Countrywide Home Loans Servicing, LP v Depinto
2017 NY Slip Op 31082(U)
May 9, 2017
Supreme Court, Suffolk County
Docket Number: 20470/2009
Judge: Howard H. Heckman
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

Short Form Order

SUPREME COURT - STATE OF NEW YORK
IAS PART 18 - SUFFOLK COUNTY

PRESENT:
HON. HOWARD H. HECKMAN JR., J.S.C.

----------X
COUNTRY WIDE HOME LOAN SERVICING, LP,
Plaintiffs,

-against-

JOSEPH DEPINTO, et al.,

Defendants.
----------X

INDEX NO.: 20470/2009
MOTION DATE: 12/12/2013
MOTION SEQ. NO.: 002 MG
003 MD

PLAINTIFFS' ATTORNEY:
GROSS POLOWY LLC
1775 WEHRLE DR., STE. 100
WILLIAMSVILLE, NY 14221

CO-COUNSEL FOR PLAINTIFF:
SANDELANDS EYET LLP
1545 US HIGHWAY 206, STE. 304
BEDMINISTER, NJ 07921

DEFENDANTS' ATTORNEYS:
TOMAO AND MARANGAS, ESQS.
1225 FRANKLIN AVE., STE. 325
GARDEN CITY, NY 11530

Upon the following papers numbered 1 to 29 read on this motion ; Notice of Motion/ Order to Show Cause and supporting papers 1- 9 (#002) 10-23 (#003) ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 24-25 ; Replying Affidavits and supporting papers 26-27 ; Other 28-29 ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff Countrywide Home Loans Servicing, L.P. seeking an order: 1) vacating the Order (Blydenburgh, J.) dated April 19, 2010 granting the appointment of a referee; 2) relieving and discharging the previously appointed referee; 3) resettling an order granting a default judgment against the defendants; 4) substituting Nationstar Mortgage LLC as the named party plaintiff in place and stead of Countrywide Home Loans Servicing, L.P.; 5) substituting "John" Depinto as a named party defendant in place and stead of a defendant designated as "John Doe #1" and discontinuing the action against remaining defendants designated as "John Doe #2" through "John Doe #25"; 6) amending nunc pro tunc the summons and complaint to correct the defendants' date of default in making timely monthly mortgage payments to July 1, 2008 and to correct the interest due date to June 1, 2008, and to reflect that the correct name of the original lender was American Home Mortgage; 7) deeming all non-appearing defendants in default; 8) amending the caption; and 9) appointing a referee to compute the sums due and owing to the plaintiff in this mortgage foreclosure action is granted; and it is further

ORDERED that the cross motion by defendants Joseph Depinto and Mary Ellen Depinto seeking an order pursuant to CPLR 3012(d), 3215(c), 3408 & 5015 dismissing plaintiff's complaint as abandoned or, in the alternative, vacating the defendants default in appearing and granting defendants leave to serve a late answer and remanding this action to the foreclosure settlement part

for an additional court settlement conference is denied; and it is further

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

ORDERED that plaintiff is directed to serve a copy of this order with notice of entry upon all parties who have appeared and not waived further notice pursuant to CPLR 2103(b)(1),(2) or (3) within thirty days of the date of this order and to promptly file the affidavits of service with the Clerk of the Court.

Plaintiff's action seeks to foreclose a mortgage in the original sum of $500,000.00 executed by defendants Joseph Depinto and Mary Ellen Depinto on January 13, 2006 in favor of American Home Mortgage. On that same date defendant Joseph Depinto executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. A consolidated mortgage agreement was signed by the defendants on December 4, 2006 forming a single lien in the sum of $648,000.00. By assignment dated February 19, 2009 the mortgage was assigned to Countrywide Home Loans Servicing, L.P. and by merger the mortgage and promissory note was acquired by Bank of America, N.A. Thereafter by assignment dated December 8, 2014 Bank of America, N.A. assigned the mortgage to Nationstar Mortgage LLC. Plaintiff claims that the defendants defaulted in making timely monthly mortgage payments under the terms of the note and mortgage since July 1, 2008. Plaintiff's motion seeks an order vacating the prior Order (Blydenburgh, J.) dated April 19, 2010 and resettling an order granting a default judgment and for the appointment of a referee. Defendants' cross motion seeks an order dismissing plaintiff's action as abandoned or, in the alternative granting leave to serve a late answer, vacate their default in appearing and remanding the action for an additional court mandated settlement conference.

In support of the cross motion and in opposition to plaintiff's motion, the defendants each submit affidavits together with two affirmations of counsel and claim that plaintiff's action should be dismissed as abandoned based upon the mortgage lender's forty month delay in seeking judgment. Defendants claim that they have a viable excuse for their default in answering the complaint based upon their understanding that the lender's offer of a trial loan modification in September, 2009 obviated the need to serve an answer and discontinued the litigation. Defendants claim that they made monthly trial payments beginning October, 2009 through June, 2010 but were misled by bank representatives who unilaterally cancelled the loan modification and continued to misrepresent the identity of the entity that owned the mortgage and provided no guidance for the borrowers. Defendants maintain that they heard nothing about the pending foreclosure action from October, 2009 until October 31, 2013 when they received a copy of plaintiff's motion. Defendants also deny having been notified of the September 16, 2013 foreclosure conference. Defendants claim that they should be permitted to vacate their default and to serve a late answer and contend that they have meritorious defenses to this foreclosure action including plaintiff's lack of standing, plaintiff's failure to timely serve a pre-foreclosure notice of default in accordance with mortgage requirements and plaintiff's failure to negotiate in good faith. Defendants also claim that the law firm representing the plaintiff has a conflict of interest since it also represents one of the named defendants.

In reply, the plaintiff submits an attorney's affirmation and argues that no basis exists to dismiss the complaint as abandoned since the plaintiff made application for the entry of judgment within one year of the defendants' default. Plaintiff also claims that defendants' application seeking

leave to serve a late answer must be denied since the defendants have failed to submit a reasonable explanation for their failure to timely serve an answer and have failed to demonstrate an arguably meritorious defense to the plaintiff's complaint. Plaintiff claims that it has standing to prosecute the action based upon having physical possession of the duly endorsed promissory note prior to commencing the action and contends that no other defense asserted by the defendants has merit. Plaintiff also contends that this motion is necessary based upon the attorney affirmation requirements set forth pursuant to the Administrative Orders of the Chief Administrative Judge (A.O. 548/10 & 431/11) so that the affidavit of facts can be substituted as required since counsel was unable to verify the affidavit of merit originally submitted by prior counsel.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material question of fact from the case. The grant of summary judgment is appropriate only when it is clear that no material and triable issues of fact have been presented (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957)). The moving party bears the initial burden of proving entitlement to summary judgment (*Winegrad v. NYU Medical Center*, 64 NY2d 851 (1985)). Once such proof has been proffered, the burden shifts to the opposing party who, to defeat the motion, must offer evidence in admissible form, and must set forth facts sufficient to require a trial of any issue of fact (CPLR 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557 (1980)). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v. Associated Fur Manufacturers*, 46 NY2d 1065 (1979)).

Entitlement to summary judgment in favor of the foreclosing plaintiff is established, prima facie by the plaintiff's production of the mortgage and the unpaid note, and evidence of default in payment (*see Wells Fargo Bank N.A. v. Eraboba*, 127 AD3d 1176, 9 NYS3d 312 (2nd Dept., 2015); *Wells Fargo Bank, N.A. v. Ali*, 122 AD3d 726, 995 NYS2d 735 (2nd Dept., 2014)). Where the plaintiff's standing is placed in issue by the defendant's answer, the plaintiff must also establish its standing as part of its prima facie showing (*Aurora Loan Services v. Taylor*, 25 NY3d 355, 12 NYS3d 612 (2015); *Loancare v. Firshing*, 130 AD3d 787, 14 NYS3d 410 (2nd Dept., 2015); *HSBC Bank USA, N.A. v. Baptiste*, 128 AD3d 77, 10 NYS3d 255 (2nd Dept., 2015)). In a foreclosure action, a plaintiff has standing if it is either the holder of, or the assignee of, the underlying note at the time that the action is commenced (*Aurora Loan Services v. Taylor, supra.; Emigrant Bank v. Larizza*, 129 AD3d 94, 13 NYS3d 129 (2nd Dept., 2015)). Either a written assignment of the note or the physical transfer of the note to the plaintiff prior to commencement of the action is sufficient to transfer the obligation and to provide standing (*Wells Fargo Bank, N.A. v. Parker*, 125 AD3d 848, 5 NYS3d 130 (2nd Dept., 2015); *U.S. Bank v. Guy*, 125 AD3d 845, 5 NYS3d 116 (2nd Dept., 2015)).

CPLR 3215(c) provides that "if the plaintiff fails to take proceedings for the entry of judgment within one year after a default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion unless sufficient cause is shown why the complaint should not be dismissed." It is, however, not necessary for a plaintiff to actually obtain a default judgment within one year to avoid dismissal but rather it is enough that the plaintiff timely takes preliminary steps toward a default judgment of foreclosure and sale by moving for an order of reference to establish that it initiated proceedings for entry of judgment (CPLR 3215(d); *Wells Fargo Bank, N.A. v. Combs*, 128 AD3d 812, 10 NYS3d 121 (2nd Dept., 2015)). "As long as proceedings are being taken which manifest an intent not to abandon the case but to seek a

judgment, the action should not be subject to dismissal" (*Brown v. Rosedale Nurseries*, 259 AD2d 256, 686 NYS2d 22 (1st Dept., 1999); *Aurora Loan Services, LLC v. Gross*, 139 AD3d 772, NYS3d (2nd Dept., 2016)).

Plaintiff has submitted sufficient evidence to justify vacating the original order of reference and for a new order of reference. Plaintiff filed the summons and complaint in the Suffolk County Clerk's Office on June 1, 2009 and served the summons and complaint upon the defendants on June 6, 2009. Defendants defaulted in appearing in the action and thereafter plaintiff's motion for an order granting a default judgment was granted by Order (Blydenburgh, J.) of Reference dated April 19, 2010. Based upon this record, the plaintiff complied with the terms of the statute by taking proceedings for the entry of judgment within one year of the defendant's default. Moreover, the plaintiff demonstrated that the affidavit of merit submitted in support of the original motion for an order of reference could not be verified and therefore the reason for the delay in resettling this order was caused by its good faith attempt to comply with A.O. 548/11 & 431/11 (*see U.S Bank, N.A. v. Ahmed*, 137 AD3d 1106, 29 NYS3d 33 (2nd Dept., 2016); *Deutsche Bank National Trust Co. v. Meah*, 120 AD3d 465, 991 NYS2d 92 (2nd Dept., 2014)). Additionally, the plaintiff has submitted evidence that the defendants failed to answer the complaint and also submitted the mortgage, the unpaid note, proof of default of the defaulting mortgagors and demonstrated that based upon these circumstances the appointment of a referee to compute the amount owed in a new order of reference would be proper (*LaSalle Bank, N.A. v. Jagoo*, 147 AD3d 746, 46 NYS3d 216 (2nd Dept., 2017); *U.S. Bank, N.A. v. Ahmed, supra.*)).

With respect to defendant's application seeking leave to vacate their default and to serve a late answer, a defendant seeking to vacate his/her default in appearing in an action and seeking leave to serve a late answer pursuant to CPLR 5015(a) and 3012(d) must provide a reasonable excuse for the default and a potentially meritorious defense to the underlying complaint (*see Eugene DiLorenzo, Inc. v. A.C. Dutton Lbr., Co.*, 67 NY2d 138, 501 NYS2d 8 (1986); *Deutsche Bank National Trust Co. v. Gutierrez*, 102 AD3d 825, 958 NYS2d 472 (2nd Dept., 2013)). Among the relevant factors to be considered are the extent of the delay, whether there has been prejudice to the opposing party, whether there has been wilfulness, the public policy in favor or resolving cases on the merits and whether the untimely answer sets forth an arguably meritorious defense (*Dinstber v. Allstate Insurance Company*, 75 AD3d 957, 906 NYS2d 636 (3rd Dept., 2010); *Montgomery v. Cranes, Inc.*, 50 AD3d 81, 855 NYS2d 681 (2nd Dept., 2008)).

The defendants have failed to provide any reasonable excuse for their default in answering the complaint and to submit an arguably meritorious defense. Defendants' claim that since the lender offered a trial modification they understood that the foreclosure action had been "discontinued" is neither credible nor rational. The record shows that the defendants did nothing to contest plaintiff's prosecution of these proceedings from the time they were initially served with the summons and complaint, and never sought to contest the plaintiff's subsequent default judgment motion. It was not until nearly four years after the action had been commenced and solely in response to plaintiff's October, 2013 motion, that the defendants first attempted to address the underlying foreclosure action by submitting their own cross motion. Under these circumstances the defendant have provided no reasonable explanation for their continuing default in serving an answer and therefore their cross motion seeking leave to vacate their default and to serve a late answer must be denied. It should be noted that in view of the defendants' failure to submit any reasonable excuse for their default in appearing, it is unnecessary to consider whether the defendants have demonstrated

the existence of an arguably meritorious defense to the foreclosure complaint (*Deutsche Bank National Trust Co. v. Rudman*, 80 AD3d 651, 914 NYS2d 672 (2nd Dept., 2011); *Deutsche Bank National Trust Co. v. Gutierrez, supra.; Deutsche Bank National Trust Co. v. Pietranico*, 102 AD3d 724, 957 NYS2d 868 (2nd Dept., 2013); *Wells Fargo Bank, N.A. v. Russell*, 101 AD3d 860, 955 NYS2d 654 (2nd Dept., 2012)).

Moreover, even were the court to consider the proposed defenses sought to be asserted, none of the affirmative defenses is meritorious since the defendants have clearly waived their lack of standing defense by defaulting in serving an answer (*see BAC Home Loans, LP v. Reardon*, 132 AD3d 790, 18 NYS3d 664 (2nd Dept., 2015); *Wells Fargo Bank Minn, N.A. v. Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 (2nd Dept., 2007)) and since any alleged failure to comply with pre-foreclosure notice requirements set forth in the mortgage is not a jurisdictional defect which would provide grounds for a defaulting defendant to vacate their default (*see PHH Mortgage Corp. v. Celestin*, 130 AD3d 703, 11 NYS3d 871 (2nd Dept., 2015); *Pritchard v. Curtis*, 101 AD3d 1502, 957 NYS2d 440 (3rd Dept., 2012); *Deutsche Bank National Trust Co. v. Posner*, 89 AD3d 674, 933 NYS2d 52 (2nd Dept., 2011)). In addition, the plaintiff has submitted sufficient evidence to establish that it has standing by its possession of the duly endorsed promissory note prior to commencing this action (*see Aurora Loan Services v. Taylor, supra.*)). Also, it should be noted that the issue raised by the defendants concerning attorney disqualification is moot, as court records indicate that plaintiff's counsel has been substituted on May 27, 20154 by incoming counsel identified as Gross, Polowy & Orlans. Esqs/

Finally, defendants' claim that the mortgage lender did not act in good faith is not supported by sufficient credible evidence to provide grounds to defeat plaintiff's motion. Court records indicate that a court settlement conference was held on September 16, 2013 and that these motions remained sub judice until submission on this court's motion submission calendar on March 21, 2107. Although the defendants contend that they were never notified of the September, 2013 conference date, there is no evidence that the mortgage lender acted in bad faith, and given the fact that nearly 8 and one-half years has gone by since a timely payment has been made or even attempted, this court of equity finds no reason to permit any further delay.

Accordingly the defendants' cross motion is denied and the plaintiff's motion is granted in its entirety. The proposed order for the appointment of a referee has been signed simultaneously with the execution of this order.

Hon. Howard H. Heckman Jr.,

Dated: May 9, 2017

J.S.C.