

Vanderbilt Mtge. and Fin., Inc. v Cushion

2015 NY Slip Op 30939(U)

January 13, 2015

Supreme Court, Suffolk County

Docket Number: 33937-11

Judge: Ralph T. Gazzillo

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SUPREME COURT - STATE OF NEW YORK
IAS PART 6 - SUFFOLK COUNTY

COPY

PRESENT: Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 10-31-13

ADJ. DATE _____

Mot. Seq. #003 - MG

_____^x
VANDERBILT MORTGAGE AND FINANCE, INC.,

Plaintiff,

HELFAND & HELFAND
Attorneys for Plaintiff
350 Fifth Avenue, Suite 5330
New York, N. Y. 10118

-against-

DEBRA CUSHION; MICHAEL CUSHION; TARGET NATIONAL BANK; CAPITAL ONE BANK USA, N.A.; NORTH STAR CAPITAL ACQ, LLC; ADVANTAGE ASSETS II INC., GE CAPITAL/LVNV FUNDING LLC; CITIBANK SOUTH DAKOTA, N.A.; HSBC BANK NEVADA N.A.; DISCOVER BANK; COUNTY OF SUFFOLK; and "JOHN DOE #1" through "JANE DOE #10", the last 10 names being fictitious and Unknown to the Plaintiff, the persons or parties intended being the occupants, tenants, persons or entities, if any, having or claiming an interest in or lien upon the mortgaged premises described in the verified complaint,

DeLISA LAW GROUP, PLLC
Attorneys for Defendant
475 Montauk Hwy.
West Islip, N. Y. 11795

Defendants.

_____^x

Upon the following papers numbered 1 to 16 read on this motion for summary judgment and an order of reference; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8; ~~Notice of Cross Motion and supporting papers _____~~; Answering Affidavits and supporting papers 9 - 14; Replying Affidavits and supporting papers 15 - 16; ~~Other _____; (and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion by plaintiff, Vanderbilt Mortgage and Finance, Inc. (Vanderbilt), for leave to renew and reargue its prior motion for an order of reference appointing a referee to compute the amount due in this action is considered pursuant to CPLR 2221 and is granted as to renewal; and it is further

ORDERED that upon renewal, plaintiff Vanderbilt's application pursuant to CPLR 3212 for summary judgment on its verified complaint as against defendant Debra Cushion and Michael Cushion (defendants), fixing the defaults as against the non-appearing, non-answering defendants, for leave to amend the caption of this action pursuant to CPLR 3025 (b) and, for an order of reference

appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is granted; and it is further

ORDERED that the caption is hereby amended by striking therefrom defendants “John Doe #1” through “Jane Doe #10”; and it is further

ORDERED that plaintiff is directed to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court; and it is further

ORDERED that the caption of this action hereinafter appear as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

_____^x
VANDERBILT MORTGAGE AND FINANCE, INC.,

Plaintiff,

-against-

DEBRA CUSHION; MICHAEL CUSHION; TARGET
NATIONAL BANK; CAPITAL ONE BANK USA, N.A.;
NORTH STAR CAPITAL ACQ, LLC; ADVANTAGE
ASSETS II INC., GE CAPITAL/LVNV FUNDING LLC;
CITIBANK SOUTH DAKOTA, N.A.; HSBC BANK
NEVADA N.A.; DISCOVER BANK; COUNTY OF
SUFFOLK,

Defendants.

_____^x

This is an action to foreclose a mortgage on premises known as 511 Station Rd. a/k/a Bellport Station Rd., Bellport, New York. On August 27, 2007, defendant Debra Cushion executed a fixed rate note in favor of First Franklin Financial Corp., an Op. Sub. of MLB&T Co., FSB (First Franklin) in the principal sum of \$272,000.00 at the yearly rate of 9.000 percent. On the same date, defendants executed a first mortgage in the principal sum of \$272,000.00 on the subject property. The mortgage indicated First Franklin to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of First Franklin as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on September 17, 2007 in the Suffolk County Clerk’s Office. Thereafter, the mortgage was transferred by assignment of mortgage dated September 15, 2011 from MERS, as nominee for First Franklin, to plaintiff Vanderbilt. The assignment of mortgage was recorded on September 22, 2011 with the Suffolk County Clerk’s Office.

Vanderbilt sent a notice of default to defendants stating that they had defaulted on their mortgage loan and that the amount past due was \$12,830.24. As a result of defendants’ continuing default, plaintiff commenced this foreclosure action on November 2, 2011. In its complaint, plaintiff

alleges in pertinent part that defendants breached their obligations under the terms of the note and mortgage by failing to make their monthly payments commencing with the installment due on January 11, 2011 and subsequent payments thereafter. Defendants interposed an answer with affirmative defenses and counterclaims.

The Court's computerized records indicate that a foreclosure settlement conference was held on September 6, 2012 at which time this matter was referred as an IAS case since a resolution or settlement had not been achieved. Thus, there has been compliance with CPLR 3408 and no further settlement conferences are required.

Plaintiff now moves for summary judgment on its complaint. In support of its motion, plaintiff submits among other things: the sworn affidavit of Jackie Stubblefield, a legal affairs representative for Vanderbilt; the affirmation of Michael A. D'Emidio, Esq. in support of the instant motion; the affirmation of Michael A. D'Emidio, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the pleadings; the note, mortgage and an assignment of mortgage; notices pursuant to RPAPL 1320, 1304 and 1303; affidavits of service for the summons and complaint; an affidavit of service for the instant summary judgment motion upon defendants' counsel; and a proposed order appointing a referee to compute. Defendants have submitted opposition to the summary judgment motion.

“[I]n an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default” (*see Republic Natl. Bank of N.Y. v O’Kane*, 308 AD2d 482, 482, 764 NYS2d 635 [2d Dept 2003]; *Village Bank v Wild Oaks Holding*, 196 AD2d 812, 601 NYS2d 940 [2d Dept 1993]). Once a plaintiff has made this showing, the burden then shifts to defendant to produce evidentiary proof in admissible form sufficient to require a trial on their defenses (*see Aames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]; *Household Fin. Realty Corp. of New York v Winn*, 19 AD3d 545, 796 NYS2d 533 [2d Dept 2005]). Where, as here, standing is put into issue by the defendant, the plaintiff is required to prove it has standing in order to be entitled to the relief requested (*see Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680, 954 NYS2d 551 [2d Dept 2011]; *US Bank, NA v Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; *Wells Fargo Bank Minn., NA v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]).

Here, plaintiff established its *prima facie* entitlement to summary judgment against the answering defendants as such papers included a copy of the mortgage, the unpaid note together with due evidence of their default in payment under the terms of the loan documents (*see Jessabell Realty Corp. v Gonzales*, 117 AD3d 908, 985 NYS2d 897 [2d Dept 2014]; *Bank of New York Mellon Trust Co. v McCall*, 116 AD3d 993, 985 NYS2d 255 [2d Dept 2014]; *North Bright Capital, LLC v 705 Flatbush Realty, LLC*, 66 AD3d 977, 889 NYS2d 596 [2d Dept 2009]; *Countrywide Home Loans, Inc. v Delphonse*, 64 AD3d 624, 883 NYS2d 135 [2d Dept 2009]).

“A plaintiff has standing where it is the holder or assignee of both the subject mortgage and of the underlying note at the time the action is commenced” (*HSBC Bank USA v Hernandez*, 92 AD3d 843, 939 NYS2d 120 [2d Dept 2012]; *US Bank, NA v Collymore*, 68 AD3d at 753; *Countrywide Home Loans, Inc. v Gress*, 68 AD3d 709, 888 NYS2d 914 [2d Dept 2009]). “Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation” (*HSBC Bank USA v Hernandez, supra*). Because “a mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation” (*Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909, 961 NYS2d 200 [2d Dept 2013] [internal citations omitted]), a mortgage passes as an incident of the note upon its physical delivery to the plaintiff. Holder status is established where the plaintiff is the special indorsee of the note or takes possession of a mortgage note that contains an indorsement in blank on the face thereof as the mortgage follows as incident thereto (*see* UCC § 3-202; § 3-204; § 9-203[g]).


Jackie Stubblefield avers that “due to the indorsement in blank on the [n]ote, the note was transferred and tendered to Vanderbilt by MERS at the time of the assignment of the mortgage on September 15, 2011. Vanderbilt became the holder of the [n]ote and [m]ortgage and the rightful successor in interest to MERS on September 15, 2011. .. As such, Vanderbilt had standing to bring this forelsoure action on November 2, 2011, as it was the holder of the [m]ortgage and [n]ote on the date when it commenced the action.” Here, plaintiff established through admissible evidence its standing as the holder of the note and mortgage by demonstrating that it obtained physical possession of the note on or about September 15, 2011, almost two months prior to the commencement of this action (*see Aurora Loan Services, LLC v Taylor*, 114 AD3d 627, 980 NYS2d 475 [2d Dept 2014]; *Deutsche Bank Nat. Trust Co. v Whalen*, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]). As such, it can reasonably be inferred from said affidavit that physical delivery of the note was made to the plaintiff on or about September 15, 2011 such that no further details are required for plaintiff to establish standing (*see Aurora Loan Services, LLC v Taylor*, 114 AD3d 627). Defendant offers no evidence, by affidavit or otherwise, to contradict said factual averments and, therefore, fails to raise a triable issue of fact concerning plaintiff’s standing (*see id.*). In addition, inasmuch as there was physical delivery of the note, and the mortgage passes as an incident to the note, any alleged lack of authority of MERS to assign the mortgage is rendered immaterial (*see MLCFC 2007-9 Mixed Astoria, LLC v 36-02 35th Ave. Development, LLC*, 116 AD3d 745, 983 NYS2d 604 [2d Dept 2014]; *Bank of New York v Silverberg*, 86 AD3d 274, 926 NYS2d 532 [2d Dept 2011]).

Defendants fail to raise a triable issue of fact concerning any bona fide defense to foreclosure in opposition to the motion for summary judgment and by their remaining affirmative defenses and counterclaims (*see Rimbambito, LLC v Lee*, 118 AD3d 690, 986 NYS2d 855 [2d Dept 2014]; *Bank of Smithtown v 219 Sagg Main, LLC*, 107 AD3d 654, 968 NYS2d 95 [2d Dept 2013][unclean hands]; *American Airlines Federal Credit Union v Mohamed*, 117 AD3d 974, 986 NYS2d 530 [2d Dept 2014] [lack of good faith in denying loan modification]; *Putnam County Sav. Bank v Mastrantone*, 111 AD3d 914, 975 NYS2d 684 [2d Dept 2013] [lack of personal jurisdiction]). Notably, defendants, who have not submitted an affidavit in support of their counsel’s contentions, do not deny that they defaulted on their mortgage payments.

Accordingly, the motion for summary judgment is granted against defendants Cushion. That branch of the motion seeking to fix the defaults as against the remaining defendants who have not answered or appeared herein is granted. Plaintiff's request for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is also granted (see *Green Tree Serv. v Cary*, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]; *Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *Bank of East Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

The proposed order appointing a referee to compute pursuant to RPAPL 1321 is signed as modified by the court.

Dated: 11/13/15



A.J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION