

Wells Fargo Bank, N.A. v Delcid

2016 NY Slip Op 32727(U)

November 4, 2016

Supreme Court, Westchester County

Docket Number: 70126/2013

Judge: Joan B. Lefkowitz

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT : STATE OF NEW YORK
IAS PART WESTCHESTER COUNTY
PRESENT: HON. JOAN B. LEFKOWITZ, J.S.C.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

-----X
WELLS FARGO BANK, N.A.,

Plaintiff,

DECISION & ORDER

-against-

Index No: 70126/2013

ARMANDO J. DELCID, et al,

Motion Return Date:
August 12, 2016
Motion Seq. #3 & #4

Defendants.
-----X

The following papers (e-filed documents #84-136) were read on (1) the **E-filed** motion by plaintiff for an order granting summary judgment and appointing a referee to compute; and the (2) **E-filed** cross-motion by defendants for an order dismissing the complaint.

- Notice of Motion, Affidavit (Exhibits A-L)
- Affirmation in Support (Exhibit A)
- Affirmation in Support (Exhibits 1-12)
- Notice of Cross-Motion, Affirmation (Exhibits A-N)
- Reply Memorandum of Law (Plaintiff)
- Reply Affirmation (Defendant)
- Proposed Order

Upon reading the foregoing papers it is

ORDERED the branch of the motion which seeks an order granting permission to treat defendant's answer as a limited notice of appearance is denied; and it is further

ORDERED in all other respects the motion is granted; and it is further

ORDERED the cross-motion is denied.

ORDERED that within thirty (30) days of the sale conducted pursuant to a subsequent Judgment of Foreclosure and Sale the Referee to Sell shall complete and submit the "FORECLOSURE ACTION SURPLUS MONIES FORM"¹ to the County Clerk and provide a copy of said order to the Part Clerk for the undersigned. In a NYSCEF filed action the form must be uploaded within thirty (30) days of the sale; and it is further

¹ The foreclosure Action Surplus Monies Form may be found at:
<http://www.nycourts.gov/forms/SurplusMoniesFormFillable.pdf>

ORDERED that within (3) days of receiving the Order of Reference the Referee shall provide the Part Clerk with his or her email address.

Plaintiff sues to foreclose a mortgage. Following the completion of discovery plaintiff moves for summary judgment against the mortgagors, default judgment against the other defendants and the appointment of a referee to compute. Defendants cross-moves for an order dismissing the complaint

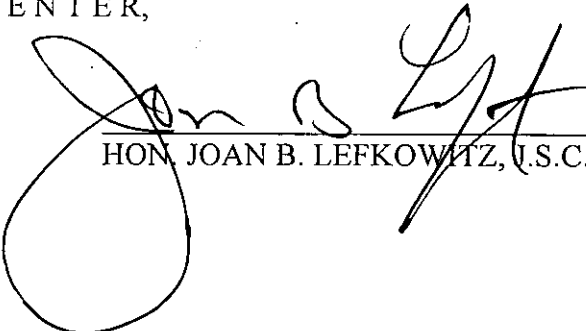
Plaintiff established its entitlement to summary judgment as a matter of law by producing the note and mortgage and evidence of default (*Wells Fargo Bank, N.A. v Hallock*, 138 AD3d35 [2d Dept 2016]). In opposition, defendants failed to raise a triable issue of fact. In addition, defendants failed to establish grounds upon which to dismiss the complaint.

Defendant's claim that plaintiff lacks standing is without merit. Plaintiff established its prima facie entitlement to judgment as a matter of law on the issue of standing by attaching a copy of the note, which is payable to plaintiff, to the complaint and by submitting the affidavit of the employee stating that plaintiff had possession of the note prior to the commencement of the action (*Nationstar Mtge, LLC v Weisblum*, 2016 Slip Op. 06808 [2d Dept 2016]). In opposition, defendant failed to raise a triable issue of fact.

Defendant's claim that plaintiff failed to demonstrate that it sent the default notice required by the mortgage is also without merit. Plaintiff established it sent the notice of default required by the mortgage by submitting copies of the notices with tracking information attached and by submitting the affidavit of plaintiff's employee who stated that she is personally familiar with plaintiff's record keeping practices and that the records concerning the mailing of the default notice are kept in the regular course of business and that the records show that the required notice of default was timely sent to the defendants (CPLR 4518). Moreover, the affidavit created a presumption of proper mailing by providing proof of plaintiff's standard office practice designed to ensure that the notices are mailed in accordance with the terms of the mortgage and proof that plaintiff complied with its standard office practice (*see, Mid-City Constr. Co., Inc. v Sirius American Ins. Co.*, 70 AD3d 789, 790 [2d Dept 2010]). The defendants failed to raise an issue of fact on the issue since their affidavits denying receipt of the notices were unsubstantiated and conclusory.

Order of Reference signed.

Dated: White Plains, New York
November 4, 2016

ENTER,


HON. JOAN B. LEFKOWITZ, J.S.C.