGINAL

SHORT FORM ORDER

INDEX No. 12-1734

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 3-20-14 (#001)
MOTION DATE 4-24-14 (#002)
ADJ. DATE 4-24-14
Mot. Seq. # 001- MG
002-XMD

THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF CWALT, INC., ALTERNATIVE LOAN TRUST 2006-9T1 MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-9T1,

Plaintiff,

- against -

JOHN A. REDAVID JR., KATHLEEN REDAVID, BANK OF AMERICA, N.A., "JOHN DOE 1 TO JOHN DOE 25" said names being fictitious, the persons or parties intended being the persons, parties, corporations or entities, if any, having or claiming an interest in or lien upon the mortgaged premises described in the complaint,

Defendants.

BRYAN CAVE LLP
Attorney for Plaintiff
1290 Avenue of the Americas
New York, New York 10104

MACCO & STERN LLP
Attorney for Defendants Redavid
135 Pinelawn Road, Suite 120S
Melville, New York 11747

Upon the following papers numbered 1 to 80 read on this motion for summary judgment and order of reference and cross motion for leave to amend answer; Notice of Motion/ Order to Show Cause and supporting papers 1 - 51; Notice of Cross Motion and supporting papers 52 - 69; Answering Affidavits and supporting papers ____; Replying Affidavits and supporting papers 70 - 80; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by plaintiff for an Order, pursuant to CPLR 3212, granting summary judgment in its favor against defendants John A. Redavid, Jr. and Kathleen Redavid, dismissing with

prejudice their 23 affirmative defenses and counterclaim, for leave to amend the caption, for an Order fixing the defaults of the non-appearing, non-answering defendants, and for an Order of Reference pursuant to RPAPL 1321, is granted; and it is further

ORDERED that the caption is hereby amended by substituting Jay Poremba in place of "John Doe #1" and substituting Janice Poremba in place of "John Doe #2" and by deleting therefrom defendants "John Doe #3" through "John Doe #25"; and it is further

ORDERED that plaintiff is directed to serve a copy of this Order 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

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THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF CWALT, INC., ALTERNATIVE LOAN TRUST 2006-9T1 MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-9T1,

Plaintiff,

-against-

JOHN A. REDAVID JR., KATHLEEN REDAVID, BANK OF AMERICA, N.A., JAY POREMBA, JANICE POREMBA,

Defendants.

---x

ORDERED that this cross-motion by defendants John A. Redavid, Jr. and Kathleen Redavid for an Order, pursuant to CPLR 3025, granting leave to amend their answer is denied.

This is an action to foreclose a mortgage on property known as 2 Seashell Lane,[1] Hampton Bays, New York. On February 17, 2006, defendants John A. Redavid, Jr. and Kathleen Redavid ("defendants

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[1] The Court notes that the mortgage specifically refers to the mortgaged property as 54 Old Riverhead Road, Hampton Bays, New York whereas the notice of default, notice of pendency, summons and complaint refer to 2 Seashell Lane, Hampton Bays, New York. The metes and bounds description of both properties appears to be the same.

Redavid") executed a note in favor of Countrywide Home Loans, Inc. ("Countrywide") agreeing to pay the sum of $427,000.00 at the yearly rate of 6.500 percent. On said date, defendants Redavid also executed a mortgage in the principal sum of $427,000.00 on the subject property. The mortgage indicated that Mortgage Electronic Registration Systems (MERS) was the mortgagee of record for the purpose of recording the mortgage. The mortgage was recorded on March 27, 2006 in the Suffolk County Clerk's Office. By assignment dated September 2, 2011, MERS, as nominee for Countrywide, assigned said mortgage to plaintiff, The Bank of New York Mellon FKA The Bank of New York, as Trustee for the Certificateholders CWALT, Inc., Alternative Loan Trust 2006-9T1 Mortgage Pass-Through Certificates, Series 2006-9T1. Said assignment was recorded in the Suffolk County Clerk's Office on October 4, 2011. The note contains an endorsement in blank by David A. Spector, Managing Director of Countrywide.

Bank of America Home Loans sent a notice of default dated May 6, 2011 to defendants Redavid stating that they had defaulted on their mortgage loan and that the amount past due was $46,361.93. As a result of their continuing default, plaintiff commenced this foreclosure action on January 11, 2012. In its complaint, plaintiff alleges in pertinent part that defendants Redavid breached their obligations under the terms of the note and mortgage by failing to make their monthly payments due on May 1, 2010 and thereafter.

Defendants Redavid interposed an answer with 23 affirmative defenses and one counterclaim. The affirmative defenses asserted by defendants Redavid in their answer include lack of standing because plaintiff did not possess the note when the action was commenced, that MERS is a necessary party to this action, failure to negotiate a loan modification in good faith, and failure to include the mortgage in the servicing pool within the time frame specified in the pooling and servicing agreement. Plaintiff served a reply to the counterclaim with five affirmative defenses.

The Court's computerized records indicate that a foreclosure settlement conference was held on November 13, 2012, the calendar was marked "not settled," and this matter was referred as an IAS case. 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 Redavid breached their obligations under the terms of the loan agreement and mortgage by failing to tender monthly payments. Plaintiff also seeks to fix the defaults of the non-appearing, non-answering defendants Bank of America, N.A. and Jay Poremba and Janice Poremba, tenants at the premises. In support of its motion, plaintiff submits among other things, the affirmation of regularity of Suzanne M. Berger, Esq. in support of the motion; the affidavit of Melissa B. Schlactus, Esq.; the affirmation of Courtney J. Peterson, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the affidavit of Jane Cashel, an AVP, Operations Team Manager at Bank of America, N.A., master loan servicer for plaintiff; the affidavit of Marlon Frazier, an Assistant Vice President Servicing at Residential Credit Solutions, Inc., current servicer of the subject loan; the pleadings; the note and mortgage; a notice of default; notices pursuant to RPAPL 1320 and 1304; affidavits of service of the summons and complaint; and an affidavit of service of the instant summary judgment motion upon counsel for defendants Redavid.

"[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, 764 NYS2d 635 [2d Dept 2003]; *see* ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]; ***Wells Fargo Bank, N.A. v Webster***, 61 AD3d 856, 877 NYS2d 200 [2d Dept 2009]). "The burden then shifts to the 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' " (***U.S. Bank Natl. Assn. TR U/S 6/01/98 [Home Equity Loan Trust 1998–2] v Alvarez***, 49 AD3d 711, 711, 854 NYS2d 171 [2d Dept 2008], *quoting* ***Mahopac Natl. Bank v Baisley***, 244 AD2d 466, 664 NYS2d 345 [2d Dept 1997], *lv to appeal dismissed* 91 NY2d 1003, 676 NYS2d 129 [1998]; *see also* ***Emigrant Mtge. Co., Inc. v Beckerman***, 105 AD3d 895, 895, 964 NYS2d 548 [2d Dept 2013]).

Here, plaintiff established its *prima facie* entitlement to summary judgment by providing evidence of the assignment, the mortgage, the note, the default of defendants Redavid, and by demonstrating that their affirmative defenses and counterclaim are without merit (*see* ***Jessabell Realty Corp. v Gonzales***, 117 AD3d 908, 985 NYS2d 897 [2d Dept 2014]; ***Bank of New York Mellon Trust Co. v McCall***, 116 AD3d 993, 985 NYS2d 255 [2d Dept 2014]; ***North Bright Capital, LLC v 705 Flatbush Realty, LLC***, 66 AD3d 977, 889 NYS2d 596 [2d Dept 2009]; ***Countrywide Home Loans, Inc. v Delphonse***, 64 AD3d 624, 883 NYS2d 135 [2d Dept 2009]). Melissa B. Schlactus, Esq. avers by affidavit that the RPAPL 1303 and 1320 notices were served upon defendants and that defendants Bank of America, N.A. ("BANA") and Jay and Janice Poremba defaulted in appearing or answering. Jane Cashel, an AVP, Operations Team Manager at BANA, master loan servicer for plaintiff, attests that BANA is authorized to act on behalf of plaintiff pursuant to an attached power of attorney; that defendants Redavid defaulted on their loan payments; that a notice of default was sent to them; that a 90-day pre-foreclosure notice pursuant to RPAPL 1304 was sent to defendants Redavid by regular and certified mail and that Kathleen Redavid signed the certified mail receipt; and that the default has not been cured.

The burden then shifted to defendants Redavid to lay bare their proof in opposition to plaintiff's *prima facie* showing (*see* ***Jessabell Realty Corp. v Gonzales***, *supra*).

Defendants Redavid cross-move for leave to amend their answer and oppose plaintiff's motion based on lack of standing when the action was commenced. They assert that they were only able to inspect the mortgage file documents when plaintiff made its summary judgment motion inasmuch as the documents were in the exclusive possession and control of plaintiff and its predecessors in interest. They argue that based on a review of the Pooling and Servicing Agreement ("PSA"), plaintiff is merely a trust and not a bank and did not loan any money to defendants or service the loan and that the seller, Countrywide, does not service the loan. They also argue that the affidavit of Jane Cashel in support of the motion is deficient in that she fails to demonstrate compliance with the PSA's document transfer protocols showing a complete and unbroken chain of endorsements of the note and assignments of the mortgage. By their proposed amended answer, defendants Redavid seek rescission of the assignment of the mortgage pursuant to Real Property Law § 329 and a declaration that the transfer of the loan by endorsement of the note and by assignment of the mortgage is null and void. They assert that their amended answer is not palpably insufficient and will not cause plaintiff any surprise.

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]). "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***, *supra*). Because "a mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation," it "passes as an incident to the note" when the note is transferred (***Deutsche Bank Natl. Trust Co. v Spanos,*** 102 AD3d 909, 961 NYS2d 200 [2d Dept 2013] [internal citations omitted]). Holder status is demonstrated when the plaintiff is the special endorsee of the note or takes possession of a mortgage note containing an endorsement in blank since the mortgage follows as an incident to the note (*see* UCC 3–202; 3–204; 9–203 [g]).

"It is not necessary, however, that the party seeking to foreclose provided the consideration. A mortgage may be valid as long as proper consideration exists for the underlying obligation; once a party has lawfully obtained both the mortgage and the underlying promissory note, that party has standing to foreclose on the mortgage in the event of the default on the borrower's obligation" (***Rose v Levine***, 107 AD3d 967, 969-970, 969 NYS2d 72 [2d Dept 2013]). Thus, the fact that plaintiff did not loan any money to defendants Redavids or service the loan is not a relevant consideration in determining standing.

Jane Cashel avers in her affidavit in support of plaintiff's motion that she has access to and has reviewed the business records concerning the subject loan, that the "loan records are maintained by BANA in the course of its regularly conducted business activities and are made at or near the time of the event, by or from information transmitted by a person with knowledge," and that "[p]laintiff has been the owner and holder of the Note and Mortgage since on or about April 1, 2006, and Plaintiff remains the owner and holder of the Note and Mortgage." Here, plaintiff established through admissible evidence its standing as the holder of the note and mortgage by demonstrating that it obtained physical possession of the note on or about April 1, 2006, almost six years prior to the commencement of this action (*see* ***Aurora Loan Services, LLC v Taylor***, 114 AD3d 627, 980 NYS2d 475 [2d Dept 2014]; ***Deutsche Bank Nat. Trust Co. v Whalen***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]). It can reasonably be inferred from said affidavit that physical delivery of the note was made to the plaintiff on or about April 1, 2006 such that no further details are required for plaintiff to establish standing (*see* ***Aurora Loan Services, LLC v Taylor***, *supra*). Defendants Redavid offer no evidence to contradict said factual averments and, therefore, fail to raise a triable issue of fact concerning plaintiff's standing (*see id.*). In addition, inasmuch as there was physical delivery of the note, and the mortgage passes as an incident to the note, any alleged lack of authority of MERS to assign the mortgage is rendered immaterial (*see* ***MLCFC 2007-9 Mixed Astoria, LLC v 36-02 35th Ave. Development, LLC***, 116 AD3d 745, 983 NYS2d 604 [2d Dept 2014]; ***Bank of New York v Silverberg***, 86 AD3d 274, 926 NYS2d 532 [2d Dept 2011]).

The remaining arguments in opposition to plaintiff's motion include the inadmissibility of Jane Cashel's affidavit, deficiencies in the allonge, and the lack of authority of MERS or Countrywide to assign the mortgage. Defendants Redavid fail to raise a triable issue of fact concerning any bona fide defense to foreclosure in opposition to the motion for summary judgment and by their remaining affirmative defenses (*see* ***Rimbambito, LLC v Lee***, 118 AD3d 690, 986 NYS2d 855 [2d Dept 2014]; ***Bank of Smithtown v 219 Sagg Main, LLC***, 107 AD3d 654, 968 NYS2d 95 [2d Dept 2013][unclean hands]; ***American Airlines Federal Credit Union v Mohamed***, 117 AD3d 974, 986 NYS2d 530 [2d Dept 2014] [lack of good faith in denying loan modification]; ***Putnam County Sav. Bank v Mastrantone***, 111 AD3d 914, 975 NYS2d 684 [2d Dept 2013] [lack of personal jurisdiction]). Notably, John Redavid in his affidavit does not deny that the Redavids defaulted on their mortgage payments.

Leave to amend a pleading pursuant to CPLR 3025 (b) should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit, or unless prejudice or surprise to the opposing party results directly from the delay in seeking leave to amend (*see* ***Giunta's Meat Farms, Inc. v Pina Constr. Corp.***, 80 AD3d 558, 914 NYS2d 641 [2d Dept 2011]; ***Rosicki, Rosicki & Assoc., P.C. v Cochems***, 59 AD3d 512, 873 NYS2d 184 [2d Dept 2009]; *see also* ***Seidman v Industrial Recycling Properties, Inc.***, 83 AD3d 1040, 1040-1041, 922 NYS2d 451 [2d Dept 2011]).

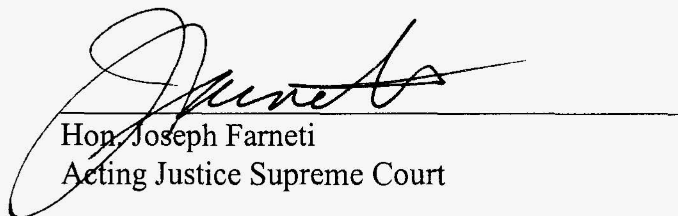
The proposed first and second counterclaims for rescission of the assignment of mortgage are based on the alleged failure to include the mortgage in the servicing pool within the PSA's time frame and the trust's terms, plaintiff's not being the lawful owner of the note and its lack of standing, and defendants being beneficiaries of the PSA. The proposed third and fourth counterclaims for declaratory judgment and to quiet title are based on the aforementioned allegations as well as MERS' alleged lack of authority to assign the mortgage, and the fifth counterclaim for bad faith is based on plaintiff's alleged lack of standing depriving defendants Redavid of the opportunity to participate in the mandatory settlement conferences with a proper party in interest.

Defendants Redavid argue that the PSA does not reference BANA as plaintiff's loan servicer and instead indicates Countrywide Home Loan Servicing LP as the master servicer for plaintiff. They further argue that plaintiff fails to "create a nexus of authority between Countrywide Home Loan Servicing LP and BANA as its alleged successor in interest for authority to service Defendant's loan." In her reply affidavit, Jane Cashel avers that the attached certificates of filing show that Countrywide Home Loans Servicing LP changed its name to BAC Home Loans Servicing, LP (BAC) effective April 27, 2009 and that BAC merged into BANA effective July 1, 2011 and since that time has been known as BANA, successor by merger to BAC. In any event, to the extent that defendants Redavid argue failure to demonstrate compliance with the PSA, they lack standing to void any purported unauthorized acts of plaintiff trustee on said basis inasmuch as defendants Redavid are not parties to, nor beneficiaries of, the securitization trusts (*see* ***Rajamin v Deutsche Bank Natl. Trust Co.***, ___ F3d ___, 2014 WL 2922317, 2014 US App LEXIS 12251 [2d Cir 2014]). Based on the foregoing, the proposed affirmative defenses and counterclaims lack merit (*see* ***Mishal v Fiduciary Holdings, LLC***, 109 AD3d 885, 971 NYS2d 334 [2d Dept 2013]). Therefore, the cross motion by defendants Redavid for leave to amend their answer is denied.

Regarding plaintiff's default request, plaintiff has met all of the requirements with respect to the non-appearing, non-answering defendants BANA, Jay Poremba and Janice Poremba (*see* CPLR 3215 [f]; ***Green Tree Serv., LLC v Cary***, 106 AD3d 691, 965 NYS2d 511[2d Dept 2013]; ***Dupps v Betancourt***, 99 AD3d 855, 952 NYS2d 585 [2d Dept 2012]; ***Atlantic Cas. Ins. Co. v RJNJ Servs., Inc.***, 89 AD3d 649, 932 NYS2d 109 [2d Dept 2011]). Therefore, that portion of plaintiff's motion for an Order fixing the defaults of the non-answering, non-appearing defendants is granted (*see* ***Green Tree Serv., v Cary***, *supra*). Accordingly, that portion of plaintiff's motion for an Order of Reference appointing a referee to compute the amount due 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 as modified by the Court.

Dated: August 6, 2014



Hon. Joseph Farneti
Acting Justice Supreme Court

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**