Citimortgage, Inc. v West
2015 NY Slip Op 31596(U)
July 27, 2015
Supreme Court, Suffolk County
Docket Number: 10362/2010
Judge: Thomas F. Whelan
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[* 1]

MEMO DECISION & ORDER

INDEX No. 10362/2010

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE: 06/30/14
SUBMIT DATE: 06/12/15
Mot. Seq. 004 - MD
PRE TRIAL CONF: 09/18/15
CDISP: NO

CITIMORTGAGE, INC., Plaintiff, -against- BLAIR WEST, ANN M. WEST, a/k/a ANN WEST, JP MORGAN CHASE BANK, N.A. AMERICAN EXPRESS TRAVEL RELATED SERVICES, INC., and and "JOHN DOE #1" to "JOHN DOE #10", the last 10 names being fictitious and unknown to plaintiff, intended to be persons, entities or corporations, having or claiming to have an interest in or lien upon the mortgaged premises, Defendants.	KNUCKLES - KOMINISKI Attys. For Plaintiff 565 Taxter Road Suite 590 Elmsford, New York NESONOFF & MILTENBERG Attys. For West Defendants 363 Seventh Ave. - Fifth Floor New York, NY 10001

Upon the following papers numbered 1 to ____ read on this motion by the plaintff for accelerated judgments, the deletion of the unknown defendants and an order appointing a referee to compute ___; Notice of Motion/Order to Show Cause and supporting papers 1 - ___; Notice of Cross Motion and supporting papers _____; Answering papers _____; Reply papers _____; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#004) for accelerated judgments on its complaint, the deletion of the unknown defendants as parties together with an amendment of the caption to reflect same and an order of reference is considered under CPLR 3212, 3215 and RPAPL § 1321 and is denied.

ORDERED that a pre-trial conference before the undersigned on Friday, September 18, 2015 at 9:30 a.m. in the courtroom of the undersigned at which counsel for the parties shall appear.

The plaintiff commenced this action to foreclose the lien of five consolidated mortgages given by the West defendants to various lenders which were the subject of three Consolidation, Extension and Modification Agreements [CEMA]. The last of such Agreements was executed by the West defendants and Main Street Bank, d/b/a Main Street Mortgage on February 8, 2005. On that date, Main Street Bank advanced additional monies in the amount $180,299.85 to Blair West as evidenced by a mortgage note which was secured by a fifth mortgage of the same date executed by both West defendants. Under the terms of the February 8, 2005 CEMA, all amounts owing under the fifth note and mortgage and the four prior notes and mortgages referred to in the CEMA were consolidated so as to form a single lien on the mortgaged premises in the amount of $2,760.000.00. Also executed by Blair West on that date was a consolidated mortgage note in the amount of $2,760,000.00, which amount reflected the total amounts owing under all of the consolidated notes and mortgages. Stated on the face of this consolidated note is that it "amends and restates in their entireties, and is given in substitution for" the prior notes recited therein. In addition, a consolidated mortgage to secure the consolidated note in the total amount of the new consolidated debt, namely, $2,760.000.00, was executed by both of the West defendants on February 8, 2005. The lien of this consolidated mortgage is the subject of the plaintiff's complaint.

The West defendants made payments in accordance with the terms of the consolidated note, mortgage and CEMA of February 8, 2005 for a period in excess of four years before defaulting in making the monthly payment due on April 1, 2009. Following the issuance of default notices, the plaintiff commenced this action in March of 2010. In response to the plaintiff's service of its summons and complaint, the West defendants appeared herein by answer. Therein, the West defendants asserted three affirmative defenses, namely, legal insufficiency, lack of personal jurisdiction and a lack of standing of the part of the plaintiff.

By the instant motion, the plaintiff moves for the following relief: (1) an order awarding it summary judgment against the answering defendants and default judgments against the other defendants served with process; (2) an order deleting of the unknown defendants and an amendment of the caption to reflect same; and (3) and order appointing a referee to compute amounts due under the subject mortgage. The motion is opposed by the West defendants.

In there opposing papers, the West defendants re-assert their pleaded standing defense by challenging the factual averments and admissibility of the plaintiff's affidavit of merit. The West defendants further assert their pleaded legal insufficiency defense, although it is premised not upon a legally in sufficiency in the plaintiff's pleaded claim for foreclosure and sale, but upon a purported failure to establish a default in payment on the part of the West defendants by due proof on this motion.

In addition, the West defendants raise defenses that were not pleaded, namely, that no meaningful CPLR 3408 conference was held herein and that the plaintiff engaged in bad faith conduct during the limited negotiating process engaged in by the parties in and out of court. However, these unpleaded defenses lack merit for several reasons. The record reveals that two

CPLR 3408 conferences were scheduled and held by quasi-judicial personnel assigned to the specialized mortgage foreclosure conference part of this court in May and August of 2010. After the second conference, the matter was marked "not settled" and released from that part and assigned to the civil case inventory of this court. These proceedings fully satisfied the settlement conference requirement imposed upon mortgagees and mortgagors under CPLR 3408. The defendants' claim that no meaningful conference took place is thus rejected as unmeritorious and provides no basis for a denial of this motion [1].

The defendants' further claims of bad faith conduct on the part of the plaintiff are equally unavailing. It now well settled law that the sole remedy for a foreclosing plaintiff's engagement such conduct is the imposition of some sort of sanction - not - a cancellation of the foreclosing plaintiff's rights and remedies under the loan documents *(see* ***U.S. Bank N.A. v Sarmiento***, 121 AD3d 187, 204, 991 NYS2d 68 [2d Dept 2014]; *see also* ***Citibank, N.A. v Barclay***, 124 AD3d 174, 999 NYS2d 375 [1st Dept 2014]; ***U.S. Bank Nat. Ass'n v Smith***, 123 AD3d 914, 999 NYS2d 468 [2d Dept 2014]; ***Bank of New York v Castillo***, 120 AD3d 598, 991 NYS2d 446 [2d Dept 2014]; ***Wells Fargo Bank, N.A. v Meyers***, 108 A.D.3d 9, 19, 966 NYS.2d 108 [2d Dept 2013]). Accordingly, the engagement in bad faith conduct on the part of a foreclosing plaintiff during the course of settlement conference proceedings and related extrajudicial communications and exchanges, does not provide a defense to the plaintiff's claim for foreclosure and sale (*see* ***Indymac Bank, F.S.B. v Yano-Horoski***, 78 AD3d 895, 912 NYS2d 239 [2d Dept 2010]; *see also* ***Citibank, N.A. v Van Brunt Props.***, *LLC*, 95 AD3d 1158, 1159, 945 NYS2d 330 [2d Dept 2012]; ***Wells Fargo Bank, N.A. v Meyers***, 108 A.D.3d 9, 19, 966 NYS.2d 108 [2d Dept 2013]; citing Hon. Mark C. Dillon, The Newly–Enacted CPLR 3408 for Easing the Mortgage Foreclosure Crisis: Very Good Steps, but not Legislatively Perfect, 30 Pace L. Rev. 855, 875 [2010]). Under the circumstances of this case, the court rejects the defendants' claim of bad faith conduct on the part of the plaintiff. Even if it were otherwise, such conduct would not provide a basis for the denial of this motion.

The court nevertheless finds that the plaintiff failed to establish its standing to prosecute this action for the reasons set forth below.

In a mortgage foreclosure action, a plaintiff establishes its prima facie entitlement to judgment as a matter of law by producing the mortgage and the unpaid note, and evidence of the default (*see* ***Wells Fargo Bank, N.A. v Erobobo***, 127 AD3d 1176, 9 NYS2d 312 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v DeSouza***, 126 AD3d 965, 3 NYS2d 619 [2d Dept 2015]; ***OneWest Bank, FSB v DiPilato***, 124 AD3d 735, 998 NYS2d 668 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v Ali***, 122 AD3d 726; 995 NYS2d 735 [2d Dept 2014]). Where, as here, the plaintiff's standing has been

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[1] While not required because CPLR 3408 mandates that only one settlement conference be held, further conferences were scheduled and held before this court but no resolution was accomplished although it was revealed that due to the size of the principal amounts loaned, the subject loan did not qualify for a modification under the federal Home Affordable Modification Program [HAMP].

placed in issue by the defendant's answer, the plaintiff also must establish its standing as part of its prima facie showing (*see* ***Loancare v Firshing***, ___ AD3d___, 2015 WL 4256095 [2d Dept 2015]; ***HSBC Bank USA, N.A. v Baptiste***, 128 AD3d 77, 10 NYS2d 255 [2d Dept 2015]).). A foreclosing plaintiff has standing if it is either the holder or the assignee of the underlying note at the time that the action is commenced (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, 2015 WL 3616293[2015]; ***Loancare v Firshing***, ___ AD3d___, 2015 WL 4256095 [2d Dept 2015, *supra;* ***Emigrant Bank v Larizza***, ___ AD3d___ , 2015 WL 3757235 [2d Dept 2015]). Proof that the plaintiff was in possession of the note on a day certain prior to the commencement of the action is sufficient to establish, prima facie, the plaintiff's possession of the requisite standing to prosecute its claims for foreclosure and sale (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, *supra*).

Upon its review of the moving papers submitted by the plaintiff, the court finds that they failed to establish, prima facie, the plaintiff's standing by due proof in admissible form sufficient to eliminate all questions of fact on that issue. Although the affidavit of merit attached to the moving papers contains an averment that the plaintiff or its duly designated custodian has been in possession of the loan documents in their present condition since October 25, 2005, including the February 8, 2005 consolidated note that contains three indorsements, one of which is in favor of the plaintiff, such an averment appears to conflict with the import of the written assignments of the note and mortgage executed subsequent to that date that are attached to the moving papers. In addition, questions of fact exist regarding whether a proper foundation was established for the admissibility of the records upon which the affiant relied to establish the plaintiff's standing and the date of the defendants' default in payment (*see* ***Citibank, N.A. v Cabrera***, ___ AD3d____, 2015 WL 4460686 [2d Dept 2015]; ***US Bank Nat. Ass'n v. Madero***, 125 AD3d 757, 5 NYS3d 105 [2d Dept 2015]; *cf.*, CPLR 4518[a]; ***State v 158th Street & Riverside Drive Housing Co., Inc.***, 100 AD3d 1293, 956 NYS2d 196 [3d Dept 2012]; ***Landmark Capital Investments, Inc. v. Li-Shan Wang***, 94 AD.3d 418, 941 NYS2d 144 [1st Dept 2012]; ***Charter One Bank, F.S.B. v Leone***, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007]). Due to the existence of these limited issues of fact concerning the plaintiff's ownership and/or possession of the consolidated note of February 8, 2005 on date of the commencement of this action and those concerning the date of the defendants' default in payment, the plaintiff's demands for summary judgment on its complaint against the answering defendants are denied.

However, the defaults in answering of the corporate defendants are hereby fixed and determined for all purposes pursuant to CPLR 3215 and RPAPL § 1321, although a judgment must abide the computation of amounts due and owing to the plaintiff under the loan documents. The unknown defendants, who were not served with process, are hereby dropped as party defendants to this action and the caption is amended to reflect this change.

In view of the foregoing, the instant motion is denied except for the fixation of the defaults in answering by the corporate defendants and the deletion of the unknown defendants. Pursuant to CPLR 3212(g), the trial of this action shall be limited to the issues framed above, namely, the plaintiff's ownership and/or possession of the consolidated note of February 8, 2005 on date of the

commencement of this action and the date of the defendants' default in payment, and to the amounts owing under the terms of the subject note and mortgage and such other matters as the court may direct. Such trial shall be held as scheduled by further order of the court. The parties are thus directed to appear for a pre-trial conference before the undersigned on Friday, September 18, 2015 at 9:30 a.m. in the courtroom of the undersigned.

Dated: July 27, 2015

THOMAS F. WHELAN, J.S.C.