Citimortgage, Inc. v Friedman
2015 NY Slip Op 32263(U)
August 27, 2015
Supreme Court, Kings County
Docket Number: 20027/08
Judge: Robin S. Garson

At an IAS Term, Part 75 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21st day of August, 2015

PRESENT:

HON. ROBIN S. GARSON,
Justice.

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CITIMORTGAGE, INC.,

Plaintiff,

- against -

Index No. 20027/08

EVA FRIEDMAN, et al.,

Defendants.

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The following papers numbered 1 to 15 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1 - 3, 4 - 7, 8 -10
Opposing Affidavits (Affirmations)	11 - 12 13, 13
Reply Affidavits (Affirmations)	13, 14, 15
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, plaintiff Citimortgage, Inc. moves for an order 1) granting summary judgment against defendants Eva Friedman And 1173 51st Development LLC (1173 LLC), striking defendants' answer, granting a default judgment against non-answering defendants, appointing a referee to compute and amending the caption to substitute Jacob Frankfurter (Jacob) and Rachel Frankfurter (Rachel) for "John Does" and "Jane Does."

Friedman cross-moves for an order, pursuant to CPLR 3025 (b), granting leave to serve an amended answer and, pursuant to CPLR 2221, granting leave to renew and reargue a prior decision, dated July 25, 2011, and upon renewal/reargument, granting Friedman's motion to dismiss the complaint. 1733 LLC cross-moves, pursuant to to CPLR 3025 (b), granting leave to serve an amended answer, granting leave to renew and reargue the July 25, 2011 order, and upon renewal/reargument, granting 1733 LLC's motion to dismiss the complaint, cancelling the notice of pendency, awarding costs and fees, tolling interest, costs and fees and awarding damages.

Plaintiff commenced this action to foreclose a mortgage encumbering the subject property at 1733 51st Street in Brooklyn. The mortgage was executed by Friedman, by power of attorney granted to Jacob, on March 10, 2006 to secure a $1,000,000.00 loan from Fairmont Funding Ltd (Fairmont). In conjunction with the mortgage, Friedman, through power of attorney to Jacob, purportedly executed two adjustable rate notes. The notes are identical in their terms except that one note provides that the new interest rate to be applied after the adjustment date will be calculated by adding 3.3750% to the relevant current index while the other note provides that 0% will be added. By deed dated August 7, 2006, Friedman (by power of attorney to Jacob) conveyed the subject property to 1733 LLC.

On July 9, 2008, plaintiff, as the alleged assignee of the mortgage, commenced the instant foreclosure action. According to the complaint, defendants defaulted by failing to make the payment due on March 1, 2008 or any month thereafter. On August 1, 2008,

Friedman and 1733 LLC filed an answer asserting various affirmative defenses and a counterclaim for a judgment declaring that the note and mortgage are unenforceable.

On December 28, 2010, defendants moved for summary judgment dismissing the complaint, arguing that the note providing for the 3.3750% addition to the current index (hereinafter the "3.375% note") is a forgery, and that plaintiff lacks standing to foreclose. By order dated July 25, 2011, the court (Hon. Lawrence Knipel, J.) denied defendants' motion. The court determined that any standing defense was waived by defendants when they failed to raise it in their answer. Further, the court found that plaintiff had established standing by presenting both the challenged 3.375% note and the uncontested note providing for a 0% addition to the current index (hereinafter, the "0% note"), each note containing a blank indorsement from Fairmont, along with the affidavit of plaintiff's representative. The court indicated that "[t]o avoid any possible prejudice, plaintiff has consented to sue under the note defendants claim is authentic." Justice Knipel's order was affirmed by order of the Appellate Division, Second Department, which stated, in part:

> "[P]laintiff demonstrated that at the time it commenced this action, it was the holder of the mortgage and two slightly different versions of the note, both versions of which were indorsed in blank. Since the plaintiff agreed to proceed on the version of the note which the appellant concedes was validly signed and was not altered, the Supreme Court properly denied the appellant's motion for summary judgment dismissing the complaint insofar as asserted against it" (*Citimortgage, Inc. v Friedman*, 109 AD3d 573, 574 [2d Dept 2013]).

In response to plaintiff's present motion for summary judgment, Friedman and 1733 LLC each cross-move to serve amended answers interposing an affirmative defense of lack of standing. Additionally, 1733 LLC seeks to add a counterclaim for damages based on monthly payments made to plaintiff despite the fact that it was never the owner of the note. Defendants further seek to renew their prior summary judgment motion for dismissal of the complaint based on lack of standing. Defendants' motions are supported by an affidavit from Joel Grunfeld, dated January 21, 2014.

In his affidavit, Mr. Grunfeld avers that he was employed as a "Product Specialist" with Fairmont from March 2003 through May 2007, charged with establishing and maintaining relationships on behalf of Fairmont with various vendors, banks and investors, negotiating products, trades and pricing with investors, underwriting files when an in-house credit exception was needed, guiding loan officers in structuring price and placing loans with investors and working with Fairmont's suspension department on resolving problematic mortgages. Mr. Grunfeld states that Fairmont submitted the 0% note for review by Clayton Holdings (Clayton), which reviewed loans for UBS, but that such note was rejected by Clayton because the margin rate was too low. Mr. Grunfeld asserts:

> I determined that the Friedman loan would be unacceptable to other investors as well, since the margin rate on the mortgage would be found too low. There was nothing more Fairmont could do with that note on the secondary market.
>
> A few days later, Fairmont resubmitted to Clayton the Friedman loan file with a revised note (with a higher margin rate). UBS agreed to purchase that second note.

> Upon information and belief, at some later date, [plaintiff] purchased the second note from UBS with the higher margin rate that UBS had purchased from Fairmont.
>
> To my personal knowledge, the first note with the lower margin rate was rejected by UBS, and was never sold, assigned or transferred by Fairmont to any other bank or investor.

A motion for leave to reargue is permissible if the court misapplied or misapprehended the law or facts (CPLR 2221 [d] [2]); *Deutsche Bank Natl. Trust Co. v. Ramirez, 117 AD3d 674* [2d Dept 2014]). A motion for leave to renew is based upon new or additional facts "not offered on the prior motion that would change the prior determination or [the motion must] demonstrate that there has been a change in the law that would change the prior determination" (CPLR 2221 [e] [2]). While defendants cross-move for both renewal and reargument, their applications are essentially for renewal only insofar as they are based on the "new facts" alleged in Mr. Grunfeld's affidavit. At any rate, any motion for reargument of Justice Knipel's order would be untimely as it was not made within thirty days of the service of the order with notice of entry (CPLR 2221 [d] [3]) and defendants do not otherwise show that any facts or law were overlooked or misapprehended by Justice Knipel.

Assuming that the affidavit of Mr. Grunfeld contains "new facts" which were unavailable on the prior motion to dismiss, nothing therein would change the prior determination. At best, the affidavit demonstrates only that the 0% note was offered to UBS and rejected. However, such does not establish that the 0% note was not subsequently delivered to plaintiff. Mr. Grunfeld states only that "to [his] knowledge," the 0% note was

never sold, assigned or transferred by Fairmont." Mr. Grunfeld does not state that his affidavit is based upon review of business records or other documents that were generated by Fairmont. Rather, his knowledge appears to be based on his memory of a specific transaction which occurred nearly eight years earlier. Significantly, Mr. Grunfeld does not state that he had the sole responsibility to assign, sell or transfer notes to investors during the time of his employment with Fairmont. Further, even if Mr. Grunfeld did have such sole and exclusive responsibility, he avers that his employment with Fairmont ended in May 2007, more than a year prior to the date plaintiff claims it was assigned the note. In short, the court finds that Mr. Grunfeld's affidavit has no probative value with respect to the question of whether the 0% note was delivered to plaintiff prior to the commencement of this action.

In the absence of prejudice or surprise to the opposing party, leave to amend an answer to assert an affirmative defense should be freely given where the proposed amendment is neither palpably insufficient nor patently devoid of merit (*see* CPLR 3025[b]; *Tomasino v American Tobacco Co.*, 57 AD3d 652, 653 [2d Dept 2008]; *Matter of Roberts v Borg*, 35 AD3d 617, 618 [2d Dept 2006]). The proposed amendments by defendants are grounded on plaintiff's standing, which has been previously determined by the order of Justice Knipel and upheld by the Appellate Division. Because the prior determination that plaintiff has standing to bring suit is the law of the case, the proposed amendments, based upon plaintiff's alleged lack of standing, are patently without merit (*see Springwell Nav. Corp. v Sanluis Corporacion, S.A.*, 99 AD3d 482 [1st Dept 2012]).

In an action to foreclose a mortgage, a plaintiff establishes its prima facie entitlement to judgment as a matter of law through the production of the mortgage, the unpaid note, and evidence of default *(see MLCFC 2007-9 Mixed Astoria, LLC v 36-02 35th Ave. Dev., LLC*, 116 AD3d 745 [2d Dept 2014]; *Argent Mtge. Co., LLC v Mentesana*, 79 AD3d 1079, 1080 [2d Dept 2010]; *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 244 [2d Dept 2007]). Here, plaintiff met its burden by producing the mortgage, note and affidavit of its vice president, Elizabeth Thomas, who avers that defendants defaulted by failing to make the payment due for March 1, 2008. Defendants do not offer proof sufficient to raise an issue of fact.

Ms. Thomas' affidavit, along with the affidavits of service upon the New York State Department of Taxation and Finance, Jacob (as John Doe #1) and Rachael (as Jane Doe #1) are sufficient to establish plaintiff's entitlement to a default judgment against these non-answering parties (CPLR 3215[f]).

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment, striking of defendant's answer, default judgment against non-appearing defendants, appointment of a referee and amendment of the caption is granted; and it is further

ORDERED that the cross motion of Friedman is denied in all respects; and it is further

ORDERED that the cross motion of 1733 LLC is denied in all respects; and it is further

ORDERED that plaintiff shall submit an order of reference within sixty days of the filing of this decision.

E N T E R,

J. S. C.
HON. ROBIN S. GARSON
A.J.S.C.

FILED
AUG 27 2015
KINGS COUNTY CLERK'S OFFICE

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