

MorEquity, Inc. v Derey
2015 NY Slip Op 32262(U)
November 10, 2015
Supreme Court, Suffolk County
Docket Number: 38621-12
Judge: Glenn A. Murphy
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

COPY

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

PRESENT: Hon. GLENN A. MURPHY
Acting Justice of the Supreme Court

MorEquity, Inc. x

Plaintiff,

-against-

Alba M. Derey a/k/a Alba Derey a/k/a Alba M. Betances
a/k/a Alba Betances; Jojer A. Betances a/k/a Jojer Betances,
and "JOHN DOE", said names 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

MOTION DATE 10-17-14
ADJ. DATE 11-10-15
MOT. SEQ # 001 MG

SHAPIRO, DICARO & BARAK, LLC
Attorneys for Plaintiff
175 Mile Crossing Boulevard
Rochester, New York 14624

LAW OFFICES OF CRAIG D. ROBINS
Craig D. Robins, Esq.
Attorney for Defendant Jojer Betances
180 Froehlich Farm Boulevard
Woodbury, New York 11797

ALBA M. DEREY a/k/a ALBA DEREY a/k/a
ALBA M. BETANCES a/k/a ALBA BETANCES
1461 Lincoln Boulevard
Bay Shore, New York 11706

Upon the following papers numbered 1 to 19 read on this motion For summary judgment and order of reference ; Notice of Motion/ ~~Order to Show Cause~~ and supporting papers 1-17 ; ~~Notice of Cross Motion and supporting papers~~ ; Answering Affidavits and supporting papers 18 ; Replied Affidavits and supporting papers 19 ; 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 MorEquity, Inc., pursuant to CPLR §3212 for summary judgment on its complaint, to strike the answer and counter-claim of Jojer Betances 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

ORDERED that the caption be amended by substituting Martin Alvarado in place of "John Doe", as a necessary party, who served with a copy of the Summons and Complaint without prejudice to the proceedings therefore had herein; and it is further

MorEquity Inc. v Derey, Alba M.

Index No. 38621-12

Page No. 2

ORDERED that the caption shall read as follows

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

MorEquity, Inc. x

Plaintiff,

Index No. 12-38621

-against-

Alba M. Derey a/k/a Alba Derey a/k/a Alba M. Betances
a/k/a Alba Betances; Jojer A. Betances a/k/a Jojer Betances;
Martin Alvarado,

Defendants.

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 1461 Lincoln Boulevard, Bay Shore, New York. On May 26, 2005, the defendants executed a note in favor of Wilmington Finance, a Division of AIG Federal Savings Bank (Wilmington), agreeing to pay the sum of \$312,000.00 at the yearly rate of 6.00% (percent). On the same date, the defendants executed a first mortgage in like sum on the subject property. The mortgage was recorded on August 26, 2005 in the Suffolk County Clerk's Office. The mortgage named Mortgage Electronic Registration Systems (MERS) as the nominee for Wilmington. On February 18, 2009, the mortgage was assigned to MERS as nominee for Wilmington to plaintiff. The assignment of mortgage was filed with the Suffolk County Clerk's Office on March 25, 2009. On or about December 15, 2009 the plaintiff and the defendants executed a loan modification agreement. The agreement called for a reduction in the note's interest payment to 2.00% (percent) for first two (2) years. The parties also agree to increase the interest 1.00% (percent) annually for years three (3) to five (5) years.

A notice of default, dated October 24, 2012, was sent to the defendants stating that they had defaulted on their mortgage loan and that the amount past due was \$28,639.74. On July 12, 2012, the plaintiff sent by regular mail a ninety (90) day notice pursuant to RPAPL §1304. As a result of the defendant's continuing default, the plaintiff commenced this foreclosure action on December 28, 2012. In its complaint, the plaintiff alleges in pertinent part that the defendants breached their 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 §1302. The defendants interposed an answer consisting of general denials and four (4) affirmative defenses.

The Court's computerized records indicate that a final foreclosure settlement conference was held on March 14, 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.

MorEquity Inc. v Derey, Alba M.

Index No. 38621-12

Page No. 3

The plaintiff now moves for summary judgment on its complaint contending that the defendants failed to comply with the terms of the loan agreement and mortgage and, that the defendant's general denials raised no issues of fact for trial. In support of its motion, the plaintiff submits among other things: the sworn affidavit of Kiandra Gildon, Assistant Secretary of Nationstar Mortgage, LLC, the plaintiff on the mortgage loan. The plaintiff also submitted a limited power by MorEquity appointing Nationstar Mortgage to act on its behalf; the affirmations of Robert Markel and Elizabeth A. Clark, 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. The defendants have submitted an answer with four (4) affirmative defenses and a pro se affirmation in opposition to the plaintiff's motion.

“[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 Mentasana*, 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 *Ames 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 defendants 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's answer and affirmation in opposition to the plaintiff's motion for summary judgment fail 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, answering the 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” (*Shaw v Time-Life Records*, 38 NY2d 201, 379NYS2d 390 [1975]). Notably, the defendants do not deny that they have failed to make 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]).

MorEquity Inc. v Derey, Alba M.

Index No. 38621-12

Page No. 4

In light of the foregoing, the motion for summary judgment is granted against the defendants 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 Donald Kitson, Esq., with an office located at 282 Helm Lane, Bay Shore, New York 11706 ph #631-206-0992, 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

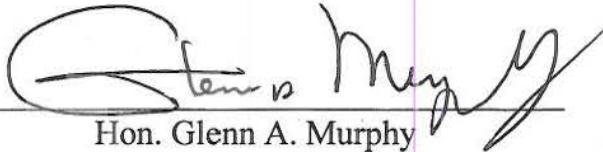
ORDERED, that the Referee appointed herein is subject to the requirements of Rule 36.2 (c) of the Chief Judge, and if the Referee is disqualified from receiving an appointment pursuant to the provision of that Rule, the Referee shall notify the appointing Justice forthwith; and it is further

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

MorEquity Inc. v Derey, Alba M.
Index No. 38621-12
Page No. 5

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