



HSBC Bank USA, N.A. v Pacifico

2016 NY Slip Op 30717(U) (2016) | Cited 0 times | New York Supreme Court | April 18, 2016

SDORT FORM ORDER

NO.:

SUPREME COURT STATE OF YORK PART - COUNTY

PRESENT: JOHN LEO

USA, TRUSTEE OF RENAISSANCE HOME TRUST 2006-4, Plaintiff,

JOSEPH H. PACIFICO SUSAN PACIFICO, PROPERTIES, LUCAS; LUCAS MOTOR COMPANY
VOLVO YORK STATE DEPARTMENT OF TAXATION UNITED STATES OF PROPERTIES

"JOHN DOE #1" "JOHN DOE #12," MOTION coon (002) _____ Seq.# #002-XMD

LEOPOLD ASSOCIATES, PLLC Plaintiff 80 Park Suite Y. 10504

JOSEPH PACIFICO SUSAN OLIVA PACIFICO Pro Se

LUCAS PACIFICO

Hill

Upon 2014, Pacifico 20 2014, (and after hem ing eom1sels' al m gnments sttpport tire motion);

(001) INDEX 1625-12

- NEW IAS 51 SUFFOLK

Hon. J. Justice of the Supreme Court HSBC BANK NATIONAL ASSOCIATION, AS INDENTURE
FOR THE REGISTERED NOTEHOLDERS EQUITY LOAN



HSBC Bank USA, N.A. v Pacifico

2016 NY Slip Op 30717(U) (2016) | Cited 0 times | New York Supreme Court | April 18, 2016

-against-

JR., OLIVA RICHARD BUTTINE, AVENTINE LLC, ROBERT G. INVESTORS GROUP, FORD CREDIT DBA CAR FINANCE NORTH AMERICA, NEW AND FINANCE, AMERICA, GMH LTD.,

through 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. DATE 4-25-14 4-25-15
ADJ.DATE Mot. 001-MD

& Attorneys for Business Drive, 110 Armonk, N.

H.

Defendants 310 New York Avenue Huntington, New York 11743

KELLY, & Attorneys for Defendants Robert G. Lucas Lucas Investor Group 23 Birch Road Locust valley, New York 11560

the reading and filing of the following papers in this matter: (I) Notice of Motion by the plaintiff, dated March 21, and supporting papers; (2) Notice of Cross Motion by the defendant Joseph H. Jr., dated April 18, I 4, and supporting papers; (3) Affirmation in Opposition/Reply by the plaintiff, dated April 24, and supporting papers; 01 in of and opposed to and now

ORDERED that this motion by the plaintiff for, inter alia, an order awarding summary judgment in its favor and against the defendants Joseph Pacifico and Susan Pacifico, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption is denied; and it is [* 1] USA,

Pg.2

ORDERED (002) Pacifico CPLR

ORDERED entry Pacifico Susan CPLR 2103 (30)

ORDERED

CPLR 2103 (30)

On 20, 2006, ("the lender") of\$645,000.00. Pacifico 20, 2006 ("MERS")



HSBC Bank USA, N.A. v Pacifico

2016 NY Slip Op 30717(U) (2016) | Cited 0 times | New York Supreme Court | April 18, 2016

("Delta"), USA,

2006-4, 2009, "[together]

" Suffolk Office 2009.

Pacifico 1, 2008,

10,

"the 2012.

United HSBC Bank N.A. v Pacifico, et. al. Index No.: 12-1625

that this cross motion by the defendant Joseph for, inter alia, an order pursuant to 3211 (a) (3) dismissing the complaint insofar as asserted against him on the grounds that the plaintiff lacks standing is denied in its entirety; and it is

that the plaintiff shall serve a copy of this order with notice of upon the defendants Joseph and Pacifico by first-class regular mail and upon all other parties, if any, who have appeared herein and not waived further notice pursuant to (b) (1), (2) or (3) within thirty days of the date herein, and shall promptly file the affidavits of service with the Clerk of the Court; and it is

that the defendant Joseph Pacifico shall serve a copy of this order with notice of entry upon counsel for the plaintiff and all other parties, if any, who have appeared herein and not waived further notice pursuant to (b) (1), (2) or (3) within thirty days of the date herein, and shall promptly file the. affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on real property situate in Suffolk County, New York. September the defendant Joseph Pacifico executed a note in favor of Fidelity Mortgage a division of Delta Funding Corporation in the principal sum To secure said note, Mr. gave the lender a mortgage also dated September on the property. The mortgage indicates that Mortgage Electronic Registration Systems, Inc. was acting solely as a nominee for the lender and its successors and assigns and that, for the purposes of recording the mortgage, MERS was the mortgagee of record.

By way of two allonges containing undated endorsements, the note was allegedly transferred by the lender to Delta Funding Corporation and then by Delta to the plaintiff, HSBC Bank National Association, as Indenture Trustee for the Registered Noteholders of Renaissance Home Equity Loan Trust prior to commencement. By an assignment of the mortgage executed on March 2, MERS as nominee for the lender purportedly transferred the mortgage with the bond or note(s) or obligation(s) described or referred to, in said mortgage and the moneys due to grow due thereon, with the interest



HSBC Bank USA, N.A. v Pacifico

2016 NY Slip Op 30717(U) (2016) | Cited 0 times | New York Supreme Court | April 18, 2016

and attorney's fees and all other charges ... to the plaintiff. Thereafter, the assignment was duly recorded in the County Clerk's on April 2,

Mr. allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on May and each month thereafter. After Mr. Pacifico allegedly failed to cure said default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on January 2012.

In response to the complaint, Mr. Pacifico and his wife, the defendant Susan Pacifico (collectively Pacifico defendants"), interposed a joint verified answer sworn to on February 15, By their answer, the Pacifico defendants deny some and admit other allegations set forth in the complaint, and assert four affirmative defenses, alleging, inter alia, the plaintiffs lack of standing. The defendants Robert G. Lucas and Lucas Investors Group appeared herein by counsel and demanded notice of all papers filed herein. The defendant States of America appeared herein and waived notice of all, but certain, [2] HSBC USA,

Pg.3

10, 2014. On 2014, IAS Pacifico

Pacifico CPLR

CPLR

Pacifico

CPLR 109, NYS2d [151 C. V., 304 YS2d 2003]). Pacifico's

"the undersigned"

CPLR

Pacifico CPLR 3018 CPLR CPLR Inc., 102 NYS2d 2012]; Co., LLCv Elwoo4 LLC, 2013 NY LEXIS 2013 2013 Slip Op [U] [Sup Suffolk 2013]; U.S. 2012 NY LEXIS 2012 2012 NY Slip Op [U] [Sup 2012]; EMC Corp. Bank N.A. v Pacifico, et. al. Index No.: 12-1625

notices. The remaining defendants have neither answered nor appeared herein.

By way of background, a conference was scheduled to be held before the specialized mortgage foreclosure part on September the continued date, November 24, this action was dismissed from the conference program and referred as an case because the defendants failed to appear at, or otherwise



HSBC Bank USA, N.A. v Pacifico

2016 NY Slip Op 30717(U) (2016) | Cited 0 times | New York Supreme Court | April 18, 2016

participate in, the scheduled conference. Accordingly, no further conference is required under any statute, law or rule.

The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor against the defendants and striking their joint answer and the affirmative defenses asserted therein; (2) pursuant to 3215 fixing the defaults of the non-answering defendants; (3) pursuant to RPAPL § 1321 appointing a referee to (a) compute amounts due under the subject mortgage; and (b) examine and report whether the subject premises should be sold in one parcel or multiple parcels; and (4) amending the caption.

Mr. Pacifico opposes the plaintiff's motion and moves for, inter alia, an order pursuant to 3211 (a) (3) dismissing the complaint insofar as asserted against him on the grounds that the plaintiff lacks standing. In his moving papers, Mr. Pacifico re-asserts the previously pleaded affirmative defense that the plaintiff lacks standing to prosecute its claims for foreclosure and sale. Mr. argues that this action should be dismissed because of the plaintiff's purported lack of standing, contending that a question of fact exists with respect to the assignment of the note and mortgage. In response to the cross motion, the plaintiff has submitted opposition and reply papers.

Initially, to the extent that Mr. Pacifico, a self-represented defendant in this action, purports to move for dismissal of the complaint insofar as to his wife, Mrs. Pacifico, he is without standing to do so because he never filed a notice of appearance on behalf of his wife as her counsel, if he is in fact an attorney (see, 321 [a]; *Wehringer v Douglas Gibbons-Hollyday & Ives*, 49 AD2d 373 347 Dept 1975]; see also, *Lipstick, Ltd. v Grupo Tribasa, S.A.* de AD2d 482, 758 317 (1st Dept Parenthetically; there are no statements, sworn or unsworn, in the Pacifico defendants' joint answer or in Mr. moving papers that Mr. Pacifico is an attorney, or that he has appeared herein as his own or his wife's counsel. In any event, the notice of cross motion submitted by Mr. Pacifico specifically indicates that he is movant without an attorney designation, and his name alone appears in the notice of motion. Thus, the cross motion is fatally defective as to Mrs. Pacifico.

To the extent that the cross motion is predicated upon dismissal pursuant to 3211 subdivision (a) (3), it was not timely interposed because it was made after joinder of issue and service of the answer cut off the defendants' right to make a CPLR 3211 motion to dismiss on this ground (see generally, 3211 [e]; see also, CPLR [b]). It is well-settled that motions under 3211 (a) are to be made at any time before service of the responsive pleading (see, 3211 [e]; *Hendrickson v Philbor Motors*, AD3d 251, 955 384 [2d Dept *Cremosa Food Catering*, Misc. 4746, WL 5761461, NY 32556 Ct, *County Bank, N.A. v Arias*, Misc 3621, WL 3135064, 31999 Ct, Queens County see also, Mtge. [* 3] *HSBC USA, Pacifico*,

1074, 981NYS2d814 2014]; *Berti*. 510 NYS2d 590 *Pacifico's* CPLR

CPLR



HSBC Bank USA, N.A. v Pacifico

2016 NY Slip Op 30717(U) (2016) | Cited 0 times | New York Supreme Court | April 18, 2016

NYS2d 2009]; 40 NYS2d 400 2007]; NYS2d 2005]; Shore 300 751NYS2d868 2002]; 706, NYS3d

NYS2d [id 2006]; US 1206 NYS2d 870 [Sup Suffolk 2013]).

NYS2d 2011)).

NYS2d U.S. 890 NYS2d 2009]). "is obligation" 102 909, NYS2d 200

11AD3d674, NYS2d 2007]; 651NYS2d121

(U.S.

NYS3d 107 US 120 991NYS2d630 2014]; NYS2d 2014]; Deutsche 100 680, 2012]; 1061, NYS2d 2012]; USA v-Hernandez, NYS2d 120 2012]). Bank N.A. v et. al. Index No.: 12-1625 Pg.4

v Gass, 114 AD3d (3d Dept Corp. v Luken, 126 AD2d 446, (1st Dept 1987)). Therefore, Mr. post-answer demand for dismissal of the complaint, to the extent it is premised upon the ground embraced by 3211 subdivision (a) (3), is untimely by approximately 26 months and will not be considered as an independent basis for dismissal.

Even though 3211 (c) empowers the court to treat a motion to dismiss a motion for summary judgment, in this case, conversion is inappropriate because, inter alia, this action does not exclusively involve issues of law which were fully appreciated and argued by the parties, and since notice has not been provided to the parties (see, *Bennett v Huckle*, 64 AD3d 529, 881 335 (2d Dept Bowes v Healy, AD3d 566, 833 (2d Dept Moutafis v Osborne, 18 AD3d 723, 795 716 [2d Dept Matter of Weiss v N. Towers Apts., Inc., AD2d 596, [2d Dept cf, *Bank of N.Y. Mellon v Green*, 132 AD3d 17 651 [2d Dept 2015])). While a defense asserting the lack of standing is preserved in the answer, adjudication of such defense must be made at trial or its procedural equivalent, namely a motion for summary judgment (see, *Diaz v DiGiulio*, 29 AD3d 623, 816 125 Dept Bank, NA v Reed, 38 Misc3d [A], 967 Ct, County Accordingly, the cross motion is denied in its entirety.

The court next turns to the plaintiff's motion-in-chief. Where, as here, an answer served includes the defense of standing, the plaintiff must prove its standing in order to be entitled to relief (see, *CitiMortgage, Inc. v Rosenthal*, 88 AD3d 759, 931 638 [2d Dept The standing of a plaintiff in a mortgage foreclosure action is measured by its ownership, holder status or possession of the note and mortgage at the time of the commencement of the action (see, *Bank of N. Y. v Silverberg*, 86 AD3d 274, 926 532 [2d Dept 2011]; *Bank, N.A. v Collymore*, 68 AD3d 752, 578 [2d Dept A mortgage merely security for a debt or other obligation, and cannot exist independently of the debt or (*Deutsche Bank Natl. Trust Co. v Spanos*, AD3d 911, 961 [2d Dept 2013] [internal quotation marks and citations omitted])). Holder status is established where the plaintiff is the special indorsee of the note or takes possession of a mortgage note that contains an endorsement in blank on its face or attached



HSBC Bank USA, N.A. v Pacifico

2016 NY Slip Op 30717(U) (2016) | Cited 0 times | New York Supreme Court | April 18, 2016

thereto, as the mortgage follows an incident thereto (see, Mortgage Elec. Registration Sys., Inc. v Coakley, 838 622 (2d Dept First Trust Natl Assn. v Meisels, 234 AD2d 414, (2d Dept 1996)). "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" Bank, N.A. v Collymore, 68 AD3d 752, supra at 754 [internal quotation marks and citations omitted]).

In the instant case, the plaintiff failed to establish, prima facie, that it had standing as its evidence did not adequately demonstrate that the note was physically delivered to it prior to the commencement of the action (see, Wells Fargo Bank, NA v Burke, 125 AD3d 765, 5 [2d Dept 2015]; Bank N.A. v Faruque, AD3d 575, [2d Dept Bank of N.Y. Mellon v Gales, 116 AD3d 723, 982 911 [2d Dept Bank Natl Trust Co. v Haller, AD3d 954 NYS2d 551 [2d Dept Deutsche Bank Natl Trust Co. v Rivas, 95 AD3d 945 328 [2d Dept HSBC Bank 92 AD3d 843, 939 [2d Dept In support of the motion, the plaintiff submitted, inter alia, the affidavit of Pamela Ballard, a Vice [* 4] HSBC USA,

Pg.5

Ocwen

909, NYS3d 2015]; Na.ti. 931NYS2d630 2011)).

100 680, U.S.

US NA NYS2d

Pacifico York Univ. NYS2d plaintiff's

igned"

\iJ ·ic\t.e. _x_ DISPOSITION Bank N.A. v Pacifico, et. al. Index No.: 12-1625

President of the plaintiffs servicer, Loan Servicing, LLC. In her affidavit, Ms. Ballard alleges, among other things, that the plaintiff was in possession of the note at the time of commencement and is the mortgagee of record. The plaintiffs representative, however, did not provide any factual details concerning when the note was endorsed or when the plaintiff received physical possession of the note, and, thus, the plaintiff failed to establish that it had physical possession of the note prior to commencing this action (see, Bank of Am., N.A. v Paulsen, 125 AD3d 6 68 [2d Dept Deutsche Bank Trust Co. v Barnett, 88 AD3d 636, [2d Dept

Furthermore, in this case, the allonges to the note contain two undated endorsements, and the plaintiffs representative did not allege when the endorsements were placed on the allonges to the



HSBC Bank USA, N.A. v Pacifico

2016 NY Slip Op 30717(U) (2016) | Cited 0 times | New York Supreme Court | April 18, 2016

note. It is, therefore, not clear whether the endorsements were effectuated prior to the commencement of this action (see, *Deutsche Bank Natl. Trust Co. v Haller*, AD3d supra; *Bank, N.A. v Collymore*, 68 AD3d 752, supra). In any event, if MERS, as nominee of the lender was not the owner of the note, as it appears, it would have lacked the authority to assign the note to the plaintiff, and absent an effective transfer of the note, the assignment of the mortgage to the plaintiff would be a nullity (see, *Bank v Faruque*, 120 AD3d 575, supra; *Bank of N.Y. v Silverberg*, 86 AD3d 274, supra; *Kluge v Fugazy*, 145 AD2d 537, 536 92 [2d Dept 1988]; cf, *Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674, supra). Thus, the issue of standing cannot be determined as a matter of law on this record. In view of the plaintiffs incomplete evidentiary submissions, an issue of fact remains as to whether it had standing to commence this action.

Thus, the plaintiff failed to establish its prima facie entitlement to judgment as a matter of law with respect to the defendants. The plaintiff's failure to make a prima facie showing requires the denial of the motion, regardless of the sufficiency of the opposing papers (see, *Winegrad v New Med. Ctr.*, 64 NY2d 851, 487 316 (1985)). In view of the open question of whether the plaintiff has standing, the remaining branches of the motion are denied at this juncture.

Accordingly, the motion by the plaintiff and the cross motion by Mr. Pacifico are each denied. The proposed order submitted by the plaintiff has been marked

Dated:

__ FINAL [* 5]

