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EASTERN SAVINGS BANK, FSB *v.* CYNTHIA
CORTESE ET AL.
(AC 36024)

Beach, Sheldon and West, Js.

Argued October 30—officially released December 30, 2014

(Appeal from Superior Court, judicial district of
Stamford-Norwalk, Hon. A. William Mottolese, judge
trial referee.)

Daniel Shepro, for the appellant (named defendant).

Ross G. Fingold, for the appellee (plaintiff).

Opinion

SHELDON, J. The defendant, Cynthia Cortese,¹ claims that the trial court (1) improperly concluded that the plaintiff, Eastern Savings Bank, FSB, had standing to bring this foreclosure action, and, thus, that the court had subject matter jurisdiction, on the basis of its erroneous determination that the plaintiff was the holder of the notes at issue, and (2) abused its discretion in permitting the plaintiff to amend its complaint to include an allegation that it was the holder of those notes. We affirm the judgment of the trial court.

The following procedural history is relevant to the claims on appeal. The plaintiff filed this action on November 6, 2006, seeking to foreclose two mortgages on property at 28 Meeting House Road in Greenwich.² The first mortgage secured a promissory note in the amount of \$2,500,000, and the second mortgage secured a promissory note in the amount of \$2,600,000. On July 27, 2010, the defendant was defaulted for failure to disclose a defense. On January 24, 2011, a judgment of strict foreclosure was entered and a law day of March 22, 2011, was set.

On March 14, 2011, the defendant filed a motion to open judgment on the ground that she sought to introduce evidence contesting the court's prior determination of the fair market value of the subject property. On March 21, 2011, the court granted the defendant's motion to open judgment and set a new law day of May 31, 2011. The court further ordered that any motion to modify, vacate or reopen that judgment must be filed on or before May 3, 2011, in order that it could be heard, argued and decided by the court not later than May 9, 2011. On May 3, 2011, the defendant filed another motion to open judgment, this time on the ground that the plaintiff had fraudulently induced her to sign the mortgage and note. On May 9, 2011, the court opened the judgment and again extended the law day to August 30, 2011. The court ordered that any motion to modify, vacate or reopen that judgment must be filed on or before July 19, 2011, in order that it could be heard, argued and decided on or before July 25, 2011. On July 19, 2011, the defendant filed another motion to open judgment, again alleging fraud on the part of the plaintiff. On July 25, 2011, the court opened the judgment and extended the law day to November 8, 2011. It further ruled that any motion to modify, vacate or reopen that judgment must be filed on or before October 11, 2011, in order that it could be heard, argued and decided on or before October 17, 2011. On September 16, 2011, the court denied the defendant's motion to open judgment. On October 11, 2011, the defendant filed another motion to open judgment, alleging fraud on the part of the plaintiff. On November 3, 2011, the court granted the motion to open judgment and ordered that any answer, special defense or counterclaim be filed on or before

November 30, 2011. On November 30, 2011, the defendant filed a motion for extension of time to plead, which the court granted over the plaintiff's objection, extending the deadline by which the defendant had to plead to December 21, 2011. On January 17, 2012, the defendant filed an answer, special defense and counterclaim. By way of special defense, the defendant reiterated her previous allegations of fraud by the plaintiff and claimed that said fraudulent conduct had breached the implied covenant of good faith and fair dealing. By way of counterclaim, the defendant essentially repleaded the allegations of her special defense, claiming breach of the implied covenant of good faith and fair dealing, and additionally alleging a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., without pleading any further facts in support of that claim. The plaintiff replied to the defendant's special defenses and answered her counterclaim on February 9, 2012.

On October 2 and 3, 2012, the court held a bench trial, after which the parties submitted briefs. On May 1, 2013, the court issued a memorandum of decision in which it concluded that the plaintiff had proven by a preponderance of the evidence each of the elements essential to obtaining a judgment of foreclosure and rejected the defendant's special defense alleging breach of the implied covenant of good faith and fair dealing. The court similarly rejected the defendant's counterclaim based upon alleged breach of the implied covenant of good faith and fair dealing, and violation of CUTPA. On those bases, the court entered a judgment of foreclosure in favor of the plaintiff and set the date of May 22, 2013, for a hearing to determine the form of the judgment and to fix the amount of the debt.

At the May 22, 2013 hearing, new counsel appeared for the defendant. The hearing was thus continued to June 11, 2013, so the new counsel could review the details of the calculation of the amount of the debt. On June 11, 2013, the defendant argued, *inter alia*,³ that the court lacked subject matter jurisdiction on the ground that the plaintiff's complaint did not contain an allegation that it was the owner or holder of the notes, and therefore that it lacked standing to pursue the foreclosure. On July 25, 2013, the court filed a supplemental memorandum of decision rejecting the defendant's jurisdictional challenge. The court found: "There was ample evidence at trial, which was never challenged, that the plaintiff was indeed the holder of the notes in question. These notes have never been assigned or endorsed to a third party. In fact, each of the notes and mortgages was introduced into evidence at the outset of the trial." The court concluded that "the allegations of the complaint necessarily imply that the plaintiff was the holder of the notes." The court also granted the plaintiff's motion to amend the complaint, over objection by the defendant, to include such an allegation on

the ground that said amendment conformed the complaint to the uncontested proof adduced at trial. A judgment of strict foreclosure again entered on August 14, 2013, from which the defendant has filed this appeal.

I

The defendant first claims that the trial court improperly concluded that the plaintiff had standing to bring this foreclosure action, and, thus, that the court had subject matter jurisdiction over it, on the basis of its erroneous determination that the plaintiff was the holder of the notes at issue. “We have long held that because [a] determination regarding a trial court’s subject matter jurisdiction is a question of law, our review is plenary.” (Internal quotation marks omitted.) *Equity One, Inc. v. Shivers*, 310 Conn. 119, 125–26, 74 A.3d 1225 (2013). Our Supreme Court’s decision in *RMS Residential Properties, LLC v. Miller*, 303 Conn. 224, 32 A.3d 307 (2011), is dispositive of this claim.

In *RMS Residential Properties, LLC v. Miller*, supra, 303 Conn. 231–32, the court held: “[A] holder of a note is presumed to be the owner of the debt, and unless the presumption is rebutted [the holder] may foreclose the mortgage under [General Statutes] § 49-17. . . . The production of the note establishes his case prima facie against the makers and he may rest there. . . . It [is] for the defendant to set up and prove the facts which limit or change the plaintiff’s rights.” (Internal quotation marks omitted.) The court reasoned: “[B]ecause the defendant offered no evidence to impeach the validity of [the plaintiff’s] evidence that it possessed the note at the time that it commenced the present action or to rebut the presumption that [the plaintiff] own[ed] the underlying debt, and as a matter of law the mortgage follows the note . . . [the plaintiff] was authorized by statute to commence [the subject] foreclosure action. Accordingly, the trial court properly denied the defendant’s motion to dismiss for lack of standing to bring the foreclosure action.” *Id.*, 232.

Here, the plaintiff introduced into evidence, without objection, the original signed notes and mortgages at issue. The defendant did not object to the admission of those documents into evidence, nor did she challenge in any way the prima facie evidence that the plaintiff was the holder of the notes. We conclude that the court’s determination that the plaintiff had proven that it was the holder of the notes was not erroneous, and, thus, that the court properly determined that the plaintiff had standing to bring this action.

II

The defendant also claims that the court abused its discretion in permitting the plaintiff to amend its complaint to include the allegation that it was the holder of the notes. We disagree.

“A trial court’s ruling on a motion of a party to amend

its complaint will be disturbed only on the showing of a clear abuse of discretion. . . . Whether to allow an amendment is a matter left to the sound discretion of the trial court. [An appellate] court will not disturb a trial court's ruling on a proposed amendment unless there has been a clear abuse of that discretion. . . . It is the [appellant's] burden . . . to demonstrate that the trial court clearly abused its discretion. . . . A trial court may allow, in its discretion, an amendment to pleadings before, during, or after trial to conform to the proof. . . . Factors to be considered in passing on a motion to amend are the length of the delay, fairness to the opposing parties and the negligence, if any, of the party offering the amendment. . . . The essential tests are whether the ruling of the court will work an injustice to either the plaintiff or the defendant and whether the granting of the motion will unduly delay a trial." (Internal quotation marks omitted.) *Fountain Pointe, LLC v. Calpitano*, 144 Conn. App. 624, 640, 76 A.3d 636, cert. denied, 310 Conn. 928, 78 A.3d 147 (2013).

Here, on the basis of the plaintiff's proffer of the original notes and mortgages to the court, it cannot reasonably be disputed that the plaintiff was foreclosing those notes as the holder thereof and that amending the complaint to include an allegation to that effect did nothing more than conform the complaint to the proof adduced at trial. This action had been pending for several years before the defendant alleged any deficiency in the plaintiff's pleading or raised the issue of the ownership of the relevant notes and mortgages. Because the plaintiff's prosecution of this foreclosure action, from its inception, necessarily would be based upon its ownership of the notes and mortgages at issue, the defendant cannot claim surprise or prejudice by such a claim only when that claim is made explicit via an amended complaint, particularly in the context of the protracted history of these proceedings wherein judgment had already entered on that very basis. We, thus, conclude that the trial court did not abuse its discretion in permitting the plaintiff to amend its complaint.

The judgment is affirmed.

In this opinion the other judges concurred.

¹ Rattet Pasternak and Gordon Oliver, LLP, Richard M. Coan, trustee, and the U.S. Department of Revenue Services also are named as defendants in this action. Because they are not parties to this appeal, we refer to Cortese as the defendant.

² Although the property has a Greenwich address, it is partially located in Stamford.

³ The defendant raised two other claims regarding the amount of the debt that the trial court rejected. She has not challenged the court's judgment in that regard.