Citimortgage, Inc. v Pena
2014 NY Slip Op 33535(U)
December 24, 2014
Supreme Court, Queens County
Docket Number: 9309/2010
Judge: Robert J. McDonald

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

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CITIMORTGAGE, INC.,

Plaintiff,

- against -

JOAN M. PENA; ABN AMRO MORTGAGE GROUP, INC; CAPITAL ONE BANK (USA), N.A.; CRIMINAL COURT OF THE CITY OF NEW YORK; JOHN HUGYECZ; NEW VISIONS FINANCIAL LLC; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; NEW YORK CITY PARKING VIOLATIONS BUREAU; NEW YORK CITY TRANSIT ADJUDICATION BUREAU; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; JUAN PENA; QUEENS SUPREME COURT; SUZANNA HUGYECZ; UNITED STATES OF AMERICA -INTERNAL REVENUE SERVICE; "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,

Defendants.

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Motion Date: 06/13/14

Motion No.: 19

Motion Seq.: 1

The following papers numbered 1 to 16 were read on this motion by the plaintiff for an order striking the answer with affirmative defenses and counterclaim of defendants Joan Pena and Juan Pena; granting summary judgment pursuant to CPLR 3212, in favor of the plaintiff for the relief demanded in the verified complaint; for an order granting a default judgment pursuant to CPLR 3215 against all other non-answering defendants; for an order amending the caption; and for an order pursuant to RPAPL § 1321 appointing a referee to ascertain and compute the amount due to the plaintiff; and the cross-motion of the defendants for an order dismissing the plaintiff's complaint and denying the plaintiff's motion for summary judgment:

	Papers Numbered
Notice of Motion-Affidavits-Exhibits	1 - 7
Cross-Motion-Affirmations-Exhibits	8 - 12
Affirmation in Reply and Opposition to Cross Motion-Memorandum of Law	13 - 16

In this mortgage foreclosure action, plaintiff moves for an order striking the answer with counterclaims and affirmative defenses of defendants Joan M. Pena and his father Juan Pena; granting summary judgment against said defendants on the grounds that the answer contains no valid defense or counterclaim and that no triable issue of fact exists; granting a default judgment against the remaining defendants who have not answered; appointing a referee to compute the sums due and owing to plaintiff; and amending the caption.

This foreclosure action pertains to the property located at 80-20 59th Street, Glendale, New York, 11385. Based upon the record before this court, defendant, Joan M. Pena, entered into a mortgage with ABN AMRO MORTGAGE GROUP, INC. on September 5, 2007, to secure a loan in the principal amount of $645,300. Defendants also executed and delivered an Initial Interest Adjustable Rate Note to ABN AMRO MORTGAGE GROUP, INC. acknowledging the loan, the rate of interest, and the monthly installments. ABN Amro Mortgage Group, Inc. was acquired by CITIMORTGAGE on March 1, 2007. The plaintiff asserts that defendants defaulted on their mortgage when they failed to make their monthly mortgage payments beginning on July 1, 2009. Defendants have not made any mortgage payments since that time.

In addition to the stated loan from ABN AMRO, Joan Pena also took out a subordinate loan from ABN AMRO in the amount of $89,100 and a loan from the seller of the home for $16,000. Joan Pena also financed the $816,000 purchase price of the home with $90,000 provided by his father.

On September 1, 2009, the plaintiff notified the defendants of their default under the terms of the Note and Mortgage. The defendants failed to remedy their default and as a result, the plaintiff elected to accelerate the defendant's mortgage and brought an action to foreclose by filing a lis pendens and summons and complaint on April 14, 2010. Plaintiff asserts that all of the defendants have been duly served with a copy of the summons and verified complaint. Plaintiff also asserts that it is the holder of the note and the mortgage and has complied with

RPAPL § 1304 by properly serving a 90 day pre-foreclosure notice by regular and certified mail on May 4, 2009.

Defendants served a verified answer on February 22, 2011, containing a general denial and asserting six affirmative defenses and five counterclaims including lack of standing and lack of capacity to sue. Plaintiff served a reply to counterclaims on April 12, 2011. Defendant asserts that the plaintiff was not the actual holder of the note and mortgage at the time of the commencement of the action. Defendant also alleges that the plaintiff violated General Business Law § 349 by engaging in deceptive practices, fraudulently induced the defendant to enter into an unconscionable mortgage loan, violated 15 USC § 1691(a) and the Federal Fair Housing Act 42 USC § 3605 by racially discriminatory actions; violated New York State Banking Law § 598; unconscionabilty in that there was a large disparity in bargaining power between Pena and the plaintiff's predecessor in interest which caused the defendant to enter into an unconscionable mortgage loan. Other than the Pena defendants none of the other defendants answered the summons and complaint.

A settlement loan conference pursuant to CPLR 3408 was held in the Residential Foreclosure Settlement Part on February 28, 2012. Defendant appeared by the Fuster Law Firm. Referee Lance Evans found that the defendant/borrower failed to demonstrate the requisite financial ability in order to qualify for plaintiff/lender's government styled modification product and directed the plaintiff to file an application seeking an Order of Reference.

In support of the motion for summary judgment, the plaintiff submits the affirmation of counsel, Jill E. Alward, Esq., the affidavit of merit of Michael Drawdy, a Vice President of Asset Management for PennyMac Loan Services; a copy of the note and mortgage, copies of the affidavits of service on all the defendants; a copy of the pleadings; a copy of the 90 day notice of intent to foreclose, dated May 4, 2009; a copy of the RPAPL § 1304 notice served on the defendant with the summons and complaint.

In his affidavit in support of the motion, Michael Drawdy, states that based upon his personal review of the business records pertaining to the subject loan, the plaintiff has been in possession of the duly endorsed promissory note and mortgage since the time it acquired the loan in May 2010. He also states that defendants defaulted under the terms of the Mortgage by failing to make monthly payments as of July 1, 2009 and the plaintiff elected to accelerate the loan. He states that a 90 day pre-foreclosure notice was mailed prior to January 14, 2010.

He also states that the amount owed by the defendant on the note through January 1, 2014 is $860,936.12 based upon unpaid principal of $645,282 as well as interest, late fees, escrow advances, and other fees.

In her affirmation in support of the motion, plaintiff's counsel asserts that the first and second affirmative defenses raised in the defendants' answer concerning lack of capacity to sue and lack of standing are without merit. Counsel submits a copy of the original note which has been endorsed in blank by Citimortgage, Inc successor in interest by merger to the original lender, ABN AMRO Mortgage Group Inc. In addition counsel submits an affidavit from Michael Drawdy, Senior Vice president of Asset Management for PennyMac Loan Services, LLC, stating that based upon his personal review of the business records relating to the loan in issue, plaintiff has been in possession of the promissory note and mortgage since it acquired the loan on May 6, 2010.

Counsel also asserts that the third affirmative defense and first counterclaim which allege a violation of New York Consumer fraud statute GBL 349 is without merit. Counsel asserts that the claimed deceptive business practices do not constitute affirmative defenses to a foreclosure action (citing La Salle Bank Natl. Assn. v Kosarovich, 31 AD3d 904 [3d Dept. 2006]; US Bank Natl. Assn. v McPherson, 35 Misc. 3d 1219(A) [Sup. Ct. Queens Co. 2012]; U.S. Bank National Assoc. v Fields, 2012 N.Y. Misc. LEXIS 4025 [Sup Ct. Suffolk Co. 2012]; Moreover, counsel provides a copy of the truth in lending statement provided to the defendants providing the required information regarding the loan including the interest rate and monthly payments of $3,495.

The fourth affirmative defense and the second counterclaim allege that the subject mortgage was obtained by fraud on the part of the plaintiff's predecessor in interest, ABN Mortgage. However, counsel asserts that fraud is not a defense to an action to foreclose a mortgage. Further, counsel asserts that the answer fails to satisfy the elements of a cause of action for fraud in that there was no showing of a misrepresentation on the part of the plaintiff and a reliance thereon. Counsel asserts that based upon the defendants' loan application, the loan was not predatory and based on defendants' income and property rental income he qualified for the loan. Plaintiff asserts that the defendants were provided with all necessary disclosures regarding the loan and mortgage including a good faith estimate of closing costs and the terms and conditions of the loan.

With respect to the third counterclaim regarding violation of the Federal Equal Credit Opportunity Act (ECOA), plaintiff

states that any alleged violations of the original lender, ABN AMRO MORTGAGE GROUP, INC, based upon racial discrimination, cannot be imputed to the plaintiff and further, plaintiff asserts that the alleged violation would not prevent plaintiff from enforcing the note and proceeding with the foreclosure action (citing Citibank, N.A. v Silverman, 85 AD3d 463 [1st Dept. 2011]; Silverman v Eastrich Multiple Investor Fund, L.P., 51 F3d 28 [US Ct of Appeals, 3d Cir. 1995]). Counsel asserts that as plaintiff was not present at the closing and the purported injury was not caused by the plaintiff's actions and the plaintiff was unaware of any discriminatory acts by the original lender.

The fifth affirmative defense and fourth counterclaim allege a violation of the Federal Fair Housing Act, 42 USC 3605, alleging that the loan was predatory and defendants were targeted because of their race. Plaintiff asserts that the statute of limitations has lapsed and the defendants do not allege that the violation is attributable to the plaintiff who was not present at the closing.

Plaintiff also alleges that the defendants fifth counterclaim asserting that the defendants are entitled to liquidated damages pursuant to Banking Law § 598(3) is not applicable to the plaintiff herein as that section relates only to the origination of the mortgage and its attendant loan application

The plaintiff asserts that the sixth affirmative defense alleging unconscionability must be dismissed because the plaintiff willingly entered into the loan and that proper procedures and protocol were followed at the inception (citing Alliance Mtge. Banking Corp. v Dobkin, 19 Misc. 3d 1121(A) [Sup. Ct. Nassau Co. 2008]).

Defendant cross-moves for an order denying the plaintiff's motion for summary judgment and for an order dismissing the plaintiff's complaint for lack of standing and lack of capacity to sue. Defendant contends that the plaintiff has failed provide documentation of the merger between ABN Amro Mortgage Group Inc. and the plaintiff CitiMortgage. Further, counsel asserts that the plaintiff does not have standing because there has been no evidence presented that plaintiff received a valid and duly authorized assignment from ABN Amro because the assignments lacked a certificate of conformity. Lastly, counsel asserts that the plaintiff did not comply with the 90 day notice requirement by demonstrating mailing of the 90 day pre-foreclosure notice pursuant to RPAPL §1304. Defendant has not submitted any opposition to the plaintiff's argument to dismiss the remaining

affirmative defenses and the counterclaims.

Upon review and consideration of the plaintiff's motion, defendant's cross-motion and affirmation in opposition and plaintiff's reply thereto, this court finds as follows:

The plaintiff has made a prima facie showing that it is entitled to a judgment of foreclosure and sale. It is well settled that a plaintiff in a mortgage foreclosure action establishes a prima facie case of entitlement to summary judgment through submission of proof of the existence of the underlying note, mortgage and default in payment after due demand (see Witelson v Jamaica Estates Holding Corp. I, 40 AD3d 284 [1st Dept. 2007]; Marculescu v Ouanez, 27 AD3d 701 [2d Dept. 2006]; US. Bank Trust National Assoc. v Butti, 16 AD3d 408 [2d Dept. 2005); Layden v Boccio, 253 AD2d 540 [2d Dept. 1998); State Mortgage Agency v Lang, 250 AD2d 595[2d Dept. 1998]). Upon such a showing, the burden shifts to the defendant to produce evidence in admissible form sufficient to raise a material issue of fact requiring a trial.

Here, the plaintiff's submissions are sufficient to establish its entitlement to summary judgment against defendant mortgagor, Joan M. Pena. The moving papers demonstrate, prima facie, that none of the asserted defenses and counterclaims set forth in the answer of defendant are meritorious and therefore plaintiff is entitled to summary judgment on its claims against defendants (see Baron Assoc., LLC v Garcia Group Enters., Inc., 96 AD3d 793 [2d Dept. 2012]; North Bright Capital, LLC v 705 Flatbush Realty, LLC, 66 AD3d 977 [2d Dept. 2009]; Witelson v Jamaica Estates Holding Corp. I, 40 AD3d 284 [1st Dept. 2007]; EMC Mortg. Corp. v Riverdale Assocs., 291 AD2d 370 [2d Dept. 2002]; State of New York v Lang, 250 AD2d 595 [2d Dept. 1998]).

As to the affirmative defense of lack of standing, plaintiff has supplied sufficient documentation to establish that Citimortgage was the successor in interest to ABN Ambro by merger. Plaintiff has submitted a Report of the United States Securities Exchange showing the acquisition of ABN Ambro by CitiMortgage. Further, plaintiff established by the affidavit of Mr. Drawdy that it was the holder of the note and mortgage when the action was commenced and that a 90 day pre-foreclosure notice was mailed to the defendant by regular and first class mail prior to the commencement of the action.

This Court finds that the evidence submitted by the plaintiff including a copy of the note and an affidavit from Mr. Dawdry stating that based upon his personal review of the

records, plaintiff was in possession of the note and mortgage at the time the action was commenced was sufficient to confer standing to commence the action (see Bank of N.Y. v Silverberg, 86 AD3d 274 [2d Dept. 2011][in a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced"]; U.S. Bank, N.A. v Collymore, 68 AD3d 752 [2d Dept. 2009]). "Where a note is transferred, a mortgage securing the debt passes as an incident to the note" (Deutsche Bank Natl. Trust Co. v Spanos, 102 AD3d 909 [2d Dept. 2013]). Therefore, "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 [2d Dept. 2012]). Since the mortgage passes with the debt that is evidenced by the note as an inseparable incident thereto, the plaintiff established its standing to commence the within action (see US Bank Natl. Assn. v Cange, 96 AD3d 825 [2d Dept. 2012]; U.S. Bank, NA v Sharif, 89 AD3d 723[2d Dept 2011]; Bank of New York v Silverberg, supra]).

In addition the Second Department has recently held that "a combined reading of CPLR 2309 and Real Property Law §§ 299 and 311(5) leads to the inescapable conclusion that where a document is acknowledged by a foreign state notary, a separate "certificate of authentication" is not required to attest to the notary's authority to administer oaths (Midfirst Bank v Agho, 121 AD3d 343 [2d Dept. 2014]).

Lastly, although it is well settled that an assignee of a mortgage takes it subject to the equities attending the original transaction (see Lapis Enterprises. Inc. v Intl. Blimpie Corp., 84 AD2d 286, [1981]), plaintiff cannot be required to answer in damages for alleged misrepresentations committed by AMRO in connection with the making of the original mortgage loan. Defendant has failed to provide sufficient facts to show that the plaintiff's predecessor in interest engaged in overreaching or oppressive conduct. Defendant does not allege that he had an absence of meaningful choice and the mortgage terms are unreasonably favorable to the lender (see generally FGH Contracting Co., Inc. v Weiss, 185 AD2d 969 [1992]).

Therefore, the plaintiff's motion for summary judgment is granted and the affirmative defenses and counterclaims contained in the defendant's answer are stricken. Defendant's cross-motion is denied. Plaintiff is entitled to a default judgment against the non-answering defendants. Plaintiff's further application for the appointment of a referee to compute the amounts due under the

subject mortgage is also granted as is the plaintiff's application for an order amending the caption deleting the John Doe defendants and substituting PennyMac Loan Trust 2010-NPL1 as the plaintiff.

Order signed contemporaneously herewith.

Dated: December 24, 2014
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.