

U.S. Bank N.A. v Cambardella
2016 NY Slip Op 32576(U)
December 15, 2016
Supreme Court, Suffolk County
Docket Number: 066089/2014
Judge: C. Randall Hinrichs
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**SUPREME COURT - STATE OF NEW YORK
IAS PART 49 - SUFFOLK COUNTY**

**PRESENT: Hon. C. Randall Hinrichs
Justice of the Supreme Court**

Motion Date: 002: 11-24-15 / 003: 11-27-16 / 004: 8-29-16

Adjourned Date: 8-29-16

Motion Sequence #: 002: MotD / 003: XMotD / 004: MD

U.S. BANK NATIONAL ASSOCIATION, AS
TRUSTEE FOR THE HOLDERS OF THE SPECIALTY
UNDERWRITING AND RESIDENTIAL FINANCE
TRUST, MORTGAGE LOAN ASSET-BACKED
CERTIFICATES, SERIES 2006-BC5,

DAVIDSON FINK LLP
Attorneys for Plaintiff
28 East Main Street
Rochester, New York 14614

Plaintiff,

CHARLES WALLSHEIN, ESQ.
Attorney for Defendant Cambardella
115 Broad Hollow Road, Suite 350
Melville, New York 11747

-against-

MARIO CAMBARDELLA; RICHARD VOLPE; "JOHN
DOE" and "MARY DOE" (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 or lien upon the premises being
foreclosed herein.),

ROBERT J. HAYDEN, ESQ.
Attorney for Defendant Volpe
1631 Deer Park Avenue
Deer Park, New York 11729

Defendants.

Upon consideration of the notice of motion for an order granting summary judgment and other relief in favor of the plaintiff U.S. Bank, National Association, as Trustee For The Holders of the Specialty Underwriting And Residential Finance Trust, Mortgage Loan Asset-Backed Certificates, Series 2006-BC5 ["the plaintiff"], the supporting affidavits, affirmations, and exhibits (motion sequence 002); the notice of cross-motion for an order denying the plaintiff's motion for summary judgment as insufficient and premature, compelling discovery, and for summary judgment striking the complaint on behalf of the defendant Mario Cambardella ["the defendant"], the cross moving affirmation, affidavit, and exhibits (motion sequence 003), the plaintiff's affirmation in opposition to the cross-motion and in further support of plaintiff's summary judgment motion, the defendant's separate motion for summary judgment for failure to comply with RPAPL §1304, the supporting affirmation, affidavit, and exhibits (motion sequence 004), and the plaintiff's affirmation in opposition, it is now

ORDERED that motion sequences 002, 003, and 004 are considered together for purposes of this determination; and it is further

ORDERED that the motion (seq. 002), by the plaintiff for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the answering defendant, striking his answer and dismissing the affirmative defenses set forth therein; (2) pursuant to RPAPL § 1321 appointing a referee to (a) compute amounts due under the subject mortgage; and (b) examine and report

whether the subject premises should be sold in one parcel or multiple parcels; (3) amending the caption; and (4) amending the Loan Modification and Unpaid Principal Balance recited in Schedule C of Plaintiff's Verified Summons and Complaint *nunc pro tunc*, is granted in part and denied in part, in accordance herewith; and it is further

ORDERED that so much of the plaintiff's motion for an order awarding it summary judgment and appointing a referee to ascertain and compute is denied, with leave to renew upon the completion of discovery, within 120 days of the entry date of this order, not to be extended without leave of Court, and it is further

ORDERED that upon the plaintiff's failure to renew its motion for summary judgment and an order of reference in accordance herewith, the plaintiff shall file a note of issue within 120 days of the entry date of this order; and it is further

ORDERED that so much of the plaintiff's motion for an order dismissing the affirmative defenses in the answer is granted with the exception of the affirmative defense of lack of standing to maintain the action, and as to that defense the plaintiff's motion is denied; and it is further

ORDERED that so much of the plaintiff's motion for an order amending the caption and the Loan Modification and Unpaid Principal Balance recited in Schedule C of Plaintiff's Verified Summons and Complaint *nunc pro tunc* is granted; and it is further

ORDERED that the defendant's cross-motion (003) for an order denying plaintiff's summary judgment motion, compelling discovery, and granting defendant summary judgment and striking the complaint is granted in part and denied in part in accordance herewith; and it is further

ORDERED that so much of the defendant's cross-motion seeking an order compelling discovery is granted to the extent that the attorneys for the parties are directed to appear in Part 49 in the Cromarty Court Building, 4th Floor, Courtroom 16, Riverhead, New York on **January 18, 2017 at 9:30 a.m.** to schedule limited discovery on the issue of the plaintiff's standing to commence the action, and the defendant's cross-motion is otherwise denied; and it is further

ORDERED that the defendant's separate motion (004) for an order granting summary judgment in the defendant's favor and dismissing the complaint for failure to comply with RPAPL §1304 is denied; and it is further

ORDERED that the plaintiff is directed to serve a copy of this order amending the caption and Schedule C upon the Calendar Clerk of this Court; and it is further

ORDERED that the plaintiff is directed to serve a copy of this order with notice of entry upon all parties who have appeared herein and not waived further notice pursuant to CPLR 2103(b)(1), (2) or (3) within thirty (30) days of the date herein, and to promptly file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on real property situate in Suffolk County, New York. On September 25, 2006, the defendant executed a note in favor of Wilmington Finance, Inc. ["Wilmington"], in the principal amount of \$560,000.00. To secure the note, on the same date, the defendant gave Wilmington a mortgage on the property. The defendants do not deny that a valid mortgage secures a valid indebtedness on the subject property. (Defendant's affirmation in opposition and in support of cross-motion, ¶ 4).

The defendant entered into a loan modification agreement with Bank of America, N.A. ["BOA"], on September 21, 2012. The defendant defaulted on the note and mortgage and the loan modification agreement by failing to make monthly payments of principal and interest which had come due on July 1, 2013. After the defendant failed to cure the default in payment, the plaintiff commenced the instant action by the filing of a summons and complaint on July 31, 2014. Issue was joined by the interposition of the defendant's answer dated September 5, 2014.

By his answer, the defendant generally denied the material allegations set forth in the complaint, and asserted ten affirmative defenses including that the plaintiff lacks standing to commence the action, and that the plaintiff failed to strictly comply with statutory and contractual notice requirements. The defendant's opposition to the plaintiff's summary judgment motion and the defendant's cross-motion is limited to asserting plaintiff's lack of standing to commence the action and requesting an order compelling the plaintiff to respond to the defendant's pre-motion discovery demands. In a separate motion (004), the defendant moves for summary judgment on the basis that the plaintiff has failed to strictly comply with RPAPL §1304.

Here, the Bank established, prima facie, that it has standing to prosecute this action by demonstrating that it was in physical possession of the note, indorsed in blank, which note was annexed to the complaint at the time the action was commenced (*see Aurora Loan Servs., LLC v. Taylor*, 25 N.Y.3d 355, 362, 12 N.Y.S.3d 612, 34 N.E.3d 363; *Deutsche Bank Natl. Trust Co. v. Leigh*, 137 A.D.3d 841, 842, 28 N.Y.S.3d 86; *Emigrant Bank v. Larizza*, 129 A.D.3d 904, 905, 13 N.Y.S.3d 129; *JPMorgan Chase Bank, Nat. Ass'n v. Weinberger*, 142 A.D.3d 643, 645, 37 N.Y.S.3d 286, 288-89).

In opposition, the defendant has not addressed any of the other affirmative defenses asserted in the answer excepting the standing defense and, by separate motion, the plaintiff's failure to strictly comply with RPAPL §1304. Therefore, as to the remaining affirmative defenses asserted in the answer, where a defendant fails to oppose some or all matters advanced on a motion for summary judgment, the facts as alleged in the movant's papers may be deemed admitted as there is, in effect, a concession that no question of fact exists (*see Kuehne & Nagel, Inc. v. Baiden*, 36 N.Y.2d 539, 369 N.Y.S.2d 667, 330 N.E.2d 624; *see also Madeline D'Anthony Enter., Inc. v. Sokolowsky*, 101 A.D.3d 606, 957 N.Y.S.2d 88; *Argent Mtge. Co., LLC v. Mentenana*, 79 A.D.3d 1079, 915 N.Y.S.2d 59).

As to the standing issue, in opposition the defendant maintains that the plaintiff can not prove that it took assignment of the note by written assignment or that the plaintiff took physical delivery of the note prior to the commencement of the action. The defendant asserts that one of the assignees in the chain of assignments of the note and mortgage, and the plaintiff's assignor, never existed as an entity. In any event, MERS, as Wilmington's nominee, had no authority to assign the note. Thus, since all subsequent attempts to transfer the debt must fail, the plaintiff can only establish standing by physical delivery of the note. The affidavit supporting the plaintiff's motion is silent as to the date that the plaintiff took possession of the note.

On September 20, 2015, the defendant served demands for production and for answers to interrogatories, all of which sought information on the standing issue. The plaintiff ignored the defendants' discovery demands before moving for summary judgment by notice of motion dated October 16, 2015. In light of the factual issues raised on the motion and cross-motion, the parties have 90 days from the entry of this order to engage in discovery on the sole issue of standing. If the plaintiff concedes that standing can only be established by physical delivery of the note, then discovery will likewise be limited to that discreet issue.

Upon completion of discovery, and within 120 days from the entry of this order, the plaintiff shall either renew its motion for summary judgment or file a note of issue. The attorneys for the parties are directed to appear in Part 49 in the Cromarty Court Building, 4th Floor, Courtroom 16, Riverhead, New York on **January 18, 2017 at 9:30 a.m.** to schedule limited discovery on the issue of the plaintiff's standing to commence the action.


Regarding the defendant's separate motion for summary judgment based on the plaintiff's alleged failure to strictly comply with RPAPL §1304 (sequence 004), the defendant admitted in an affidavit to having received the statutory notice. The Court knows of no requirement, and the defendant has not cited any, that requires the amount to cure the default included in the RPAPL 1304 notice to correspond with the reinstatement figure contained in a notice to cure required under the terms of the note and mortgage. The defendant's separate motion for summary judgment dismissing the complaint is denied. The issue raised by the defendant is one of interpretation of the terms of the loan modification agreement, not compliance with RPAPL 1304.

In light of the foregoing, so much of the plaintiff's motion for an order awarding it summary judgment and appointing a referee to ascertain and compute is denied, with leave to renew, upon the completion of discovery on the limited issue of the plaintiff's standing to commence the action, and within 120 days of the entry date of this order, not to be extended without further leave of court.

As the defendant's opposition and cross motion do not address so much of the plaintiff's motions that seek to amend the caption and its Schedule C, both requests are granted.

The proposed order appointing a referee to compute has been marked "not signed".

Dated: December 15, 2016



 Hon. C. Randall Hinrichs, JSC

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION