Beneficial Homeowner Serv. Corp. v Hagans
2020 NY Slip Op 33170(U)
September 29, 2020
Supreme Court, Suffolk County
Docket Number: 11984/2013
Judge: Robert F. Quinlan
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[* 1]

SHORT FORM ORDER

COPY

INDEX No. 11984/2013

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT F. QUINLAN
Justice of the Supreme Court

MOTION DATE: 5/30/19 (Mot. Seq. #005)
ADJ DATE: 6/13/19; 7/11/19
SUBMIT DATE: 9/8/20
Mot. Seq.: #005 - MotD

---X

BENEFICIAL HOMEOWNER SERVICE CORPORATION,

Plaintiff,

- against -

ENCARNACION HAGANS; RAYMOND HAGANS; CAPITAL ONE BANK USA, N.A., "JOHN DOE" AND "MARY ROE" (SAID NAME BEING FICTITIOUS, IT BEING THE INTENTION OF THE PLAINTIFF TO DESIGNATE ANY AND ALL OCCUPANTS OF THE PREMISES BEING FORECLOSED HEREIN),

Defendants.

---X

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Upon the following papers numbered 1 - 73 on plaintiff's motion for an order granting summary judgment striking and dismissing defendant's answer, an order of reference pursuant to RPAPL §1321 and to amend the caption. Notice of Motion and supporting papers: 1-45; Opposition and supporting papers: 46-73;

UPON the court having held a phone conference on this action on September 8, 2020 in compliance with the requirements of AO/157/20 of the Chief Administrative Judge of the Courts, dated July 23, 2020, and counsel for both parties having appeared; it is further

ORDERED that the portion of plaintiff Beneficial Homeowner Service Corporation's motion seeking an order granting summary judgment dismissing defendant's remaining affirmative defenses (1st, 3rd and 4th) after the court's decision and order placed on the record after oral argument of plaintiff's prior motion for summary judgment on November 15, 2016 (Mot. Seq. #004), striking and dismissing defendant's answer and for the appointment of a referee pursuant to RPAPL § 1321 is denied, and its proposed order submitted with this motion is marked "Not Signed;" and it is further

ORDERED that the portion of plaintiff's motion seeking to discontinue the action against decedent Raymond Hagans and deleting him from the caption, and to further amend the caption by deleting the "John

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Doe" and "Mary Roe" defendants substituting Ryan Hagans in their place, and substituting U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust for plaintiff, is granted; and it is further

ORDERED that the caption shall now appear as follows:

--X

U.S. BANK TRUST, N.A. AS TRUSTEE FOR LSF9
MASTER PARTICIPATION TRUST,

Plaintiff,

- against -

ENCARNACION HAGANS; CAPITAL ONE BANK
USA, N.A., and RYAN HAGANS

Defendants.

--X;

and it is further

ORDERED that plaintiff is to serve a copy of this order upon the calendar clerk of this part within thirty (30) days of the filing of this order with the Clerk of the Court, and all further proceedings are to be under the amended caption; and it is further

ORDERED that the action is scheduled for the trial set by the order of November 15, 2016 on **October 20, 2020 at 2:00 PM** before this part, by virtual means through the court's "Skype" system; and it is further

ORDERED that the court will provide counsel for the parties with the information necessary for them to participate in a "Skype" virtual trial by notice through the court's e-filing system; and it is further

ORDERED that counsel for the parties are directed to submit copies of all exhibits intended to be relied upon at the trial to the court and all other counsel 72 hours prior the trial; and it is further

ORDERED that no further successive summary judgment motions are authorized; and it is further

ORDERED that pursuant to the provisions of AO/115/20 and AO/121/20 of the Chief Administrative Judge of the Courts, the parties are to immediately take all steps necessary to convert this action into one in conformity with the requirements for electronic filing pursuant to NYSCEF.

The prior history of this action to foreclose a mortgage on residential real property known as 18 Rugby Drive, Shirley, Suffolk County, New York ("the property") given by defendant Encarnacion Hagans ("defendant") and Raymond Hagans ("decedent") is set forth in the court's decision of June 6, 2016 (Mot. Seq. # 003) and the court's decision and order placed on the record after oral argument of plaintiff's prior motion for summary judgment on November 15, 2016 (Mot. Seq. #004). The decision and order of November 15, 2016, the terms of which were memorialized in a written discovery order and schedule of the same date (Plaintiff's Exhibit "M" and Defendant's Exhibit "A") granted plaintiff Beneficial Homeowner

Service Corporation ("plaintiff") partial summary judgment dismissing all of defendants' affirmative defenses except their 1st, 3rd and 4th affirmative defenses (failure to state a cause of action by failing to establish defendants default in payment and mailing of the notices required by RPAPL § 1304). That order set a trial on those issues, allowed a limited period of discovery, and authorized the parties to file successive motions for summary judgment on those issues within thirty days (30) days of the filing of a note of issue (CPLR 3212 [a]).

It is undisputed that Raymond Hagans, decedent, died on March 23, 2017 (Defendant's Exhibit "D"). At the time that plaintiff's present motion was submitted, there was no personal representative appointed on behalf of decedent's estate.

Plaintiff filed a note of issue on March 28, 2019, and then filed this motion on May 9, 2019. Defendant has filed opposition.

UNTIMELY SUCCESSIVE SUMMARY JUDGMENT MOTION DENIED

Although multiple summary judgment motions are discouraged, a court may properly entertain a subsequent summary judgment motion when it is substantively valid and when granting the motion will further the ends of justice while eliminating an unnecessary burden on court resources (*see Detko v McDonald's Restaurants of New York, Inc*, 198 AD2d 208 [2d Dept 1993]; *Valley National Bank v INI Holding, LLC*, 95 AD3d 1108 [2d Dept 2012]; *Graham v City of New York*, 136 AD3d 754 [2d Dept 2016]; *Kolel Damsek Eliezer, Inc. v Schlesinger*, 139 AD3d 810 [2d Dept 2016]). Such a motion is clearly appropriate where , as here, the court has already granted a party partial summary judgment and limited the issues to a few, eliminating the burden on judicial resources which would otherwise require a trial (*see Rose v Horton Med. Ctr.*, 29 AD3d 977 [2d Dept 2006]; *Landmark Capital Investments, Inc. v Li-Shan Wang*, 94 AD3d 418 [1st Dept 2012]). A subsequent summary judgment motion which could be dispositive should not be denied solely because of the general prohibition against second summary judgment motions (*see Burbige v Siben & Ferber*, 152 Ad3d 641 [2d Dept 2017]).

But, as noted by defendant who makes a substantive objection on this issue, such a motion must be timely made pursuant to CPLR 3212(a). Pursuant to that statute, a party is allowed to move for summary judgment within one hundred twenty (120) days of the filing of a note of issue, unless the court had set an earlier date for the filing of the motion, which cannot be earlier than thirty (30) days after the filing of the note of issue. Here, both the decision of the court placed on the record on November 15, 2016 and the written discovery order and schedule of the same date directed that any successive summary judgment motion be made within thirty (30) days of the filing of the note of issue. Plaintiff failed to file its motion within thirty (30) days of its filing of the note of issue. There is a general prohibition against considering late summary judgment motions, unless the movant makes a showing of good cause for the delay establishing a satisfactory explanation of untimeliness, rather than the court simply permitting a meritorious, non-prejudicial filing (*see Brill v City of New York*, 2 NY3d 648 [2004]; *Micelli v. State Farm Mut. Auto Ins. Co.*, 3 NY3d 725 [2004]; *Nationstar Mtg., LLC v Weisblum*, 143 AD3d 866 [2d Dept 2016]). Here plaintiff ignores its delay and makes no attempt at explaining it. Accordingly, the court is compelled to deny its motion for summary judgment, but notes that even if it considered it, it would have denied its motion. Those portions of plaintiff's motion seeking to discontinue the action against decedent and amend the caption are not essential parts of a motion for summary judgment and are considered.

AFFIDAVITS FAIL TO ESTABLISH DEFAULT IN PAYMENT AND RPAPL § 1304 MAILINGS

Even if plaintiff's motion for summary judgement was considered, as pointed out by defendant, plaintiff's submissions fail to establish the two issues remaining after the decision of November 15, 2016, proof of defendant's default in payment and proof of mailing of the RPAPL § 1304 notices ("the notices").

Although the affidavit of plaintiff's employee sets forth his ability to testify as to plaintiff's records pursuant to CPLR 4518 (a), plaintiff fails to recognize that his testimony is ancillary to his ability to present those business records of plaintiff which he reviewed and which records are claimed to establish the mailing of the notices. It is those records which are admissible based upon his testimony pursuant to CPLR 4518 (a) to establish the mailing, and not merely his bare conclusory assertion of what he claims they show. Rather than presenting the records that show their mailing, plaintiff's affiant only presents copies of the notices he claims were sent. Additionally, rather than explaining the mailing process used to ensure that items are properly addressed and mailed, and providing copies of the business records that establish it (*see Vivane Etienne Med. Care, P.C. v Country Wide Ins. Co.*, 25 NY3d 498 [2015]; *Residential Holding Corp. v Scottsdale Ins. Co.*, 286 AD2d 679 [2d Dept 2001]; *Wells Fargo Bank, N.A. v Taylor*, 170 AD3d 921 [2d Dept 2019]; *LNV Corp. v Sofer*, 171 AD3d 1033 [2d Dept 2019]; *U.S. Bank, N.A. v Ahmed*, 174 AD3d 661 [2d Dept 2019]), the affiant merely states he is familiar with the mailing process. Where an affiant establishes the ability to testify to business records pursuant to CPLR 4518 (a), but merely states a review of the records establishes that the notices were mailed by plaintiff by both regular and certified mail on a certain date, without producing the records he relied upon, his statement is conclusory hearsay and insufficient to establish the mailing required by RPAPL § 1304 (*see US Bank, NA v Henderson*, 163 AD3d 601 [2d Dept 2018]; *Bank of New York Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]; *CitiBank, N.A. v Conti-Scheurer*, 172 AD3d 17 [2d Dept 2019]; *CitiMortgage, Inc. v Osorio*, 174 AD3d 496 [2d Dept 2019]). Plaintiff is directed to the holding in *Citimortgage, Inc. v Goldberg*, 179 AD3d 1006 (2d Dept 2020).

As noted by defendant in her opposition, plaintiff's motion ignores that portion of the court's decision of November 15, 2016 that found that plaintiff had not established that defendant had defaulted in payment pursuant to the note and mortgage. Even if the court was to consider the motion, and read the submission of the affidavit of the employee of plaintiff's servicer broadly, for reasons similar to the failure of plaintiff's affidavit noted above, the court would have to deny plaintiff's motion.

Entitlement to summary judgment in favor of a foreclosing plaintiff is established by plaintiff's production of the mortgage, the unpaid note, and evidence of default in payment (*see Wells Fargo Bank, N.A. v. DeSouza*, 126 AD3d 965 [2d Dept 2015]; *Wells Fargo, NA v Erobobo*, 127 AD3d 1176 [2d Dept 2015]; *Wells Fargo Bank, NA v Morgan*, 139 AD3d 1046 [2d Dept 2016]). This default in payment must be established by proof submitted in evidentiary form (*see Federal Home Loan Mtge. Corp. v Karastathis*, 237 AD2d 558 [2d Dept 1997]). As in any other action, a movant for summary judgment in a foreclosure action must provide affirmative evidence in evidentiary form to establish as a matter of law entitlement to the relief (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Gilbert Frank Corp. v. Federal Insurance*, 70 NY2d 966[1988]; *Torres v. Industrial Container*, 305 AD2d 136 [1st Dept 2003]). Failure to do so requires the denial of the motion regardless of the sufficiency of the opposition (*see*

Winegrad v. New York University Medical Center, 64 NY2d 851[1985]; *William J. Jenack Estate Appraiser and Auctioneers v. Rabizadeh*, 22 NY3d 470 [2013]; *Jacobsen v. New York City Health & Hospital Corp*, 22 NY3d 824 [2014]).

The affidavit of the employee of the servicer for the proposed substitute plaintiff is insufficient to establish defendant's default in payment. Again, although this affiant establishes her ability to testify to her employer's business records pursuant to CPLR 4518 (a), she fails to provide copies of the business records she relies upon to draw her conclusions, therefore her statements lack probative value and failed to establish plaintiff's *prima facie* proof necessary to grant foreclosure (*see Bank of New York Mellon v Gordon,* 171 AD3d 197; *Federal Natl. Mtge. Assoc. v Bronfman*, 173 AD3d 1139 [2d Dept 2019]; *HSBS Bank, USA v Bazigos*, 175 AD3d 1506 [2d Dept 2019]; *US Bank, NA v Kochhar*, 176 AD3d 1010 [2d Dept 2019]; *Wells Fargo Bank, N.A. v Salazar*, 177 AD3d 819 [2d Dept 2019]).

Accordingly, even if the court had considered plaintiff's motion pursuant to CPLR 3212, the motion would have been denied. The issues set for limited issue trial by the decision and order of November 15, 2016 remain to be determined, and the court will consider no further motions for summary judgment by any party.

DISCONTINUANCE AND AMENDMENT OF CAPTION GRANTED

Defendant's opposition to plaintiff's request to discontinue the action against decedent and to amend the caption, arguing that the action must be stayed until a representative of decedent is appointed in Florida, the state where he died, is without merit. The court notes that there is no representation that any form of estate proceeding has been, or will be, instituted in Florida.

Defendant's counsel misapplies the maxim that "the dead may not be sued" to the facts in this case. Certainly a dead person cannot be sued and such an action would be a nullity (*see Citigroup Global Mkts. Realty Corp. v LaGreca*, 167 AD3d 842 [2d Dept 2018]; *Deutsche Bank Natl. Trust Co. v Faden*, 172 AD3d 817 [2d Dept 2019]; *Wells Fargo Bank, N.A. v Baymack*, 176 AD3d 905 [2d Dept 2019]), but here all parties agree that decedent was alive when the action was commenced and only died in 2017.

Defendant unnecessarily discusses situations where a mortgagor dies intestate either before or after an action was commenced, and how a plaintiff may proceed against his/her heirs by discontinuing against such a decedent and unequivocally representing that there will be no claim for a deficiency judgment (*see Federal Natl. Mtge Assoc. v Connelly*, 84 AD2d 805 [2dDept 1981];*DLJ Mortg. Capital Inc. v 44 Brushy Neck, Ltd.*, 51 AD3d 875 [2d Dept 2008]; *Bank of New York Mellon, Trust Co. v Ungar Family Realty Corp.*, 111AD3d 657 [2d Dept 2013]; *Wells Fargo Bank, N.A. v Baymack*, 176 AD3d 905 [2d Dept 2019]). This is not the situation before the court, there is no need for plaintiff to prove that decedent died intestate, that a representative of decedent's estate be appointed and substituted, and that the action be stayed pending such appointment.

Plaintiff has provided a copy of the deed to the property dated April 30, 2003 and recorded with the Suffolk County Clerk ("the Clerk") on October 28, 2003 from the Clerk's records (Plaintiff's Exhibit "L"). The deed shows that defendant and decedent, although spouses (see references thereto in defendant's affidavit) took title to the property as joint tenants with rights of survivorship (EPLT § 6-2.2 [b]). Prior to

decedent's passing, either could have alienated their interest in the property, but as there is no proof that either did so, upon decedent's passing, title to the property passed fully to defendant, as if title had originally been by the entireties. There is no need for the appointment of a representative of decedent who would be substituted in his place, nor for a stay of the action until such appointment can be made pursuant to CPLR 1015(a). Therefore, plaintiff's application to discontinue the action against decedent is appropriate, even if its motion for summary judgment is untimely, and the caption is amended accordingly.

Similarly, the application to amend the caption to remove the "John Doe" and "Mary Roe" defendants and substitute the occupant Ryan Hagans as a defendant is supported by plaintiff's submissions and is independent of the untimely summary judgment motion and granted.

Plaintiff's application to substitute a new "plaintiff" is also not intrinsic to the untimely summary judgment motion. As indicated in the court's decision of November 15, 2016, plaintiff, the original mortgagee, had established its standing, and having done so, it may appropriately substitute another "plaintiff" in its place. Plaintiff has submitted copies of assignments of the mortgage, which also assigned the note, from it to U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust filed with the Clerk subsequent to the commencement of this action in. Therefore, its application to amend the caption by substituting U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust, as plaintiff is granted.

Plaintiff is to serve a copy of this order upon the calendar clerk of this part within thirty (30) days of the filing of this order, and all further proceedings are to be under the amended caption

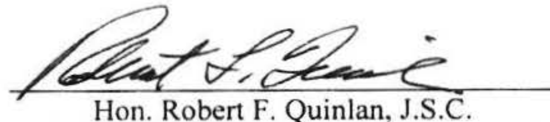
Plaintiff's proposed order is marked "Not Signed."

The court sets a trial of this matter pursuant to the decision and order of November 15, 2016 for October 20, 2020 at 2:00 PM before this part. In consideration of the ongoing Covid-19 Crisis, and the fact that plaintiff's witnesses will be coming from outside of the New York metropolitan area, the court will hold the trial by virtual means through the court's "Skype" system. To facilitate this, the court will provide counsel for the parties with the information necessary for them to participate in a "Skype" virtual trial by notice filed through the court's e-filing system. Both parties are directed to submit copies of all exhibits intended to be relied upon at the trial to the court, and all other counsel, at least 72 hours prior the trial.

Pursuant to the provisions of AO/115/20 and AO/121/20 of the Chief Administrative Judge of the Courts, the parties are to immediately take all steps necessary to convert this action into one in conformity with the requirements for electronic filing pursuant to NYSCEF.

This constitutes the decision and order of the Court.

Dated: September 29, 2020



Hon. Robert F. Quinlan, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION