

U.S. Bank N.A. v Manfredo

2015 NY Slip Op 32258(U)

November 10, 2015

Supreme Court, Suffolk County

Docket Number: 17372/2013

Judge: Glenn A. Murphy

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COPY

**SUPREME COURT - STATE OF NEW YORK
IAS PART 25 - SUFFOLK COUNTY**

**PRESENT: Hon. GLENN A. MURPHY
Acting Justice Supreme Court**

**MOTION DATE 09-02-14
ADJ. DATE 11-10-15
Mot. Seq. #001 MG**

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE
FOR MASTER ASSET BACKED SECURITIES TRUST
2006-HE4, MORTGAGE PASS-THROUGH
CERTIFICATES, SERIES 2006-HE4,

Plaintiff,

GROSS POLOWY, LLC
Steven Rosenfeld, Esq.
Attorneys for Plaintiff
25 Northpointe Parkway, Suite 25
Amherst, New York 14228

-against-

MICHAEL KENNEDY KARLSON, ESQ.
Attorney for Defendants
60 Seaman Avenue, 4E
New York, New York 10034

**JOSEPH G. MANFREDO, SANDRA L. MANFREDO,
MIDLAND FUNDING LLC. TEACHERS FEDERAL
CREDIT UNION, JOHN DOE (being fictitious, the names
unknown to plaintiff intended to be tenants, occupants,
persons or corporations having or claiming an interest in or
lien upon the property described in the complaint or their
heirs at law, distributees, executors, administrators, trustees,
guardians, administrators, creditors or successors.)m**

Defendants.

_____x

Upon the following papers numbered 1 to 26 read on this motion for summary judgment; Notice of Motion/ ~~Order to Show Cause~~ and supporting papers 1-24; ~~Notice of Cross Motion and supporting papers~~; Answering Affidavits and supporting papers 25; Replying Affidavits and supporting papers 26; ~~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 hereby

ORDERED that this motion by the plaintiff Wells Fargo Bank, N.A., (Wells Fargo), pursuant to CPLR §3212 for summary judgment on its verified complaint, to strike the answer and counter-claim of Joseph G. Manfredo and, for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law (RPAPL) §1321, is granted; and it is further

ORDERED that the plaintiff's application for leave to amend the caption of this action pursuant to CPLR §3025 (b), is granted; and it is further

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ORDERED that Amanda Manfredo be substituted in the caption of this action in place of "John Doe" and that the caption be amended to reflect this substitution; and it is further

ORDERED that Brandon Manfredo be substituted in the caption of this action in place of "John Doe" and that the caption be amended to reflect this substitution; and it is further

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE
FOR MASTER ASSET BACKED SECURITIES TRUST
2006-HE4, MORTGAGE PASS-THROUGH CERTIFICATES,
SERIES 2006-HE4,

Plaintiff,

-against-

JOSEPH G. MANFREDO, SANDRA L. MANFREDO,
MIDLAND FUNDING LLC. TEACHERS FEDERAL
CREDIT UNION, AMANDA MANFREDO, BRANDON
MANFREDO,

Defendants.

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MORTGAGED PREMISES
84 7TH AVENUE NORTH
HUNTINGTON STATION, NY
11746

SBL #:
DISTRICT 0400,
SECTION 142.00,
BLOCK 01.00,
LOT 106.000

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.

This is an action to foreclose a mortgage on premises known as 84 7th Avenue North, Huntington Station, New York. On September 12, 2006, the defendants executed a note in favor of Meritage Mortgage Corporation (Meritage) agreeing to pay the sum of \$265,000.00 at the yearly rate of 6.875% (percent). On the same date, the defendant executed a first mortgage in like sum on the subject property. The mortgage was recorded on October 24, 2006 in the Suffolk County Clerk's Office. The mortgage named Mortgage Electronic Registration Systems (MERS) as the nominee for Meritage. On August 4, 2009, the mortgage was assigned by MERS to US Bank National Association as trustee for Master Asset Packed Securities Trust 2006-HE4. The assignment was filed on September 8, 2009. On August 13, 2010, the loan was modified between the defendant and the new lender, Wells Fargo Bank, N.A. d/b/a America's Servicing Corporation. The loan was recast whereby the rate was reduced to 4.500% (percent) and extended to 2040. On April 24, 2012, MERS assigned the mortgage to US Bank (plaintiff).

A notice of default, dated January 9, 2013, was sent to the defendant stating that they he defaulted on his mortgage loan and that the amount past due was \$6,799.59. On that same date, the plaintiff sent by certified and regular mail a ninety (90) day notice pursuant to RPAPL §1304. As a result of the defendants continuing default, the plaintiff commenced this foreclosure action on July 3, 2013. In its complaint, the plaintiff alleges in pertinent part that the defendant breached his obligations under the terms of the note and mortgage by failing to make monthly payments. The summons and complaint comply with the requirement of RPAPL §1303. The defendant interposed an answer consisting of general denials and eight (8) affirmative defenses.

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The Court's computerized records indicate that a final of two foreclosure settlement conferences was held on March 4, 2014, 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.

The plaintiff now moves for summary judgment on its complaint contending that the defendant failed to comply with the terms of the loan agreement and mortgage and, that the defendant's general denials raised no issue of fact for trial. In support of its motion, the plaintiff submits among other things: the sworn affidavit of Natalie Bryant, Vice President Loan Documentation of Wells Fargo Bank, N.A. d/b/a America's Servicing Company (Wells Fargo) the plaintiff's servicer; the affirmations of Steven Rosenfeld, in support of the instant motion together with his affirmation 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; notice of default; notices pursuant to RPAPL §§ 1320, 1304 and 1303; affidavits of service for the summons and complaint; and, an affidavit of service for the instant summary judgment motion upon the defendant's counsel.

"[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 Mgt. Co., LLC v Montesana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). 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 of their defenses (see *Aames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]; *Household Fin. Realty Corp. of New York v Winn*, 19 AD3d 545, 796 NYS2d 533 [2d Dept 2005]; see also *Washington Mut. Bank v Valencia*, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]).

Here, plaintiff has established its entitlement to summary judgment against the defendant as such papers included a copy of the mortgage, a copy of the assignment of 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. Serv. of New York City v Hawkins*, 97 AD3d 554, 947 NYS2d 321 [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]; *Archer Capital Fund, L.P. v GEL, LLC*, 95 AD3d 800, 944 NYS2d 179 [2d Dept 2012]; *Swedbank, AB v Hale Ave. Borrower, LLC*, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]; *Rossrock Fund II, L.P. v Osborne*, 82 AD3d 737, 918 NYS2d 514 [2d Dept 2011]).

The defendant sent opposition to the plaintiff via fax on or about August 27, 2014. The plaintiff rejected service as a fax does not meet the procedural requirements of the CPLR. The Court notes that although service is "defective"; the Court will nonetheless address the claims contained therein as if properly served.

The defendant's opposition raises three (3) major issues. The first attacked the sufficiency of the plaintiff's RPAPL §1304 notice. The plaintiff attacks both the service and facial sufficiency thereof.

With regard to the content, the defendant argues that the provided list of five (5) counseling agencies was not in the fourteen (14) point type, and as such the notice was defective. Although, this issue has not been addressed by any of the appellate divisions, it should be noted that the type size requirement is found only in the notice requirement of RPAPL §1304.1. This Court notes that the font size language

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was not included by the legislation when it placed the additional requirement on a foreclosing bank has to provide a homeowner with a list of five (5) housing counseling agencies. As the requirements are found in two separate subdivisions of RPAPL §1304, this Court hereby finds that the font requirements of RPAPL §1304.1 is limited to the notice provided in RPAPL §1304.1 only. The Court therefore finds the notice provided to the defendant is sufficient as there is no font size requirement for the list of counseling agencies as required under RPAPL §1304.2.

The defendants opposition also attacks the proffered proof of service of the RPAPL §1304 notice.

It is well settled that proper service of the notice required by RPAPL §1304 is a condition precedent to the commencement of a residential foreclosure action, and is the plaintiff's burden to establish *see Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909, 961 NYS2d 200 [2d Dept 2013]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]; *First Natl. Bank of Chicago v Silver*, 73 AD3d 162, 899 NYS2d 256 [2d Dept 2010]). Here, the plaintiff satisfied its burden that service of the RPAPL§1304 notice was properly made. The defendants bare and unsubstantiated denial of receipt of the RPAPL§1304 notice was insufficient to rebut the presumption of proper service created by the affidavit of service (*see id.*; *Deutsche Bank Natl. Trust Co. v Hussain*, 78 AD3d 989, 912 NYS2d 595 [2d Dept 2010]). In addition, annexed to the plaintiff's motion is a copy of the RPAPL §1304 notice, the affidavit of Ms. Bryants which is based upon her personal knowledge and the plaintiff's records, together with documents submitted in support thereof, established that the RPAPL §1304 notice was properly sent by certified and regular mail. Thus, the defendants mere denial of receipt is insufficient to rebut the Natalie Bryant affidavit establishing a proper mailing. (*see Kihl v Pfeffer*, 94 NY2d 118, 700 NYS2d 87 [1999]).

The second area of opposition raised by the defendant attacks on the mortgage transfers, this Court notes that the Court of Appeals in *Aurora v Taylor*, 25 NY3d 355 (2015) has given clarity with regard to foreclosure actions. The Court held that the note...”and not the mortgage is the dispositive instrument that conveys standing...” to a NY foreclosure action. (id 361). In this case, the defendant in neither his answer nor his opposition, attacks the fact that the plaintiff possessed the note prior to the commencement of the action. The affidavits of Ms. Bryant together with the certification of possession of the note by plaintiffs counsel prior to the commencement of the action establishes standing under the *Aurora* guidelines.

The defendant's third area of opposition regards the defendants claim that the Pooling Service Agreement (PSA) may have been violated by the plaintiff and as such the plaintiff lacks standing; the second department has recently held that a defendant has no standing to attack the non compliance of a PSA as he is not a party to the transaction. *Bank of America v Patino*, 128 AD2d 994 (2nd Dept 2015). *See also*; *Bank of Mellon v Gates*, 116 AD3d 723 at 725.

Turning to the remainder of the defendants affirmed defenses and affirmation in opposition the Court finds that defense counsel's conclusionary allegations attacking the mortgage assignments contained in counsels affirmation are not based upon personal knowledge, and as such, are “without evidentiary value” *See Zuckerman v. City of New York*, 49 NY 2d 557(1980); *see also Weingarten v. Marcus*, 118 AD 2d 640 (2d Dept 1986); *Reuben Israelson v. Sidney Rubin*, 20 AD2d 668, 247 NYS2d 85 (2d Dept 1964) Affd 14 NY2d 887(1964); *Erin Federico v. City of Mechanicville*, 141 AD2d 1002, 531 NYS2d 42 (3rd Dept. 1988); *Cohen v. Pannia*, 7 AD2d 886, 181 NYS2d 220 (4th Dept. 1959). “Motions for summary judgment may not be defeated merely by surmise, conjecture or suspicion” *Shaw v Time-Life Records*, 38 NY2d 201, 379NYS2d 390 [1975]

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With respect to his remaining claims, the defendant has failed to raise any triable issues 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 [2d Dept 2007] quoting *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 664 NYS2d 345 [2nd Dept 1997]). Here, the defendant has 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]). Notably, the defendant does not deny that he has not made payments of interest or principal on the note. *see Citibank, N.A. v Souto Geffen Co.*, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996].

In light of the foregoing, the motion for summary judgment is granted against the defendant and the defendant's answer is stricken. The plaintiff's request for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is also 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])

ORDERED, further that this action is hereby referred to Lynn D. Poster-Zimmerman, Esq., with an office located at 775 Park Avenue, Suite 335, Huntington, New York 11743 ph #631-673-11743, who is hereby appointed Referee to ascertain and compute the total amount due plaintiff for unpaid principal, accrued interest and all (other disbursements advanced as provided for by statute) mortgage costs and expenses other than attorneys' fees secured by the note and mortgage set forth in the complaint, and to examine and report as to whether the mortgaged premises can be sold in one parcel; and it is further

ORDERED, that plaintiff shall provide the Referee all required documents to compute within sixty (60) days from the date of this Order, and the Referee shall make his/her report no later than thirty (30) days thereafter and that, except for good cause shown, the plaintiff shall move for judgment no later than thirty (30) days of the date of the Referee's Report; and it is further

ORDERED, that by accepting this appointment the Referee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to section 36.2 (c) ("Disqualifications from appointment"), and section 36.2 (d) ("Limitations on appointments based upon compensation"); and it is further

ORDERED, that upon submission of the Referee's Report, plaintiff shall pay pursuant to CPLR §8003 (a) \$250.00 to the Referee as compensation for his/her services, which sum may be recouped as a cost of litigation; and it is further

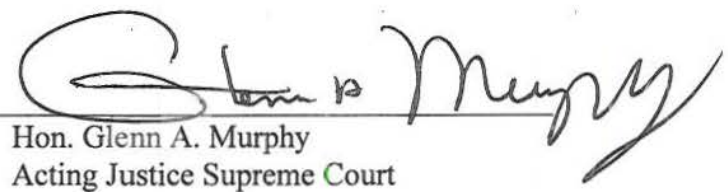
ORDERED, that the Referee is prohibited from accepting or retaining any funds for him/herself or paying funds to him/herself without compliance with Part 36 of the rules of the Chief Administrative Judge; and it is further

ORDERED, that the Referee appointed herein is subject to the requirements of Rule 36.2 (c) of the Chief Judge, and if the Referee is disqualified from receiving an appointment pursuant to the provision of that Rule, the Referee shall notify the appointing Justice forthwith; and it is further

ORDERED, plaintiff is to include in any proposed order for a judgment of foreclosure and sale language complying with the Suffolk County Local Rule for filing of the Foreclosure Action Surplus Monies form contained in Suffolk County Administrative Order #41-13; and it is further

ORDERED, that a copy of this order with Notice of Entry shall be served upon the designated Referee, the owner of the equity of redemption, any tenants named in this action and any other party entitled notice within twenty (20) days of entry and no less than thirty (30) days prior to any hearing before the Referee. The Referee shall not proceed to take evidence as provided herein without proof of such service, which must accompany any application for Final Judgment of Foreclosure and Sale.

Dated: NOV 10 2015


Hon. Glenn A. Murphy
Acting Justice Supreme Court

 FINAL DISPOSITION X NON-FINAL DISPOSITION