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

Decided and Entered: March 25, 2021 530033

BAYVIEW LOAN SERVICING, LLC,
Respondent,
v
MEMORANDUM AND ORDER
DAVID K. FREYER, Also Known as DAVID FREYER,
Appellant,
et al.,
Defendant.

Calendar Date: February 10, 2021

Before: Lynch, J.P., Clark, Aarons, Reynolds Fitzgerald and Colangelo, JJ.

Wolfenden Law Firm, PLLC, Brewerton (Michelle L. Wolfenden of counsel), for appellant.

Woods Oviatt Gilman, LLP, Rochester (Cassie T. Doran of counsel), for respondent.

Reynolds Fitzgerald, J.

Appeal from an order of the Supreme Court (Cerio Jr., J.), entered March 23, 2019 in Madison County, which, among other things, granted plaintiff's motion for summary judgment.

In 2006, defendant David K. Freyer (hereinafter defendant) executed a note to Washington Mutual Bank, FA in the sum of $172,000. The note was secured by a mortgage, executed by

defendant and defendant Kimberly C. Freyer,[1] on property located in the Town of Cazenovia, County of Madison. The mortgage was assigned to plaintiff in 2014. In 2015, defendant entered into a loan modification agreement, increasing the balance on the mortgage to $278,028.23. Thereafter, defendant defaulted. In 2017, plaintiff commenced this mortgage foreclosure action. Defendant answered, asserting various affirmative defenses, including lack of standing. In 2019, plaintiff moved for summary judgment dismissing the answer, including all affirmative defenses and counterclaims, and appointing a referee to compute the amount due. Defendant opposed the motion. Supreme Court granted plaintiff's motion, and defendant appeals.

"To establish its prima facie entitlement to summary judgment in a mortgage foreclosure action, a plaintiff must submit the mortgage, unpaid note and evidence of the mortgagor's default" (Bank of N.Y. Mellon v Cronin, 151 AD3d 1504, 1505 [2017] [citations omitted], lv dismissed 31 NY3d 1061 [2018]; see Bank of N.Y. Mellon v Slavin, 156 AD3d 1073, 1075 [2017], lv dismissed 33 NY3d 1128 [2019]). However, "[w]here, as here, the issue of standing is raised as an affirmative defense, the plaintiff must also prove its standing in order to be entitled to relief" (Deutsche Bank Natl. Trust Co. v Monica, 131 AD3d 737, 738 [2015] [internal quotation marks and citations omitted]; see Wells Fargo Bank, NA v Ostiguy, 127 AD3d 1375, 1376 [2015]). A "plaintiff has standing in a mortgage foreclosure action where 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" (Citibank, NA v Abrams, 144 AD3d 1212, 1214 [2016] [internal quotation marks and citations omitted]; see JPMorgan Chase Bank, N.A. v Verderose, 154 AD3d 1198, 1200 [2017]). "Holder status is established where the plaintiff possesses a note that, on its face or by allonge, contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff" (McCormack v Maloney, 160 AD3d 1098, 1099 [2018] [internal quotation marks and citations omitted], lv dismissed 32 NY3d

[1] Although named in the action, Kimberly C. Freyer did not serve an answer and is not involved in this appeal.

1185 [2019]; see U.S. Bank Trust, N.A. v Varian, 156 AD3d 1255, 1256 [2017]).

Here, plaintiff established its prima facie entitlement to summary judgment by producing evidence of the mortgage, the loan modification agreement, and the unpaid note. To establish its standing and defendant's default, plaintiff proffered the affidavit of Leticia Sanchez, a senior document coordinator for plaintiff, who averred that plaintiff is the master servicer and M&T Bank is the sub-servicer agent for defendant's loan, that she has access to and is familiar with how the business records are created and maintained by both entities, that the business records are made at or near the time of the activity or transaction and are kept in the regular course of business, and that it is the regular practice of both entities to make and maintain these records in the course of its regularly conducted business activities. Sanchez affirmed that, based on her review of the records, defendant failed to make payments as of March 1, 2017 and the default has not been cured. She further affirmed that plaintiff received possession of the note, endorsed in blank, on February 27, 2014 and had possession of the note on or before the commencement of the action on September 21, 2017. As plaintiff's employee, Sanchez established personal knowledge of plaintiff's business practices and procedures and that the records provided by M&T Bank as sub servicer of the loan were incorporated into its own records and routinely relied upon. As these records qualify as business records (see CPLR 4518), Sanchez's affidavit was sufficient to establish plaintiff's standing, given that plaintiff was the holder of the note prior to and at the time the action was commenced, and defendant's default (see Aurora Loan Servs. LLC v Taylor, 25 NY3d 355, 361 [2015]; Deutsche Bank Natl. Trust Co. v Monica, 131 AD3d at 739).

Where the plaintiff has met its initial burden for summary judgment, the burden shifts to the defendant to demonstrate the existence of a triable issue of fact (see HSBC Bank USA, N.A. v Guardian Preserv. LLC, 160 AD3d 1236, 1237 [2018], lv denied 32 NY3d 902 [2018]). Defendant contends that there are concerns as to the note based upon discrepancies in its pagination. As a

result, defendant served discovery demands, after the filing of plaintiff's summary judgment motion, seeking to inspect the original note and other documents. Defendant further asserts that the motion should not have been granted while discovery was outstanding. We disagree. The Court of Appeals recently held that "there is no per se rule requiring the court to grant a request for inspection of the original note prior to awarding summary judgment to a plaintiff in a mortgage foreclosure action. To the extent that cases have held or suggested otherwise, they should not be followed" (JPMorgan Chase Bank, N.A. v Caliguri, 36 NY3d 953, 954 [2020] [citation omitted]).

Defendant has also questioned the authenticity of the assignment of mortgage. However, once a note is transferred, the mortgage passes as an incident to the note. "Any disparity between the holder of the note and the mortgagee of record does not stand as a bar to a foreclosure action because the mortgage is not the dispositive document of title as to the mortgage loan; the holder of the note is deemed the owner of the underlying mortgage loan with standing to foreclose" (Aurora Loan Servs., LLC v Taylor, 25 NY3d at 361-362 [internal quotation marks, brackets and citation omitted]; see U.S. Bank Trust, N.A. v Varian, 156 AD3d at 1256). Defendant's additional allegations of misconduct by plaintiff's predecessors in interest, and its contention that plaintiff has a history of falsifying documents, are unsubstantiated and conclusory and, therefore, insufficient to raise a triable issue of fact to defeat a motion for summary judgment (see JPMorgan Chase Bank, N.A. v Verderose, 154 AD3d at 1200). Thus, Supreme Court properly awarded summary judgment in favor of plaintiff (see Bank of N.Y. Mellon v Rutkowski, 148 AD3d 1341, 1343 [2017]).

Lynch, J.P., Clark, Aarons and Colangelo, JJ., concur.

ORDERED that the order is affirmed, with costs.

ENTER:

Robert D. Mayberger
Clerk of the Court