Citimortgage, Inc. v Akil
2015 NY Slip Op 31785(U)
July 17, 2015
Supreme Court, Suffolk County
Docket Number: 10136/2011
Judge: Thomas F. Whelan

[* 1]

COPY

MEMO DECISION & ORDER

INDEX No. 10136/2011

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

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE: 07/11/14
SUBMIT DATE: 06/12/15
Mot. Seq. #001 - MotD
CDISP: No

----------X

CITIMORTGAGE, INC.,

Plaintiff,

-against-

ANDREW T. AKIL, SAADIA AKIL, CITIBANK SOUTH DAKOTA, NA, DISCOVER BANK, SUFFOLK COUNTY CLERK, WASHINGTON MUTUAL BANK, "JOHN DOE" said name being fictitious, it being the intention of plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises,

Defendants.

----------X

SWEENEY, GALLO, REICH et al
Attys. For Plaintiff
95-25 Queens Blvd.
Rego Park, NY 11374

RICHARD V. KANTER, ESQ.
Atty. For Def. Andrew Akil
555 Broadhollow Rd. - Ste. 274
Melville, NY 11747

Upon the following papers numbered 1 to 12 read on this motion by plaintiff for accelerated judgments, the identification of the unknown defendant and an order appointing a referee to compute; Notice of Motion/Order to Show Cause and supporting papers 1 - 6; Notice of Cross Motion and supporting papers ____; Answering papers 7-8; Reply papers 9-11; Other 12 (memorandum); ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion (#001) by the plaintiff for 1) summary judgment dismissing the affirmative defenses set forth in the answer of defendant, Andrew T. Akil, and for summary judgment on its complaint against him; 2) an order identifying the persons served as John Doe and the deletion of all others and a caption amendment to reflect these changes; 3) default judgments against all non-answering defendants; and 4) an order appointing a referee to compute amounts due under the terms of the note and mortgage, is granted only with respect to the First cause of action set forth in the complaint for foreclosure and sale; and it is further

ORDERED that the motion is denied with respect to the Second and Third causes of action in the complaint; and it is further

ORDERED that the Second and Third causes of action set forth in the complaint are hereby severed from the First cause of action, which alone shall continue herein, and any final judgment of foreclosure and sale entered on the First cause action shall reflect the severance of the Second and Third causes of action as directed herein.

The plaintiff commenced this action to foreclose the lien of a January 13, 2009 mortgage given by the obligor/mortgagor defendants [Akil] to a predecessor-in-interest of the plaintiff to secure a mortgage note of the date likewise executed by such defendants. Following service to the summons, complaint and other initiatory papers upon the Akil defendants, defendant Andrew T. Akil appeared herein by answer which contained five affirmative defenses. In the Third affirmative defense, answering defendant Akil challenges the standing of the plaintiff "due to defective assignments". The record reveals that no other defendants appeared herein by answer.

A review of the complaint served and filed herein reveals that in addition to its claim for foreclosure and sale of the mortgaged premises, two additional causes of action are set forth. The plaintiff demands in the separate Second cause of action a judicial declaration extinguishing of record a prior recorded lien against the subject premises allegedly held by defendant Washington Mutual Bank and an order directing the Suffolk County Clerk to note the extinguishment of the record. In the Third cause of action, the plaintiff seeks to reform the description of the mortgaged premises that is set forth in the deed dated January 13, 2009 and the mortgage indenture of the same date due to a purported error in the legal description of the premises.

By the instant motion, the plaintiff moves for an order awarding it summary judgment dismissing the affirmative defenses asserted in the answer of defendant, Andrew T. Akil, and an award of summary judgment on its complaint against said defendant. The plaintiff also seeks an order of reference upon the default in answering of the remaining defendants who were joined herein by service of process including the one served as John Doe and an order identifying such defendant pursuant to CPLR 1024, together with caption amendment to reflect these changes (*see* RPAPL §1321). Finally, the plaintiff seeks an order appointing a referee to compute amounts due under the subject note and mortgage pursuant to RPAPL § 1321.

The motion is opposed by answering defendant, Andrew T. Akil, who asserts only his pleaded standing defense in an effort to defeat the plaintiff's motion. Both he and counsel challenge the plaintiff's proof which rests upon an affidavit of the plaintiff's Vice President, in which she avers facts known personally to her and those known upon her review of the plaintiff's business records. Such facts include allegations that the plaintiff became the holder of the note by virtue of its possession of such note, which contains an undated allonge indorsed in blank, prior to the commencement of this action. The defendant claims that the undated nature of the allonge and the lack of evidence as to its attachment to the note warrant a denial of the motion.

In reply to these challenges, the plaintiff submits a further affidavit by a new affiant Vice President, Ashley Sterling, which is based upon her personal knowledge and review of the business records of the plaintiff including the original note maintained in the collateral loan file. Ms. Sterling avers that she personally reviewed the original note to confirm its attachment to the note and she found it to bear a a further indorsement in blank by the plaintiff. She further avers that the note has been in the possession of plaintiff since January 27, 2009, a mere seven days following the closing of the loan. This is evidenced by her review of a screenshot of the business entries maintained by the plaintiff which confirms the plaintiff's receipt of said note on that date. In addition, the business records maintained by the plaintiff contain copies of letters dated January 29th and 30th of 2009 to the Akil defendants that their loan had been purchased and transferred to the plaintiff.

For the reasons stated, the plaintiff's motion is granted only as to the plaintiff's First cause of action and as to relief demanded that is incidental thereto.

Entitlement to an award of summary judgment of a claim for foreclosure is established, as a matter of law, where the plaintiff produces both the mortgage and unpaid note, together with evidence of the mortgagor's default, thereby shifting the burden to the mortgagor to demonstrate, through both competent and admissible evidence, any defense which could raise a question of fact (*see* ***Redrock Kings, LLC v Kings Hotel, Inc.***, 109 AD3d 602, 970 NYS2d 804 [2d Dept 2013]; ***One West Bank, FSB v DiPilato***, 124 AD3d 735, 998 NYS2d 668 [2d Dept 2015]; ***Emigrant Mtge. Co., Inc. v Beckerman,*** 105 AD3d 895, 964 NYS2d 548 [2d Dept 2013]; ***Solomon v Burden***, 104 AD3d 839, 961 NYS2d 535 [2d Dept 2013]; ***US Bank Natl. Ass'n v Denaro,*** 98 AD3d 964, 950 NYS2d 581 [2d Dept 2012]; ***Baron Assoc., LLC v Garcia Group Enter.***, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; ***Citibank, N.A. v Van Brunt Prop., LLC***, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]; ***US Bank N.A. v Eaddy***, 79 AD3d 1022, 1022, 914 NYS2d 901 [2010]; ***Zanfini v Chandler***, 79 AD3d 1031, 912 NYS2d 911 [2d Dept 2010]). This standard is enlarged to include a demonstration that the plaintiff was possessed of the requisite standing to prosecute its claims for foreclosure and sale, where and only where, the defense of standing is raised by a defendant duly possessed of such defense, by its assertion in an answer due an timely served (see

Here, the plaintiff produced both the note and mortgage together with due evidence of the answering defendant's default in payment under the terms of those documents. In addition, the plaintiff, whose standing was challenged in an affirmative defense asserted in the answer served, duly established by proof in admissible form that it had standing to prosecute its claims for foreclosure and sale by virtue of its possession of the note, duly indorsed in blank since January 27, 2009, which was prior to the commencement of this action (*see* ***Aurora Loan Serv., LLC v Taylor***, ____ NY3d ___, 2015 WL 3616293 [2015]; ***Emigrant Bank v Larizza***, ___ AD3d___, 2015 WL 3757235 [2d Dept 2015]; ***Citimortgage, Inc. v Chow Ming Tung***, 126 AD3d 841, 7 NYS3d 147 [2d Dept 2015]; *see also* ***Nationstar Mtge. LLC v Davidson***, 116 AD3d 1294, 983 NYS2d 705 [3d Dept 2014]). The plaintiff thus demonstrated that the standing defense of defendant, Andrew T. Akil, is without merit. The remaining defenses asserted in his answer of defendant Akil were also shown to be without merit and were abandoned by such defendant's failure to raise them in opposition to

the plaintiff's motion. Those portions of the instant motion wherein the plaintiff seeks summary judgment dismissing the affirmative defenses of defendant, Andrew T. Akil, and for summary judgment in favor of the plaintiff on its First cause of action for foreclosure and sale are granted.

To succeed on a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing (*see* ***Todd v Green***, 122 AD3d 831, 997 NYS2d 155 [2d Dept 2014]; ***U.S. Bank, Natl. Ass'n v Razon***, 115 AD3d 739, 981 NYS2d 571 [2d Dept 2014]; ***Green Tree Serv., LLC v Cary***, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]; ***Diederich v Wetzel***, 112 AD3d 883, 979 NYS2d 605 [2d Dept 2013]; ***Loaiza v Guzman***, 111 AD3d 608, 609, 974 NYS2d 282 [2d Dept 2013]; ***Dupps v Betancourt***, 99 AD3d 855, 952 NYS2d 585 [2d Dept 2012]). In the mortgage foreclosure cases, a claim for foreclosure is further governed by RPAPL § 1321 and appellate case authorities interpreting it. Pursuant thereto, the claim is established by the plaintiff's production of the note and mortgage together with evidence of default in payment or a default in other obligations giving right to the remedy of foreclosure and sale which the mortgagor willingly conferred upon the lender in exchange for the advancement of the mortgage loan monies (*see* CPLR 3215[f]; ***Wells Fargo Bank, NA v Ambrosov,*** 120 AD3d 1225, 993 NYS2d 322 [2d Dept 2014]; ***Todd v Green***, 122 AD3d 831, *supra*; ***U.S. Bank Natl. Assn. v Razon***, 115 AD3d 739, *supra*).

Here, the moving papers established the plaintiff's possession of cognizable claims for a judgment of foreclosure and sale against the obligor/mortgagor defendants, Saadia Akil , Citibank South Dakota, N.A., Discover Bank, and defendant "Natalie Doe" who was served herein as unknown defendant JOHN DOE, all of whom were joined herein as necessary parties to the plaintiff's First cause of action wherein it demands such relief. The moving papers also established a default in answering on the part of these defendants. The plaintiff thus demonstrated its entitlement to default judgments against these defendants pursuant to CLR 3215 on the plaintiff's First cause of action for foreclosure and sale.

The plaintiff also demonstrated its entitlement to an order identifying the unknown defendant as Natalie Doe and an order dropping as party defendants the unknown defendants named in the caption together with an amendment thereof to reflect same. The plaintiff is further entitled to an order appointing a referee to compute since the plaintiff's claims for foreclosure and sale have been resolved in its favor and against all defendants joined as party defendants to the plaintiff's First cause of action for such relief (*see* RPAPL § 1321).

The plaintiff is not, however, entitled to accelerated judgments against the defendants who were joined in this action by virtue of the plaintiff's assertion of its Second cause of action for declaratory relief. As indicated above, this claim is aimed at extinguishing, by judicial declaration, the superior and prior lien of defendant, Washington Mutual Bank pursuant to RPAPL §1501. In separate riders attached to the complaint, the plaintiff lists Washington Mutual Bank, the holder of the lien for which extinguishment is sought, and the Suffolk County Clerk as the parties affected by the relief requested in the Second cause of action.

Claims for declaratory relief of the type advanced in the plaintiff's Second cause of action, sound in quiet title or adverse claim determination and are thus governed by RPAPL Article 15. Declaratory relief aimed at removing clouds on title to real property or to determine adverse claims to such property is available under the provisions of Article 15 of the Real Property Actions and Proceedings Law and provision is made therein for the extinguishment of mortgages where the statute of limitations applicable to a foreclosure action has expired (*see* RPAPL § 1501[4]). In addition, common law relief in the form of a judgment quieting title is available under RPAPL Article 15 to remove clouds on property which serve as an apparent title such as a deed or other instrument that is actually invalid or inoperative (*see* ***Acocella v Bank of New Yok Mellon***, 127 AD3d 891, 9 NYS3d 67 [2d Dept 2015]). Due to the in rem nature of these actions, specific pleading and party joinder requirements are imposed by RPAPL Article 15 and plaintiffs are required to state their interests in the premises, the source of such interest and its nature and the existence of a removable cloud on the property arising from an invalid or inoperative instrument (*id*; ***Piedra v Vanover***, 174 AD2d 191, 579 NYS2d 675, 678 [2d Dept 1992]). In addition, RPAPL Article 15 plaintiffs must identify and join all persons having interests in the premises which may be adversely affected by the granting of the relief and state whether such persons are known and/or unknown and, if known, whether they suffer from any of the legal disabilities described in RPAPL § 1515.

These specific pleading and joinder requirements reflect the elements of a viable claim for relief under RPAPL Article 15. They are derived from the statutory mandate that a judgment issued pursuant to RPAPL Article 15 must "declare the validity of any claim ... established by any party," and may direct that an instrument purporting to create an interest deemed invalid be cancelled or reformed (RPAPL § 1521[1]; *see also* ***TEG N.Y. LLC v Ardenwood Estates, Inc.***, 2004 WL 626802, at *4 [E.D.N.Y. 2004]). The judgment must "also declare that any party whose claim to an estate or interest in the property has been judged invalid, and every person claiming under him ... be forever barred from asserting such claim...." (RPAPL § [1]; *see also* ***O'Brien v Town of Huntington***, 66 AD3d 160, 884 NYS2d 446, 451 [2009]).

Here, the moving papers of the plaintiff failed to establish the plaintiff's possession of cognizable claims for such relief pursuant to RPAPL Article § 1501 against the defendants joined as party defendants to this Second cause of action (*see* CPLR 3215[f]; RPAPL §§ 1515; 1519). The claim is based upon pleaded allegations that the prior lien of defendant, Washington Mutual Bank, which is no longer a going concern, is "adverse" to the plaintiff's subsequent in time and in recording, mortgage lien. The only ground for such extinguishment is an allegation of the plaintiff's belief as to its satisfaction. No facts are alleged in either the complaint or the supporting motion papers from which a plausible claim for the extinguishment of the prior lien pursuant to RPAPL Article 15 is discernable. Nor is compliance with the pleading requirements of RPAPL Article 15 evident from a reading of the complaint.

The plaintiff's motion with respect to its Third cause of action suffers from similar insufficiencies which warrant the denial all relief requested with respect to such cause of action. This Third cause of action sounds in equitable reformation of the legal description of the mortgaged premises that is set forth in the January 13, 2009 mortgage indenture and a deed of the same date.

Claims for equitable relief in the nature of a judicial reformation of a description of the mortgaged premises set forth in a recorded mortgage have long been recognized as actionable, independently, in an equitable action for such relief, or in an action in which other equitable relief such as foreclosure and sale is demanded (*see* ***Wells Fargo Bank, NA v Ambrosov***, 120 AD3d 1225, 993 NYS2d 322 [2d Dept 2014]; *see also Warren's Weed New York Real Property*; Chapter 117, Reformation §117.03). Recent appellate case authorities have held that cognizable claims for such relief must be premised upon allegations of either mutual mistake of the parties or their agents, including scriveners, who cause an error in the description of the mortgaged premises in a recorded mortgage indenture or deed (*see* ***McPherson v Goldstein***, 256 AD 1006, 10 NYS2d 971 [2d Dept 1939]), or a unilateral mistake by one party coupled with fraud (*see* ***Janowitz Bros. Venture v 25-30120th St. Queens Corp.***, 75 AD2d 203, 429 NYS2d 215 [2d Dept 1980]).

Reformation on grounds of mutual mistake requires proof, by clear and convincing evidence, that an agreement does not express the true intentions of either party (*see* ***Migliore v Manzo***, 28 AD3d 620, 621, 813 NYS2d 762 [2d Dept 2006]; ***Miller v Seibt***, 13 AD3d 496, 788 NYS2d 126 [2d Dept 2004]). In the case of a scrivener's error, reformation based upon such an error requires proof of a prior agreement between parties which, when subsequently reduced to writing, fails to accurately reflect the prior agreement (*see* ***Harris v Uhlendorf***, 24 NY2d 463, 467, 301 NYS2d 53 [1969]; ***Wells Fargo Bank, NA v Ambrosov***, 120 AD3d 1225, *supra*; ***US Bank Natl. Ass'n v Lieberman***, 98 AD3d 422, 950 NYS2d 127 [1st Dept 2012]). While the pleading and procedural requirements applicable to quiet title claims of the type contemplated by RPAPL Article 15 (*see* RPAPL §1519) are not necessarily applicable to an equitable claim for reformation of a legal description of the mortgaged premises against the parties to the loan transaction, where the relief requested would adversely affect persons other than those parties due to an enlargement of the premises encumbered by any proposed reformation of the description of the mortgaged premises, the joinder of such parties to the claim is required in order to afford complete relief to all persons whose interest may be inequitably affect by the judgment (*see* CPLR 1001[a]; *see also Warren's Weed New York Real Property*; Chapter 117, Reformation §117.32[2]).

Here, the allegations asserted in the plaintiff's Third cause of action rest upon conclusory claims of an error in the legal description of the premises that were the subject of the deed and the mortgage indenture of January 13, 2009. By virtue of such error, the third course of such description failed to identify the first direction as north. In its moving papers, the plaintiff's counsel addresses only the error in the mortgage indenture and not the deed, and asks that upon the filing of a certified copy of the order to be entered hereon "that said mortgage shall be reformed of record and no further instruments be placed in the public record". However, the proposed order attached to the moving papers calls for a reformation of the deed described in the complaint, no copy of which is attached to the moving papers. The court thus finds that no cognizable claims for reformation of any deed were advanced in the moving papers.

The court further finds that counsel's allegations failed to establish facts constituting cognizable claims for reformation of the mortgage indenture as required by CPLR 3212 and 3215. The purported error is not described as a scrivener's error nor as one of a mutual mistake of the parties to the deed and mortgage and no proof or first hand confirmation of allegations of

plaintiff's counsel, who has no apparent knowledge of the error or of the intention of the parties' to the deed or mortgage, is attached to the moving papers.

Finally, court notes that the complaint identifies no one as joined as a party defendant to the Third cause of action and the plaintiff did not address the existence or non-existence of any persons or entities who would be adversely affected by the granting of the relief requested. In this regard, the court notes that there are not any allegations or submission demonstrating the history of the matters indexed in the public record against the premises subsequent to the recording of the deed and the mortgage. The plaintiff is thus not entitled to accelerated judgments on its Third cause of action for reformation of any of the instruments executed on January 13, 2009.

In view of the foregoing the court denies the plaintiff's request for for accelerated judgments on both its Second cause of action for declaratory relief and its Third cause for reformation of a deed not before the court and the subject mortgage indenture as the plaintiff failed to assert facts which constitute cognizable claims for such relief (*see* CPLR 3212; 3215[f]; ***Wells Fargo Bank, NA v Ambrosov***, 120 AD3d 1225, *supra*; ***Interboro Ins. Co. v Johnson***, 123 AD3d 667, 1 NYS3d 111 [2d Dept 2014]). The Second and Third causes of action are thus severed from the First cause of action, which alone shall continue herein, and any final judgment of foreclosure and sale entered on the First cause action shall reflect the severance of the Second and Third causes of action under the terms of this order.

However, the court's denial of relief with respect to the Third cause of action for reformation of the description of the mortgaged premises in the mortgage indenture and deed without prejudice to the interposition of a new application for an order re-joining the now severed Third cause of action with the First cause of Action and for an order and judgment granting accelerated judgments on the Third cause of action for reformation, provided that, such application contains more elaborate allegations as to the nature of and grounds for the requested reformations and some proof of the plaintiff's entitlement thereto (*see* ***Bank of New York v Stein***, ___ AD3d___, 2015 WL 3972186 [2d Dept 2015]; ***Wells Fargo Bank, NA v Ambrosov***, 120 AD3d 1225, 993 NYS2d 322 [2d Dept 2014]).

Proposed Order appointing a referee to compute, as modified by the court to reflect the terms of this order, has been signed simultaneously herewith.

DATED: 7/[illegible]/15

THOMAS P. WHELAN, J.S.C.