Trust v Rashid
2017 NY Slip Op 32571(U)
December 5, 2017
Supreme Court, Queens County
Docket Number: 28590/09
Judge: Howard G. Lane

MEMORANDUM

SUPREME COURT - QUEENS COUNTY
IAS Part 6

CHRISTIANA TRUST, NOT IN ITS INDIVIDUAL CAPACITY BUT SOLELY AS TRUSTEE FOR WINSTED FUNDING TRUST 2015-1, Plaintiff,	Index No. 28590/09
-against-	**By: Lane, J.**
FAWAD RASHID, ALINA NIYAZOV, NATIONAL CITY BANK, THE BOARD OF MANAGERS OF THE WINDSOR AT FOREST HILLS CONDOMINIUM HOMEOWNERS ASSOCIATION, NEW YORK CITY DEPARTMENT OF FINANCE, Defendants.	Date: December 5, 2017

After trial and based upon the credible testimony and admissible evidence adduced therein, the court finds as follows:

This foreclosure action was commended by JP Morgan Chase Bank, N.A. ("Chase") by filing a summons, complaint and notice of pendency of action on October 23, 2009. Plaintiff Christiana Trust, not in its individual capacity, but solely as Trustee for Winsted Funding Trust 2015-1 ("Plaintiff" or "Christiana Trust"), is the successor owner and servicer of the subject note and mortgage to Chase. Chase commenced the within foreclosure action after defendant Fawad Rashid ("Defendant") defaulted under the subject loan.

Defendant served and filed an Answer to the Complaint. A bench trial was held before this court on January 11-12, 2017. Upon the close of the trial, the court reserved decision and granted the parties leave to submit post-trial memorandum.

Plaintiff's prima facie case

Plaintiff's first witness was Carie Sciabica - an asset manager of Planet Home Lending ("Planet Home") from September 2016 to the present. Ms. Sciabica testified that Planet Home is the current mortgage servicer of the subject loan for the current owner Winsted Funding Trust 2015-1 ("Winsted"), pursuant to a Servicing Agreement between those entities (Plaintiff's Exhibit 4). Ms. Sciabica testified that she reviewed the entire collateral file maintained by Planet Home as servicer.

Ms. Sciabica testified that upon plaintiff retaining Planet Home to act as servicer, certain normal and customary procedures known as "boarding" of the loan took place at Planet Home. Those procedures included transferring the servicing records relating to the loan to Planet Home. Ms. Sciabica testified that the servicing records maintained by Planet Home indicated that an Original Adjustable Rate Note previously held and maintained by Chase was transferred to plaintiff as part of the collateral file. The Original Adjustable Rate Note (the "Note"), dated July 7, 2005, executed by defendant Fawad Rashid in favor of Washington Mutual Bank, FA ("WaMu") in the principal

amount of $780,000.00 was admitted into evidence as Plaintiff's Exhibit 1. Ms. Sciabica testified that the Original Note was part of the collateral file maintained by the plaintiff.

The original mortgage executed by Mr. Rashid on July 7, 2005, which secured repayment of the note and granted WaMu a mortgage lien on the premises known as 108-24 71 Rd., Unit PH4C, Forest Hills, New York 11375 (the "Property"), and recorded in the office of the City Register of the City of New York on August 1, 2006, as CRFN 2006000433840, was admitted into evidence as plaintiff's Exhibit 2. Ms. Sciabica testified that the original mortgage was delivered to plaintiff as part of the collateral file.

Various loan modifications executed by Mr. Rashid from September 2007 through April 2009, whereby he acknowledged the existence of the debt and whereby WaMu and then its successor Chase agreed to modify the terms of the Note were admitted into evidence as Plaintiff's "6A", "6B", "6C" and "6D". Ms. Sciabica testified that the loan modifications were part of the collateral file maintained by the plaintiff.

The notice of default, dated July 20, 2009, and addressed to Mr. Rashid was also admitted into evidence as Plaintiff's "7". Ms. Sciabica testified that the notice of default was part of the collateral file maintained by the plaintiff. The notice of default sets forth that the mortgage

payments due June and July 2009 were due as of the date of the letter.

A certified copy of an Affidavit of the Federal Deposit Insurance Corporation, dated October 2, 2008 ("FDIC Affidavit"), and filed with the Washington State Recorder's Office in King County, Washington on October 3, 2008 was admitted into evidence as Plaintiff's Exhibit "5". The FDIC Affidavit demonstrates: (1) that on September 25, 2008, WaMu was closed by the Office of Thrift Supervision and the FDIC was named receiver, and (2) on September 25, 2008, Chase became the owner of the loans of WaMu by operation of law.

Plaintiff's next witness was Daniel George of Spurs Capital, LLC, the entity which owns the plaintiff. Mr. George testified that the plaintiff then employed Planet Home as the mortgage servicer for the loan that was the subject of the trial and that plaintiff previously used Seneca Mortgage to service the loan. Mr. George testified that Winsted Funding acquired the Note from OHA Newbury on May 5, 2015. Winsted Funding received the collateral file (which included the original Note) by delivery of the collateral file to Wells Fargo in Minnesota acting as custodian for Winsted Funding. Mr. George testified that Wells Fargo had been acting as custodian for OHA Newbury and, as Winsted Funding also used Wells Fargo as custodian of its collateral documents, the original Note remained at Wells Fargo

in Minnesota upon the transfer to Winsted Funding.

On cross-examination, Mr. George confirmed that based upon all of the records associated with the loan there was only one Original Note - which was Plaintiff's Exhibit "4" in evidence.

Defendant's Case

Defendant, Fawad Rashid presented one witness - the defendant Fawad Rashid, whose testimony was limited to his denial of receipt of the notice of default, dated July 20, 2009 (Plaintiff's "7") and addressed to Mr. Rashid at the mortgaged premises pursuant to the terms of the mortgage. The notice of default was part of the collateral file maintained by the plaintiff that was received into evidence as a business record. Mr. Rashid denied receipt of the notice which was addressed to him at the mortgage premises. He claimed that he had moved and had notified WaMu of his new address. On cross-examination and in response to the questioning as to whether he advised WaMu of a change of address Mr. Rashid answered "2006, yes", I don't know exactly the date, but I know sometime in, end of 2007 or middle of 2008, some time. I'm sorry, I don't recall of the exact date."

Mr. Rashid presented no testimony on any of the affirmative defenses set forth in his Answer. Additionally, although defendant asserts in his Post-Trial Memorandum dated

May 14, 2017, that plaintiff was not in physical possession of the note prior to commencing the action and that "plaintiff ... tampered with evidence in order to achieve the fraudulent illusion of an entitlement to something", defendant presented no evidence to support these bold allegations.

Findings of Fact and Conclusions of Law

I. JP MORGAN CHASE BANK N.A. HAD STANDING TO COMMENCE THE WITHIN FORECLOSURE ACTION

Defendant contends that Chase lacked standing when it brought this action. At trial, plaintiff demonstrated its standing to foreclose and established that Chase had standing. The court finds that Chase both: (1) acquired ownership of the Note by operation of law and (2) demonstrated its possession of the Note prior to the commencement of this action on October 23, 2009, by attaching a copy of the original Note to the Complaint (Defendant's Exhibit "A"). Although standing is not an element of a mortgagee's claim for foreclosure once a plaintiff's standing is placed in issue by the defendant, it is incumbent upon the plaintiff to prove its standing to be entitled to relief (*see, U.S. Bank N.A. v. Sharif*, 89 AD3d 723 [2d Dept 2011]). A plaintiff establishes that it has standing where it demonstrates that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note (*Aurora Loan Servs. v. Taylor*, 25 NY3d 355 [NY 2015]; *Bank of N.Y. v.*

Silverberg, 86 AD3d 274 [2d Dept 2011]; *Aurora Loan Servs., LLC v. Weisblum*, 85 AD3d 95 [2d Dept 2011]). An assignment of the mortgage without assignment of the underlying note or bond is a nullity (*Deutsche Bank Natl. Trust Co. v. Barnett*, 88 AD3d 636 [2d Dept 2011]). 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 (*U.S. Bank, N.A. v. Collymore*, 68 AD3d 752 [2d Dept 2009]). At trial, plaintiff submitted into evidence the original Note. The plaintiff established that it had standing to commence the action as it established that it had physical possession of the note prior to commencing the action (*Citimortgage, Inc. v. Stosel*, 89 AD3d 887 [2d Dept 2011]).

Moreover, the court finds that plaintiff established a prima facie entitlement to foreclose on a mortgage by demonstrating the existence of the mortgage and note, ownership of the mortgage, and the defendant's default in payment (*see, Campaign v. Barbra*, 23 AD3d 327 [2d Dept 2005]; *First Trust National Association v. Pinter*, 264 AD2d 464 [2d Dept 1999]). Plaintiff presented sufficient evidence to warrant the requested relief pursuant to RPAPL 1321. The physical delivery of the note prior to commencement of the foreclosure action is sufficient to bestow standing (*Aurora Loan Servs, LLC v. Taylor*, 114 AD3d 627, 628-29 [2d Dept 2014]; *U.S. Bank, Nat. Ass'n v. Sharif*, 89 AD3d

723 [2d Dept 2011]). Further, "[o]wnership of the note is not imperative to the establishment of standing as one must be either the owner or the holder of the note and mortgage at the time of the commencement of the action" (*Bank of Am., NA v. Maeder*, 47 Misc3d 1217(A) [Sup Ct, Suffolk County 2015][explaining that under the Uniform Commercial Code, "the holder of an instrument, whether or not he or she is the owner, may transfer or negotiate it and discharge it or enforce payment in his or her own name".

Plaintiff has established that Chase had standing by operation of law to foreclose. Further, the testimony of Daniel George established that the original Note was in the collateral file when plaintiff acquired the loan. The original Note is the same Note as was attached to the Complaint. While defendant has questioned the timing of the endorsements, defendant has failed to submit proof that would support defendant's assertion that Chase did not possess the Note at the time of the commencement of the action. Whether the Note was subsequently endorsed or altered is of no relevance, as plaintiff established that it is authorized to enforce the terms of the subject loan and that it remains in possession of the original Note and, as such, any endorsements are not relevant. As such, the court finds that plaintiff has adequately proven that Chase had standing to commence this matter.

Plaintiff, as the assignee of Chase, had standing to

continue the action. A note can be a negotiable instrument and a "holder" may enforce a negotiable instrument (NY UCC § 3-301). "Holder" means "person who is in possession of a document of title or an instrument or an investment certificated security drawn, issued or endorsed to him or to his order or to bearer or in blank" (NY UCC § 1-201(20); *Wells Fargo Bank, N.A. v. Ostiguy*, 127 AD3d 1375, 8 NY3d 669 [3d Dept 2015]). "An endorsement in blank specifies no particular endorsee and may consist of a mere signature" and "[a]n instrument payable to order and endorsed in blank becomes payable to bearer and may be negotiated by delivery alone until specially endorsed (UCC3-204[2])" (*JPMorgan Chase Bank Natl. Assn. v. Weinberger*, 142 AD3d at 625, *supra*).

With respect to any issue of the transfer of the note, UCC § 3-201 provides as follows: "[t]ransfer of an instrument vests in the transferee such rights as the transferor has therein. UCC § 3-201 the provisions of the UCC Article 3 parallel the common law rule that the "security follows the debt" and require that in order to become a "holder" of a note, the note must be endorsed, either by special endorsement to a named payee or "in blank".

In the instant matter, the plaintiff, Christiana Trust, is a "holder" in accordance with the aforementioned definition of such because plaintiff, Christiana Trust is in possession of a note which contained an allonge endorsing the note "in blank" to

an un-named party. "So vital is the indorsement, as a foundation of negotiable instruments law, that "mere possession of a promissory note endorsed in blank (just like a check) provides a presumptive ownership of that note by the current holder (citations omitted)" (*Deutsche Bank National Trust Co. v. Vasquez*, 2012 NY Misc, LEXIS 2608 [Nassau 2012]; *see also, Collins v. Gilbert*, 94 US 753 [1877]). Under this, in order to establish standing as a "holder" of a duly endorsed note in blank, a plaintiff is only required to demonstrate possession of the note ..." (*see, Deutsche Bank Natl. Trust Co. v. Brewton*, 142 AD3d 683, 37 NYS3d 25 [2d Dept 2016]).

In such cases "it is necessary to give factual details of the delivery in order to establish that possession was obtained prior to a particular date" since a plaintiff in possession of a note endorsed in blank is without obligation to establish how it came into possession of the instrument in order to enforce it (UCC-3-204[2]; *Pennymac Corp. v. Chavez*, 144 AD3d 1006, 42 NYS3d 239 [2d Dept 2016] [*citing JPMorgan Chase v. Weinberger*, 142 AD3d at 645, *supra*]). Because "a signature on a negotiable instrument "is presumed to be genuine or authorized" (UCC3-307[1][b], the plaintiff is not required to submit proof that the person who endorsed the subject note to the plaintiff on behalf of the original lender was authorized to do so (*Citimortgage, Inc. v. McKinney*, 144 AD3d 1073, 1074, 42 NYS3d

302 [2d Dept 2016]).

The establishment of the plaintiff's actual possession of the note (or possession through an agent such as a custodian) renders unavailing any claimed defects in the chain of assignments of the mortgage (*see, Aurora Loan Servs. v. Taylor*, 25 NY3d 355, *Citimortgage, Inc. v. McKinney*, 144 AD3d 1073, *supra*; *U.S. Bank Natl Trust v. Naughton*, 137 AD3d 1199, 28 NYS3d 444 [2d Dept 2016]).

II. THE 30-DAY DEFAULT NOTICE WAS PROPERLY MAILED TO DEFENDANT AND DEFENDANT'S ALLEGATIONS DO NOT SUPPORT A DEFENSE TO THIS ACTION

The evidence of record confirms and demonstrates that a 30-day default notice was properly mailed to the defendant at the Property, pursuant to the terms of the mortgage.

Furthermore, defendant's allegations that plaintiff failed to meet a condition precedent to foreclose cannot be considered by this court, as the defense was not raised in defendant's Answer. As such, the defense has been waived as a matter of law (*see*, CPLR 3015[a] [the performance or occurrence of a condition precedent in a contract need not be pleaded. A denial of performance or occurrence shall be made specifically and with particularity") (CPLR 3018[b] ["A party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading"]; [3B Carmody-Wait 2d § 27:20 [June

2016 Update], Conditions Precedent [noting that when a lender does not explicitly plead compliance with a condition precedent under a contract, '[a] failure to plead the nonperformance of a condition precedent or waiver of such as an affirmative defense results in a waiver of the defense").

Indeed, "[i]f the defendant fails to specifically plead the plaintiff's failure to comply with a condition precedent, the defense is waived" (*1199 Housing Corp. v. Int'l Fidelity Ins. Co.*, 788 NYS2d 88, 90 [1st Dept 2005]; *see also, U.S. Bank Natl Assn v. Weinman*, No. 4754/2010, 2013 WL 162138, at * 14 [Sup Ct, Suffolk County, March 29, 2013]; *Deutsche Bank Natl. Trust Co. v. Crea*, No. 101368/2008, 5NYS3d 327 [Sup Ct, Richmond County, Nov 21, 2014]).

Further, under New York law, even if the mortgagee fails to satisfy the condition precedent, the commencement of the action is not prohibited and the Supreme Court is not deprived of jurisdiction to enter the judgment of foreclosure and sale *(see, Zuckerman v. 234-6 W. 22 St. Corp.*, 645 NYS2d 967, 971 [Sup Ct, NY County 1996]; *Regency Sav. Bank FSB v. Merritt Park Lands Assoc.*, 139 F Supp2d 462, 469 [SDNY 2001]; *Deutsche Bank trust Co. Americas v. Shields*, 983 NYS2d 286, 287 [2d Dept 2014]). Indeed, unless the defendant alleges lack of actual notice of the default or foreclosure or prejudice resulting from a bank's failure to comply with the mortgage notice requirements, "strict

compliance with contractual notice provisions need not be enforced" (*OneWest Bank, NA v. Rubio*, No. 14-CV-3800 (CS), 2015 WL 5037111, at * 4 [SDNY Aug 26, 2015] [noting that "strict compliance with contractual notice provisions need not be enforced ... where the adversary party does not claim the absence of actual notice or prejudice by the deviation" (*citing Baygold Assn., Inc. v. Congregation Yetev Lev of Monsey, Inc.*, 81 AD3d 763 [2d Dept 2011], *affd* 19 NY3d 223 [2012] [entering summary judgment despite failure of bank to comply with mortgage agreement where defendant does not allege a lack of actual knowledge or show prejudice suffered by defective notice]; *Wachovia Bank, Nat. Assn. v. Carcano*, 965 NYS2d 516, 517 [2d Dept 2013] [finding that the ninety-day notice was sufficient for purposes of complying with the thirty-day mortgage default provisions, because it informed the borrowers of the default and gave borrowers at least thirty (30) days to cure the default to avoid foreclosure]).

Finally, the record reflects that the 30-day default notice was mailed to defendant. Under New York law, "there is a rebuttable presumption that a letter which is mailed is presumed to be received by the addressee" (*Mount Vernon Fire Ins. Co. v. East Side Renaissance Assocs.*, 893 F Supp 242 [SDNY 1995], *citing Meckel v. Cont. Resources Co.*, 758 F2d 811 [2d Cir 1985]; *Nassau Ins. Co. v. Murray*, 46 NY2d 828 [1978]). Here, defendant has not

set forth any facts to rebut the presumption of mailing.

CONCLUSION

Plaintiff established through the testimony and evidence admitted at trial that Chase had standing to commence the within action and that plaintiff had standing to continue same. At trial, plaintiff produced the Original Note and Mortgage, and proof of defendant's default. Defendant admitted to executing the Note and Mortgage and did not rebut plaintiff's prima facie showing of entitlement to judgment. Plaintiff has established that it complied with RPAPL 1304 and 1306. Plaintiff is granted a judgment of foreclosure, and leave to appoint a referee to ascertain the sums due and owing plaintiff.

Settle order on notice and submit order to the Motion Support Office, Room 140.

Counsel are directed to retrieve their Exhibits from the clerk of Part 6, courtroom 24, 88-11 Sutphin Blvd., Jamaica, New York, (718) 298-1113, by December 18, 2017. If they are not retrieved by that date, they will be destroyed without further notice.

A courtesy copy of this memorandum is being mailed to counsel for the respective parties.

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Howard G. Lane, J.S.C.