

Green Tree Servicing LLC v Rossetti

2016 NY Slip Op 31856(U)

September 23, 2016

Supreme Court, Suffolk County

Docket Number: 14-66699

Judge: Arthur G. Pitts

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 12-16-15
MOTION DATE 2-4-16
ADJ. DATE _____
Mot. Seq. # 001 - MG
Mot. Seq. # 002 - XMD

-----X

GREEN TREE SERVICING LLC

Plaintiff,

- against -

MARIA ROSSETTI; AMERICAN EXPRESS BANK, FSB; ; "JOHN DOES" and "JANE DOES", said names being fictitious, parties intended being possible tenants or occupants of premises and corporations, other entities or persons who have, claim, or may claim, a lien against, or other interest in, the premises,

Defendants.

-----X

ROSICKI, ROSICKI & ASSOCATES, P.C.
Attorneys for Plaintiff
51 E Bethpage Road
Plainview, New York 11803

WESTERMAN BALL EDERER MILLER
ZUCKER & SHARFSTEIN, LLP
Attorneys for Defendant
MARIA ROSSETTI
1201 RXR Plaza
Uniondale, New York 11556

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/ ~~Order to Show Cause~~ by the plaintiff, dated November 16, 2015, and supporting papers (including Memorandum of Law dated _____); (2) Notice of Cross Motion by the defendant, dated January 27, 2016, supporting papers; (3) Affirmation in Opposition by the plaintiff, dated February 2, 2016, and supporting papers; (4) ~~Reply Affirmation by the~~, dated _____, and supporting papers; (5) ~~Other~~ _____ (and after hearing counsels' oral arguments in support of and opposed to the motion); it is

ORDERED that this motion (001) by the plaintiff for, *inter alia*, an order awarding it summary judgment against the answering defendant, fixing the defaults as against the remaining defendants joined by service of process, amending the caption and for an order appointing a referee to compute, is considered under CPLR 3212, 3215, 1003 and RPAPL §1321, and is granted to the extent indicated below, otherwise denied; and it is further

ORDERED that the cross motion (002) by defendant Maria Rossetti (defendant) for an order pursuant to CPLR 3212 granting summary judgment in its favor against plaintiff, dismissing the complaint in its entirety and, canceling the notice of pendency, is denied.

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This is an action to foreclose a mortgage on premises known as 218 Steward Avenue, West Babylon, New York. On April 7, 2006, defendants Maria Rossetti and Joseph Rossetti executed a fixed rate note in favor of GreenPoint Mortgage Funding, Inc. agreeing to pay the sum of \$324,000.00 at the yearly rate of 6.500 percent. On the same date, defendants Rossetti also executed a mortgage in the principal sum of \$324,000.00 on the subject property. The mortgage indicated GreenPoint Mortgage Funding, Inc. to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of GreenPoint Mortgage Funding, Inc. as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on May 10, 2006 in the Suffolk County Clerk's Office. Thereafter, the mortgage was transferred by an assignment of mortgage effective November 30, 2008 from MERS, as nominee of GreenPoint Mortgage Funding, Inc., to BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing LP. The assignment of mortgage was recorded on September 24, 2010 in the Suffolk County Clerk's Office. The foregoing assignment of mortgage was re-recorder on October 3, 2011. Subsequently, the note and mortgage were transferred by an assignment of mortgage dated June 6, 2013 from Bank of America, N.A. to Green Tree Servicing LLC, the plaintiff herein.

Bank of America Home Loans sent a notice of default dated June 7, 2010 to defendant stating that she had defaulted on her mortgage loan and that the amount past due was \$20,446.18. As a result of defendant's continuing default, plaintiff commenced this foreclosure action. Defendant interposed an answer with affirmative defenses and a counterclaim.

The Court's computerized records indicate that a foreclosure settlement conference was held on March 6, 2015 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.

Plaintiff now moves for summary judgment on its complaint contending that defendant breached her obligations under the terms of the note and mortgage by failing to tender monthly payments commencing with his December 1, 2009 installment and subsequent payments thereafter. In support of its motion, plaintiff submits among other things: the sworn affidavit of Leslie Grisham, foreclosure specialist of Green Tree Servicing LLC; the affidavit of possession of Chelsie Hall, assistant vice president of Ditech Financial LLC fka Green Tree Servicing LLC; the affirmation of Catherine Gran, Esq. in support of the motion; the pleadings; the note, mortgage and assignments of mortgage; a notice of default; a notice pursuant to RPAPL 1304; affidavits of service for the summons and complaint; an affidavit of service for the instant summary judgment motion upon defendants; and, a proposed order appointing a referee to compute. Defendant has submitted a cross motion.

A plaintiff in a mortgage foreclosure action establishes a prima facie case for summary judgment by submission of the mortgage, the note, bond or obligation, and evidence of default (*see, Valley Natl. Bank v Deutsch*, 88 AD3d 691, 930 NYS2d 477 [2d Dept 2011]; *Wells Fargo Bank v Das Karla*, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; *Washington Mut. Bank, F.A. v O'Connor*, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]). The burden then shifts to the defendant to demonstrate "the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff" (*Capstone Bus. Credit, LLC v Imperia Family Realty, LLC*, 70 AD3d 882, 883, 895 NYS2d 199 [2d Dept 2010], quoting *Mahopac Natl. Bank v Baisley*, 244

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AD2d 466, 467, 644 NYS2d 345 [2d Dept 1997]). It was thus incumbent upon the answering defendant to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's *prima facie* showing or in support of the affirmative defenses asserted in their answer or otherwise available to them (*see Flagstar Bank v Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Grogg Assocs. v South Rd. Assocs.*, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; *Wells Fargo Bank v Karla*, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]).

Where, as here, standing is put into issue by the defendant, the plaintiff is required to prove it has standing in order to be entitled to the relief requested (*see Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680, 954 NYS2d 551 [2d Dept 2011]; *US Bank, NA v Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; *Wells Fargo Bank Minn., NA v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). In a mortgage foreclosure action “[a] plaintiff has standing where it is the holder or assignee of both the subject mortgage and of the underlying note at the time the action is commenced” (*HSBC Bank USA v Hernandez*, 92 AD3d 843, 939 NYS2d 120 [2d Dept 2012]; *US Bank, NA v Collymore*, 68 AD3d at 753; *Countrywide Home Loans, Inc. v Gress*, 68 AD3d 709, 888 NYS2d 914 [2d Dept 2009]). Because “a mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation” (*Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909, 961 NYS2d 200 [2d Dept 2013] [internal citations omitted]), a mortgage passes as an incident of the note upon its physical delivery to the plaintiff. Holder status is established where the plaintiff is the special indorsee of the note or takes possession of a mortgage note that contains an indorsement in blank on the face thereof as the mortgage follows as incident thereto (*see* UCC § 3–202; § 3–204; § 9–203[g]). Here, the plaintiff established that it took possession of the note containing an indorsement in blank on an allonge attached to the note prior to the commencement of the action (*see US Bank N.A. v Dellarmo*, 94 AD3d 746, 942 NYS3d 122 [2d Dept 2012]; *citing Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674, 838 NYS2d 622 [2d Dept 2007]). The plaintiff thus established, *prima facie*, its has standing to prosecute this action.

It was thus incumbent upon the answering defendant to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's *prima facie* showing or in support of the affirmative defenses asserted in their answer or otherwise available to them (*see Flagstar Bank v Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Grogg Assocs. v South Rd. Assocs.*, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; *Wells Fargo Bank v Karla*, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]).

In her cross motion (002), defendant re-asserted her pleaded affirmative defense that the plaintiff lacks standing to prosecute its claims for foreclosure and sale. The defendant contends, *inter alia*, that there are gapping holes in the chain of title pertaining to the note and that the endorsements contained thereon are undated. However, the court finds that none of defendant's unsupported allegations give rise to questions of fact that implicate a lack of standing on the part of the plaintiff. Here, the proof submitted in support of plaintiff's application provided a delivery date of June 26, 2014, which predated the commencement of the action, as the date on which plaintiff obtained physical possession of the note, which also effected a transfer of the mortgage under the principal incident rule (*see Wells Fargo Bank, N.A. v Parker*, 125 AD3d 848, 5 NYS3d 130 [2d Dept 2015]; *Wells Fargo Bank, N.A. v Arias*, 121 AD3d 973; *PHH Mtge. Corp. v Israel*, 120 AD3d 1329, 992 NYS2d 355 [2d Dept 2014]). Furthermore, evidence of plaintiff's pre-commencement possession of the note is discernible from the attachment of a copy of the indorsed note to the summons and complaint at the time the action was commenced (*see Nationstar Mtge., LLC v Catizone*, 127 AD3d 1151,

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9 NYS3d 315 [2d Dept 2015]; *Bank of N.Y. Mellon Trust Co. NA v Sachar*, 95 AD3d 695, 943 NYS2d 893 [2d Dept 2012]; *cf.*, *Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680, 954 NYS2d 551 [2d Dept 2012]). As such, defendant's assertion that plaintiff lacks standing is rejected as being without merit.

Also rejected as unmeritorious is defendant's challenge to the plaintiff's compliance with the statutory notice requirements under RPAPL 1306. Here, plaintiff demonstrated compliance with RPAPL 1306 which requires the plaintiff to file the 90 day notice with the superintendent of financial services within three business days of the mailing of the notice. Plaintiff has submitted the "Proof of Filing Statement" from the New York State Banking Department pursuant to RPAPL 1306 which evinces "Green Tree Servicing LLC" as the filer and Rossetti as the borrower. The document also includes the following information: a reference to the loan dated April 7, 2006; the property address; "Step 1" mailing date (October 14, 2013); "Step 1" filing date (October 15, 2013); and a tracking number (NYS3415136). Moreover, the Proof of Filing Statement was filed with the superintendent of financial services within three business days of the mailing of the 90 day notice.

Likewise, the answering defendant's challenge to the sufficiency of the proof upon which the plaintiff relies to support its motion for summary judgment is without merit. Contrary to the answering defendant's contentions, the affidavit of the plaintiff's representative is legally sufficient and comports with the requirements of CPLR 3212 (*see*, *Deutsche Bank Natl. Trust Co. v Monica*, 131 AD3d 737, 15 NYS3d 863 [3d Dept 2015]; *Fleet Bank v Pine Knoll Corp.*, 290 AD2d 792, 736 NYS2d 737 [3d Dept 2002]; *see also*, *HSBC Bank USA, N.A. v Sage*, 112 AD3d 1126, 977 NYS2d 446 [3d Dept 2013]; *cf.*, *Citibank N.A. v Cabrera*, 130 AD3d 861, 14 NYS3d 420 [2d Dept 2015]; *US Bank N.A. v Madero*, 125 AD3d 757, 5 NYS3d 105 [2d Dept 2015]; *Cadle Co. v Gregory*, 293 AD2d 335, 739 NYS2d 825 [1st Dept 2002]). The answering defendant's assertion that plaintiff's affidavit is hearsay because the affiant did not personally service the subject account until after the defendant's default is also unavailing in light of the affiant's unchallenged assertion of personal knowledge of defendant's default (*Charter One Bank, FSB v Leone*, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007]). Moreover, defendant has offered no competent evidence to establish that she made timely payments of principal and interest subsequent to the date of default. The answering defendant did not deny having received the loan proceeds and having defaulted on the subject loan payments in her affidavit (*see Citibank, N.A. v Souto Geffen Co.*, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]; *see also Stern v Stern*, 87 AD2d 887, 449 NYS2d 534 [2d Dept 1982]). In instances where a defendant fails to oppose a motion for summary judgment, the facts, as alleged in the moving papers, may be deemed admitted and there is, in effect, a concession that no question of fact exists (*see Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 369 NYS2d 667 [1975]; *see also Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; *Argent Mtge. Co., LLC v Mentasana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Additionally, "uncontradicted facts are deemed admitted" (*Tortorello v Carlin*, 260 AD2d 201, 206, 688 NYS2d 64 [1st Dept 1999] [internal quotation marks and citations omitted]). Thus, even when considered in the light favorable to the answering defendant, her application is insufficient to raise any genuine question of fact as to the sufficiency of plaintiff's proof relative to defendant's default (*see Charter One Bank, FSB v Leone*, 45 AD3d 958).

Lastly, contrary to the answering defendants' contentions, the instant motion for summary judgment made by the plaintiff imposed an automatic stay of discovery (*see*, CPLR 3214 [b]; *Schiff v Sallah Law Firm, P.C.*, 128 AD3d 668, 7 NYS3d 587 [2d Dept 2015]). In any event, the answering defendant failed


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to sufficiently demonstrate that she made reasonable attempts to discover the facts which would give rise to a triable issue of fact or that further discovery might lead to relevant evidence (*see* CPLR 3212 [f]; *Seaway Capital Corp. v 500 Sterling Realty Corp.*, 94 AD3d 856, 941 NYS2d 871 [2d Dept 2012]; *Swedbank, AB, N.Y. Branch v Hale Ave. Borrower, LLC*, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]; *JP Morgan Chase Bank v Agnello, N.A.*, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]). Mere hope and speculation that additional discovery might yield evidence sufficient to raise a triable issue of fact is not a basis for denying summary judgment (*see Lee v T.F. DeMilo Corp.*, 29 AD3d 867, 868, 815 NYS2d 700 [2d Dept 2006]; *Sasson v Setina Mfg. Co., Inc.*, 26 AD3d 487, 488, 810 NYS2d 500 [2d Dept 2006]).

Based upon the foregoing, the motion for summary judgment is granted against the answering defendants. That branch of the motion seeking to fix the defaults as against the remaining defendant who have not answered or appeared herein is granted. 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 Green Tree Serv. v Cary*, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]; *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]). Defendant's cross motion is denied in its entirety.

The proposed order appointing a referee to compute pursuant to RPAPL 1321 is signed simultaneously herewith as modified by the court.

Dated: Riverhead, New York
September 23, 2016


ARTHUR G. PITTS, J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION