

Bayview Loan Servicing, L.L.C. v Abbatiello
2013 NY Slip Op 32198(U)
August 26, 2013
Supreme Court, Suffolk County
Docket Number: 24775/09
Judge: Peter H. Mayer
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Dominick Abbatiello (Abbateiello), 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 caption of this action pursuant to CPLR 3025 (b), is granted; and it is further

ORDERED that the caption is hereby amended by striking therefrom the names of defendants "JOHN DOES" and "JANE DOES"; 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**

BAYVIEW LOAN SERVICING, LLC., x

Plaintiff,

-against-

**DOMINICK ABBATIELLO; AUGUSTINE ABBATIELLO, JR.;
NEW YORK STATE DEPARTMENT OF TAXATION AND
FINANCE,**

Defendants.

ORDERED that the cross motion (#004) by defendant Abbatiello for an order pursuant to CPLR 3025 granting defendant leave to file with the Clerk and serve upon plaintiff an amended verified answer containing additional affirmative defenses, a counterclaim and a cross-claim is denied.

This is an action to foreclose a mortgage on commercial premises known as 538 West Hoffman Avenue, Lindenhurst, New York. On December 8, 2005, defendants Dominick Abbatiello and Augustine Abbatiello executed an adjustable rate note in favor of InterBay Funding, LLC (InterBay) agreeing to pay \$572,000.00 at the yearly starting rate of 10.75 percent. On December 8, 2005, defendants Dominick Abbatiello and Augustine Abbatiello also executed a first mortgage in the principal sum of \$572,000.00 on the subject property. The mortgage was recorded on December 28, 2005 in the Suffolk County Clerk's Office. Thereafter, the mortgage was transferred by assignment of mortgage dated August 30, 2006 from Interbay to Bayview. The assignment of mortgage was recorded on March 6, 2007 with the Suffolk County Clerk's Office. An allonge to the adjustable rate note contains the endorsement of Raymond J. Carvara, vice president of InterBay, transferring the note from InterBay to Bayview.

Bayview sent a notice of default dated April 29, 2009 to defendant Dominick Abbatiello stating that his loan was in default and that the amount past due was \$7,547.93. As a result of defendant Abbatiello's continuing default, plaintiff commenced this foreclosure action on June 29, 2009. In its complaint, plaintiff alleges in pertinent part that defendants Abbatiello breached their

obligations under the terms of the note and mortgage by failing to make monthly payments commencing with the April 1, 2009 payment and payments thereafter. Defendant Dominick Abbatiello interposed an answer consisting of a general denial with three affirmative defenses.

The Court's computerized records indicate that foreclosure settlement conferences were held on December 15, 2010 and April 17, 2013 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 defaulted under the terms of the loan agreement and mortgage for failure to pay the April 1, 2009 payment and subsequent payments thereafter and that defendant's answer and affirmative defenses are without merit. In support of its motion, plaintiff submits among other things: the sworn affidavit of Robert D. Repass, senior vice president of Bayview, the plaintiff herein; the affirmation of Zack Baisley, Esq.; the affirmation of Zack Baisley, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the pleadings; the note, mortgage and assignment; a notice of default; notices pursuant to RPAPL §§ 1320 and 1303; affidavits of service for the summons and complaint; an affidavit of service for the instant summary judgment motion; and a proposed order appointing a referee to compute.

After plaintiff moved for summary judgment, defendant cross-moved for leave to serve and file an amended answer to assert a defense based on, *inter alia*, an allegation that defendant Dominick Abbatiello cannot recall executing the subject note and mortgage and that he never attended the closing. Plaintiff has submitted an affirmation in opposition to defendant's cross-motion and defendant has submitted an affirmation in further opposition to plaintiff's summary judgment motion and in further support of its cross-motion.

The court shall consider the defendant's cross motion first since the granting thereof may render the plaintiff's motion-in-chief, academic.

Motions for leave to amend pleadings should be freely granted, absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit (*see Aurora Loan Servs., LLC v Thomas*, 70 AD3d 986, 897 NYS2d 140 [2d Dept 2010]; *see* CPLR 3025[b]; *Lucido v Mancuso*, 49 AD3d 220, 851 NYS2d 238 [2d Dept 2008]). Case authorities provide that in the absence of prejudice or surprise to the non-moving party, leave should be granted without an examination of the merits of the proposed amendments nor any obligation to support them with evidentiary materials (*see Rosicki & Rosicki Assocs. PC v Cochems*, 59 AD3d 512, 873 NYS2d 184 [2d Dept 2009]; *Mackenzie v Croce*, 54 AD3d 825 864 NYS2d 474 [2d Dept 2008]; *Lucido v Mancuso, supra*). However, proposed amendments that are palpably insufficient or patently devoid of merit will be rejected without any showing of surprise or prejudice to non-moving parties (*see Vista Prop, LLC v Rockland Eye, Ear, Nose and Throat Assocs. PC*, 60 AD3d 846, 875 NYS2d 248 [2d Dept 2009]). Moreover, a determination whether to grant such leave is within the court's broad discretion, and the exercise of

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that discretion will not be lightly disturbed (*see Gitlin v Chirinkin*, 60 AD3d 901, 875 NYS2d 585 [2d Dept 2009]). While delay alone is insufficient to deny a motion to amend, an unexcused lateness coupled with prejudice may justify a denial of the application (*see Clark v MGM Textiles Indus., Inc.*, 18 AD3d 1006, 794 NYS2d 735 [3d Dept 2005]; *Ciarelli v Lynch*, 46 AD3d 1039, 847 NYS2d 694 [3d Dept 2007]; *Moon v Clear Channel Communications*, 307 AD2d 628, 763 NYS2d 157 [3d Dept 2003]).

Defendant Dominick Abbatiello asserts in support of his application to amend his answer and interpose additional defenses that since being served with plaintiff's complaint for foreclosure, he believes that he never attended the closing and that after examining subpoenaed mortgage documents he realized that the signatures contained thereon were not his signatures.

Plaintiff Bayview asserts that the cross-motion should be denied as on December 8, 2005, the defendant's driver license and social security card were presented to verify his identity at the execution of the note and mortgage at closing of title, that almost three years after execution of the note and mortgage defendant Dominick Abbatiello signed a loan adjustment agreement, that the defendant's document examiner did not examine the signature of the defendant on the mortgage and security agreement and, that further delay would prejudice plaintiff as the loan has been in default for three years and defendant has had the use of the subject commercial property without making any payments on the loan.

Granting defendant Abbatiello's leave to amend his answer would clearly be prejudicial to plaintiff. This is especially so given the fact that plaintiff, who had previously withdrawn a summary judgment motion in an attempt to reach a negotiated settlement, indicated that the loan has been in default since April 1, 2009, in excess of three years from the filing of the instant application. Defense counsel's conclusory self-serving statement that "the plaintiff will not be prejudiced" fails to demonstrate by credible evidence a lack of prejudice to the plaintiff, who has already moved for summary judgment on two occasions (*see generally Majestic Investors, Ltd. v Lopez*, 111 AD2d 844, 490 NYS2d 585 [2d Dept 1985]). Furthermore, defendant has not provided the court with a credible excuse for the long delay in seeking leave to amend his answer (*see Brooks v Robinson*, 56 AD3d 406, 867 NYS2d 133 [2d Dept 2008]). While he asserts that he only recently discovered through subpoenaed records that the signatures contained on the note and mortgage were not his signatures, insufficient evidence of same has been produced in support of this statement. Paranthetically, defendant fully acknowledges that he is a co-owner of the subject property with his brother in his affidavit before the court. Similarly, defendant has failed to establish that there is any merit to the defenses contained in his amended answer. In support of his application, defendant Abbatiello relies on a document prepared by Robert Baier, Forensic Document Examiner. In a "Document Examiner Letter of Opinion" annexed to defendant's cross-motion, Mr. Baier was asked to examine an undisclosed number of documents. His opinion found question with three documents, namely: "Q1 Top left of page 'In Witness Whereof, Borrower has duly executed...' Notary date 12/8/05; Q2 Middle of page 'FEES PAID OUTSIDE OF CLOSING'; Q3 Back of check with Stamp 'Teller No. 1732 Dec 10, 2005' ". Defendant however, has failed to produce any evidence in support of his application that the signature affixed to "Mortgage and Security Agreement" is not his own. Finally, plaintiff's

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production of defendant's driver's license and social security card from the closing of title on the subject premises sufficiently invalidates defendant Abbatiello's claim that he never attended a closing on December 8, 2005 putting into question the veracity of Mr. Abbatiello's affidavit in its entirety.

As to plaintiff's motion in chief, "[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 and mortgage executed by defendants Abbatiello, the assignment of mortgage and note, as well as evidence of defendants' 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]). Robert D. Repass, senior vice president of Bayview, avers that defendants Abbatiello defaulted on paying the monthly payment due May 1, 2009 and thereafter; that a notice of default was sent to the defendants on April 29, 2009; and, that defendants failed to timely cure.

Where, as here, standing is put into issue by the defendant, the plaintiff is required to prove it has standing in order to be entitled to the relief requested (see *Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680, 954 NYS2d 551 [2d Dept 2011]; *US Bank, NA v Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; *Wells Fargo Bank Minn., NA v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). In a mortgage foreclosure action "[a] plaintiff has standing where it is the holder or assignee of both the subject mortgage and of the underlying note at the time the action is commenced" (*HSBC Bank USA v Hernandez*, 92 AD3d 843, 939 NYS2d 120 [2d Dept 2012]; *US Bank, NA v Collymore*, 68 AD3d at 753; *Countrywide Home Loans, Inc. v Gress*, 68 AD3d 709, 888 NYS2d 914 [2d Dept 2009]). "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation" (*HSBC Bank USA v Hernandez*, 92 AD3d 843).

Here, plaintiff has established, *prima facie*, that it had standing to commence this action. The evidence submitted by the plaintiff in support of its motion demonstrated that the note and mortgage were assigned to Bayview. In addition, the affidavit from Robert D. Repass, senior vice president for Bayview, provided factual details of the assignment of the note and mortgage thus, establishing possession of the note prior to commencing this action.

Defendant Dominick Abbatiello failed to raise a triable issue of fact concerning his affirmative defenses.

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Accordingly, the motion for summary judgment (#003) is granted against defendant Dominick Abbatiello and the defendant's answer is stricken.

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]).

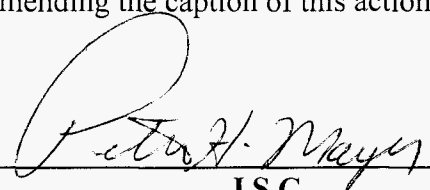
The proposed order appointing a referee to compute pursuant to RPAPL §1321 is signed simultaneously herewith as modified by the court.

The defendant's cross-motion (#004) is denied in its entirety.

To the extent that either plaintiff or defendant have requested other forms of relief but have not supported such noticed forms of relief with any allegations of law or fact, the court denies such applications.

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

Dated: 8/26/13



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION