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| <p>U.S. Bank, N.A. v Campbell</p> |
| <p>2015 NY Slip Op 30390(U)</p> |
| <p>March 16, 2015</p> |
| <p>Supreme Court, Queens County</p> |
| <p>Docket Number: 11601/2012</p> |
| <p>Judge: Robert J. McDonald</p> |
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| <p>This opinion is uncorrected and not selected for official publication.</p> |

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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U.S. BANK, NATIONAL ASSOCIATION, as Index No.: 11601/2012
 Trustee for RASC 2006-EMX9, Motion Date: 01/23/15
 Plaintiff, Motion No.: 93
 - against - Motion Seq.: 2

ELINOR CAMPBELL; U.S. BANK NATIONAL
 ASSOCIATION as Trustee for RASC 2006-
 EMX9; Curtley Valentin; Lennon Downer,

Defendants.

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The following papers numbered 1 to 20 were read on this motion by plaintiff, U.S. Bank, National Association, for a Judgment of Foreclosure and Sale pursuant to RPAPL § 1351; and the cross-motion of the defendant, Elinor Campbell, for an order pursuant to CPLR 3211(a)(3), dismissing the plaintiff's complaint on the ground that plaintiff lacked standing to commence the instant action:

Papers
Numbered

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|---|---------|
| Notice of Motion-Affirmation-Affidavits-Exhibits | 1 - 8 |
| Defendant's Cross-Motion-Affirmation-Exhibits..... | 9 - 13 |
| Affirmation in Opposition to Cross-Motion..... | 14 - 20 |

This is a motion made by plaintiff, U.S. Bank National Association, seeking a Judgment of Foreclosure and Sale for the property located at 133-12 145th Street, Jamaica, New York, 11436. Based upon the record before this court the defendant, Elinor Campbell, entered into a mortgage with Mortgage Lenders Network USA on August 31, 2006, in the principal amount of \$440,000.00. Defendant also executed and delivered an "Adjustable Rate Balloon Note" to Mortgage Lenders Network USA, Inc. acknowledging the loan, the rate of interest, and the monthly installments. On

February 15, 2012, the note and mortgage were transferred to U.S. Bank National Association. The transfer was memorialized by an Assignment of Mortgage executed on February 15, 2012 and recorded March 1, 2012. The defendant defaulted on the mortgage when she failed to make her monthly mortgage payments beginning on November 1, 2011. At that time the plaintiff accelerated the mortgage and elected to have the entire principal sum and all amounts still owing under the Note be due and payable in full immediately.

Plaintiff subsequently brought an action to foreclose its mortgage by filing a summons, complaint and lis pendens on June 1, 2012. Defendant was served with a copy of the summons, complaint and RPAPL § 1303 notices at the mortgaged premises on June 16, 2012. The affidavit of process server, Joseph Leggio, dated June 27, 2012, states that Elinor Campbell was served personally by in hand delivery pursuant to CPLR 308(1) by service of a copy of the summons and complaint and all applicable RPAPL notices at the defendant's dwelling place. The defendant, pro se, served an answer to the complaint on June 29, 2012. The answer contains a general denial and raises certain affirmative defenses such as lack of standing and failure to serve a notice of default.

A residential foreclosure conference was held on August 13, 2013. Defendant failed to appear at the conference despite being duly notified of the date. Referee Lance Evans, by order dated August 30, 2013, directed plaintiff to file an application seeking an Order of Reference.

By memorandum decision dated July 10, 2014, this court granted the plaintiff's motion for an order striking the defendant's answer and granting summary judgment in favor of the plaintiff and against defendant Elinor Campbell. The court also directed the appointment of a Referee to compute the amounts due and owing to the plaintiff. The defendant did not oppose the motion for summary judgment.

On July 10, 2014, this Court signed an order granting an Order of Reference appointing Eugene Crowe, Esq., as Referee to ascertain and compute the amount due to the plaintiff for principal, interest, and other disbursements.

On October 10, 2014, Mr. Crowe filed a copy of his oath and report in which he computed that as of February 20, 2014 plaintiff is due the sum of \$485,480 including the principal balance of \$405,028.80 plus interest in the amount of \$69,441.99 through February 20, 2014 as well as additional sums for taxes,

hazard insurance, and property inspections. The plaintiff now moves for an order confirming the Referee's Report and granting plaintiff a Judgment of Foreclosure and Sale.

Defendant, Elinor Campbell, by counsel Precious Williams, Esq., submits an affirmation in opposition and a cross-motion, alleging that the plaintiff did not have standing to commence the instant action for foreclosure. Counsel contends that the original Note executed by the defendant naming Mortgage Lenders Network USA has an endorsement which is stamped as cancelled. Thus, counsel asserts that the plaintiff has failed to demonstrate ownership of the underlying Note (citing Bank of N.Y. v Silverberg, 86 AD3d 274 [2d Dept. 2011]). Further, defendant's counsel maintains that the affidavit of Ms. Weatherly, the Vice President of Loan Documentation for Wells Fargo Bank, N.A., the Servicer for the plaintiff, is insufficient to establish that plaintiff had physical possession of the Note at any time prior to the commencement of the action. Defendant contends that Ms. Weatherly did not provide factual details of physical delivery of the Note (citing HSBC Bank USA v Hernandez, 92 AD3d 843 [2d Dept. 2012]).

In opposition to the cross-motion, plaintiff's counsel Austin T. Shufelt, Esq., asserts that the defendant does not have standing to oppose the motion for a Judgment of Foreclosure and Sale because her answer has been stricken and she did not oppose the motion for summary judgment. Counsel asserts that the time for the defendant to have raised the issue of standing would have been in a separate motion or in opposition to the motion for summary judgment but the defendant defaulted. Moreover, counsel asserts that the defendant has not moved to vacate the default and is barred from relitigating the issue of standing.

In addition, plaintiff argues that the defendant's objections to the plaintiff's standing are without merit because the plaintiff has supplied an attorney certified copy of the original Note duly indorsed to the plaintiff. Counsel states that the plaintiff was in possession of the indorsed Note at the time of the commencement of the action. Counsel asserts that it filed the indorsed Note along with the complaint and thus proved that it had physical possession of the Note when the action was commenced. Plaintiff contends that its demonstration of possession of the indorsed Note at the time of commencement suffices as a matter of law to establish plaintiffs standing to commence the action (citing Deutsche Bank Natl. Trust Co. v. Whalen, 107 AD3d 931 [2d Dept. 2013]). Plaintiff argues that it further confirmed its possession of the indorsed note at the time of commencement via the affidavit of its loan servicer's

corporate officer (citing HSBC Bank USA, N.A. v. Sage, 112 AD3d 1126 [3d Dept. 2013]; Vanderbilt Mtge. & Fin. Inc. v Davis, 2013 NY Slip Op 32117(U) [Sup Ct. Suffolk Co. 2013]).

Upon review and consideration of the plaintiff's motion for a judgment of foreclosure and sale and the defendant's affirmation in opposition thereto, this court finds that the motion for an order confirming the report of the Referee and for a Judgment of Foreclosure and Sale is granted.

The plaintiff's submissions are sufficient to establish its entitlement to confirmation of the Referee's report and a Judgment of Foreclosure and Sale. The defendant defaulted on the motion to strike her answer and for summary judgment and failed to argue at that time that the plaintiff lacked standing to commence the action. The defendant has failed to provide a reasonable excuse for her default on the motion for summary judgment or a meritorious defense for this court to vacate the default pursuant to CPLR 5015.

A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that 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 (see U.S. Bank N.A. v Faruque, 120 AD3d 575 [2d Dept. 2014]). Here, the plaintiff established it has standing to commence the instant action for foreclosure and sale by demonstrating that prior to the commencement of this action, it took physical possession of, and was the holder of the note indorsed to U.S. Bank National Association, a copy of which was attached to the complaint (see Bank of N.Y. v Silverberg, *supra*; Kondaur Capital Corp. v Argyros, 38 Misc 3d 1230[A] [Sup. Ct. Queens Cty. 2013]). Since the mortgage follows as an incident of the note, when possession of the note changed, the mortgage interest automatically followed (see Deutsche Bank Natl. Trust Co. v Spanos, 102 AD3d 909 [2d Dept 2013]; U.S. Bank Natl. Assn. v Cange, 96 AD3d 8252 [2d Dept 2012]). Therefore, plaintiff's demonstration of possession of the indorsed note at the time of possession is sufficient to establish plaintiff's standing (see Wells Fargo Bank, N.A. v Parker, 2015 NY Slip Op 01445 [2d Dept. 2015]; Deutsche Bank Natl. Trust Co. v Whalen, 107 AD3d 931 [2d Dept. 2013]).

Therefore, this court finds that the defendant has not set forth a meritorious defense or any other legal basis as to why a Judgment of Foreclosure should not be granted at this time.

Accordingly, the defendant's cross-motion for an order dismissing the plaintiff's complaint on the ground of lack of standing is denied and the plaintiff's motion for a Judgment of Foreclosure and Sale is granted.

Judgment signed contemporaneously herewith.

Dated: March 16, 2015
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.