New York Community Bank v Garzon
2017 NY Slip Op 30864(U)
April 27, 2017
Supreme Court, Suffolk County
Docket Number: 00561/2013
Judge: Joseph A. Santorelli
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[* 1]

SHORT FORM ORDER

PUBLISH

INDEX
NO.:00561/2013

SUPREME COURT - STATE OF NEW YORK
IAS PART 10 - SUFFOLK COUNTY

PRESENT: Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE: 04/28/2016 (001, 002)
ADJ. DATE: 07/14/2016 (001, 002)
Mot. Seq. # 001-MotD
Mot. Seq. # 002-MD

NEW YORK COMMUNITY BANK,

Plaintiff,

-against-

MIGUEL GARZON, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR CONCORD MORTGAGE CORP., NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, TOWN SUPERVISOR OF ISLIP,

"JOHN DOE #1" through "JOHN DOE #10," the last ten names being fictitious and unknown to plaintiff, the persons or parties intended being the persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the verified complaint,

Defendants,

STAGG, TERENZI, CONFUSIONE & WABNIK, LLP
Attorneys for Plaintiff
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Garden City, NY 11530

VICTOR CAMPOS, P.C.
Attorney for Defendant
Miguel Garzon
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Bay Shore, NY 11706

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the plaintiff, dated April 5, 2016, and supporting papers; (2) Notice of Cross Motion by the defendant Miguel Garzon, dated April 15, 2015, and supporting papers; (3) Affirmation in Opposition/Reply by the plaintiff, dated June 18, 2015, and supporting papers; and (4) Stipulations; (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now it is

ORDERED that this motion (001) by the plaintiff for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor against the defendant Miguel Garzon, striking his answer, and dismissing the affirmative defenses and counterclaims asserted therein; (2) pursuant to CPLR 3215 fixing the defaults of the non-answering defendants; (3) pursuant to RPAPL § 1321 appointing a referee to (a) compute amounts due under the subject mortgage; and (b) examine and report whether the subject premises should be sold in one parcel or multiple parcels; and (4) amending the caption is granted solely to the extent stated below, otherwise denied with leave to renew within 120 days of the date of this order for the reasons set forth below; and it is

ORDERED that the plaintiff is granted summary judgment in its favor against the defendant Miguel Garzon, striking his answer, and dismissing all affirmative defenses and counterclaims asserted in the answer; and it is

ORDERED that this motion (002) by the defendant Miguel Garzon for, inter alia, an order pursuant to CPLR 3212 and 3211(a)(3) dismissing the complaint on the grounds that the plaintiff lacks standing is denied in its entirety; and it is

ORDERED that the moving parties shall serve a copy of this order by first-class mail upon opposing counsel and upon all appearing defendants that have not waived further notice within thirty (30) days of the date herein, and they shall promptly file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on real property known as 202 Daly Road, East Northport, New York 11731 ("the property"). On January 9, 2008, the defendant Miguel Garzon ("the defendant mortgagor") executed a fixed/adjustable rate note in favor of Concord Mortgage Corp. ("the lender") in the principal sum of $525,000.00. The note reflects that it is a Federal National Mortgage Association ("Fannie Mae") uniform instrument. To secure said note, the defendant mortgagor gave the lender a mortgage also dated January 9, 2008 on the property. The mortgage indicates that Mortgage Electronic Registration Systems, Inc. ("MERS") acted solely as a nominee for the lender and its successors and assigns and that, for the purposes of recording the mortgage, MERS was the mortgagee of record. The mortgage was recorded on February 20, 2008.

The note was allegedly transferred by way of two allonges with undated endorsements to New York Community Bank ("the plaintiff") prior to commencement. The first allonge bears undated endorsement from the lender to AmTrust Bank and a second undated, blank endorsement. The second allonge, which contains a specific loan number (redacted by the court) loan date "1/9/2008," and other loan details bears an endorsement by the Federal Deposit Insurance Corporation ("FDIC") as Receiver of AmTrust Bank formerly known as Ohio Savings Bank to the plaintiff. The alleged transfer of the note to the plaintiff was memorialized by an assignment of the mortgage executed by MERS on July 17, 2012. Thereafter, the assignment was duly recorded in the Office of the Suffolk County Clerk on August 23, 2012.

Issue was joined by the interposition of the defendant mortgagor's answer dated February 15, 2013. By his answer, the defendant mortgagor generally denies all of the allegations contained in the complaint. In the answer, the defendant mortgagor asserts nine affirmative defenses and three counterclaims, alleging, inter alia, the following: equitable estoppel based upon unclean hands, bad faith; an unconscionable loan; the lack of standing; fraud and misrepresentation in the loan origination and servicing; and the failure to: state a cause of action; make diligent inquiry into the defendant mortgagor's ability to repay the loan; and comply with the notice requirements of Article 13 of the Real Property Actions and Proceedings Law.

The court turns first to the motion-in-chief. The plaintiff now moves for, inter alia, an order: (1) awarding summary judgment in its favor and against the defendant mortgagor, striking their answer and the dismissing the affirmative defenses and counterclaims asserted therein; (2) pursuant to CPLR 3215

fixing the defaults of the non-answering defendants; (3) pursuant to RPAPL § 1321 appointing a referee to (a) compute amounts due under the subject mortgage; and (b) examine and report whether the subject premises should be sold in one parcel or multiple parcels; and (4) amending the caption.

The defendant mortgagor opposes the plaintiff's motion and moves for, inter alia, an order pursuant to CPLR 3212 and 3211(a)(3) granting him summary judgment dismissing the complaint on the ground that the plaintiff lacks standing. In addition, the defendant mortgagor asserts in his affidavit that he did not receive a 90-day notice from the plaintiff. In response, the plaintiff filed opposition and reply papers.

Initially, the court notes that the defendant mortgagor's motion is defective to the extent that the request for summary judgment set forth in counsel's affirmation is not included in the notice of cross motion (*see*, CPLR 2214 [a]; CPLR 3212 [b]). To the extent that the requested relief is supported by the affirmation of counsel and/or the affidavit from the defendant mortgagor, it has been considered.

By its submissions, the plaintiff established its prima facie entitlement to summary judgment on the complaint (*see*, CPLR 3212; RPAPL § 1321; ***U.S. Bank, N.A. v Denaro***, 98 AD3d 964, 950 NYS2d 581 [2d Dept 2012]; ***Capital One, N.A. v Knollwood Props. II, LLC***, 98 AD3d 707, 950 NYS2d 482 [2d Dept 2012]). In the instant case, the plaintiff produced, inter alia, the note with two endorsed allonges, the mortgage, the assignment, and evidence of nonpayment (*see*, ***Federal Home Loan Mtge. Corp. v Karastathis***, 237 AD2d 558, 655 NYS2d 631 [2d Dept 1997]; ***First Trust Natl. Assn. v Meisels***, 234 AD2d 414, 651 NYS2d 121 [2d Dept 1996]).

The plaintiff also submitted an affidavit from its Donna Wilson, Senior Vice President of the plaintiff, wherein it is alleged that the endorsed note was in its possession since December 4, 2009, and that it has remained in its custody since that time (*see*, ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, 12 NYS3d 612 [2015]; ***Kondaur Capital Corp. v McCary***, 115 AD3d 649, 981 NYS2d 547 [2d Dept 2014]; ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]). Additionally, the plaintiff submitted the Purchase and Assumption Agreement dated as of December 4, 2009 among the FDIC as receiver of AmTrust Bank and the plaintiff (*see*, ***New York Community Bank v McClendon***, 138 AD3d 805, 29 NYS3d 507 [2d Dept 2016]; see also, ***JP Morgan Chase Bank, N.A. v Schott***, 130 AD3d 875, 15 NYS3d 359 [2d Dept 2015]; ***JP Morgan Chase Bank, N.A. v Russo***, 121 AD3d 1048, 996 NYS2d 68 [2d Dept 2014]). Such evidence demonstrates that the plaintiff holds and/or owns the original note and mortgage. Thus, the plaintiff demonstrated its prima facie burden as to the merits of this foreclosure action and as to its standing.

By its submissions, the plaintiff demonstrated compliance with the 90-day notice requirements of RPAPL 1304 (*see*, ***Zarabi v Movahedian***, 136 AD3d 895, 26 NYS3d 153 [2d Dept 2016]; ***JP Morgan Chase Bank, N.A. v Schott***, 130 AD3d 875, 15 NYS3d 359 [2d Dept 2015]; ***Wells Fargo v Moza***, 129 AD3d 946, 13 NYS3d 127 [2d Dept 2015]). The plaintiff's submissions in this regard include, inter alia, the affidavit of mailing of Matthew Tercek, a Senior Foreclosure Specialist for the plaintiff.

The plaintiff also submitted sufficient proof to establish, prima facie, that the remaining affirmative defenses and the counterclaims set forth in the answer are subject to dismissal due to their

unmeritorious nature (*see*, ***Becher v Feller***, 64 AD3d 672, 884 NYS2d 83 [2d Dept 2009]; ***Wells Fargo Bank Minn., N.A. v Perez***, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]; ***Coppa v Fabozzi***, 5 AD3d 718, 773 NYS2d 604 [2d Dept 2004] [unsupported affirmative defenses are lacking in merit]; *see also*, ***Gillman v Chase Manhattan Bank, N.A.***, 73 NY2d 1, 537 NYS2d 787 [1988] [unconscionability generally not a defense]; ***Emigrant Mtge. Co., Inc. v Fitzpatrick***, 95 AD3d 1169, 945 NYS2d 697 [2d Dept 2012] [an affirmative defense asserting violations of General Business Law § 349 and/or engagement in deceptive business practices lacks merit where, inter alia, clearly written loan documents describe the terms of the loan]; ***HSBC Bank USA v Picarelli***, 36 Misc3d 1218 [A], 959 NYS2d 89, *affd on other grounds by* 110 AD3d 1031, 974 NYS2d 90 [2d Dept 2013] [TILA requirements satisfied where the lender provided the required information and forms to the obligor at the closing]). Further, prevailing authority holds that the Fair Debt Collection Practices Act (FDCPA) (15 USC § 1692) does not generally apply to a creditor seeking to enforce a contract, such as a mortgage or a note (***United Cos. Lending Corp. v Candela***, 292 AD2d 800, 801-802, 740 NYS2d 543 [4th Dept 2002]). Moreover, a borrower may not properly claim to have reasonably relied on representations that are plainly at odds with the loan documents governing the terms of the loan (***Aurora Loan Servs., LLC v Enaw***, 126 AD3d 830, 831, 7 NYS3d 146 [2d Dept 2015]), and "a party who signs a document without any valid excuse for having failed to read it is 'conclusively bound' by its terms" (*see*, ***Patterson v Somerset Invs. Corp.***, 96 AD3d 817, 817, 946 NYS2d 217 [2d Dept 2012]).

It was thus incumbent upon answering defendant to submit proof sufficient to raise a genuine question of fact rebutting plaintiff's prima facie showing or in support of the affirmative defenses asserted in the answer (*see*, ***Grogg v South Rd. Assoc., LP***, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; ***Washington Mut. Bank, F.A. v O'Connor***, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]; ***JP Morgan Chase Bank, N.A. v Agnello***, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]).

In response, the defendant mortgagor has not come forward with any evidence to raise a triable issue of fact as to the plaintiff's standing (*see*, ***JPMorgan Chase Bank, N.A. v Weinberger***, 142 AD3d 643, 37 NYS2d 286 [2d Dept 2016]; ***Wells Fargo Bank, N.A. v Charlaff***, 134 AD3d 1099, 24 NYS3d 317 [2d Dept 2015]; ***LNV Corp. v Francois***, 134 AD3d 1071, 22 NYS3d 543 [2d Dept 2015]). Turning to the defense asserting the lack of compliance with RPAPL § 1304, the defendant mortgagor's mere allegation that he did not receive a 90-day notice is insufficient to raise a triable issue of fact (*see*, ***TD Bank, N.A. v Mandia***, 133 AD3d 590, 20 NYS3d 83 [2d Dept 2015]; ***PHH Mtge. Corp. v Israel***, 120 AD3d 1329, 992 NYS2d 355 [2d Dept 2014]). Further, contrary to the defendant mortgagor's contentions, the affidavit of the plaintiff's representative is legally sufficient and comports with the requirements of CPLR 3212 (*see*, ***Emigrant Bank v Marando***, 143 AD3d 856, 39 NYS3d 83 [2d Dept 2016]; ***North Am. Sav. Bank, FSB v Esposito-Como***, 141 AD3d 706, 35 NYS3d 491 [2d Dept 2016]; ***RBS Citizens, N.A. v Galperin***, 135 AD3d 735, 23 NYS3d 307 [2d Dept 2016]).

Notably, the defendant mortgagor did not deny having received the loan proceeds and having defaulted on the subject loan payments in his opposing and moving papers (*see*, ***Citibank, N.A. v Souto Geffen Co.***, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]; *see also*, ***Stern v Stern***, 87 AD2d 887, 449 NYS2d 534 [2d Dept 1982]). Thus, even when considered in the light favorable to the defendant mortgagor, the opposing papers are insufficient to raise any genuine question of fact requiring a trial on the merits of the plaintiff's claims for foreclosure and sale (*see*, ***Bank of Smithtown v 219 Sagg Main,***

LLC, 107 AD3d 654, 968 NYS2d 95 [2d Dept 2013]; ***Emigrant Mtge. Co., Inc. v Beckerman***, 105 AD3d 895, 964 NYS2d 548 [2d Dept 2013]). The opposition papers are also insufficient to demonstrate any bona fide defenses (*see*, CPLR 3211[e]; ***Wells Fargo Bank, N.A. v Ali***, 122 AD3d 726, 995 NYS2d 735 [2d Dept 2014]; ***American Airlines Fed. Credit Union v Mohamed***, 117 AD3d 974, 986 NYS2d 530 [2d Dept 2014]; ***Washington Mut. Bank v Schenk***, 112 AD3d 615, 975 NYS2d 902 [2d Dept 2013]).

The plaintiff, therefore, is awarded summary judgment in its favor against the defendant mortgagor (*see*, ***Federal Home Loan Mtge. Corp. v Karastathis***, 237 AD2d 558, *supra*). Accordingly, the answer is stricken; all affirmative defenses and counterclaims asserted in the answer are dismissed in their entirety. In light of the foregoing, the defendant mortgagor's cross motion is denied.

The branches of the motion for an order amending the caption by excising and/or substituting certain fictitious defendants, fixing the defaults of the non-answering defendants and appointing a referee are denied, without prejudice to renewal within 120 days of the date of this order, as the plaintiff failed to demonstrate its prima facie burden with respect to the same (*see*, CPLR 3215[f]; RPAPL § 1321).

More specifically, the branch of the plaintiff's motion for an order substituting Jane Doe and Miguel Garzon Jr. for the fictitious defendants in the caption and fixing their defaults in answering is denied because there are insufficient allegations in the moving papers as to said infants' approximate age at the time of the alleged service (*see*, CPLR 105 [j]; *see also*, CPLR 306-b; CPLR 309; CPLR 1203; ***Kolodzinski v Ferreiras***, 168 AD2d 431, 562 NYS2d 554 [2d Dept 1990]; ***Fox v 18-05 215th St. Owners,*** 143 AD2d 804, 533 NYS2d 347 [2d Dept 1988]). If the defendants Jane Doe and Miguel Garzon Jr. were over 14 years of age at the time of alleged service, then, in that event, the plaintiff has not demonstrated compliance with CPLR 309(a). Additionally, if the defendants Jane Doe and Miguel Garzon Jr. were under the age of 18 years of age at the time of service, the plaintiff has not demonstrated its entitlement to judgment against them based upon the proof submitted (*see*, CPLR 1203).

The branch of the plaintiff's motion for an order pursuant to CPLR 602(a) consolidating this action with another action entitled, ***New York Community Bank v Newport Beach Holdings, LLC***, (filed under Suffolk County Index No.: Index No.: 70215/2014), and the branch of the motion for an order fixing the default in answering of said defendant are each denied. The plaintiff's moving papers do not include an affidavit of service of the summons and complaint in the related action upon Newport Beach Holdings, LLC. Under these circumstances, the court may not grant the plaintiff an order of reference at this juncture.

In view of the foregoing, the proposed order submitted by the plaintiff has been marked "not signed."

Dated: APR 27 2017

Hon. JOSEPH A. SANTORELLI
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION