

Citimortgage, Inc. v Egner

2014 NY Slip Op 33438(U)

December 29, 2014

Supreme Court, Suffolk County

Docket Number: 01604/2010

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

Citimortgage, Inc.,

Index No.: 01604/2010

Plaintiff,

Motion Sequence No.: 001; MGMotion Date: 10/16/13

-against-

Submitted:Brenda Egner a/k/a Brenda Sardisco, John Egner,
New York State Department of Taxation and
Finance, "John Does" and "Jane Does", said names
being fictitious, parties intended being possible
tenants or occupants of premises, and corporations,
other entities or persons who claim, or may claim, a
lien against the premises,Motion Sequence No.: 002; XMDMotion Date: 11/20/13Submitted:Attorney for Plaintiff:

Defendants.

Rosicki, Rosicki & Associates, P.C.
51 East Bethpage Road
Plainview, NY 11803Attorney for Defendants Brenda Egner
a/k/a Brenda Sardisco and John Egner:Martin Silver, P.C.
330 Motor Parkway, Suite 201
Hauppauge, NY 11788Clerk of the Court

Upon the following papers numbered 1 to 17 read upon this motion for summary judgment and order of reference: Notice of Motion and supporting papers, 1 - 11; Notice of Cross Motion and supporting papers, 12 - 15; Answering Affidavits and supporting papers, 16 - 17, it is

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ORDERED that the motion by plaintiff, CitiMortgage, Inc., for an order pursuant to CPLR 3212 granting summary judgment in its favor against defendants Brenda Egner a/k/a Brenda Sardisco and John Egner (defendants), fixing the defaults as to the non-appearing, non-answering defendants, to amend the caption of this action pursuant to CPLR 3025 (b), 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 cross-motion by defendants, Brenda Egner and John Egner, for an order awarding summary judgment in their favor dismissing the complaint is denied; and it is further

ORDERED that the caption is hereby amended by striking therefrom defendants “John Does” and “Jane Does”; 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

Citimortgage, Inc.,

Plaintiff,

-against-

Brenda Egner a/k/a Brenda Sardisco, John Egner,
New York State Department of Taxation and Finance,

Defendants.

_____x

This is an action to foreclose a mortgage on property known as 430 S. Ocean Avenue, Patchogue, New York. On June 4, 2008, defendant Brenda Egner (defendant Egner) executed a fixed rate note in favor of CitiMortgage agreeing to pay the sum of \$294,000.00 at the yearly interest rate of 7.250 percent. On said date, defendant Egner also executed a mortgage in the principal sum of \$294,000.00 on the subject property. The mortgage indicated CitiMortgage, Inc. to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of CitiMortgage, Inc. as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was

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recorded on August 25, 2008 in the Suffolk County Clerk's Office. Thereafter, on October 20, 2009, the note and mortgage were transferred by assignment of mortgage from MERS, as nominee for CitiMortgage, Inc. to plaintiff CitiMortgage, Inc. The assignment of mortgage was recorded on April 23, 2010 in the Suffolk County Clerk's Office.

Plaintiff sent a notice of default dated August 3, 2009 to defendant Egner stating that she had defaulted on her mortgage loan and that the amount past due was \$8,385.67. As a result of her continuing default, plaintiff commenced this foreclosure action on January 8, 2010. In its complaint, plaintiff alleges in pertinent part that defendant Egner breached her obligations under the terms of the note and mortgage by failing to pay the installment due on June 1, 2009 and subsequent payments thereafter. Defendants interposed an answer with affirmative defenses.

The Court's computerized records indicate that a foreclosure settlement conference was held on April 5, 2011 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. In support of its motion, plaintiff submits among other things, the affidavit of Kathleen Daugherty, vice president-document control of CitiMortgage, Inc.; the affirmation of Melissa S. Kubit, Esq. in support of the instant motion; the affirmation of Melissa S. Kubit, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the pleadings; the note, mortgage and an assignment of mortgage; proof of notices pursuant to RPAPL 1320, 1303 and 1304; affidavits of service of the summons and complaint; an affidavit of service of the instant summary judgment motion upon the defendants in this action; and, a proposed order appointing a referee to compute. Defendants have submitted a cross motion opposing plaintiff's motion and seeking an order dismissing the complaint on the grounds that plaintiff does not have standing.

“[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 defendants, 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, the unpaid note together with due evidence of his default 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 or takes possession of a mortgage note that contains an indorsement in blank on the face thereof as the mortgage follows as incident thereto (*see* UCC § 3–202; § 3–204; § 9–203[g]). Here, Kathleen Daugherty avers that plaintiff was the holder of the note on the date this action was commenced (*see Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674, 838 NYS2d 622 [2d Dept 2007]). The plaintiff thus has established, *prima facie*, its 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]).

In their cross motion, defendants re-assert their pleaded affirmative defense that the plaintiff lacks standing to prosecute its claims for foreclosure and sale. The defendants contend that a question of fact exists with respect to the plaintiff's standing as the assignment from MERS to plaintiff was recorded more than three months after the commencement of the instant action; that the assignment is defective as its effective date precedes the execution date of the assignment itself; and, that the assignment fails in view of the fact that the mortgage was assigned to CitiMortgage and not CitiMortgage, Inc., the plaintiff herein. Counsel opines that although plaintiff may have possession and ownership of the note, it does not have ownership of the mortgage thereby requiring denial of plaintiff's motion.

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The court finds that none of defendants' allegations give rise to questions of fact that implicate a lack of standing on the part of the plaintiff. Here, the uncontroverted facts establish that plaintiff, CitiMortgage, Inc., was the original lender in connection with the subject note which remained in its physical possession prior to the commencement of the action and as such, the mortgage passed as an incident to the note. Here, neither the defenses raised in their answer nor, those asserted on this motion rebut the plaintiff's *prima facie* showing of its entitlement to summary judgment.

Accordingly, the motion for summary judgment is granted against the answering defendants. That branch of the motion seeking to fix the defaults as against the remaining defendants who have not answered or appeared herein is granted. Plaintiff's request for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is also 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:

12/29/2014



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

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION