Vanderbilt Mtge. & Fin. Inc. v Davis
2013 NY Slip Op 32117(U)
September 3, 2013
Sup Ct, Suffolk County
Docket Number: 11-37840
Judge: Jerry Garguilo
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SHORT FORM ORDER

INDEX No. 11-37840

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

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 7-31-12
ADJ. DATE 3-27-13
Mot. Seq. # 001 - MG

VANDERBILT MORTGAGE AND FINANCE, INC.,

Plaintiff,

- against -

FREDERICK E. DAVIS and KIM MITCHELL, co-executors of the Last Will and Testament of Gerald P. Burnett, THE INTERNAL REVENUE SERVICE, and "JOHN DOE #1" through "JANE DOE #10," the last 10 names being fictitious and unknown to the Plaintiff, the persons or parties intended being the occupants, tenants, persons or entities, if any, having or claiming an interest in or lien upon the mortgaged premises described in the verified complaint,

Defendants.

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Upon the following papers numbered 1 to 11 read on this motion for summary judgment and the appointment of referee; Notice of Motion/ Order to Show Cause and supporting papers 1 - 6 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 7 - 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 motion by plaintiff for summary judgment on its complaint, to amend the caption deleting the "John Doe" and "Jane Doe" defendants, and for the appointment of a referee to compute is granted.

This is an action to foreclose a mortgage on the premises located at 50 Beach Avenue, in Sag Harbor, New York, designated on the Suffolk County Tax Map as District 0302, Section 004.000, Block

04.00, Lot 001.000 (the "premises"). On July 26, 2007, Gerald P. Burnett ("Burnett") executed a note for the principal loan amount of $560,000, and as security for payment thereof, contemporaneously executed a mortgage on the premises in favor of First Franklin Financial Corp., an Op. Sub of MLB&T Co., FSB (the "original lender"). The mortgage reflects that Mortgage Electronic Registration Systems, Inc. ("MERS") is the original lender's nominee, and for purposes of recording, the mortgagee of record. On October 31, 2011, MERS assigned the mortgage to plaintiff.

Burnett defaulted in making the monthly payments due as of April 1, 2011 and thereafter. He died on June 17, 2011, leaving a will naming defendants Frederick E. Davis and Kim Mitchell as co-executors. On December 9, 2011 the instant action was commenced against the co-executors seeking to foreclose on the mortgage and sell the premises. The co-executors have interposed an answer with twelve affirmative defenses, including that the plaintiff lacks the capacity to sue (first affirmative), fraud (third affirmative defense), predatory lending in violation of the Banking Laws (fourth affirmative defense), unclean hands (fifth affirmative defense), violations of federal and state anti-discrimination and banking laws (sixth affirmative defense), redlining (seventh affirmative defense), failure to comply with RPAPL 1304 and 1306 (eleventh affirmative defense), and that the plaintiff's actions were unconscionable (twelfth affirmative defense), and a counterclaim for fraud, fraud in the inducement and conspiracy to commit fraud.

The plaintiff now moves for summary judgment on its complaint, to strike the co-executors' answer and for an order of reference pursuant to RPAPL 1321 fixing the default of the non-answering defendant the Internal Revenue Service, to amend the caption to delete the "John Doe" and "Jane Doe" defendants, and for the appointment of a referee to compute. The co-executors oppose and maintain that the motion should be denied and the complaint dismissed, relying on their counsel's affirmation wherein arguments are made in support of the aforementioned affirmative defenses and counterclaim. The opposition also includes an argument that the pleadings are facially defective, as well as a challenge to the authenticity of Burnett's signature.

"Entitlement to a judgment of foreclosure may be established, as a matter of law, where a mortgagee produces both the mortgage and unpaid note, together with evidence of the mortgagor's default, thereby shifting the burden to the mortgagor to demonstrate, through both competent and admissible evidence, any defense which could raise a question of fact" (***Zanfini v Chandler***, 79 AD3d 1031, 1031-1032, 912 NYS2d 911 [2d Dept 2010], quoting ***HSBC Bank USA v Merrill***, 37AD3d 899, 900, 830 NYS2d 598 [2d Dept 2010]; *see* ***U.S. Bank Natl. Assn. v Denaro***, 98 AD3d 964, 950 NYS2d 581 [2d Dept 2012]; ***Citibank, N.A. v. Van Brunt Prop., LLC***, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]). Where, as here, an answer includes lack of capacity to sue as an affirmative defense, the plaintiff must further establish its standing to succeed on a motion for summary judgment and to prevail on the relief requested in the complaint (*see* ***U.S. Bank Nat. Assn. v Dellarmo***, 94 AD3d 746, 942 NYS2d 122 [2d Dept 2012]; ***Bank of New York v Silverberg***, 86 AD3d 280, 926 NYS2d 532 [2d Dept 2011]; ***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; ***Wells Fargo Bank Minnesota v Mastropaolo***, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]).

Here, the plaintiff has established its entitlement to summary judgment by submitting copies of the mortgage and the unpaid note, together with evidence that the monthly payments were not paid

pursuant to the terms thereof *(see* CPLR 3212; RPAPL § 1321; ***Neighborhood Hous. Serv. of New York City v Hawkins***, 97 AD3d 554, 947 NYS2d 321 [2d Dept 2012]; ***Baron Assoc., LLC v Garcia Group Enter.***, 96 AD3d 793, 946 NYS2d 611[2d Dept 2012]; ***Citibank, N.A. v. Van Brunt Prop., LLC***, *supra*). The plaintiff further established, prima facie, it has standing to prosecute its pleaded claims for foreclosure and sale by demonstrating that prior to the commencement of this action, it took possession of, and was the holder of the note indorsed by the original lender to First Franklin Financial Corporation ("First Franklin") and, in turn, indorsed by First Franklin in blank, a copy of which is attached to the complaint (*see* ***Bank of N.Y. v Silverberg***, *supra;* ***Mortgage Elec. Registration Sys., Inc. v Coakley***, 41 AD3d 674, 838 NYS2d 622 [2d Dept.2007]; ***Kondaur Capital Corp. v Argyros***, 38 Misc 3d 1230[A], 2013 Slip Op 869945 [Sup Ct Queens County 2013]; ***Deutsche Bank Natl. Trust Co. v Pietranico***, 33 Misc. 3d 528, 928 NYS2d 818 [Sup Ct Suffolk County 2011], *aff'd*, 102 AD3d 724 [2d Dept 2013]; *see also* UCC § 3–202; § 3–204; § 9–203[g]). "The mere possession of a promissory note endorsed in blank (just like a check) provides presumptive ownership of that note by the current holder" (***Deutsche Bank National Trust Co. v Pietranico***, *supra* at 545). The holder of the note is deemed the owner thereof with standing to foreclose (*id.*, citing *see, e.g.*, ***Mortgage Elec. Registration Sys., Inc. v Coakley***, *supra*). Since the mortgage follows as an incident of the note, when the note changed hands, the mortgage interest automatically followed (*see* ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, 961 NYS2d 200 [2d Dept 2013]; ***U.S. Bank Natl. Assn. v Cange***, 96 AD3d 825, 826, 947 NYS2d 522 [2d Dept 2012]); ***U.S. Bank, NA v Sharif***, 89 AD3d 723, 933 NYS2d 293 [2d Dept 2011]; ***Bank of New York v Silverberg***, *supra;* ***U.S. Bank, N.A. v Collymore***, *supra*).

Therefore, based on the evidence before the court, the plaintiff was in possession of the note on the date the instant action was commenced, and therefore is deemed the presumptive owner of the note and mortgage with standing to prosecute its claim for foreclosure and sale (*see* ***U.S. Bank Natl. Assn. v Cange***, *supra;* ***U.S. Bank, NA v Sharif***, *supra*). The burden, thus, shifts to the co-executors to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's prima facie showing or in support of the affirmative defenses asserted in their answer. They have failed to do so.

The argument that the pleadings are defective on their face is insufficient to overcome the plaintiff's prima facie showing. Although the summons and complaint identify the address of the premises subject to foreclosure as "50 S. Beach Avenue" instead of "50 Beach Avenue", this error is negligible in view of the accurate description of the premises in the documents attached to the complaint (i.e., the executed mortgage to which is attached Schedule A with the "metes and bounds" description of the premises, and the accurately designated section, block and lot of the premises set forth in the complaint) (*see* ***American Mtge. Bank v Matovitz***, 208 AD2d 788, 618 NYS2d 391 [2d Dept 1994]; *cf.* ***Bagnoli v Albert***, 263 AD2d 594, 692 NYS2d 790 [3d Dept 1999]).

Additionally, the argument in opposition that the assignment of mortgage is "alarmingly questionable" is of no consequence as the plaintiff demonstrated its standing by establishing that the note, indorsed in blank, was physically delivered to it and in its possession (*see* ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, 2013 WL 3198184 [2d Dept 2013]). Therefore, also defeated is the argument in support of their first affirmative defense that the plaintiff lacks the capacity to sue (*see id*; ***U.S. Bank Natl. Assn. v Cange***, *supra*; ***M&T Bank v Romero***, 40 Misc 3d 1210[A], 2013 WL 3583999, Slip Op 51147[U] [Sup Ct Suffolk County 2013]).

Also inadequate to raise an issue of fact necessitating a trial is the conclusory assertion that Burnett's signature on the note appears to be a forgery. "Something more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature" (***Banco Popular N. Am. v Victory Taxi Mgt.***, 1 NY3d 381, 385, 774 NYS2d 480 [2004]; *see* ***JP Morgan Chase Bank, NA v Bauer***, 92 AD3d 641, 938 NYS2d 190 [2d Dept 2012] [defendant's affidavit alone insufficient]; *cf.* ***TD Bank, NA v Piccolo Mondo 21st Century, Inc.***, 98 AD3d 499, 949 NYS2d 444 [2d Dept 2012] [expert opinion not required to raise an issue of fact regarding a forgery allegation, however, copies of driver's license and passport submitted as exemplars were sufficient]). Here, no such additional evidence has been proffered to support the co-executors' allegations of forgery.

The allegations that the original lender targeted Burnett and was a predatory lender, engaged in reverse redlining and discrimination by charging an interest rate greater than nine percent, and acted with unclean hands from the inception of the transaction are also unavailing. It is well-settled that the doctrine of unclean hands is not a defense to a mortgage foreclosure action (*see* ***Jo-Ann Homes v Dwortetz***, 25 NY2d 112, 302 NYS 599 [1969]). In any event, the co-executors have failed to come forward with any evidence that the plaintiff's conduct was immoral or unconscionable (*see* ***CFSC Capital Corp. XXVII v W.J. Bachman Mechanical Sheet Metal Co.***, 247 AD2d 502, 669 NYS2d 329 [2d Dept 1998]).

Relying on ***Equicredit Corp. v Turcios*** (300 AD2d 344, 752 NYS2d 684 [2d Dept 2002]) and ***M&T Mortgage Corp. v Foy*** (20 Misc 3d 274, 858 NYS2d 567 [Sup Ct, Kings County 2008]), counsel for the co-executors attempts to persuade this court that Burnett was the victim of a form of predatory or discriminatory lending practices known as reverse redlining. Reverse redlining is "a scheme that targets low-income minorities, offering them exorbitantly high interest rate loans in large amounts, even though they do not have the ability to repay, thereby approving a loan designed to fail, and resulting in loss of the home through foreclosure" (***Equicredit Corp. v Turcios***, *supra* at 346). It has been held that "a mortgage granted to a minority buyer for the purchase of property in a minority area which carries an interest rate that exceeds nine percent creates a rebuttable presumption of discriminatory practice" (***M&T Mortgage Corp. v Foy***, *supra* at 275).

Here, no evidence has been submitted by a person with knowledge to establish that Burnett was known to be a member of a minority, or that the premises, located in Sag Harbor, was in a minority area. Additionally, the documents attached to the opposition papers at Exhibit H reflect that the loan was a "Cash-Out Refinance", not a purchase, and that Burnett was not in a low-income category with an inability to repay the loan inasmuch as his monthly base income was $17,785.00. Therefore, the rebuttable presumption has not been created, thus, the related fourth and seventh affirmative defenses of predatory lending and redlining are not viable.

Similarly, the sixth affirmative defense which alleges that federal and state anti-discrimination and banking laws were violated is not viable. The co-executors are attempting to invoke violations of Banking Law §§ 6-l and 6-m, failure to investigate Burnett's creditworthiness or ability to repay the note and mortgage. Neither section of the Banking Law applies, as both sections require the mortgaged premises "be occupied by the borrower as the borrower's principal dwelling (*see* Banking Law

§§ 6-l[1][e][iv] and 6-m[1][d][iv]). The loan documents reveal that Burnett's principal dwelling was in Hempstead, New York.

Additionally, unpersuasive is the claim by the co-executors that Burnett was fraudulently induced to enter an agreement with unconscionable terms. The determination of unconscionability is a matter of law for the court to decide (***Emigrant Mortg. Co., Inc. v Fitzpatrick***, 95 AD3d 1169, 945 NYS2d 697 [2d Dept 2012]). The co-executors have not presented any evidence to indicate that Burnett had an absence of meaningful choice as to whether to accept the original lender's terms (*see id.*; ***Fremont Investment & Loan v Laroc***, 21 Misc 3d 1124[A], 873 NYS2d 511 [Sup Ct, Queens County 2008]), citing ***King v Fox***, 7 NY3d 181, 818 NYS2d 833 [2006] and ***Gillman v Chase Manhattan Bank, N.A.***, 73 NY2d 1, 537 NYS2d 787 [1988]). There is nothing unconscionable about enforcing the terms of an agreement Burnett willingly entered into (*see* ***Arias Indus., Inc. v 1411 Trizechahn Swig, LLC***, 294 AD2d 107, 744 NYS2d 362 [1st Dept 2002]).

Even assuming, without deciding, that unconscionability is an affirmative defense to the underlying default, the co-executors failed to demonstrate that "no reasonable and competent person would accept [the] terms, which are so inequitable as to shock the conscience" (internal citations omitted) (***LaSalle Bank Nat. Assn v Kosarovich***, 31 AD3d 904, 906, 820 NYS2d 144 [3d Dept 2006]; *see also* ***Emigrant Mortg. Co., Inc. v Fitzpatrick***, *supra*). The co-executors have further failed to demonstrate that the value of the subject property was inflated, that the appraisal was fraudulent at the time it was issued, or that it was intended for Burnett's benefit, and Burnett justifiably relied upon the representations therein when deciding to enter into the original transaction (*see* ***Fremont Investment & Loan v Laroc***, *supra*).

Furthermore, "although it is well settled that an assignee of a mortgage takes it subject to the equities attending the original transaction (*see* ***Lapis Enterprises, Inc. v Intl. Blimpie Corp.***, 84 AD2d 286 [1981]), the plaintiff cannot be required to answer in damages for alleged misrepresentations committed by the original lender in connection with the making of the original mortgage loan (***US Bank National Assn v McPhearson***, 33 Misc 3d 1219[A], 2012 NY Slip Op 50742[U], 2012 WL 1521862 [Sup Ct, Queens County]). In any event, the facts establish that Burnett made payments on the mortgage note from 2007 until March 2011, which conduct constitutes acquiescence and assent to the terms thereof (***Feinstein v Levy***, 121 AD2d 499, 500, 503 NYS2d 821 [2d Dept 1986]). Therefore, the fourth, fifth, and seventh affirmative defenses, and the fraud counterclaim cannot be sustained, and are hereby severed and dismissed.

The arguments in opposition and in support of the eleventh affirmative defense regarding the plaintiff's failure to comply with RPAPL 1304 and 1306 are unavailing. RPAPL 1304 provides, *inter alia*, that at least ninety days before a lender, assignee or loan servicer commences an action against a borrower to foreclose on a mortgage, notice must be provided to the borrower advising that the loan is in default and his or her home is at risk (*see* RPAPL 1304[1]; ***Aurora Services, LLC v Weisblum***, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]). The statutorily mandated content of the 90-day notice and the method by which service must be effected are set forth in RPAPL 1304 subdivisions (1) and (2). It has been held that "proper service of the RPAPL 1304 notice containing the statutorily-mandated content is a condition precedent to the commencement of the foreclosure action" (***Aurora Services, LLC v***

Weisblum, *supra* at 103). A plaintiff's failure to demonstrate strict compliance with the manner of service and that the notice contains the mandatory language as set forth in the statute requires denial of a motion for summary judgment (*see* ***Deutsche Bank Natl. Trust Co. v Spanos***, *supra*).

Here, the borrower, Burnett, was deceased 90 days prior to commencement of this action. There is nothing in the record before the Court to indicate that the co-executors assumed the mortgage or obtained a new mortgage in their own names. Therefore, as the statute requires only that the borrower be given notice, the provisions of RPAPL 1304 are inapplicable herein (*see* ***Bank of New York Mellon v Roman as Ex'r of Estate of Pablo Roman***, 2012 WL 2463828, 2012 Slip Op 31687[U]) [Sup Ct, Queens County]; *see also* RPAPL 1304[3]). Thus, also inapplicable is the condition precedent found in RPAPL 1306 which requires filing the pre-foreclosure notice with the superintendent of banks. Therefore, the eleventh affirmative defense also cannot be sustained.

The co-executors have not addressed their other affirmative defenses. Thus, the second affirmative defense for lack of personal jurisdiction, eighth affirmative defense for failure to state a cause of action, the ninth affirmative defense which simply reads "Statute of Limitations", the tenth affirmative defense for laches, and the affirmative defense alleging plaintiff violated the "Home Equity Act" (inadvertently labeled the twelfth affirmative defense), are treated as abandoned (*see* ***US Bank, N.A. v Flynn***, 27 Misc 3d 802, 897 NYS2d 855 [Sup Ct, Suffolk County 2010, Whelan, J.]).

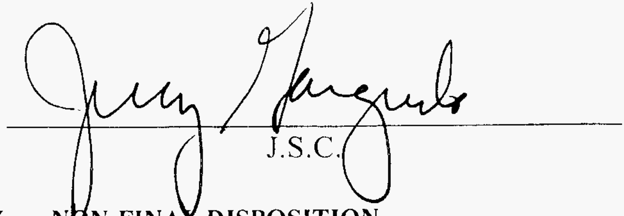
"On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing" (***Green Tree Servicing, LLC v Cary***, 106 AD3d 691, 692, 965 NYS2d 511 [2d Dept 2013] [internal quotation marks omitted]). As the United States has submitted a notice of appearance on behalf of defendant Internal Revenue Service, the plaintiff is not entitled to a default judgment against this defendant. However, as the United States has not interposed an answer, no question of fact has been raised to preclude the grant of summary judgment in plaintiff's favor as against the co-executors. Any arguments by the parties not explicitly addressed herein have been reviewed and deemed to be without merit. Hence, as the co-executors have failed to raise a genuine issue of fact to overcome the plaintiff's prima facie showing of entitlement to summary judgment, plaintiff is awarded summary judgment on its complaint against them.

The portion of the instant motion wherein the plaintiff seeks an order dropping the John Does and Jane Does as party defendants is also granted, as is an amendment of the caption to reflect same. Plaintiff, having been awarded summary judgment is entitled to an order appointing a referee to compute the amounts due under the subject note and mortgage (*see* RPAPL § 1321).

Accordingly, the motion is granted.

Submit Order.

Dated: 9/3/13



J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**