

Independence Bank v Valentine

2012 NY Slip Op 33280(U)

January 30, 2012

Sup Ct, Queens County

Docket Number: 13157/11

Judge: Allan B. Weiss

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M E M O R A N D U M

SUPREME COURT QUEENS COUNTY
CIVIL TERM PART 2

ALLAN B. WEISS

INDEPENDENCE BANK,

Plaintiff,

-against-

ROSELYN VALENTINE, WELLS FARGO BANK,
N.A., WILLOW RUN FOODS, INC., CITY OF
NEW YORK, "JOHN ONE" THROUGH "JOHN
ONE HUNDRED" they being tenants,
occupants or parties having a mortgage,
judgment, lien, warrant or other
encumbrance affecting the premises,
all of which are subordinate to
plaintiff's,

Defendants.

Index No.: 13157/11

Motion Date: 1/25/12

Motion Cal No.: 14

Motion Seq. No.: 1

In this action to foreclose a mortgage the plaintiff moves for an Order striking the defendant's affirmative defenses, granting summary judgment in its favor, appointing a referee to ascertain and compute the amount due to the plaintiff and amending the caption.

To establish a prima facie case in an action to foreclose a mortgage, the plaintiff must establish the existence of the mortgage and mortgage note, ownership of the note and mortgage, and the defendant's default in payment (see Capstone Bus. Credit, LLC v Imperia Family Realty, LLC, 70 AD3d 882 [2010]; U.S. Bank Natl. Assn. TR U/S 6/01/98 [Home Equity Loan Trust 1998-2] v Alvarez, 49 AD3d 711, 712 [2008]). Where, as here, the plaintiff

establishes its entitlement to summary judgment, the burden shifts to the defendant to demonstrate "the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff" (see Mahopac Natl. Bank v. Baisley, 244 AD2d 466, 467 [1997]); Nassau Trust Co. v. Montrose Concrete Prods. Corp., 56 NY2d 175, 183 [1982]).

In opposition, defendant asserts that the motion should be denied since the defendant is entitled to a foreclosure settlement conference pursuant to CPLR 3408 and because the mortgage being foreclosed is a third mortgage which will not be satisfied since the total of all of the existing mortgages exceeds the value of the property. The defendant's claims are insufficient to raise a triable issue of fact sufficient to defeat the plaintiff's prima facie entitlement to judgment.

CPLR 3208 provides in pertinent part that "In any residential foreclosure action involving a home loan as such term is defined in § 1304 of the Real Property Actions and Proceedings Law (RPAPL), in which the defendant is a resident of the property subject to foreclosure, the court shall hold a mandatory conference." RPAPL § 1304(b)(ii), (iii), and the Banking Law § 6-1 subd. (e) (ii), (iii), define in pertinent part a "Home Loan" as one in which "... (ii) The borrower is a natural person; & (iii) The debt is incurred by the borrower primarily for personal, family, or household purposes; "... In this case the borrower was

Roz-Valt, Corp., in which the defendant was the principal, for the purpose of financing the defendant's business. The defendant was the guarantor and gave the mortgage as security for the business loan. Thus, defendant does not qualify for a mandatory foreclosure settlement conference. Moreover, the defendant has failed to provide any evidence to demonstrate that she has the ability to or would qualify for a refinance, so as to warrant the court to exercise its equity jurisdiction and order a settlement conference.

Insofar as defendant claims that the motion should be denied since plaintiff holds a third mortgage is also insufficient to raise a triable issue of fact (see generally 1-2 Bergman on New York Mortgage Foreclosures § 2.16).

The motion is granted except the branch of plaintiff's motion to strike the defendant's answer, which is denied. Plaintiff has failed to submit any basis for striking the defendant's answer which is tantamount to a default in answering (see e.g. Rokina Optical Co., Inc. v. Camera King, Inc., 63 NY2d 728, 730, [1984]; Fappiano v. City of New York, 5 AD3d 627 [2004] lv denied 4 NY3d 702 [2004]). Granting summary judgment does not require striking the defendant's answer.

Settle Order.

Dated: January 30, 2012
D# 47

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J. S. C.