

179 A.D.3d 1130

Supreme Court, Appellate Division, Second
Department, New York.

U.S. BANK NATIONAL ASSOCIATION,
etc., Respondent,

v.

Vivian Mook BAER, et al., Appellants, et
al., Defendants.

2017-00464

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2017-00466

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2017-00467

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2017-09415

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(Index No. 57522/14)

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Argued - September 12, 2019

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January 29, 2020

Synopsis

Background: Holder of note secured by mortgage brought action to foreclose mortgage. The Supreme Court, Westchester County, [Mary Smith, J.](#), granted summary judgment for holder, denied mortgagors' motion to compel holder to produce certain original loan documents for inspection, denied mortgagors' motion for summary judgment, and issued order and judgment of foreclosure and sale. Mortgagors appealed.

[Holding:] The Supreme Court, Appellate Division, held that holder established that it had standing to commence action.

Appeals dismissed; order and judgment of foreclosure and sale affirmed.

West Headnotes (6)

[1] Judgment → Liens and mortgages

Generally, in moving for summary judgment in an action to foreclose a mortgage, a plaintiff establishes its prima facie case through the production of the mortgage, the unpaid note, and evidence of default; however, where a plaintiff's standing to commence a foreclosure action is placed in issue by the defendant, plaintiff must prove its standing in order to be entitled to relief.

[2] Mortgages and Deeds of Trust → Assignees and other transferees Mortgages and Deeds of Trust → Holders of obligations secured and their agents; non-holders in possession

A plaintiff has standing in a mortgage foreclosure action when it is the holder or assignee of the underlying note at the time the action is commenced.

[3] Mortgages and Deeds of Trust → Delivery Mortgages and Deeds of Trust → Necessity of writing Mortgages and Deeds of Trust → Mortgage as following note; note as following mortgage

Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of a foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident.

[4] Commercial Paper → Promissory notes

A promissory note is a negotiable instrument

within the meaning of the Uniform Commercial Code. [N.Y. Uniform Commercial Code § 3-104\(2\)\(d\)](#).

[5] Mortgages and Deeds of Trust → Holders of obligations secured and their agents; non-holders in possession

Holder of note secured by mortgage established that it had physical possession of note at the time it commenced foreclosure action, and thus had standing to commence action; holder attached the note, endorsed in blank, to its summons and complaint.

[6] Commercial Paper → Indorsement in full or in blank

There is no requirement that an entity in possession of a negotiable instrument that has been endorsed in blank must establish how it came into possession of the instrument in order to be able to enforce it. [N.Y. Uniform Commercial Code § 3-204\(2\)](#).

Attorneys and Law Firms

**170 Markham & Read, White Plains, N.Y. ([John J.E. Markham II](#) and [Bridget Zerner](#) of counsel), for appellants.

[David A. Gallo](#) & Associates LLP (Akerman LLP, New York, N.Y. [[Jordan M. Smith](#)], of counsel), for respondent.

[REINALDO E. RIVERA](#), J.P., [LEONARD B. AUSTIN](#), [JOHN M. LEVENTHAL](#), [ANGELA G. IANNACCI](#), JJ.

DECISION & ORDER

*1130 In an action to foreclose a mortgage, the defendants Vivian Mook Baer and Stephen H. Baer appeal from (1) an order of the Supreme Court, Westchester County (Mary H. Smith, J.), dated December 5, 2016, (2) an order of the same court also dated December 5, 2016, (3) an order of the same court dated December 12, 2016, and (4) an order and judgment of foreclosure and sale (one paper) of the same court dated August 18, 2017. The first order dated December 5, 2016, insofar as appealed from, granted those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendants Vivian Mook Baer and Stephen H. Baer and for an order of reference. The second order dated December 5, 2016, insofar as appealed from, granted those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against those defendants and for an order of reference, and referred the matter to a referee to compute the amount due to the plaintiff on the mortgage loan. The order dated December 12, 2016, denied **171 those defendants' motion to compel the plaintiff to produce certain original loan documents for inspection and to adjourn the plaintiff's motion, inter alia, for summary judgment on the complaint insofar as asserted against them and for an order of reference. The order and judgment of foreclosure and sale, inter alia, granted the plaintiff's motion to confirm the referee's report and directed the sale of the subject property.

ORDERED that the appeals from the orders are dismissed; and it is further,

ORDERED that the order and judgment of foreclosure and sale is affirmed; and it is further,

ORDERED that one bill of costs is awarded to the plaintiff.

The appeals from the orders must be dismissed because the right of direct appeal therefrom terminated with the entry of the order and judgment of foreclosure and sale in the action (*see Matter of Aho*, 39 N.Y.2d 241, 248, 383 N.Y.S.2d 285, 347 N.E.2d 647). The issues raised on the appeals from the orders are brought up for review and have been considered on the appeal from the order and judgment of foreclosure and sale (*see CPLR 5501[a][1]*).

In 2014, the plaintiff commenced this action to foreclose a

consolidated mortgage encumbering certain property in *1131 Bedford. The defendants Vivian Mook Baer and Stephen H. Baer (hereinafter together the defendants) interposed an answer asserting various affirmative defenses, including lack of standing. Thereafter, the plaintiff moved, inter alia, for summary judgment on the complaint insofar as asserted against the defendants and for an order of reference. The defendants opposed the motion and moved to compel the plaintiff to produce certain original loan documents for inspection and for a corresponding 30-day adjournment of the plaintiff's motion. In an order dated November 21, 2016, the Supreme Court noted that the defendants' motion was not accompanied by the proper fee and treated it as a request for an adjournment. The court then adjourned the plaintiff's motion to afford the defendants' counsel an opportunity to submit proof of his authorization to practice in New York.

Upon complying with the Supreme Court's directive, the defendants again moved to compel the plaintiff to produce the subject original loan documents for inspection and for a further adjournment of the plaintiff's motion to allow them to submit additional opposition papers. In an order dated December 5, 2016, the court, inter alia, granted those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendants and for an order of reference. In a second order dated December 5, 2016, the court, among other things, granted the same relief and referred the matter to a referee to compute the amount due to the plaintiff on the mortgage loan. In an order dated December 12, 2016, the court denied the defendants' motion. On August 18, 2017, the Supreme Court entered an order and judgment of foreclosure and sale, inter alia, granting the plaintiff's motion to confirm the referee's report and directing the sale of the subject property. The defendants appeal.

[1] [2] [3] "Generally, in moving for summary judgment in an action to foreclose a mortgage, a plaintiff establishes its prima facie case through the production of the mortgage, the unpaid note, and evidence of default" (*Deutsche Bank Natl. Trust Co. v. Brewton*, 142 A.D.3d 683, 684, 37 N.Y.S.3d 25, quoting *Plaza Equities, LLC v. Lamberti*, 118 A.D.3d 688, 689, 986 N.Y.S.2d 843). Additionally, where, as here, a defendant places standing in issue, the plaintiff must prove its standing in order to be entitled to relief (see **172 *Deutsche Bank Natl. Trust Co. v. Brewton*, 142 A.D.3d at 684, 37 N.Y.S.3d 25; *Aurora Loan Servs., LLC v. Taylor*, 114 A.D.3d 627, 628, 980 N.Y.S.2d 475, *affd* 25 N.Y.3d 355, 12 N.Y.S.3d 612, 34 N.E.3d 363; *Wells Fargo Bank Minn., N.A. v. Mastropaolo*, 42 A.D.3d 239, 242, 837 N.Y.S.2d 247). A

plaintiff has standing in a mortgage foreclosure action when it is the holder or *1132 assignee of the underlying note at the time the action is commenced (see *Aurora Loan Servs., LLC v. Taylor*, 25 N.Y.3d at 361, 12 N.Y.S.3d 612, 34 N.E.3d 363; *Deutsche Bank Natl. Trust Co. v. Brewton*, 142 A.D.3d at 684, 37 N.Y.S.3d 25). "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" (*U.S. Bank N.A. v. Collymore*, 68 A.D.3d 752, 754, 890 N.Y.S.2d 578; see *Aurora Loan Servs., LLC v. Taylor*, 25 N.Y.3d at 361-362, 12 N.Y.S.3d 612, 34 N.E.3d 363; *Dyer Trust 2012-1 v. Global World Realty, Inc.*, 140 A.D.3d 827, 828, 33 N.Y.S.3d 414).

[4] A promissory note is a negotiable instrument within the meaning of the Uniform Commercial Code (see UCC 3-104[2][d]; *Bayview Loan Servicing, LLC v. Kelly*, 166 A.D.3d 843, 844, 87 N.Y.S.3d 569; *U.S. Bank, N.A. v. Zwisler*, 147 A.D.3d 804, 806, 46 N.Y.S.3d 213; *Mortgage Elec. Registration Sys. Inc. v. Coakley*, 41 A.D.3d 674, 674, 838 N.Y.S.2d 622). A "holder" is the "person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession" (UCC 1-201[b][21][A]; see UCC 3-301). Where an instrument is endorsed in blank, it may be negotiated by delivery (see UCC 3-202[1]; 3-204[2]).

[5] [6] Here, the plaintiff established its standing to commence the action by demonstrating that it had physical possession of the note at the time the action was commenced, as evidenced by its attachment of the note, endorsed in blank, to the summons and complaint (see *Deutsche Bank Natl. Trust Co. v. Logan*, 146 A.D.3d 861, 45 N.Y.S.3d 189; *JPMorgan Chase Bank, N.A. v. Weinberger*, 142 A.D.3d 643, 645, 37 N.Y.S.3d 286; *Deutsche Bank Natl. Trust Co. v. Leigh*, 137 A.D.3d 841, 842, 28 N.Y.S.3d 86; *Emigrant Bank v. Larizza*, 129 A.D.3d 904, 905, 13 N.Y.S.3d 129; *Nationstar Mtge., LLC v. Catizone*, 127 A.D.3d 1151, 1152, 9 N.Y.S.3d 315). Contrary to the defendants' contention, "[t]here is simply no requirement that an entity in possession of a negotiable instrument that has been endorsed in blank must establish how it came into possession of the instrument in order to be able to enforce it" (*JPMorgan Chase Bank, N.A. v. Weinberger*, 142 A.D.3d at 645, 37 N.Y.S.3d 286; see UCC 3-204[2]).

In opposition, the defendants failed to raise a triable issue of fact as to the plaintiff's standing (see *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923,

501 N.E.2d 572).

The defendants' remaining contention is without merit.

Accordingly, we agree with the Supreme Court's determination to grant those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendants and for an order of reference. Furthermore, we agree with the court's determination to deny *1133 the defendants' motion, inter alia, to compel the plaintiff to produce the original loan documents for inspection.

RIVERA, J.P., AUSTIN, LEVENTHAL and IANNACCI, JJ., concur.

All Citations

179 A.D.3d 1130, 118 N.Y.S.3d 169, 2020 N.Y. Slip Op. 00635