

Mid-Island Mtge. Corp. v Gutierrez

2014 NY Slip Op 32916(U)

November 17, 2014

Supreme Court, Suffolk County

Docket Number: 12-19787

Judge: John Iliou

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 14 - SUFFOLK COUNTY

P R E S E N T :

Hon. JOHN ILIOU
Acting Justice of the Supreme Court

MOTION DATE 9-13-13
ADJ. DATE _____
Mot. Seq. # 001 - MG

-----X
MID-ISLAND MORTGAGE CORPORATION,

Plaintiff,

- against -

GONZALO F. GUTIERREZ, GEMINI ASSET
RECOVERIES, INC.,

“JOHN DOE #1” through “JOHN DOE #20,” the
last twenty names being fictitious and unknown to
the plaintiff, the persons or parties intended being
the tenants, occupants, persons or corporations, if
any having or claiming an interest in or lien upon
the premises described in the complaint,

Defendants.
-----X

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Upon the following papers numbered 1 to 21 read on this motion for summary judgment and an order of reference; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; ~~Notice of Cross Motion and supporting papers _____~~; Answering Affidavits and supporting papers 13 - 17; Replying Affidavits and supporting papers 18 - 21; ~~Other _____~~; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion (001) by plaintiff, Mid-Island Mortgage Corporation (Mid-Island) pursuant to CPLR 3212 for summary judgment on its complaint against defendant Gonzalo F. Gutierrez (Gutierrez), for leave to amend the caption of this action pursuant to CPLR 3025 (b) and, to appoint a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is granted; and it is further

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ORDERED that the caption is hereby amended by substituting Kondaur Capital Corporation in place of plaintiff Mid-Island and by striking therefrom defendants "John Doe #1" through "John Doe 20"; and it is further

ORDERED that plaintiff is directed to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court; and it is further

ORDERED that the caption of this action hereinafter appear as follows:

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF SUFFOLK

-----X
 KONDAUR CAPITAL CORPORATION

Plaintiff,

-against-

GONZALO F. GUTIERREZ, GEMINI ASSET
 RECOVERIES, INC.,

Defendants.

-----X

This is an action to foreclose a mortgage on property known as 80 North Road, Hampton Bays, New York. On June 30, 2008, defendant Gutierrez executed a fixed rate note in favor of Mid-Island agreeing to pay the sum of \$317,494.00 at the yearly rate of 7.000 percent. On the same date, defendant Gutierrez executed a first mortgage in the principal sum of \$317,492.00 on the subject property. The mortgage indicated Mid-Island to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of Mid-Island as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on July 22, 2008 in the Suffolk County Clerk's Office. Thereafter, defendant Gutierrez executed a consolidation, extension and modification agreement (CEMA) dated November 16, 2009 with Mid-Island in which the aforementioned note and mortgage were consolidated with a second note in the sum of \$7,675.31 and second mortgage. The consolidated note in the sum of \$321,100.00 and mortgages formed a consolidated lien on the subject premises. The second mortgage and consolidated mortgage were recorded on January 12, 2010 in the Suffolk County Clerk's Office. Thereafter, on May 25, 2012, the aforementioned notes and mortgages were transferred by assignment of mortgage from MERS, as nominee for Mid-Island to plaintiff Mid-Island. The assignment of mortgage was recorded on June 22, 2012 with the Suffolk County Clerk's Office.

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Notice pursuant to RPAPL 1304 dated March 30, 2012 was sent to defendant Gutierrez stating that he had defaulted on his mortgage loan and that the amount past due was \$11,088.49. As a result of defendant's continuing default, plaintiff commenced this foreclosure action on June 29, 2012. In its complaint, plaintiff alleges in pertinent part that defendant breached his obligations under the terms and conditions of the note and mortgage by failing to make monthly payments commencing with the December 1, 2011 payment and subsequent payments thereafter. Defendant Gutierrez interposed a verified answer with six affirmative defenses.

The Court's computerized records indicate that a foreclosure settlement conference was held on May 17, 2013, at which time this matter was referred as an IAS case since a resolution or settlement had not been achieved. Thus, there has been compliance with CPLR 3408 and no further settlement conference is required.

Plaintiff now moves for summary judgment on its complaint contending that defendant Gutierrez breached his obligations under the terms of the loan agreement and mortgage by failing to tender the monthly payment due on December 1, 2011. In support of its motion, plaintiff submits among other things: the sworn affidavit of William Suh, foreclosure specialist of substituted plaintiff, Kondaur Capital Corporation; the affirmation of Michael P. DeRosa, Esq. in support of the motion; the pleadings; the notes, mortgages, CEMA and assignments of mortgage; notices pursuant to RPAPL 1320, 1304 and 1303; and, affidavits of service for the summons and complaint. Defendant Gutierrez through his attorney has submitted opposition to the summary judgment motion.

"[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 AD2d 482, 764 NYS2d 635 [2d Dept 2003]; see *Argent Mtge. Co., LLC v Mentosana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]; *Wells Fargo Bank, N.A. v Webster*, 61 AD3d 856, 877 NYS2d 200 [2d Dept 2009]). "The burden then 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'" (*U.S. Bank Natl. Assn. TR U/S 6/01/98 [Home Equity Loan Trust 1998-2] v Alvarez*, 49 AD3d 711, 711, 854 NYS2d 171 [2d Dept 2008], quoting *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 664 NYS2d 345 [2d Dept 1997], *lv to appeal dismissed* 91 NY2d 1003, 676 NYS2d 129 [1998]; see also *Emigrant Mtge. Co., Inc. v Beckerman*, 105 AD3d 895, 895, 964 NYS2d 548 [2d Dept 2013]).

Here, plaintiff established its prima facie entitlement to summary judgment by providing evidence of the assignments, the mortgages, the notes, the CEMA and, the default of defendant Gutierrez, and by demonstrating that his affirmative defenses are without merit (see *Jessabell Realty Corp. v Gonzales*, 117 AD3d 908, 985 NYS2d 897 [2d Dept 2014]; *Bank of New York Mellon Trust Co. v McCall*, 116 AD3d 993, 985 NYS2d 255 [2d Dept 2014]; *North Bright Capital, LLC v 705 Flatbush Realty, LLC*, 66 AD3d 977, 889 NYS2d 596 [2d Dept 2009]; *Countrywide Home Loans, Inc. v Delphonse*, 64 AD3d 624, 883 NYS2d 135 [2d Dept 2009]). William Suh attests that defendant Gutierrez defaulted on his loan by failing to make the monthly installment due on December 1, 2011; that the default has not been cured; and, that notice pursuant to RPAPL 1304 was mailed to defendant by regular and certified mail prior to the commencement of the action.

The burden then shifted to defendant Gutierrez to lay bare his proof in opposition to plaintiff's prima facie showing (*see Jessabell Realty Corp. v Gonzales, supra*). It was thus incumbent upon him to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's prima facie showing or in support of the affirmative defenses asserted in his answer or otherwise available to him (*see Flagstar Bank v Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Grogg Assocs. v South Rd. Assocs.*, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; *Wells Fargo Bank v Karla*, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]). Here, the only pleaded defenses raised by the answering defendant in opposition to this motion was the assertion that plaintiff violated the Real Estate Settlement Procedures Act (RESPA) and the Truth in Lending Act (TILA).

As to the fifth affirmative defense, defendant asserts that plaintiff violated RESPA by not disclosing the costs associated with the real estate closing three days prior to the consummation of the instant mortgage. RESPA requires lenders who offer "federally related mortgage loans" (*see* 12 USC § 2605), to disclose the costs associated with real estate transactions which involve federally-related mortgage loans (12 USC § 2603; 24 CFR 3500.7). Here, not only has defendant Gutierrez failed to demonstrate that his mortgage loan, which was subsequently modified by a CEMA, a consolidated mortgage and consolidated note, is subject to RESPA (*see* 24 CFR § 3500[b][6]), a RESPA violation does not adversely affect the validity or enforceability of a federally-related mortgage loan (*see* 12 USC § 2615; *see also G.E. Capital Mortgage Services, Inc. v Baker*, No. CV 980167089S, 1999 WL 511156, 1999 Conn Super LEXIS 1791 [Conn Super Ct 1999]; *Security Pacific Natl. Bank v Robertson*, No. CV 920124622S, 1997 WL 561235, 1997 Conn Super LEXIS 2306, [Conn Super Ct 1997]; *cf. Bibler v Arcata Investments 2, LLC*, No. 263024, 2005 WL 3304127 [Mich Ct App 2005]). Thus, a disclosure violation of RESPA does not constitute a valid defense to mortgage foreclosure (*see Webster Bank v Linsley*, 2001 WL 1042581 [Conn Super Ct 2001] *see also generally 1 Bergman, Mortgage Foreclosures* §5).

As to the sixth affirmative defense, defendant alleges that plaintiff violated TILA by failing to verify defendant's ability to repay his mortgage. Here, defendant's unsubstantiated, self-serving and conclusory assertion that "the loan application at closing, unknown to me at the time, had stated my monthly income at \$6,608.00 in Gross Monthly income " and "[a]t no time, in the year 2007 or 2008 did I ever make this amount..." does not raise an issue of fact and does not require plaintiff to respond to an alleged defense which is based on such allegations (*see Charter One Bank, FSB v Leone*, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007]; *Rosen Auto Leasing, Inc. v Jacobs*, 9 AD3d 798, 780 NYS2d 438 [3d Dept 2004]). While defendant has supplied an executed copy of the subject loan application reflecting gross monthly income of \$6,608.00 with his opposition papers, defendant has failed to demonstrate what his income was in 2007 or 2008. As such, defendant has not established a defense which could raise a question of fact.

Thus, a review of the opposing papers submitted by the answering defendant reveals that the same were insufficient to raise any genuine question of fact requiring a trial on the merits of the plaintiff's claims for foreclosure and sale and insufficient to demonstrate any bona fide defense to the plaintiff's claim for a judgment of foreclosure and sale (*see Cochran Inv. Co., Inc. v Jackson*, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007]). Defendant's failure to raise and/or assert all of his pleaded affirmative defenses in opposition to the plaintiff's motion for summary judgment warrants the dismissal of the abandoned affirmative defenses (*see Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 369 NYS2d [1975]; *Madeline*

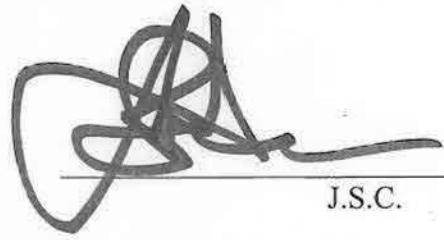
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D'Anthony Enterprises, Inc. v Sokolowsky, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]). The court notes that defendant Gutierrez does not deny having received the loan proceeds or having defaulted on his mortgage loan payments in his affidavits (see *Citibank, N.A. v Souto Geffen Co.*, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]).

Based on the foregoing, plaintiff's motion for summary judgment is granted as against defendant Gutierrez, and the application for an order of reference appointing a referee to compute the amount due under the note and mortgage is granted (see *Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *Bank of East Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 732 [2d Dept 1994]).

Plaintiff is directed to forthwith submit a proposed order appointing a referee to compute pursuant to RPAPL 1321 on notice.

Dated: 11-17-14



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION