

Bank of Am., N.A. v Kljajic
2015 NY Slip Op 31533(U)
August 13, 2015
Supreme Court, Queens County
Docket Number: 17271/2013
Judge: Robert J. McDonald
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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

- - - - - x
BANK OF AMERICA, N.A.,

Plaintiff,

- against -

VINKO KLJAJIC, VIOLET KLJAJIC A/K/A
VIOLATE KLJAJIC, CACH LLC, CACH LLC AS
ASSIGNEE OF CHASE BANK USA, NA, 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,
UNITED STATES OF AMERICA ACTING
THROUGH THE IRS,

JOHN DOE (being fictitious, the names
unknown to Plaintiff intended to be
tenants, occupants, persons or
corporations having or claiming an
interest in or lien upon the property
described in the complaint or their
heirs at law, distributees, executors,
administrators, trustees, guardians,
assignees, creditors or successors,

Defendants.

- - - - - x

The following papers numbered 1 to 8 read on this motion by
plaintiff for an order granting summary judgment pursuant to CPLR
3212, dismissing the affirmative defenses of defendants Vinko
Kljajic and Violet Kljajic a/k/a Violeta Kljajic, and treating
the answer as a limited notice of appearance; appointing a
Referee to determine the amount due and ascertain whether the
premises can be sold in parcels; adding Dimitry Yazovitz
(occupant) as a party defendant to this action in place of "John
Doe" and amending the caption of the action to reflect same; and

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deeming all non-appearing and non-answering defendants in default.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits-Memo of Law.....1 - 5
Affirmation in Opposition.....6
Reply Affirmation-Exhibits.....7-8

Upon the foregoing papers, it is ordered that the motion is determined as follows:

This is an action to foreclose a mortgage encumbering property located at 64-44 84th Place, Middle Village, NY 11379. On December 27, 2002, defendants Vinko Kljajic and Violet Kljajic a/k/a Violeta Kljajic (collectively hereinafter defendants) obtained a loan from Wells Fargo Home Mortgage, Inc. in the principal amount of \$475,000.00, secured by a Consolidation, Extension and Modification Agreement (CEMA) on the property. Thereafter, the mortgage was assigned to plaintiff by way of an assignment dated July 21, 2011 and recorded on August 1, 2011. A corrective assignment was made on August 15, 2013. Plaintiff asserts that defendants defaulted on the mortgage when they failed to make their monthly mortgage payments beginning September 1, 2012.

Pursuant to the terms of the mortgage, plaintiff alleges that a demand letter and notice to cure and 90 day pre-foreclosure notice were sent to defendants on April 18, 2013. Plaintiff subsequently accelerated defendants' mortgage and commenced this action by filing a lis pendens and summons and complaint on September 16, 2013. Plaintiff submits affidavits of service on all of the named defendants, including occupant Dimitry Yazovitz. Defendant borrowers were served with a copy of the summons and complaint and all necessary RPAPL notices, pursuant to CPLR 308(2), at their residence on September 21, 2013. Defendant borrowers served an answer dated October 23, 2013, asserting eleven affirmative defenses and seeking dismissal of the complaint. The remaining defendants failed to answer the summons and complaint and are in default.

A residential foreclosure settlement conference was held on June 23, 2014. Defendants failed to appear and plaintiff was permitted to proceed with this foreclosure action.

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 defendants to produce evidence in admissible form sufficient to raise a material issue of fact requiring a trial.

In support of the motion for summary judgment, plaintiff submits the affirmation of counsel; the affidavit of Krysta Johnson, Vice President Loan Documentation of Wells Fargo Bank, N.A., the servicer for plaintiff; the limited power of attorney authorizing Wells Fargo Bank, N.A. to act on plaintiff's behalf; the certificate of merit pursuant to CPLR 3012(b); a copy of the merger agreement of Wells Fargo Home Mortgage, Inc. and Wells Fargo Bank, National Association; a copy of the notice of default; a copy of the 90 day notice of intent to foreclose; a copy of the RPAPL § 1303 notice sent to defendants; a copy of the notice of pendency; a copy of the pleadings; and copies of the affidavits of service on all defendants.

In her affidavit, Ms. Johnson states that based upon her personal knowledge and her personal review of the bank's business records, plaintiff is in possession of the note which was indorsed in blank and plaintiff was in possession of the note prior to the commencement of this action. The record contains copies of the indorsed note, mortgage, and assignment of mortgage. She states that there is in fact a default under the terms and conditions of the note and mortgage because the September 1, 2012 mortgage payment and subsequent payments were not timely made by defendants.

Plaintiff contends that it has made a prima facie showing that it is entitled to summary judgment based upon its submission of the note, mortgage, notice of default and affidavit of Ms. Johnson evidencing defendants' failure to make the contractually required loan payments.

In opposition, defendants argue that summary judgment should be denied because there are material questions of fact including whether plaintiff complied with RPAPL § 1304, whether plaintiff has standing and whether plaintiff complied with Paragraph 22 of the mortgage.

Defendants first allege that plaintiff did not proffer

sufficient evidence establishing that the 90 day notices were sent in accordance with RPAPL § 1304.

RPAPL § 1304 provides that at least 90 days before a lender begins an action against a borrower to foreclose on a mortgage, the lender must provide notice to the borrower that the loan is in default and his or her home is at risk (see Aurora Loan Services, LLC v Weisblum, 85 AD3d 95 [2d Dept. 2011]). “[P]roper service of the RPAPL § 1304 notice on the borrower or borrowers is a condition precedent to the commencement of the foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition” (see id. at 107). The presumption of receipt by the addressee “may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed” (see Residential Holding Corp. v Scottsdale Ins. Co., 286 AD2d 679 [2d Dept. 2001]).

Plaintiff submits Ms. Johnson’s affidavit to demonstrate compliance with RPAPL § 1304. Ms. Johnson states “I have reviewed the 90 day pre-foreclosure notice sent to borrowers by certified mail and also by first-class mail to the borrowers’ last known address, which is the mortgaged property.” A copy of the 90 day notice was annexed to the moving papers. The notice is dated April 18, 2013 and is addressed to the borrowers at the mortgaged premises. A certified mailing receipt was also annexed. Ms. Johnson acknowledges that her affidavit is based on her personal examination of plaintiff’s business records, which were made in the ordinary course of business. As Ms. Johnson has identified that she personally reviewed the business records and that the notice was sent to defendants, plaintiff presented sufficient proof that it complied with RPAPL § 1304. Moreover, defendants do not deny receipt of the notice.

Defendants also challenge plaintiff’s standing by asserting that plaintiff failed to demonstrate that the original note was physically delivered to plaintiff and that the assignment of mortgage failed to assign the note. Specifically, defendants allege that Ms. Johnson’s affidavit is insufficient as it does not provide details regarding the delivery of the note.

“Where the plaintiff is not the original lender and standing is put into issue, the plaintiff seeking summary judgment must also provide evidence that it received both the mortgage and note by a proper assignment, which can be established by the production of a written assignment of the note or by physical delivery to the plaintiff of the mortgage and note” (Midfirst

Bank v. Agho, 121 A.D.3d 343 [2d Dept. 2014] [internal citations omitted]).

Here, plaintiff demonstrated that it became the holder of the note prior to commencement of this action by submitting Ms. Johnson's affidavit attesting to such. Moreover, plaintiff attached an attorney certified copy of the original note indorsed in blank to its complaint.

Defendants also argue that the assignment of mortgage did not assign the note. However, "[w]here 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]). Thus, plaintiff does not need to rely on the assignment of the mortgage when it can demonstrate physical delivery of the note prior to commencement of the action. Since the mortgage passes with the debt that is evidenced by the note as an inseparable incident thereto, 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).

Lastly, defendants argue that plaintiff failed to provide evidence that a default notice was sent in accordance with the mortgage; that plaintiff failed to provide a default notice that complied with the terms of the mortgage; and that plaintiff's notice was insufficient or defective.

The controlling contract is the CEMA. Paragraph 15 of the CEMA requires that "[a]ny notice to me in connection with this Security Instrument is considered given to me when mailed by first class mail or when actually delivered to my notice address if sent by other means." Here, Ms. Johnson attests that "[i]n accordance with the provisions of the mortgage, a notice of default was mailed to Vinko Kljajic and Violet Kljajic by first class mail at the last known address provided by the mortgagors to this institution, which is the mortgaged property." As such, plaintiff sent a default notice by first class mail, which is in accordance with Paragraph 15.

Paragraph 22 of the CEMA contains the information which must be stated in the default notice. The default notice annexed to plaintiff's motion papers states: the default; the action that must be taken to correct the default; the date by which to correct the default, which was more than 30 days from the date of

the letter; that the loan will be accelerated if the default is not cured; that if foreclosure is initiated there is a right to refute the existence of a default and any other defenses may be presented; and that there is a right to reinstate after acceleration to have the enforcement of the mortgage discontinued. The notice also sets forth the single amount due and states that additional monies may be due if the default is not cured by the due date. Accordingly, the notice substantially complies with the terms of Paragraph 22.

Lastly, defendants' request to permit them to continue to conduct discovery is denied. The "mere hope and speculation that additional discovery might uncover evidence sufficient to raise a triable issue of fact is not sufficient" to warrant a denial of summary judgment (see Sasson v Setina Mfg. Co., Inc., 26 AD3d 487 [2d Dept. 2006]). Moreover, defendants do not dispute the existence of the note, mortgage and default thereunder.

Accordingly, this court finds that the allegations set forth in defendants' affirmative defenses and opposition to the motion are insufficient to defeat summary judgment. Therefore, the plaintiff's motion for summary judgment is granted and the affirmative defenses contained in defendants' answer are stricken. The submissions further reflect that plaintiff is entitled to amend the caption to substitute Dimitry Yazovitz (occupant) as a party defendant to this action in place of the "John Doe" defendant. That branch of the motion for a default judgment against the remaining defendants who have not answered or appeared herein is granted. Plaintiff's further application for the appointment of a referee to compute the amounts due under the subject mortgage is also granted.

Order of Reference signed contemporaneously herewith.

Dated: August 13, 2015
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.