VERMONT SUPERIOR COURT

SUPERIOR COURT
Windsor Unit

CIVIL DIVISION
Docket No. 654-10-10 Wrcv

Capital One, N.A., successor by merger to North Fork Bank,
Plaintiff

v.

Kevin McKosky,
Defendant

Decision on Motions for Summary Judgment

Factual Background

Plaintiff, Capital One, National Association, sues Defendant, Kevin McKosky to foreclose on property in Ludlow, Vermont. Defendant was a principal of 185 Waverly Ave. Corp. Plaintiff's predecessor, North Fork Bank, loaned 185 Waverly Ave. Corp. $1,460.00.00. In return for the loan, Defendant personally guaranteed the loan by signing a promissory note and granting North Fork a mortgage in Defendant's Ludlow property. The mortgage agreement indicates New York law controls the case. 185 Waverly Ave. Corp. could not repay the loan and Plaintiff now seeks foreclosure on Defendant's Ludlow property.

The current case fits into a more complicated set of facts involving another loan and related corporate entities. Plaintiff lent Coastal Electric Construction Corp., another corporation controlled by Defendant, $10,000,000 secured by Coastal Electric's personal property. 185 Waverly Ave. Corp. guaranteed the loans Plaintiff made to Coastal Electric. Coastal could not repay its loan and Plaintiff sought to enforce its rights. A New York court entered judgment from Plaintiff and this Court recently domesticated that decision in separate action.

Plaintiff gained an interest in North Fork's loan when North Fork merged into Plaintiff. Both Plaintiff (Capital One, National Association) and North Fork were subsidies of Capital One Financial Corporation. North Fork was a trust company organized under the laws of New York. Plaintiff is a national banking association organized under federal law. North Fork merged into Plaintiff on April 24, 2007. Plaintiff survived the merger and remains a subsidiary of Capital One Financial Corporation.

After the merger, Plaintiff took control of North Fork's assets and responsibilities. Plaintiff did not obtain a formal assignment of North Fork's mortgages. Plaintiff also did not record the merger in the counties where North Fork held mortgages, including Windsor County in regard to Defendant's property.

Procedural History

On April 21, 2011, Plaintiff moved for summary judgment. Defendant opposed the motion and filed a cross-motion for summary judgment on May 20, 2011. Plaintiff filed a response to Defendant's motion on June 22, 2011. Hurricane Irene and settlement negotiations halted all motions on this case until September 1, 2012. The motions are now ready for review.

Standard of Review

The Court grants summary judgment if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(c)(3) (2000). The Court makes all reasonable inferences and resolves all doubts in favor of the non-moving party. *Boulton v. CLD Consulting Eng'rs, Inc.*, 2003 VT 72, ¶ 5, 175 Vt. 413.

Discussion

Plaintiff and Defendant raise several overlapping legal issues to demonstrate each is entitled to summary judgment. Plaintiff argues Defendant failed to assert any defense except its claim that Plaintiff lacked standing. Further, Plaintiff can show it has standing because Plaintiff owns the mortgage on Defendant's property. Related to ownership, Defendant argues Plaintiff lacks standing because Plaintiff did not receive an assignment of the mortgage from North Fork. Defendant also claims Plaintiff is estopped from foreclosing because of New York's election of remedies statute. Finally, Defendant argues Plaintiff cannot sue because it failed to record the merger in Windsor County.

The first issue in this case is whether Plaintiff requires an assignment of the mortgage to have standing. The parties dispute which laws apply and how those laws would alter the outcome of their case. Accordingly, the Court must decide first which laws apply and then how those law relate to assignment and standing.

On the assignment issue, the first question is if state or federal law controls. The relevant federal statute indicates how banks can be consolidated under federal law, but does not indicate when it applies. See 12 U.S.C. § 215(a). Nevertheless, the "merger [of national banks] is governed and controlled by the applicable Federal Statutes and regulations, not by State law." *D.M. Rogers v. First Nat'l Bank of St. George*, 297 F. Supp. 641, 645 (D.S.C. 1969), *aff'g*, 410 F.2d 579 (4th Cir. 1969). More recent federal cases also indicate federal law applies. See *Boone v. Carlsbad Bancorporation, Inc.*, 972 F.2d 1545, 1551–54 (10th Cir. 1992) (applying federal law to a bank merger). State cases also indicate federal law controls merger of national banks. See, e.g., *Pankey v. Hot Springs Nat'l Bank*, 119 P.2d 636, 640 (N.M. 1941) (holding national banks may only merge through federal law); *Nat'l Commercial Bank & Trust Co. v. Commonwealth Bank & Co.*, 43 Misc. 2d 827, 829 (N.Y. Sup. Ct. 1964) (applying federal law to a national bank merger). Therefore, the Court must look to federal law to determine if Plaintiff required an assignment of the mortgage to have standing.

The next question is what federal law requires in regard to assignments of interests between merging entities. "Any national bank or any bank incorporated under the laws of any State may… be consolidated with or more national banking associations located in the same State." 12 U.S.C. § 215(a). For the purposes of this statute, State banks include "any bank, banking association, trust company, savings bank…, or other banking instruction which is engaged in the business of receiving deposits and which is incorporated under the laws of any State…" 12 U.S.C. § 215b(1). Thus, after a merger under 12 U.S.C. § 215(a), the surviving bank automatically receives all rights and property of the previous entities. See 12 U.S.C. § 215(e); *Standard Fed. Bank v. M/Y Pleasures*, No. 02-60925-CIV, 2003 WL 22722077, *4 (S.D. Fla. July 24, 2003) (holding assignment is not required for boat mortgages after a merger under 12 U.S.C. § 215).

Plaintiff does not require an assignment of the mortgage on Defendant's property because it obtained ownership of the mortgage through a merger. The merger document indicated North Fork merged into Plaintiff before Plaintiff filed the suit. Accordingly, Plaintiff automatically receives ownership of all North Fork's assets and does not requirement an assignment. See 12 U.S.C. § 215(a); *Standard Fed. Bank*, 2003 WL 22722077, *4. Plaintiff therefore has standing.[1]

The next issue is whether New York's election of remedies statute estopps Plaintiff from foreclosing on Defendant's Vermont property. New York law prevents the holder of a mortgage from simultaneously attempting to foreclose on mortgaged property and collect on the associated promissory note. See N.Y. Real Prop. Acts. § 1301. Defendant relies on the judgment order against Costal Electric to show that Plaintiff elected to collect on the promissory note and therefore cannot foreclose on Plaintiff's property at the moment. The election of remedies statute is not applicable here because the New York case is a separate suit based on a different loan.[2] Thus, Plaintiff is not estopped from seeking to foreclose on the mortgage it holds in Defendant's Vermont property.

Finally, the Court must decide whether Plaintiff's failure to record its merger in Windsor County prevents Plaintiff from foreclosing on the mortgage. Defendant presents an informal opinion by the New York Attorney General that concludes "an instrument commemorating the merger of a bank which holds a mortgage on property in a certain county is in recordable form, and must be recorded in the county clerk's office of that county pursuant to the recording provisions of the Real Property Law." Informal Op. No. 85-11, N.Y. Op. (Inf.) Att'y Gen. 73 (1985). The Attorney General's opinion applies to a discharge of a mortgage. The opinion is informal and does not state the consequences for failing to record a merger. No New York statutes or cases make a similar conclusion.

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[1] Defendant argues the Court should evaluate the effect of the merger under New York law. Evaluating the effect of merger under New York law would not change the outcome. New York law indicates that after a merger of banks "all the property, rights, powers and franchises" of the original entities become vested in the surviving bank. N.Y. Banking Law § 602(2). In regard to mortgages, a New York Appellate court held "no formal assignment is required to effect a transfer of assets of a merged corporation into the receiving corporation." *Barclay's Bank of N.Y. York, N.A. v. Smitty's Ranch, Inc.*, 504 N.Y.S.2d 295, 296 (N.Y. App. Div. 1986). Even under New York law, Plaintiff does not require an assignment to have standing.

[2] Plaintiff also correctly observes that N.Y. Real Pro. Acts. § 1301 does not prohibit seeking enforcement on a promissory note and foreclosing on a property that is outside of New York. See *Wells Fargo Bank of Minn. v. Lohr*, 771 N.Y.S.2d 649, 649 (N.Y. App. Div. 2004).

The Court cannot find that failure to record a merger in the county where a bank holds mortgages prevents foreclosing on a mortgage. Nothing in the Attorney General's opinion or New York law indicates a bank cannot file a foreclosure action without first recording its merger. Even failure to record the mortgage itself would not make the mortgage void, although it may limit the holder's rights against subsequent purchasers for value. See *Hopper v. Lockey*, 795 N.Y.S.2d 103, 104 (N.Y. App. Div. 2005); see also N.Y. Real Prop. § 291(describing how conveyances of interests in real property should be recorded). If failure to record the mortgage itself would not invalidate the loan between the parties, then failure to record an automatic transfer of ownership should not invalidate the loan. Failure to record the merger does not prevent Plaintiff from foreclosing on a mortgage.

The Court grants Plaintiff's motion for summary judgment. There are no disputed material facts and Plaintiff is entitled to judgment as a matter of law. See V.R.C.P. 56. Taking all of Defendant's assertion as true, Defendant has no legal defense to Plaintiff's claims. The Court finds Defendant's arguments that Plaintiff cannot pursue this action for lack of standing, election of remedies, and failure to record its merger unpersuasive. For the same reasons, the Court must deny Defendant's motion for summary judgment.

Order

Plaintiff's motion for summary judgment is *granted*. Defendant's motion for summary judgment is *denied*. The Clerk shall prepare an accounting in connection with the foreclosure.

Dated at Woodstock, Vermont on December 14, 2012

Harold E. Eaton, Jr.
Superior Court Judge

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WINDSOR UNIT