

Deutsche Bank Natl. Trust Co. v Aquino

2013 NY Slip Op 32118(U)

August 23, 2013

Sup Ct, Suffolk County

Docket Number: 41781-10

Judge: Ralph Gazzillo

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COPY

SUPREME COURT - STATE OF NEW YORK
IAS PART 6 - SUFFOLK COUNTY

PRESENT: HON. RALPH T. GAZZILLO
Acting Supreme Court Justice

MOTION DATE 7-19-12
ADJ. DATE _____
Mot. Seq. #001 - Mot D

DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS INDENTURE TRUSTEE, FOR THE BENEFIT
OF THE HOLDERS OF THE AAMES MORTGAGE
INVESTMENT TRUST 2005-4 MORTGAGE
BACKED NOTES,

KENNETH SHEEHAN, ESQ.
Attorney for Plaintiff
51 E. Bethpage Road, Plainview, N. Y. 11803

Plaintiff,

ANADEL CANALE, ESQ.
Attorney for Defendant Esbin Aquino
1111 Route 110, 3rd Floor, Farmingdale, N. Y. 11735

AAMES FUNDING CORPORATION
dba Aames Home Loan
c/o National Registered Agents, Inc.
875 Avenue of the Americas, Suite 501
New York, N. Y. 10001

-against-

AMERICAN EXPRESS TRAVEL
RELATED SERVICES COMPANY, INC.
s/h/a American Express Travel Related Services
111 8th Avenue, 13th Floor, New York, N. Y. 10011

CACH LLC
c/o CT Corporation System
111 8th Avenue, 13th Floor, New York, N. Y. 10011

ESBIN AQUINO; AAMES FUNDING CORPORATION
DBA AAMES HOME LOAN; AMERICAN EXPRESS
TRAVEL RELATED SERVICES; CACH LLC;
CYPRESS FINANCIAL RECOVERIES, LLC;
HOUSEHOLD FINANCE CORPORATION III;
NEW YORK FINANCIAL SERVICES LLC;
"JOHN DOES" and "JANE DOES", said names
being fictitious, parties intended being possible
tenants or occupants of premises, and
corporations, other entities or persons who claim,
or may claim, a lien against the premises,

CYPRESS FINANCIAL RECOVERIES, LLC
21 Derby Lane, Dumont, N. J. 07628

HOUSEHOLD FINANCE CORPORATION III
c/o CT Corporation System
111 8th Avenue, 13th Floor, New York, N. Y. 10011

NY FINANCIAL SERVICES LLC
s/h/a New York Financial Services LLC
401 Railroad Avenue, Westbury, N. Y. 11590

Defendants.

CARLOS ALLENDE
33 Sandy Hollow Court, Riverhead, N. Y. 11901

x

Upon the following papers numbered 1 to 22 read on this motion for summary judgment and order of reference; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; Notice of Cross Motion and supporting papers ; Affirmation in Opposition and supporting papers 15 - 20; Replying Affidavits and supporting papers 21 - 22; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

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

ORDERED that this motion by plaintiff Deutsche Bank National Trust Company, as Indenture Trustee, for the Benefit of the Holders of the Aames Mortgage Investment Trust 2005-4 Mortgage Backed Notes (Deutsche Bank) pursuant to CPLR 3212 for summary judgment on its verified complaint, to strike the answer of defendant Esbin Aquino (Aquino), awarding plaintiff a default judgment as to the remaining non-appearing and non-answering defendants, for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, and for leave to amend the complaint pursuant to CPLR 3025 (b), is hereby determined as follows; and it is hereby

ORDERED that this motion by plaintiff Deutsche Bank pursuant to CPLR 3212 for summary judgment on its verified complaint, to strike the answer of defendant Aquino, awarding plaintiff a default judgment as to the remaining non-appearing and non-answering defendants, and for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321 is denied; and it is further

ORDERED that plaintiff's application for leave to amend the complaint in this action pursuant to CPLR 3025 (b), is denied without prejudice as the notice of motion before the court did not request said relief and did not contain a copy of the proposed amended pleadings clearly showing the changes or additions to be made to the complaint and for failure to serve the amended complaint, in motion form, upon defense counsel thereby giving him an opportunity to be heard; and it is further

ORDERED that the caption is hereby amended by substituting Carlos Allende in place of the defendants "John Does" and "Jane Does" and by striking from the caption the names of the remaining "John Does" and "Jane Does"; and it is further

ORDERED that the caption is hereby amended by substituting American Express Travel Related Services Company, Inc. S/H/A American Express Travel Related Services in place of defendant American Express Travel Related Service; and it is further

ORDERED that the caption is hereby amended by substituting NY Financial Services LLC S/H/A New York Financial Services LLC in place of defendant New York Financial Services LLC; and it is further

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

Deutsche Bank v Aquino
Index No. 10-41781
Page No. 3

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

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS
INDENTURE TRUSTEE, FOR THE BENEFIT OF THE HOLDERS
OF THE AAMES MORTGAGE INVESTMENT TRUST 2005-4
MORTGAGE BACKED NOTES,

Plaintiff,

-against-

ESBIN AQUINO; AAMES FUNDING CORPORATION DBA
AAMES HOME LOAN; AMERICAN EXPRESS TRAVEL
RELATED SERVICES COMPANY, INC. S/H/A AMERICAN
EXPRESS TRAVEL RELATED SERVICES; CACH LLC;
CYPRESS FINANCIAL RECOVERIES, LLC; HOUSEHOLD
FINANCE CORPORATION III; NY FINANCIAL SERVICES
LLC S/H/A NEW YORK FINANCIAL SERVICES LLC;
CARLOS ALLENDE;

Defendants.

The plaintiff commenced this action to foreclose a mortgage on November 16, 2010 in connection with the premises known as 33 Sandy Hollow Court, Riverhead, New York. On July 8, 2005, defendant Aquino executed an adjustable rate note in favor of Aames Funding Corporation DBA Aames Home Loan (Aames), agreeing to pay the sum of \$288,000.00 at the start rate of 6.900 percent per annum. On July 8, 2005, defendant Aames executed a first mortgage in the principal sum of \$288,000.00 on the subject property. The mortgage was recorded on October 4, 2005 in the Suffolk County Clerk's Office. Subsequently, the note and mortgage were transferred by assignment of mortgage dated July 12, 2005 from Aames to Deutsche Bank, the plaintiff herein. The assignment of mortgage was recorded on July 19, 2010 with the Suffolk County Clerk's Office. Thereafter, the loan was modified by a loan modification agreement, executed by defendant Aquino, increasing the unpaid balance to \$300,200.46.

Select Portfolio Servicing, Inc. (SPS, Inc.) sent a notice of default dated August 14, 2009 to defendant Aquino stating that he had defaulted on his mortgage loan and that the amount past due was \$9,701.82. On August 23, 2010, plaintiff's attorney sent defendant Aquino another notice of default advising defendant that the amount past due on his mortgage loan was \$33,718.88. 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 obligation under the terms and conditions of the note and mortgage by failing to make his monthly payments commencing with the November 1, 2009 payment and every month thereafter. Defendant Aquino interposed an answer consisting of a general denial with one affirmative defense.

The Court's computerized records indicate that a foreclosure settlement conference was held on August 10, 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.

Plaintiff now moves for summary judgment on its complaint contending that defendant breached his obligation with plaintiff by failing to tender the installment which became due on November 1, 2009 and that the answer of defendant raises no triable issues of fact or meritorious defenses to the instant proceeding. In support of its motion, plaintiff submits among other things: the sworn affidavit of Jason T. Baker, document control officer at SPS, Inc., as attorney in fact for Deutsche Bank; the affirmations of Kenneth Sheehan, Esq. in support of the instant motion; the affirmation of Kenneth Sheehan, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the summons and verified complaint; defendant's verified answer; the note, mortgage, loan modification agreement and assignment; notices of default; notices pursuant to RPAPL §§ 1320, 1303 and 1304; affidavits of service for the summons and complaint and instant motion; and, a proposed order appointing a referee to compute.

Defendant Aquino opposes the summary judgment motion asserting, *inter alia*, predatory lending and financial hardship.¹

“[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 Montesana*, 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, mortgage and loan modification agreement executed by defendant Aquino, the assignment of mortgage, the affidavit of Jason T. Baker, 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 Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). Jason T. Baker, document control officer at SPS, Inc. as attorney in fact for Deutsche Bank, avers that defendant Aquino breached his obligation by failing to tender the installment which became due and payable on November 1, 2009 and by failing to tender subsequent payments; that demand letters were mailed to defendant on August 14, 2009 and August 23, 2010; and, that in accordance with RPAPL

¹ It should be noted that defendant's Affirmation in Opposition contains the following supporting documents: Exhibits “A”; “B”; “C”; “D” and “G”.

Deutsche Bank v Aquino
 Index No. 10-41781
 Page No. 5

§1304, plaintiff forwarded a ninety day notice to the last known address of defendant and that plaintiff is the holder of the 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 Aquino 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]). Furthermore, defendant Aquino’s affirmative defense of improper service is nothing more than an unsubstantiated allegation. Here, the process server’s affidavit of service constituted prima facie evidence of proper service upon defendant pursuant to CPLR 308 (2) and as such, defendant’s conclusory assertion is insufficient to rebut the presumption of proper service created by said affidavit (see *Beneficial Homeowner Service Corp. v Girault*, 60 AD3d 984, 875 NYS2d 815 [2d Dept 2009]).

Based upon the foregoing, the motion for summary judgment is denied. That branch of the motion for a default judgment against the remaining defendants who have not answered or appeared herein is granted.

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 denied.

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

Dated: _____

8/23/13



 A.S.C.J.

 FINAL DISPOSITION

X NON-FINAL DISPOSITION