

Carmike Holding 1 LLC v Smith
2015 NY Slip Op 31961(U)
September 14, 2015
Supreme Court, Suffolk County
Docket Number: 14-5403
Judge: W. Gerald Asher
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Upon the following papers numbered 1 to 22 read on this motion for summary judgment and order of reference, and motion to dismiss; Notice of Motion/Order to Show Cause and supporting papers 1 - 10; Notice of Cross Motion and supporting papers 11 - 17; Answering Affidavits and supporting papers 18 - 20; Replying Affidavits and supporting papers 21 - 22; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the plaintiff's motion (002) and defendant's motion (001) are hereby consolidated for the purpose of this determination; and it is further

ORDERED that the defendant's motion (001) to dismiss the complaint is denied; and it is further

ORDERED that the plaintiff's motion (002) pursuant to CPLR 3212 for summary judgment on its complaint against defendant David R. Smith, fixing the defaults as to the non-appearing, non-answering defendants, to amend the caption of this action pursuant to CPLR 3025 (b), 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 the caption is hereby amended by deleting "John Does" and "Jane Does" therefrom; and it is further

ORDERED that the plaintiff is directed to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this court; and it is further

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X
CARMIKE HOLDING I LLC,
Plaintiff,

- against -

DAVID R. SMITH; COMMISSIONER OF TAXATION
AND FINANCE; PEOPLE OF THE STATE OF NEW
YORK; PORTFOLIO RECOVERY ASSOCIATES
LLC; SFERRAZZA & KEENAN PLLC; RAPID OIL
SERVICE, INC.; CLERK OF THE SUFFOLK COUNTY
DISTRICT COURT; CITIBANK SOUTH DAKOTA NA;
UNITED STATES OF AMERICA - INTERNAL
REVENUE SERVICE; CAROLANNE SMITH; FIA
CARD SERVICES NA; CAPITAL ONE AUTO
FINANCE INC.; LVNV FUNDING LLC,
Defendants.

-----X

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This is an action to foreclose a mortgage on property known as 167 Araca Road, Babylon, New York. On October 6, 2011, defendant David R. Smith ("defendant") executed a note in favor of plaintiff Carmike Holding LLC and Steven P. Raia ("Carmike") agreeing to pay the sum of \$275,000. On said date, defendant also executed a mortgage in the principal sum of \$275,000 on the subject property. The mortgage was recorded on October 19, 2011 with the Suffolk County Clerk's Office. The note was transferred to Carmike by Steven P. Raia by allonge without recourse or warranty. By assignment dated January 8, 2013, Steven P. Raia assigned said mortgage to Carmike. The assignment was recorded on February 20, 2013 with the Suffolk County Clerk's office.

A notice of default was sent by plaintiff Carmike on October 22, 2013 to the defendant stating that he had defaulted on his mortgage loan and that he owed the sum of \$336,204.01. As a result of defendant's continuing default, plaintiff commenced this foreclosure action on March 13, 2014. In its complaint plaintiff alleges in pertinent part that the defendant breached his obligations under the terms of the note and mortgage by failing to make his monthly installment due on November 6, 2012 and subsequent payments thereafter. The defendant asserted a verified answer on May 9, 2014 containing general denials, four affirmative defenses and three counterclaims.

The court's computerized records indicate that foreclosure settlement conferences were held on August 4, 2014 and September 5, 2014. The matter was referred to an IAS Part on the ground that no settlement occurred. Thus, there has been compliance with CPLR 3408 and no further settlement conferences are required.

Plaintiff now moves for summary judgment on its complaint, to amend the caption deleting the John Does and Jane Does therefrom, to appoint a referee to compute the sums due the plaintiff, dismiss defendant Smith's answer and counterclaims, and grant a default judgment against all non-answering and non-appearing defendants. Defendant now moves to dismiss the complaint pursuant to CPLR 3211 (a) (7).

In support of its motion, plaintiff submits, among other things, the sworn affidavit of Frank Martino; the pleadings, the note, mortgage and assignments of mortgage; notices pursuant to RPAPL 1320, 1303 and 1304; and affidavits of service for the summons and complaint. Mr. Martino avers that he is the sole member of Carmike and that the note provided for repayment in monthly installments commencing November 6, 2011 and ending on October 6, 2013. As collateral security for the payment of his indebtedness, defendant also executed a mortgage. The mortgage and note were assigned to Carmike Holding I LLC on January 8, 2013. Defendant breached his obligation when he failed to tender the installment which became due and payable on December 6, 2012. On October 22, 2013, plaintiff mailed a demand letter via first class mail and certified mail. The time prescribed to cure the default has expired. Mr. Martino states that defendant now owes the amount of \$372,298.92. In addition, plaintiff's counsel affirms that

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plaintiff is not subject to New York banking laws.

In opposition and in support of his cross motion, defendant submits, *inter alia*, his personal affidavit, the pleadings, copies of the note, allonge, mortgage and assignment of mortgage. Defendant claims that plaintiff violated New York Banking Law §§ 6-1 (2) (b), (k), (l) (i), (ii), and (2-a) (a), and 6-m (2) (J), (4) (b) and (c). In addition defendant claims that the repayment terms of the mortgage agreement are unconscionable and that the interest rate is usurious. Defendant further seeks discovery. Initially, the defendant's personal affidavit is rejected as inadmissible inasmuch as it has not been notarized.

In opposition to defendant's cross motion and reply, plaintiff submits the affirmation of Robert H. King who affirms that defendant has failed to present a bona fide issue of fact sufficient to deny the plaintiff's motion. He states that Banking Law §§ 590 (1) (f) and 590 (2) apply only to a discrete set of individuals and entities, of which plaintiff is not one. In addition, plaintiff submits the affidavit of Glen Krebs, who avers that he is a limited member of Carmike. He avers that plaintiff is not a mortgage broker or a lender as defined by the Banking Law §590 (2). Specifically, in 2011, Carmike did not make or originate more than three loans in 2011, and has not originated more than five loans in any two year period. In addition, the subject loan was not solicited, processed, placed or negotiated by a mortgage broker, mortgage banker or exempt organization. He further states that he personally appeared at the foreclosure settlement conference at which time the defendant appeared through his attorney and no settlement was reached.

“[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]; *Village Bank v Wild Oaks Holding*, 196 AD2d 812, 601 NYS2d 940 [2d Dept 1993]). 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 on their defenses (*Ames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]; *Household Fin. Realty Corp. v Winn*, 19 AD3d 545, 796 NYS2d 533 [2d Dept 2005]). A plaintiff who makes less than three home loans in a calendar year and less than five loans in any two year period is exempt from the licensing provisions of New York Banking Law §§ 590 (2) and 6-1 (1), and is not considered a lender under the Banking Law (*Balsam v Fioriglio*, 123 AD3d 750, 999 NYS2d 425 [2d Dept 2014]).

Here, the plaintiff has established its entitlement to summary judgment against the answering defendant as such papers included a copy of the mortgage, the unpaid note together with due evidence of his default in payment under the terms of the loan documents (see CPLR 3212; RPAPL § 1321; *Neighborhood Hous. Servs. of N.Y. City, Inc. v Hawkins*, 97 AD3d 554, 947 NYS2d 321 [2d Dept 2012]; *Baron Assoc., LLC v Garcia Group Enters., Inc.*, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]). Plaintiff has also established that it is exempt from

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licensing provisions of the Banking Law, that it is not a lender under the Banking Law, and that it does not fall into any other category to which Banking Law § 6-i applies. Defendant has failed to raise a triable issue of fact. The remainder of defendant's contentions are not meritorious defenses to a foreclosure action and are hereby rejected.

Turning to the defendant's motion, on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), a court must afford the pleading a liberal construction, accept all the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]; *Hynes v Griebel*, 300 AD2d 628, 754 NYS2d 293 [2d Dept 2002]; *Glassman v Zoref*, 291 AD2d 430, 737 NYS2d 537 [2d Dept 2002]). The criterion is whether the plaintiff has a cause of action, not whether he or she has stated one (*Vorel v NBA Props.*, 285 AD2d 641, 728 NYS2d 397 [2d Dept 2001]). Here, the complaint states a cause of action sounding in foreclosure.

Accordingly, the plaintiff's motion for summary judgment is granted and the defendant's motion is denied.

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

Dated: Sept. 14, 2015

W. Gerard Arler
J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION