

State of N.Y. Mtge. Agency v Massarelli
2019 NY Slip Op 33903(U)
August 5, 2019
Supreme Court, Albany County
Docket Number: 901689-17
Judge: Christina L. Ryba
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

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STATE OF NEW YORK MORTGAGE AGENCY,
Plaintiff,

DECISION/ORDER

-against-

Index No. 901689-17
RJI No. 01-17-123999

JULIANE MASSARELLI a/k/a JULIANE O'BRIEN,
NEW YORK STATE DEPARTMENT OF TAXATION
AND FINANCE, "JOHN DOE", said name being fictitious
and unknown to plaintiff, the persons or parties intended being
the persons or parties, if any, having or claiming an interest in,
or lien upon the premises described in the complaint,
Defendants.

APPEARANCES:

McCabe, Weisberg & Conway, PC
For Plaintiff
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Timothy Shevy, Esq.
For Defendant Juliane Massarelli a/k/a Juliane O'Brien
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RYBA, J.,

In September 2005, defendant Juliane Massarelli a/k/a Juliane O'Brien (hereinafter defendant) executed a \$136,800.00 note secured by a mortgage on her property located in the City of Albany in favor of HSBC Mortgage Corporation. When defendant defaulted on her mortgage payments in May 2011, plaintiff, purporting to be HSBC's assignee, commenced a mortgage foreclosure action in July 2012. That action was dismissed, without prejudice, as the combined result of a Court order (Platkin, J.) issued in September 2013 and a subsequent stipulation of the parties signed in July 2016. Plaintiff

thereafter commenced the present action in March 2017 seeking to foreclose on the mortgage for the entire principle balance due of \$120,689.15. Defendant initially moved for an order dismissing the complaint pursuant to CPLR 3211 (a) as barred by principles of res judicata and based on a defense of documentary evidence. By decision and order entered June 30, 2017, this Court denied the motion. That decision and order was affirmed on appeal by the Appellate Division, Third Department (see, State of New York Mtg. Agy. v Massarelli, 167 AD3d 1296 [2018]).

Following joinder of issue and discovery, plaintiff filed a note of issue and the matter was scheduled for a non-jury trial commencing on August 28, 2019. Defendant once again moves for an order dismissing the complaint pursuant to CPLR 3211 (a), this time arguing that plaintiff lacks standing in light of its failure to comply with defendant's discovery demands to produce either the note itself or a valid assignment thereof. Alternatively, defendant requests an order vacating the note of issue and compelling plaintiff's production of documents responsive to its outstanding discovery demands. Plaintiff opposes the motion, arguing that defendant should be barred from making successive motions to dismiss and that, in any event, standing has been established.

"The single motion rule prohibits parties from making successive motions to dismiss a pleading" by barring both repetitive motions to dismiss a pleading on the same grounds, as well as subsequent motions to dismiss a pleading that are based on different grounds (see, CPLR 3211 [a], [e]; McLearn v Cowen & Co., 60 NY2d 686, 689 [1983]; Ramos v City of New York, 51 AD3d 753, 754 [2008]). Here, because defendant previously moved to dismiss the complaint pursuant to CPLR 3211 (a) as barred by documentary evidence and principles of res judicata, the present motion to dismiss, also brought pursuant to CPLR 3211 (a), albeit on different grounds, is procedurally barred by the single motion rule.

However, even considering the motion, the Court would find that standing has been sufficiently established. Although defendant raised the issue of standing in her answer, thereby ultimately requiring plaintiff to establish standing in order to obtain a judgment of foreclosure, as the proponent of a motion to dismiss it is incumbent upon defendant to initially establish plaintiff's lack of standing as a matter of law (see, BAC Home Loans Serv. LP v Bixby, 135 AD3d 1009, 1010 [2016]). Because "the note * * * is the dispositive instrument that conveys standing to foreclose under New York law", standing may be established by the physical delivery of a note that is endorsed to the plaintiff or indorsed in blank prior to the commencement of the action (see, Aurora Loan Servs. LLC v Taylor, 25 NY3d 355, 361-362 [2015]; Bank of NY Mellon v McClintock, 138 AD3d 1372, 1373-1374 [2016]; Deutsche Bank Natl. Trust Co. v Monica, 131 AD3d 737, 738 [2015]). In the present case, the face of the subject note bears a specific endorsement transferring the note from plaintiff's predecessor in interest directly to plaintiff. This note was attached as an exhibit to the complaint that was filed by plaintiff when it commenced the present action. In the Court's view, this evidence is sufficient to establish that a note specifically endorsed to plaintiff was physically delivered to the plaintiff prior to the commencement of the action. Under these circumstances, dismissal of the complaint for lack of standing is inappropriate.

As for defendant's alternative request for an order striking the note of issue, a note of issue will generally be stricken if the case is not ready for trial and there are pending and legitimate discovery requests outstanding (see, Ireland v Geico Corp., 2 AD3d 917, 917 [2003]). However, where the parties have had sufficient time to complete discovery and there are no valid outstanding discovery demands, the Court will decline to strike the note of issue (see, Tilden Financial Corp. v Muffoletto, 161 AD2d 583, 584 [2003]). Here, defendant's request to strike the note of issue is premised upon the claim that

plaintiff has failed to produce a note that was endorsed to plaintiff. As previously discussed, that note was attached as an exhibit to the initiatory papers. Inasmuch as defendant has failed to establish the existence of any legitimate discovery request that remains pending, defendant's alternative request to strike the note of issue is denied.

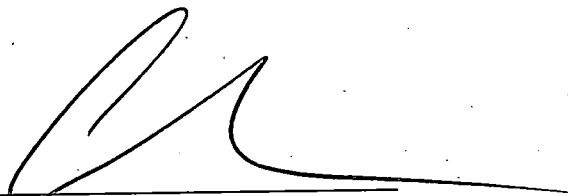
For the foregoing reasons, it is

ORDERED that the motion is denied, without costs.

This constitutes the Decision & Order of the Court, the original of which is being transmitted to the Albany County Clerk for electronic filing and entry. Upon such entry, plaintiff's counsel shall promptly serve notice of entry on all other parties (see, Uniform Rules for Trial Courts [22 NYCRR] § 202.5-b [h] [1], [2]).

ENTER.

Dated: August 5, 2019



HON. CHRISTINA L. RYBA
Supreme Court Justice

