

Quicken Loans, Inc. v Holmes
2016 NY Slip Op 30478(U)
February 26, 2016
Supreme Court, Suffolk County
Docket Number: 64101/14
Judge: Thomas F. Whelan
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ORIGINAL

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE: 12/4/15
SUBMIT DATE: 2/19/16
Mot. Seq. #001 - MG
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QUICKEN LOANS, INC., :
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 :
 Plaintiff, :
 :
 -against- :
 :
 GREGORY J. HOLMES, SR. a/k/a GREGORY J. :
 HOLMES, PEOPLE OF THE STATE OF NEW :
 YORK, BROOKHAVEN MEMORIAL :
 HOSPITAL, "JOHN DOE #1-5" and "JANE DOE :
 #1-5", said names being fictitious, it being the :
 intention of plaintiff to designate any and all :
 occupants, tenants, persons or corporations, if any, :
 having or claiming an interest in or lien upon the :
 premises being foreclosed herein, :
 :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 7 read on this motion for summary judgment and order of reference, among other things; Notice of Motion/Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers ; Answering papers 5-6; Reply papers 7; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that those portions of this motion (#001) by the plaintiff wherein it seeks accelerated judgments on its complaint, the identification and deletion of certain party defendants and an order of reference is considered under CPLR 3212, 3215 1003, 1018 and RPAPL § 1321 and are granted; and it is further

upheld
3/2/16
sd

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ORDERED that those portions of the instant motion wherein the plaintiff seeks an order substituting its purported assignee of the note and mortgage is considered under CPLR 1018 and is denied.

The plaintiff commenced this action to foreclose the lien of an April 1, 2013 mortgage given to it by defendant Holmes to secure a mortgage note in the principal amount of \$163,715.00 likewise given on April 1, 2013. The loan went into default in November of 2013 and the plaintiff commenced this action on May 29, 2014 to foreclose the lien of its mortgage.

In response to the plaintiff's service of its summons and complaint, defendant Holmes appeared herein by an answer prepared by his counsel. Therein, defendant Holmes raised several affirmative defenses, including, that the plaintiff, who was the original lender, lacked standing to prosecute its claims for foreclosure and sale. The remaining known defendants and two persons served with process as unknown defendants, failed to appear herein by service of an answer.

By the instant motion (#001), the plaintiff moves for summary judgment dismissing the affirmative defenses asserted in the answer of defendant Holmes and for summary judgment on its complaint against such defendant. The plaintiff further requests an order identifying the true names of the two individuals who were served with process as unknown defendants, the deletion of the remaining unknown defendants and a substitution of the plaintiff's assignee together with a caption amendment to reflect these changes. The plaintiff also seeks an award of default judgments against the defendants served with process who failed to appear herein by answer. Finally, the plaintiff requests the issuance of an order appointing a referee to compute amounts due under the terms of the note and mortgage.

The motion is opposed by an affirmation of counsel for defendant Holmes. Therein, defense counsel challenges the quality of the plaintiff's proof and contends that the moving papers failed to establish the plaintiff's entitlement to any of the relief requested against defendant Holmes. The plaintiff replied to this opposition by an affirmation of its counsel.

For the reasons stated, the motion (#001) by the plaintiff is granted to the extent set forth below.

Entitlement to summary judgment in favor of the foreclosing plaintiff is established, prima facie, by the plaintiff's production of the mortgage and the unpaid note, and evidence of the default in payment (*see Wells Fargo Bank, N.A. v Eroboho*, 127 AD3d 1176, 9 NYS2d 312 [2d Dept 2015]; *Wells Fargo Bank, N.A. v DeSouza*, 126 AD3d 965, 3 NYS2d 619 [2d Dept 2015]; *OneWest Bank, FSB v DiPilato*, 124 AD3d 735, 998 NYS2d 668 [2d Dept 2015]; *Wells Fargo Bank, N.A. v Ali*, 122 AD3d 726, 995 NYS2d 735 [2d Dept 2014]). Where the plaintiff's standing has been placed in issue by the defendant's answer, the plaintiff also must establish its standing as part of its prima facie showing (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 12 NYS3d 612 [2015];

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Loancare v Firshing, 130 AD3d 787, 2015 WL 4256095 [2d Dept 2015]; *HSBC Bank USA, N.A. v Baptiste*, 128 AD3d 77, 10 NYS2d 255 [2d Dept 2015]).

A foreclosing plaintiff has standing if it is the original lender or is otherwise either the holder or the assignee of the underlying note at the time that the action is commenced (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, *supra*; *Loancare v Firshing*, 130 AD3d 787, *supra*; *Emigrant Bank v Larizza*, 129 AD3d 904, 13 NYS3d 129 [2d Dept 2015]). In cases wherein the plaintiff is the original lender and its standing is challenged by the interposition of a due and timely standing defense, the plaintiff need not establish its ownership or holder status of the note and mortgage via a written assignment or physical delivery to it or to any of its custodial agents (*see Wells Fargo Bank, N.A. v Ali*, 122 AD3d 726, *supra*). Instead, the plaintiff need only establish that it alone, or in conjunction with a predecessor by merger or acquisition or a custodial agent, has maintained possession of the subject note and mortgage since the origination of the loan and that such possession continued through the commencement date of the foreclosure action (*see PNC Bank, Natl. Ass'n v Klein*, 125 AD3d 953, 5 NYS3d 439 [2d Dept 2015]; *Wells Fargo Bank, N.A. v Hudson*, 98 AD3d 576, 949 NYS2d 703 [2d Dept 2012]; *Bank of America, N.A. O'Donnell*, 47 Misc3d 1210[A], 16 NYS3d 791 [Sup. Ct. Suffolk County 2015]; *Suntrust Mtge. Inc. v Andriopoulos*, 39 Misc3d 1208[A], 971 NYS2d 75 [Sup. Ct. Suffolk County 2013]; *see also Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375, 1376, 8 NYS3d 669, 671 [3d Dept 2015]). In addition, the plaintiff's attachment of a duly indorsed mortgage note to its complaint or to the certificate of merit required by CPLR 3012-b, coupled with an affidavit in which it alleges that it had possession of the note prior to commencement of the action, has been held to constitute due proof of the plaintiff's standing to prosecute its claim for foreclosure and sale (*see Nationstar Mtge., LLC v Catizone*, 127 AD3d 1151, 9 NYS3d 315 [2015]).

Here, the moving papers of the plaintiff, who was the original lender of the monies loaned and secured by the subject mortgage, demonstrated, prima facie, the plaintiff's entitlement to the dismissal of the affirmative defenses asserted in the answer served by defendant, Holmes, including his standing defense, as lacking in merit (*see Nationstar Mtge., LLC v Catizone*, 127 AD3d 1151, 9 NYS3d 315 [2015]). The moving papers further established, prima facie, the plaintiff's entitlement to summary judgment on its complaint against this answering defendant (*see CPLR 3212, 3215, 1003 and RPAPL §1321; see also Wells Fargo Bank, N.A. v Erobobo*, 127 AD3d 1176, *supra*; *Wells Fargo Bank, N.A. v DeSouza*, 126 AD3d 965, *supra*; *Citimortgage, Inc. v Chow Ming Tung*, 126 AD3d 841, 7 NYS3d 147 [2d Dept 2015]; *OneWest Bank, FSB v DiPilato*, 124 AD3d 735, *supra*; *Wells Fargo Bank, N.A. v Ali*, 122 AD3d 726, *supra*; *Central Mtge. Co. v McClelland*, 119 AD3d 885, 991 NYS2d 87 [2d Dept 2014]).

The court rejects the defendant's challenges to the quality of the plaintiff's proof. That a loan servicer may testify on behalf of a foreclosing plaintiff is clear (*see Deutsche Bank Natl. Trust Co. v Abdan*, 131AD3d 1001, 16 NYS3d 459 [2d Dept 2015]; *Wells Fargo Bank, N.A. v Arias*, 121 AD3d 73, 995 NYS2d 118 [2d Dept 2014]; *HSBC Bank USA, Natl. Ass'n v Sage*, 112 AD3d 1126,

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977 NYS2d 446 [3d Dept 2013]; *Ames Capital Corp. v Ford*, 294 AD2d 134, 740 NYS2d 880 [2d Dept 2002]). Moreover, an assignee of the original lender may rely upon the business records of the original lender to establish its claims for recovery of amounts due from the debtor so long as the plaintiff establishes that it relied upon those records in the regular course of its business (*see Landmark Capital Inv., Inc. v Li-Shan Wang*, 94 AD3d 418, 941 NYS2d 144 [1st Dept 2012]). The plaintiff's affidavit of merit sufficiently established the plaintiff's entitlement to the summary judgment requested by it against answering defendant Holmes and no genuine questions of fact were raised in his opposing papers which would require a trial of this action. While defense counsel references an attached affidavit from the defendant which "refutes the allegation made by the plaintiff in its affidavit", no affidavit from defendant Holmes is attached to counsel's affirmation nor uploaded in the E-filing system maintained by the New York State Unified Court System.

The moving papers failed, however, to establish the plaintiff's entitlement to a substitution of itself as plaintiff by a successor-in-interest under two assignments of the mortgage. It is well settled that a plaintiff may continue to prosecute an action notwithstanding its transfer by assignment or otherwise of its interest in the subject matter of the action as the provisions of CPLR 1018, which govern substitution upon transfer of interests, are permissive rather than mandatory (*see GRP Loan, LLC v Taylor*, 95 AD3d 1172, 945 NYS2d 336 [2d Dept 2012]; *Wells Fargo Bank, N.A. v Wine*, 90 AD3d 1216, 935 NYS2d 664 [3d Dept 2011]; *CitiMortgage, Inc. v Rosenthal*, 88 AD3d 759, 931 NYS2d 638 [2d Dept 2011]; *Tarr v Delsener*, 70 AD3d 774, 895 NYS2d 168 [2d Dept 2010]; *Buywise Holding, LLC v Harris*, 31 AD3d 681, 821 NYS2d 213 [2d Dept 2006]). Where a note and mortgage "are validly assigned to a third party subsequent to the commencement of a foreclosure action", the assignee can continue the action in the name of the original plaintiff even in the absence of a formal substitution (*see Lincoln Sav. Bank, FSB v Wynn*, 7 AD3d 760, 776 NYS2d 908 [2d Dept 2004]), or it can undertake the steps necessary to obtain its formal substitution (*see Woori America Bank v Global Universal Group Ltd.*, 134 AD3d 699, 20 NYS3d 597 [2d Dept 2015]; *Brighton BK, LLC v Kurbatsky*, 131 AD3d 1000, 17 NYS3d 137 [2d Dept 2015]). Where, however, there is insufficient proof of the transfer of the note and mortgage to the proposed new plaintiff, the substitution should be denied (*see Flagstar Bank, FSB v Anderson*, 129 AD3d 665, 12 NYS3d 118 [2d Dept 2015]).

Here, the record contains insufficient evidence that the mortgage note was duly assigned or otherwise transferred to the Secretary of Housing and Development in November of 2014 and that such Secretary effected a valid transfer of both the mortgage and underlying debt to the proposed new plaintiff, U.S. Bank National Association as Trustee SW Remic Trust 2014-2. The written assignments of the subject mortgage, dated November 21 2014 and March 19, 2015, upon which the plaintiff relies to establish the proposed new plaintiff's entitlement to take over the prosecution of this action, do not include assignments of the note or the indebtedness it represents. The affidavit of the loan servicer failed to establish the valid transfers of the note as none of the records recited as attached to the affidavit were so attached and no evidence of indorsements of the notes to the assignees named in the written mortgage assignments was included in the

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plaintiff's submissions. The substitution of the plaintiff by U.S. Bank National Association as Trustee SW Remic Trust 2014-2 is thus denied.

Those portions of the instant motion wherein the plaintiff seeks an order identifying the true names of the first two unknown defendants as Brenda Holmes and Crystal Holmes and deleting the remaining unknown defendants listed in the caption and an amendment of the caption to reflect same are granted.

The moving papers further established the default in answering on the part of defendant, Gregory J. Holmes, and the newly identified defendants, none whom served answers to the plaintiff's complaint (*see HSBC Bank USA, N.A. v Alexander*, 124 AD3d 838, 4 NYS3d 47 [2d Dept 2015]; *U.S. Bank, N.A. v Razon*, 115 AD3d 739, 740, 981 NYS2d 571 [2d Dept 2014]). Accordingly, the defaults of all such defendants are hereby fixed and determined. Since the plaintiff has been awarded summary judgment against the sole answering defendant and has established a default in answering by the remaining defendants, the plaintiff is entitled to an order appointing a referee to compute amounts due under the subject note and mortgage (*see* RPAPL § 1321; *Bank of East Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]; *Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *LaSalle Bank, NA v Pace*, 31 Misc3d 627, 919 NYS2d 794 [Sup. Ct. Suffolk County 2011], *aff'd*, 100 AD3d 970, 955 NYS2d 161 [2d Dept 2012]).

Proposed Order of Reference, as modified by the court to reflect the insurance and terms of this memo decision and order, has been marked signed.

DATED: 2/26/16


THOMAS F. WHELAN, J.S.C.