HSBC Bank USA v San-Miguel
2015 NY Slip Op 31340(U)
January 9, 2015
Supreme Court, Queens County
Docket Number: 26095 2009
Judge: David Elliot
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[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IAS Part 14
Justice

HSBC BANK USA, etc.,
Plaintiff(s),

- against -

ROBERT SAN-MIGUEL, et al.,
Defendant(s).

Index No. 26095 2009

Motion Date September 22, 2014

Motion Cal. No. 73

Motion Seq. No. 1

The following papers numbered 1 to 14 read on this motion by plaintiff for an order, inter alia, granting it summary judgment against answering defendants and appointing a referee to compute.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits....................................	1-5
Answering Affirmation - Exhibits..	6-9
Reply..	10-14

By prior order dated October 21, 2014, this court held the instant motion in abeyance pending the completion of a foreclosure settlement conference (22 NYCRR § 202.12-a), held on December 8, 2014. Though same was requested by defendant Robert San-Miguel, he failed to appear at said conference. As such, the matter was released from that Part by order (CA-R Evans) dated the same date. The motion may now be considered on the merits.

Plaintiff commenced this action to foreclose a mortgage by filing a copy of the summons and complaint and notice of pendency on September 28, 2009. Defendants Robert

San-Miguel and MRM Development Corp. (defendants), answered the complaint and interposed twelve affirmative defenses,[1] including lack of personal jurisdiction and standing.

It is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" *(Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

As to the defense of lack of personal jurisdiction, plaintiff is entitled to summary judgment, since, inter alia, defendants waived this defense by failing to move for judgment on that ground within 60 days of having served their answer containing that defense (CPLR 3211 [e]). Furthermore, defendants' defenses regarding lack of case or controversy, failure to state a claim, and lack of damages, are conclusory and without merit and are entitled to dismissal.

As to the remaining defenses, which all appear to sound in lack of standing, "it is incumbent upon the plaintiff to prove its standing to be entitled to relief" (*Citimortgage, Inc. v Stosel*, 89 AD3d 887, 888 [2011]; *see Kondaur Capital Corp. v McCary*, 115 AD3d 649 [2014]; *GRP Loan, LLC v Taylor*, 95 AD3d 1172 [2012]; *Bank of N.Y. v Silverberg*, 86 AD3d 274 [2011]; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 753 [2009]). A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced (*see HSBC Bank USA v Hernandez*, 92 AD3d 843 [2012]; *Bank of N.Y. v Silverberg*, 86 AD3d at 279; *U.S. Bank, N.A. v Collymore*, 68 AD3d at 753). The plaintiff may demonstrate that it is the holder or assignee of the underlying note by showing "[e]ither a written assignment of the underlying note or the physical delivery of the note" (*U.S. Bank, N.A. v Collymore*, 68 AD3d at 754; *see Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 108 [2011]). The note secured by the mortgage is a negotiable instrument (*see* UCC 3-104) which requires indorsement on the instrument itself "or on a paper so firmly affixed thereto as to become a part thereof" (UCC 3-202 [2]) in order to effectuate a valid "assignment" of the entire instrument (*cf.*, UCC 3-202 [3], [4]; *Slutsky v Blooming Grove Inn, Inc.*, 147 AD2d 208, 212 [2d Dept 1989]).

Here, based on the documentary evidence submitted on the motion, it appears that defendant Robert San-Miguel executed a note and mortgage, both dated November 2, 2006, in favor of Delta Funding Corporation (Delta). Plaintiff also presents a written assignment dated September 18, 2009, and recorded on October 1, 2009, in which the subject mortgage, together with the note described therein, were assigned from Mortgage Electronic

1. There are two affirmative defenses labeled as "Eleventh Affirmative Defense."

[* 3]

Registration Systems, Inc. (MERS), as nominee for Delta, to plaintiff. There is also an undated allonge following the note, endorsed to plaintiff. There is also a second allonge following the written assignment, dated September 18, 2009, and effective December 26, 2006, executed by Ocwen as Delta's attorney-in-fact. The allonge states, in part, that "[t]his allonge shall be annexed to the original Note . . . referenced above for purposes of transferring same from the present Owner and Holder of the Note, **DELTA FUNDING CORPORATION** ('Transferor') as of the date set forth below" (emphasis in original). Plaintiff also submits a limited power of attorney, dated March 24, 2010, in which it appoints Ocwen as its attorney-in-fact, permitting the latter to, inter alia, execute affidavits of debt. In that respect, plaintiff also presents an affidavit of merit of Dana Vera, Contract Manager of Ocwen, who details that defendant San-Miguel's default occurred upon the failure to remit payment on May 1, 2009, to date. Ms. Vera also makes the following statements regarding the issue of standing, to wit:

> "4. Based on my review of Ocwen's Servicing Records, Plaintiff owns the note and mortgage, true and correct copies of which I understand have been previously filed with the Court . . .
>
> "(f) Paragraph SIXTH of the complaint states that the Mortgage was ultimately assigned to Plaintiff . . . Not only do I know this to be true of my own knowledge, but a copy of the Assignment herein . . . is also annexed hereto as Exhibit 'E'. Answering Defendants' naked denial with respect to this paragraph of the complaint raises no issue . . .
>
> "(j) Paragraph TENTH of the complaint recites that the Plaintiff is the holder of the Note and Mortgage, something I know to be true of my own knowledge. Additionally, a copy of the Assignment herein is annexed hereto as Exhibit 'E'. Answering Defendants' naked denial with respect to this paragraph of the complaint raises no issue . . .
>
> "10. With regard to Answering Defendants' purported affirmative defenses, said allegations are either a) vague and fail to specifically identify the events, conduct or documents that the Defendants are referring to and Plaintiff is thus unable to properly respond to these allegations; or b) deal with matters of law and will be addressed in the attorney affirmation."

Plaintiff has failed to meet its burden in order to properly confer its standing. Initially, plaintiff's reliance upon the written assignment is insufficient since plaintiff failed to demonstrate that MERS was either the holder or assignee of the note when the instrument was purportedly assigned by the instrument dated September 18, 2009, or that it had the

authority to execute assignments on behalf of the originator of the loan (*see Homecomings Financial, LLC v Guldi*, 108 AD3d 506 [2013]; *Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909 [2013]; *Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680 [2012]; *Bank of New York v Silverberg*, 86 AD3d 274 [2011]).

Furthermore, Ms. Vera's affidavit, other than her mere declaration that she knows plaintiff has been assigned the note – without any detail as to, inter alia, the date of the assignment – it would appear that her knowledge stems, at least in part, from the written assignment, said assignment being defective for the reasons noted, *supra*. To the extent she relies on the affirmation of plaintiff's counsel, plaintiff's counsel has not demonstrated personal knowledge of when plaintiff came into possession or ownership of the loan documents.

Moreover, while it is noted that plaintiff may rely on physical delivery of the note alone, the fact that: (1) the allonge following the note is undated; (2) Ms. Vera is silent on the circumstances surrounding delivery of the note (*see U.S. Bank Nat. Assn. v Faruque*, 120 AD3d 575 [2014]; *Homecomings Financial, LLC v Guldi*, 108 AD3d at 509; *HSBC Bank USA v Hernandez*, 92 AD3d 843 [2012]); and (3) a second allonge is inexplicably submitted, same being apparently attached to the defective written assignment and not to the note, as the terms of the allonge – and established case and statutory law (*see e.g.* UCC § 3-202 [2]) – require, warrant denial of the motion for summary judgment. Even assuming the second allonge were sufficient, plaintiff presents no proof that Ocwen had the authority to execute same on Delta's behalf. Indeed, the only power of attorney provided was the one as it relates to plaintiff.

Notwithstanding issues of standing, plaintiff has not established that it complied with certain conditions precedent to suit. Namely, defendants, in their answer, denied paragraph ninth of the complaint which alleges that no payment was made, despite demand. The mortgage requires the lender, prior to declaring the entire balance due and commencing foreclosure, send a notice of default which, inter alia, provides for an option to cure the default. Plaintiff has not submitted proof that such a notice was sent. Ms. Vera's contention that "[i]ndeed, an acceleration letter was sent" is insufficient to prove same. Her contention that follows, that "the declaration to accelerate contained in this very paragraph of the complaint serves, as a matter of law . . . as that very election to accelerate," is without foundation.

Finally, it is noted that, in opposition to the motion, defendants point out that plaintiff, a trust, may not have complied with, inter alia, its Mortgage Loan Sale and Contribution Agreement regarding transfer of ownership of the subject loan documents.

[* 5]

Accordingly, the branch of the motion for summary judgment is granted only to the extent that defendants' affirmative defenses – with the exception of those regarding standing – are dismissed. Summary judgment is otherwise denied. That branch of the motion for an order of reference is denied. The caption is amended by deleting "John Doe#1" through "John Doe #12." Further, though not mentioned by plaintiff, it would appear from a review of County Clerk records that the action as against defendants City of New York Unsafe Building Unit and NYC Department of Highways has been discontinued. As such, the caption is further amended to delete these defendants therefrom. The remaining defendant is otherwise in default in appearing or answering the complaint.

Dated: January 9, 2015

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J.S.C.