Colfin Metro Funding LLC v Rojas
2014 NY Slip Op 32187(U)
July 23, 2014
Sup Ct, Queens County
Docket Number: 703458/2013
Judge: Orin R. Kitzes

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY
COMMERCIAL DIVISION

Present: HONORABLE ORIN R. KITZES Justice IA Part 17

ORIGINAL

COLFIN METRO FUNDING LLC,

Plaintiff,

-against-

NANCY ROJAS, ASSET ACCEPTANCE LLC, CITIBANK (SOUTH DAKOTA), NA, PORTFOLIO RECOVERY ASSOCIATES LLC, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, OLYMPIAN FUEL OIL CORP., "JOHN DOE #1" through "JOHN DOE #10," the last ten names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest or lien upon the premises described in the complaint,

Defendants.

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Motion Date March 21, 2014

Motion Seq. No. 4

FILED
JUL 28 2014
COUNTY CLERK
QUEENS COUNTY

The following papers numbered E68 to E114 read on this motion by plaintiff pursuant to CPLR 3212(b) for summary judgment against defendant Nancy Rojas and dismissing the counterclaims asserted by defendant Rojas, pursuant to CPLR 3215(d) for leave to enter a default judgment against defendants Asset Acceptance LLC, Citibank (South Dakota), NA, Portfolio Recovery Associates, LLC, New York City Environmental Control Board and Olympian Fuel Oil Corp., for leave to amend the caption and pursuant to RPAPL 1321 and CPLR 4311 for leave to appoint a referee to compute the sums due and owing plaintiff.

	Papers Numbered
Amended Notice of Motion-Affidavits-Exhibits...	E68-E82, E90
Answering Affidavits-Exhibits.....	E91-E106
Reply Affidavits.....	E107-E114

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff commenced this foreclosure action alleging that defendant Rojas gave several mortgages on the real property known as 33-53 70th Street, a/k/a 70-01 34th Avenue, Jackson Heights, New York (Block 1243, Lot 39) to secure various loans and, in 2007, entered into a consolidation, modification, and extension agreement with Washington Mutual Bank, F.A. (WAMU), consolidating the mortgages into one consolidated mortgage (the "Amended and Restated Mortgage") securing the repayment of the principal loan amount of $625,000.00, as evidenced by an amended and restated promissory note. The consolidated mortgage provides that it also constitutes a security interest on all fixtures and personal property attached to the mortgaged property. Plaintiff alleged that defendant Rojas is in default in payment under the consolidated mortgage by failing to make required payments due under the loan documents beginning with the payment due on September 1, 2012 and thereafter. Plaintiff also alleged that it elects to accelerate the mortgage debt.

Defendant Rojas served an answer, asserting affirmative defenses, including one based upon lack of standing to sue, and interposing various counterclaims. Plaintiff served a reply. Defendants Asset Acceptance LLC, Citibank (South Dakota), NA, Portfolio Recovery Associates, LLC, New York City Environmental Control Board and Olympian Fuel Oil Corp. are in default in the action. Plaintiff caused Allan Pollock, Jenny Soto, Mohammad Islam, Basharat Mahmood, Jose Vasques and Elsa Rocha to be served with a copy of the summons and complaint as defendants "John Doe #1" through "John Doe #6" respectively. It is unclear from the papers submitted whether Allan Pollock, Jenny Soto, Mohammad Islam, Basharat Mahmood, Jose Vasques and Elsa Rocha have appeared or answered. Counsel for plaintiff makes reference in his affirmation of regularity to defendants Asset Acceptance LLC, Citibank (South Dakota), NA, Portfolio Recovery Associates, LLC, New York City Environmental Control Board and Olympian Fuel Oil Corp. as the "non-answering defendants" without mention of Allan Pollock, Jenny Soto, Mohammad Islam, Basharat Mahmood, Jose Vasques and Elsa Rocha. The affirmation does not indicate whether Allan Pollock, Jenny Soto, Mohammad Islam, Basharat Mahmood, Jose Vasques and Elsa Rocha have appeared or answered the complaint.

Plaintiff made an ex-parte application for the appointment of a temporary receiver, which was granted by order dated October 16, 2013. Thereafter, the temporary Receiver moved to be discharged of his duties, and by memorandum decision dated February 20, 2014, the

court granted the motion without opposition, and appointed a substitute temporary Receiver.

That branch of the motion for leave to amend the caption is granted to the extent of substituting Allan Pollock, Jenny Soto, Mohammad Islam, Basharat Mahmood, Jose Vasques and Elsa Rocha in place and stead of defendants "John Doe #1" through "John Doe #6, and deleting reference to defendants "John Doe #7" through "John Doe #10." Accordingly, it is hereby **ORDERED** that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY

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COLFIN METRO FUNDING, LLC,

Plaintiff,

-against-

NANCY ROJAS, ASSET ACCEPTANCE LLC, CITIBANK (SOUTH DAKOTA), NA, PORTFOLIO RECOVERY ASSOCIATES, LLC, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, OLYMPIAN FUEL OIL CORP., ALLAN POLLOCK, JENNY SOTO, MOHAMMAD ISLAM, BASHARAT MAHMOOD, JOSE VASQUES and ELSA ROCHA,

Defendants.

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It is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

In a foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced (*see Bank of New York v Silverberg*, 86 AD3d 274, 279 [2d Dept 2011]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 108 [2d Dept 2011]). However, where, as here, the answer includes a challenge to the plaintiff's standing to bring the action, the latter must also be established in order to succeed on a motion for

summary judgment (*see Deutsche Bank Natl. Trust Co v Haller*, 100 AD3d 680, 682 [2d Dept 2012]; *GRP Loan, LLC v Taylor*, 95 AD3d 1172, 1173 [2d Dept 2012]; *Bank of New York v Silverberg*, 86 AD3d at 279; *US Bank N.A. v Collymore*, 68 AD3d 752, 753 [2d Dept 2009]).

In support of its motion, plaintiff offers, among other things, a copy of the pleadings, affidavits of service, an affirmation of regularity by its counsel, a copy of the consolidated mortgage, the amended and restated note, the consolidation, modification and extension agreement, assignments dated June 1, 2012 and December 12, 2012, a "Purchase and Assumption Agreement" (the P & A Agreement), and an affidavit of Ryan Riemer, a representative of, and portfolio manager at, plaintiff, attesting to the default by defendant Rojas in payment of the monthly mortgage installment due on September 1, 2012 and thereafter.

Defendant Rojas contends the assignment dated June 1, 2012 is invalid as a product of self-dealing by JP Morgan Chase, N.A. (JP Morgan), as the attorney in fact for the FDIC. Contrary to the argument of defendant Rojas, the assignment dated June 1, 2012 was not the instrument by which the subject mortgage loan was assigned to JP Morgan. The June 1, 2012 assignment recognizes it was "intended to further memorialize the transfer that occurred by operation of law on September 25, 2008 as authorized by Section 11(d)(2)(G)(i)(II) of the Federal Deposit Insurance Act, 12 U.S.C. § 1821(d)(2)(G)(i)(II)." On September 25, 2008, the Office of Thrift Supervision closed WAMU and appointed the FDIC as Receiver (*see JP Morgan Chase Bank N.A. v Miodownik*, 91 AD3d 546 [1st Dept 2012], *lv to appeal dismissed* 10 NY3d 1017 [2012]). Under 12 USC § 1821(d)(2)(G)(i)(II), the FDIC was authorized to transfer any asset or liability of WAMU without any approval, assignment or consent with respect to any such transfer. On September 2, 2008, the bulk of WAMU's assets were transferred to JP Morgan pursuant to the P & A Agreement entered into between FDIC as Receiver, the FDIC in its corporate capacity, and JP Morgan (*see Dipaola v JP Morgan Chase Bank*, 2011 WL 3501756, *3, 2011 US Dist LEXIS 88753, *7 [ND Cal 2011]). It has been held by courts that the P & A Agreement evinces JP Morgan purchased all of WAMU's loans and loan commitments, and therefore has the right to foreclose on a defaulting borrower (*see JP Morgan Chase Bank N.A. v Miodownik*, 91 AD3d at 547). Thus, JP Morgan, by virtue of the P & A Agreement became the assignee of the subject mortgage and note on September 25, 2008 (*see JP Morgan Chase Bank, N.A. v Shapiro*, 104 AD3d 411, 412 [1st Dept 2013]; *JP Morgan Chase Bank N.A. v Miodownik*, 91 AD3d 546, 547), and no formal assignment of the mortgage loan to JP Morgan was necessary. The additional argument

by defendant Rojas that JP Morgan was not a bona fide encumbrancer for value is without merit.

JP Morgan then assigned the subject mortgage and underlying note to plaintiff pursuant to an assignment dated December 12, 2012. Defendant Rojas has failed to demonstrate the December 12, 2012 assignment was invalid in any way. Contrary to the argument of defendant Rojas, plaintiff had standing to commence this action (*see generally Wells Fargo Bank, N.A. v Marchione*, 69 AD3d 204 [2009]; *Katz v East-Ville Realty Co.*, 249 AD2d 243 [1998]; *Kluge v Fugazy*, 145 AD2d 537, 538 [1988]).

To the extent defendant Rojas claims that she made mortgage payments which were not properly applied to the mortgage debt, she did not assert a defense of tender or improper acceleration in her answer, and thus waived such defenses. Defendant Rojas, in any event, has failed to show that a triable issue of fact exists as to whether she was in default in payment of the amounts due under the subject mortgage as of September 1, 2012, or whether plaintiff improperly accelerated the mortgage debt. She offers no evidence that she tendered or timely paid the full amounts due under the mortgage as of September 1, 2012, and instead acknowledges that although she made a payment of $8,100 on December 16, 2012, she was still in arrears in the amount of $12,419.60 despite the payment. "A valid tender requires an actual proffer of all mortgage arrears" (*First Fed. Sav. Bank v Midura*, 264 AD2d 407, 407 [2d Dept 1999]). Under the loan documents plaintiff was entitled to accelerate the mortgage debt following the defaults without notice or demand to defendant Rojas. Plaintiff nevertheless provided defendant Rojas with notice dated January 31, 2013 of her default and of acceleration. Defendant Rojas makes no claim that she timely tendered the full amount demanded pursuant to such notice (*see First Fed. Sav. Bank v Midura*, 264 AD2d 407, 407-408).

Defendant Rojas claims that JP Morgan, as plaintiff's predecessor in interest, obtained property insurance for the subject premises and paid several premiums, notwithstanding that she had maintained property insurance for the property and provided proof of her payment of premiums to JP Morgan. Again, she did not raise such claim as a defense in her answer, and therefore waived it. Plaintiff, furthermore, did not predicate its claim of default under the mortgage based upon any failure by defendant Rojas to maintain adequate hazard insurance with respect to the property. The existence of a dispute regarding whether defendant Rojas maintained adequate property insurance does not preclude the granting of summary judgment against defendant Rojas (*see Crest/Good Mfg. Co., Inc. v Baumann*, 160 AD2d 831 [2d Dept 1990]). Any dispute as to the exact amount owed by the mortgagor to the

mortgagee may be resolved after a reference pursuant to RPAPL 1321 (*Id.*).

To the extent defendant Rojas asserts that the property is residential and plaintiff has failed to comply with CPLR 3408 and RPAPL 1304, CPLR 3408, as amended (L 2009, c 507, § 25, subd e), provides that the court hold a mandatory settlement conference in any residential foreclosure action involving a "home loan" as defined pursuant to RPAPL 1304, in which the defendant is a resident of the property subject to foreclosure. RPAPL 1304, as amended (L 2009, c 507, § 1-a) defines "home loan" to mean:

> "(5)(a) 'Home loan' means a loan, including an open-end credit plan, other than a reverse mortgage transaction, in which:
> (I) The borrower is a natural person;
> (ii) The debt is incurred by the borrower primarily for personal, family, or household purposes;
> (iii) The loan is secured by a mortgage or deed of trust on real estate improved by a one to four family dwelling, or a condominium unit, in either case, used or occupied, or intended to be used or occupied wholly or partly, as the home or residence of one or more persons and which is or will be occupied by the borrower as the borrower's principal dwelling; and
> (iv) The property is located in this state."

(L 2009, c 507, § 25, subd a).

The subject premises has six residential units, and defendant Rojas warranted that the mortgage loan "[was] not incurred primarily for personal, family or household purposes" (*see* the mortgage at ¶ 4.1[c]). The subject mortgage loan, therefore, does not constitute a home loan under RPAPL 1304. As a consequence, no settlement conference pursuant to CPLR 3408 is required in this action.

As first and second counterclaims, defendant Rojas asserts plaintiff's predecessor in interest violated the federal Truth in Lending Act (TILA), (15 USC §§ 1601 et seq.) and the TILA implementing regulations, (found in Federal Reserve Board Regulation Z [Regulation Z] at 12 CFR 226), 15 USC § 1639 (the "Home Ownership and Equity Protection Act" [HOEPA], an amendment to the "Truth in Lending Act" [TILA] [15 USC 1601 *et seq.*]), Fair Debt Collection Practices Act (15 USC § 1692 *et seq.*) (FDCPA), and General Business Law § 349. The TILA and HOEPA do not apply to credit transactions involving extensions of credit primarily for business, commercial or agricultural purposes (15 USC § 1603[1]),

and Regulation Z of the TILA does not apply to business, commercial, agricultural or organizational credit transactions (12 CFR 226.3[a]). Actions arising out of commercial debts are not covered by the protective provisions of the FDCPA (*see* 15 UCS § 1692a[5]; *Goldman v Cohen*, 445 F3d 152, 158 n 1 [2d Cir 2006]). The mortgage loan involved herein was for a commercial purpose and, thus, is not covered by the TILA, HOEPA, Regulation Z or FDCPA.

With respect to the claimed violation of General Business Law § 349, a party asserting a viable claim under that statute must plead that (1) the challenged conduct was consumer-oriented, (2) the conduct or statement was materially misleading, and (3) [he or she sustained] damages' (*Lum v New Century Mtge. Corp.*, 19 AD3d 558, 559 [2d Dept 2005]; *see Blue Cross & Blue Shield of N.J., Inc. v Philip Morris USA Inc.*, 3 NY3d 200, 205 [2004]; *Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]; *Gaidon v Guardian Life Ins. Am.*, 94 NY2d 330, 344 [1999])" (*Emigrant Mortg. Co., Inc. v Fitzpatrick*, 95 AD3d 1169 [2d Dept 2012]). In this instance, the conduct alleged by defendant Rojas does not have a "broad impact on consumers at large," and "is outside the ambit of [the] statute" (*Brooks v Key Trust Co. Nat. Assn.*, 26 AD3d 628 [3d Dept 2006]) and therefore, fails to state a cause of action (*see Golden Eagle Capital Corp. v Paramount Management Corp.*, 88 AD3d 646 [2d Dept 2011]). Furthermore, the second counterclaim based upon violation of General Business Law § 349 is barred by the expiration of the three-year statute of limitations (*see* CPLR 214[2]; *see Corsello v Verizon New York, Inc.*, 18 NY3d 777 [2012]).

To the extent the third counterclaim is based upon a violation of Banking Law Article 12-D, Article 12-D relates to the licensing of mortgage bankers, and defendant Rojas has failed to allege any facts to show it is applicable to plaintiff and the manner in which the article has been violated. In addition, to the extent defendant Rojas alleges a violation of Banking Law § 419, that statute was repealed in 1939 (L 1939, c 341, § 44, eff. June 30, 1939). That portion of the claim that plaintiff or its predecessor in interest misled defendant Rojas into believing it would forbear from prosecuting the action or enter into a modification of the subject mortgage loan, is without merit. The mortgage provides that the loan documents may not be amended or modified except by a writing executed by the party to be charged with the amendment or modification (*see* mortgage at ¶ 18.3). Defendant Rojas has made no allegation or offer of proof of such a writing. The remainder of the third counterclaim purports to assert "laches, waiver, unclean hands, accord and satisfaction, res judicata, statute of frauds, usury and collateral estoppel." These claims are conclusory and insufficient to establish any viable cause of action or defense.

The fourth counterclaim is based upon a claim by defendant Rojas that plaintiff violated the National Housing Act (12 USC § 1701x[c][5]) ("NHA") by failing to provide her with a notice advising of available counseling services. The NHA, however, does not create a private right of action, regardless of whether a defendant is in compliance with § 1701x(c)(5) (*see Coley v Accredited Home Lenders, Inc.*, 2011 WL 1193072, 2011 US Dist LEXIS 38294 [ED Arkansas 2011]). In addition, section 1701x of the NHA requires lenders to provide notice of home ownership counseling to certain qualifying low and moderate income homeowners. Because the subject loan is a commercial one, there was no requirement that defendant Rojas be notified of available counseling services. Nor has defendant Rojas offered any legal authority to support her claim that a failure by the lender to make notification of counseling availability should result in the penalty of estopping it from seeking foreclosure.

The fifth counterclaim is based upon the claim of defendant Rojas that plaintiff has charged or collected payments from her which are not authorized under the terms of the note and mortgage. The mortgage, however, provides that in the event of a default, the lender is entitled to collect from the borrower on demand all fees and expenses incurred in connection with the enforcement of the mortgage, "including but not limited to fees of attorneys, accountants, appraisers, environmental inspectors, consultants, expert costs and expenses in connection with ... (c) judicial or nonjudicial foreclosure..." (*see* mortgage ¶ 14). Again, to the degree that defendant Rojas seeks to challenge the amount due under the subject mortgage, she may do so in connection with the referee's or the court's calculation of the amount owed.

Under such circumstances, plaintiff has established entitlement to summary judgment as against defendant Rojas and dismissing the counterclaims, and defendant Rojas has failed to come forward with any evidence showing the existence of a triable issue of fact. That branch of the motion by plaintiff for summary judgment against defendant Nancy Rojas and dismissing the counterclaims asserted against it is granted.

That branch of the motion by plaintiff for leave to enter a default judgment against Asset Acceptance LLC, Citibank (South Dakota), NA, Portfolio Recovery Associates, LLC, New York City Environmental Control Board, and Olympian Fuel Oil Corp. is granted.

That branch of the motion by plaintiff for leave to appoint a referee is denied without prejudice to renewal based upon proper papers. Plaintiff has failed to demonstrate that defendants Allan

Pollock, Jenny Soto, Mohammad Islam, Basharat Mahmood, Jose Vasques and Elsa Rocha are in default in the action or have answered, admitting the right of plaintiff to foreclose their interests (*see* RPAPL 1321).

To the extent defendant Rojas seeks to vacate the October 16, 2013 order appointing a temporary Receiver, she did not make her application for this relief in a formal cross motion in accordance with CPLR 2215 (*see J.A. Valenti Elec. Co. v Power Line Constructors*, 123 AD2d 604 [2d Dept 1986]). Defendant Rojas, furthermore, failed to oppose the motion by the temporary Receiver to discharge and relieve himself as receiver, and cancel the receiver's bond and discharge the surety on the bond. Moreover, the subject mortgage includes a provision expressly authorizing, in an action to foreclose the mortgage based upon any event of default, the appointment of a receiver "without notice to Borrower and without regard to the sufficiency of the Property or any other security for the indebtedness secured hereby and, without the necessity of posting any bond or other security" (*see* mortgage at ¶ 5.3[a]). Plaintiff therefore was entitled to the appointment of a temporary receiver, "regardless of proving the necessity for the appointment" (*Naar v Litwak & Co.*, 260 AD2d 613, 614 [2d Dept 1999]; *see* Real Property Law § 254[10]; *see also Maspeth Fed. Sav. & Loan Assn. v McGown*, 77 AD3d 890, 891 [2d Dept 2010]). Although a court of equity may vacate an order appointing a receiver in its discretion and under appropriate circumstances (*see GECMC 2007-C1 Ditmars Lodging, LLC v Mohola, LLC*, 84 AD3d 1311 [2d Dept 2011]; *Naar v Litwak & Co.*, 260 AD2d at 614-615; *Clinton Capital Corp. v One Tiffany Place Developers*, 112 AD2d 911, 912 [2d Dept 1985]), defendant Rojas has failed to demonstrate circumstances warranting the discharge of the substitute temporary Receiver here (*see GECMC 2007-C1 Ditmars Lodging, LLC v Mohola*, 84 AD3d at 1132; *Maspeth Fed. Sav. & Loan Assn. v McGown*, 77 AD3d at 891; *Naar v Litwak & Co.*, 260 AD2d at 614-615). The original temporary Receiver indicated in his affidavit dated January 30, 2014 that defendant Rojas ignored his repeated requests for records and documents and had been wrongfully collecting rents. That the original temporary Receiver did not take certain actions regarding the collection of rents may be explained by virtue of such failure by defendant Rojas to cooperate with him. Selling the property is not within the receiver's powers or duties, and nothing prevents defendant Rojas from seeking out prospective purchasers of the property.

Dated: July 23, 2014

J.S.C.