

Bank of N.Y. Mellon v Dutan
2016 NY Slip Op 32101(U)
September 20, 2016
Supreme Court, Queens County
Docket Number: 33708/2009
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

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THE BANK OF NEW YORK MELLON, FKA THE
BANK OF NEW OYRK AS SUCCESSOR TO
JPMORGAN CHASE BANK, N.A. AS TRUSTEE
OF BSALTA 2005-09,

Plaintiff,

- against -

MANUEL DUTAN, BLANCA DUTAN, ANA S.
JORGE, ASTORIA FEDERAL SAVINGS AND
LOAN ASSOCIATION SUCCESSOR BY MERGER
TO THE LONG ISLAND SAVINGS BANK OF
CENTEREACH, FSB, MAXIMO A. JORGE,
MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC. AS NOMINEE FOR
COUNTRYWIDE HOME LOANS, INC., MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, INC.
AS NOMINEE FOR GREENPOINT MORTGAGE
FUNDING, INC., NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, NEW YORK
CITY PARKING VIOLATIONS BUREAU, NEW
YORK CITY TRANSIT ADJUDICATION BUREAU,
NEW YORK HOSPITAL MEDICAL CENTER OF
QUEENS, NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE, UNITED STATES OF
AMERICA ACTING THROUGH THE IRS,

JOHN DOE (Said name being fictitious,
it being the intention of Plaintiff to
designate any and all occupants of
premises being foreclosed herein, and
any parties, corporations or entities,
if any, having or claiming an interest
or lien upon the mortgaged premises.),

Defendants.

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Index No.: 33708/2009

Motion Date: 9/12/16

Motion No.: 11

Motion Seq.: 2

The following papers numbered 1 to 15 read on this motion by plaintiff for an Order restoring the instant case to active status, and upon restoration, granting plaintiff summary judgment, striking defendants Manuel Dutan and Blanca Dutan's answer, amending the caption, deeming all non-appearing and non-answering defendants in default, appointing a referee, and awarding plaintiff costs of this motion; and on this cross-motion by defendants Manuel Dutan and Blanca Dutan for an order denying plaintiff's motion and dismissing this action:

	<u>Papers Numbered</u>
Notice of Motion-Affidavits-Exhibits.....	1 - 6
Notice of Cross-Motion-Affirmation-Exhibits.....	7 - 10
Reply Affirmation-Exhibit.....	11 - 13
Defendants' Reply Affirmation.....	14 - 15 ¹

This is an action to foreclose a mortgage encumbering property located at 94-10 40th Road, Elmhurst, New York 11373.

Based on the record before the Court, on July 19, 2005, defendants Manuel Dutan and Blanca Dutan (collectively hereinafter defendants) obtained a loan from Countrywide Home Loans, Inc. in the principal amount of \$667,500, secured by a mortgage encumbering the subject premises. Plaintiff asserts that it is the holder of the note and mortgage, and defendants defaulted pursuant to the terms of the note and mortgage when defendants failed to make the monthly mortgage payments beginning on February 1, 2009 and continuing thereafter.

Plaintiff subsequently accelerated the mortgage and commenced this action by filing a lis pendens and summons and complaint on December 16, 2009. Plaintiff submits affidavits of service on all defendants, including occupants Victor Munoz, Maria Lopez, and Gladys Calderon. Defendant borrowers filed a notice of appearance, verified answer, set-offs and counterclaims on August 29, 2012. All other defendants are in default.

Settlement conferences pursuant to CPLR 3408 were held from February 18, 2011 until January 9, 2012. On January 9, 2012, this matter was released from the settlement conference part, permitting plaintiff to proceed with the action. A status conference was held on April 29, 2015. Plaintiff was directed to file a Foreclosure Affirmation/Certificate of Merit and an

¹ Although defendants' reply was served on September 16, 2016, which was after the return date, this Court will consider the reply herein.

application seeking an Order of Reference by June 10, 2015. A final status conference was held on June 10, 2015. Plaintiff appeared, but failed to comply with the terms of the Order dated April 29, 2015. Accordingly, the matter was dismissed without prejudice.

Plaintiff now seeks to restore this matter on the grounds that at the final compliance conference, plaintiff was awaiting required documents necessary to proceed did not abandon this action. Plaintiff's counsel, Megan K. McNamara, Esq., contends that pursuant to CPLR 3404, plaintiff has timely moved to restore this action. Counsel further contends, inter alia, that plaintiff did not miss any appearances and was diligently preparing its summary judgment motion.

In opposition to that branch of plaintiff's motion to restore this action, defendants' counsel, Phionah N. Brown, Esq., contends that plaintiff failed to demonstrate sufficient cause or a reasonable excuse for its delay in proceeding with this action.

Upon review and consideration of that branch of plaintiff's motion to restore this matter, defendants' cross-motion and affirmation in opposition, and plaintiff's reply thereto, this Court finds that this action is restored. However, this matter was released from the foreclosure settlement conference part on January 9, 2012. Plaintiff failed to take any steps to proceed with this action until the filing of this instant motion. This Court finds it would not be fair to charge defendants interest and penalties during the period of the over four year delay (see Dayan v York, 51 AD3d 964 [2d Dept. 2004]; US Bank Natl. Assn. v Gioia, 42 Misc. 3d 947 {Sup. Ct. Queens County 2013}; U.S. Bank, N.A. v Shinaba, 40 Misc 3d 1239[A] [Sup. Ct. Bronx Co. 2013]; BAC Home Loans Servicing v Westervelt, 29 Misc 3d 1224[A][Sup Ct. Dutchess Co. 2000]). Therefore, the interest and late fees shall be tolled from the date of the last foreclosure conference on January 9, 2012 through the date that this motion was served on June 8, 2016.

Regarding that branch of plaintiff's motion for an Order of Reference, 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 American Airlines Federal Credit Union v Mohamed, 117 AD3d [2d Dept. 2014]; TD Bank, N.A. v 126 Spruce Street, LLC, 117 AD3d 716 [2d Dept. 2014]; Citibank, N.A. v Van Brunt Properties, LLC, 95 AD3d [2d Dept. 2012]). Upon such a showing, the burden shifts to the defendant to produce evidence in admissible form sufficient to raise a material issue of fact requiring a trial.

In support of the motion, plaintiff submits the affidavit of Daphne Proctor, a Document Execution Specialist for Nationstar Mortgage LLC (Nationstar), the servicer of the subject mortgage loan. Ms. Proctor states that based upon a personal review of Nationstar's business records, which include the records of Countrywide Home Loans, Inc., the prior servicer, Nationstar, as agent for plaintiff, has physical possession of the original Note endorsed to plaintiff. She affirms that defendants are in default under the terms and conditions of the note and mortgage because the February 1, 2009 payment and subsequent payments were not made. Ms. Proctor further affirms that a default notice was sent to defendants on March 19, 2009.

Plaintiff also submits an affidavit of physical delivery of note from James Francis Bluemle, an Assistant Vice President of Bank of America, N.A., successor by merger to BAC Home Loans Servicing, L.P., the servicing agent for plaintiff. He affirms that he has personally reviewed the business records maintained and kept by Bank of America, N.A. and the records of Countrywide Home Loans, Inc. Mr. Bluemle affirms that the note was physically delivered to plaintiff from Countrywide Home Loans, Inc. on July 19, 2005. An allonge, duly executed and attached to the original Note, assigned all rights, title and interest in the Note to plaintiff. An assignment of mortgage was then executed on December 10, 2009.

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, the affidavits of merit evidencing defendants' failure to make the contractually required loan payments.

Defendants' counsel opposes the motion and cross-moves to dismiss the action. Counsel contends that plaintiff failed to demonstrate that it complied with Paragraph 22(b)(3) of the Mortgage, which is a prerequisite to commencing a foreclosure action. Counsel also contends that plaintiff failed to demonstrate compliance with RPAPL 1304, that plaintiff failed to respond to plaintiff's discovery requests, and that the notice of pendency has expired.

Paragraph 22 of the mortgage requires plaintiff to give defendant notice of the default prior to demanding payment of the loan in full. Paragraph 15 of the mortgage provides that any notice sent to the borrower is considered given when mailed by first class mail or when actually delivered if sent by other means. Ms. Proctor affirms that the notice of default was mailed on March 19, 2009. This Court finds that plaintiff's evidence

established appropriate mailing of the required notice, which created a rebuttable presumption that the intended recipients actually received it (see Countrywide Home Loans v Brown, 305 AD2d 626 [2d Dept. 2003]). Here, defendants do not submit an affidavit denying receipt of the notice of default. Accordingly, defendants have failed to rebut the presumption of delivery.

The remainder of defendants' opposition and cross-motion fails to raise a triable issue of fact. Plaintiff was not required to send defendants a 90 day pre-foreclosure notice as this matter was commenced prior to the January 14, 2010 effective date or RPAPL 1304. Moreover, plaintiff may file a new notice of pendency despite cancellation of a previous one (see Wasserman v Harriman, 234 AD2d 596 [2d Dept. 1996]). As defendants failed to raise a material issue of fact, plaintiff is entitled to the relief sought (see Baron Assoc., LLC v Garcia Group Enters., Inc., 96 AD3d 793 [2d Dept. 2012]; Wells Fargo Bank Minn., Natl. Assn. v Perez, 41 AD3d 590 [2d Dept. 2007], lv dismissed 10 NY3d 791 [2008]).

Accordingly, based on the reasons set forth above, plaintiff's motion to restore is granted. The interest and late fees shall be tolled from the date of the foreclosure conference on January 9, 2012 through the date that this motion was served on June 8, 2016. Upon restoration, plaintiff's motion for summary judgment is granted and defendants' answer is stricken. All non-appearing and non-answering defendants are deemed to be in default. Plaintiff's application for the appointment of a referee to compute the amounts due under the subject mortgage is also granted and the caption shall be amended as proposed. Plaintiff's request for costs of the motion will be determined in the Judgment of Foreclosure and Sale. Defendants' cross-motion is denied.

Order of Reference signed contemporaneously herewith.

Dated: September 20, 2016
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.