Bosco Credit V Trust Series 2012-1 v Johnson
2018 NY Slip Op 31577(U)
July 10, 2018
Supreme Court, New York County
Docket Number: 850218/2015
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK: Part 10
ALL COUNTIES WITHIN THE CITY OF NEW YORK

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BOSCO CREDIT V TRUST SERIES 2012-1,

Index № 850218/2015
Motion Seq. № 001

DECISION & ORDER

Plaintiffs,

-against-

DEREK JOHNSON, , *et al.*,

Defendants

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GEORGE J. SILVER, J.S.C.:

This action has been brought to foreclose a mortgage held by plaintiff Bosco Credit V Trust Series 2012-1 ("plaintiff") on a premises located at 51 Hamilton Terrace New York, NY 10027. The defendant mortgagors (hereinafter "defendant Johnson" and "defendant Crawford," collectively "defendants") are husband and wife. Defendant Johnson is an attorney, and formerly a senior vice president of AOL Time Warner and president of the Apollo Theatre, among other positions. Defendant Crawford is a Manhattan dentist. Defendants are alleged to have failed to pay interest or principal on the mortgage loan since May 2008 or to pay real estate taxes and insurance for a similar period. The summons, complaint and notice of pendency of action were all filed on July 13, 2015 in the Office of the Clerk of the County of New York.[1]

Plaintiff moves for summary judgment pursuant to CPLR § 3212, arguing that defendants' general denials in their answer do not refute the allegations in the complaint, and therefore fail to raise triable issues of fact. To establish an entitlement to judgment in its favor, plaintiff annexes to its moving papers various mortgage documents, including the adjustable rate note, the mortgage,

[1] Since the commencement of this action, it has been ascertained that defendant Tim Kelly (a junior judgment creditor) is not a necessary party defendant because his judgment was assigned to All Region Equities LLC.

the recording information as to the mortgage, and the assignment of the mortgage and its recording information. Plaintiff also notes that it is the owner and holder of the note and mortgage. Plaintiff further recites that plaintiff has adhered to the necessary requirements that must be followed prior to initiating a foreclosure action, including the sending a ninety-day notice and a filing with the Superintendent of Finance. Additionally, plaintiff references defendants' default by failing to make payments due beginning on May 1, 2008 and monthly thereafter. Plaintiff further contends that the mortgage balance has been accelerated so that the full sum is due.

In opposition, defendants submit a general denial and argue that plaintiff has failed to furnish sufficient documentation attesting to its interest in the mortgage. Defendants further cross-move for summary judgment based on an affirmative defense on statute of limitations grounds.[2] Indeed, defendants assert that this foreclosure action is time-barred because it was filed more than six years after the acceleration of the loan, as reflected in a prior foreclosure action filed in 2005 (hereinafter "2005 Action"). Indeed, defendants assert that since the subject mortgage was accelerated on June 20, 2005, and this action was not commenced until July 13, 2015, the action is time-barred.

In reply, plaintiff argues that defendants' statement that "the [2005] Action was resolved by the parties' execution of a forbearance stipulation," is incorrect. Rather, plaintiff avers that the forbearance agreement simply provided defendants with additional time to cure their default on the loan before its predecessor, Tribeca Lending Corporation ("Tribeca"), enforced the 2005 judgment and conducted a foreclosure sale, and provided for defendants to make certain payments and fulfill other conditions. Defendants did not fulfill their obligations under the forbearance

[2]A separate non-answering defendant, Henry Hews, submitted opposition to the motion for summary judgment that advances the same arguments presented by the answering defendants, and which are addressed here by the court.

agreement. As such, plaintiff contends that the mere entry into the forbearance agreement by the parties did not resolve the 2005 Action, as the agreement was entered into "without prejudice" to the 2005 acceleration of the loan. Plaintiff further argues that the forbearance agreement was later superseded by the deferment agreement the parties entered in 2008. Consequently, plaintiff maintains that the deferment agreement was a valid and binding modification that revoked the 2005 acceleration of the loan, thereby making this action timely.

DISCUSSION

Plaintiff moves for summary judgment, arguing that plaintiff has made out a *prima facie* case, and that the answer interposed by defendants fails to set forth the existence of either a triable issue of fact or a meritorious defense.

CPLR § 3212 (b) provides, in relevant part:

> A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.

Thus, a party moving for summary judgment must first establish its *prima facie* entitlement to judgment as a matter of law by demonstrating the absence of material issues of fact (*see Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). It is only after the burden of proof is met that the opposing party must then show "facts and conditions from which…liability may be reasonably inferred" (*Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 [1st Dept. 1995]; *see also First Nationwide Bank FSB v. Goodman*, 272 AD2d 433 [2d Dept. 2000]; *Charter One Bank v. Houston*, 300 AD2d 429 [2d Dept. 2002]). The plaintiff

cannot, however, rely on conjecture or speculation (*see Roimesher v Colgate Scaffolding & Equip. Corp.*, 77 AD3d 425, 426 [1st Dept. 2010]). Conclusory allegations are insufficient to defeat a motion for summary judgment (*Freedman v. Chemical Construction Corp.*, 43 NY2d 260 [1997]).

In moving for summary judgment in a mortgage foreclosure action, a plaintiff establishes a *prima facie* right to foreclose by producing the mortgage, the assignment, if any, the unpaid note and evidence of default (*see CitiFinancial Co. (DE) v. McKinney*, 27 AD3d 224 [1st Dept. 2006]; *LPP Mortgage, Ltd v. Card Corp.*, 17 AD3d 103 [1st Dept], *lv app den*, 6 NY3d 702 [2005]); *Hypo Holdings, Inc v. Chalasani*, 280 AD2d 386 [1st Dept], *lv app den* 96 NY2d 717 [2001]). Once a plaintiff satisfies that burden, it is incumbent on the party opposing foreclosure to come forward with evidence sufficient to raise a triable issue of fact as to a bona fide defense such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff (*see Nassau Trust Co. v. Montrose Concrete Products Corp.*, 56 NY2d 175, *reargmt den* 57 NY2d 674 [1982]; *CitiFinancial Co. (DE) v. McKinney, supra*; *Mahopac National Bank v. Baisley*, 244 AD2d 466 [2nd Dept 1997], *lv app dism* 91 NY2d 1003 [1998]).

Once a *prima facie* case has been established, the burden shifts to defendants to furnish documentary evidence establishing a triable issue of fact. Defendants argue that the chain of assignments in this action do not establish that plaintiff is the rightful holder of the mortgage and note. As such, defendants argue that plaintiff lacks standing to pursue this foreclosure action, as plaintiff has provided no evidence that plaintiff was given ownership of the loan. In light of this, defendants aver that there is clearly a question of fact as to who actually has ownership over the loan. Defendants further contend that the affidavits furnished by plaintiff should be discounted by this court on account of the affiants lack of personal knowledge. As alluded to above, to commence a mortgage foreclosure action, the plaintiff must have either a legal or equitable interest in the

mortgage (*see Countrywide Home Loans, Inc, v. Gress*, 68 AD3d 709 [2d Dept. 2009]). A plaintiff has standing where it the holder or assignee of the note and the mortgage at the time the action is commenced (*see CitiMortgage. Inc, v. Rosenthal*, 88 AD3d 759 [2nd 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, and the mortgage passes with the debt as an inseparable incident (*see US Bank National Assoc, v. Cange*, 96 AD3d 825 [2nd Dept. 2012]). Defendants contend that plaintiff has failed to produce these critical proofs.

Contrary to defendants' argument, plaintiff's production of copies of the adjustable rate note, the mortgage and the recording information as to the mortgage, and the assignment of the mortgage and its recording information, constitute *prima facie* evidence that plaintiff has an interest in the mortgage. Plaintiff has also retained physical possession of the original note and accompanying documents since June 16, 2015. Moreover, plaintiff's production of copies of the ninety-day notice and filing with the Superintendent of Finance are further evidence of plaintiff's compliance with the conditions precedent to commencing this action (*see Nationstar Mtge.. LLC v. Catizone*, 127 AD3d 1151, 1152 [2nd Dept. 2015]["[T]he plaintiff established its standing as the holder of the note and mortgage by demonstrating that the note was in its possession and the mortgage had been assigned to it prior to the commencement of the action, as evidenced by its attachment of the indorsed note, the mortgage, and the mortgage assignment to the summons and complaint at the time the action was commenced."]). Based on the record before this court, plaintiff has satisfactorily established standing as holder of the note and mortgages as a matter of law. Defendants have failed to provide any admissible evidence to challenge that finding. Indeed, defendants' "general denials in an answer are insufficient to raise triable issues" *Iandoli v. Lange*, 35 AD2d 793, 793 [1st Dept. 1970]).

Defendants do, however, cross-move for summary judgment based on plaintiff's alleged failure to commence this action within the requisite statute of limitations. Defendants argue that plaintiff's contention that a subsequent modification of the loan obviates their argument is immaterial, as that modification was invalid. Contrary to defendants' argument, the 2005 Action was commenced on or about June 20, 2005 by plaintiff's predecessor, Tribeca, which was then the owner of the loan. On January 2, 2007, the court in the 2005 Action issued a judgment of foreclosure and sale. The 2005 judgment was then entered with the Office of the Clerk of the County of New York on February 14, 2007. Notice of entry was served on defendants on March 21, 2007. A foreclosure sale of the subject property was scheduled, but was ultimately never conducted because the parties entered into the forbearance agreement. The forbearance agreement provided defendants with additional time to cure their default on the loan before Tribeca enforced the 2005 Judgment and conducted a foreclosure sale, and provided for defendants to make certain payments and to fulfill other conditions. The forbearance agreement provided that Tribeca would vacate the 2005 judgment and discontinue the 2005 Action if defendants fulfilled all of their obligations under the forbearance agreement. Because the forbearance agreement by the parties did not resolve the 2005 Action, the agreement was entered "without prejudice" to the 2005 acceleration of the loan. The forbearance agreement was later superseded by a deferment proposal the parties entered in 2008 that provided as follows:

> A total of 16 payments are currently due from December 2006 through March 2008 in the amount of $278,565.28. These payments will be added to the end of your loan, bringing your loan current, and the outstanding interest will be due as a balloon payment at maturity or the date the loan is paid off. Your Next Payment will be due on April 1, 2008 and your Maturity Date is extended to July 1, 2036. The offer of $92,722.83 as a Borrower Contribution must be received by March 31, 2008.

The deferment proposal was subject to four conditions: 1.) execute the deferment letter; 2.) hardship letter explaining the situation; 3.) satisfactory evidence of monthly net income; and 4.) receipt of the borrower contribution by the date below [March 31, 2008]. The deferment proposal further provided that "if the above stated documents are not received within ten days, the extension is void." Defendants signed the deferment proposal and paid the borrower contribution of $92,722.83. Defendants also made handwritten notes on the deferment proposal to reflect payment of the borrower contribution. The remaining documents required by the deferment proposal were not received within ten days, as required. As such, Franklin Credit sent defendants a revised deferment proposal in April 2008. The terms of this deferment proporal were similar to those of the prior deferment proposal, save for two key differences that provided as follows:

> A total of 17 payment(s) are currently due in the amount of $295,975.61. These payments will be added to the end of your loan, bringing your loan current, and the outstanding interest will be due as a balloon payment at maturity or the date the loan is paid off. Your Next Payment will be due on 5/1/2008 and your Maturity Date is extended to 8/1/2036. The offer of $17,876.47 as a borrower contribution must be received by 4/30/2008.

Payment of the borrower contribution was not a condition of the April 2008 deferment proposal as it had been in the previous deferment proposal. Defendants both executed the subsequent deferment proposal and fulfilled all the conditions that were necessary to give it full effect, thereby rendering it a deferment agreement. Accordingly, Franklin Credit accepted the executed deferment agreement. Considering the foregoing, the court agrees that collectively these actions effected a modification of the loan and brought the loan current in accordance with the terms of the deferment agreement, with defendants' contractual installment payments due beginning with the May 1, 2008 payment. As a result, the loan was no longer in default, and there was no longer a basis for the 2005 acceleration of the loan. It is axiomatic that given the existence

of the deferment agreement, the 2005 acceleration and the forbearance agreement were no longer viable, as defendants would have had a disincentive to adhere to the conditions of the deferment agreement if they would still be considered in default. Defendants defaulted anew by failing to make the May 1, 2008 payment or any subsequent payments under the deferment agreement. Consequently, defendants cannot use the 2005 acceleration agreement as both a shield and a sword, and cannot establish a *prima facie* entitlement to summary judgment on their cross-motion by advancing a statute of limitations argument.

At the April 17, 2018 oral argument on the parties separate cross-motions for sanctions (Seq. № 002), defendants argued for the first time that this action is time-barred because it was purportedly filed "six years and one day" after the acceleration of the subject mortgage loan. Defendants' incoming counsel advanced that argument by relying on the First Department's decision in *Deutsche Bank Nat. Tr. Co. v. Royal Blue Realty Holdings, Inc.*, 148 AD3d 529 (1st Dept. 2017). Defendants' interpretation of *Deutsche Bank* is misplaced. Indeed, a correct reading of the case, and applying it to the facts of the instant foreclosure action further supports plaintiff's position. In *Deutsche Bank*, the court held that a loan at issue was accelerated after the expiration of a 30-day cure period (148 AD3d at 530 [lender's letter stated that it "'will' accelerate the loan balance...unless the borrower cured his defaults within 30 days of the letter" and court noted that "[w]hen the borrower did not cure his defaults within 30 days, all sums became immediately due and payable."]). Here, similarly, the servicer's letter on which defendants rely, and which their new counsel handed up at oral argument, states that defendants could cure their default "on or before July 12, 2009" and that " [i]f you do not cure your default, we will accelerate your mortgage." Thus, defendants had the opportunity to cure on or before July 12, 2009 and the loan would only be accelerated after that date had passed, i.e., no earlier than July 13, 2009. The loan

could not be accelerated on July 12, 2009, as defendants now assert, because July 12, 2009 was still within the cure period. This action was filed on July 13, 2015, within six years of the first possible date the loan could have been accelerated, and is therefore timely.

Moreover, even if the loan could have been accelerated on July 12, 2009 rather than July 13, 2009 at the earliest, this action is still timely because July 12, 2015 (six years later) was a Sunday. Accordingly, even under the Johnsons' interpretation, the statute of limitations would be extended to the next business day, making the last day to file this action Monday, July 13, 2015, the date on which it was filed (*see* Gen. Constr. L. § 25-1[a][" When any period of time, computed from a certain day, within which or after which or before which an act is authorized or required to be done, ends on a Saturday, Sunday or a public holiday, such act may be done on the next succeeding business day . . . ."]; *see also Wilson v. Exigence of Team Health*, 151 AD3d 1849, 1849-50 [4th Dept. 2017][two-year statute of limitations period that ended on a Saturday was extended until the next succeeding business day]). As such, defendants' belated attempt to revive their argument that this action is time-barred, is unpersuasive.

The court is unpersuaded by any of defendants' additional arguments.

Accordingly, it is hereby

ORDERED, that plaintiff's motion for summary judgment is hereby granted, and defendants' cross-motion denied; and it is further

ORDERED, that the single answer of the defendants is hereby stricken; and it is further

ORDERED, that this action be, and the same is hereby referred to Allison Michele Furman Esq. having an office at 260 Madison Avenue, telephone number (212) 684-9400, e-mail ALLISON@AFURMANLAW.COM as Referee to ascertain and compute the amount due to the plaintiff herein for principal, interest, and other disbursements advanced as provided for by statute

and in the note and mortgage upon which this action was brought, to examine and report whether the mortgaged premises should be sold in parcels, and that the Referee make his/her report no later than 60 days of the date of this order and that, except for good cause shown, the plaintiff shall move for judgment no later than 60 days of the date of the Referee's report; and it is further

ORDERED, that, if required, said Referee take testimony pursuant to RPAPL § 1321; and it is further

ORDERED, that upon submission of the Referee's Report, plaintiff shall pay $250.00 to the Referee as compensation for her services, which sum may be recouped as a cost of litigation; and it is further

ORDERED, that the referee appointed herein is subject to the requirements of Rule 36.2(c) of the chief Judge, and if the referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the referee shall notify the Appointing Judge forthwith; and it is further

ORDERED, that by accepting this appointment the Referee certifies that she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including but not limited to section 36.2 ("Disqualifications from appointment") and section 36.2(d) ("Limitations on appointments based upon compensation"); and it is further

ORDERED, that defendant Tim Kelly be excised from the caption of this action and All Region Equities LLC be substituted in his place and stead thereof; and it is further

ORDERED, that defendants captioned as "John Doe #1" through "John Doe #12", not having been served with copies of the summons and complaint, are neither necessary nor proper party defendants and their names are hereby stricken from the caption of the action; and it is further

ORDERED, that the caption as amended shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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BOSCO CREDIT TRUST SERIES 2012-1,

Index No. 850218/2015

Plaintiff,

-against-

DEREK JOHNSON a/k/a DEREK Q. JOHNSON, SUSAN JOSIE CRAWFORD a/k/a SUSAN CRAWFORD LEMELLE a/k/a SUSAN J. JOHNSON, RICHARD D. PARSONS c/o BANK OF NEW YORK MELLON, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, CRIMINAL COURT OF THE CITY OF NEW YORK (COUNTY OF NEW YORK), HENRY HEWES, ALL REGION EQUITIES LLC, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, UNITED STATES OF AMERICA (SOUTHERN DISTRICT,

Defendants.

;and it is further

ORDERED, that a copy of this Order with Notice of Entry shall be served upon the designated Referee, the owner of equity of redemption, any tenants named in this action and any other party entitled to notice within 20 days of entry and no less than 30 days prior to any hearing before the Referee. The Referee shall not proceed to take evidence as provided herein without proof of such service, which proof must accompany any application for Final Judgment of Foreclosure and Sale; and it is further

ORDERED that the parties are directed to appear for a status conference on August 14, 2018 in Part 10 located at 111 Centre Street, Room 1227, at 9:30 AM to report the status of compliance with this order.

This constitutes the decision and order of the court.

Dated: July 10, 2018

George J. Silver

HON. GEORGE J. SILVER