Bank of N.Y. Mellon v Arthur
2013 NY Slip Op 32625(U)
October 23, 2013
Supreme Court, New York County
Docket Number: 104611/2010
Judge: Cynthia S. Kern
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[* 1] SCANNED ON 10/24/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ______________________ PART ______

Justice

Index Number : 104611/2010
BANK OF NEW YORK MELLON
vs.
ARTHUR, KEITH
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. ____________

MOTION DATE ____________

MOTION SEQ. NO. ________

The following papers, numbered 1 to _____ , were read on this motion to/for ______________________

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______________ | No(s). ________

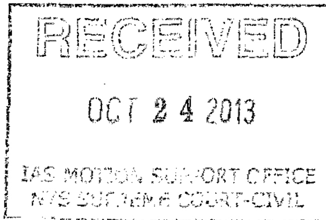
Answering Affidavits — Exhibits ______________ | No(s). ________

Replying Affidavits ______________ | No(s). ________

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ______
FOR THE FOLLOWING REASON(S): ______



Dated: 10/23/13

______________________, J.S.C.

1. CHECK ONE: .... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: .... ☒ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

S/O

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

---x

THE BANK OF NEW YORK MELLON f/k/a THE BANK OF NEW YORK AS SUCCESSOR TO JPMORGAN CHASE BANK, N.A., AS TRUSTEE FOR SAMI II TRUST 2005-AR8, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-AR8,

Plaintiff,

Index No. 104611/2010

-against-

DECISION/ORDER

KEITH ARTHUR, et al.,

Defendants.

---x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :____

Papers	Numbered
Notice of Motion and Affidavits Annexed..................................	1
Answering Affidavits..	2
Cross-Motion and Affidavits Annexed...	3
Answering Affidavits to Cross-Motion..	4
Replying Affidavits..	5
Exhibits..	6

Plaintiff commenced the present action for foreclosure of a mortgage. Plaintiff now moves for an order: (i) pursuant to CPLR § 3212 granting summary judgment on its foreclosure claim; (ii) pursuant to CPLR § 3211(b) and § 3212, dismissing with prejudice each of the affirmative defenses and counterclaims raised by Keith Arthur ("Arthur") in his answer; (iii) pursuant to CPLR § 3215, entering judgment on default against defendants New York City

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Environmental Control Board, New York City Parking Violations Bureau, New York City Transit Adjudication Bureau and the People of the State of New York (hereinafter the "non-answering defendants"); (iv) pursuant to Real Property Actions and Proceeding Law ("RPAPL") § 1321 for an order appointing a Referee to compute the amount due plaintiff and to determine whether the premises should be sold in a single parcel; and (v) for an order amending the caption to remove John Doe as defendant. Arthur cross-moves for summary judgment dismissing plaintiff's complaint with prejudice and awarding him damages in the amounts indicated on each and every counterclaim in his answer. For the reasons set forth below, plaintiff's motion is granted and Arthur's cross-motion is denied.

The relevant facts are as follows. This action involves the foreclosure of a mortgage on the property located at 22 West 132nd Street, New York, New York (the "Property"). On or about May 10, 2005, Arthur took out the original loan and mortgage for the Property. Thereafter, on or about November 7, 2005, Arthur took out a second mortgage and entered into a Consolidation, Extension and Modification Agreement ("CEMA") with Countrywide Bank, N.A. ("Countrywide") to consolidate the two mortgages into a single lien. Accordingly, in conjunction with entering the CEMA, Arthur executed and delivered to Countrywide its successors and assigns, a promissory note (the "Note") which evidenced his indebtedness in the original principal sum of $1,105,000.00. Additionally, at the same time, Arthur executed, acknowledged and delivered to the Mortgage Electronic Registration System ("MERS"), as nominee for Countrywide, the mortgage ("Mortgage") for the Property. Thereafter, the Note was endorsed by Countrywide to Countrywide Home Loans, Inc. and then endorsed by Countrywide Home Loans, Inc. in blank. According to the affidavits of Danielle Burnette, Assistant Vice-President of Bank

of America, N.A. ("BANA") and its predecessor BAC Home Loans Servicing, LP, which serviced Arthur's loan until October 31, 2012, on or about November 7, 2005, the Note and Mortgage were delivered to Structured Asset Mortgage Investments II Inc. ("Structured Asset") and eventually delivered to plaintiff who had purchased the Note and Mortgage pursuant to a pooling and service agreement (the "PSA").

On or about December 22, 2008, Arthur was sent a letter informing him that his loan was in default based on his non-payment and advising him that failure to cure his default would result in acceleration of the loan. Arthur failed to cure and on or about October 19, 2009, he was sent an additional notice alerting him that he was in danger of losing his home. Arthur again failed to cure his default and on or about April 8, 2010, plaintiff commenced the instant action and filed a Notice of Pendency with the City Register. Defendants failed to answer and on August 24, 2010, plaintiff filed a motion for default judgment. At that time, Arthur appeared and cross-moved for summary judgment. By stipulation dated August 13, 2010, plaintiff and Arthur each withdrew their motions and plaintiff agreed to accept Arthur's untimely answer. Thereafter, Arthur served his answer with ten affirmative defenses and three unlabeled counterclaims. Arthur's first counterclaim seeks damages based on the alleged false statement of Elpiniki M. Bechakas that she is a vice president of MERS, while the second counterclaim seeks damages for the expenses Arthur has incurred to cancel the Notice of Pendency. In his third counterclaim, Arthur alleges that this court lacks jurisdiction over him based on improper service.

Plaintiff now moves for summary judgment to foreclose on Arthur's mortgage based on his non-payment and to dismiss Arthur's counterclaims. Additionally, plaintiff seeks default judgment against the non-answering defendants as well as an order directing that the caption be

amended to remove John Doe as a defendant. Arthur cross-moves for summary judgment dismissing plaintiff's complaint in its entirety and awarding him damages in the amount stated in each and every counterclaim on the ground that plaintiff lacks standing to bring the instant action and has failed to allege the correct mortgage it now seeks to foreclose on in its complaint.

As an initial matter, plaintiff's motion for an order pursuant to CPLR § 3215 for a default judgment of foreclosure and sale against the non-answering defendants is granted without opposition as said defendants have failed to answer or otherwise appear in the within action and the time to do so has expired. Additionally, the portion of plaintiff's motion requesting that defendant John Doe be removed from the caption is granted without opposition. The court now turns to plaintiff and Arthur's respective motions for summary judgment.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.,* 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

In a mortgage foreclosure case, "[a] plaintiff may establish a prima facie right to foreclosure by producing the mortgage documents underlying the transaction and undisputed evidence of nonpayment." *E.g., Red Tulip, LLC v. Neiva*, 44 A.D.3d 204 (1st Dept 2007). Once plaintiff establishes its right to foreclosure, the burden is on the defendant "to raise a triable issue

regarding [his] affirmative defenses and counterclaims in opposition to foreclosure." *Id.* Here, plaintiff has made out its prima facie by producing the undisputed affidavits of Danielle Burnette, wherein she attests that Arthur failed to make payment on the Note and annexes the Note and Mortgage herein at issue.

In response, Arthur has failed to produce competent evidence of any defense to raise an issue of fact. Indeed, Arthur does not dispute his nonpayment or default under the Note, nor does he attempt to argue the merits of his alleged counterclaims. Instead, Arthur opposes plaintiff's motion on the ground that: (1) plaintiff's complaint fails to identify the proper note and mortgage it is now seeking to foreclose on; and (2) that plaintiff lacks standing to bring the instant action as it is not the proper owner of the Note and Mortgage. Both of these contentions are without merit as they are not supported by the facts in the record. As an initial matter, Arthur's contention that plaintiff's complaint fails to identify the note it now seeks to foreclose on is completely contradicted by the complaint that references the CEMA agreement and that Arthur's prior mortgages were consolidated under this agreement to form a single lien in the amount of $1,105,000.00. Accordingly, it is quite clear from the complaint what note and mortgage plaintiff is attempting to foreclose on in this action.

Additionally, to the extent that Arthur argues that plaintiff lacks standing to bring this action as the Note was never properly indorsed to plaintiff pursuant to the PSA, such contention is without merit. Section 2.01(b) of the PSA provides that:

> In connection with the above sale, transfer and assignment, the Depositor hereby deposits with the Trustee, or the Custodian, as its agent, as described in the Mortgage Loan Purchase Agreement, with respect to each Mortgage Loan, (i) the original Mortgage Note, including any riders thereto, endorsed without recourse (A) to the order of the Trustee, or (B) in the case of a Mortgage Loan registered on MERS® System, in blank, and in each

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> case showing an unbroken chain of endorsements from the original payee thereof to the Person endorsing it to the Trustee.

Pursuant to N.Y.U.C.C. § 3-204(2), "[a]n indorsement in blank specifies no particular indorsee and may consist of a mere signature. An instrument payable to order and indorsed in blank becomes payable to bearer and may be negotiated by delivery alone until specifically indorsed." In the present case, the proof provided by plaintiff is sufficient to demonstrate that the Note was properly deposited by Structured Assets, as Depositor for the trust, with plaintiff and that there was an unbroken chain of indorsements from the original payee Countrywide to Structured Assets to satisfy the terms of the PSA as the Note was indorsed in blank and the accompanying Mortgage was registered with MERS. As an initial matter, it is unequivocally clear from the face of the Note that the Note was originally indorsed from Countrywide, as original payee, to Countrywide Home Loans, Inc. who in turn indorsed it in blank. Accordingly, as the Mortgage at issue herein was undisputedly registered with MERS, the blank indorsement was sufficient to comply with the terms of the PSA and, contrary to Arthur's contention, the Note did not need to be directly indorsed to plaintiff. Additionally, once the Note became indorsed in blank, no further specific indorsement was necessary to create an unbroken chain of indorsement as the ownership of the Note transferred by physical delivery of the Note. Thus, the Note and Mortgage were properly conveyed and transferred to plaintiff and it has the right to foreclose on Arthur's mortgage in this action.

Based on the foregoing, plaintiff's motion is granted in its entirety and Arthur's cross-motion is denied. Settle Order.

Dated: 10/23/13

CGK
J.S.C.