

Ditech Fin. LLC v Levine
2018 NY Slip Op 33694(U)
January 23, 2018
Supreme Court, Saratoga County
Docket Number: Index No. 2016-3096
Judge: Ann C. Crowell
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF SARATOGA

DITECH FINANCIAL LLC,

Plaintiff,

-against-

SHARON LEVINE; RUSSELL LEVINE A/K/A
RUSSELL H. LEVINE; DISCOVER BANK;
FIA CARD SERVICES, N.A., CAPITAL ONE
BANK (USA), N.A.,

Defendants.

DECISION and ORDER

RJI #45-1-2017-1146

Index # 2016-3096

APPEARANCES

RAS Boriskin, LLC
Attorneys for Plaintiff
900 Merchants Concourse, Suite 106
Westbury, New York 11590

Matthew J. Mann, Esq.
Attorney for Defendants Levine
426 Troy-Schenectady Road
Latham, New York 12110

2018 FEB -5 AM 10:53
SARATOGA COUNTY
CLERK'S OFFICE
BALLSTON SPA, NY

FILED

ANN C. CROWELL, J.,

Plaintiff Ditech Financial, LLC requests an Order pursuant to Civil Practice Law and Rules (CPLR) § 3212, granting summary judgment against defendants Sharon Levine and Russell Levine, a/k/a Russell H. Levine ("defendants"). Defendants oppose the requested relief.

This is an action brought pursuant to CPLR § 3001 and RPAPL Article 15 to declare a mortgage dated September 2, 2003 as a valid mortgage against the defendants' property located at 19 Commons Boulevard a/k/a 19 Lexington Commons Boulevard, Clifton Park,

New York 12065. Plaintiff also seeks an Order directing the Saratoga County Clerk to record copies of an assignment of mortgage executed October 11, 2011, the mortgage dated September 2, 2003 with its legal description and the Consolidation, Extension, and Modification Agreement dated September 2, 2003 instead of the originals.

On October 11, 2001, defendants executed a note and mortgage securing the sum of \$180,547.00 advanced by Greenpoint Mortgage Funding, Inc. ("Greenpoint"). Mortgage Electronic Registration Systems, Inc. ("MERS") was the mortgagee of record. On an unspecified date, Greenpoint endorsed the note to GMAC Mortgage Corporation ("GMAC"). On an unspecified date, GMAC endorsed the note in blank. By Assignment of Mortgage, dated October 11, 2011, MERS assigned the mortgage to GMAC Mortgage, LLC. The original assignment of mortgage has been lost.

On or about September 2, 2003, Sharon Levine executed a note in favor of GMAC dba ditech.com in the amount of \$2,420.88. On an unspecified date, GMAC endorsed the note in blank. On or about September 2, 2003, defendants executed a mortgage securing the sum of \$2,420.88 advanced by GMAC dba ditech.com. MERS was the mortgagee of record. The mortgage was not recorded with the Saratoga County Clerk and the original has been lost. On or about September 2, 2003, defendants executed a Consolidation, Extension and Modification Agreement ("CEMA") consolidating the 2001 note and recorded mortgage and the 2003 note and unrecorded mortgage. The CEMA acknowledged and secured the combined sum of \$180,000.00. On or about September 2, 2003, Sharon Levine executed a consolidated note in favor of GMAC dba ditech.com in the amount of \$180,000.00. On an unspecified date, GMAC endorsed the note in blank.

On November 22, 2016, this RPAPL Article 15 action was commenced. On December 20, 2016, defendants filed an Answer with Counterclaims. On December 27, 2016, plaintiff filed a Reply.

Plaintiff has submitted the affidavit of Emily Johnson (“Johnson”), a Document Execution Representative of Ditech Financial LLC (“Ditech”). Ditech is the servicer for the loan in this action. Johnson personally reviewed Ditech’s records before executing her affidavit. Johnson avers that Ditech came into possession of the Consolidated Note as of October 16, 2003 and has maintained possession of the Consolidated Note up to the filing of the Complaint. Defendants made payments on the consolidated note from November of 2003 until 2009.

Plaintiff has established a *prima facie* case for entitlement to a judgment in this RPAPL Article 15 action as a matter of law by producing the notes, mortgages, and CEMA and Johnson’s affidavit in support. *Friends of Animals, Inc. v Associated Fur Manufacturers, Inc.*, 46 NY2d 1065 [1979]. Defendants do not dispute the fact that they executed the loan documents. Defendants challenge the plaintiff’s standing and raise numerous affirmative defenses applicable to a foreclosure action.

Where the defendant properly raises the issue of standing, the plaintiff must also establish its standing in order to be entitled to relief. *See, Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375 [3d Dept. 2015]. Plaintiff has also met *its prima facie* burden on the issue of standing through Modlin’s affidavit attesting to plaintiff’s possession of the original loan documents since October 16, 2003 and through attaching copies of the notes to the Complaint. *Green Tree Servicing, LLC v Bormann*, ___ AD3d ___, 2018 WL 356308 [3d Dept. 2018]; *JP Morgan Chase Bank, N.A. v Venture*, 148 AD3d 1269, 1270-1271 [3d Dept.

2017]; *U.S. Bank, N.A. v Coppola*, __ AD3d __ [2d Dept. 2017]. “[I]t is unnecessary to give factual details of the delivery [of the note] in order to establish that possession was obtained prior to a particular date.” *JPMorgan Chase Bank, N.A. v Weinberger*, 142 AD3d 643, 645 [2d Dept. 2016]. Defendants have failed to raise any issues of fact with respect to their default on the note or plaintiff’s standing. Defendants’ contention that the summary judgment motion is premature is unsupported by any evidentiary showing that the plaintiff has exclusive knowledge and possession of pertinent facts essential to justify opposition to the motion. *See, CPLR § 3212(f); Green Tree Servicing, LLC v Bormann, supra; Ivory Development, LLC v Roe*, 135 AD3d 1216 [3d Dept. 2016]. Defendants’ remaining affirmative defenses, including the statute of limitations, are without merit.

Pursuant to CPLR § 3215, plaintiff’s motion for a default judgment against the non-answering defendants is granted for the relief demanded in the complaint. Plaintiff’s motion for summary judgment is granted. Concurrently herewith, the Court is issuing the proposed Judgment submitted by the plaintiff with its motion papers. Any relief not specifically granted herein is denied. No costs are awarded to any party. The original decision and order and judgment shall be forwarded to the attorney for the plaintiff for filing and entry. The underlying papers will be filed by the Court.

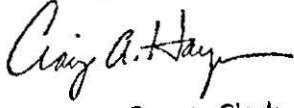
Dated: January 23, 2018
Ballston Spa, New York


ANN C. CROWELL, J.S.C.
ENTERED

Craig A. Hayner

Papers Received and Considered:

Notice of Motion dated August 25, 2017


Saratoga County Clerk

Affirmation of Craig K. Beideman, Esq., dated August 25, 2017, with Exhibits A-M

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BALLSTON SPA, NY

ENTERED

Affidavit of Emily Johnson, sworn to August 24, 2017

Affirmation of Matthew J. Mann, Esq., dated November 1, 2017, with Exhibits A-B

Papers Not Considered:

Affirmation of Marcelo E. Martinez, Esq., dated November 6, 2017, with Exhibits A-D