SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: Part 36

Index No.: 23119/10
Motion Calendar No.
Motion Sequence No.

DEUTSCHE BANK NATIONAL TRUST COMPANY, TRUSTEE FOR ARGENT SECURITIES, INC. ASSET BACKED PASS-THROUGH CERTIFICATES, SERIES 2005-W2,

Plaintiff(s),

-against-

JOHN T. FOSTER, et al.,

Defendant(s).

DECISION / ORDER

Present:
Hon. Judge Bernard J. Graham
Supreme Court Justice

Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion for summary judgment and the appointment of a referee to compute and cross-motion for permission to file an amended answer.

Papers	**Numbered**
Notice of Motion and Affidavits Annexed.....	1-2
Order to Show cause and Affidavits Annexed.....	
Answering Affidavits and cross-motion.....	3-4
Replying Affidavits.....	5,6,7
Exhibits.....	
Other:.....	

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Plaintiff, Deutsche Bank National Trust Company, ("Deutsche Bank") has moved pursuant to CPLR § 3212, for an order awarding summary judgment in favor of the plaintiff and against the defendant/borrower John T. Foster ("Mr. Foster"), striking defendant's answer and seeking the appointment of a referee to compute the sums due and owing the plaintiff pursuant to the terms of the mortgage. Defendant has cross-moved seeking leave of court to file an amended answer, to

include affirmative defenses, and opposes plaintiff's motion upon the grounds that summary judgment is not an appropriate remedy, as plaintiff failed to demonstrate that it has standing to commence this action and that plaintiff has not satisfied the condition precedent in order to maintain this action.

Background

This action was commenced by plaintiff to foreclose upon a mortgage dated July 29, 2005, which mortgage was recorded in the Office of the City Register of the City of New York, Kings County on September 21, 2005, in the principal amount of $240,000.00. A note and mortgage were executed by Mr. Foster on July 29, 2005, in favor of Argent Mortgage Company, LLC, ("Argent Mortgage") the mortgagee. The mortgage encumbers the property located at 174 Schaefer Avenue, Brooklyn, New York. City Residential Lending Inc., as attorney-in-fact for Argent Mortgage, assigned all of its rights, title and interest in the note and mortgage to the plaintiff by way of assignment dated January 15, 2009, which was recorded in the office of the Clerk of Kings County on February 17, 2009.

Pursuant to the terms of the mortgage note, the borrower promised to make monthly payments of principal and interest until the maturity date, which date is set forth in the note, at which time the borrower was required to pay the entire unpaid principal sum still due and owing under the note, as well as any accrued interest thereon.

The terms of the mortgage provided that the failure of the borrower to make any payment due under the note, which remains uncured for a period of thirty days, is considered to be a default under the mortgage, which would entitle the plaintiff to institute a foreclosure proceeding.

The borrower failed to make the monthly payment due under the note on March 1, 2010, and has not made any subsequent monthly payments due thereafter. Prior to the commencement of this action, plaintiff allegedly mailed a default notice to the defendant, dated March 22, 2010, via first class mail. As a result of the failure to pay the amounts due under the note and mortgage, plaintiff commenced this foreclosure action on or about September 20, 2010, by the filing of a summons, verified complaint and Notice of Pendency in the office of the County Clerk of Kings County. Service was effectuated upon John T. Foster by personal service on October 4, 2010 at

250 Wortman Avenue, Apt. 2F, Brooklyn, New York.

A pro-se answer, dated October 22, 2010, was served by the defendant, upon the office of the attorney for the plaintiff, by regular mail.

Thereafter, this matter appeared in the Settlement Conference Part of this Court between November 30, 2010 and June 28, 2011, and when the matter could not be resolved, the plaintiff was given permission by the Court to proceed with this foreclosure action.

Plaintiff's contention

In a mortgage foreclosure, a plaintiff establishes "its prima facie entitlement to a judgment as a matter of law by submitting the mortgage, the note and evidence of a default" (Countrywide Home Loans, Inc. v. Delphonse, 64 AD3d 624, 883 NYS2d 135 (2nd Dept. 2005)). Here, the plaintiff states that they have submitted copies of the note and mortgage and conclusively established that the borrower is in default of his obligations under said loan documents (see the affidavit of Daniel Staten, a vice-president of Homeward Residential, Inc. the attorney in fact for Deutsche Bank).

The standing of a plaintiff is measured by its ownership, holder status or possession of the note and mortgage at the time of commencement of the action (see U.S. Bank, N.A. v. Collymore, 68 AD3d 752, 890 NYS2d 578 (2nd Dept. 2009)). A mortgage passes as an incident of the note upon its physical delivery to the plaintiff (see Deutsche Bank Natl. Trust Co. v. Spanos, 102 AD3d 909 (2nd Dept. 2013)). Here, the note contains a blank indorsement which conveys ownership upon the party who holds same (see OneWest, FSB v. Davies, 38 Misc.3d 1230). The endorsed note is fully negotiable and delivery with such endorsement prior to filing confers standing on the party that holds it (see US Bank v. Flynn, 27 Misc2d 902, 897 NTS2d 554 (2nd Dept. 2007)). Here, the assignment of mortgage does not come from MERS but from the loan's originator. The assignment is from a party who had physical possession and an interest in the underlying note. The defendant's argument as to the plaintiff not having standing is based upon self-serving and conclusory allegations which do not raise issues of fact.

Plaintiff opposes the cross-motion by counsel for the defendant, which request for relief seeks to amend the original pro-se answer. Plaintiff maintains that defendant has failed to provide

a reasonable excuse for failing to timely move to amend his answer. The matter concluded in the Settlement Conference Part on June 28, 2011, when the matter was released to the IAS part. Thereafter, plaintiff moved for summary judgment and defendant waited eight months in response to the motion, and nearly three years after the matter was released from the settlement conference part before seeking leave to amend his answer. The excuse proffered by defendant that he was involved in settlement negotiations has been found by the Second Department to be an unacceptable excuse in not timely answering. The Court in HSBC Bank, USA, National Association v. Lafazan, 2014 NY Slip Op 01436 (App Div., 2nd Dept. 2014), determined that appearances in the settlement conference part do not provide a reasonable excuse for the delay in answering.

Plaintiff maintains that it has stated a cause of action by naming the parties, the obligation, the default thereon and the remedy sought (see Foley v. D'Agostino, 21 AD2d 60, 248NYS2d 121 (2nd Dept. 1964)). As to the issue of the thirty day Notice of Default, plaintiff has submitted a copy of the notice along with an affidavit of plaintiff's representative who confirms that based upon a review of the business records of the plaintiff that it was mailed to the defendant.

It is undisputed that the defendant failed to make the payments due and owing commencing on or about March 1, 2010, or any payments due subsequent thereto. After the lender establishes its prima facie claim, the burden shifts to the defendant to provide proof in admissible form of the existence of a triable issue of fact (see Wells Fargo Bank v. Webster, 61 Ad3d 856, 877 NYS2d 200 (2nd Dept. 2009); Rose v. Levine, 52 AD3d 800, 861 NYS2d 374 (2nd Dept. 2008)).

Defendant's contentions:

Defendant in opposing plaintiff's motion maintains that summary judgment is inappropriate where there are issues of fact that have not as yet been resolved. The defendant contends that the plaintiff in either the complaint or in the motion, included an allegation that there was physical delivery of the note or plaintiff had physical possession of both the note and mortgage prior to the commencement of this action. In addressing the affidavit of Mr. Staten, he fails to attach or describe any of plaintiff's business records which he relied upon, nor is there an

allegation that such records are maintained in the regular course of business. As to the note which was endorsed in blank without recourse, defendant argues that there is a question of fact as to when the note was endorsed. Here, defendant contends that the assignment of mortgage to plaintiff dated January 15, 2009 is defective if plaintiff does not have physical possession of the note prior to the written assignment.

Defendant further argues that the plaintiff may not have been entitled to demand immediate payment of the outstanding balance of the loan, pursuant to Section 22 of the Mortgage, if all conditions precedent were not met, including service of the notice of default. The attorney affirmation and the affidavit of Daniel Staten which contained conclusory allegations that the notice was given was not sufficient to establish that plaintiff served the defendant with the requisite notice to cure his default. The plaintiff failed to provide an affidavit of service as to the alleged notice of default.

The defendant, in cross-moving, maintains that pursuant to CPLR § 3025(b), leave to amend or supplement pleadings shall be freely given upon such terms as may be just. A motion for leave to amend an answer should be granted where plaintiff fails to demonstrate prejudice and the proposed answer is not frivolous. Mere lateness is not a barrier to amending. It must be lateness coupled with significant prejudice to the other side (see U.S. Bank v. Natl. Assn. v Sharif, 89 AD3d 723, 933 NYS2d 293 (2nd Dept. 2011)). Counsel for defendant maintains that they were not retained until the defendant was served with the motion for summary judgment, as this matter was dormant for approximately eighteen months prior thereto, between the time that the matter was released from the foreclosure part and the filing of this motion. The pro-se answer originally submitted, served and filed by the defendant did not contain the substantive affirmative defenses, including standing, that counsel wishes to assert on behalf of the defendant.

Defendant maintains that an issue exists as to when the note was delivered to the plaintiff and whether it was delivered on or before the commencement of the action. A note endorsed in blank must be physically delivered to be negotiated and a written assignment, such as the Assignment of Mortgage, would be ineffective to convey the note (see UCC §3-202(1)). An assignment is ineffective to transfer a note endorsed in blank, without a specific endorsement, because the note is a bearer instrument and if another party is in possession of the note, it would

have a right to enforce it. Defendant contends that plaintiff's papers and pleadings fail to establish how the plaintiff came into possession of the note and instead relies upon conclusory allegations.

Defendant maintains that the plaintiff's reliance upon HSBC Bank, USA v. Dammond, 59 AD3d 679 (2nd Dept. 2009) for the proposition that the failure to raise a defense is a waiver is misplaced. In Dammond, the attempt to raise a standing defense was only made post-judgment of foreclosure and sale and immediately prior to the date scheduled for the sale of the property.

Defendant further wishes to engage in formal discovery as no discovery was conducted in this matter.

Discussion:

This Court has reviewed the submissions of counsel for the respective parties and considered the arguments presented herein, as well as the applicable law in making its determination with respect to the underlying mortgage and note, and the relief sought herein.

At issue, before this Court, is whether the plaintiff has demonstrated its entitlement to a judgment or whether the cross-motion of defendant's current counsel which seeks to amend the defendant's answer and include affirmative defenses is warranted.

In attempting to demonstrate its prima facie entitlement to summary judgment, the plaintiff has submitted the mortgage, unpaid note with mortgagor's signature, the assignment of mortgage and evidence of a default (an affidavit that the borrower defaulted in the payment of its obligations under the note and mortgage) (see Wells Fargo Bank v. Karla, 71 AD3d 1006, 896 NYS2d 681 (2nd Dept. 2010); Capstone Bus. Credit v. Imperia Family Realty, 71 AD3d 1006, 895 NYS2d 199 (2nd Dept. 2010); Cochran Inv. v. Jackson, 38 AD3d 704, 705, 834 NYS2d. 198-199 (2nd Dept. 2007)). Additionally, the defendant/borrower does not deny in its answer that the documents related to the note and mortgage were executed and that the loan proceeds were received by the defendant. However, notwithstanding the above, in order for this Court to find that the plaintiff has set forth its prima facie entitlement to summary judgment and was permitted to accelerate the balance due on the loan, the plaintiff must establish that the defendant was served with a notice of default. In support of establishing proof that the default notice was mailed to the

defendant, the plaintiff submits the affidavit of Daniel Staten, a vice-president of Homeward Residential, Inc., the attorney-in-fact for Deutsche Bank. Mr. Staten states that he is the document control officer of the plaintiff and that he has personal knowledge based upon business records that the demand was sent to the mortgagor and the mail was not returned as undeliverable. (A copy of the default notice is annexed to the Notice of Motion as Exhibit "F"). In opposition to the motion for summary judgment, defendant maintains that the affidavit of Mr. Staten with regard to the default notice contains conclusory allegations which is insufficient to establish that the notice was sent pursuant to paragraph #22 of the mortgage. Upon review, this Court finds that the plaintiff has not met its burden of proof to establish that the default notice was sent to the defendant and that plaintiff complied with the condition precedent as set forth in the terms of the mortgage. An affidavit of service has not been submitted nor has the plaintiff submitted proof of mailing from the U.S. post office or another officially recognized mailing agent. The "unsubstantiated and conclusory statements in the affidavit, which indicated that the required notice of default was sent in accordance with the terms of the mortgage, combined with the copy of the notice of default, failed to show that the required notice was mailed by first class mail or actually delivered to the notice address if sent by other means, as required by the mortgage agreement." (Wells Fargo Bank v. Eisler, 2014 NY App Div. Lexis 44792, 2014 NY Slip Op 4753); HSBC Mortgage Corp (USA) v. Gerber, 100 AD3d 966, 955 NYS2d 131 (App. Div. 2d. Dept. 2012)). Furthermore, there is no credible evidence submitted that the statutory notices were also sent to the defendants.

The award of summary judgment is a drastic remedy and should only be considered when there is conclusive absence of any triable issue (see Rotuba Extruders v. Ceppos, 46 NY2d 223, 413 NYS2d 141 (1978). Summary judgment should not be awarded where there is any doubt as to the existence of a triable issue, or when its existence is arguable (see Alvarez v. Prospect Hospital, 68 NY2d 320, 508 NYS2d 923 (1986). There are questions of fact as to whether the requisite default notice was served upon the defendant and as such the motion for summary judgment by the plaintiff is denied.

In addressing, defendant's cross-motion which seeks to amend the original answer, this Court notes that the defendant did submit a timely pro-se answer in response to being served with

a copy of the summons and complaint and thereafter participated in the mandatory settlement conference part which did not result in a resolution of this matter. Upon the defendant being served with this motion for summary judgment, defendant maintains that he retained counsel who then cross-moved for leave of Court to submit an amended or supplemental answer which is inclusive of affirmative defenses. This Court in considering whether the relief sought in the cross-motion is timely, does not find that counsel was dilatory in seeking to amend defendant's answer, as they were recently retained by the defendant. This Court does not find that this situation is akin to those cases in which a defendant defaulted in answering the complaint and later sought permission to file its original answer.

This Court has next considered the merits of the proposed amended verified answer of the defendant which includes four affirmative defenses (see Exhibit "F" annexed to the cross-motion). In reviewing same, this Court will address each of the affirmative defenses and determine whether there is any legal basis for their inclusion in the amended answer.

As to the first proposed affirmative defense, in which the defendant contends that the plaintiff failed to state a cause of action, this Court finds that the plaintiff established a prima facie case for foreclosure when it presented the mortgage, an unpaid note with mortgagor's signature and evidence of a default (see Cochran Inv. v. Jackson, 38 AD3d at 705). Accordingly, this proposed affirmative defense lacks merit and should be stricken from inclusion as a defense in defendant's amended answer.

As to the second and fourth proposed affirmative defenses, this Court is not persuaded by the attempt of defendant to challenge the standing of the plaintiff which would result in a finding that plaintiff was not the holder of the mortgage and/or note. The plaintiff has established that it has standing, as it was in possession of the indorsed in blank note at the time of the commencement of this proceeding. A plaintiff has standing in a foreclosure action where it is both the holder of the note and mortgage or assignee or holder of the subject mortgage and the holder or assignee of the underlying note, either by physical delivery or execution of a written assignment (see Wells Fargo Bank, N.A. v. Marchione, 69 AD3d 204, 207-09, 887 NYS2d 615 (2nd Dept. 2009)) and has been in continuous possession of the note and mortgage since prior to the commencement of this proceeding. A note and mortgage may be transferred either by a written

assignment or the physical delivery of the note prior to the commencement of the foreclosure action. The mortgage passes with the debt as an inseparable incident (see MERS v. Coakley, 41AD2d 674, 838 NYS2d 622 (2nd Dept. 2007)). Here, the assignment to the plaintiff occurred on January 15, 2009 and the foreclosure action was commenced by plaintiff on or about September 20, 2010. Accordingly, this Court finds that the proposed second and fourth affirmative defenses lack merit and should be stricken from inclusion as a defense in defendant's amended answer.

As to the third proposed affirmative defense, which alleges that the plaintiff did not satisfy a condition precedent, as plaintiff failed to comply with RPAPL § 1302 through § 1304, as well as § 1306, no evidence is provided by the plaintiff as to the service of the statutory notices upon the defendant. Furthermore, as discussed above, the Court has determined in the plaintiff's primary motion that the plaintiff has not conclusively established that the notice of default was served upon the defendant. As a result, this Court finds that there is a legal basis for the inclusion of this portion of the third affirmative defense in defendant's answer.

As to the portion of the third proposed affirmative defense, which alleges that plaintiff failed to comply with RPAPL § 265-a, there has been no proof adduced that the defendant was the victim of fraud, deception and/or unfair dealing. The defendant failed to assert any facts or provide any evidence of these practices. In order to establish fraud, a plaintiff must show "a material misrepresentation of an existing fact, made with knowledge of its falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages (MBIA Ins. Corp. v. Countrywide Home Loans, Inc., 87 AD3d 287, 928 NYS2d 229 (1st Dept. 2011)). Defendant failed to offer any evidence that plaintiff committed any of these elements of fraud nor was the fraud claim plead in detail. Accordingly, this Court does not find that there is any merit to the inclusion of the portion of the third proposed affirmative defense that plaintiff failed to comply with RPAPL § 265-a, and thus, it should be stricken from inclusion as a defense in defendant's amended answer.

Conclusion:

The motion by plaintiff for an Order granting summary judgment in favor of the plaintiff and against the defendant and appointing a referee to compute the sums due and owing the

plaintiff pursuant to the terms of the mortgage is denied. The cross-motion of defendant which seeks to amend the pro-se answer is granted to the extent that the defendant may assert the proposed third affirmative defense solely to the extent that plaintiff failed to comply with RPAPL § 1302 through § 1304, as well as § 1306. The amended answer should be served upon plaintiff and filed with the Court within thirty days after receipt of a copy of this Order which Order is being mailed to both parties by the Court.

This constitutes the decision and order of the Court.

Enter:

Dated: August 29 ,2014
Brooklyn, New York

Hon. Bernard J. Graham, Justice
Supreme Court, Kings County