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

Citimortgage, Inc. v. Succes

2019 N.Y. Slip Op. 02058 (N.Y. Ct. App. 2019) · No. 2016-09364; 2017-02054 · Decided March 20, 2019

SUMMARY

The New York Appellate Division, Second Department, reversed an order granting CitiMortgage summary judgment and an order of reference in a mortgage foreclosure action. The court held that CitiMortgage failed to establish prima facie compliance with the ninety-day notice requirements of RPAPL 1304 because its evidence did not establish that the notices were sent by first-class mail.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
WRITING FOR THE COURT	Leonard B. Austin, J.P.; Sylvia O. Hinds-Radix, J.; Joseph J. Maltese, J.; Linda Christopher, J.
JURISDICTION	New York
DECIDED	March 20, 2019
DOCKET	2016-09364; 2017-02054
DISPOSITION	reversed
PROCEDURAL POSTURE	Defendants appealed from orders granting the mortgage plaintiff summary judgment and an order of reference in a foreclosure action.
STANDARD OF REVIEW	De novo review of the Supreme Court's determination on summary judgment; the plaintiff was required to establish prima facie entitlement to judgment as a matter of law.
PRECEDENTIAL VALUE	Published opinion of the Appellate Division, Second Department
PARTIES	Vladimir Succes, Natacha Succes v. Citimortgage, Inc.

TOPICS

foreclosure · mortgages · summary judgment · appellate procedure · civil procedure

PRACTICE AREAS

foreclosure · mortgages · civil procedure · appellate procedure

QUESTIONS PRESENTED

1. Whether Citimortgage established prima facie compliance with RPAPL 1304's pre-foreclosure notice and mailing requirements.
2. Whether summary judgment and an order of reference could be granted when the plaintiff failed to establish satisfaction of a statutory condition precedent to commencing the foreclosure action.

HOLDINGS

1. Citimortgage failed to establish prima facie that it complied with RPAPL 1304 because its documentary evidence did not establish that the required notices were mailed by first-class mail.

KEY QUOTATIONS

> *“"[P]roper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition"”* (at 2)

> *“Since the plaintiff failed to establish, prima facie, that it complied with the requirements of RPAPL 1304, the Supreme Court should have denied those branches of its motion which were for summary judgment on the complaint insofar as asserted against the defendants and for an order of reference, regardless of the sufficiency of the opposing papers”* (at 2)

FACTUAL BACKGROUND

Citimortgage brought an action to foreclose a mortgage against Vladimir and Natacha Succes, among others. The defendants answered and opposed Citimortgage's motion for summary judgment, arguing in part that Citimortgage failed to establish compliance with the ninety-day notice requirement of RPAPL 1304. Citimortgage relied on an employee affidavit and documentary records, but the records redacted tracking numbers and did not establish that the notices had been mailed by first-class mail.

PROCEDURAL HISTORY

Citimortgage commenced a mortgage-foreclosure action against Vladimir Succes, Natacha Succes, and others. After the defendants answered, Citimortgage moved for summary judgment and an order of reference. The Supreme Court, Nassau County, granted the motion and appointed a referee to compute the amount due. The Appellate Division reversed the appealed portion of the May 18 order, vacated the corresponding portion of the May 19 order, and dismissed the appeal from the May 19 order as academic.

DISPOSITION

reversed

CASES CITED

- Aurora Loan Servs., LLC v. Weisblum, 85 AD3d 95, 106
- Deutsche Bank Natl. Trust Co. v. Spanos, 102 AD3d 909, 910

- Citimortgage, Inc. v. Wallach, 163 AD3d 520, 521
- CitiMortgage, Inc. v. Espinal, 134 AD3d 876, 878
- Citimortgage, Inc. v. Banks, 155 AD3d 936, 937
- Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853
- Bank of N.Y. Mellon v. Zavolunov, 157 AD3d 754, 757

OPINION

Citimortgage, Inc. v. Succes 2019 NY Slip Op 2058
PER CURIAM.
Citimortgage, Inc. v Succes (2019 NY Slip Op 02058) Citimortgage, Inc. v Succes 2019 NY Slip Op 02058 Decided on March 20, 2019 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 March 20, 2019
SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Second Judicial Department LEONARD B. AUSTIN, J.P.
SYLVIA O. HINDS-RADIX
JOSEPH J. MALTESE
LINDA CHRISTOPHER, JJ. 2016-09364
2017-02054 (Index No. 8885/14) [*1]Citimortgage, Inc., respondent, vVladimir Succes, et al., appellants, et al., defendants. Rubin & Licatesi, P.C., Garden City, NY (Richard H. Rubin and Amy J. Zamir of counsel), for appellants. Akerman LLP, New York, NY (Jordan M. Smith and Natsayi Mawere of counsel), for respondent. DECISION & ORDER In an action to foreclose a mortgage, the defendants Vladimir Succes and Natacha Succes appeal from (1) an order of the Supreme Court, Nassau County (Thomas A. Adams, J.), entered May 18, 2016, and (2) an order of the same court entered May 19, 2016. The order entered May 18, 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. The order entered May 19, 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 appointed a referee to compute the amount due to the plaintiff. ORDERED that the order entered May 18, 2016, is reversed insofar as appealed from, on the law, those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendants Vladimir Succes and Natacha Succes and for an order of reference are denied, and so much of the order entered May 19, 2016, as granted those branches of the plaintiff's motion and appointed a referee to compute the amount due to the plaintiff is vacated; and it is further, ORDERED that the appeal from the order entered May 19, 2016, is dismissed as academic in light of our determination on the appeal from the order entered May 18, 2016; and it is further, ORDERED that one bill of costs is awarded to the defendants Vladimir Succes and

Natacha Succes. The plaintiff commenced this action against the defendants Vladimir Succes and Natacha Succes (hereinafter together the defendants), among others, to foreclose a mortgage. The defendants interposed an answer to the complaint. 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 on the ground that, among other things, the plaintiff failed to demonstrate its compliance with RPAPL 1304. The Supreme Court granted the motion, [*2]and the defendants appeal. RPAPL 1304(1) provides that "at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower, . . . including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower." "[P]roper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition" (Aurora Loan Servs., LLC v Weisblum, 85 AD3d 95, 106; see Deutsche Bank Natl. Trust Co. v Spanos, 102 AD3d 909, 910). RPAPL 1304(2) requires that the notice be sent by registered or certified mail, and also by first-class mail, to the last known address of the borrower. "Proper mailing may be proven by documents meeting the requirements of the business records exception to the rule against hearsay under CPLR 4518" (Citimortgage, Inc. v Wallach, 163 AD3d 520, 521; see CitiMortgage, Inc. v Espinal, 134 AD3d 876, 878). Here, the plaintiff relied upon the affidavit of an employee who claimed that the plaintiff's business records showed that RPAPL 1304 notices were sent by certified and first-class mail. However, the documentary evidence submitted in support of those claims redacted certain tracking numbers and failed to establish, prima facie, that the notices were mailed by first-class mail (cf. Citimortgage, Inc. v Wallach, 163 AD3d at 521; Citimortgage, Inc. v Banks, 155 AD3d 936, 937). Since the plaintiff failed to establish, prima facie, that it complied with the requirements of RPAPL 1304, the Supreme Court should have denied those branches of its motion which were for summary judgment on the complaint insofar as asserted against the defendants and for an order of reference, regardless of the sufficiency of the opposing papers (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853; Bank of N.Y. Mellon v Zavolunov, 157 AD3d 754, 757). In view of our determination, we need not address the defendants' remaining contention. AUSTIN, J.P., HINDS-RADIX, MALTESE and CHRISTOPHER, JJ., concur. ENTER: Aprilanne Agostino Clerk of the Court