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

US Bank National Association v. Cusati

2020 NY Slip Op 03943 (N.Y. Ct. App. 2020) (Supreme Court of the State of New York Appellate Division Second Judicial Department 2020) · No. 2018-00331; 2019-01138 · Decided July 15, 2020

SUMMARY

The New York Appellate Division, Second Department, dismissed the appeal from a trial court decision because no appeal lies from a decision and reversed the judgment of foreclosure and sale. The court held that although the plaintiff established that Chase possessed the mortgage note when the action commenced, it failed to establish that Chase had authority to act on the plaintiff's behalf at that time. The complaint was therefore dismissed insofar as asserted against the defendant borrowers.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
WRITING FOR THE COURT	Alan D. Scheinkman, P.J.; Sylvia O. Hinds-Radix, J.; Colleen D. Duffy, J.; Linda Christopher, J.
JURISDICTION	New York
DECIDED	July 15, 2020
DOCKET	2018-00331; 2019-01138
DISPOSITION	reversed
PROCEDURAL POSTURE	Defendants appealed from a trial-court decision following a nonjury trial on standing and from the resulting judgment of foreclosure and sale.
STANDARD OF REVIEW	On review of a determination after a nonjury trial, the Appellate Division's power is as broad as that of the trial court and it may render the judgment warranted by the facts, while giving some consideration in a close case to the trial court's opportunity to see and hear witnesses.
PRECEDENTIAL VALUE	published opinion
PARTIES	Edward J. Cusati, Judith Ann Cusati v. US Bank National Association

TOPICS

foreclosure standing appellate procedure evidence real estate

PRACTICE AREAS

real estate litigation mortgage foreclosure civil procedure appellate procedure evidence

QUESTIONS PRESENTED

1. Whether the appeal from the Supreme Court's decision following the nonjury trial was properly before the Appellate Division.
2. Whether US Bank established standing to maintain the foreclosure action by proving that, at commencement, Chase possessed the note and had authority to act on US Bank's behalf.

HOLDINGS

1. No appeal lies from a trial-court decision; the appeal from the decision was dismissed.
2. US Bank failed to establish standing because, although it proved that Chase possessed the note when the action commenced, it did not prove that Chase had authority to act on US Bank's behalf at that time.

KEY QUOTATIONS

> *"A plaintiff has standing to maintain a mortgage foreclosure action where it is the holder or assignee of the underlying note at the time the action is commenced"* (2020 NY Slip Op 03943, at *2)

> *"In reviewing a determination made after a nonjury trial, this Court's power is as broad as that of the trial court, and this Court may render the judgment it finds warranted by the facts, taking into account that, in a close case, the trial court had the advantage of seeing and hearing the witnesses"* (2020 NY Slip Op 03943, at *2)

FACTUAL BACKGROUND

US Bank brought a mortgage foreclosure action against Edward and Judith Cusati, who asserted lack of standing as an affirmative defense. At trial, US Bank established that Chase possessed the note when the action commenced, relying on a Chase business record and testimony from a Chase mortgage banking research officer. However, the power-of-attorney document offered to establish Chase's authority to act for US Bank was dated more than four years after commencement of the action.

PROCEDURAL HISTORY

US Bank commenced a mortgage foreclosure action in 2009. The Supreme Court, Westchester County, denied two motions for summary judgment and an order of reference because US Bank had not established standing at commencement. After a nonjury trial limited to standing, the court found that US Bank had standing, entered a judgment of foreclosure and sale, confirmed the referee's report, and directed sale of the premises. The Appellate Division dismissed the appeal from the decision because no appeal lies from a decision, reversed the judgment, and dismissed the complaint as against the Cusatis defendants.

DISPOSITION

reversed

CASES CITED

- Schicchi v. J.A. Green Const. Corp., 100 A.D.2d 509 (N.Y. App. Div. 1984)
- Countrywide Home Loans, Inc. v. Gibson, 157 A.D.3d 853, 855 (N.Y. App. Div. 2018)
- Aurora Loan Servs., LLC v. Taylor, 25 N.Y.3d 355, 361-362 (2015)
- HSBC Bank USA, N.A. v. Betts, 67 A.D.3d 735, 736 (N.Y. App. Div. 2009)
- Deutsche Bank Natl. Trust Co. v. Silverman, 178 A.D.3d 898 (N.Y. App. Div. 2019)
- Deutsche Bank Natl. Trust Co. v. Rudman, 170 A.D.3d 950, 952 (N.Y. App. Div. 2019)

OPINION

PER CURIAM.

US Bank N.A. v Cusati (2020 NY Slip Op 03943) US Bank N.A. v Cusati 2020 NY Slip Op 03943 Decided on July 15, 2020 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 July 15, 2020 SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Second Judicial Department ALAN D. SCHEINKMAN, P.J. SYLVIA O. HINDS-RADIX COLLEEN D. DUFFY LINDA CHRISTOPHER, JJ. 2018-00331 2019-01138 (Index No. 66770/15) [*1]US Bank National Association, respondent, vEdward J. Cusati, et al., appellants, et al., defendant.

Reich, Reich & Reich, P.C., White Plains, NY (Nicholas A. Pasalides of counsel), for appellants. Eckert Seamans Cherin & Mellott, LLC, White Plains, NY (Kenneth Flickinger of counsel), for respondent. DECISION & ORDER In an action to foreclose a mortgage, the defendants Edward J. Cusati and Judith Ann Cusati appeal from (1) a decision of the Supreme Court, Westchester County (Lawrence H. Ecker, J.), dated October 30, 2017, and (2) a judgment of foreclosure and sale of the same court entered January 9, 2019.

The judgment of foreclosure and sale, upon the decision, made after a nonjury trial, inter alia, confirmed the report of the referee, and directed the sale of the subject premises. ORDERED that the appeal from the decision is dismissed, as no appeal lies from a decision (see Schicchi v J.A. Green Const. Corp., 100 AD2d 509); and it is further, ORDERED that the judgment of foreclosure and sale is reversed, on the law, and the complaint insofar as asserted against the defendants Edward J. Cusati and Judith Ann Cusati is dismissed; and it is further, ORDERED that one bill of costs is awarded to the defendants Edward J. Cusati and Judith Ann Cusati.

On January 28, 2009, the plaintiff commenced this action to foreclose a mortgage against, among others, the defendants Edward J. Cusati and Judith Ann Cusati (hereinafter together the defendants). The defendants interposed an answer in which they asserted as an affirmative defense that the plaintiff lacked standing.

In December 2014, the plaintiff moved, among other things, for summary judgment on the complaint insofar as asserted against the defendants and for an order of reference. In an order dated May 7, 2015, the Supreme Court denied those branches of the plaintiff's motion, with leave to renew, determining that the plaintiff failed to demonstrate that it had physical possession of the note prior to commencement of the action.

A note of issue was filed on January 8, 2016. In March 2016, the plaintiff moved, inter alia, for summary judgment on the complaint insofar as asserted against the defendants and for an order of reference. In an order dated May 19, 2017, the court, among other things, denied those branches of the plaintiff's motion, determining, inter alia, that there was an issue of fact as to whether the plaintiff had standing at the [*2]time the action was commenced.

On August 28, 2017, a nonjury trial was held on the issue of standing. At trial, the plaintiff submitted the testimony of Albert Smith, Jr., a mortgage banking research officer for J.P. Morgan Chase Bank, N.A. (hereinafter Chase). Smith testified that Chase was servicing the loan at issue when the instant action was commenced. He relied on a Default Document and Exception Report (hereinafter DDER), a Chase business record, which was admitted into evidence over the defendants' objection.

The DDER indicated that Chase took physical possession of the note on February 8, 2007. Smith further testified that Chase had power of attorney for the plaintiff. Smith relied on a power of attorney document between Chase and the plaintiff, which was admitted into evidence.

The power of attorney document was dated May 3, 2013—over four years after the instant action was commenced. In a decision dated October 30, 2017, the Supreme Court determined that the plaintiff had established standing.

The defendants appeal from the decision. In a judgment of foreclosure and sale entered January 9, 2019, the Supreme Court, inter alia, confirmed the report of the referee, and directed the sale of the subject premises.

The defendants appeal from the judgment of foreclosure and sale. Initially, the appeal from the decision must be dismissed, as no appeal lies from a decision (see Schicchi v J.A. Green Const. Corp., 100 AD2d 509). We disagree with the Supreme Court's determination that the plaintiff established standing. "In reviewing a determination made after a nonjury trial, this Court's power is as broad as that of the trial court, and this Court may render the judgment it finds warranted by the facts, taking into account that, in a close case, the trial court had the advantage of seeing and hearing the witnesses" (Countrywide Home Loans, Inc. v Gibson, 157 AD3d 853, 855).

A plaintiff has standing to maintain 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).

Here, the plaintiff established that Chase had possession of the note at issue at the time this action was commenced. However, the plaintiff failed to establish that Chase had the authority to act on its behalf at that time (see HSBC Bank USA, N.A. v Betts, 67 AD3d 735, 736; cf. Deutsche Bank Natl. Trust Co. v Silverman, 178 AD3d 898; Deutsche Bank Natl. Trust Co. v Rudman, 170 AD3d 950, 952).

Thus, the Supreme Court's finding that the plaintiff had standing was not warranted by the facts. In light of our determination, we need not reach the defendants' remaining contention. Accordingly, the Supreme Court should have dismissed the complaint insofar as asserted against the defendants. SCHEINKMAN, P.J., HINDS-RADIX, DUFFY and CHRISTOPHER, JJ., concur.

ENTER: Aprilanne Agostino Clerk of the Court