

AJAX Mtge. Loan Trust 2018-G v Marcelin

2024 NY Slip Op 34367(U)

November 18, 2024

Supreme Court, Kings County

Docket Number: Index No. 511309/2018

Judge: Derefim B. Neckles

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part FRP-2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, 11201 on the 18th day of November, 2024.

P R E S E N T:

HON. DEREKIM B. NECKLES,
Acting Justice.

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AJAX MORTGAGE LOAN TRUST 2018-G,
MORTGAGE BACKED SECURITIES, SERIES
2018-G, BY U.S. BANK NATIONAL
ASSOCIATION, AS INDENTURE TRUSTEE,

Plaintiff,

- against -

Index No. 511309/2018

LOUIS MARCELIN A/K/A LOUIS GENE
MARCELIN, TOMEKA VOLCY A/K/A TOMEKA
T. VOLCY A/K/A TOMEKA TRACIA VOLCY AS
VOLUNTARY ADMINISTRATOR OF THE
ESTATE OF JEAN BERTHONY VOLCY A/KA
JEAN BERTHONY VOLCY A/K/A JEAN
BERTHONY VOLCY, ET AL

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Affidavits Annexed	<u>130-153</u>
Opposition to Motion/Affidavits Annexed	<u>168-170</u>
Notice of Cross-Motion/Affidavits Annexed	<u>156-165</u>
Opposition to Cross-Motion/Affidavits Annexed	<u>172</u>

Upon the foregoing papers in this proceeding to foreclose on a mortgage encumbering the subject property located at 1415 East 84th Street, Brooklyn, NY 11236 (Block 8081, Lot 73), plaintiff moves (under mot. seq. 8) for an order (1) confirming the referee's report made in accordance with RPAPL §1321, (2) granting a judgment of foreclosure and sale pursuant to RPAPL §1351, and (3) directing the distribution of the

sale proceeds pursuant to RPAPL §1354. Defendant 1415 EAST 84 ST REALTY 712 LLC ("1415 EAST 84 ST"), cross-moves (under mot. seq. 9) for an order dismissing the instant action, pursuant to CPLR §3211(a)(1), by reason of lack of standing of the original party plaintiff, Wells Fargo Bank, N.A.

Background

This residential mortgage foreclosure action was commenced by filing the summons and complaint on June 1, 2018. The original mortgage and note were in favor of Wachovia Bank, National Association, however, on March 21, 2019, the mortgage was assigned to MTGLQ Investors, L.P. Later, the mortgage was ultimately assigned to AJAX Mortgage Loan Trust 2018-G, on March 25, 2019.

Prior to commencing the instant foreclosure action, plaintiff asserts that it complied with RPAPL §1303 and §1304, and defendant was served with the necessary notices on August 22, 2017. The defendant was then served on June 11, 2018, with a copy of the summons and complaint, and also mailed a copy on June 12, 2018. Plaintiff then moved for a default judgment and an order of reference on September 11, 2019. The court granted plaintiff's motion on December 2, 2019, deeming all defendants to be in default.

Pursuant to a separate foreclosure action regarding a second mortgage owned by Wells Fargo Bank and secured by the subject property, 1415 EAST 84 ST obtained possession of title to the property, by a referee's deed at a foreclosure auction on May 19, 2022. 1415 EAST 84 ST, then moved to intervene in this instant action, on April 20, 2023. The court granted its motion on May 22, 2024.

The court appointed referee executed an oath and report of amount due, on January 16, 2024. Plaintiff now files the instant motion to confirm the referee's report and for a judgment of foreclosure and sale. 1415 EAST 84 ST cross-moves to dismiss the complaint, alleging the original party plaintiff, Wells Fargo, lacks standing, in that it transferred ownership of the note, prior to the commencement of this action.

Discussion

(1) Plaintiff's Standing

A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that, when the action was commenced, it was either the holder or assignee of the underlying note (*see Aurora Loan Servs., LLC v. Taylor*, 25 N.Y.3d 355, 361–362, 12 N.Y.S.3d 612, 34 N.E.3d 363; *Central Mtge. Co. v. Jahnsen*, 150 A.D.3d 661, 663, 56 N.Y.S.3d 107; *U.S. Bank, N.A. v. Collymore*, 68 A.D.3d 752, 753–754, 890 N.Y.S.2d 578). “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” (*Central Mtge. Co. v. Jahnsen*, 150 A.D.3d at 663, 56 N.Y.S.3d 107 [internal quotation marks omitted]; *see Deutsche Bank Trust Co. Ams. v. Garrison*, 147 A.D.3d 725, 726, 46 N.Y.S.3d 185). In this case, the plaintiff established its standing by attaching a written assignment of the note and mortgage and a copy of the note, endorsed in blank, to the complaint at the time the action was commenced. Defendant fails to present any evidence that the plaintiff was not holder or assignee of the underlying note when the action was commenced.

(2) Referee's Report of Amount Due

In opposition to plaintiff's motion for an order for a judgment of foreclosure and sale, 1415 EAST 84 ST contends that the submitted referee's report of amount due to plaintiff is insufficient. 1415 EAST 84 ST alleges that the referee's report makes reference to amounts of "prior servicer escrow advances" and "escrow deficiency" without annexing evidence of such payments. This argument is without merit, as plaintiff has annexed, as exhibit D, multiple documents, itemizing escrow payments with the referenced dates, to its servicer's affidavit.

"Mere filing of papers received from other entities" is "insufficient to qualify the documents as business records," and those records are only admissible "if the recipient can establish personal knowledge of the maker's business practices and procedures or establish that the records provided by the maker were incorporated into the recipient's own records and routinely relied upon by the recipient in its own business." *Bank of New York Mellon v. Gordon*, 97 N.Y.S.3d 286, 297.

Here, the affidavit of Wan-I J. Lee, the foreclosure team lead for the servicer Gregory Funding, LLC, and the attached documents can properly be considered by the court because the affidavit lays sufficient foundation for their admissibility. Lee states that he is familiar with the record keeping practices and procedures Gregory Funding LLC maintains on behalf of the plaintiffs and has examined the records Gregory Funding LLC maintains with respect to the subject mortgage. He discusses the "Statement of Computation" which was prepared from the business records and correctly sets forth the amount presently due to plaintiffs. All documents that were referenced in Lee's affidavit

and that were relied in for the computation, were attached as exhibits. Accordingly, Lee's affidavit and attached exhibits are admissible in support of the referee's report and plaintiff's motion.

Accordingly, it is

ORDERED that plaintiff's motion for a judgment of foreclosure and sale is granted in its entirety, and it is

ORDERED that defendant's cross-motion to dismiss the complaint is denied in its entirety.

This constitutes the decision and order of the court.

E N T E R,



HON. DEREKIM B. NECKLES
A. J. S. C.

HON. DEREKIM B. NECKLES
A.J.S.C.

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KINGS COUNTY CLERK
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