

OneWest Bank, F.S.B. v Battaglia

2012 NY Slip Op 32213(U)

August 15, 2012

Supreme Court, Suffolk County

Docket Number: 31273-09

Judge: Denise F. Molia

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NO.: 31273-09

**SUPREME COURT - STATE OF NEW YORK
IAS PART 39 - SUFFOLK COUNTY**

**PRESENT: Hon. DENISE F. MOLIA
Justice of the Supreme Court**

OneWest Bank, F.S.B.,

Plaintiff,

**MOTION DATE: 1-31-12
ADJ. DATE: _____
MOT. SEQ. #: 004 MG
005 MD**

-against-

**STEIN, WIENER & ROTH, L.L.P.
Attorneys for Plaintiff
One Old Country Road
Suite 113
Carle Place, N. Y. 11514**

**Alfred Battaglia, LaSalle Bank National
Association f/k/a LaSalle National Bank, in
its capacity as trustee under that certain
Pooling and Servicing Agreement dated June 1,
1999 between LaSalle National Association,
as Trustee, and Superior Bank FSB, as
Depositor and Servicer, AFC Mortgage Loan
Asset Backed Certificates, Series 1999-2,**

**LISA STRAX, ESQ.
Attorney for Defendant
Alfred Battaglia
10-54 Totten Street
Whitestone, N. Y. 11357**

**"JOHN DOE", "RICHARD ROE", "JANE
DOE", "CORA COE", "DICK MOE" and
"RUBY POE", the six defendants last named
in quotation marks being intended to
designate tenants or occupants in possession
of the herein described premises or portions
thereof, if any there be, said names being
fictitious, their true name being unknown to
plaintiff,**

Defendants,
_____x

Upon the following papers numbered 1 to 33 read on this Notice of Motion and supporting papers for summary judgment and an order of reference 1-21; Cross motion and supporting 22-27; Replying Affidavits and supporting papers 28-32; Other memorandum of law 33; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the plaintiff for an order; (1) granting summary judgment pursuant to CPLR 3212 and; (2) an order of reference to compute is granted; and it is further

ORDERED that the cross-motion by the defendant for an Order pursuant to CPLR 3211 [b][f] dismissing the plaintiff's complaint in its entirety as the plaintiff lacked standing to commence this action or in the alternative to compel the plaintiff to comply with the defendant's discovery demands is denied; and it is further

ORDERED that plaintiff shall serve a copy of this order with Notice of Entry within sixty (60) days of the date this Order is signed upon counsel for the defendant pursuant to CPLR 2103 (b), (1), (2) or (3) and thereafter file the affidavit of service with the Clerk of the Court.

The present action involves the foreclosure on a mortgage alleging that the defendant Alfred Battaglia (hereinafter "Battaglia ") defaulted in repaying a note and mortgage which was secured by real property located at 35 Bellows Pond Road, Hampton Bays, New York 11946.

Issue was joined by the service of Battaglia's amended answer with three affirmative defenses on March 30, 2011.

Plaintiff now moves for summary judgment (see CPLR 3212 [a] ; *Myung Chun v North American Mortgage Co.*, 285 AD 2d 42; 729 NYS 2d 716 [1st Dept 2001]) seeking to dismiss Battaglia's answer, affirmative defenses and for the issuance of an order of reference. "[I]n an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default" (*Republic Natl. Bank of N.Y. v O'Kane*, 308 AD 2d 482, 764 NYS 2d 635 [2d Dept 2003](citation omitted).

Plaintiff has established a prima facie case in this foreclosure action by the submission of the affidavits of Forrest McKnight, an Assistant Secretary of plaintiff, and plaintiff's counsel, along with copies of the pleadings and relevant mortgage documents, such as the note and mortgage signed by Battaglia, documentary evidence of Battaglia's default since December 1, 2008 and proof that the default has not been cured to date (see *Valley Natl. Bank v Deutsch*, 88 AD 3d 691, 930 NYS 2d 477 [2d Dept 2011] ; *Wells Fargo Bank v Karla*, 71 AD 3d 1006, 896 NYS 2d 681 [2d Dept 2010] ; *Wash. Mut Bank F.A. v O'Conner*, 63 AD 3d 832, 889 NYS 2d 696 [2d Dept 2009]; *Bercy Invs. v Sun*, 239 AD2d 161, 657 NYS2d 47 [1st Dept 1997]; *Bank of Leumi Trust Co. of New York v Lightning Park, Inc.*, 215 AD2d 246, 626 NYS2d 202 [1st Dept 1995]; *Village Bank v Wild Oaks Holding, Inc.*, 196 AD2d 812, 601 NYS2d 940 [2d Dept 1993]; *Dart Assoc. v Rosa Meat Mkt.*, 39 AD2d 564, 321 NYS2d 853 [2d Dept 1972]; *Gould v McBride*, 36 AD2d 706, 319 NYS2d 125 [1st Dept 1971]; *aff'd* 29 NY2d 708, 36 NYS2d 565 [1971]). Plaintiff has also submitted documentary proof that it is a current holder in due course of a valid note and mortgage executed by Battaglia (see *Deutsche Bank Natl' Trust Co. v Pietranoico*, 33 Misc 3d 528 [Sup Ct Suffolk County 2011] ; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Plaintiff has established and Battaglia does not deny the existence of a valid note and mortgage. Plaintiff has also submitted proof of service of the default acceleration notice as required by the mortgage documents.

Since plaintiff has presented documentary evidence of its entitlement to summary judgment as a matter of law, it now becomes incumbent upon Battaglia to come forward with proof of evidentiary facts showing the existence of a triable issue with regards to bona fide defenses to the action such as waiver, estoppel, bad faith, fraud, oppressive and/or unconscionable conduct on the part of the plaintiff or its predecessor in interest (*see Capstone Bus. Credit, LLC v Imperia Family Realty, LLC*, 70 AD 3d 882 *Marine Midland Bank, N.A. v Freedom Rd. Realty Assoc.*, 203 AD2d 538, 611 NYS2d 34 [2d Dept 1994]; *Village Bank v Wild Oaks Holding, Inc.*, 196 AD2d 812, *supra*; *Marton Assoc. v Vitale*, 172 AD2d 501, 568 NYS2d 119 [2d Dept 1991]; *Andre v Pomery*, 35 NY2d 362 NYS2d 131 [1974]). The Court finds that Battaglia has not met that burden.

Battaglia's general denials and denial of information sufficient to form a belief, are patently insufficient, as a matter of law, and summary judgment will be granted when "the Answer proffers nothing more than general denials" (*Fairbanks Co. v Simplex Supply Co.*, 126 AD2d 882, 511 NYS2d 171 [3d Dept 1987]). Bare denials, such as those asserted by Battaglia without more, is insufficient to defeat plaintiff's motion for summary judgment (*see 1130 Anderson Ave. Realty Corp. v Mina Equities Corp.*, 95 AD2d 169, 465 NYS2d 511 [1st Dept 1983]). "Where . . . the cause of action is based upon documentary evidence, the authenticity of which is not disputed, a general denial, without more, will not suffice to raise an issue of fact" (*Gould v McBride*, 36 AD2d 706, 319 NYS2d 125 [1st Dept 1971]; *affd* 29 NY2d 768, 326 NYS2d 565 [1971]).

Furthermore, speculation and conjecture is insufficient to defeat plaintiff's motion (*see Capobianco v Mari*, 267 AD2d 191, 699 NYS2d 487 [2d Dept 1999]; *Presta v Houssian*, 186 AD2d 542, 589 NYS2d 791 [2d Dept 1992]). In fact, Battaglia has not submitted an affidavit either in support of his pleadings and affirmative defenses of payment and lack of notice as to his default, or in opposition to plaintiff's motion for summary judgment. Lack of opposition is tantamount to consent and in effect a concession that no question(s) of fact exist (*see Argent Mtge. Co., LLC v Mentesa*, 70 AD 3d 1070, 915 NYS 2d 591 [2d Dept 2010]; *Hermitage Ins. Co. v Trance Nite Club, Inc.*, 40 AD 3d 1032, *supra* : CPLR 3215; *Zino v Jaob Taxi, Inc.*, 20 AD 3d 521, *supra* ; *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, *supra* ; *see also Neuman v Zurich N. Am.*, 36 AD 3d 601, *supra* ; *Kuehne & Nagel, Inc. v Baiden*, 36 NY 2d 539, 369 NYS 2d 667 [1975]). Additionally, "uncontradicted facts are deemed admitted" (*Tortorello v Larry M. Carlin*, 260 AD 2d 201, *supra*).

However, the defendant has cross moved for an order pursuant to CPLR 3211 [a][3] (*see Wells Fargo Bank Minnesota National Association v Mastropaolo*, 42 AD 3d 239, 837 NYS 2d 247 2d Dept 2007]) to dismiss the plaintiff's complaint in its entirety as the plaintiff lacked standing to commence and maintain this action. The cross motion ignores and does not address the two other affirmative defenses Battaglia submitted in his answer. Defendant's counsel, in her affirmation attempts to divert the first affirmative defense in defendant's answer into a separate issue, wherein Battaglia does not have to submit proof sufficient to raise a genuine question of fact or implicate support for the affirmative defenses asserted in Battaglia's answer. (*see Grogg v. South Road Assocs.*,

74 AD 3d 1021, 907 NYS 22 [2d Dept 2010]; *Washington Mut. Bank v O'Conner*, 63 AD 3d 832, 880 NYS 2d 696 [2d Dept 2009]). In effect the general contentions of Battaglia's counsel in her affirmation does not provide sufficient basis under CPLR 3212(f) for delaying determination of plaintiff's motion for summary judgment (see *Lewis v Safety Disposal Sys. of Pennsylvania, Inc.*, 12 AD3d 324, 786 NYS2d 146 [1st Dept 2004]).

"In order to commence a foreclosure action, the plaintiff must have a legal or equitable interest in the mortgage" (*Wells Fargo Bank, N.A. v Marchione*, 69 AD 3d 204, 207, *supra*). A plaintiff has standing where it is both (1) the holder or assignee of the subject mortgage and; (2) the holder or assignee of the underlying note, either by physical delivery or execution of a written assignment prior to the commencement of the action with the filing of the complaint (see *Wells Fargo Bank, N.A. v Marchione*, 69 AD 3d 204, *supra* ; *U.S. Bank, N.A. v Collymore*, 68 AD 3d 752, 890 NYS 2d [2d Dept 2009]).

In a reply affirmation to Battaglia's cross motion, counsel for plaintiff confirms that counsel is in possession of the original note and submits a copy therein. Here the plaintiff has established its lawful status as assignee, by the written assignment and physical delivery of the note/allonge prior to the filing of the complaint and which is noted in the complaint. Where as in this foreclosure action plaintiff has produced sufficient documentary evidence and has eliminated all material issues of fact, the Court finds that the affirmation of Battaglia's counsel alone in this cross motion is insufficient (see *Zuckerman v City of New York*, 49 NY 2d 557, *supra*), and is without probative value in opposition to plaintiff's motion (see *Dicupe v City of New York*, 124 AD2d 542, 507 NYS2d 687 [2d Dept 1986]). As plaintiff has demonstrated its prima facie case, the burden shifted to the defendant to demonstrate by admissible evidence, the existence of a triable issue of fact as to a bona fide defense (see *Wells Fargo Bank v Webster*, 61 AD 3d 856, 877 NYS 2d 200 [2d Dept 2009]; *Rose v Levine*, 52 AD 3d 800, 861 NYS 2d 374 [2d Dept 2008]; *Chemical Bank v Bowers*, 228 AD 2d 407, 643 NYS 2d 653 [2d Dept 1996]).

The granting of a summary judgment motion should not be postponed to allow for discovery where the proponent of the additional discovery has failed "to demonstrate that the discovery sought would produce relevant evidence" (*Frith v Affordable Homes of Am.* 252 AD 2d 536, 537, 676 NYS 513 [2d Dept 1998]); and cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that the discovery may lead to relevant evidence" (*Bailey v New York City Tr. Auth.*, 270 AD 2d 156, 704 NYS 2d 582 [2d Dept 2000]). Battaglia, a signatory to the note and mortgage, has failed to proffer any singular evidentiary fact in support of his claim and that part of the cross motion is also denied.

Whereas in this foreclosure action plaintiff has produced sufficient documentary evidence and has eliminated all material issues of fact, the Court finds that Battaglia has failed to sustain his burden and the affirmation of counsel alone in this cross motion is insufficient (see *Zuckerman v City of New*

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York, 49 NY 2d 557, *supra*), and is without probative value in opposition to plaintiff's motion (see *Dicupe v City of New York*, 124 AD2d 542, 507 NYS2d 687 [2d Dept 1986]). The Court finds that Battaglia has failed to demonstrate that plaintiff lacked standing to commence this action. Therefore the cross motion is denied and the affirmative defense of lack of standing is dismissed.

Accordingly, the motion for summary judgment and for the appointment of a referee to compute is granted and the cross motion is denied. The Order of Reference is being concurrently signed with this Short Form Order. All matters not decided herein are hereby deemed denied.

This constitutes the Order and decision of the Court.

Dated: August 15 2012
Riverhead, NY

Hon. Denise F. Molia
HON. DENISE F. MOLIA J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION