

Wells Fargo Bank, NA v Omoshalewa Banks

2011 NY Slip Op 33345(U)

December 15, 2011

Supreme Court, Richmond County

Docket Number: 130044/09

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No. 130044/09
Motion No.: 1**

WELLS FARGO BANK, NA, as Trustee under Pooling and Servicing Agreement dated as of October 1, 2006 Securitized Asset Bank Receivables LLC Trust 2006-WM2 Mortgage Pass-Through Certificates. Series 2006-WM2

Plaintiff

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

**OMOSHALEWA BANKS;
NEW YORK CITY ENVIRONMENTAL CONTROL BOARD;
NEW YORK CITY PARKING VIOLATIONS BUREAU;
NEW YORK CITY TRANSIT ADJUDICATION BUREAU;
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS,
INC., as nominee;
WMC MORTGAGE CORPORATION;
NEW YORK STATE DEPARTMENT OF TAXATION
AND FINANCE;
“JOHN DOES” and “JANE DOES”, said names being
fictitious, parties intended being possible tenants or occupants
of premises, and corporations, other entities or persons who
claim, or may claim, a lien against the premises,**

Defendants

The following items were considered in the review of the following motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The motion of The plaintiff, Wells Fargo Bank, NA (“Wells Fargo”) for summary judgment against the defendant, Omoshalewa Banks (“Ms. Banks”), for default judgment against the other defendants, to strike Ms. Banks’ answer and to convert the answer to a notice of appearance and waiver, to appoint a Referee, and to amend the caption is granted in its entirety.

Facts

On June 26, 2006, Ms. Banks executed a note issued to WMC Mortgage Corp. (“WMC”) for \$424,800.00. The note was secured by a mortgage on the real property commonly known as 78 Layton Avenue, Staten Island, New York 10301. The mortgage was issued to Mortgage Electronic Registration Systems, Inc. (“MERS”) as nominee for WMC. The note was acquired by and in the possession of Wells Fargo on September 1, 2006. On September 1, 2006, the mortgage was transferred to Wells Fargo by MERS.

Ms. Banks failed to make payments due on September 1, 2008 and thereafter. Foreclosure proceedings were initiated with service of a summons and complaint on January 14, 2009. A settlement conference was held on July 8, 2009, at which Ms. Banks was not in attendance. Nonetheless, other unsuccessful communications were held regarding a loan modification for Ms. Banks. On October 29, 2010, Ms. Banks filed for bankruptcy and proceedings were stayed until she was dismissed from bankruptcy by an order issued February 9, 2011.

Discussion

A motion for summary judgment on a complaint of default on a mortgage requires the plaintiff to submit the relative mortgage, the underlying note and evidence of default.¹ In opposition, the defendant should raise a triable issue of fact.² Here, the plaintiff, has submitted the relevant mortgage, the underlying note and an affidavit evidencing default. An attorney’s affirmation. This action was pending on November 18, 2010 and no judgment of foreclosure was entered as of that date. Consequently, the required affirmation must be filed at the time of a proposed order of

¹*Emigrant Mtge. Co., Inc. v. Turk*, ___ AD 3d ___, 2010 NY Slip Op 1915 *1 [2d Dept 2011].

²*Id.*

reference or a proposed judgment of foreclosure.³ The defendant has not submitted any evidence to contest the plaintiff's *prima facie* showing of an entitlement for summary judgment. None the less, the defendant asserts that because a mortgage modification is in progress, that the plaintiff may not foreclose.

A settlement conference is required prior to foreclosure.⁴ It is also required that the plaintiff and defendant must both appear at that conference in person, or by counsel, if counsel is fully authorized to dispose of the case.⁵ The mandatory settlement conference was scheduled to be held on July 8, 2009. The plaintiff's attorney-in-fact states that Ms. Banks did not attend the conference, a representation founded upon the required personal knowledge of the facts.⁶ Defendant's counsel confirms that Ms. Banks did not attend the conference. The defendant's counsel uses the word "indicated," to relate how the defendant communicated the defendant's excuse to her counsel for failing to attend the settlement conference. Defendant's counsel states the defendant "indicated" she did not receive notification of the meeting. However, there is no sworn affidavit from the defendant confirming this "indication." Therefore, the plaintiff has presented no evidence to contest that she voluntarily defaulted from the settlement conference.

The defendant further asserts that loan modification is pending. The defendant states that an application for loan modification was submitted on December 7, 2009, and resubmitted on January 6, 2010. As evidence, the defendant presents copies of papers allegedly provided for the purpose of applying for a loan modification. There is a copied form from Neighborhood Housing Services of Staten Island, Inc. Dated April 4, 2010, this form asserts that the plaintiff was still waiting for a response from the servicer. A second form was allegedly dated December 3, 2009, and projects liabilities of \$5,609.00 per month including two mortgages. This is set against a net income of

³Administrative Order of the Chief Administrative Judge of the Courts 431/11.

⁴CPLR § 3408 (a).

⁵CPLR § 3408 ©.

⁶*Bahldow v. Greenberg*, 185 AD 2d 829 [2d Dept 2009].

\$2,662.00 per month. The defendant's current deficiency is \$2,947.00 per month. Her liabilities excluding mortgage payments total \$1,968.00 per month. In a best case scenario, the plaintiff indicates she has only \$694.00 per month in discretionary funds with which to pay a mortgage on a property. The plaintiff affirms that the loan obligation was not modified. The defendant affirms that she has received no decision. Although this is a fact in dispute, it is not a material one. The defendant tacitly concurs that communications regarding loan modifications have been held, and therefore there is substantive compliance with, and proposals submitted in the spirit of CPLR § 3408. The defendant's previous mortgage payments were calculated on a property for which the defendant paid \$424,800.00, although the defendant now values the property at \$350,000.00. The plaintiff does not attach a letter rejecting the loan modification. However, there is no obligation for the plaintiff lender to modify the loan in accordance with the defendant's available discretionary funds. Summary judgment is entered against the defendant, the defendant's answer is struck and a Referee is appointed to compute sums owed by the defendant to the plaintiff.

The defendant has alleged a lack of personal jurisdiction due to failure to serve process as required by CPLR § 308.⁷ The plaintiff presents the affidavit of Kenneth E. Sloman, who served David Banks, an individual of suitable age and discretion found at the defendant's known residence, and completed service with a first class mailing. The defendant failed to provide any evidence to the contrary of the plaintiffs' representations. Therefore, the plaintiff obtained personal jurisdiction over the defendant.

The plaintiff moves to have the defendant's answer deemed as the notice of appearance and waiver. Because the plaintiff is awarded summary judgment, the defendant's answer may be converted to a notice of appearance and waiver if it is not prejudicial to the defendant.⁸ The defendant has made no representation that this conversion would be prejudicial, and the defendant's answer is converted to a notice of appearance and waiver.

⁷CPLR § 308 (2).

⁸*36 North Water, Inc. v. Caliper*, 295 AD 2d 499 [2d Dept 2002].

The anonymous individuals indicated in the caption by “John Does” and “Jane Does” are now designated by the plaintiff as “John” Starks (a male refusing to give his first name), “Jane” Starks (a female refusing to give her first name), Olayte Agrudaj, “Jane” Lassiter (a female refusing to give her first name), and “Jane” Arogradade (a female refusing to give her first name). The plaintiff further moves without opposition for default judgment against the other defendants. The plaintiff has presented evidence of in-person service against the New York City Environmental Control Board, the New York City Parking Violations Board, the New York City Transit Adjudication Bureau, Mortgage Electronic Registration Systems, Inc., WMC Mortgage Corporation, the New York State Department of Taxation and Finance, “John” Starks (a male refusing to give his first name), “Jane” Starks (a female refusing to give her first name), Olayte Agrudaj, “Jane” Lassiter (a female refusing to give her first name), and “Jane” Arogradade (a female refusing to give her first name). In the absence of opposition, default judgment is granted against these defendants.

Accordingly, it is hereby:

ORDERED, that summary judgment is granted to the plaintiff, Wells Fargo Bank, NA, as Trustee under Pooling and Servicing Agreement dated as of October 1, 2006 Securitized Asset Bank Receivables LLC Trust 2006-WM2 Mortgage Pass-Through Certificates. Series 2006-WM2 against the defendant, Omoshalewa Banks; and it is further

ORDERED, that upon filing of an attorney affirmation compliant with the Administrative Order of the Chief Administrative Judge of the Courts 431/11, judgment shall be settled on notice; and it is further

ORDERED, that the caption shall be amended to read:

WELLS FARGO BANK, NA, as Trustee under Pooling and Servicing Agreement dated as of October 1, 2006 Securitized Asset Bank Receivables LLC Trust 2006-WM2 Mortgage Pass-Through Certificates. Series 2006-WM2

Plaintiff

against

**OMOSHALEWA BANKS;
NEW YORK CITY ENVIRONMENTAL CONTROL BOARD;
NEW YORK CITY PARKING VIOLATIONS BUREAU;
NEW YORK CITY TRANSIT ADJUDICATION BUREAU;
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS,
INC., as nominee;
WMC MORTGAGE CORPORATION;
NEW YORK STATE DEPARTMENT OF TAXATION
AND FINANCE;
“JOHN” STARKS, a male refusing to give his first name;
“JANE” STARKS, a female refusing to give her first name;
OLAYTE AGRUDAJ;
“JANE” LASSITER, a female refusing to give her first name, and
‘JANE” AROGRUDADE, a female refusing to give her first name;**

Defendants

ENTER,

DATED: December 15, 2011

Joseph J. Maltese
Justice of the Supreme Court