

CitiMortgage, Inc. v Baron
2016 NY Slip Op 31759(U)
September 21, 2016
Supreme Court, Kings County
Docket Number: 500393/2014
Judge: Lara J. Genovesi
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At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 21st day of September 2016.

P R E S E N T:

HON. LARA J. GENOVESI,
J.S.C.

-----X
CITIMORTGAGE, INC,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 500393/2014

AHILDA D. BARON; POWAN K. SINGH; NEW YORK CITY PARKING VIOLATIONS BUREAU; JACOB MOVTADY PROFIT SHARING PLAN; HOME HEATING OIL CORP; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; LESLIE SINGH; John Doe #1" to "John Doe #10" inclusive the names of the ten last name Defendants being fictitious, real names unknown to the Plaintiff, the parties intended being persons or corporations having an interest in, or tenants or persons in possession of, portions of the mortgaged premises described in the complaint,

Defendants.

-----X
Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed _____

Papers Numbered

1A

Opposing Affidavits (Affirmations) _____

2

Reply Affidavits (Affirmations) _____

3

Other Papers: Memorandum of Law in Support _____

1B

Introduction

Plaintiff CitiMortgage, Inc., moves by amended notice of motion, sequence number one, (1) pursuant to CPLR § 3212 for an order granting summary judgment and striking the answer of defendant Leslie Singh; (2) pursuant to CPLR § 3215 for an order granting default judgment against all non-appearing defendants; (3) pursuant to RPAPL § 1321 for an order appointing a referee to compute the amount claimed due to CitiMortgage; (4) pursuant to CPLR § 3025 for an order amending the caption of the action; and (5) for such other and further relief as the court deems just and proper. Defendant Leslie Singh opposes this application.

Background and Procedural History

The Note and Mortgage

On December 22, 1998, defendant Ahila Baron executed a promissory note in the principal amount of \$155,600.00, and a mortgage, naming Island Mortgage Network Inc. as both lender and mortgagee, respectively. The mortgage was duly recorded in the City Registrar's Offices on April 5, 1999, (Reel 4438, Page 04302007) and covers the premises known and located at 1062 Liberty Avenue in Brooklyn, New York (Block 4198, Lot 13). Defendant defaulted in making the monthly payment on April 1, 2012.

Assignments, Transfers and Judgments

The mortgage was assigned by Island Mortgage Network, Inc. to Source One Mortgage Services Corporation by Assignment of Security Instrument dated December 22, 1998, which was recorded in the office of the City Register of Kings County on April

5, 1999 (Liber 4438, Page 439). The mortgage was again assigned by White Mountains Services Corporation FKA Source One Mortgage Services Corporation (FKS Firemens Fund Mortgage Corporation FKA Manufacturers Hanover Mortgage Corporation FKA Citizens Mortgage Corporation to Mortgage Electronic Registration Systems, Inc. (MERS) by Assignment of Mortgage dated March 23, 2000, which was recorded on June 20, 2000 (Liber 4900, Page 730). The mortgage was then assigned by MERS to CitiMortgage, Inc., by Assignment of Mortgage dated March 26, 2012, which was recorded April 11, 2012, CFRN 2012000143013 (*see* Affidavit of Heather Minear, Vice President of Document Control).

In the interim, defendant Ahila Baron transferred a 99% interest in the property to defendant Powan Singh by virtue of a deed dated August 19, 2008, recorded on September 10, 2008, CRFN 2009000359955 (*see* Notice of Motion, Exhibit H). Thereafter, defendant Leslie Singh obtained a judgment against Powan Singh, dated September 21, 2012, in the amount of \$231,125.00. The judgment is based “upon the February 01, 2008 written guaranty by Defendant of the payment of a \$200,000 Mortgage Note” (*see* Notice of Motion, Exhibit I, Judgment, Supreme Court, County of Queens, Index No.: 1812/11). Plaintiff states in reply that the judgment was filed on November 21, 2012.

The Foreclosure Action

CitiMortgage Inc., sent the borrower a ninety (90) day pre-foreclosure notice in full compliance with RPAPL § 1304, by certified mail and first class mail on April 26,

2013 to their last known address and to the address of the premises (*see* Minear Affidavit). CitiMortgage, Inc. commenced this foreclosure action by electronically filing a summons with notice and complaint on January 17, 2014. The summons and complaint were served with a notice in compliance with RPAPL § 1303 (*see* Notice of Motion, Exhibit E). The summons contained language in compliance with RPAPL § 1320. According to the complaint, plaintiff complied with the New York State Banking Law filing requirements of RPAPL § 1306 (*see* Notice of Motion, Exhibit D). Plaintiff efiled a Certificate of Merit pursuant to CPLR § 3012-b dated January 16, 2014. The Certificate of Merit was served on defendants with the summons and complaint (*see* Notice of Motion, Exhibit E).

Defendant Leslie Singh, after service of the summons and complaint, served and filed an answer, by counsel. Singh's answer alleges the following, in its entirety:

- 1) As to Paragraph "20" of the Complaint: Admits that "the premises are... subject to... existing prior...liens."
- 2) As to Paragraph "21" of the Complaint: Denies that Defendant Powan K. Singh "has an ownership interest in the premises" that "is subordinate to the lien of Plaintiffs purchase money mortgage".
- 3) As to Paragraph "26" of the Complaint: Denies that his interest is confined to the judgment described; and denies further that his interest "is subject and subordinate to the lien of Plaintiff's mortgage."

WHEREFORE, Defendant Leslie Singh demands a Judgment that maintains the priority of his lien vis-a-vis the lien of Plaintiff's mortgage [*sic*].

(*see*, Notice of Motion, Exhibit F).

A request for judicial intervention was filed. The matter was referred to the Settlement Conference Part (SCP) for a mandatory CPLR 3408 settlement conference. The case was released from the SCP on August 6, 2014.

Discussion

Amend the Caption

Plaintiff seeks to amend the caption by (1) substituting Rani Beauty Salon and Spa as “John Doe #1”; (2) substituting Andrea Cobbett as “John Doe #2”; and (3) by striking “John Doe # 3” through “John Doe # 10” as party defendants. There is no opposition to this application. The plaintiff’s application to amend the caption is granted (*see U.S. Bank Nat. Ass’n v. Norgriff*, 131 A.D.3d 527, 15 N.Y.S.3d 803 [2 Dept., 2015]); *see also HSBC Bank USA, N.A. v. Alexander*, 124 A.D.3d 8384 N.Y.S.3d 47 [2 Dept., 2015]).

Summary Judgment

The proponent for the summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact (*see Gammons v. City of New York*, 24 N.Y.3d 562, 25 N.E.3d 958 [2014], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 501 N.E.2d 572 [1986]). Once a moving party has made a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Hoover v. New Holland N. Am., Inc.*, 23 N.Y.3d 41, 11 N.E.3d 693 [2014]; *see also Zuckerman v. City of New York*, 49 N.Y.2d

557, 404 N.E.2d 718 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Chiara v. Town of New Castle*, 126 A.D.3d 111, 2 N.Y.S.3d 132 [2 Dept., 2015], citing *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 965 N.E.2d 240 [2012]).

“In order to establish prima facie entitlement to judgment as a matter of law in a foreclosure action, a plaintiff must submit the mortgage and unpaid note, along with evidence of the default” (*Zarabi v. Movahedian*, 136 A.D.3d 895, 26 N.Y.S.3d 153 [2 Dept., 2016]; *see Bank of New York Mellon v. Aquino*, 131 A.D.3d 1186, 16 N.Y.S.3d 770 [2 Dept., 2015], citing *Washington Mut. Bank v. Schenk*, 112 A.D.3d 615, 975 N.Y.S.2d 902 [2 Dept., 2013]). “A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that, when the action was commenced, it was either the holder of, or the assignee of, the underlying note” (*Wells Fargo Bank, N.A. v. Joseph*, 137 A.D.3d 896, 26 N.Y.S.3d 583 [2 Dept., 2016]; *see Fed. Nat. Mortgage Ass'n v. Yakaputz II, Inc.*, 141 A.D.3d 506, 35 N.Y.S.3d 236 [2 Dept., 2016]; *see also Wells Fargo Bank, N.A. v. Rooney*, 132 A.D.3d 980, 19 N.Y.S.3d 543 [2 Dept., 2015]).

““Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident”” (*Wells Fargo Bank, N.A. v. Joseph*, 137 A.D.3d 896, *supra*, quoting *U.S. Bank N.A. v. Collymore*, 68 A.D.3d 752, 890 N.Y.S.2d 578 [2 Dept., 2009]; *see Fed. Nat. Mortgage Ass'n v. Yakaputz II, Inc.*, 141 A.D.3d 506, *supra*).

In the instant case, plaintiff met their prima facie burden and established entitlement to summary judgment as a matter of law. Plaintiff provided the affidavit of Heather Minear, Vice President of Document Control at CitiMortgage, Inc.¹ Minear stated that CitiMortgage, Inc. was the assignee of the underlying note at the time the action was commenced. The note was assigned from MERS to CitiMortgage, Inc. pursuant to the assignment dated March 26, 2012, and filed in the City Register of Kings County on April 11, 2012, CFRN 2012000143013. Minear states that the note was delivered to plaintiff on June 2, 2000, which is prior to the commencement of this action. The summons and complaint was filed on January 17, 2014.

In opposition, defendant Leslie Singh failed to raise a triable issue of fact. Defendant Leslie Singh interposed a three-paragraph answer which addresses only the priority of the 2012 judgment as against defendant Powan Singh. The case law in the Appellate Division, Second Department is clear that the affirmative defense of standing is waived if not raised in the answer (*see Bank of New York Trust Co. v. Chiejina*, 142 A.D.3d 570, 36 N.Y.S.3d 512 [2 Dept., 2016]; *US Bank, N.A. v. Primiano*, 140 A.D.3d 857, 32 N.Y.S.3d 643 [2 Dept., 2016]).

¹ Although Minear's affidavit, which was completed in Boone County, Kentucky, does not contain the language "sworn to before me" above the notary stamp, Minear signed the document as "affiant" and the document begins with the phrase "Heather Minear, duly sworn deposes and says". The court's acceptance of this affidavit in spite of the omission of oath or swearing language in the jurat does not prejudice the defendant (*see Sirico v. F.G.G. Productions, Inc.*, 71 A.D.3d 429, 896 N.Y.S.2d 61 [1 Dept., 2010]). The affidavit contains the stamp of a notary public who, "in the absence of a showing to the contrary, is presumed to have acted within his or her jurisdiction and to have carried out the duties required by law" (*Bd. of Managers of 34-44 82nd St. Condo. v. Roman*, 116 A.D.3d 817, 983 N.Y.S.2d 733 [2 Dept., 2014], citing *Feinman v. Mennan Oil Co.*, 248 A.D.2d at 504, 669 N.Y.S.2d 892 [2 Dept., 1998]; *see Furtow v. Jenstro Enterprises, Inc.*, 75 A.D.3d 494, 903 N.Y.S.2d 754 [2 Dept., 2010]).

Furthermore, defendant Leslie Singh, by counsel, submitted an affirmation in opposition to plaintiff's motion wherein he contests the priority of his judgment.² In this affirmation, defendant Leslie Singh contends that the 2008 quitclaim deed and the 2012 judgment render his interest in the property senior to plaintiff's interest. Defendant maintains that the "issue is when Plaintiff acquired its rights". (Affirmation in Opposition at ¶ 6). "My opposition is based on the fact that if Plaintiff's rights as an Assignee and as a Plaintiff can be downgraded, then Powan K. Singh's rights as a lienor, based on his August 18, 2008, Deed will, correspondingly, be upgraded" (Affirmation in Opposition at ¶ 8). "Powan K Singh's lien has priority over Plaintiff's lien, and because it does, my lien has priority" (Affirmation in Opposition at ¶ 11). Defendant's arguments in opposition are conclusory. Singh provided no evidence and cited no legal authority to support this proposition.

The 2008 quitclaim deed, wherein Powan Singh transferred a 99% interest in the property to Leslie Singh, does not alter the defendant's obligation to repay the mortgage. Furthermore, defendant Leslie Singh's judgment "upon the written guaranty by Defendant of the payment of a \$200,000 Mortgage Note" against Powan Singh, dated September 21, 2012, is not senior to the mortgage obligation. Pursuant to Real Property Law § 291, plaintiff has a senior interest in the property, as their interest was recorded

² Defendant Powan Singh appeared, self-represented, at motion appearances on October 15, 2015, and October 29, 2015. Defendant did not interpose an answer in the action. The matter was adjourned twice to afford defendant the opportunity to retain counsel. On December 10, 2015, the date of oral argument, defendant appeared with new counsel. However, counsel represented to this Court that he was not officially retained, as no retainer agreement was signed. No further adjournments were requested.

first in time. The law clearly states that “an assignee stands in the shoes of the assignor (*Weiss v. Markel*, 110 A.D.3d 869, 973 N.Y.S.2d 318 [2 Dept., 2013], citing *Mortgage Elec. Registration Sys., Inc. v. Rambaran*, 97 A.D.3d 802, 949 N.Y.S.2d 694 [2 Dept., 2012])). The note and mortgage were executed in 1998, assigned to plaintiff on March 26, 2012, and recorded on April 11, 2012; all prior to the date of defendant’s judgment, September 21, 2012. Based on the foregoing, defendant failed to raise a triable issue of fact.

Order of Reference

RPAPL 1321 (1) provides, in pertinent part, that:

“If the defendant fails to answer within the time allowed or the right of the plaintiff is admitted by the answer, upon motion of the plaintiff, the court shall ascertain and determine the amount due, or direct a referee to compute the amount due to the plaintiff and to such of the defendants as are prior incumbrancers of the mortgaged premises, and to examine and report whether the mortgaged premises can be sold in parcels and, if the whole amount secured by the mortgage has not become due, to report the amount thereafter to become due.”

Defendant Baron defaulted in payment of the mortgage on April 1, 2012. Plaintiff also produced the mortgage, the unpaid note and evidence of the defendant’s default and amount due by affidavit (*see* Minear Affidavit). Pre-foreclosure notices, which are conditions precedent to a foreclosure action, were timely and properly sent to defendant at the subject address (*see* Minear Affidavit; *see also* Exhibit C; Exhibit E). According to the complaint, proper and timely notice was also filed with the New York State Banking Department of Financial Services, in compliance with RPAPL section 1306. On January

17, 2014, plaintiff filed a Notice of Pendency with the Kings County Clerk's office and commenced this action by summons and complaint. The summons and complaint properly complied with RPAPL sections 1320 and 1303. Plaintiff efiled a Certificate of Merit Pursuant to CPLR 3012-b dated January 16, 2014, which was served on defendants with the summons and complaint (*see* Notice of Motion, Exhibit E). The case was released from the Settlement Conference Part (SCP) after mandatory CPLR 3408 settlement conferences. Accordingly, plaintiff's motion for an order of reference and to appoint a referee to compute is granted.

Default Judgment

“An applicant for a default judgment against a defendant must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting defendant's failure to answer or appear” (*U.S. Bank Nat. Ass'n v. Wolnerman*, 135 A.D.3d 850, 24 N.Y.S.3d 343 [2 Dept., 2016], quoting *U.S. Bank N.A. v. Dorestant*, 131 A.D.3d 467, 15 N.Y.S.3d 142 [2 Dept., 2015]; *see* CPLR § 3215[f]).

Pursuant to the notice requirements of CPLR § 3215,

[w]hen a default judgment based upon nonappearance is sought against a natural person in an action based upon nonpayment of a contractual obligation an affidavit shall be submitted that additional notice has been given by or on behalf of the plaintiff at least twenty days before the entry of such judgment, by mailing a copy of the summons by first-class mail to the defendant at his place of residence in an envelope bearing the legend “personal and confidential” and not indicating on the outside of the envelope that the communication is from an attorney or concerns an alleged debt. In the event such mailing is returned as undeliverable by the post office before the entry of a default judgment, or if

the place of residence of the defendant is unknown, a copy of the summons shall then be mailed in the same manner to the defendant at the defendant's place of employment if known... The additional notice may be mailed simultaneously with or after service of the summons on the defendant.

...

When a default judgment based upon non-appearance is sought against a domestic or authorized foreign corporation which has been served pursuant to paragraph (b) of section three hundred six of the business corporation law, an affidavit shall be submitted that an additional service of the summons by first class mail has been made upon the defendant corporation at its last known address at least twenty days before the entry of judgment.

(CPLR § 3215[g][3], [4]).

In the instant case, plaintiff commenced the instant foreclosure action by filing the summons and complaint on January 17, 2014. Defendants were served with the summons and complaint within 120 days of filing (*see* Notice of Motion, Exhibit E, Affidavits of Service, Affidavits of Mailing). However, although plaintiff submitted proof of (1) service of the summons and complaint; (2) proof of the facts constituting the claim; and (3) proof of the defaulting defendant's failure to answer or appear, plaintiff failed to provide proof that additional notices were sent in compliance with CPLR § 3215[g][3] and [4]. Accordingly, plaintiff's motion for default judgment is denied without prejudice.

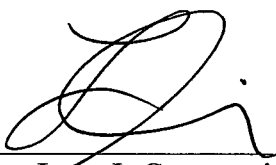
Conclusion

Accordingly, the plaintiff's motion for summary judgment, to amend the caption, for an order of reference and to appoint a referee to compute is granted. Plaintiff's

motion for default judgment against all non-appearing parties is denied without prejudice. This Court shall sign a separate order of reference appointing a referee to compute the sums due and owing plaintiff pursuant to the terms of the mortgage. Any applications not specifically addressed herein are denied.

The foregoing constitutes the decision and order of this Court.

E N T E R:


 Hon. Lara J. Genovesi
 J.S.C.

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