Countrywide Home Loans, Inc. v Cano
2013 NY Slip Op 32071(U)
August 26, 2013
Supreme Court, Suffolk County
Docket Number: 08-29145
Judge: Jerry Garguilo

COPY

SHORT FORM ORDER

INDEX No. 08-29145

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 3-6-13
ADJ. DATE 3-27-13
Mot. Seq. # 002 - MotD

COUNTRYWIDE HOME LOANS, INC., Plaintiff, - against - JEREMY CANO, CRISTINA CANO, and "JOHN DOE #1"through "JOHN DOE #10", the last ten names being fictitious and unknown to the plaintiff, the person or parties intended being the persons or parties, if any, having or claiming an interest in or lien upon the Mortgage premises described in the complaint, Defendants.	FRENKEL, LAMBERT, WEISS, WEISMAN & GORDON, LLP Attorney for Plaintiff 53 Gibson Street Bay Shore, New York 11706 JEREMY & CRISTINA CANO, ProSe 41 North Prospect Avenue Patchogue, New York 11772

Upon the following papers numbered 1 to 11 read on this motion to vacate order of reference ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 5 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 6 - 8 ; Replying Affidavits and supporting papers 9 - 11 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the branch of this motion by plaintiff to vacate the prior order of reference dated September 21, 2009 and entered on October 13, 2009 in the Suffolk County Clerk's Office, and upon the filing of a new affidavit of merit for the issuance of a new order of reference is denied, and the action is continued; and it is further

ORDERED that the branch of this motion to amend paragraph "Second" and paragraph "Sixth" of the complaint, *nunc pro tunc*, to correct typographical errors is granted; and it is further

ORDERED that the branch of this motion to amend the caption is granted; and it is

ORDERED that the Clerk of this Court is directed to amend the caption as follows, and all future pleadings and papers will use the amended caption:

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BANK OF AMERICA, N.A., s/b/m to BAC HOME LOANS SERVICING, L.P., f/k/a COUNTRYWIDE HOME LOAN SERVICING L.P.,

Plaintiff,

-against-

JEREMY CANO, CRISTINA CANO,

Defendants.
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The plaintiff commenced this mortgage foreclosure action in August 2008, six months after the subject mortgage went into default, and it moved for an order of reference in February 2009. That application was granted by Justice Melvyn Tanenbaum, retired, by order dated September 21, 2009. In such order, the court fixed the defaults of the mortgagor defendants, Jeremy and Cristina Cano, as they had failed to interpose an answer or oppose the application, removed the John Doe defendants from the action and amended the caption to reflect same, and appointed a referee to compute the amounts due under the mortgage.

By the instant motion, the plaintiff moves for an order vacating the September 21, 2009 order, for the issuance of a new order of reference predicated upon a new affidavit of merit, and to amend the caption to reflect Bank of America, N.A., the successor in interest by merger, as the plaintiff.

On September 23, 2009, two days after plaintiff obtained the order of reference dated September21, 2009 (the "Order of Reference"), Jeremy Cano filed a Chapter 7 Bankruptcy petition; by order dated January 26, 2010, the case was closed.

Subsequently, in December 2011, plaintiff retained new counsel. Underlying the instant application for vacatur of the Order of Reference is an apparent inability on the part of plaintiff's current counsel to comply with the requirements of Administrative Order 548-10, as amended by Administrative order 431-11 (the "Administrative Order"). The Administrative Order mandates the submission of an affirmation by the mortgagee's counsel verifying, among other things, the accuracy of the notarizations contained in the supporting documents filed with the foreclosure action. Counsel is required to represent that he or she communicated with a representative of the plaintiff who reviewed the documents and records relating to the action and the papers filed with the court, and confirmed their factual accuracy and the accuracy of the notarizations contained therein. The plaintiff's counsel is further required to represent that, based upon such communication and counsel's own inspection of the papers, to the best of counsel's knowledge, information and belief, the filed documents are complete and accurate in all

relevant respects.

Here, plaintiff's counsel states, the "plaintiff is unable to confirm that a proper review of the records was made and a proper notary taken when the prior affidavit...in support of the previous order, was signed." Armed with the new affidavit of merit submitted with the moving papers, counsel asserts that he may now attest to the accuracy of the facts set forth therein. Counsel thus requests the court vacate the order of reference and issue a new one re-fixing the defaults in answering of the mortgagor defendants and appointing a new referee to compute. For the reasons stated below, this application is denied.

The Administrative Order initially issued by the Chief Administrative Judge of the State of New York on October 20, 2010, and amended March 2, 2011, provides that in cases pending on the effective date thereof, where no judgment of foreclosure has been entered, the attorney affirmation is required to be filed at the time of filing of either the proposed order of reference or the proposed judgment of foreclosure (***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***US Bank, NA v Boyce***, 93 AD3d 782, 940 NYS2d 656 [2nd Dept 2012]).

The instant mortgage foreclosure action was pending at the time of the effective date of the Administrative Order, and the plaintiff filed its proposed order of reference in February 2009, approximately 18 months before the Administrative Order issued. Thus, the plaintiff could not have filed the attorney affirmation pursuant to the Administrative Order when it filed its proposed order of reference. Based on the plain language of the Administrative Order, the plaintiff is therefore required to file the attorney affirmation at the time it files the proposed judgment of foreclosure (***Flagstar Bank v Bellafiore***, *supra*; ***US Bank, NA v Boyce***, *supra*). Thus, no basis has been set forth to vacate the order of reference; therefore, denied is the branch of the motion for vacatur and the issuance of a new order of reference.

Denial is warranted on another ground. "It is elementary that a final judgment or order represents a valid and conclusive adjudication of the parties' substantive rights..." (***Da Silva v Masso*** 76 NY2d 436, 440, 560 NYS2d 109 [1990]). Doctrines such as law of the case, collateral estoppel and full faith and credit generally serve to protect the sanctity and finality of litigated judicial orders and judgments, the doctrine of res judicata does so for such orders and those issued upon default (*see* ***Richter v Sportsman Prop., Inc.***, 82 AD3d 733, 918 NYS2d 511 [2d Dept 2011]; ***83-17 Broadway Corp. v Debcon Fin. Serv., Inc.***, 39 AD3d 583, 835 NYS2d 602 [2d Dept 2007]; ***Rosendale v Citibank***, 262 AD2d 628, 691 NYS2d 901 [2d Dept 1999]).

The order of reference issued herein is a sufficiently final adjudication of the defaults in answering of the defendants and/or the merits of the plaintiff's claims for foreclosure and sale (*see* ***Citicorp Mtge. Inc. v Strong***, 227 AD2d 818, 642 NYS2d 423, 642 NYS2d 423 [3d Dept 1996]; *see also* ***Sussman v Jo-Sta Realty Corp.***, 99 AD3d 787, 951 NYS2d 683 [2d Dept 2012]). It thus constitutes a conclusive adjudication of all questions at issue between the parties and all matters of defense which were raised or could have been raised by any of the defendants (*see* ***Richter v Sportsman Prop., Inc.***, *supra*; ***83-17 Broadway Corp. v Debcon Fin. Serv., Inc.***, *supra*; ***Rosendale v Citibank***, *supra*). Long standing rules, such as res judicata and law of the case, which govern the sanctity afforded

judicial orders, decisions and judgments, all serve to protect the unquestioned order of reference from attack (*see* ***Rizzo v Ippolito***, 137 AD2d 511, 524 NYS2d 255 [2d Dept 1988]; *see also* ***Citicorp Mtge. Inc. v Strong***, *supra*; ***Wait v Landemark***, 49 Hun 612, 2 NYS 265 [3d Dept 1888]).

The branch of the motion to amend the caption to reflect, "Bank of America, NA. s/b/m to BAC Home Loans Servicing, L.P., f/k/a Countrywide Home Loans Servicing, L.P.," as plaintiff is granted. It has been established that subsequent to the commencement of this action, on December 28, 2009, plaintiff assigned the note and mortgage to BAC Home Loans Servicing LP, which was formerly known as Countrywide Home Loans Services LP. Thereafter, on July 1, 2011, BAC Home Loan Servicing, LP was acquired by and merged with Bank of America, N.A ("BANA").

Banking Law § 602, which governs the effect of a merger, provides that the receiving bank "shall be considered the same business and corporate entity" as the bank merged into it, and that all of the property, rights, and powers of the merged bank shall vest in the receiving bank ***(Ladino v Bank of America***, 52 AD3d 571, 861 NYS2d 683 [2d Dept 2008]). Moreover, BANA is considered to have been named in any document taking effect before the merger (***Barclay's Bank of New York, N.A. v Smitty's Ranch, Inc.***, 122 AD2d 323, 504 NYS2d 295 [3d Dept 1986]). Thus, as successor by merger, BANA is now the real party in interest. Therefore, the caption is hereby amended.

The court will deem the plaintiff's motion as one to include leave to amend, and grant its request to amend the complaint, *nunc pro tunc*, to correct two typographical errors. Leave to amend the complaint should be freely granted absent prejudice (CPLR 3025[b]; ***Edenwald Contracting Co., Inc. v. City of New York***, 60 N.Y.2d 957, 471 NYS2d 55 [1983]). Plaintiff seeks to amend paragraph "Second" of the complaint to reflect that only Jeremy Cano, and not Cristina Cano, signed the note, and paragraph "Sixth" to correct the date from which interest accrued from January 1, 2008 to February 1, 2008. There is no indication of prejudice to defendant and no substantive rights affected by an amendment, *nunc pro tunc* (*see generally* ***Madison Physical Therapy, P.C. v 3311 Shore Parkway Realty Corp.***, 79 AD3d 978, 912 NYS2d 889[2d Dept 2010]; ***Key Bank, NA v Stern***, 14 AD3d 656, 789 NYS2d 297 [2d Dept 2005]; ***Poughkeepsie Sav. Bank FSB v Maplewood Land Dev. Co., Inc.***, 201 AD2d 606, 620 NYS2d 161 [3d Dept 1994]).

The mortgagor defendants assertion in opposition that they join in that part of the plaintiff's motion which seeks to vacate the order of reference, and their assertion that the plaintiff does not have standing, are both unavailing. The mortgagor defendants have waived the defense of lack of standing, have failed to make a cross motion seeking any affirmative relief, and have failed to move to vacate their default judgment.

It is now well established that standing is an affirmative defense which is waived by a defendant who fails to interpose an answer or file a timely pre-answer motion pursuant to CPLR 3211(e) asserting such a defense (***HSBC Bank USA, NA v Taher***, 104 AD3d 815, 962 NYS2d 301 [2d Dept 2013]; ***Bank of N.Y. v Alderazi***, 99 AD3d 837, 951 NYS2d 900 [2d Dept 2012]; ***JPMorgan Chase Bank, N.A. v Bauer***, 92 AD3d 641, 938 NYS2d 190 [2d Dept 2012]; ***Deutsche Bank Natl. Trust Co. v Hussain***, 78 AD3d 989, 912 NYS2d 595 [2d Dept 2010]); ***Wells Fargo Bank Minn., NA v Perez***, 70 AD3d 817, 894 NYS2d 509 [2010]; *leave to appeal denied*, 14 NY3d 710, 903 NYS2d 769 [2010], *cert. denied*, 131 S

Ct 648 [2010]); ***HSBC Bank, USA v Dammond***, 59 AD3d 679, 875 NYS2d 679 [2d Dept 2009]; ***Wells Fargo Bank Minn., N.A. v Mastropaolo***, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). A plaintiff is thus under no obligation to plead and prove its standing in the first instance. It is only where standing is put in issue by a defendant's answer or pre-answer motion that the plaintiff must prove it has standing (*see* ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]; ***Wells Fargo Bank Minn, NA v. Mastropaolo***, *supra*; ***US Bank, NA v Collymore***, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; ***TPZ Corp. v Dabbs***, 25 AD3d 787, 808 NYS2d 746 [2d Dept 2006]; *see also* ***Society of Plastics Indus. v County of Suffolk***, 77 NY2d 761,570 NYS2d 778 [1991]). Here, having failed to interpose an answer or file a timely pre-answer motion asserting the defense of lack of standing, the mortgagor defendants waived this defense (*see* ***Bank of N.Y. v Alderazi***, *supra*; ***Deutsche Bank Natl. Trust Co. v Hussain***, *supra*; ***HSBC Bank, USA v Dammond***, *supra*; ***Wells Fargo Bank Minn., N.A. v. Mastropaolo***, *supra*).

In addition, to the extent that the mortgagor defendants purport to join in that part of the plaintiff's motion which seeks to vacate the order of reference, such relief is not available as they have failed to interpose a demand for relief pursuant to a notice of motion or cross motion (*see generally* CPLR 2214 and 2215; ***Dossous v Corporate Owners Bayridge, Nissan, Inc.***, 101 AD3d 937, 956 NYS2d 174 [2d Dept 2012]; ***Chun v North American Mtge. Co.***, 285 AD2d 42, 729 NYS2d 716 [1st Dept 2001]; ***Bauer v Facilities Dev.***, 210 AD2d 992, 621 NYS2d 815 [4th Dept 1994]). Moreover, they have not sought relief from their default (*see* ***Deutsche Bank Trust Co., Americas v Stathakis***, 90 AD3d 983, 935 NYS2d 651 [2d Dept 2011]; ***McGee v Dunn***, 75 AD3d 624, 906 NYS2d 74 [2d Dept 2010]).

Accordingly, the plaintiff's motion is granted to the extent that the caption is amended and the complaint is amended, *nunc pro tunc*; the motion is otherwise denied, as is any relief requested by the defendants.

Dated: 8/26/13

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION