

Bayview Loan Servicing, LLC v Kelly

2015 NY Slip Op 31724(U)

August 24, 2015

Supreme Court, Suffolk County

Docket Number: 00853/2014

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK**I.A.S. PART 7 - SUFFOLK COUNTY****PRESENT:****WILLIAM B. REBOLINI**
Justice

Bayview Loan Servicing, LLC,

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Plaintiff,

Motion Sequence No.: 001; MGMotion Date: 2/17/15

-against-

Submitted: 5/20/15

Brian J. Kelly, Helene R. Kelly a/k/a Helene Kelly, Astoria Federal Savings and Loan Association as Successor by Merger to the Long Island Savings Bank, FSB, People of the State of New York by the Department of Taxation and Finance, Nurco Settings, Ford Motor Credit Company, People of the State of New York, Cypress Financial Recoveries LLC, United States of America by the Internal Revenue Service, State of New York on behalf of University Hospital, TC Music Co. Inc. d/b/a Cornet Music, The Mountbatten Surety Company, Inc., Marran Oil LLC, Bricklayers Insurance and Welfare Fund, Bricklayers Pension Fund, Allied Craft Workers and Bricklayers Labor Management Relations Committee New York City, Long Island Joint Apprenticeship and Training Fund, International Masonry Institute, Santo Lanza Fame in his Fiduciary Capacity as Administrator, Bricklayers Local 1 International Union of Bricklayers, Bricklayers Supplemental Annuity Fund, Bricklayers and Trowels Treads International Fund, Clerk of the Suffolk County District Court,

Motion Sequence No.: 002; XMDMotion Date: 2/17/15Submitted: 5/20/15Attorneys/Parties [See Rider Annexed]:

- Continued-

John T. Mather Memorial Hospital,
People's Alliance Federal Credit Union,
Huntington YMCA, Asset Acceptance LLC, Local 66
Penison Fund Welfare Fund, Vacation Fund, Annuity
Fund, LECET Fund, Greater NY LECET Fund and
Training Program, Stephen Flanagan, as a Trustee of
General Building Laborers, Teachers Federal Credit
Union and "John Doe" (Said name being fictitious, it
being the intention of plaintiff to designate any and all
occupants, tenants, persons or corporations, if any,
having or claiming an interest in or lien upon the
premises being foreclosed herein.)

Defendants.

Upon the following papers numbered 1 to 37 read upon this motion for summary judgment and cross motion to dismiss: Notice of Motion and supporting papers, 1 - 19; Notice of Cross Motion and supporting papers, 20 - 25; Answering Affidavits and supporting papers, 26 - 35; Replying Affidavits and supporting papers, 36 - 37; it is

ORDERED that this motion by plaintiff, Bayview Loan Servicing, LLC, for an order awarding summary judgment in its favor and appointing a referee to compute is granted and the proposed order of reference, as amended, is signed simultaneously herewith; and it is further

ORDERED that the cross-motion by defendant, Brian J. Kelly, for summary judgment in his favor dismissing the complaint against him is denied.

Plaintiff commenced this action by the filing of a summons and complaint with exhibits and a notice of pendency on January 14, 2014 to foreclose a mortgage on premises located at 12 Maywood Court, St. James, NY 11780. The mortgage dated August 9, 1994 was executed by defendants Brian J. Kelly and Helene R. Kelly to Interbank of New York in the principal sum of \$175,000.00 and was recorded in the office of the Suffolk County Clerk on August 19, 1994 in Liber 18860 at page 117. According to the affidavit of Gary Locke, Document Coordinator of plaintiff Bayview Loan Servicing, LLC, the plaintiff or its agent on plaintiff's behalf has possession of the original note. The note and mortgage were assigned to Sunrise Federal Savings Bank by assignment dated August 11, 1994, and they were further assigned to GRP Loan, LLC by assignment dated August 1, 2008, and assigned again to plaintiff, as servicer for Wachovia Bank N.A., as trustee, successor by merger to First Union National Bank, as indenture trustee, by assignment dated March 18, 2009. It is asserted that defendants breached their obligation to pay under the terms of the note by failing to tender the installment which became due and payable on July 1, 2008 and subsequent installments, and plaintiff sent the required 90-day Notice of Intent to Foreclose to the mortgagors. In a separate affidavit, Locke avers that plaintiff complied with the notice and reporting requirements of RPAPL §§1304(5) and 1306.

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Defendant Brian J. Kelly served his answer to the complaint with five affirmative defenses, including lack of standing. Defendant now moves for an order dismissing the complaint and contends that plaintiff failed to provide any details regarding when and how it obtained physical possession of the note. Although it was not asserted as a defense in his answer to the complaint, defendant also claims that plaintiff's process server, Nelson Acevedo, failed to serve a notice printed on colored paper different than the color of the summons and verified complaint, as required under RPAPL §1303(1)(a). In his affidavit that was submitted in support of the cross-motion, Kelly avers that the RPAPL §1303 notice to homeowners that he received was printed on white paper, the same as the summons and verified complaint.

In reply to the defendant's cross-motion, plaintiff submitted the affidavit of Robert G. Hall, Vice President of Bayview Loan Servicing, LLC, the loan which is the basis of this action was purchased by plaintiff on October 31, 2003, and the loan documents were scanned into plaintiff's document storage program on November 5, 2003 and "have been held by Bayview by its custodian USBank from that date to the present." Hall also avers that he reviewed the original note and that the copy that was submitted to the Court as an exhibit "is a true and accurate copy of the original Note with Allonges."

In addition to the foregoing, plaintiff submitted the affidavit of Nelson Acevedo, who avers that he "personally served the Defendant Brian Kelly on January 22, 2014 with the Summons and Verified Complaint herein, and the New York RPAPL §1303 Notice, which Notice was printed on pink colored paper, a color different than that of Summons and Verified Complaint and RPAPL §1320 Notice (which were on white paper)." Acevedo also avers that he has "prepared and served thousands of foreclosure documents for service of process and always include, for residential property, the RPAPL § 1303 notice on colored paper." Furthermore, it is Acevedo's contention that he verifies as he walks to the door of the property at which service is being made that the colored notice is included in the documents to be served. Moreover, it is averred in the original affidavit of service of Nelson Acevedo dated January 23, 2014 that was filed with the Suffolk County Clerk that defendant was personally served with the "Summons and Verified Complaint with Certificate of Merit in Compliance with CPLR 3012-b, Section 1303 Notice printed on a colored paper that is other than the color of the Summons and Verified Complaint and RPAPL Section 1320 Notice."

"[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 his defenses (*see Ames 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]). Here, plaintiff established its *prima facie* entitlement to summary judgment by submitting the note and mortgage, and the affidavits of merit with multiple documentary exhibits (*see* CPLR 3212; RPAPL §1321; *Neighborhood Hous. Serv. of New York City v Hawkins*, 97 AD3d 554, 947 NYS2d 321 [2d Dept 2012]; *Baron Assoc., LLC v Garcia*

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Group Enter., 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; *Citibank, N.A. v Van Brunt Prop., LLC*, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]; *Archer Capital Fund, L.P. v GEL, LLC*, 95 AD3d 800, 944 NYS2d 179 [2d Dept 2012]; *Swedbank, AB v Hale Ave. Borrower, LLC.*, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]; *Rossrock Fund II, L.P. v Osborne*, 82 AD3d 737, 918 NYS2d 514 [2d Dept 2011]). Plaintiff has also demonstrated that the conclusory first, second, third, fourth, and fifth defenses set forth in the answer should be dismissed. Plaintiff is the assignee of the note and, by operation of law, transfer of the note is sufficient to transfer the obligation under the mortgage. "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, and the mortgage passes with the debt as an inseparable incident" (*Aurora Loan Serv., LLC v Taylor*, 114 AD3d 627, 628, 980 NYS2d 475 [2d Dept 2014], quoting *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 754, 890 NYS2d 578). Moreover, the affidavits of Locke and Hall with supporting exhibits demonstrate that plaintiff has physical possession of the note and mortgage through its document custodian.

In his cross-motion and opposition papers, defendant re-asserts claims raised as affirmative defenses. The Court finds, however, that none of the defendant's allegations present questions of fact and none implicate a lack of standing on the part of the plaintiff. To the extent that the copy of the note attached to the complaint was incomplete and differed from the copy of the original note attached to Hall's affidavit, such mistake, omission, defect or irregularity did not prejudice a substantial right of a party and should be disregarded (*see* CPLR 2001). Furthermore, contrary to defendant's contention, plaintiff satisfied its burden of establishing proper service of the RPAPL 1303 notice on colored paper (*see Aurora Loan Services, LLC v Weisblum*, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]). Accordingly, plaintiff established its entitlement to judgment as a matter of law and, in opposition, defendant failed to raise a triable issue of fact as to a bona fide defense (*see JP Morgan Chase Bank, N.A. v Schott*, ___ AD3d ___, 2015 NY Slip Op 06217 [2d Dept 2015]). The Court has considered defendants' remaining contentions and finds them to be unavailing.

Accordingly, plaintiff's motion for summary judgment in its favor is granted and the cross-motion is denied. The order of reference, as amended, is signed simultaneously herewith.

Dated:

August 24, 2015


HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION ___ X ___ NON-FINAL DISPOSITION

RIDER

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Clerk of the Court