

**Chase Home Ffn., LLC v Dangelo**

2017 NY Slip Op 30392(U)

January 26, 2017

Supreme Court, Suffolk County

Docket Number: 16434-09

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 33 - SUFFOLK COUNTY

**PRESENT:**

Hon. THOMAS F. WHELAN  
Justice of the Supreme Court

MOTION DATE: 9/22/16  
SUBMIT DATE: 1/13/17  
Mot. Seq. # 003 - MG  
CDISP: No

-----X

CHASE HOME FINANCE, LLC, :

Plaintiff, :

-against- :

DORINE DANGELO, NATIONAL CITY BANK, :  
NEW YORK STATE DEPARTMENT OF :  
TAXATION AND FINANCE, "JOHN DOES" and :  
"JANE DOES" said names being fictitious, parties :  
intended being possible tenants or occupants of :  
premises and corporations, other entities or persons :  
who claim, or may claim, a lien against the premises: :

Defendants. :

-----X

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Upon the following papers numbered 1 to 9 read on this motion by the plaintiff for accelerated judgments and other relief including a substitution of the plaintiff and the appointment of a referee to compute ; Notice of Motion/Order to Show Cause and supporting papers 1-4 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 5-7 ; Replying Affidavits and supporting papers 8-9 ; Other ; (~~and after hearing counsel in support of and in opposition to the motion~~) it is,

**ORDERED** that those portions of this motion (#003) by the plaintiff for summary judgment against the answering defendant, Dorine Dangelo, default judgments against the remaining defendants served with process including, Ed Deck, who was served as an unknown defendant and an order identifying his true name with an amendment of the caption to reflect it and the deletion of the other unknown defendants and an order appointing a referee to compute amounts due under the terms of the note and mortgage are considered under CPLR 3212, 3215, 1024 and RPAPL Article 13 and is granted; and it is further

**ORDERED** that those portions of this motion (#003) by the plaintiff wherein it seeks an order substituting the current note holder for the plaintiff named above, is considered under CPLR 1018 and is granted; and it is further

**ORDERED** that the remaining portions of this motion wherein the plaintiff seeks an amendment of the complaint to reflect the default in the payment date as September 1, 2007, nunc pro tunc, is considered under CPLR 3025(b) and is denied.

The plaintiff commenced this action on May 11, 2009 to foreclose the lien of a July 27, 2007 mortgage in the principal amount of \$315,000.00 given to JPMorgan Chase Bank by defendant D'Angelo to secure a mortgage note of the same date. The property encumbered by such mortgage is located in Lindenhurst, New York. According to the complaint and moving papers, a default in payment occurred on the part of defendant D'Angelo on December 1, 2008.

In response to the plaintiff's service of the summons, complaint and other initiatory papers, defendant D'Angelo appeared herein by an answer prepared by her then retained counsel. Four affirmative defenses were asserted therein, including, a purported failure to serve the contractual notice of default, failure to advise of assignments, lack of capacity to sue due to plaintiff's failure to register as doing business in New York and an estoppel against the plaintiff for failing to ascertain the defendant's ability to afford the subject mortgage loan.

By the instant motion (#003), the plaintiff seeks summary judgment dismissing the affirmative defenses asserted in the answer served by defendant D'Angelo and an award of summary judgment on its complaint against said defendant. The plaintiff also seeks default judgments against all others served with process, including Ed Deck, who was served at the mortgaged premises as unknown defendant "John Doe", together with an order pursuant to CPLR 1024 identifying his true name and amending the caption to reflect it. The plaintiff further seeks the deletion of the remaining unknown defendants and a caption amendment to reflect this change and an order substituting Pennymac Corp., the current note holder, in the place and stead of the above named plaintiff. In addition, the plaintiff seeks an order amending the complaint, nunc pro tunc, to reflect the date of the defendant's default in payment as September 1, 2007. Finally, the plaintiff seeks an order appointing a referee to compute amounts due under the terms of the note mortgage.

The motion is opposed by defendant D'Angelo in papers prepared by her newly retained attorney. Therein, the defendant and her counsel contend that the plaintiff's motion must be denied due to the failure of the plaintiff to comply with the ninety day notice requirements allegedly applicable to this action under RPAPL § 1304. For the reasons stated, the motion is granted.

The obligation of a foreclosing plaintiff to prove compliance with RPAPL § 1304 in the first instance on a motion for summary judgment arises only where the plaintiff has pleaded compliance with the notice requirements of RPAPL § 1304 or a defendant has properly asserted non-compliance therewith as a defense (*see Zarabi v Movahedian*, 136 AD3d 895, 26 NYS3d 308 [2d Dept 2016]; *Cenlar v Weisz*, 136 AD3d 855, 25 NYS3d 308 [2d Dept 2016]; *Citimortgage v Espinal*, 134 AD3d 876, 23 NYS3d 251 [2d Dept 2016]; *Bank of New York v Aquino*, 131 AD3d 1186, 16 NYS3d 770 [2d Dept 2015]; *cf.*, *Flushing Savings Bank v Latham*, 139 AD3d 663, 32 NYS3d 206 [2d Dept



2016]). This result is mandated by recent appellate case authorities in which claims of non-compliance with RPAPL § 1304 is stated to be a “defense”, as it is characterized in RPAPL § 1302 (*see Pritchard v Curtis*, 101 AD3d 1502, 957 NYS2d 440 [3d Dept 2011]) and those holding that such defense is not one that is jurisdictional in nature (*see Flagstar Bank, FSB v Jambelli*, 140 AD3d 829, 32 NYS3d 625 [2d Dept 2016]; *U.S. Bank N.A. v Carey*, 137 AD3d 894, 896, 28 NYS3d 68 [2d Dept 2016]; *Citimortgage v Espinal*, 134 AD3d 876, 23 NYS3d 251 [2d Dept 2016]; *cf., Wells Fargo Bank, N.A. v Muricy*, 135 AD3d 725, 24 NYS3d 137 [2d Dept 2016]). Notably, RPAPL § 1302 only mandates that a plaintiff plead compliance with RPAPL § 1304 where the subject mortgage is a high-cost home loan or subprime home loan and there is no allegation that the loan at issue in this case is either.

Accordingly, compliance with RPAPL § 1304 is not an element of the plaintiff’s claim for foreclosure and sale, as the plaintiff need not establish such compliance on an unopposed application for an order of reference upon the default in answering of the obligor/mortgagor defendants (*see CPLR 3215[f]; Flagstar Bank, FSB v Jambelli*, 140 AD3d 829, *supra*; *U.S. Bank N.A. v Carey*, 137 AD3d 894, *supra*; *PHH Mtge. Corp. v Celestin*, 130 AD3d 703, 11 NYS3d 871 [2d Dept 2016]). Moreover, the plaintiff need not disprove the defense in the first instance on a motion for a summary judgment if compliance has not been pleaded or the defense has not been asserted in an answer or in papers in which an obligor/mortgagor defendant entitled to the RPAPL § 1304 notice opposes the plaintiff’s motion on that ground (*see JPMorgan Chase Bank, Nat. Ass’n v Kutch*, 142 AD3d 536, 36 NYS3d 235 [2d Dept 2016]; *Citimortgage v Espinal*, 134 AD3d 876, *supra*; *Bank of N.Y. Mellon v Aquino*, 131 AD3d 1186, 16 NYS3d 770 [2d Dept 2016]). Nevertheless, because other appellate case authorities have characterized compliance with RPAPL § 1304 as a condition precedent, the defense of non-compliance may be raised by an appearing defendant anytime prior to judgment, even if it is not raised in his or her answer (*see Citimortgage v Espinal*, 134 AD3d 876, *supra*; *Flagstar Bank, FSB v Jambelli*, 140 AD3d 829, *supra*; *U.S. Bank N.A. v Carey*, 137 AD3d 894, *supra*; *cf., PHH Mtge. Corp. v Celestin*, 130 AD3d 703, *supra*; *the defense cannot be raised by a defendant in default of answering without the establishment of grounds for a vacatur of such default*).

Here, the plaintiff’s complaint contains a qualified allegation of compliance with the notice provisions of RPAPL § 1304, as it is conditioned upon the words “if applicable” and the defendant’s answer did not assert non-compliance with the statute. Defendant D’Angelo was nevertheless free to raise the RPAPL § 1304 non-compliance defense in opposition to the plaintiff’s motion for summary judgment thereby placing the onus upon the plaintiff to demonstrate compliance or the inapplicability of the statute to the facts of this case in its reply papers (*see Citimortgage v Espinal*, 134 AD3d 876, *supra*).

As indicated above, this action was commenced in May of 2009, at which time, the provisions of RPAPL § 1304 were applicable only to certain home loans which were limited to those which were “high cost,” “subprime,” and “non-traditional” home loans (*Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 104, 923 NYS2d 609 [citing L. 2008, ch. 472, § 2]). A review of the mortgage note at issue in this action, reflects that the loan may constitute a non-traditional loan within the contemplation



of the statute as it provided for the payment of interest only during the first 120 months of the loan. Pursuant to RPAPL § 1302, the plaintiff was under no obligation to plead compliance with RPAPL § 1304 as that statute relates only to high-cost and subprime home loans. Since, however, the applicable provisions of RPAPL § 1304 relate to non-traditional loans, the plaintiff's claim that no notice was required because the loan was not a subprime home loan is unavailing.

Nevertheless, in addition to the statutory qualifiers of high cost, subprime and non-traditional loans that are applicable to this action, other qualifiers of the term home loan are set forth therein. These provide that to be subject to the provisions of RPAPL § 1304, the home loans at issue must be ones in which the borrower is a natural person, the borrower incurs the debt primarily for personal, family, or household purposes, and the loan is secured by a mortgage on real property in this state "used or occupied, or intended to be used or occupied wholly or partly, as the home or [the] residence of one or more persons and which is or will be occupied by the borrower as the borrower's principal dwelling" (RPAPL § 1304[5][a][I]-[iv]). Moreover, compliance is not required where the borrower no longer occupies the mortgaged premises as his or her principal dwelling (*see* § 1304[c]).

Here, the opposing papers of defendant D'Angelo contain unequivocal and substantiated averments that upon her purchase of a house in Brookhaven on November 5, 2007, she moved there on that date (*see* ¶¶ 6-10 of the October 14, 2016 affidavit of defendant D'Angelo submitted in opposition to the plaintiff's motion). Accordingly, the defendant did not occupy the mortgaged premises as her principal dwelling at the time of the December 1 2008 default in payment upon which the claim for foreclosure and sale is predicated. Under these circumstances, the court finds that the plaintiff established that compliance with the ninety day notice was obviated, as a matter of law, by the defendant's continuous failure to occupy the mortgaged premises as her principal dwelling on and after November 5, 2007. The defendant's challenge to the plaintiff's entitlement to summary judgment, which is solely premised on the asserted RPAPL § 1304 non-compliance defense, is thus rejected as lacking in merit.

Upon review of the plaintiff's moving papers, the court finds that they established, *prima facie*, that none of the affirmative defenses asserted in the answer of defendant D'Angelo are meritorious and are thus subject to dismissal pursuant to CPLR 3212(b). The moving papers further demonstrated, *prima facie*, the plaintiff's entitlement to summary judgment on its complaint against said defendant as they included copies of the note and mortgage and due proof of a default in payment (*see Deutsche Bank Natl. Trust Co. v Logan*, \_\_\_ AD3d \_\_\_, 2016 WL 189186 [2d Dept 2017]; *Deutsche Bank Natl. Trust Co. v Abdan*, 131 AD3d 1001, 16 NYS3d 459 [2d Dept 2015]; *Nationstar Mtge., LLC v Silveri*, 126 AD3d 864, 7 NYS2d 147 [2d Dept 2015]; *One West Bank, FSB v DiPilato*, 124 AD3d 735, 998 NYS2d 668 [2d Dept 2015]; *Plaza Equities, LLC v Lamberti*, 118 AD3d 688, 689, 986 NYS2d 843 [2d Dept 2014]; *Bank of New York v McCall*, 116 AD3d 993, 985 NYS2d 255 [2d Dept 2014]). The defendant's opposing papers failed to raise any genuine questions of fact regarding the defendant's possession of any bona fide pleaded defense or one otherwise available to her.

Accordingly, the plaintiff is awarded summary judgment dismissing the affirmative defenses asserted in the answer of defendant D'Angelo and summary judgment on its complaint against said defendant.

The moving papers further established the plaintiff's entitlement to default judgments against all other defendants, served with process, including, Ed Deck, who was served at the mortgaged premises as an unknown defendant and an order identifying his true name in the caption together with the appointment of a referee to compute amounts due under the subject note and mortgage. The court further awards the requested substitution of Pennymac Corp., in the place of the above named plaintiff and a caption amendment to reflect same. However, the application for a nunc pro tunc amendment of the complaint to reflect a September 1, 2007 default date is denied as palpably insufficient.

Proposed Order of reference, as modified by the court, has been marked signed.

DATED: 1/26/17

  
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THOMAS F. WHELAN, J.S.C.