Ditech Fin. LLC v Naidu
2016 NY Slip Op 32110(U)
September 9, 2016
Supreme Court, Queens County
Docket Number: 700387/2016
Judge: Robert J. McDonald

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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DITECH FINANCIAL LLC f/k/a GREEN TREE SERVICING LLC,

Plaintiff,

- against -

SANTHANA KUMAR NATARAJA NAIDU; CITIMORTGAGE, INC.; and "JOHN DOE #1" through "JOHN DOE #12," the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises being foreclosed herein,

Defendants.

Index No.: 700387/2016

Motion Date: 8/25/16

Motion No.: 38

Motion Seq.: 1

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The following electronically filed documents numbered 18 to 48 read on this motion by defendant SANTHANA KUMAR NATARAJA NAIDU (defendant) for an Order dismissing the action pursuant to CPLR 3211(a)(5); and on this cross-motion by plaintiff for an Order denying the motion, appointing a Referee, striking defendant's answer, and amending the caption:

	Papers Numbered
Notice of Motion-Affidavits-Exhibits.....	EF 18 - 27
Notice of Cross-Motion-Affidavits-Exhibits.....	EF 28 - 43
Opposition to Cross-Motion.....	EF 44 - 48

This foreclosure action pertains to property located at 13729 Laburnum Ave., Flushing, NY 11355.

Based on the record before the Court, on April 1, 2003, defendant obtained a loan from America's Wholesale Lender in the principal amount of $14,148.68, secured by a mortgage on the subject premises. A Consolidation, Extension Modification

Agreement (CEMA) was executed on March 20, 2006 in the amount of $296,000. Plaintiff asserts that it is the holder of the note and mortgage, and defendant defaulted pursuant to the terms of the note and mortgage by failing to make the monthly mortgage payments beginning on February 1, 2009 and continuing thereafter.

BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing LP commenced an action to foreclose a mortgage securing the CEMA dated March 20, 2006 by filing a lis pendens, summons and complaint. On February 24, 2014, a stipulation to discontinue the matter was filed.

Plaintiff then commenced this action to foreclose on the same CEMA by filing a lis pendens, summons and complaint on January 13, 2016. Defendant joined issue by service of an answer dated January 29, 206. All other defendants are in default.

This matter was released from the residential foreclosure settlement conference part on March 30, 2016. Defendant now moves to dismiss the action on the ground that the statute of limitations expired prior to commencement of this action. Plaintiff cross-moves for an Order of Reference.

On a motion pursuant to CPLR 3211(a)(5)to dismiss a complaint as barred by the applicable statute of limitations, the moving defendant must establish, prima facie, that the time in which to commence the action has expired (Kitty Jie Yuan v 2368 W. 12th St., LLC, 119 AD3d 674 [2d Dept. 2014]). Once a mortgage debt is accelerated, the borrowers' right and obligation to make monthly installments ceases, all sums become immediately due and payable, and the six-year statute of limitations begins to run on the entire mortgage debt (see CPLR 213[4]; EMC Mtge. Corp. v Patella, 279 AD2d 604 [2d Dept. 2001]; Federal Natl. Mtge. Assn. v Mebane, 208 AD2d 892 [2d Dept. 1994]). A lender may revoke its election to accelerate the mortgage through an affirmative act of revocation occurring during the six-year statute of limitations (see EMC Mtge. Corp. v Patella, 279 AD2d 604 [2d Dept. 2001]).

Here, the debt was accelerated upon commencement of the first action on July 28, 2009. Defendant contends, therefore, that the statute of limitations expired on July 28, 2015. Defendant further contends that the voluntary discontinuance was not an affirmative act by the lender to revoke its election to accelerate (citing Federal Natl. Mtge. Assn. v Mebane, 208 AD2d 892 [2d Dept. 1994]). Thus, this action is time-barred.

In opposition, plaintiff contends that this action is timely because the stipulation to discontinue the prior action acted as a deceleration of the debt. Plaintiff argues that the prior action was not unilaterally discontinued by plaintiff. As such, there was an affirmative action taken by plaintiff that was confirmed and accepted when defendant signed the stipulation.

Upon a review of the motion, cross-motion, opposition and reply thereto, this Court finds that the stipulation discontinuing the prior action without prejudice acted as a deceleration of the debt. Although a court dismissal of a prior action for failure to prosecute, failure to appear at a conference, or lack of personal jurisdiction or the acceptance of additional payments after acceleration do not constitute an act of revocation, (see e.g. Clayton Natl., Inc. v Guldi, 307 AD2d 982 [2d Dept. 2003]; Federal Nat. Mortg. Ass'n v Mebane, 208 AD2d 892 [2d Dept. 1994]), here the plaintiff and defendant executed a stipulation providing that the action was dismissed without prejudice. "When an action is discontinued, it is as if had never been; everything done in the action is annulled and all prior orders in the case are nullified" (Newman v Newaman, 245 AD2d 353, 354 [2d Dept. 1997]). Thus, the election to accelerate contained in the complaint was nullified when the stipulation was executed. Accordingly, this Court finds that discontinuing the prior foreclosure action was an affirmative act of revocation (see 4 Cosgrove 950 Corp. v Deutsche Bank Nat. Trust Co., 2016 WL 2839341 [Sup. Ct., New York Cnty. 2016][finding that withdrawing the prior foreclosure action is an act of revocation]. Thus, the statute of limitations has not run, and plaintiff's action is timely.

Turning to plaintiff's cross-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 cross-motion, plaintiff submits the affidavit of Emily Johnson, an AVP for plaintiff. Ms. Johnson states that based upon a personal review of plaintiff's business records, plaintiff is the holder of the note and mortgage, and

the note was indorsed in blank prior to the commencement of this action. She affirms that defendant is 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. Johnson affirms that a default notice was sent to defendant via regular mail on August 28, 2015. Additionally, 90 day pre-foreclosure notices were sent by regular and certified mail to defendant on March 26, 2015.

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, and Ms. Johnson's affidavit evidencing defendant's failure to make the contractually required loan payments.

In opposition, defendant contends that the affidavit of Ms. Johnson is inadmissible and insufficient to establish plaintiff's prima facie case; plaintiff's notice of default is improper; plaintiff failed to establish strict compliance with RPAPL 1306; and plaintiff lacks standing.

This Court finds that Ms. Johnson properly laid the foundation for her affidavit to qualify the records that she relied on as business records. "[A] witness who is familiar with the practices of a company that produced the records at issue, and who generally relies upon such records, may have the requisite knowledge to meet the CPLR requirements for the admission of a business record, provided that the witness can also attest that (1) the record was made in the regular course of business; (2) it was the regular course of business to make such record; and (3) the record was made contemporaneously with the relevant event, thereby assuring its reliability" (People v Brown, 13 NY3d 332, 341 [2009]). The factual allegations set forth in Ms. Johnson's affidavit, including her personal review of the records, sufficiently established the admissibility of her statements under the business records exception to the hearsay rule (see Deutsche Bank Natl. Trust Co. v Monica, 131 AD3d 737 [3d Dept. 2015]; Portfolio Recovery Assoc., LLC v Lall, 127 AD3d 576 [1st Dept. 2015]; Merrill Lynch Bus. Fin. Servs. Inc. v Trataros Constr., Inc., 30 AD3d 336 [1st Dept. 2006]).

Next, defendant contends that plaintiff failed to satisfy a condition precedent by failing to provide notice as required by the terms of the subject mortgage. Ms. Johnson affirms that a notice of default was mailed via first class mail to defendant's last known mailing address in accordance with mortgage paragraph 22 and is dated August 28, 2015. A copy of the notice of default is attached to the motion papers and identifies the amount

required to cure the default and the deadline to submit payment. Ms. Johnson's affidavit is sufficient to demonstrate compliance with the terms of the note and mortgage (see Indymac Bank, F.S.B. v Kamen, 68 AD3d 931 [2d Dept. 2009]). Defendant's mere denial is insufficient to establish that the notice of default was not mailed to defendant.

Defendant also contends that plaintiff failed to comply with RPAPL 1306 by failing to file with the superintendent of financial services the Proof of Filing Statement within three days of the mailing. Here, the 90 day pre-foreclosure notice was sent on March 26, 2015. Thus, filing was to be completed by March 29, 2015. The filing, however, was completed on March 30, 2015. Defendant argues that such fails to establish strict compliance with RPAPL 1306, and thus, the action must be dismissed for failing to comply with the mandatory condition precedent (see TD Bank, N.A. v Oz Leroy, 121 AD3d 1256 [3d Dept. 2014]). RPAPL 1306 provides that lenders "shall file [the Proof of Filing Statement] with the superintendent of financial services (superintendent) within three business days of the mailing of the notice". As March 29, 2015 was a Sunday, plaintiff did strictly comply with RPAPL 1306 by filing the notice within three business days of the mailing of the notice.

Lastly, defendant contests plaintiff's standing. "Where, as here, standing is put into issue by a defendant, the plaintiff must prove its standing in order to be entitled to relief" (Aurora Loan Services, LLC v. Taylor, 114 AD3d 627 [2d Dept. 2014][internal citations omitted]; see Midfirst Bank v. Agho, 121 A.D.3d 343 [2d Dept. 2014]; U.S. Bank, N.A. v Collymore, 68 AD3d 752 [2d Dept. 2009]). A plaintiff has standing where it is both the holder or assignee of the subject mortgage and the underlying note at the time the action is commenced (see Aurora Loan Services, LLC v. Taylor, 114 AD3d 627 [2d Dept. 2014]; Deutsche Bank Natl. Trust Co. v Whalen, 107 AD3d 931 [2d Dept. 2013]; Bank of N.Y. v Silverberg, 86 AD3d 274 [2d Dept. 2011]).

This Court finds that the evidence submitted by plaintiff, including Ms. Johnson's affidavit stating that plaintiff was in possession of note indorsed in blank prior to commencement of this action, is sufficient to establish standing to commence the action (see Aurora Loan Servs., LLC v Taylor, 114 AD3d 627 [2d Dept. 2014]; Bank of N.Y. v Silverberg, 86 AD3d 274 [2d Dept. 2011]; U.S. Bank, N.A. v Collymore, 68 AD3d 752 [2d Dept. 2009]). "Where a note is transferred, a mortgage securing the debt passes as an incident to the note" (Deutsche Bank Natl. Trust Co. v Spanos, 102 AD3d 909 [2d Dept. 2013]). Therefore, "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" (HSBC Bank USA v Hernandez, 92 AD3d 843 [2d Dept. 2012]). Since the mortgage passes with the debt that is evidenced by the note as an inseparable incident thereto, plaintiff established its standing to commence the within action (see US Bank Natl. Assn. v Cange, 96 AD3d 825 [2d Dept. 2012]; U.S. Bank, NA v Sharif, 89 AD3d 723[2d Dept 2011]). Accordingly, as plaintiff has demonstrated its standing by demonstrating that it was the holder of, and in possession of, the note at the time this action was commenced, any challenge to the assignments is insufficient to demonstrate that plaintiff lacks standing.

The remainder of defendant's opposition to the cross-motion is insufficient to raise a question of fact. As defendant has failed to raise a material issue of fact in opposition, 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]).

Therefore, defendant's motion is denied and plaintiff's cross-motion for summary judgment is granted. Plaintiff's branches of its application for a default judgment against the remaining defaulting defendants and for the appointment of a referee to compute the amounts due under the subject mortgage are also granted. The submissions further reflect that plaintiff is entitled to amend the caption.

Order of Reference signed simultaneously herewith.

Dated: September 9, 2016
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.