

Deutsche Bank Natl. Trust Co. v Ghilardi

2013 NY Slip Op 30216(U)

January 14, 2013

Sup Ct, New York County

Docket Number: 106535/10

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. JOAN A. MADDEN
J.S.C.

PRESENT: _____
Justice

PART 11

Index Number : 106535/2010
DEUTSCHE BANK
vs
GHILARDI II, LUIGI
Sequence Number : 001
STRIKE ANSWER

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is *determined in accordance with the annexed decision, settle order on notice, including a copy of this decision.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: January 14, 2013

HON. JOAN A. MADDEN
J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
 - 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
 - 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS TRUSTEE FOR GSR 2006-OA1,

Plaintiff,

INDEX NO.106535/10

-against-

LUIGI GHILARDI II, BOARD OF MANAGERS OF THE
CHELSEA MERCANTILE CONDOMINIUM, CRIMINAL
COURT OF THE CITY OF NEW YORK, NEW YORK
CITY ENVIRONMENTAL CONTROL BOARD, "JOHN
DOE #1" through "JOHN DOE #12," the last twelve names
being fictitious and unknown to plaintiff, the persons or
parties intended being the tenants, occupants, persons or
corporations, if any, having or claiming an interest in or
lien upon the premises, described in the complaint,

Defendants.

-----X
JOAN A. MADDEN, J.:

In this action to foreclose on a mortgage, plaintiff moves for an order pursuant to CPLR 3212 granting summary judgment of foreclosure, and other relief including striking the answer of defendant mortgagor Luigi Ghilardi II, amending the caption to delete the "John Doe" defendants and the appointment of a referee to compute. Defendant Ghilardi opposes the motion.

In moving for summary judgment in an action to foreclose a mortgage, plaintiff establishes a prima facie right to foreclose by producing the mortgage, the assignment, if any, the unpaid note and evidence of default. See CitiFinancial Co. (DE) v. McKinney, 27 AD3d 224 (1st Dept 2006); LPP Mortgage, Ltd v. Card Corp, 17 AD3d 103 (1st Dept), lv app den, 6 NY3d 702 (2005); Hypo Holdings, Inc v. Chalasani, 280 AD2d 386 (1st Dept), lv app den 96 NY2d 717 (2001). Once plaintiff satisfies that burden, it is incumbent on the party opposing foreclosure to

come forward with evidence sufficient to raise a triable issue of fact as to a bona fide defense such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of plaintiff. See Nassau Trust Co. v. Montrose Concrete Products Corp., 56 NY2d 175, reargmt den 57 NY2d 674 (1982); CitiFinancial Co. (DE) v. McKinney, *supra*; Mahopac National Bank v. Baisley, 244 AD2d 466 (2nd Dept 1997), lv app dismissed 91 NY2d 1003 (1998).

Here, plaintiff has established its prima facie entitlement to judgment as a matter of law by uncontested proof of the note, the mortgage, the assignment and defendant Ghilardi's default. See CitiFinancial Co. (DE) v. McKinney, *supra*; LPP Mortgage, Ltd. v. Card Corp., *supra*; Hypo Holdings, Inc. v. Chalasani, *supra*. While defendant Ghilardi opposes the motion, he has not come forward with evidence sufficient to raise a material issue of fact as to a bona fide defense. He does not deny that money is owed or that he defaulted on the mortgage. He has not submitted an affidavit, but relies solely on the affirmation of his attorney who argues that "there was improper service of the complaint and are numerous questions of fact which remain outstanding and must be explored to determine the validity of the note and mortgage herein."

Defendant Ghilardi's objection that the summons and complaint were not properly served has been waived pursuant to CPLR 3211(e). Under CPLR 3211(e), a defendant challenging service is required to move for judgment on that ground within 60 days of filing the answer, or otherwise a defense based on improper service is considered waived. See B.N. Realty Assocs v. Lichtenstein, 21 AD3d 793 (1st Dept 2005); Wiebusch v. Bethany Memorial Reform Church, 9 AD3d 315 (1st Dept 2004); Aretakis v. Tarantino, 300 AD2d 160 (1st Dept 2002). While CPLR 3211(e) authorizes the court to extend the statutory deadline "upon the ground of undue hardship," defendant provides no basis for granting such relief. See B.N. Realty Assocs v.

Lichtenstein, supra; Wiebusch v. Bethany Memorial Reform Church, supra; Aretakis v. Tarantino, supra.

As to the “validity” of the note and mortgage, defendant Ghilardi argues that “the interest due is usurious and unascertainable at this time as a full review of the Plaintiffs’ file will be required to determine the extent of the HUD and RESPA violations committed by Plaintiff.” Defendant asserts that the “APR is higher than Sixteen Percent (16%) and is therefore in direct violation of New York State General Obligations Law § 5-501.” Defendant’s arguments are without merit. By its clear and express terms, paragraph 2(D) of the Note and paragraph 2(D) of the Adjustable Rate Rider state that the “interest will never be greater than 9.950%.” Likewise, the Truth in Lending Disclosure Statement signed and acknowledged by defendant Ghilardi’s attorney-in-fact, lists the “Annual Percentage Rate” or “cost of your credit as a yearly rate” as 7.183%.

To the extent defendant Ghilardi asserts that summary judgment should be denied as premature since he has not had opportunity to conduct discovery, defendant’s assertion is without merit. The absence of discovery does not require denial of plaintiff’s motion, as defendant Ghilardi fails to make a sufficient showing that how that facts essential to oppose the motion are in plaintiff’s exclusive knowledge, or that discovery might lead to facts relevant to the issues and a viable defense. See Woods v. 126 Riverside Drive Corp, 64 AD3d 422, 423 (1st Dept 2009), lv app den 14 NY3d 704 (2010); Duane Morris LLP v. Astor Holdings, Inc., 61 AD3d 418 (1st Dept 2009).

Defendant Ghilardi further argues that plaintiff lacks the capacity and standing to bring this action, asserting that plaintiff “was not in possession of the said note at the time of the

commencement of this action and in fact, still does not have possession of the notes.”


Defendant’s argument is without merit. Plaintiff’s motion papers include a copies of both the Note and Mortgage, as well as a written assignment document dated May 10, 2010. Plaintiff also submits an affidavit of Ryan Paul Lucas, an Assistant Vice President of plaintiff’s servicing agent, Bank of America, N.A., stating that “I have reviewed the records kept in the normal course of business of BANA [Bank of American, N.A.] and have determined that the subject Note and Mortgage were physically delivered, surrendered and conveyed to Deutsche Bank National Trust Company, as Trustee for GSR 2006-OA1, along with all right, title and interest in and thereto, on February 14th 2006 (the ‘Delivery Date’).” He further states that the “transfer and assignment of the Note and Mortgage first became effective on the Delivery Date, when Mortgage Electronic Registration Systems Inc., as Nominee Countrywide Bank, N.A., and Countrywide Bank, N.A. delivered the Note and Mortgage to Plaintiff with the full intent of surrendering all rights therein and thereto, and Plaintiff accepted all rights, title, and interest in and thereto.” He also states that “[o]n May 10, 2010, Mortgage Electronic Registration Systems, Inc., as Nominee for Countrywide Bank, N.A., executed a written assignment of mortgage document, which memorialized the transfer that had taken place on the Delivery Date when Mortgage Electronic Registration Systems, Inc. as Nominee for Countywide Bank, N.A. and Countrywide Bank, N.A., surrendered all rights and title in and to the Note and Mortgage by delivering, surrendering, and conveying said mortgage to Plaintiff.”

Even if the court were to rely solely on the written assignment agreement, plaintiff has established that such document was executed on May 10, 2010, which was eight days prior to the commencement of the instant action on May 18, 2010. Thus, since the written assignment pre-

dates the commencement of this action, plaintiff has standing to maintain this action. See Bank of New York Mellon Trust NA v. Sachar, 95 AD3d 695 (1st Dept 2012); Aurora Loan Services, LLC v. Weisblum, 85AD3d 95 (2nd Dept 2011); Wells Fargo Bank, N.A. v. Marchione, 69 AD3d 204, 207 (2nd Dept 2009).

Based on the foregoing, defendant has failed to establish the existence of triable issue of fact as to a bona fide defense. Plaintiff's motion, therefore, is granted in its entirety, and plaintiff is entitled to summary judgment of foreclosure, dismissal of defendant Ghilardi's answer, the appointment of a Referee to compute, and the amendment of the caption deleting the "John Doe" defendants.

Settle order on notice including a copy of this decision.

DATED: January , 2013

ENTER:



J.S.C.