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

HSBC Bank USA, N.A. v. Sene

2023 NY Slip Op 04757 (N.Y. Ct. App. 2023) · No. 2020-09133 · Decided September 27, 2023

SUMMARY

The Appellate Division, Second Department, modified and otherwise affirmed an order in a mortgage foreclosure action. The court held that HSBC failed to establish prima facie standing to foreclose and failed to demonstrate compliance with applicable notice requirements, but established that most of the defendant's affirmative defenses and counterclaims were waived, meritless, or conclusory.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
WRITING FOR THE COURT	Mark C. Dillon, J.P.; Lara J. Genovesi, J.; William G. Ford, J.; Janice A. Taylor, J.
JURISDICTION	New York
DECIDED	September 27, 2023
DOCKET	2020-09133
DISPOSITION	modified_and_affirmed
PROCEDURAL POSTURE	Plaintiff appealed from an order denying its motion for summary judgment in a mortgage foreclosure action, dismissal of the defendant's affirmative defenses and counterclaims, striking of the answer, and an order of reference.
STANDARD OF REVIEW	On a motion for summary judgment, the movant must establish prima facie entitlement to judgment as a matter of law; where standing is placed in issue in a foreclosure action, the plaintiff must establish standing as part of that prima facie showing. If the movant fails to meet that burden, the motion must be denied regardless of the sufficiency of the opposition.
PRECEDENTIAL VALUE	published
PARTIES	HSBC Bank USA, N.A. v. Marie Sene

TOPICS

foreclosure mortgages summary judgment affirmative defenses appellate procedure

PRACTICE AREAS

mortgage foreclosure civil procedure appellate procedure summary judgment real estate

QUESTIONS PRESENTED

1. Whether HSBC established prima facie standing to commence the mortgage foreclosure action.
2. Whether HSBC established prima facie compliance with statutory and contractual notice requirements preceding foreclosure.
3. Whether HSBC was entitled to summary judgment dismissing Sene's affirmative defenses other than lack of standing and failure to comply with conditions precedent.
4. Whether HSBC was entitled to summary judgment dismissing Sene's counterclaims.

HOLDINGS

1. HSBC failed to establish prima facie standing because the affidavit's assertion that the note had been physically delivered was not based on personal knowledge and was unsupported by documentary evidence, the pooling and servicing agreement materials did not include the mortgage loan schedule, and the plaintiff did not establish standing through a written assignment of the mortgage.
2. HSBC failed to establish prima facie compliance with the required 90-day notice and the mortgage's notice-of-default provisions.
3. HSBC was not entitled to summary judgment on the complaint insofar as asserted against Sene or to an order of reference because it failed to meet its prima facie burdens concerning standing and notice compliance.
4. HSBC was entitled to summary judgment dismissing Sene's affirmative defenses other than those alleging lack of standing and failure to comply with conditions precedent, and dismissing her counterclaims.

KEY QUOTATIONS

> *"A plaintiff has standing to commence a mortgage foreclosure action where it is the holder or assignee of the underlying note at the time the action is commenced"* (at 2)

> *"Since the plaintiff failed to meet its prima facie burden, the Supreme Court properly denied those branches of the plaintiff's motion"* (at 3)

FACTUAL BACKGROUND

Marie Sene executed a promissory note secured by a mortgage on real property in Brooklyn. HSBC commenced a foreclosure action and Sene asserted affirmative defenses, including lack of standing and failure to comply with conditions precedent, as well as counterclaims. HSBC supported its summary-judgment motion with an affidavit concerning delivery and assignment of the note, excerpts from a pooling and servicing agreement, and evidence concerning statutory and contractual notices.

PROCEDURAL HISTORY

HSBC commenced a mortgage foreclosure action against Marie Sene. The Supreme Court, Kings County, denied the relevant branches of HSBC's motion. The Appellate Division modified the order to grant summary judgment dismissing most of Sene's affirmative defenses and counterclaims, but otherwise affirmed.

DISPOSITION

modified_and_affirmed

CASES CITED

- Citimortgage, Inc. v. Doomes, 202 AD3d 752, 753
- HSBC Bank USA, N.A. v. Boursiquot, 204 AD3d 980, 981-982
- Aurora Loan Servs., LLC v. Taylor, 25 NY3d 355, 361-362
- U.S. Bank, N.A. v. Collymore, 68 AD3d 752, 754
- Deutsche Bank Natl. Trust Co. v. Schmelzinger, 189 AD3d 1173, 1175
- Deutsche Bank Natl. Trust Co. v. Crosby, 201 AD3d 878, 882
- US Bank N.A. v. Davis, 196 AD3d 530, 532
- U.S. Bank Trust, N.A. v. Rose, 176 AD3d 1012, 1015
- Deutsche Bank Natl. Trust Co. v. Haller, 100 AD3d 680, 683
- Emigrant Bank v. Cohen, 205 AD3d 103, 113
- U.S. Bank N.A. v. Laino, 172 AD3d 947, 948
- U.S. Bank N.A. v. Thomas, 211 AD3d 1078, 1080
- HSBC Bank USA, N.A. v. Martin, 210 AD3d 872, 873-874
- Wilmington Sav. Fund Socy., FSB v. Stern, 187 AD3d 969, 970
- U.S. Bank N.A. v. Hammer, 192 AD3d 846, 849
- Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853
- US Bank N.A. v. Okoye-Oyibo, 213 AD3d 718, 721-722

OPINION

PER CURIAM.

HSBC Bank USA, N.A. v Sene (2023 NY Slip Op 04757) HSBC Bank USA, N.A. v Sene 2023 NY Slip Op 04757 Decided on September 27, 2023 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 September 27, 2023 SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Second Judicial Department MARK C. DILLON, J.P.

LARA J. GENOVESI WILLIAM G. FORD JANICE A. TAYLOR, JJ. 2020-09133 (Index No. 18600/09) [*1]HSBC Bank USA, N.A., etc., appellant, vMarie Sene, respondent, et al., defendants. Hinshaw & Culbertson LLP, New York, NY (Jason J. Oliveri and Schuyler B. Kraus of counsel), for appellant. DECISION & ORDER In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Kings County (Noach Dear, J.), dated December 2, 2019.

The order, insofar as appealed from, denied those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendant Marie Sene and dismissing her affirmative defenses and counterclaims, to strike that defendant's answer, and for an order of reference. ORDERED that the order is modified, on the law, by deleting the provision thereof denying those branches of the plaintiff's motion which were for summary judgment dismissing the affirmative defenses, other than those alleging lack of standing and failure to comply with conditions precedent, and counterclaims of the defendant Marie Sene, and substituting therefor a provision granting those branches of the motion; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements.

The defendant Marie Sene (hereinafter the defendant) executed a note that was secured by a mortgage on real property located in Brooklyn. Subsequently, the plaintiff commenced this action to foreclose the mortgage. The defendant interposed an answer in which she asserted affirmative defenses, including affirmative defenses alleging lack of standing and failure to comply with conditions precedent, and counterclaims.

The plaintiff moved, inter alia, for summary judgment on the complaint insofar as asserted against the defendant and dismissing her affirmative defenses and counterclaims, to strike the defendant's answer, and for an order of reference.

The defendant opposed the motion. In an order dated December 2, 2019, the Supreme Court, among other things, denied those branches of the plaintiff's motion. The plaintiff appeals. "[T]o establish prima facie entitlement to judgment as a matter of law in a foreclosure [*2]action, a plaintiff must produce the mortgage, the unpaid note, and evidence of the default" (Citimortgage, Inc. v Doomes, 202 AD3d 752, 753).

Additionally, where, as here, the plaintiff's standing has been placed in issue by a defendant, the plaintiff must prove its standing as part of its prima facie showing on a motion for summary judgment (see HSBC Bank USA, N.A. v Boursiquot, 204 AD3d 980, 981).

The plaintiff failed to establish, prima facie, its standing to commence this action. A plaintiff has standing to commence a mortgage foreclosure action where it is the holder or assignee of the underlying note at the time the action is commenced (see Aurora Loan Servs., LLC v Taylor, 25 NY3d 355, 361-362; HSBC Bank USA, N.A. v Boursiquot, 204 AD3d at 981).

"The plaintiff meets this burden with proof of either a written assignment of the underlying note or the physical delivery of the note endorsed in blank or specially to it prior to the commencement of the foreclosure action" (HSBC Bank USA, N.A. v Boursiquot, 204 AD3d at 982; see Aurora Loan Servs., LLC v Taylor, 25 NY3d at 361). "[T]he mortgage passes with the debt as an inseparable incident" (U.S.

Bank, N.A. v Collymore, 68 AD3d 752, 754; see Aurora Loan Servs., LLC v Taylor, 25 NY3d at 361-362). Here, in support of its motion, the plaintiff submitted an affidavit from Sony Prudent, a senior loan analyst for Ocwen Financial Corporation, "whose indirect subsidiary is Ocwen Loan Servicing, LLC..., the loan servicer and attorney-in-fact for plaintiff." Prudent's statement that the plaintiff had standing because the note was physically delivered to the plaintiff prior to the commencement of the action, however, was not based on personal knowledge and was unsupported by any documentary evidence, including business records, and thus, was inadmissible hearsay (see HSBC Bank USA, N.A. v Boursiquot, 204 AD3d at 982; Deutsche Bank Natl.

Trust Co. v Schmelzinger, 189 AD3d 1173, 1175). Prudent otherwise stated that the plaintiff was an assignee of the note in accordance the terms of a certain pooling and servicing agreement (hereinafter PSA), excerpts of which were submitted in support of the motion.

However, since the plaintiff failed to submit the mortgage loan schedule to the PSA, which would have shown whether the note was assigned to the subject trust, the plaintiff failed to demonstrate that, as trustee under the PSA, it had standing as an assignee of the note under the PSA (see Deutsche Bank Natl. Trust Co. v Crosby, 201 AD3d 878, 882; cf. US Bank N.A. v Davis, 196 AD3d 530, 532).

Furthermore, the plaintiff failed to establish its standing by virtue of a written assignment of mortgage (see U.S. Bank Trust, N.A. v Rose, 176 AD3d 1012, 1015; Deutsche Bank Natl. Trust Co. v Haller, 100 AD3d 680, 683).

The material submitted by the plaintiff for the first time in reply could not be used to satisfy the plaintiff's prima facie burden (see Emigrant Bank v Cohen, 205 AD3d 103, 113; U.S. Bank N.A. v Laino, 172 AD3d 947, 948). Additionally, the plaintiff failed to demonstrate, prima facie, that it complied with notice requirements. Prudent stated that a review of business records of Ocwen Loan Servicing, LLC, confirmed that a 90-day notice was sent via certified and first-class mail on February 1, 2009.

However, not only does the purported 90-day notice dated February 1, 2009, predate the alleged default on March 1, 2009, but Prudent "did not aver that [Prudent] had personal knowledge of the mailings, did not describe a standard office mailing procedure designed to ensure that items were properly addressed and mailed, and did not attach domestic return receipts or other evidence to demonstrate the actual mailings by certified mail or first-class mail" (U.S.

Bank N.A. v Thomas, 211 AD3d 1078, 1080; see HSBC Bank USA, N.A. v Martin, 210 AD3d 872, 873-874). Likewise, the plaintiff failed to establish, prima facie, that a notice of default in accordance with paragraphs 15 and 22 of the mortgage agreement was properly transmitted to the defendant prior to the commencement [*3]of this action (see Wilmington Sav. Fund Socy., FSB v Stern, 187 AD3d 969, 970).

The plaintiff could not rely on material submitted in reply to satisfy its prima facie burden (see U.S. Bank N.A. v Hammer, 192 AD3d 846, 849). Since the plaintiff failed to meet its prima facie burden, the Supreme Court properly denied those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendant and dismissing her affirmative defenses alleging lack of standing and failure to comply with conditions precedent, and for an order of reference, without regard to the sufficiency of the defendant's opposition papers (see Winegrad v New York Univ.

Med. Ctr., 64 NY2d 851, 853). However, the Supreme Court should have granted those branches of the plaintiff's motion which were for summary judgment dismissing the defendant's affirmative defenses other than those alleging lack of standing and failure to comply with conditions precedent and the defendant's counterclaims.

The plaintiff demonstrated, prima facie, that those affirmative defenses and counterclaims were waived, without merit, or conclusory in nature and contained no factual allegations (see CPLR 3211[e]; US Bank N.A. v Okoye-Oyibo, 213 AD3d 718, 721-722).

In opposition, the defendant failed to raise a triable issue of fact. DILLON, J.P., GENOVESI, FORD and TAYLOR, JJ., concur. ENTER: Darrell M. Joseph Acting Clerk of the Court