

Flagstar Bank, FSB v Brennan
2013 NY Slip Op 30945(U)
May 3, 2013
Supreme Court, Albany County
Docket Number: 2645-12
Judge: Joseph C. Teresi
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

FLAGSTAR BANK, FSB,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 2645-12
RJI NO. 01-12-107671

DARREN G. BRENNAN a/k/a DARREN BRENNAN;
“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, April 26, 2012
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Knuckles, Komosinski & Elliott, LLP
Michel Lee, Esq.
Attorneys for Plaintiff
655 Taxter Road, Suite 590
Elmsford, New York 10523

Stanley Jones, Esq.
Attorney for Defendant Darren G. Brennan
1496 Maplecrest Drive
Castelton, New York 12033

TERESI, J.:

On May 4, 2012, Plaintiff commenced this action to foreclose its mortgage on real property located at 1247 19th Street, Watervliet, New York (hereinafter “the property”) and owned by defendant Darren Brennan (hereinafter “Brennan). Brennan answered and a mandatory settlement conference has been held. Plaintiff now moves for summary judgement, for the

appointment of a referee to compute and to amend the caption of the action. Brennan opposes the motion and cross moves to dismiss the complaint. Because Plaintiff demonstrated its entitlement to the relief it seeks, its motion is granted and Brennan's is denied.

It is now 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 [2d Dept 2010], quoting HSBC Bank USA v Merrill, 37 AD3d 899 [3d Dept 2007]; Citibank, 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, 1381 [3d Dept 2012]; Charter One Bank, FSB v Leone, 45 AD3d 958 [3d Dept 2007]). If such showing is made “[t]he burden then shifts to the defendant 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, 95 AD3d 1158, 1159 [2d Dept 2012], quoting Mahopac Nat. Bank v Baisley, 244 AD2d 466 [2d Dept 1997]).

On this record, Plaintiff met its initial burden. Plaintiff first supports its motion by attaching a copy of the Note, dated June 23, 2008 (hereinafter “Note”): The Note was initially given to ICC Mortgage Services (hereinafter “ICC”), but the copy submitted contains an endorsement from ICC to Plaintiff. Additionally, one of Plaintiff’s Mortgage Analysts, who alleged sufficient knowledge, established that Plaintiff held possession of the original Note as of the date this action was commenced. In support of such assertion, Plaintiff’s Complaint attached a copy of the endorsed Note as an exhibit. Plaintiff also submitted the Mortgage, dated June 23, 2008 (hereinafter “Mortgage”), and its assignment. It too was initially given to ICC with

Mortgage Electronic Registration Systems, Inc. (hereinafter “MERS”) as its nominee for recording purposes. The subsequent Assignment of Mortgage, dated March 21, 2012, assigned the Mortgage from MERS as nominee for ICC to Plaintiff. Lastly, Plaintiff’s Mortgage Analyst’s affidavit duly established Brennan’s default. Upon such showing, Plaintiff demonstrated its entitlement to judgment as a matter of law.

With the burden shifted, Brennan neither raised an issue of fact nor asserted a viable defense. First, because Brennan submitted only his attorney’s affirmation, which was 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]). His attorney did candidly admit, however, that no “issues of fact exist.” Rather, Brennan opposes the motion, and seeks dismissal, pursuant to Bank of New York v Silverberg (86 AD3d 274 [2d Dept 2011]). Such argument is wholly unavailing. The Bank of New York v Silverberg matter was dismissed because that plaintiff’s sole assignee, MERS, was not the “actual holder or assignee of the underlying notes.” (Id. at 275). Here, Plaintiff established just the opposite. It demonstrated, as set forth above, that the Note was transferred to it directly from ICC, the initial lender, and that it actually possessed the Note prior to commencement. On this record Plaintiff duly established its standing by demonstrating that it was “both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action [was] commenced.” (Id. at 279). Contrary to Brennan’s arguments, he made no factual showing that the Mortgage was transferred without the Note.

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]). Accordingly, Plaintiff's motion for the appointment of a referee is granted.

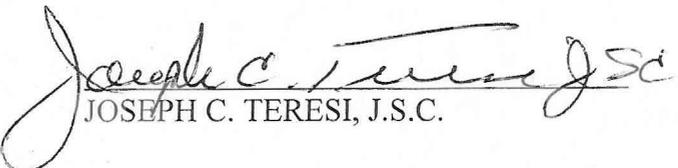
Plaintiff is similarly entitled to amend the caption of this action to add three proposed defendants. Plaintiff sufficiently established, with affidavits of service, that each proposed defendant was duly served with process. It further demonstrated each proposed defendant defaulted in this action. Moreover, although each proposed defendant received notice of this motion, not one of them filed opposition papers. Brennan too raised no objection. Accordingly, Plaintiff's motion to amend the caption is granted on default.

In accord with the above, the proposed Order Plaintiff submitted is being executed herewith.

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: May 3, 2013
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated March 15, 2013; Affirmation of Michel Lee, dated March 15, 2013; Affidavit of Vanessa Ellison, dated March 8, 2013, with attached Exhibits 1-7; Affidavit of Michel Lee, dated March 15, 2013, with attached unnumbered exhibit; Affidavit of Michel Lee, dated March 15, 2013, with attached Exhibits 1-2; with attached Exhibits A-H.
2. Notice of Cross Motion, dated April 10, 2013; Affirmation of Stanley Jones, dated April 10, 2013.
3. Affirmation of Michel Lee, dated April 16, 2013.