

Bank of America, N.A. v Barton
2015 NY Slip Op 30353(U)
March 4, 2015
Supreme Court, Suffolk County
Docket Number: 10965-12
Judge: John H. Rouse
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COPY

SUPREME COURT - STATE OF NEW YORK
IAS PART 12 - SUFFOLK COUNTY

PRESENT: Hon. JOHN H. ROUSE
 Acting Justice of the Supreme Court

Bank of America, N.A. successor by merger to BAC
 Home Loans Servicing, LP f/k/a Countrywide
 Home Loans Servicing LP,

Plaintiff,

-against-

Rebecca Barton, Raymond Barton, Mortgage
 Electronic Registration Systems, Inc. as nominee
 for Quicken Loans, Inc. Mortgage Electronic
 Registration Systems, Inc. As nominee for
 Countrywide Home Loans, Inc., Town of Brookhaven,
 Hann Financial Service Corp., Keyspan Gas East
 Corporation d/b/a National Grid, Chase Manhattan
 Bank USA NA, Tony Sann's Music Store d/b/a
 Sound Beach Music, Aaron Woskoff, Spacely LLC,
 Long Island Lighting Company, d/b/a LIPA, and
 "JOHN DOE #1" through "JOHN DOE #10",
 the last ten names being fictitious and unknown to the
 plaintiff, the person or parties, if any, having or
 claiming an interest in or lien upon the Mortgage
 premises described in the Complaint,

Defendants.

x **MOTION DATE:** 9-19-13 (001)
 11-6-13 (002)
ADJ. DATE:
 Mot. Seq. # 001 - MG
 002 - MD

**FRENKEL, LAMBERT, WEISS,
 WEISMAN & GORDON LLP**
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Upon the following papers numbered 1 to 49 read on this motion for summary judgment and order of reference, and cross motion to dismiss, for leave to amend answer, and an extension of time to oppose the motion; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19; Notice of Cross Motion and supporting papers 20 - 35; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers 36 - 49; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (001) by plaintiff Bank of America, N.A. and the cross motion (002) by

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defendants Rebecca Barton and Raymond Barton, are consolidated for purposes of this determination; and it is further

ORDERED that this motion by plaintiff pursuant to CPLR 3212 for an order granting summary judgment on its complaint against defendants Rebecca Barton and Raymond Barton, fixing the defaults as against the non-answering and non-appearing defendants, to amend the caption of this action pursuant to CPLR 3025 (b) and, for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is granted; and it is further

ORDERED that the cross motion (002) by the defendants Rebecca Barton and Raymond Barton for an order dismissing plaintiff's complaint pursuant to CPLR 3215 (c), amending the answer pursuant to CPLR 3025 (b), and to extend the defendants' time to respond to plaintiff's motion for summary judgment is denied; and it is further

ORDERED that the caption is hereby amended by deleting "John Doe #1" through "John Doe #10;" 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

Bank of America, N.A. successor by merger to BAC
Home Loans Servicing, LP f/k/a Countrywide
Home Loans Servicing LP,

Plaintiff,

-against-

Rebecca Barton, Raymond Barton, Mortgage
Electronic Registration Systems, Inc. as nominee
for Quicken Loans, Inc. Mortgage Electronic
Registration Systems, Inc. As nominee for
Countrywide Home Loans, Inc., Town of Brookhaven,
Hann Financial Service Corp., Keyspan Gas East
Corporation d/b/a National Grid, Chase Manhattan
Bank USA NA, Tony Sann's Music Store d/b/a
Sound Beach Music, Aaron Woskoff, Spacely LLC,
Long Island Lighting Company, d/b/a LIPA,

Defendants. x

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This is an action to foreclose a mortgage on premises known as 9 Fowler Lane, Mount Sinai, New York. On September 28, 2001, defendant Rebecca Barton executed a note in favor of Quicken Loans, Inc. ("Quicken"), agreeing to pay the sum of \$243,200.00 at the rate of 7.25 percent. The note was transferred without recourse to Countrywide Home Loans, Inc. ("Countrywide"). The note was thereafter indorsed in blank without recourse by Countrywide and executed by Estelle Pettway, Assistant Secretary of Countrywide.

Also on September 28, 2001, defendants Rebecca Barton and Raymond Barton executed a first mortgage in the principal sum of \$243,200.00 on the subject property. The mortgage indicated Quicken to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of Quicken as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on October 25, 2001 in the Suffolk County Clerk's Office. Thereafter, the mortgage was transferred by assignment of mortgage dated April 28, 2008 from MERS to Countrywide Home Loans, Inc. The assignment of mortgage was recorded on June 23, 2008 with the Suffolk County Clerk's Office. The record reveals that on June 30, 2008, Countrywide Home Loans, Inc., as a subsidiary of Countrywide Financial Corporation merged with and into Red Oak Merger Corporation, a subsidiary of Bank of America Corporation ("BAC"), and that as a result of the merger, BAC acquired all of the existing subsidiaries of the merged Countrywide Financial Corporation, including Countrywide Home Loans, Inc. A second assignment occurred on November 7, 2008 from Countrywide Home Loans, Inc. to Countrywide Home Loans Servicing, LP, and recorded on September 8, 2009. A corrected assignment of mortgage was executed by Nicole Jones, Assistant Vice President of BAC Home Loans Servicing, LP as attorney-in-fact for Countrywide Home Loans, Inc. on April 15, 2011 to correct the name of the assignee in the recent assignment to BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing, LP. On July 14, 2009, defendant Rebecca Barton executed, acknowledged and delivered a loan modification agreement in favor of BAC Home Loans Servicing, LP, a subsidiary of plaintiff Bank of America, N.A., agreeing to pay a new principal balance of \$315,365.82 at a fixed interest rate.

Plaintiff sent a notice of default dated November 9, 2010 to defendants stating that they had defaulted on their mortgage loan. As a result of defendants' continuing default, plaintiff commenced this foreclosure action on April 4, 2012. In its complaint, plaintiff alleges in pertinent part that defendants Rebecca Barton and Raymond Barton breached their obligations under the terms of the note and mortgage by failing to make their monthly payments commencing with the November 1, 2009 payment. Defendants Rebecca Barton and Raymond Barton interposed an answer asserting general denials, and two affirmative defenses.

The Court's computerized records indicate that foreclosure settlement conferences were held on January 24, 2013, April 2, 2013, and June 18, 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 conferences are required.

Plaintiff now moves for summary judgment on its complaint contending that defendants breached their obligations under the terms of the loan agreement and mortgage by failing to tender monthly payments commencing with their November 1, 2009 payment. In support of its motion, plaintiff submits among other things: the sworn affidavit of Robert Andrew Krenitsky, officer of Bank of America, N.A.; the pleadings; the note, mortgage and assignments; notices pursuant to RPAPL §§ 1320 and 1304; affidavits of service for the

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summons and complaint; an affidavit of service for the instant summary judgment motion upon defendant's counsel; and a proposed order appointing a referee to compute.

Defendants Rebecca Barton and Raymond Barton cross-move for an order dismissing the complaint pursuant to CPLR 3215 (c), amend the answer pursuant to CPLR 3025 to assert an additional fourteen affirmative defenses and three counterclaims, and denying plaintiff's motion.

Initially, the branch of the defendants' cross motion seeking to dismiss the action pursuant to CPLR 3215 (c) is denied. Although the defendants have defaulted in paying their mortgage loan, they have not defaulted in answering the complaint, and it cannot be said that the plaintiff abandoned the action.

As to plaintiff's summary judgment application, "[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" (see *Republic Natl. Bank of N.Y. v O'Kane*, 308 AD2d 482, 482, 764 NYS2d 635 [2d Dept 2003]; *Village Bank v Wild Oaks Holding*, 196 AD2d 812, 601 NYS2d 940 [2d Dept 1993]). Once a plaintiff has made this showing, the burden then shifts to defendant to produce evidentiary proof in admissible form sufficient to require a trial on their defenses (see *Aames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]; *Household Fin. Realty Corp. v Winn*, 19 AD3d 545, 796 NYS2d 533 [2d Dept 2005]).

Here, plaintiff has established its entitlement to summary judgment against the answering defendants as such papers included a copy of the mortgage, copies of the assignments of mortgage, the unpaid note together with due evidence of defendants' default in payment under the terms of the loan documents (see CPLR 3212; RPAPL §1321; *Neighborhood Hous. Servs. of N.Y. City, Inc. v Hawkins*, 97 AD3d 554, 947 NYS2d 321 [2d Dept 2012]; *Baron Assoc., LLC v Garcia Group Enters.*, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]). Mr. Krenitsky avers in his affidavit that plaintiff, directly or through an agent, has had possession of the note, which has been duly endorsed. Therefore, the plaintiff is the assignee of the secured instrument for the referenced loan.

It was thus incumbent upon the answering defendants 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 their answer or otherwise available to them (see *Flagstar Bank v Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Grogg v South Road Assocs., L.P.*, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]). In opposition and in support of their cross motion, the defendants submit, among other things, the personal affidavit of Raymond Barton, and a proposed amended answer containing sixteen affirmative defenses, and three counterclaims. Defendants contend that the plaintiff did not have possession of the note and mortgage at the commencement of the action, and therefore has no standing. The defendants also contend that the corrective assignment was incorrectly recorded and that the 2008 assignment of mortgage from Quicken to Countrywide is a nullity. Defendant Raymond Barton avers in his affidavit that when he applied for a mortgage modification, he understood the new payment to be \$2150 per month with a reduction in the interest rate to 2%. He began receiving mortgage invoices for \$2496 per month, which included the arrears and escrow advances. These additional payments resulted in no net savings in the payments. Defendant found that he could not afford to maintain that payment, and a default resulted. The defendants believe that the mortgage loan is owned by Fannie Mae and not by the plaintiff.

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In opposition to the cross motion, the plaintiff submits the affidavit of Dawn M. Romashko, an officer of the plaintiff. She states that the plaintiff received the original note for the subject loan on or about October 22, 2001. In addition, the plaintiff received the original recorded mortgage for the subject loan on or about February 2, 2002. Upon receipt by the plaintiff, the note and mortgage were placed in a secure file room for safe keeping. In addition, the plaintiff maintained continuous physical possession of the note and mortgage until they were shipped by request to the plaintiff's attorney.

It is well established that leave to amend a pleading shall be freely granted absent prejudice or surprise resulting from the delay (CPLR 3025[b]; *Thomas Crimmins Contracting Co. v New York*, 74 NY2d 166, 544 NYS2d 580 [1989]; *McCaskey, Davies & Associates, Inc. v New York City Health & Hospitals Corp.*, 59 NY2d 755, 463 NYS2d 434 [1983]). The court, however, has consistently held that in order to conserve judicial resources, an examination of the proposed affirmative defense is warranted (*Non-Linear Trading Co. v Braddis Assocs.*, 243 AD2d 107, 675 NYS2d 5 [1998]; *East Asiatic Co. v Corash*, 34 AD2d 432, 312 NYS2d 311 [1970]), and leave to amend will be denied where the proposed pleading is palpably insufficient as a matter of law (*Bankers Trust Co. v Cusumano*, 177 AD2d 450, 576 NYS2d 546 [1991], *lv dismissed* 81 NY2d 1067 [1993]); *Bencivenga & Co., CPAs, P. C. v Phyfe*, 210 AD2d 22, 619 NYS2d 33 [1994]).

The court finds that the defendants' proposed amended answer is palpably insufficient. The defendants' assertion that the plaintiff lacks standing to sue is refuted by the record. Where the plaintiff is the assignee of the mortgage and underlying note at the time the foreclosure action was commenced, the plaintiff has standing to maintain the action (*Countrywide Home Loans, Inc. v Gress*, 68 AD3d 709, 888 NYS2d 914 [2d Dept 2009]; quoting *Fannie Mae v Youkelson*, 303 AD2d 546, 755 NYS2d 730 [2d Dept 2003]; *First Trust National Assn. v Meisels*, 234 AD2d 414, 651 NYS2d 121 [2d Dept 1996]). Holder status is established where the plaintiff is the special endorsee of the note or takes possession of a mortgage note that contains an endorsement in blank on the face thereof as the mortgage follows as incident thereto (see UCC § 3-202; § 3-204; § 9-203[g]). Here, plaintiff established in the affidavit of Ms. Romashko that it took possession of the note by physical delivery prior to the commencement of the action (see *Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674, 838 NYS2d 622 [2d Dept 2007]).

The remaining arguments by the defendants fail to raise a triable issue of fact concerning any bona fide defense to foreclosure in opposition to the motion for summary judgment (see *People's United Bank v Hallock Landing Assoc., LLC*, 114 AD3d 835, 980 NYS2d 797 [2d Dept 2014]); *Bank of Smithtown v 219 Sagg Main, LLC*, 107 AD3d 654, 968 NYS2d 95 [2d Dept 2014]). Notably, defendants do not deny that they defaulted on the mortgage payments. In addition, the allegations in the counterclaims are palpably insufficient (see *805 Third Ave. Co. v M.W. Realty Associates*, 58 NY2d 447, 451, 461 NYS2d 778 [1983]; *Precision Mech., Inc. v Dormitory Auth.*, 5 AD3d 653, 654, 774 NYS2d 734 [2d Dept 2004]). The branch of the cross motion seeking an extension of time to respond to the plaintiff's motion is denied.

Accordingly, based on the foregoing, plaintiff's motion for summary judgment is granted against defendants Rebecca Barton and Raymond Barton, whose answer is dismissed. In addition, plaintiff's request for an order fixing the default of the non-appearing, non-answering defendants and an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is granted (see *Green Tree Servicing, LLC v Cary*, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]; *Bank of East Asia v Smith*,

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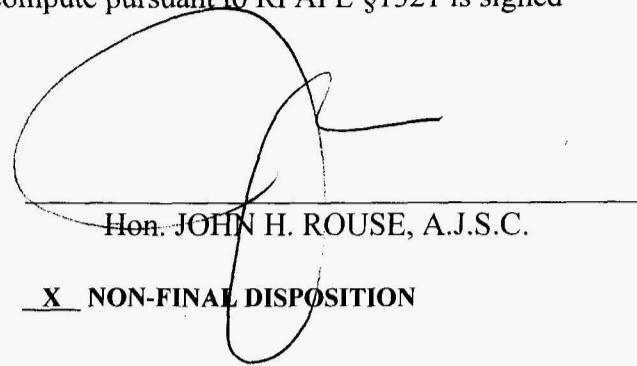
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201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]). Defendants' cross motion is denied in its entirety.

The proposed order appointing a referee to compute pursuant to RPAPL §1321 is signed simultaneously herewith as modified by the court.

Dated: March 4, 2015



Hon. JOHN H. ROUSE, A.J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION