

U.S. Bank N.A. v Ronquillo

2015 NY Slip Op 31783(U)

September 16, 2015

Supreme Court, Queens County

Docket Number: 13228/2013

Judge: David Elliot

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MEMORANDUM

SUPREME COURT - QUEENS COUNTY
I.A.S. PART 14

U.S. BANK NATIONAL ASSOCIATION, etc.,
Plaintiff(s),

Index No. 13228/2013

By: **ELLIOT, J.**

-against-

Date: September 16, 2015

MAGALI J. RONQUILLO, et al.,
Defendant(s).

Motion Cal. No. 138

Motion Seq. No. 1

Motion Date: September 2, 2015

In this action to foreclose a mortgage, plaintiff moves for an order awarding it summary judgment against defendant Magali J. Ronquillo (defendant), striking her answer, affirmative defenses, and counterclaims, appointing a referee to compute, and amending the caption.

To establish a prima facie case in an action to foreclose a mortgage, the plaintiff must produce the mortgage, the unpaid note, bond or obligation and evidence of default (*see Baron Assoc., LLC v Garcia Group Enters., Inc.*, 96 AD3d 793 [2012]; *Citibank, N.A. v Van Brunt Props., LLC*, 95 AD3d 1158 [2012]). Where standing is put into issue by the defendant, as it was here, the plaintiff must prove its standing in order to be entitled to relief (*see Deutsche Bank Nat. Trust Co. v Haller*, 100 AD3d 680 [2012]; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 753 [2009]; *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42

AD3d 239, 242 [2007]). A plaintiff establishes that it has standing where it demonstrates that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note (*see Bank of N.Y. v Silverberg*, 86 AD3d 274 [2011]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95 [2011]). An assignment of the mortgage without assignment of the underlying note or bond is a nullity (*see Deutsche Bank Natl. Trust Co. v Barnett*, 88 AD3d 636 [2011]). 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 (*U.S. Bank, N.A. v Collymore*, 68 AD3d 752 [2009]).

Plaintiff has met its prima facie burden of establishing its entitlement to summary judgment by submitting, *inter alia*, a copy of the note, mortgage, loan modification agreement, and the affidavit of Teri Townsend, Vice President of Loan Documentation for Wells Fargo Bank, N.A. (Wells Fargo), plaintiff's servicer and custodian – pursuant to a Pooling and Servicing (PSA) and Custodial Agreement – who details the circumstances of defendant's default under the loan documents. Moreover, plaintiff established its standing to foreclose by demonstrating that, pursuant to the terms of the PSA, the loan documents were transferred to Wells Fargo on June 1, 2007. Further, Ms. Townsend details that Wells Fargo was in physical possession of the note, which was indorsed in blank by the originator of the loan, on June 1, 2007, after which point it was released directly to plaintiff's foreclosure counsel on or about June 20, 2013, which is prior to the commencement of this action. Counsel submitted his own affirmation confirming same. Plaintiff has, thus,

adequately met its burden with respect to the issue of standing (*see Wells Fargo Bank, N.A. v Arias*, 121 AD3d 973 [2014]; *Aurora Loan Servs., LLC v Taylor*, 114 AD3d 627 [2014]).

Plaintiff has also established, *prima facie*, its entitlement to the dismissal of defendant's affirmative defenses and counterclaims, as they are without merit. As to the first and fourteenth defense regarding plaintiff's alleged failure to appropriately file an attorney affirmation in accordance with Administrative Order 431/11, plaintiff did, indeed, file same at the time it filed the Request for Judicial Intervention, as required by the Administrative Order. Thus, these defenses are dismissed.

As to the second affirmative defense of lack of standing, plaintiff has established same, as discussed, *supra*. As such, plaintiff is entitled to dismissal of this defense.

As to the third affirmative defense and eleventh counterclaim, which alleges a violation of General Business Law § 349, the loan documents fully set forth the terms of the subject mortgage loan and demonstrate that no deceptive act or practice occurred (*see Patterson v Somerset Investors Corp.*, 96 AD3d 817 [2012]); further, the counterclaim is time-barred and, thus, is dismissed (CPLR 214 [2]; *see Corsello v Verizon New York, Inc.*, 18 NY3d 777 [2012]; *Pike v New York Life Ins. Co.*, 72 AD3d 1043 [2010]). The second counterclaim is similarly time-barred (15 USC § 1691e [f]).

As to the fourth affirmative defense and first counterclaim of fraud, the claim/defense lacks the requisite specificity and are, in any event, time-barred (CPLR 213

[8]; 3016 [b]). Thus, plaintiff is entitled to dismissal of the defense and counterclaim.

As to the fifth affirmative defense and third counterclaim pursuant to the Fair Housing Act (42 USC § 3605), same is time-barred (42 USC § 3613 [a] [1] [A]) as is the sixth affirmative defense of unconscionability (CPLR 213). In any event, plaintiff has demonstrated that all material terms of the mortgage loan were disclosed and agreed to by defendant.

As to the seventh affirmative defense and fourth counterclaim for breach of contract for plaintiff's alleged failure to enter into an agreement for an affordable loan modification, defendant has pointed to no provision in the loan documents that required plaintiff to do so; in any event, the loan was indeed modified. It is noted that the matter was released from the Residential Foreclosure Part as defendant "failed to demonstrate the requisite compliance in order to qualify for plaintiff/lender's second tier gov't styled loan modification product" (Evans, CA-R).

Regarding the eighth affirmative defense and fifth counterclaim alleging a breach of the implied covenant of good faith and fair dealing, plaintiff established that the material terms of the mortgage loan were disclosed to her, in writing, at the time of the closing of the mortgage loan. Thus, this defense is stricken and counterclaim is dismissed.

As to the ninth affirmative defense and sixth counterclaim asserting violations of the Truth-in-Lending Act, plaintiff submitted proof that defendant executed a TILA statement and, in any event, the counterclaim alleging such a violation is time-barred (15

USC § 1640 [e]).

As to the tenth affirmative defense and eighth counterclaim, defendant has not specified any of the circumstances which indicate that plaintiff represented to her that her home would not be foreclosed upon (CPLR 3013). Thus, this defense/counterclaim sounding in promissory estoppel is dismissed.

Regarding the eleventh affirmative defense and ninth counterclaim, plaintiff has established that defendant's claim of a violation of the Real Estate Settlement Procedures Act is time-barred (12 USC § 2614) and, in any event, the evidence submitted demonstrates that defendant received a HUD settlement statement.

As to the twelfth and thirteenth affirmative defenses and tenth counterclaim, plaintiff is entitled to dismissal of same as defendant has not established that she is entitled to rescission, and plaintiff has established that it has properly stated a cause of action to foreclose a mortgage.

Regarding defendant's seventh counterclaim of a violation of the Fair Debt Collection Practices Act, same does not apply in this instance (15 USC § 1692a [6]).

Finally, plaintiff is entitled to dismissal of the twelfth counterclaim as plaintiff is not a mortgage broker (Banking Law § 598).

As to the remaining defendants, plaintiff has established that they were served with process and that their time to answer or otherwise appear has expired. Plaintiff has also demonstrated that it served Jessi Ronquillo and Abby Rojas as John Does herein and that they

should be substituted as defendants.

Though served with the motion, none of the defendants, including the answering defendant, have opposed it. Thus, no triable issue of fact has been raised (*see Nationstar Mtge., LLC v Silveri*, 126 AD3d 864 [2015]).

Accordingly, the motion is granted. Plaintiff is awarded summary judgment against Magali J. Ronquillo. Her answer, affirmative defenses, and counterclaims are stricken and deemed a Notice of Appearance. Plaintiff is awarded judgment by default against the remaining defendants. Plaintiff is granted leave to submit an order of reference. The caption is amended by substituting “Abby Rojas” and “Jessi Ronquillo” in the place of “John Doe.”

Submit Order.

J.S.C.