State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: June 20, 2019 526189

JPMORGAN CHASE BANK NATIONAL ASSOCIATION,
Respondent,
v
MEMORANDUM AND ORDER
ENID FUTTERMAN,
Appellant,
et al.,
Defendants.

Calendar Date: April 25, 2019

Before: Lynch, J.P., Clark, Devine, Aarons and Pritzker, JJ.

Stephen C. Silverberg, PLLC, Uniondale (Stephen C. Silverberg of counsel), for appellant.

Parker Ibrahim & Berg LLP, New York City (Scott W. Parker of counsel), for respondent.

Clark, J.

Appeals (1) from an order of the Supreme Court (Weinstein, J.), entered March 28, 2017 in Columbia County, upon a decision of the court in favor of plaintiff, and (2) from an order of said court, entered June 6, 2018 in Columbia County, which denied defendant Enid Futterman's motion to vacate the prior order.

In 2005, defendant Enid Futterman (hereinafter defendant) executed and delivered a promissory note in the sum of $665,000

to Washington Mutual Bank, FA (hereinafter WaMu), which was secured by a mortgage on certain real property in Columbia County. In September 2008, plaintiff entered into a purchase and assumption agreement with the Federal Deposit Insurance Corporation as receiver for WaMu, wherein plaintiff acquired certain of WaMu's assets and liabilities. Plaintiff asserts that the subject note and mortgage were among those assets that were transferred to it by virtue of the agreement.

In June 2009, after defendant stopped making payments on the mortgage loan, plaintiff commenced this mortgage foreclosure action. Defendant joined issue and asserted a counterclaim to quiet title. Plaintiff thereafter served an amended summons and complaint. Defendant, in turn, served an amended answer in which she asserted, for the first time, various affirmative defenses, including that plaintiff lacked standing and failed to comply with the requirements of RPAPL 1304 and 1306. Following a nonjury trial in April 2016, but before Supreme Court rendered a verdict, defendant moved to reopen the trial to permit the introduction of newly-discovered evidence. In a March 2017 decision and order, Supreme Court denied defendant's motion to reopen and, as to the merits of the action, found that plaintiff was entitled to a judgment of foreclosure. Nearly one year later, defendant moved, pursuant to CPLR 5015 (a) (2), to vacate the March 2017 order on the ground that further new evidence had been discovered. In June 2018, Supreme Court denied defendant's motion to vacate. Defendant appeals from the March 2017 and June 2018 orders, primarily challenging Supreme Court's determination that plaintiff had standing to commence this action.

Where, as here, standing is contested, the plaintiff bears the burden of demonstrating that, at the time that the action was commenced, it was the holder or assignee of the mortgage and the holder or assignee of the underlying note (see McCormack v Maloney, 160 AD3d 1098, 1099 [2018], lv dismissed 32 NY3d 1185 [2019]; HSBC Bank USA, N.A. v Corazzini, 148 AD3d 1314, 1315 [2017], lv dismissed 29 NY3d 1040 [2017]). "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" (Onewest Bank, F.S.B. v Mazzone, 130 AD3d 1399, 1400 [2015]; see Aurora Loan Servs., LLC v Taylor, 25 NY3d 355, 361 [2015]; Goldman Sachs Mtge. Co. v Mares, 166 AD3d 1126, 1129 [2018]). In assessing Supreme Court's resolution of the standing issue after a nonjury trial, we independently review the weight of the evidence and, while according appropriate deference to the court's credibility determinations and factual findings, determine the judgment warranted by the record (see HSBC Bank USA, N.A. v Corazzini, 148 AD3d at 1315; Nationstar Mtge., LLC v Davidson, 116 AD3d 1294, 1295 [2014], lv denied 24 NY3d 905 [2014]).

At trial, plaintiff produced, among other things, the mortgage and the original "wet ink" note, which had been endorsed in blank without recourse by a vice-president of WaMu. Peter Katsikas, a mortgage banking research officer employed by plaintiff and previously employed by WaMu, testified that he reviewed the documents in defendant's account file, including the original note, prior to trial. He testified that he was familiar with plaintiff's practices with respect to its storage of original promissory notes and explained that plaintiff typically applied a "swirl" to the upper right-hand corner of its original notes. Katsikas stated that the note in question had plaintiff's particular swirl in the upper right-hand corner and that, therefore, it was the original note. Katsikas further testified that plaintiff maintained its original promissory notes in a secure facility in Louisiana and that, based upon his review of plaintiff's custodial system of record, emBTrust, the original note had been in plaintiff's Louisiana facility from January 16, 2009 through July 2, 2014, when it was moved to the office of plaintiff's counsel.[1]

Defendant attempted to disprove or cast doubt upon plaintiff's proof that it had physical possession of the

[1] Plaintiff also introduced into evidence an affidavit from an assistant secretary for plaintiff, who also stated that, based upon his review of emBTrust, the original note had been in plaintiff's Louisiana storage facility from January 16, 2009 until its transfer to counsel's office in July 2014.

original note prior to the commencement of this action through various means. First, during her cross-examination of Katsikas, defendant presented evidence, including a report from a different record-keeping system used by plaintiff and an affidavit from one of plaintiff's employees, identifying July 20, 2009 as the date on which plaintiff took physical possession of the original note. Defendant also presented expert testimony from Marie McDonnell, a mortgage fraud and forensic analyst, who testified that, based upon her interpretation of plaintiff's loan histories and internal investor codes, plaintiff did not acquire physical possession of the original note until September 23, 2010.[2] Supreme Court, however, rejected defendant's alternate versions of events and, in a detailed decision and order, set forth its many valid reasons for finding that plaintiff was in physical possession of the original note on January 16, 2009, including its determinations to credit Katsikas' testimony that emBTrust was plaintiff's custodial system of record and to discredit McDonnell's testimony as speculative. Deferring to Supreme Court's credibility assessments and factual findings, we find that the weight of the evidence supports Supreme Court's determination that plaintiff had standing to commence this action based upon its physical possession of the original note at the time of commencement (see Nationstar Mtge., LLC v Davidson, 116 AD3d at 1295-1296; cf. Aurora Loan Servs., LLC v Taylor, 25 NY3d at 361-362; Green Tree Servicing LLC v Bormann, 157 AD3d 1112, 1115 [2018]). Inasmuch as plaintiff's physical possession of the note at the time of commencement is sufficient to establish standing, we need not determine whether the purchase and assumption agreement

[2] Defendant sought to offer additional expert testimony from a witness trained in forensic document evaluation to opine as to whether the note possessed by plaintiff was the original. However, Supreme Court precluded this testimony on the basis that the purported expert did not possess the requisite qualifications to render an opinion on the matter. We discern no abuse of discretion in this determination (see Reese v New York City Bd. of Educ., 297 AD2d 793, 793 [2002]; Franklin v Jaros, Baum & Bolles, 257 AD2d 600, 600 [1999], lv denied 93 NY2d 811 [1999]).

independently conferred upon plaintiff standing to commence this action.

Further, assuming, without deciding, that RPAPL former 1304 was applicable to this mortgage foreclosure action, we agree with Supreme Court that plaintiff established its compliance with the requirements of that statute (see Wells Fargo Bank, N.A. v Walker, 141 AD3d 986, 989 [2016]; compare TD Bank, N.A. v Leroy, 121 AD3d 1256, 1258-1259 [2014]). As to defendant's contention that plaintiff failed to comply with RPAPL 1306, plaintiff commenced this action prior to the date on which that statute became effective (see L 2009, ch 507, § 5). Defendant's remaining arguments are without merit. Accordingly, upon review of defendant's arguments, we find no basis upon which to disturb Supreme Court's determination that plaintiff is entitled to a judgment of foreclosure.

Lynch, J.P., Devine, Aarons and Pritzker, JJ., concur.

ORDERED that the orders are affirmed, with costs.

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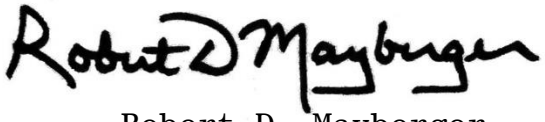

Robert D. Mayberger
Clerk of the Court