

U.S. Bank N.A. v 433 E. 35th 3 Inc.
2021 NY Slip Op 31671(U)
May 13, 2021
Supreme Court, Kings County
Docket Number: 506344/15
Judge: Lawrence S. Knipel
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At an IAS Term, Part Comm 6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 13th day of May, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE
FOR CREDIT SUISSE FIRST BOSTON MORTGAGE
SECURITIES CORP., CSMC MORTGAGE-
BACKED PASS-THROUGH CERTIFICATES, SERIES
2006-6,

Plaintiff,

- against -

Index No. 506344/15

433 EAST 35TH 3 INC.; MARIE EDWARDS,
INDIVIDUALLY AND AS ADMINISTRATRIX OF
THE ESTATE OF CARLTON EDWARDS A/K/A
CARLTON D. EDWARDS A/K/A CARLTON
EDWARDS, SR.; CARLTON EDWARDS A/K/A
CARLTON EDWARDS, JR.; PAUL EDWARDS;
MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC. AS NOMINEE FOR N.Y.
FINANCIAL MORTGAGE LENDING;
DEPARTMENT OF HOUSING PRESERVATION
AND DEVELOPMENT; STATE OF NEW YORK;
CITY OF NEW YORK ENVIRONMENTAL
CONTROL BOARD; CITY OF NEW YORK
PARKING VIOLATIONS BUREAU; CITY OF NEW
YORK TRANSIT ADJUDICATION BUREAU;
MARIA GONZALEZ; MINERVA CUMMINGS;
UTON CUMMINGS; JACKIM PIERRE; LATASHA
CRUICKSHANK; MONICA ENNIS; JOSEPH
GLANDEN; DANIEL LASHER and JOSEPH GERRY,

Defendants.

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<u>The following e-filed papers read herein:</u>	<u>NYSCEF Doc Nos.</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) _____	<u>127-138</u>
Opposing Affidavits (Affirmations) _____	<u>140</u>

Upon the foregoing papers in this action to foreclose a mortgage on the real property at 433 East 35th Street in Brooklyn (Property), defendant 433 East 35th 3 Inc. (433) moves (in motion sequence [mot. seq.] five), by order to show cause, for an order: (1) vacating the judgment of foreclosure and sale and order of reference, pursuant to RPAPL 1302-a, and (2) canceling the foreclosure auction.

Background

On May 21, 2015, plaintiff U.S. Bank National Association, as Trustee for Credit Suisse First Boston Mortgage Securities Corp., CSMC Mortgage-Backed Pass-Through Certificates, Series 2006-6 (US Bank) commenced this foreclosure action by filing a summons, a complaint and a notice of pendency against the Property. The complaint seeks to foreclose a mortgage encumbering the Property, which secured a \$422,500.00 note executed by the decedent, Carlton Edwards, Sr., in favor of N.Y. Financial Mortgage Lending (NY Financial) (complaint at ¶¶ 4-5).

Regarding US Bank’s standing to foreclose, the complaint alleges that:

“The Plaintiff is the current owner and holder of the subject mortgage and note, or has been delegated the authority to institute a mortgage foreclosure action by the owner and holder of the subject mortgage and note. If Plaintiff is not the original owner and holder of the subject note and mortgage

then information regarding the chain of title will be contained in Schedule ‘D’” (*id.* at ¶ 6).

Schedule ‘D’ to the complaint provides that:

“The instrument being foreclosed herein is a Mortgage dated April 6, 2006, executed by Carlton Edwards, Sr., now deceased, as Mortgagor(s) to Mortgage Electronic Registration Systems, Inc., as nominee for N.Y. Financial Mortgage Lending, as Mortgagee, to secure the sum of \$422,500.00, and recorded in the Kings County Office of the City Register on April 27, 2006, at CFRN: 2006000235152. The Note and Mortgage were transferred to U.S. Bank National Association, as Trustee for CSMC 2006-6, and said transfer was memorialized by an Assignment of Mortgage executed on February 18, 2011 and recorded March 21, 2011 in CRFN: 2011000099731.

“In addition, the underlying Note was indorsed by the original lender or its agent, successor, or assign, and was delivered to Plaintiff prior to the commencement of this action.”

Notably, a copy of the original note with a blank indorsement from “Ameritrust Mortgage Bankers, Inc. dba N.Y. Financial Mortgage Lending” was annexed to the complaint.

By an October 21, 2016 order of reference, the court (Vaughan, J.) granted US Bank a default judgment against defendants and appointed a referee to ascertain the amount due under the note and mortgage and examine and report whether the Property should be sold in parcels. US Bank’s motion for a default judgment and an order of reference was based on the August 20, 2015 affidavit of Melissa Guillote (Guillote), Vice President of Loan Documentation of Wells Fargo Bank, N.A. (Wells Fargo), the servicer and attorney-in-fact for US Bank.

The court (Vaughan, J.) subsequently issued a March 27, 2019 judgment of foreclosure and sale, ratified and confirmed the December 15, 2016 referee report, which determined that \$656,279.43 was due to US Bank as of November 17, 2016, and that the Property should be sold in one parcel, and ordered that a public auction of the Property take place under the direction of the referee. The judgment of foreclosure and sale awarded US Bank \$656,279.43 together with interest from November 17, 2016, \$4,950.00 in reasonable legal fees and an additional amount for costs and disbursements.

An auction of the Property was subsequently noticed for March 12, 2020.

Defendant's Order to Show Cause

On March 11, 2020, the day before the scheduled foreclosure auction, 433 moved, by order to show cause, for an order vacating the March 27, 2019 judgment of foreclosure and sale and the October 21, 2016 order of reference and canceling the foreclosure auction of the Property. Although defendant sought a temporary restraining order (TRO) staying the foreclosure auction pending its motion, this court declined to stay the sale, and a foreclosure auction was held on March 12, 2020, at which time non-party Shmayer Lebovits emerged as the successful bidder.

In support of defendant's order to show cause, defense counsel asserts that "[a]lthough defendant defaulted in this action, newly enacted RPAPL § 1302-a provides that 'any objection or defense based on the plaintiff's lack of standing in a foreclosure proceeding *relating to a home loan* . . . shall not be waived if a defendant fails to raise the

objection or defense in a responsive pleading or pre-answer motion to dismiss” (emphasis added). The defense argues that “plaintiff failed to establish standing when it moved for an Order of Reference” because the Guillotte affidavit “did not annex any evidence that Wells Fargo services [or] serviced the loan” and “there was not a single document annexed to her affidavit which could have established when, if ever, the Note came into possession of plaintiff[,]” and therefore, “Ms. Guillotte’s averments as to possession of the note are hearsay and not admissible.” Defense counsel asserts that “[a]lthough RPAPL 1302-a applies only to home loans and the current owner is a corporation, Carlton Edwards, Sr., the mortgag[or], resided in the property.”

Defense counsel also advises that “defendant intends to reinstate the mortgage by paying the arrears” and “defendant has secured a commitment for a loan in the sum of \$400,000.00, which is to be advanced to the defendant on April 9, 2020 . . .” which is “more than enough to pay the reinstatement amount.” Defendant submits an affidavit from Mike Kohn, the managing member and president of Alliance Private Capital Group LLC (Alliance), who attests that “Alliance has arranged for a loan from Aspen Real Estate Capital to 433 . . . in the sum of \$400,000.00.” Defendant also submits an affirmation from Joel Rubinfeld, the president of 433, who affirms that he received a commitment for a \$400,000.00 loan and “I intend to use the sum to pay the reinstatement amount of the mortgage held by the plaintiff herein.”

US Bank's Opposition

US Bank, in opposition, argues that there is no issue regarding its standing to foreclose since “[a]nnexed to the complaint was an attorney-certified copy of the original note, which contains a blank indorsement by the original lender . . .” US Bank asserts that it previously demonstrated its prima facie entitlement to judgment, as a matter of law, by producing the mortgage, the unpaid note and evidence of the undisputed payment default. US Bank further notes that “[d]efendant does not dispute proper . . . service of process, and it does not allege any excuse for its default in appearing and pleading herein.”

US Bank notes that “[t]he borrower, Carlton Edwards, Sr., died on or about July 11, 2010, that being nearly five (5) years before this action [was] commenced” and, prior to commencement of this action, the Property was transferred by administrator’s deed to 433, a corporation. US Bank also notes that “at the time the action [was] commenced, the deceased borrower’s estate was no longer the owner of the mortgaged premises.” US Bank argues that RPAPL 1302-a, by its express terms, only applies to a home loan as defined by RPAPL 1304 and is “inapplicable to a foreclosure action commenced after the borrower died, which is what occurred in the case at bar.”

US Bank further argues that defendant seeks to vacate the order of reference and the judgment of foreclosure and sale without first moving to vacate its default in failing to

answer, pursuant to CPLR 317, 3012 or 5015 (a) (1). US Bank asserts that “Defendant fails to offer any excuse, let alone a justifiable excuse, in order to vacate its default . . .”

Discussion

RPAPL 1302-a, which recently became effective on December 23, 2019, provides:

“Notwithstanding the provisions of [CPLR 3211 (e)], any objection or defense based on the plaintiff’s lack of standing in a foreclosure proceeding *related to a home loan*, as defined in [RPAPL 1304 (a)], shall not be waived if a defendant fails to raise the objection or defense in a responsive pleading or pre-answer motion to dismiss. A defendant may not raise an objection or defense of lack of standing following a foreclosure sale, however, unless the judgment of foreclosure and sale was issued upon defendant’s default” (emphasis added).

While there is a dearth of case law regarding this new statute, New York courts have held that the provisions in RPAPL 1304 are inapplicable to a foreclosure action, like this one, which was commenced after the borrower died (*see, e.g., Bank of America, N.A. v McNamara*, 2018 NY Slip Op 31677[U] [Sup. Ct., Suffolk County 2018]). Furthermore, by its express terms, RPAPL 1302-a is only applicable to a “home loan” and the borrower/decedent, Carlton Edwards, Sr., died five years before this action was commenced, and thus, was no longer residing at the Property.

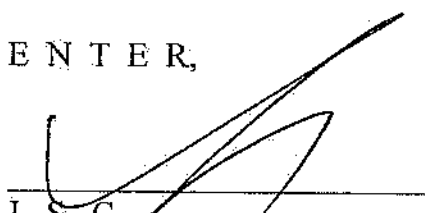
In any event, defendant 433 improperly seeks to interpose the standing defense in RPAPL 1302-a after defaulting in the action without establishing grounds to vacate its default (*see JPMorgan Chase Bank, National Association v Carducci*, 67 Misc3d 561,

564 [Sup. Ct. Westchester County 2020] [denying defendant's motion to vacate and set aside judgment of foreclosure and sale granted on default, pursuant to RPAPL 1302-a, because mortgagor failed to show a reasonable excuse for its failure to answer the complaint]). In order to vacate a judgment of foreclosure and sale, a defendant must establish both a reasonable excuse for the default and a meritorious defense (*HSBC Bank, USA v Dammond*, 59 AD3d 679, 680 [2009]). Defendant 433 failed to demonstrate a reasonable excuse for its default in this foreclosure action, and therefore, denial of its motion to vacate the order of reference and judgment of foreclosure and sale is warranted. Accordingly, it is hereby

ORDERED that defendant 433's motion (mot. seq. five) is denied.

This constitutes the decision and order of the court.

E N T E R,


J. S. C.
HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE