Onewest Bank, FSB v Mazzone
2013 NY Slip Op 32247(U)
September 25, 2013
Sup Ct, Albany County
Docket Number: 2696-11
Judge: Joseph C. Teresi

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

ONEWEST BANK, FSB,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 2696-11
RJI NO. 01-12-107784

LYNN M. MAZZONE AKA LYNN MAZZONE;
JEFFREY MAZZONE AKA JEFFREY M. MAZZONE;
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR QUICKEN LOANS, INC.;
"JOHN DOE #1" to "JOHN DOE #10", the last ten names 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 mortgaged premises described in the verified complaint,

Defendants.

Supreme Court Albany County All Purpose Term, September 18, 2013
Assigned to Justice Joseph C. Teresi

APPEARANCES:
Greenberg Traurig, LLP
Daniel Milstein, Esq.
Attorneys for Plaintiff
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New York, New York 10166

Mann Law Firm
Matthew Mann, Esq.
Attorney for Defendants Lynn and Jeffrey Mazzone
4267 Troy Schenectady Road
Latham, New York 12110

TERESI, J.:

On April 18, 2011, Plaintiff commenced this action to foreclose a mortgage on real property owned by Lynn and Jeffrey Mazzone (hereinafter collectively "the Mazzones"), located

at 100 Waterman Avenue, Colonie New York. Issue was joined by the Mazzones, who asserted that Plaintiff lacks standing in their answer. The requisite settlement conferences have been held and discovery is ongoing. Plaintiff now moves for summary judgement against the Mazzones, the appointment of a referee to compute, default judgment against Mortgage Electronic Registration Systems, Inc. (hereinafter "MERS"), and an amendment of the caption to delete the "JOHN DOE" Defendants. The Mazzones oppose the motion. Because Plaintiff demonstrated its entitlement to the relief it seeks, and the Mazzones raised no triable issue of material fact, Plaintiff's motion is granted in its entirety.

Preliminarily, the Mazzones' objection to the timeliness of Plaintiff's motion is rejected. The Mazzones correctly note that Plaintiff failed to comply with this Court's prior Order directing it to "deliver to the Albany County Supreme Court Clerk" a motion to appoint a referee by August 20, 2013. While Plaintiff's affidavit of service established that it "made" (CPLR §2211) this motion on August 20, 2013, Plaintiff did not "deliver" this motion to the Supreme Court Clerk until August 21, 2013. This single day delay however, does not demonstrate "willful and contumacious conduct" to justify dismissal. (Armstrong v B.R. Fries & Assoc., Inc., 95 AD3d 697, 698 [1st Dept 2012]). Nor, on such minimal dealy, may this case be dismissed for failure to prosecute. (Cadichon v Facelle, 18 NY3d 230 [2011]). The Mazzones made no further showing that Plaintiff "engage[d] in 'delinquent conduct' and there is no evidence of a pattern of willful noncompliance with court-ordered deadlines." (Aurora Loan Services, LLC v Sobanke, 101 AD3d 1065 [2d Dept 2012]). Accordingly, to the extent this action was previously deemed dismissed such dismissal is vacated in its entirety.

Turning to Plaintiff's motion for summary judgment, it is well established that

"[e]ntitlement to a judgment of foreclosure may be established, as a matter of law, where a mortgagee produces both the mortgage and unpaid note, together with evidence of the mortgagor's default." (Zanfini v Chandler, 79 AD3d 1031, 1031-32 [2d Dept 2010], quoting HSBC Bank USA v Merrill, 37 AD3d 899 [3d Dept 2007]; Cititbank, N.A. v Van Brunt Properties, LLC, 95 AD3d 1158 [2d Dept 2012]; La Salle Bank Nat. Ass'n v Kosarovich, 31 AD3d 904 [3d Dept 2006]; Pritchard v Curtis, 95 AD3d 1379 [3d Dept 2012]). "Where, as here, the issue of standing is raised by a defendant, a plaintiff must prove its standing in order to be entitled to relief." (Homecomings Fin., LLC v Guldi, 108 AD3d 506, 508 [2d Dept 2013], quoting Bank of New York v Silverberg, 86 AD3d 274 [2d Dept 2011]; U.S. Bank, N.A. v Adrian Collymore, 68 AD3d 752 [2d Dept 2009]; Deutsche Bank Nat. Trust Co. v Whalen, 107 AD3d 931 [2d Dept 2013]; Bank of New York Mellon Trust Co. NA v Sachar, 95 AD3d 695 [1st Dept 2012]).

Plaintiff first properly produced the note and mortgage, along with evidence of the Mazzones' default. Plaintiff attached to its motion a copy of the Mazzones' Mortgage and Adjustable Rate Note, both dated November 20, 2006 (hereinafter respectively referred to as "Mortgage" and "Note"), upon which this action is based. It further established the Mazzones' default with an affidavit made by Charles Boyle (hereinafter "Boyle"), a Vice President in Plaintiff's Default Risk Management - Litigation department. Boyle alleged personal knowledge of Plaintiff's default, based upon sufficient CPLR §4518 allegations, by his review of the Plaintiff's business records and his attaching a copy of same. (Charter One Bank, FSB v Leone, 45 AD3d 958 [3d Dept 2007]).

Turning to standing, Plaintiff failed to demonstrate its standing by operation of the

assignment it received from MERS. It is uncontested that the Mazzones initially gave the Mortgage to Quicken Loans Inc. (hereinafter "Quicken"), with MERS named as Quicken's nominee for recording purposes and as mortgagee of record. The Complaint and motion premise Plaintiff's standing, in part, on its receipt of MERS's Assignment of Mortgage, dated April 12, 2011 (hereinafter "2011 Assignment"). Without more, however, such assignment was a nullity. As has long been held, the "transfer of the mortgage without the debt is a nullity, and no interest is acquired by it." (Bank of New York v Silverberg, supra at 280, quoting Merritt v Bartholick, 36 NY 44 [1867]). Plaintiff offered no allegations or proof, in its Complaint or on this motion, that MERS was the holder or assignee of the Note prior to its 2011 Assignment. Despite the 2011 Assignment's statement that it assigned the underlying Note, "MERS could not transfer that which it did not hold." (Homecomings Fin., LLC v Guldi, supra 508). As such, Plaintiff demonstrated neither the validity of the 2011 Assignment nor its standing to pursue this action based upon the 2011 Assignment.

Plaintiff similarly failed to establish its standing by demonstrating that it held the Note at the time of commencement.[1] Like the Mortgage, the Note was also originally given to Quicken (but only by Mr. Mazzone). Quicken then indorsed the Note "pay[able] to the order of IndyMac Bank, F.S.B." (hereinafter "IndyMac Bank"). Quicken's indorsement was undated. So too was IndyMac Bank's indorsement in blank. Plaintiff offered no explanation for IndyMac Bank's blank indorsement. Nor did Plaintiff explain, with any factual detail, what IndyMac Bank did with the Note after indorsing it. Instead, Plaintiff only offered Boyle's conclusory statements that

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[1] The Complaint alleged Plaintiff's standing, in part, by stating that it is "the holder of said note." While such conclsuory statement is insufficient for summary judgment, it was adequate for pleading purposes. (CPLR §3013).

IndyMac Bank indorsed the Note "prior to the commencement of this action" and that Plaintiff "possessed the original Note... prior to the commencement of this action." No details of such tender and acceptance were provided. Because Boyle "did not give any factual details of a physical delivery of the note[, he] failed to establish that the plaintiff had physical possession of the note prior to commencing this action" to sufficiently support this summary judgment motion. (Deutsche Bank Nat. Trust Co. v Haller, 100 AD3d 680 [2d Dept 2012], quoting HSBC Bank USA v. Hernandez, 92 AD3d 843 [2d Dept 2012]; U.S. Bank, N.A. v Adrian Collymore, supra; Homecomings Fin., LLC v Guldi, supra).

Plaintiff also failed to establish its standing as the assignee of the Note pursuant to the Loan Sale Agreement, dated March 19, 2009 (hereinafter "Loan Sale Agreement"), Plaintiff attached to its motion. The Loan Sale Agreement's recitals established that the Federal Deposit Insurance Corporation (hereinafter "FDIC") was appointed IndyMac Bank's receiver in 2008. Certain IndyMac Bank assets were then transferred to IndyMac Federal Bank, F.S.B. (hereinafter "IndyMac Federal"), for which the FDIC was also appointed conservator and receiver. The recitals went on to state that IndyMac Federal owned the loans (defined as both notes and mortgages) listed on Attachment A. The Loan Sale Agreement then transferred from IndyMac Federal to Plaintiff the loans, with mortgages, listed on Attachment A. The Loan Sale Agreement's Attachment A, however, was blank. As such, it offers no proof that Plaintiff is the assignee of the Note and fails to establish Plaintiff's standing.

Despite the above defects, Plaintiff established its standing by showing that it acquired the Note by a Bill of Sale, dated March 19, 2009 (hereinafter "Bill of Sale"), it submitted. Again, on this record it is uncontested that FDIC acted as IndyMac Bank's receiver in transferring

IndyMac Bank's assets to IndyMac Federal. The Bill of Sale then memorializes IndyMac Federal's transfer to Plaintiff, pursuant to the Loan Sale Agreement's terms, those loans listed on its Exhibit A. The Note was listed on Exhibit A, and the Loan Sale Agreement's terms transferred the Mortgage therewith. Because such March 2009 transfer of the Note occurred well before the April 2011 commencement of this action, Plaintiff established its standing herein.

With the above, Plaintiff made a prima facie showing of its entitlement to judgment as a matter of law, and shifted the burden to the Mazzones "to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action." (Citibank, N.A. v Van Brunt Properties, LLC, supra, quoting Mahopac Nat. Bank v Baisley, 244 AD2d 466 [2d Dept 1997]).

On this record, the Mazzones failed to raise a triable issue of fact. The Mazzones offer neither a denial of their default in paying the Note and Mortgage, nor any factual affidavit. Instead, they rely solely upon their attorneys' affirmation. However, because such affirmation is not based upon "personal knowledge of the operative facts [it is of no]... probative value." (2 North Street Corp. v Getty Saugerties Corp., 68 AD3d 1392 [3d Dept 2009]; Groboski v Godfroy, 74 AD3d 1524 [3d Dept 2010]; Zuckerman v City of New York, 49 NY2d 557 [1980]). To the extent the affirmation claims to raise unanswered questions, it failed to properly raise issues of fact with "evidentiary proof in admissible form." (Solomon v Burden, 104 AD3d 839 [2d Dept 2013]). Nor did the affirmation demonstrate that the Mortgages' lien was a nullity, as such argument ignores the well settled principle that "where a note is transferred, a mortgage securing the debt passes as an incident to the note." (Deutsche Bank Nat. Trust Co. v Spanos, 102 AD3d 909, 911 [2d Dept 2013]). Similarly unavailing is the Mazzone's reliance on a Deutsche Bank fax cover page dated July 26, 2012, which references the Note. Such fax cover

page, dated well after commencement, raises no issue of fact about the Note's ownership prior to commencement. In addition, the Mazzones' contention that the Mortgage is void because of its designation of MERS as nominee, was specifically considered and rejected by the Court of Appeals. (MERSCORP, Inc. v Romaine, 8 NY3d 90 [2006]). Lastly, while the affirmation specifies numerous instances of prior bad acts within other mortgage foreclosure actions, it did not demonstrate that such conduct has occurred here. (*see* Wells Fargo, N.A. v Levin, 101 AD3d 1519 [3d Dept 2012]).

Accordingly, Plaintiff's motion for summary judgment is granted.

With Plaintiff's motion for summary judgment granted, a referee must be appointed. (Neighborhood Housing Services of New York City, Inc. v Meltzer, 67 AD3d 872 [2d Dept 2009]; US Bank, NA v Boyce, 93 AD3d 782 [2d Dept 2012]; Vermont Fed. Bank v Chase, 226 AD2d 1034 [3d Dept 1996]; Bank of E. Asia v Smith, 201 AD2d 522 [2d Dept 1994]).

Plaintiff also demonstrated its entitlement to a default judgment. Plaintiff submitted an affidavit of service demonstrating its proper service of the Summons and Complaint on MERS. It further established, its compliance with CPLR §3215 and MERS' default.

Additionally, Plaintiff sufficiently demonstrated that the fictitiously named defendants in the caption are unnecessary, as there are no tenants or other parties that fit the caption's description.

Accordingly, Plaintiff's motion for the appointment of a referee is granted; its motion for a default judgment against MERS is granted; and its motion to amend the caption of this action to delete the fictitiously named "JOHN DOE" defendants is granted. Plaintiff shall submit to this Court an Order of Appointment and Amendment as soon as possible.

This Decision and Order is being returned to the attorneys for the Plaintiff. A copy of this

Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: September 25, 2013
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated August 19, 2013;Affidavit of Charles Boyle, dated August _, 2013, with attached Exhibit A; Affirmation of Daniel Milstein, dated August 19, 2013, with attached Exhibits A-M.
2. Affirmation of Matthew Mann, dated September 10, 2013, with attached Exhibits A-I.