

American Home Mtge. Serv., Inc. v Dulisse
2013 NY Slip Op 30637(U)
March 22, 2013
Sup Ct, Suffolk County
Docket Number: 13963-11
Judge: Elizabeth H. Emerson
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SHORT FORM ORDER

INDEX
NO.: 13963-11**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 8 SUFFOLK COUNTY**PRESENT: Honorable Elizabeth H. EmersonMOTION DATE: 8-10-12
SUBMITTED: 8-10-12
MOTION NO.: 001-MG
002-XMD_____
AMERICAN HOME MORTGAGE
SERVICING, INC.,

Plaintiff,

-against-

**FRENKEL, LAMBERT, WEISS,
WEISMAN & GORDON, LLP**
Attorneys for Plaintiff
One Whitehall Street, 20th Floor
New York, New York 10004JOSEPH R. DULISSE, JPMORGAN CHASE
BANK, N.A., TEACHERS FEDERAL CREDIT
UNION, AND "JOHN DOE #1" THROUGH
"JOHN DOE #10, THE LAST TEN NAMES
BEING FICTITIOUS AND UNKNOWN TO
THE PLAINTIFF, THE PERSON OR
PARTIES, IF ANY, HAVING OR CLAIMING
AN INTEREST IN OR LIEN UPON THE
MORTGAGE PREMISES DESCRIBED IN THE
COMPLAINT,**NIERODA & NIERODA, PC**
Attorneys for Defendant Joseph R. Dulisse
320 Carleton Avenue, Suite 6400
Central Islip, New York 11722Defendants.

_____ X

Upon the following papers numbered 1-20 read on this motion for summary judgment and order of reference ; Notice of Motion and supporting papers 1-12 ; Notice of Cross Motion and supporting papers 13-17; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers 18-20 ; it is,

ORDERED UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that this motion (001) by plaintiff American Home Mortgage Servicing, Inc., pursuant to CPLR 3212 for summary judgment on its complaint, to strike the answer of defendant Joseph R. Dulisse (Dulisse), awarding plaintiff a default judgment against the remaining defendants,

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for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is granted; and it is further

ORDERED that plaintiff's application for leave to amend the caption of this action pursuant to CPLR 3025 (b), is granted; and it is further

ORDERED that the caption is hereby amended by substituting the name Sergio Doe for "John Doe #1" and by striking the names of defendants "John Doe #2" through "John Doe #10"; and it is further

ORDERED that the caption of this action hereinafter appear as follows:

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK**

_____X
American Home Mortgage Servicing, Inc.,

Plaintiff,

-against-

**Joseph R. Dulisse, JP Morgan Chase Bank, N.A.,
Teachers Federal Credit Union, Sergio Doe,**

Defendants.

_____X
ORDERED that this cross motion (002) by defendant Dulisse seeking to restore the instant matter to the court's Residential Mortgage Foreclosure Settlement Conference Calendar is denied.

The plaintiff commenced this action to foreclose a mortgage on April 25, 2011 in connection with the premises known as 28 Blueberry Lane, Patchogue, New York. On August 3, 2005, defendant Dulisse executed a note in favor of American Home Mortgage, agreeing to pay the sum of \$285,000.00 at the rate of 6.500 percent. On August 3, 2005, defendant Dulisse executed a first mortgage in the principal sum of \$285,000.00 on the subject property. The mortgage indicated American Home Mortgage to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of American Home Mortgage as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on October 17, 2005 in the Suffolk County Clerk's Office. Thereafter, the mortgage was transferred by assignment of mortgage dated March 30, 2011 from MERS to American Home Mortgage Servicing Inc. (AHMSI), the plaintiff herein. The assignment of mortgage was recorded on April 13, 2011 with the Suffolk County Clerk's Office. The note was indorsed in blank by Ryan McGroary, assistant secretary of

American Home Mortgage.

Plaintiff AHMSI sent a notice of default dated November 3, 2010 to defendant Dulisse stating that he had defaulted on his mortgage loan and that the amount past due was \$35,902.53. As a result of defendant's continuing default, plaintiff commenced this foreclosure action. In its complaint, plaintiff alleges in pertinent part that defendant breached his obligations under the terms and conditions of the note and mortgage by failing to make the monthly payments commencing with his November 1, 2009 payment.

The Court's computerized records indicate that a foreclosure settlement conference was held on July 29, 2011 at which time this matter was referred as an IAS case since a resolution or settlement had not been achieved. Thus, there has been compliance with CPLR 3408 and no further settlement conference is required. Defendant interposed an answer consisting of a general denial and six affirmative defenses.

Plaintiff now moves for summary judgment on its complaint contending that defendant Dulisse failed to comply with the terms of the loan agreement and mortgage, that notice of default was mailed to the defendant, that the defendant failed to timely cure the default, that the answer of defendant Dulisse raised no triable issues of fact or valid defenses to this proceeding. In support of its motion, plaintiff AHMSI submits, inter alia, the affirmation of Barry M. Weiss, Esq.; the summons and verified complaint; the note, mortgage and assignment; defendant's verified answer, a notice of default; notices pursuant to RPAPL §§ 1320 and 1304; affidavits of service for the summons and complaint; an affidavit of service for the instant summary judgment motion upon the attorneys for defendant Dulisse; and a proposed order appointing a referee to compute.

Defendant Dulisse by notice of cross motion seeks to restore the instant matter to the court's residential mortgage foreclosure settlement conference calendar. In addition, defendant opposes the summary judgment motion which seeks to strike the defendant's answer.

Plaintiff's reply affirmation asserts that defendant failed to state any facts that would establish an issue of fact precluding summary judgment. In addition, plaintiff points out that no affidavit by the defendant or anyone else with personal knowledge of the circumstances of this case was offered to refute the facts established by plaintiff. On the cross motion, plaintiff avers that defendant was given an opportunity to conference the case in the Mortgage Foreclosure Settlement Part on July 29, 2011 however, failed to appear; that defendant has offered no explanation why he failed to appear; and, that defendant had one year to restore this matter to the Mortgage Foreclosure Conference Part but failed to do so.

“[I]n an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default” (*see Republic Natl. Bank of N.Y. v O’Kane*, 308 AD2d 482, 482, 764 NYS2d 635 [2d Dept 2003]; *Village Bank v Wild Oaks Holding*, 196 AD2d 812, 601 NYS2d 940 [2d Dept 1993]; *see also Argent Mtge. Co.*,

LLC v Mentasana, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Once a plaintiff has made this showing, the burden then shifts to defendant to produce evidentiary proof in admissible form sufficient to require a trial of their defenses (*see Aames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]; *Household Fin. Realty Corp. of New York v Winn*, 19 AD3d 545, 796 NYS2d 533 [2d Dept 2005]; *see also Washington Mut. Bank v Valencia*, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]).

Here, plaintiff produced the note and mortgage executed by defendant Dulisse, the assignment of mortgage, as well as evidence of defendant's nonpayment, thereby establishing a prima facie case as a matter of law (*see Wells Fargo Bank Minnesota, Natl. Assn. v Mastropalo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). Emmitt Wilson IV, vice president of AHMSI, avers that the defendant defaulted under the terms of the Note and Mortgage by failing to tender payment for the monthly installment due for November 1, 2009 and subsequent payments thereafter. Defendant was mailed a notice of default dated November 3, 2010 which was not cured. As a result thereof, plaintiff elected to accelerate the mortgage debt and declared all sums secured thereby due and payable on the mortgage. Plaintiff maintains that they are in physical possession of the original note and mortgage.

Once plaintiff has made a prima facie showing, it is incumbent on defendant "to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff" (*see Cochran Inv. Co., Inc. v Jackson*, 38 AD3d 704, 834 NYS2d 198, 199 [2d Dept 2007] *quoting Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 467, 664 NYS2d 345 [2d Dept 1997]). Here, defendant Dulisse has failed to demonstrate, through the production of competent and admissible evidence, a viable defense which could raise a triable issue of fact (*Deutsche Bank Natl. Trust Co. v Posner*, 89 AD3d 674, 933 NYS2d 52 [2d Dept 2011]). "Motions for summary judgment may not be defeated merely by surmise, conjecture or suspicion" (*see Shaw v Time-Life Records*, 38 NY2d 201, 379 NYS2d 390 [1975]). Here, the defendant's papers are devoid of sufficient evidence to support his contentions. This court finds that the answer, affirmative defenses and averments contained in the affirmation in opposition to summary judgment submitted by defendant, which contain mere denials and unsupported declarations, to be insufficient so as to raise a triable issue of fact.

The defendant has cross-moved seeking to restore the instant matter to the court's residential mortgage foreclosure settlement conference calendar. Defendant through his attorney, in pertinent part, contends that "[p]laintiff, by this motion, attempts to negate all of the hard work and effort [d]efendant and his attorney have put into the loan modification process" as a basis for this Court's denial of summary judgment and restoration of the matter to the conference calendar. In support of his application, defendant submits a copy of his verified answer; correspondence from plaintiff AHMSI dated November 17, 2011 and November 15, 2011; fax transmission sheets from his attorney's office dated November 11, 2011; Making Home Affordable Program Request for Modification and Affidavit dated November 4, 2011; Citibank Statements for the periods August

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10, 2011 through September 11, 2011 and September 12, 2011 through October 10, 2011, and a IRS Schedule C, Profit and Loss Defendant from Business for the year 2010. While it appears that a limited effort was made by defendant in November 2011 to attempt to obtain a loan modification, same cannot be characterized as “hard work”. Furthermore, the Court’s computerized records indicate that a foreclosure settlement conference was held on July 29, 2011 at which time the defendant inexplicably failed to appear. No request for an adjournment was submitted and no request to have the matter re-calendared has been submitted. Here, the evidence in support of the cross motion as offered by defendant is patently insufficient to warrant this Court to grant the relief requested. As such, the court denies such application.

Based upon the foregoing, the motion for summary judgment is granted, the answer of defendant Dulisse and the affirmative defenses contained therein are stricken. The cross motion is denied.

In addition, plaintiff’s request for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is granted (*see Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *Bank of East Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

The proposed order appointing a referee to compute pursuant to RPAPL §1321 is signed as modified by the court.

Plaintiff is directed to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court.

Dated: March 22, 2012

HON. ELIZABETH HAZLITT EMERSON

J.S.C.