APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT

U.S. Bank Trust v. McGlone

2022 NY Slip Op 00458 (App. Div. 2022) · No. 2018-12424; 2018-12425 · Decided January 26, 2022

SUMMARY

The New York Appellate Division, Second Department, dismissed the appeal from an intermediate order and affirmed an order and judgment of foreclosure and sale. The court held that the defendants failed to establish fraud, misrepresentation, or other misconduct warranting vacatur under CPLR 5015(a)(3), and rejected their challenges concerning mortgage assignments, certificates of conformity, and standing.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, Second Judicial Department
WRITING FOR THE COURT	Francesca E. Connolly, J.P.; Sylvia O. Hinds-Radix, J.; Sheri S. Roman, J.; Deborah A. Dowling, J.
JURISDICTION	New York
DECIDED	January 26, 2022
DOCKET	2018-12424; 2018-12425
DISPOSITION	affirmed
PROCEDURAL POSTURE	Defendants appealed from an order granting the plaintiff's motion to confirm a referee's report and for a judgment of foreclosure and sale, denying their CPLR 5015(a)(3) cross-motion to vacate a prior summary-judgment order, and from the resulting order and judgment of foreclosure and sale.
STANDARD OF REVIEW	A motion under CPLR 5015(a)(3) to vacate an order granting summary judgment in a foreclosure action requires the movant to establish that the order was procured by fraud, misrepresentation, or other misconduct. The appellate court reviewed the legal sufficiency of that showing and the propriety of the foreclosure judgment.
PRECEDENTIAL VALUE	precedential

PARTIES	Theodore J. McGlone, Susanne Clegg, Other defendants v. U.S. Bank Trust

TOPICS

foreclosure · summary judgment · appellate jurisdiction · civil procedure · remedies

PRACTICE AREAS

real estate · foreclosure · civil procedure · appellate procedure · remedies

QUESTIONS PRESENTED

1. Whether the appeal from the May 3, 2018 order had to be dismissed after entry of the order and judgment of foreclosure and sale.
2. Whether the defendants established fraud, misrepresentation, or other misconduct warranting vacatur under CPLR 5015(a)(3) of the prior order granting summary judgment in the foreclosure action.
3. Whether the out-of-state acknowledgments and absence of certificates of conformity on the affidavits and assignments of mortgage invalidated the documents or established misconduct.
4. Whether the assignments of mortgage affected the plaintiff's standing to foreclose.

HOLDINGS

1. The appeal from the May 3, 2018 order was dismissed because the right to take a direct appeal from that order terminated upon entry of the order and judgment of foreclosure and sale; issues raised on the order were reviewable on the appeal from the final order and judgment.
2. To vacate an order granting summary judgment in a foreclosure action under CPLR 5015(a)(3), the movant must establish that the opposing party procured the order through fraud, misrepresentation, or other misconduct; the defendants failed to make that showing.
3. The out-of-state acknowledgments on the affidavits and on the August 14, 2014 and October 24, 2016 assignments of mortgage substantially conformed to New York requirements and therefore did not require certificates of conformity. Even if a certificate was required for any document, its absence was a waivable irregularity rather than a fatal defect absent actual prejudice.
4. A mere assignment of the mortgage is irrelevant to the plaintiff's standing to foreclose because the mortgage is not the dispositive document of title.

KEY QUOTATIONS

> *"The appeal from the order dated May 3, 2018, 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"* ([*1])

> *"To prevail on a motion pursuant to CPLR 5015(a)(3) to vacate an order granting summary judgment in a foreclosure action, the proponent must establish that the opponent procured the order by fraud, misrepresentation, or other misconduct"* ([*2])

FACTUAL BACKGROUND

On September 19, 2009, Theodore J. McGlone executed a note for $485,347 secured by a mortgage on real property in Lynbrook. After McGlone allegedly defaulted, U.S. Bank Trust commenced a foreclosure action in 2013. The plaintiff submitted assignments of mortgage and affidavits in support of its motions, and the defendants argued that those documents demonstrated fraud or misconduct because of out-of-state acknowledgments and the absence of certificates of conformity.

PROCEDURAL HISTORY

U.S. Bank Trust commenced a mortgage foreclosure action in 2013 after Theodore J. McGlone allegedly defaulted on a note secured by real property in Lynbrook. The Supreme Court, Nassau County, granted the plaintiff summary judgment, appointed a referee, later confirmed the referee's report, entered a judgment of foreclosure and sale, and denied the defendants' motion to vacate the summary-judgment order based on alleged fraud, misrepresentation, or misconduct. The Appellate Division dismissed the appeal from the intermediate order and affirmed the order and judgment of foreclosure and sale.

DISPOSITION

affirmed

CASES CITED

- Matter of Aho, 39 NY2d 241, 248
- Citimortgage, Inc. v. Kish, 192 AD3d 659, 659
- Citimortgage, Inc. v. Zagoory, 198 AD3d 715, 716
- Deutsche Bank Natl. Trust Co. v. Le-Mond, 198 AD3d 610, 610
- Midfirst Bank v. Agho, 121 AD3d 343, 351
- Aurora Loan Servs., LLC v. Taylor, 25 NY3d 355, 362
- Bank of N.Y. Mellon v. West, 183 AD3d 683, 685

OPINION

U.S. Bank Trust v. McGlone 2022 NY Slip Op 00458
PER CURIAM.
U.S. Bank Trust v McGlone (2022 NY Slip Op 00458) U.S. Bank Trust v McGlone 2022 NY Slip Op 00458 Decided on January 26, 2022 Appellate Division, Second Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided on January 26, 2022
SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Second Judicial Department FRANCESCA E. CONNOLLY, J.P.
SYLVIA O. HINDS-RADIX

SHERI S. ROMAN

DEBORAH A. DOWLING, JJ. 2018-12424

2018-12425 (Index No. 8590/13) [*1]U.S. Bank Trust, etc., respondent, vTheodore J. McGlone, et al., appellants. David A. Bythewood, Mineola, NY, for appellants. Fein, Such & Crane, LLP, Westbury, NY (Michael S. Hanusek of counsel), for respondent. DECISION & ORDER In an action to foreclose a mortgage, the defendants appeal from (1) an order of the Supreme Court, Nassau County (Thomas A. Adams, J.), dated May 3, 2018, and (2) an order and judgment of foreclosure and sale (one paper) of the same court, also dated May 3, 2018. The order, insofar as appealed from, granted those branches of the plaintiff's motion which were to confirm a referee's report and for a judgment of foreclosure and sale, and denied the defendants' cross motion pursuant to CPLR 5015(a)(3) to vacate an order of the same court dated November 29, 2017, inter alia, granting those branches of the plaintiff's motion which were for summary judgment on the complaint and to appoint a referee to compute the amount due to the plaintiff. The order and judgment of foreclosure and sale, upon the order dated November 29, 2017, and the order dated May 3, 2018, among other things, granted those branches of the plaintiff's motion which were to confirm the referee's report and for a judgment of foreclosure and sale, and directed the sale of the subject property. ORDERED that the appeal from the order dated May 3, 2018, is 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 appeal from the order dated May 3, 2018, 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 NY2d 241, 248). The issues raised on the appeal from the order 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]). On September 19, 2009, the defendant Theodore J. McGlone executed a note in the [*2]principal sum of $485,347. The note was secured by a mortgage on certain real property located in Lynbrook. McGlone allegedly defaulted on the loan, and in 2013, the plaintiff commenced this action to foreclose the mortgage. Subsequently, the plaintiff moved, inter alia, for summary judgment on the complaint, to appoint a referee to compute the amount due to the plaintiff, and to amend the caption to include Susanne Clegg as a defendant. In an order dated November 29, 2017, the Supreme Court, inter alia, granted those branches of the plaintiff's motion. In February 2018, the plaintiff moved, among other things, to confirm the referee's report and for a judgment of foreclosure and sale. The defendants cross-moved pursuant to CPLR 5015(a)(3) to vacate the order dated November 29, 2017. By order dated May 3, 2018, the court granted the plaintiff's motion and denied the defendants' cross motion. In an order and judgment of foreclosure and sale also dated May 3, 2018, the court, among other things, granted those branches of the plaintiff's motion which were to confirm the referee's report and for a judgment of foreclosure and sale, and directed the sale of the subject property. The defendants appeal. "To prevail on a motion pursuant to CPLR 5015(a)(3) to vacate an order granting summary judgment in a foreclosure action, the proponent must establish that the opponent procured the order by fraud, misrepresentation, or other misconduct" (Citimortgage, Inc. v Kish, 192 AD3d 659, 659; see Citimortgage, Inc. v Zagoory, 198 AD3d 715, 716; Deutsche Bank Natl. Trust Co. v Le-Mond, 198 AD3d 610, 610). Contrary to the defendants' contention, the plaintiff's submission of three assignments of mortgage and two affidavits to the Supreme Court did not constitute fraud, misrepresentation, or other misconduct. Because the out-of-state acknowledgments on the affidavits, and on the assignments of mortgage dated August 14, 2014, and October 24, 2016, respectively, conformed substantially with the requirements of New York law (see Real Property Law § 309-b), those documents did not require a certificate of conformity pursuant to Real Property Law § 299-a(1) (see Midfirst Bank v Agho, 121 AD3d 343, 351). Although the copy of the assignment of mortgage dated December 6, 2011, in the record on appeal is barely legible, even if that assignment of mortgage, or any of the other subject documents, were not accompanied by certificates of conformity, the absence of a certificate of conformity is a mere irregularity, not a fatal defect, which can be disregarded in the absence of a showing of actual prejudice (see CPLR 2001; Midfirst Bank v Agho, 121 AD3d at 351). Moreover, a mere assignment of mortgage is irrelevant to the issue of the plaintiff's standing to foreclose, as the mortgage is not the dispositive document of title (see Aurora Loan Servs., LLC v Taylor, 25 NY3d 355, 362; Citimortgage, Inc. v Zagoory, 198 AD3d at 715). The defendants' remaining contentions are either without merit or improperly raised for the first time on appeal (see Bank of N.Y. Mellon v West, 183 AD3d 683, 685). CONNOLLY, J.P., HINDS-RADIX, ROMAN and DOWLING, JJ., concur. ENTER: Maria T. Fasulo Clerk of the Court