DOCKET NO: LLICV206026858S : SUPERIOR COURT

ASPEN PROPERTIES GROUP, LLC : JUDICIAL DISTRICT OF LITCHFIELD AT TORRINGTON

v. :

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ROBERTS-JOACHIM, CATHLEEN Et Al : SEPTEMBER 22, 2022

MEMORANDUM OF DECISION DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This case arises from a note secured by a mortgage granted by the defendants, Cathleen Roberts-Joachim and Douglas Joachim, that is currently assigned to the plaintiff, Wilmington Savings Fund Society, FSB (Wilmington). The plaintiff alleges that the note is in default and seeks to foreclose upon the property mortgaged to secure the note. The plaintiff moves for summary judgment as to liability. For the following reasons, the plaintiff's motion for summary judgment is denied.

I

The following facts are not disputed for purposes of the plaintiff's summary judgment motion. On September 11, 2006, the defendants received a home equity line of credit from National City Bank secured by a second mortgage on their premises in New Milford. The mortgage was acquired by PNC Bank, N.A. (PNC) when PNC bought National City Bank in 2008. The defendants made payments on the note until April 4, 2012. On April 4, 2013, PNC sent the defendants a letter stating that the note secured by the mortgage had been charged off. PNC sent the defendants four more identical letters over the following two years.

On April 16, 2013, Wells Fargo Bank, N.A. (Wells Fargo), the assignee of the first note and mortgage on the premises, filed an action to foreclose on the first mortgage. PNC did not file an appearance or participate in the mediation sessions in that case. On April 30, 2014, PNC was

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defaulted for failure to appear in the Wells Fargo foreclosure. Thereafter, a judgment of strict foreclosure entered in favor of Wells Fargo on September 29, 2014. *Wells Fargo Bank, N.A.* v. *Joachim*, Superior Court, judicial district of Litchfield, Docket No. CV-13-6008544-S (September 29, 2014, *Moore, J.*). On October 14, 2014, Wells Fargo moved to open and vacate the judgment of strict foreclosure, stating that it had offered the defendants a repayment plan. Wells Fargo withdrew the case on November 7, 2014. On March 31, 2015, the defendants obtained a modification of the terms of the Wells Fargo note under the federal Home Affordable Modification Program.

On May 5, 2014, the defendants applied to PNC for a loan modification. On May 6, 2014, PNC responded by requesting pay stubs and tax returns. Thereafter, PNC sent the defendants a letter on September 11, 2014, stating that the accelerated balance was due and that monthly statements would no longer be issued. The defendants received no further communications from PNC relating to the note or mortgage.

On October 10, 2018, PNC assigned the note and mortgage to US Mortgage Resolution LLC (USMR). The defendants received no communications from USMR relating to the mortgage. On February 27, 2019, USMR assigned the note and mortgage to Aspen Properties Group, LLC (Aspen). On May 13, 2020, the defendants received a letter from Aspen stating that the loan was due and that Aspen would seek foreclosure if the defendants did not repay the debt. On June 3, 2021, Aspen offered the defendants a modification of the note, which the defendants rejected.

Aspen commenced the present action on December 4, 2020. On September 14, 2021, Aspen assigned the note and mortgage to Wilmington. On December 7, 2021, Aspen moved to substitute Wilmington as the plaintiff, which was granted. The plaintiff moved for summary

judgment on June 13, 2022. The defendants filed an objection on July 28, 2022. Oral argument on the motion took place on August 31, 2022.

II

"Summary judgment is a method of resolving litigation when pleadings, affidavits, and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (Internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 534, 51 A.3d 367 (2012). "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) *Graham* v. *Commissioner of Transportation*, 330 Conn. 400, 414-15, 195 A.3d 664 (2018).

"In ruling on a motion for summary judgment, the court's function is not to decide issues of material fact . . . but rather to determine whether any such issues exist." (Internal quotation marks omitted.) *RMS Residential Properties, LLC* v. *Miller*, 303 Conn. 224, 233, 32 A.3d 307 (2011). "[I]ssue-finding, rather than issue-determination, is the key to the procedure." (Internal quotation marks omitted.) *DiMiceli* v. *Cheshire*, 162 Conn. App. 216, 222, 131 A.3d 771 (2016). "[S]ummary judgment procedure is particularly inappropriate where the inferences which the parties seek to have drawn deal with questions of motive, intent and subjective feelings and reactions." (Internal quotation marks omitted.) *Suarez* v. *Dickmont Plastics Corp.*, 229 Conn. 99, 111, 639 A.2d 507 (1994).

"When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § 380 [now § 17-45]." (Internal quotation marks omitted.) *Fiano* v. *Old Saybrook Fire Co. No. 1, Inc.*, 332 Conn. 93, 101, 209 A.3d 629 (2019).

"[B]ecause any valid special defense raised by the defendant ultimately would prevent the court from rendering judgment for the plaintiff, a motion for summary judgment should be denied when any [special] defense presents significant fact issues that should be tried." (Internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Eichten*, 184 Conn. App. 727, 745, 196 A.3d 328 (2018). "Only one of [a defendant's] defenses needs to be valid in order to overcome [a] motion for summary judgment. [S]ince a single valid defense may defeat recovery, [a movant's] motion for summary judgment should be denied when any defense presents significant fact issues that should be tried." (Internal quotation marks omitted.) *Union Trust Co.* v. *Jackson*, 42 Conn. App. 413, 417, 679 A.2d 421 (1996).

III

A

The plaintiff argues that it has satisfied its prima facie case to maintain this foreclosure and this court agrees. "A plaintiff establishes its prima facie case in a mortgage foreclosure action by demonstrating by a preponderance of the evidence that it is the owner of the note, that

the defendant mortgagor has defaulted on the note, and that conditions precedent to foreclosure have been satisfied." *Deutsche Bank National Trust Co.* v. *Bliss*, 159 Conn. App. 483, 495, 124 A.3d 890, cert. denied, 320 Conn. 903, 157 A.3d 186 (2015). The plaintiff has submitted a copy of the promissory note demonstrating that it is the assignee of the debt; the affidavit of Stacey Talton, an employee of the servicer of the mortgage, FCI Lender Services, Inc., demonstrating that the defendants defaulted on the note secured by the mortgage; and a certified copy of the note and mortgage demonstrating that there are no conditions precedent to foreclosure which have not been met. The defendants do not dispute any of this evidence. Accordingly, the plaintiff has satisfied its prima facie case.

However, the plaintiff also argues that none of the defendants' special defenses precludes the granting of summary judgment in the plaintiff's favor. The defendants withdrew their fourth special defense and agree that the third special defense does not preclude the granting of summary judgment as to liability. The court addresses the remaining three special defenses.

B

The defendants argue that the plaintiff cannot maintain this action because it is an unlicensed mortgage servicer. This is not grounds to deny the plaintiff's motion for summary judgment.

"Generally, in order to have standing to bring a foreclosure action the plaintiff must, at the time the action is commenced, be entitled to enforce the promissory note that is secured by the property." *U.S. Bank, N.A.* v. *Ugrin*, 150 Conn. App. 393, 401, 91 A.3d 924 (2014). "To prevail in an action to enforce a negotiable instrument, the plaintiff must be a holder of the instrument or a nonholder with the rights of a holder. . . . Only a holder in due course may enforce a negotiable instrument. . . . Pursuant to General Statutes § 42a-3-301, a [p]erson entitled

to enforce an instrument [such as a promissory note] means . . . the holder of the instrument . . . . Moreover, General Statutes § 42a-1-201 (20) defines the term holder, with respect to a negotiable instrument, as meaning the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession." (Emphasis omitted; internal quotation marks omitted.) *Florian* v. *Lenge*, 91 Conn. App. 268, 278, 880 A.2d 985 (2005).

There is no requirement that the holder of the note be a licensed mortgage servicer. Indeed, the note holder may institute a foreclosure action, even if the holder of the mortgage is different. "It is well established that the holder of a note has standing to enforce a mortgage even if the mortgage is not assigned to that party. General Statutes § 49-17 permits the holder of a negotiable instrument that is secured by a mortgage to foreclose on the mortgage even when the mortgage has not yet been assigned to him." (Internal quotation marks omitted.) *Goshen Mortgage, LLC* v. *Androulidakis*, 205 Conn. App. 15, 27, 257 A.3d 360, cert. denied, 338 Conn. 913, 259 A.3d 653 (2021).

In the present case, the defendants do not dispute that the note was assigned and transferred to the plaintiff. The defendants contend that there is a genuine issue of material fact as to whether the plaintiff can enforce the note and mortgage because it is not a licensed mortgage servicer under General Statutes § 36a-718.

The defendants provide no case law in support of this contention, nor have they pointed to anything in the legislative history of the statute which would suggest that instituting foreclosure proceedings was intended to be included in the definition of mortgage servicing. To foreclose on a note secured by a mortgage, a plaintiff must be the holder of the note. In the present case, it is not contested that the plaintiff is the holder of the note. Accordingly, the court

rejects the defendants' claim that the plaintiff's motion for summary judgment must be denied because there is a genuine issue of material fact as to whether plaintiff has a mortgage servicer license.

C

The defendants also argue that there is a genuine issue of material fact as to whether laches precludes the granting of summary judgment. "To prevail on the affirmative defense of laches, the defendants must establish, first, that there was an inexcusable delay and, second, that the delay prejudiced the defendant[s]. . . . The mere lapse of time does not constitute laches . . . unless it results in prejudice to the defendant[s] . . . ." (Internal quotation marks omitted.) *Reclaimant Corp.* v. *Deutsch*, 332 Conn. 590, 614, 211 A.3d 976 (2019). "[T]he burden is on the party alleging laches to establish that defense." (Internal quotation marks omitted.) *Fay* v. *Merrill*, 338 Conn. 1, 22, 256 A.3d 622 (2021).

"A conclusion that a plaintiff has been guilty of laches is one of fact for the trier and not one that can be made [as a matter of law], unless the subordinate facts found make such a conclusion inevitable . . . ." (Internal quotation marks omitted.) Id. Furthermore, "an assignee of a [mortgage] takes it subject to all defenses which might have been asserted against the assignor . . . ." (Emphasis omitted; internal quotation marks omitted.) *Hartford* v. *McKeever*, 139 Conn. App. 277, 286, 55 A.3d 787 (2012), aff'd, 314 Conn. 255, 101 A.3d 229 (2014). Thus, the actions and omissions of the plaintiff's predecessors may be considered as well.

The defendants argue that the eight-year delay between the defendants' 2012 default on the note and the commencement of this foreclosure proceeding was an unreasonable delay. They also argue that they were prejudiced because, had the holder of the note sought repayment of the debt earlier, the defendants would have had the opportunity to renegotiate the terms of the note

under the federal Second Lien Modification Program (2MP). The defendants claim that a modification under 2MP would have granted more favorable terms than the modification offered by Aspen. Because 2MP ceased to exist in 2016; see Consolidated Appropriations Act, Pub. L. No. 114-113, Div. O, § 709 (b) (1), 129 Stat. 2242 (2015) ("[t]he Making Home Affordable initiative . . . shall terminate on December 31, 2016"); the defendants were deprived of this opportunity by the delay of the plaintiff and its predecessors. The plaintiff counters that the defendants have provided no evidence that they would have qualified for modification under 2MP or that the terms of the modification under 2MP would have been more favorable than Aspen's proposed modification.

There is a genuine issue of material fact as to the defendants' claim of laches. The subordinate facts are not such that this court can or should find whether laches applies at this summary judgment stage. Rather, the issue should be left to the trier of fact. Accordingly, the plaintiff's motion for summary judgment is denied on the ground of laches.

D

Although the court has denied the plaintiff's motion for summary judgment finding there is a genuine issue of material fact regarding laches, the defendants also claim the plaintiff or its predecessors abandoned the note and mortgage, so the court addresses that issue as well.

"To constitute an abandonment there must be an intention to abandon or relinquish accompanied by some act or omission to act by which such intention is manifested. . . . While mere nonuser and lapse of time alone are not enough to constitute abandonment, they are competent evidence of an intent to abandon, and as such may be entitled to great weight when considered with other circumstances, and abandonment may be inferred from circumstances, such as failure by acts or otherwise to assert any claim to the right alleged to have been

abandoned, or may be presumed from long continued neglect. . . . Most frequently, where abandonment has been held established, there has been found present some affirmative act indicative of an intention to abandon . . . but . . . other negative or passive conduct may be sufficient to signify the requisite intention and justify a conclusion of abandonment. The weight and effect of such conduct depends not only upon its duration but also upon its character and the accompanying circumstances." (Citations omitted.) *Glotzer* v. *Keyes*, 125 Conn. 227, 233, 5 A.2d 1 (1939). "Abandonment is a question of fact." *Brierley* v. *Johnson*, 131 Conn. 675, 678, 42 A.2d 34 (1945).

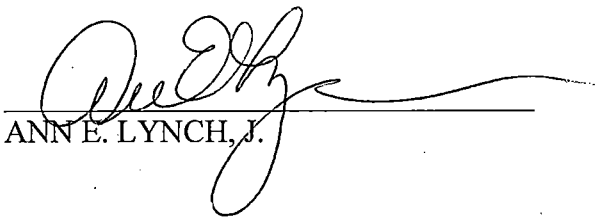
The defendants point to the failure of PNC to participate in the Wells Fargo foreclosure proceedings on the first note and mortgage, as well as the nearly six-year gap in communications relating to the note and mortgage, as demonstrating an intent to abandon the note and mortgage. The plaintiff responds that the loan was merely charged off rather than forgiven and that it and its predecessors had no legal obligation to continue sending monthly statements once the loan was charged off.

While there is no requirement that a lender send monthly statements after a note has been charged off, the plaintiff and its predecessors made no attempts to collect the debt or communicate with the defendants about the note and mortgage for six years. A seven-year gap has been found sufficient to constitute abandonment. *Brierley* v. *Johnson*, supra, 131 Conn. 679. Moreover, PNC failed to participate in the foreclosure proceedings on the first note and mortgage, was defaulted, and initially had its interest extinguished by the judgment of strict foreclosure in favor of Wells Fargo. There is a genuine issue of material fact with respect to abandonment. Accordingly, the plaintiff's motion for summary judgment is denied.

IV

For all the foregoing reasons, the plaintiff's motion for summary judgment is denied.

BY THE COURT



ANN E. LYNCH, J.