

PNC Bank Natl. Assoc. v Giovanni

2013 NY Slip Op 30891(U)

April 18, 2013

Supreme Court, Suffolk County

Docket Number: 18963/2011

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

PNC Bank National Association,

Plaintiff,

-against-

Michael Sam Giovanni a/k/a Michael Sangiovanni,
Karla Manzueta, HSBC Mortgage Corporation
(USA), Mortgage Electronic Registration Systems,
Inc., and "John Doe #1" through "John Doe #12"
the lat 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 being foreclosed herein,

Defendants.

Motion Sequence No.: 001; MOT.DMotion Date: 9/26/12Submitted:Index No.: 18963/2011Attorneys/Parties [See Rider Annexed]

Upon the following papers numbered 1 to 24 read upon this motion for summary judgment and order of reference: Notice of Motion and supporting papers, 1 - 18; Answering Affidavits and supporting papers, 19 - 24; it is

ORDERED that this motion by plaintiff, PNC Bank, National Association (PNC Bank), pursuant to CPLR 3212 for summary judgment on its complaint, to strike the answer and defenses of defendant Michael San Giovanni a/k/a Michael Sangiovanni (Sangiovanni), awarding plaintiff a default judgment, for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, and for leave to amend the caption of this action pursuant to CPLR 3025 (b), is hereby determined as follows; and it is hereby

PNC Bank v. SanGiovanni, et al.

Index No.: 18963/2011

Page 2

ORDERED that the branch of the motion for summary judgment against defendant Sangiovanni, to strike his answer and defenses, awarding plaintiff a default judgment and for an order of reference is denied without prejudice to resubmit upon proper papers as set forth, including but not limited to a copy of the papers submitted with this application, a copy of this order and evidence of physical delivery of the note or written assignment of the note to plaintiff prior to the commencement of this action and a copy of the assignment of mortgage dated December 2, 2005 from Nationpoint a Division of National City Bank of IN to First Franklin Financial Corporation with proof of recording; and it is further

ORDERED that plaintiff's application for leave to amend the caption of this action pursuant to CPLR 3025 (b), is granted; and it is further

ORDERED that the caption is hereby amended by striking from the caption the names of defendants "JOHN DOE #1" through "JOHN DOE #12"; 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**
PNC Bank, National Association

Plaintiff,

- against -

Michael San Giovanni a/k/a Michael Sangiovanni, Karla Manzueta, HSBC Mortgage Corporation (USA), Mortgage Electronic Registration Systems, Inc.,

Defendants.

_____ **x**

This is an action to foreclose a mortgage on premises known as 14 Gregory Lane, Central Islip, New York. On July 26, 2005, defendants Sangiovanni and Karla Manzueta (Manzueta) executed a fixed rate note in favor of Nationpoint a Division of Nat. City Bank of IN (Nationpoint) agreeing to pay \$220,000.00 at the yearly rate of 5.9990 percent. The note presented to the court contains neither an indorsement nor an allonge. On July 27, 2005, defendants Sangiovanni and Manzueta executed a first mortgage in the principal sum of \$220,000.00 on their home, the subject property. The mortgage was recorded on August 11, 2005 in the Suffolk County Clerk's Office. Thereafter, it is alleged that the mortgage was transferred by assignment of mortgage dated

PNC Bank v. SanGiovanni, et al.

Index No.: 18963/2011

Page 3

December 2, 2005 from Nationpoint a Division of National City Bank of IN to First Franklin Financial Corporation and recorded with the Suffolk County Clerk's Office on March 8, 2006¹. On May 26, 2011, the mortgage was transferred by assignment of mortgage from First Franklin Financial Corporation to PNC Bank, National Association. SPS Select Portfolio Servicing, Inc., attorney-in-fact for plaintiff, sent a notice of default dated January 31, 2011 to defendants stating that Sangiovanni and Manzueta had defaulted on their mortgage loan and that the amount past due was \$11,386.93.

As a result of defendants' continuing default, plaintiff commenced this foreclosure action on June 10, 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 monthly payments commencing on September 1, 2010, and each subsequent month thereafter, and that it is the current holder of the note and mortgage. Defendant Sangiovanni answered by entering a denial and asserting five affirmative defenses.

The Court's computerized records indicate that a foreclosure settlement conference was held on March 28, 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 conference is required.

Plaintiff now moves for summary judgment on its complaint contending that defendants Sangiovanni and Manzueta failed to comply with the terms of the loan agreement and mortgage, that the answer of defendant Sangiovanni raised no issues of fact for trial and, that no valid affirmative defenses were raised by the defendant. In support of its motion, plaintiff submits among other things: the sworn affidavits of David Coleman, document control officer for Select Portfolio Servicing, Inc.; the affirmation of Ted Eric May, Esq.; the summons and verified complaint; defendant's verified answer; the note, mortgage and assignment of mortgage dated May 26, 2011; a notice of default; notices pursuant to RPAPL §§ 1320, 1303 and 1304; the affirmation of Ted Eric May, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); affidavits of service for the summons and complaint; an affidavit of service of the instant summary judgment motion upon the defendants; and a proposed order appointing a referee to compute.

Defendant, in opposition to the summary judgment motion contends, *inter alia*, that PNC Bank lacks standing to foreclose on defendant's mortgage.

"[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*

¹ Plaintiff has failed to submit evidence of the December 2, 2005 assignment of mortgage and proof of filing with the Suffolk County Clerk's Office in its motion before the Court.

v Wild Oaks Holding, 196 AD2d 812, 601 NYS2d 940 [2d Dept 1993]; *see also Argent Mtge. Co., LLC v Mentasana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). 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 of 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]; *see also Washington Natl. Bank v Valencia*, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]). However, “foreclosure of a mortgage may not be brought by one who has no title to it” (*see US Bank, Nat Ass’n v Sharif*, 89 AD3d 723, 933 NYS2d 293 [2d Dept 2011]; *Kluge v Fugazy*, 145 AD2d 537, 536 NYS2d 92 [2d Dept 1988]).

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]). In a mortgage foreclosure action “[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*, 92 AD3d 843).

In the matter at hand, plaintiff has failed to establish, *prima facie*, that it had standing to commence this action. The evidence submitted by the plaintiff in support of its motion did not demonstrate that the note was physically delivered or assigned to it prior to the commencement of the action. The affidavit from David Coleman, document control officer for Select Portfolio Servicing, Inc., did not give any factual details based on personal knowledge of a physical delivery or assignment of the note and thus, failed to establish possession of the note prior to commencing this action (*HSBC Bank USA v Hernandez*, 92 AD3d 843; *Citimortgage, Inc. v Stosel*, 89 AD3d 887, 934 NYS2d 182 [2d Dept 2011]). Conclusory boiler plate statements such as “[p]laintiff is the holder and owner of the subject note” will not suffice when standing is raised as a defense (*see Deutsche Bank Natl. Trust Co. v Barnett*, 88 AD3d 636, 931 NYS2d 630 [2d Dept 2011]; *Aurora Loan Services, LLC v Weisblum*, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]). Furthermore, plaintiff has failed to establish through demonstrable evidence a chain of title to the note and related mortgage that plaintiff seeks to foreclose on. As such, plaintiff has no foundation in law or fact to foreclose on the mortgage.

Based upon the foregoing, the motion for summary judgment against defendant Sandgiovanni, to strike his answer, granting a default judgment in favor of plaintiff and for an order of reference is denied without prejudice as set forth above.

The Court grants plaintiff’s request to amend the caption by striking from it the names of defendants “JOHN DOE #1” through “JOHN DOE #12”.

PNC Bank v. SanGiovanni, et al.

Index No.: 18963/2011

Page 5

Plaintiff is directed to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court.

Dated: 4/18/2013


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

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION

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Clerk of the Court