Bank of New York Mellon v Wille
2014 NY Slip Op 30435(U)
February 6, 2014
Sup Ct, Suffolk County
Docket Number: 12-8100
Judge: W. Gerard Asher

[* 1]

SHORT FORM ORDER

INDEX No. 12-8100

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 5-17-13
ADJ. DATE
Mot. Seq. # 001 - MG

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The Bank of New York Mellon fka The Bank of New York, as Trustee for the Benefit of the Certificateholders of the CWABS Inc., Asset-Backed Certificates, Series 2004-6,

Plaintiff,

- against -

Tracey Wille, Michael Loubier, Washington Mutual Bank, FA, American Express Centurion Bank, Asset Acceptance, LLC a/p/o HSBC Consumer Lending, Tribeca Asset Management, LLC, Clerk of the Suffolk County District Court, Oil King of Li, and "JOHN DOE #1" through "JOHN DOE #10", the last ten names being fictitious and unknown to the plaintiff, the person or parties, if any, having or claiming an interest in or lien upon the Mortgage premises described in the Complaint,

Defendants.

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FRENKEL, LAMBERT, WEISS, WEISMAN & GORDON, LLP
Attorney for Plaintiffs
53 Gibson Street
Bay Shore, New York 11706

THE BROOKE LAW FIRM
Attorney for Defendants Wille and Loubier
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KIRSCHENBAUM PHILLIPS & ROACH
Attorney for Defendant Tribeca Asset Management
40 Daniel Street, Suite 7
Farmingdale, New York 11735

Upon the following papers numbered 1 to 38 read on this motion for summary jusgment and an order of reference; Notice of Motion/ Order to Show Cause and supporting papers 1 - 27; ~~Notice of Cross Motion and supporting papers ____~~; Answering Affidavits and supporting papers 28 - 32; Replying Affidavits and supporting papers 33 - 38; ~~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 (001) by plaintiff The Bank of New York Mellon fka The Bank of New York, as Trustee for the Benefit of the Certificateholders of the CWABS Inc., Asset-Backed Certificates,

Series 2004-6 (Mellon), pursuant to CPLR 3212 for summary judgment on its complaint against defendants Tracey Wille (Wille) and Michael Loubier (Loubier), to strike the answer of defendant Wille and Loubier, for a default judgment as against the non-answering, non-appearing defendants and, for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is granted; and it is further

ORDERED that plaintiff's application 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 "John Doe #1" through "John Doe #10"; and it is further

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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The Bank of New York Mellon fka The Bank of New York, as Trustee for the Benefit of the Certificateholders of the CWABS Inc., Asset-Backed Certificates, Series 2004-6,

Plaintiff,

- against -

Tracey Wille, Michael Loubier, Washington Mutual Bank, FA, American Express Centurion Bank, Asset Acceptance, LLC a/p/o HSBC Consumer Lending, Tribeca Asset Management, LLC, Clerk of the Suffolk County District Court, Oil King of Li

Defendants.

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ORDERED that the notice of pendency and complaint is hereby corrected, *nunc pro tunc*, to reflect the defendant's name as Tracey Wille instead of Tracey Willie.

This is an action to foreclose a mortgage on premises known as 318 Haven Avenue, Ronkonkoma, New York. On May 19, 2004, defendants Wille and Loubier executed an adjustable rate note in favor of Full Spectrum Lending, Inc. (Full Spectrum) agreeing to pay the sum of $260,000.00 at the starting rate of

7.250 percent. On May 19, 2004, defendants Wille and Loubier executed a mortgage in the principal sum of $260,000.00 on their home. The mortgage indicated Full Spectrum to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of Full Spectrum as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on June 4, 2004 in the Suffolk County Clerk's Office. Thereafter, on October 12, 2011, the note and mortgage were transferred by assignment of mortgage from MERS, as nominee for Full Spectrum, to plaintiff Mellon.

Bank of America Home Loans Servicing, LP, the servicer of the loan, sent a notice of default dated February 22, 2011 to defendants Wille and Loubier stating that they had defaulted on their mortgage loan and that the amount past due was $57,399.94. As a result of defendants' continuing default, plaintiff commenced this foreclosure action. In its complaint, plaintiff alleges in pertinent part, that defendants breached their obligations under the terms of the note and mortgage by failing to make the monthly payments commencing with the May 1, 2009 payment. Defendants interposed an answer with eleven affirmative defenses.

The Court's computerized records indicate that a foreclosure settlement conference was held on October 10, 2012, 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 defendants breached their obligations under the terms of the loan agreement and mortgage by failing to tender monthly payments commencing with the May 1, 2009 payment and subsequent payments thereafter. In support of its motion, plaintiff submits among other things: the sworn affidavit of Yisroel Tsvi Estrin, assistant vice president of Bank of America, N.A. (BANA); the affirmation of Patricia Esdinsky, Esq. in support of the instant motion; the affirmation of Patricia Esdinsky, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the pleadings; the note, mortgage and assignment of mortgage; notices pursuant to RPAPL §§ 1320, 1304 and 1303; affidavits of service for the summons and complaint; an affidavit of service for the instant summary judgment motion upon defendants; and a proposed order appointing a referee to compute. Defendants Wille and Loubier have submitted opposition to plaintiff's summary motion citing, *inter alia*, plaintiff's alleged failure to provide responses to outstanding discovery requests. Plaintiff has submitted a reply.

"[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" (***Republic Natl. Bank of N.Y. v O'Kane***, 308 AD2d 482, 482, 764 NYS2d 635 [2d Dept 2003]; *see* ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Once a plaintiff has made this showing, the burden then shifts to defendant to establish by admissible evidence the existence of a triable issue of fact as to a defense (*see* ***Washington Mut. Bank v Valencia***, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]).

Here, plaintiff produced the note and mortgage executed by defendants Wille and Loubier, 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]). Yisroel Tsvi Estrin, assistant vice president of BANA, avers that the defendants defaulted on their payments

commencing with the May 1, 2009 payment and payments thereafter; that a notice of default was tendered to defendants by correspondence dated February 22, 2011; that a 90 day pre-foreclosure notice was tendered to defendants by first class mail and via certified mail to their last known address; and, that plaintiff either directly or through an agent has possession of the note.

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]). Defendants claim that the plaintiff's motion is premature since there has been no discovery. This claim is rejected. CPLR 3212(f) provides that "should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just". Appellate case authorities have long instructed that to avail oneself of the safe harbor this rule affords, the claimant must "offer an evidentiary basis to show that discovery may lead to relevant evidence and that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff" (***Martinez v Kreychmar***, 84 AD3d 1037, 923 NYS2d 648 [2d Dept 2011]; *see* ***Seaway Capital Corp. v 500 Sterling Realty Corp.***, 94 AD3d 856, 941 NYS2d 871 [2d Dept 2012]). In addition, the party asserting the rule must demonstrate that he or she made reasonable attempts to discover facts which would give rise to a genuine triable issue of fact on matters material to those at issue (*see* ***Swedbank, AB v Hale Ave. Borrower, LLC***, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]). Here, the opposing papers submitted by defendants Wille and Loubier were insufficient to satisfy this statutory burden. The defendants failed to demonstrate that they made reasonable attempts to discover the facts which would give rise to a triable issue of fact or that further discovery might lead to relevant evidence (*see* CPLR 3212 [f]; ***Cortes v Whelan***, 83 AD3d 763, 922 NYS2d 419 [2d Dept 2011]; ***Sasson v Setina Mfg. Co., Inc.***, 26 AD3d 487, 810 NYS2d 500 [2d Dept 2006]). Accordingly, defendants' claim of prematurity is thus rejected as unmeritorious.

The remaining contentions raised in defendants' opposition papers are also without merit. Here, defendants have failed to demonstrate, through the production of competent and admissible evidence, a viable defense which could raise a triable issue of fact (*see* ***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 [1975]). Notably, defendants did not deny having received the loan proceeds and having defaulted on their loan payments in their opposition papers.

The Court thus finds that defendants Wille and Loubier have failed to rebut the plaintiff's prima facie showing of its entitlement to the summary judgment. Accordingly, the motion for summary judgment is granted against defendants Wille and Loubier and the defendants' combined answer is stricken. 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]).

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

Dated: February 6, 2014

W. Gerard Asher
J.S.C.
HON. W. GERARD ASHER

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION