US Bank N.A. v Romano

2015 NY Slip Op 32501(U)

December 22, 2015

Supreme Court, Suffolk County

Docket Number: 19833-2010

Judge: Glenn A. Murphy

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This opinion is uncorrected and not selected for official publication.

[* 1]

SHORT FORM ORDER

COPY

INDEX NO.: 19833-2010

SUPREME COURT - STATE OF NEW YORK
IAS PART 25 - SUFFOLK COUNTY

PRESENT: Hon. GLENN A. MURPHY
Acting Justice of the Supreme Court

MOTION DATE 07-17-14/08-18-14
ADJ. DATE 12-22-15
MOT. SEQ #001 MG
#002 MD

---x

US BANK NATIONAL ASSOCIATION, AS TRUSTEE OF MASTR ADJUSTABLE RATE MORTGAGE TRUST 2006-0A2,

Plaintiff,

-against-

PASQUALE ROMANO, ANDREA ROMANO, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR COUNTRYWIDE, BANK, N.A., MIDLAND FUNDING OF DELAWARE LLC, and "JOHN DOE #1" through "JOHN DOE #10, inclusive, the last ten names being fictitious and unknown to plaintiff, the persons or parties intended being the persons, tenants, occupants, or corporations, if any, having or claiming an interest in or lien upon the mortgaged premises described in the complaint,

Defendants,

---x

ZEICHNER ELLMAN & KRAUSE, LLP
Attorney for Plaintiff
1211 Avenue of the Americas
New York, New York 10036

RONALD D. WEISS, P.C.
Attorney for Defendants
734 Walt Whitman Road, Suite 203
Melville, New York 11747

Upon the following papers numbered 1 to 35 read on this motion for summary judgment and order of reference ; Notice of Motion seeking a Discovery Order/ ~~Order to Show Cause~~ and supporting papers 1-20 ; Notice of Cross Motion and supporting papers 21-30 ; ~~Answering Affidavits and supporting papers~~ ; Replying Affidavits and supporting papers 31-35 ; ~~Other~~ ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is hereby

ORDERED that this motion by the plaintiff US Bank National Association (US BANK), pursuant to CPLR §3212 for summary judgment on its complaint, to strike the answer and counter-claim of Pasquale Romano and Andrea Romano and, for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law (RPAPL) §1321, is granted; and it is further

ORDERED that defendants cross-motion is denied in all respects,.it is further ordered

ORDERED that the defendants motion to strike JOHN DOE #1 through #10 as defendants is granted , it is further ordered

[* 2]

ORDERED that the plaintiff's application for leave to amend the caption of this action pursuant to CPLR §3025 (b), is granted; and it is further

ORDERED that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

____x

US BANK NATIONAL ASSOCIATION, AS TRUSTEE OF MASTR ADJUSTABLE RATE MORTGAGE TRUST 2006-0A2,

Plaintiff,

-against-

PASQUALE ROMANO, ANDREA ROMANO, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR COUNTRYWIDE, BANK, N.A., MIDLAND FUNDING OF DELAWARE LLC,

Defendants.

____x

INDEX NO. 19833-10

Mortgaged Premises:
7 Parkhill Court
Huntington, NY 11743

ORDERED that within 30 days of the entry date of this order, plaintiff shall serve a copy of the order of reference with notice of entry upon all parties who have appeared in this action and thereafter file the affidavit of service with the Clerk of the Court.

This is an action to foreclose a mortgage on premises known as 7 Parkhill Court, Huntington, New York. On July 20, 2006, the defendant executed a note in favor of Countrywide Bank,N.A., (Countrywide), agreeing to pay the sum of $596,250.00 at the yearly rate of 8.00 % (percent.) On the same date, the defendants executed a first mortgage in like sum on the subject property. The mortgage was recorded on October 5, 2006 in the Suffolk County Clerk's Office. The mortgage named Mortgage Electronic Registration Systems (MERS) as the nominee for Countrywide. On July 18, 2008, the mortgage was assigned by MERS as nominee for Countrywide to plaintiff. The assignment of mortgage was filed with the Suffolk County Clerk's Office on August 4, 2008. On or about June 10, 2009, the parties entered into a loan modification agreement where in the loan was recast at the reduced rate of 5.25% (percent). The defendant made one (1) payment under the terms of the modification agreement.

Thereafter, a notice of default, dated September 16, 2009, was sent to the defendant stating that he had defaulted on his mortgage loan and that the amount past due was $11,845.00. On February 4, 2010, the plaintiff sent by certified and regular mail a ninety (90) day notice pursuant to RPAPL §1304. As a result of the defendant's continuing default, the plaintiff commenced this foreclosure action on June 10, 2010. In its complaint, the plaintiff alleges in pertinent part that the defendants breached their obligations under the terms of the note and mortgage by failing to make monthly payments. The summons and complaint comply with the requirement of RPAPL §1302. The defendants interposed an answer consisting of general denials and fourteen (14) affirmative defenses and two (2) counter-claims.

The Court's computerized records indicate that nine (9) foreclosure settlement conferences were held over a fourteen and a half month period. The final conference occurred on January 16, 2012, 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.

The plaintiff now moves for summary judgment on its complaint contending that the defendants failed to comply with the terms of the loan agreement and mortgage and, that the defendant's general denials and cross-claims raised no issues of fact for trial. In support of its motion, the plaintiff submits among other things: the sworn affidavit of Edward Hyne, Litigation Resolution Analyst with Nationstar Mortgage (Nationstar), acting as servicer for plaintiff US Bank, as trustee for the holders of the Master Adjustable Rate Mortgage Trust 2006-OA2 (the plaintiff), the servicer of the plaintiffs loan; the affirmations of B J Finnerman in support of the instant motion together with his affirmation pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the pleadings; the note, mortgage, and assignment of mortgage; notice of default; notices pursuant to RPAPL §§ 1320, 1304 and 1303; affidavits of service for the summons and complaint; and, an affidavit of service for the instant summary judgment motion upon the defendant's counsel. The defendant also filed an objection to the plaintiffs' motion as well as a cross-motion to compel discovery and reschedule further foreclosure conference.

"[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" (***Republic Natl. Bank of N.Y. v O'Kane***, 308 AD2d 482, 482, 764 NYS2d 635 [2d Dept 2003]; *see* ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). 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 of their defenses (see ***Aames Funding Corp. v Houston***, 44 ASD3d 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] *see also* ***Washington Mut. Bank v Valencia***, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]).

Here, plaintiff has established its entitlement to summary judgment against the answering defendant as such papers included a copy of the mortgage, a copy of the assignment of 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]).

In the defendants opposition and cross-motion four (4) claims are made seeking dismissal of the plaintiffs' motion for summary judgment and an order to compel discovery. The defendant initially argues that the plaintiff lacked standing necessary to support a motion for summary judgment. In opposition the plaintiff provided the unchallenged affidavit Edward Hyne. The affidavit established that the note was held by the plaintiffs' custodian since July 20, 2006. The plaintiffs lawful US Bank

possession of the note prior to the commencement of the action in and of itself supplies the requisite standing to proceed with the foreclosure. *See **Aurora v Taylor***, 25 NY3d 355 (2015.)

The defendant also attacks standing alleging that the mortgage assignments violated the requirements established in ***Bank of NY v Silverberg***, 86 AD3d 274 (2nd Dept 2011). The defendant suggestion that ***Silverberg*** is controlling is without merit. Further, the documentation provided by the plaintiff including the mortgage and its assignment to the plaintiff establish standing within the meaning of ***Silverberg.***

The defendant suggestion that the "late" assignment from Countrywide to the plaintiff via MERS raises an issue as to the validity of the transfer is likewise without merit as the plaintiff provided adequate proof of the Pooling and Servicing Agreement (PSA). Further, this department recently affirmed its position with regard to a defendants standing in attacking a PSA in ***Bank of America, NA v Patino***, 128 AD3d 994 (2d Dept 2015). In ***Bank of America, N.A.***, the Court noted, the defendant argued that the assignment of the mortgage to the plaintiff did not comply with the terms of the original lender's PSA. However, the Court ruled, the defendant did not have standing to assert noncompliance with the PSA (*see **Bank of [995] N.Y. Mellon v Gales***, 116 AD3d 723, 725, 982 NYS2d 911, citing ***Rajamin v Deutsche Bank Nat'l Trust Co.***, 757 F.3d 79, 87 [2d Cir]). The ***Bank of America v Patino*** decision cannot be ignored and as such the defendants claim attacking the transfer of the mortgage to the plaintiff trust must be denied as the defendant lacks standing.

The defendant also suggests that the plaintiff did not act in good faith during the foreclosure conference process. Initially, the Court notes that the defendant negotiated a modification agreement prior to commencement of this matter. The defendant has made only one (1) payment thereunder, and defaulted. Thereafter, the action was commenced and upon the filing of an RJI, the matter was referred to the mandatory conference part as required under CPLR §3408. The parties actively negotiated in the settlement part for fourteen (14) months. After the ninth conference, the matter was referred to the IAS as settlement negotiation have been exhausted. The fact that the parties did not agree on a modification that was acceptable to the defendant does not give rise in and of itself to a claim of bad faith. ***Wells Fargo N.A. v Van Dyke***, 101 AD3d 638 (1st Dept 2012).

The defendants cross-motion seeks this an order to compel discovery. The defendants motion in this regard is denied. Initially, as noted above, the plaintiff has produced sufficient uncontroverted documentation in support of plaintiffs' motion for summary judgment. The defendant's attack on the MERS assignment is mere conjecture. The defendant provides no extrinsic non- hearsay evidence supporting its position that discovery is necessary other than an allegation by defendants counsel that the plaintiff produced "blurry and reduced" copies of the loan documentation. The Court finds that the documentation supplied by the plaintiff are legible. The defendant has therefore failed to establish that the proposed discovery would produce "relevant evidence". ***T.D. Bank v Scotto***. 2013 NY. Misc Lexis 3188 citing ***Frith v Affordable Homes of Am.***, 253 AD2d 536 [2nd Dept 1998] and ***Bailey v New York City Tr. Auth.***, 270 AD2d 156 [2nd Dept 2000].

In light of the foregoing, the motion for summary judgment is granted against the defendants' cross-motion is denied in all respects and the defendant's answer is stricken. The 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 **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]).

ORDERED, further that this action is hereby referred to Andrew C. Ellsworth Esq., with an office located at 7 High Street, Suite 200 Huntington, NY 11743 Ph #631-271-5000, who is hereby appointed Referee to ascertain and compute the total amount due plaintiff for unpaid principal, accrued interest and all (other disbursements advanced as provided for by statute) mortgage costs and expenses other than attorneys' fees secured by the note and mortgage set forth in the complaint, and to examine and report as to whether the mortgaged premises can be sold in one parcel; and it is further

ORDERED, that plaintiff shall provide the Referee all required documents to compute within sixty (60) days from the date of this Order, and the Referee shall make his/her report no later than thirty (30) days thereafter and that, except for good cause shown, the plaintiff shall move for judgment no later than thirty (30) days of the date of the Referee's Report; and it is further

ORDERED, that by accepting this appointment the Referee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to section 36.2 (c) ("Disqualifications from appointment"), and section 36.2 (d) ("Limitations on appointments based upon compensation"); and it is further

ORDERED, that upon submission of the Referee's Report, plaintiff shall pay pursuant to CPLR §8003 (a) $250.00 to the Referee as compensation for his/her services, which sum may be recouped as a cost of litigation; and it is further

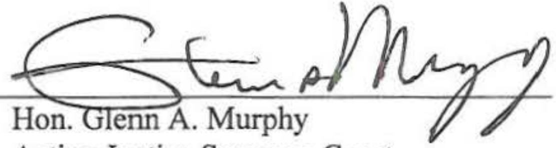
ORDERED, that the Referee is prohibited from accepting or retaining any funds for him/herself or paying funds to him/herself without compliance with Part 36 of the rules of the Chief Administrative Judge; and it is further

ORDERED, that the Referee appointed herein is subject to the requirements of Rule 36.2 (c) of the Chief Judge, and if the Referee is disqualified from receiving an appointment pursuant to the provision of that Rule, the Referee shall notify the appointing Justice forthwith; and it is further

ORDERED, plaintiff is to include in any proposed order for a judgment of foreclosure and sale language complying with the Suffolk County Local Rule for filing of the Foreclosure Action Surplus Monies form contained in Suffolk County Administrative Order #41-13; and it is further

ORDERED, that a copy of this order with Notice of Entry shall be served upon the designated Referee, the owner of the equity of redemption, any tenants named in this action and any other party entitled notice within twenty (20) days of entry and no less than thirty (30) days prior to any hearing before the Referee. The Referee shall not proceed to take evidence as provided herein without proof of such service, which must accompany any application for Final Judgment of Foreclosure and Sale.

Dated: DEC 22 2015



Hon. Glenn A. Murphy
Acting Justice Supreme Court

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**