Bank of N.Y. Mellon v Aquino

2012 NY Slip Op 33143(U)

December 11, 2012

Supreme Court, Queens County

Docket Number: 7736/10

Judge: Kevin Kerrigan

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MEMORANDUM

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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The Bank of New York Mellon f/k/a The Bank of New York, as Trustee for the Certificate Holders CWALT, Inc., Alternative Loan Trust 2006-OC8, Mortgage Pass-Through Certificates, Series 2006-OC8,

Plaintiff,

- against -

Alberto Aquino a/k/a Albert Aquino, Elizabeth Aquino and "John Doe #1" through "John Doe #12",

Defendants.

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Index Number: 7736/10

Motion Date: 11/27/12

Motion Cal. Number: 1

Motion Seq. No.: 1

Motion by plaintiff in this mortgage foreclosure action for amendment of the caption discontinuing the action against John Does 1-12, for summary judgment against defendants Aquino and for an order appointing a referee to compute the sums owing to plaintiff and to ascertain whether the premises may be sold in one or more parcels is granted. That branch of the motion for a default judgment against all non-answering and non-appearing defendants is denied as moot in light of the discontinuance of this action against the John Doe defendants. That branch of the motion for the costs of this motion is denied.

Cross-motion by Aquino for leave to amend their answer to assert affirmative defenses and counterclaims, and upon such amendment, to dismiss the complaint upon the grounds that plaintiff lacks standing to maintain the action and that plaintiff failed to comply with the notice requirements of RPAPL §§1304 and 1306 is denied.

Plaintiff has demonstrated its entitlement to summary judgment by submitting proof of the mortgage and Aquinos' default in payment (see First national Bank, FSB v Goodman, 272 AD 2d 433 [2nd Dept 2000]). Indeed, defendants do not deny their indebtedness or their default under the mortgage and, in fact, have acknowledged the same by virtue of their prior loan modification and their application for another modification with plaintiff.

The Court notes that the instant motion was adjourned five times and marked "Final" three times upon defendants' representation to the Court that they had applied for and were in the process of obtaining a loan modification from plaintiff and that they wished to submit to plaintiff the required financial

information in support of their application for a modification. Contrary to plaintiff's contention that the Court's law secretary "inexplicably" "refused to submit the motion" and allow it to be determined pending the loan modification application, it is the policy of this Court not to proceed with the foreclosure process while a loan modification application is pending and being considered. Furthermore, there was an issue raised during prior conferences as to whether plaintiff received some of the financial information it demanded from defendants.

At the calling of the calendar on November 27, 2012, which date was marked "Final" for the third time, instead of apprising the Court of the status of their loan modification, defendants submitted, through their attorney, the instant cross-motion to amend their answer to include 25 affirmative defenses and two counterclaims.

Although motions for leave to amend pleadings should be freely granted in the absence of prejudice or surprise, they should be denied if they are palpably insufficient or patently meritless (see CPLR 3025[b]; Aurora Loan Servs., LLC v Thomas, 70 AD 3d 986 [2nd Dept 2010]). Defendants' affirmative defenses set forth in their proposed amended complaint are patently meritless.

Defendants' counsel contends that plaintiff has not demonstrated that it has standing to maintain the foreclosure action. Contrary to counsel's assertion, the affidavit of Pamela D. Goliat, an officer of the Bank of America, N.A. (BANA), the servicing agent for plaintiff, in support of the motion, does not constitute inadmissible hearsay. She has adequately laid the foundation for admission of the relevant loan documents as business records.

The record on this motion and cross-motion reflects that defendants obtained a mortgage loan and executed and delivered a note to the lender, Ocwen Loan Servicing, LLC on May 10, 2006 and simultaneously executed and delivered to Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for Ocwen, a mortgage on the subject property. On June 26, 2008, MERS assigned the mortgage to The Bank of New York as Trustee for the Certificateholders CWALT, Inc., Alternative Loan Trust 2006-OC8, Mortgage Pass-Through Certificates, Series 2006-OC8. Thereafter, the above-mentioned assignee became known as The Bank of New York Mellon. On March 18, 2010, the mortgage was assigned from plaintiff, now known as The Bank of New York Mellon f/k/a The Bank of New York, as Trustee for the Certificate Holders CWALT, Inc., Alternative Loan Trust 2006-OC8, Mortgage Pass-Through Certificates, Series 2006-OC8, to Countrywide Home Loans Servicing, LP, Countrywide changed its name to BAC Home Loans Servicing, LP and there was a third assignment of the mortgage from BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing, LP, to

plaintiff once again.

A loan modification agreement was entered into between Countrywide and defendant Albert Aquino on September 4, 2008. Plaintiff's counsel contends that the waiver language in the modification agreement wherein the borrower waived any defenses, claims, counterclaims or offsets bars plaintiff's proposed defenses and counterclaims to the present foreclosure action. However, the waiver provision applies only to "Lender or agent of Lender" and also provides, "This release extends to any claims arising from any foreclosure proceedings conducted prior to the date of this agreement." Since plaintiff was not the lender on September 4, 2008 and did not commence a foreclosure action prior to that date, the waiver contained in the modification agreement does not apply to bar defenses and counterclaims against plaintiff in this action.

The modification agreement, however, is of no moment, since defendants' proposed affirmative defenses and counterclaims are patently meritless.

Since plaintiff has shown that it was the assignee of the mortgage and that it had physical possession of the underlying note on March 18, 2010, prior to the date it commenced this foreclosure action on March 29, 2010, it had standing to maintain this foreclosure action.

With respect to the note, Goliat averred in her affidavit that plaintiff is the holder of the note and has held the note prior to commencement of this action. The copy of the note annexed to the moving papers bears two stamped endorsements on its signature page. As heretofore noted, one endorsement is to Countrywide by an officer of Ocwen. The second endorsement is a blank endorsement by the executive vice president of Countrywide.

The argument of defendants' counsel that the blank endorsement does not show that there is a "definitive owner" of the note is without merit. A mortgage note is a negotiable instrument (see UCC 3-104), and an endorsement on the instrument in blank constitutes proof of a valid transfer by physical delivery (see UCC 3-202).

The mortgage instrument provides, in part, "The Note, or an interest in the Note, together with this Security Instrument, may be sold one or more times." The assignment from MERS to plaintiff provides, inter alia, that the mortgage is being assigned "Together with the notes described in said mortgage, and the moneys due and to grow due thereon with interest", and both assignments from plaintiff to Countrywide and from Countrywide (now known as BAC) on March 18, 2010 provided that the mortgage was assigned to plaintiff "together with the bond or obligation described in said mortgage, and the moneys due to grow due thereon with interest". Thus, the assignments reflect that both the ownership of the debt (the note) and the security for it (the mortgage) were transferred as part of

a single transaction on March 18, 2010. As heretofore noted, Goliat averred in her affidavit that plaintiff was in possession of the note prior to the commencement of this action. In his affirmation in opposition to the cross-motion, plaintiff's counsel represents that, as reflected in the books and records of his office, plaintiff was at all times in possession of the note and that Goliat "procured the collateral document file from the Plaintiff before the commencement of the within action, and directed same to the offices of your affirmant". Counsel also certified a copy of the note, as annexed to the moving papers, as an original. Therefore, plaintiff has proffered sufficient evidence that the note secured by the mortgage was in the physical possession of plaintiff prior to the commencement of this action and that it was provided to its counsel in preparation for the commencement of this action.

Therefore, plaintiff has demonstrated its standing to maintain this foreclosure action by proffering evidence that it was the assignee of the mortgage, and that it was the holder of the note at the time the action was commenced (see Bank of New York v Silverberg, 86 AD 3d 274 [2nd Dept 2011]). Moreover, as noted, since the promissory note was tendered to and accepted by plaintiff, the mortgage passed as an incident to the note (id.).

Without merit are defendants' attorney's additional arguments that plaintiff has failed to demonstrate that Goliat is the mortgage servicer for plaintiff because no agency agreement was annexed to the moving papers and that plaintiff has failed to prove that "the person executing the Affidavit on behalf of the Plaintiff is in fact authorized and acting within the scope of the Trust" because the trust agreement has not been submitted for review. Plaintiff cites no relevant authority for the borderline frivolous contention that an agency agreement need be provided to the Court by plaintiff's mortgage servicer as proof of its authority to act as servicer for the very party that has commenced a foreclosure action and has annexed the servicer's affidavit in support of its motion for summary judgment and an order of reference. Likewise, this Court need not review the trust agreement to determine whether the mortgage loan servicer was authorized to act as such by the trustees on whose behalf plaintiff received the assignment of the mortgage and the note and who unquestionably vested the servicer with authority to act on its behalf, as evidenced by plaintiff's very act of annexing the servicer's affidavit to its moving papers in support thereof.

Counsel contends that the action must be dismissed because plaintiff failed to comply with RPAPL §1304. The cross-moving papers contain the affidavit of Alberto Aquino who avers that he and his wife Elizabeth Aquino receive mail at the subject premises and that he never received the 90-day notice. The proposed amended complaint merely recites, "Plaintiff failed to abide by the requirements of RPAPL 1304 prior to commencing the within lawsuit."

Annexed to the moving papers is a statutorily proper 90-day notice addressed to Alberto Aquino at the subject property, and Goliat averred in her affidavit that based upon the business records she reviewed, a 90-day notice was served via certified mail and first class mail to the last known address of the borrower prior to the commencement of the action. However, plaintiff has not submitted a copy of the certified mail receipt or an affidavit of mailing of the 90-day notice.

But even had plaintiff failed to serve defendants with a statutory 90-day notice, RPAPL §1304(3) provides, "The ninety day period ... shall not apply, or shall cease to apply, if the borrower has filed an application for the adjustment of debts of the borrower".

Defendants applied for and received a loan modification in 2008 with plaintiff's predecessor in interest. Defendants defaulted under the loan modification agreement and, after commencement of the action, defendants applied for another modification with plaintiff. Pursuant to the residential foreclosure conference order issued by Court Attorney-Referee Mark J. Kugelman on November 9, 2010, it was directed that the action shall proceed by order of reference/motion since the case had not been settled. The order noted, "Defendant/borrowers have failed to submit loan modification as of this date, even though provided with same on August 17, 2010. No good faith activity on the part of defendant/borrowers."

On the multiple dates that the instant motion was on this Court's motion calendar, defendants appeared and represented to the Court that they applied for a loan modification with plaintiff, that they were negotiating with plaintiff for a modification and had submitted documentation in support of their application for a modification, that plaintiff had informed them that it either had not received all the documents defendants maintains they submitted or that the documentation submitted was inadequate and, therefore, their application was incomplete and had to be re-submitted with complete documentation, and requested adjournments to afford them the opportunity to submit the demanded financial documentation, notwithstanding that they insisted that they had submitted a complete and proper application. Plaintiff's counsel was not aware of the precise status of defendants' application. For this reason, the Court adjourned the matter multiple times pending defendants' submission, or re-submission, of the required documents and plaintiff's determination of the modification application.

However, on the final adjourned date of November 27, 2012, defendants appeared through their present counsel and submitted the instant cross-motion.

"Since RPAPL 1304 notice must be sent at least 90 days prior to the commencement of an anticipated foreclosure action, its manifest purpose is to aid the homeowner in an attempt to avoid

litigation. The legislative history noted a typical lack of communication between distressed homeowners and their lenders prior to the commencement of litigation, leading to needless foreclosure proceedings. The bill sponsor sought 'to bridge that communication gap in order to facilitate a resolution that avoids foreclosure' by providing a pre-foreclosure notice advising the borrower of 'housing counseling services available in the borrower's area' and an 'additional period of time...to work on a resolution' (Senate Introducer Mem. in Support, Bill Jacket, L. 2008, ch 472, at 10)" (Aurora loan Services, LLC v Weisblum, 85 AD 3d 95, 107 [2nd Dept 2011]).

By seeking and receiving a loan modification from plaintiff's predecessor, and then, after defaulting under the loan modification, applying for another modification from plaintiff and, after the instant motion was made pursuant to the order of Court Attorney-Referee Kugelman who noted in his order that defendants were not proceeding in good faith, procuring five adjournments of the instant motion upon the representation to the Court that they had submitted their application but that plaintiff apprised them that the required supporting documentation had not been received, has more than satisfied the concerns underlying the 90-day notice requirement of RPAPL 1304(1). It is precisely in situations such as the present that the Legislature also saw fit to add subsection (3) to the statute.

It is immaterial that the 2008 loan modification agreement was with plaintiff's predecessor in interest or that one of the clauses of the modification providing for a waiver of defenses and counterclaims against the "Lender" might be interpreted, as defendants' counsel urges, as applying only to the particular lender that issued the modification and not to a subsequent assignee. RPAPL 1304(3) is an independent statutory provision and has nothing to do with a contractual waiver of defenses and counterclaims provision. RPAPL 1304(3) provides that the 90-day notice requirement is rendered inapplicable if the borrower applies for a modification.

The statute, moreover, does not contain any language limiting its applicability only to that lender in the chain of assignments that issued the loan modification. Even if it did, or could be interpreted in such manner, defendants also applied for a modification of their loan with plaintiff. Although the giving of the requisite 90-day notice is a condition precedent to commencement of a foreclosure action, that defendants did not apply for a modification with plaintiff until after the action was commenced does not render 1304(3) inapplicable and mandate dismissal of the action, since 1304(3) states that the 90-day notice requirement "shall not apply, or shall cease to apply" (emphasis added) if the borrower has filed a loan modification application. It is well-established that a statute should not be interpreted in a manner that would render its terms superfluous or

redundant (see Sin, Inc. v Department of Finance of City of New York, 71 NY 2d 616 1988]). If it were the intent of the Legislature that the 90-day notice requirement be inapplicable only if the lender applied for a modification prior to the statutory period for mailing of the 90-day notice, the additional phrase "or shall cease to apply" would be entirely redundant.

Here, defendants who clearly had knowledge of the loan modification process, who entered into negotiations with the lender, negotiated and obtained a loan modification and thereafter applied for and engaged in further negotiations for a second modification, who availed themselves of legal counsel and who engaged in these negotiations patently in bad faith to evade payment of their loan debt are not the type of property owners for whom the statute was intended to bridge the communication gap and facilitate a resolution to avoid foreclosure. Moreover, these sophisticated defendants who have retained two attorneys, have negotiated and dishonored a loan modification and have applied for a second modification in bad faith to delay this matter and avoid foreclosure were hardly in need of being given by plaintiff a list of housing counseling services. RPAPL 1304(1) was not intended to protect mortgagors such as defendants, and it is for the foregoing reasons that this Court is of the opinion that the statute's 90-day notice requirement is inapplicable to them pursuant to RPAPL 1304(3). Consequently, plaintiff was not required to comply with the filing requirements of RPAPL 1306.

Without merit is defendants' counsel's additional contention in his affirmation in opposition and in support of the cross-motion that plaintiff's counsel was not in compliance with the Administrative Orders of the Chief Administrative Judge of the Courts (AO 548-10 and AO 431-11), which require the submission of an attorney affirmation certifying the accuracy of the papers filed in support of a residential foreclosure action. The affirmation submitted by plaintiff's counsel is in the form annexed to AO 548-10 and is proper in every respect.

The balance of defendants' affirmative defenses contained in their proposed amended answer are also patently without merit, as are their counterclaims. Indeed, defendants' counsel does not make any attempt to justify them, does not seek dismissal upon these other affirmative defenses and does not even reference them in his affirmation. Likewise, defendants' counterclaims are patently without merit and no support for them is proffered by counsel in the cross-moving papers.

Accordingly, the motion is granted and the cross-motion is denied.

Settle order.

Dated: December 11, 2012

KEVIN J. KERRIGAN, J.S.C.