Bank of N.Y. Mellon v Wiggins
2015 NY Slip Op 32359(U)
December 16, 2015
Supreme Court, Queens County
Docket Number: 12389/14
Judge: Allan B. Weiss

SUPREME COURT QUEENS COUNTY
CIVIL TERM PART 2

HON. ALLAN B. WEISS

THE BANK OF NEW YORK MELLON fka THE BANK OF NEW YORK, as Trustee, on behalf of the Holders of the Alternative Loan Trust 2006-OA17, Mortgage Pass-Through Certificates Series 2006-OA17,

Plaintiff,

-against-

CLAUDINE WIGGINS, et al

Defendants.

Index No.: 12389/14

Motion Date: 9/22/15

Motion Seq. No.: 1

This is an action to foreclose a mortgage encumbering the real property known as 89-17 210th Street, Queens Village, N.Y. 11427 (the property) given by defendant, CLAUDINE WIGGINS, on August 23, 2006, to Mortgage Electronics Registration System as nominee for The Mortgage Bankers Corp., to secure the repayment of a note evincing a loan in the principal amount of $325,000.00, with interest. Plaintiff alleges that the defendant defaulted under the terms of the mortgage and note by failing to make the monthly installment payment of interest due and owing beginning on March 1, 2009, and continuing to the present, and that as a consequence, it elected to accelerate the entire mortgage debt.

This action was commenced by filing on August 18, 2014. The defendant, Wiggins, appeared, *pro se*, by serving an answer and thereafter an amended answer containing six affirmative defenses.

The plaintiff now moves for an Order granting summary judgment, striking the defendant's, Claudine Wiggins', answer, a default judgment as against the non-appearing defendants, appointing a referee to ascertain and compute the amount due to the plaintiff and amending the caption by substituting Marie

Gilles, Claude Luberisse, Herbert Calite and Darrell Belcher as defendants in place of the defendants s/h/a "John Doe #1" through "John Doe #4" and deleting reference to defendants s/h/a "John Doe #5" through "John Doe #10."

The defendant, Wiggins, opposes and cross-moves to dismiss the complaint and cancel the Notice of Pendency pursuant to CPLR 3211(a)(1),(3),(5),(8); CPLR 3211(e), CPLR 6512, CPLR 6514(a), Real Property Actions and Proceedings Law (RPAPL) §§ 1303 & 1304, and CPLR 213(4) and RPAPL 1311(1). Essentially, defendant seeks dismissal of the action and vacature of the Notice of Pendency based upon her affirmative defenses, i.e. lack of personal jurisdiction, the plaintiff's lack of standing, expiration of the applicable statute of limitations, plaintiff's failure to comply with RPAPL 1304, the statutory condition precedent and failure to join a necessary party.

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; Zuckerman v City of New York, 49 NY2d 557 [1980]). A mortgagee establishes its prima facie entitlement to summary judgment in a foreclosure action where it produces both the mortgage and unpaid note, together with evidence of the mortgagor's default (see Citibank, N.A. v Van Brunt Properties, LLC, 95 AD3d 1158 [2012]; Capstone Bus. Credit, LLC v Imperia Family Realty, LLC, 70 AD3d 882 [2010]; U.S. Bank Natl. Assn. TR U/S 6/01/98 [Home Equity Loan Trust 1998-2] v Alvarez, 49 AD3d 711, 712 [2008]). The plaintiff established its prima facie entitlement to judgment as a matter of law by submitting the mortgage, the underlying note, and evidence of Wiggins' default, and by demonstrating the lack of merit of the defendant's six

affirmative defenses (see Bank of New York Mellon Trust Co. v McCall, 116 AD3d 993 [2014]; Countrywide Home Loans, Inc. v Delphonse, 64 AD3d 624, 625 [2009]; Wells Fargo Bank Minnesota, Nat. Ass'n v Mastropaolo, 42 AD3d 239 [2007]).

Thus, to avoid summary judgment, the burden shifts to the defendant to demonstrate "the existence of a triable issue of fact as to her affirmative defenses or any 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 Solomon v Burden, 104 AD3d 839 [2013]; Citibank, N.A. v Van Brunt Properties, LLC, 95 AD3d 1158 [2012]; Nassau Trust Co. v Montrose Concrete Prods. Corp., 56 NY2d 175, 183 [1982]). To prevail on her cross-motion to, inter alia, dismiss the complaint, defendant must establish her entitlement to judgment as a matter of law submitting sufficient evidence in admissible form to demonstrate the absence of any material issues of fact(see Zuckerman v City of New York, supra at 562).

In opposition, the defendants failed to raise a triable issue of fact rebutting the plaintiff's showing or as to the merit of her affirmative defenses (see Wells Fargo Bank Minn., N.A. v Perez, 41 AD3d 590 [2007]; Trans World Grocers v Sultana Crackers, 257 AD2d 616, 617 [1999]; Home Sav. of Am. v Isaacson, 240 AD2d 633 [1997]).

In her first affirmative defense, defendant does not assert that she was improperly served, but only that the court lacks personal jurisdiction over "Marie Gilles" as she was not properly served with process. The defense of lack of personal jurisdiction based upon improper service of process is personal in nature and may only be raised by the party who claims improper service (see Wells Fargo Bank, NA v Bowie, 89 AD3d 931[2011]; Home Savs. of America v Gkanios, 233 AD2d 422 [1996]). To the extent that defendant asserts lack of personal jurisdiction with respect to

herself in her affidavit in support of the cross-motion, she waived any objection to personal jurisdiction she might have asserted by failing to move to dismiss the action for lack of personal jurisdiction pursuant to CPLR 3211(a)(8) prior to serving her answer and by failing to interpose a jurisdictional defense in her answer and/or amended answer (CPLR 3211[e]; Iacovangelo v Shepherd, 5 NY3d 184 [2005]; Colbert v. International Security Bur., 79 AD2d 448, 460-462 [1981], lv. denied 49 NY2d 988[1981]). Even were the court to assume that the defendant asserted a personal jurisdiction defense in her answer on her own behalf, this defense was waived pursuant to CPLR 3211(e).

The defendant's second affirmative defense asserts that the plaintiff failed to comply with the notice provisions of RPAPL 1304. The plaintiff provided proof including the affidavit of Karter Nelson, copies of the notices that were mailed and the USPS Tracking printout as proof of mailing by ordinary and certified mail, which established that it had complied with the requirements of RPAPL 1304.

The defendant claims that the USPS Tracking printout does not establish that the notices were delivered only that they were scheduled for delivery. Generally, proof that an item was properly mailed gives rise to a rebuttable presumption that the item was received by the addressee (see Engel v Lichterman, 62 NY2d 943, 944-945 [1984], affg 95 AD2d 536, 538 [1983]; New York & Presbyt. Hosp. v Allstate Ins. Co., 29 AD3d 547, 547 [2006]). The defendant's conclusory claim is insufficient to rebut the presumption of delivery and receipt based on proof of proper mailing particularly where, as here, defendant does not deny receiving the notices.

The defendant's third affirmative defense is that this action is barred by the applicable the statute of limitations

(CPLR 213[4]). Contrary to the defendant's claim, this action is timely inasmuch as the defendant's Bankruptcy filing in which she acknowledged the mortgage debt and negotiated a mitigation plan and made payments on the mortgage pursuant to the bankruptcy plan was sufficient to extend the statute of limitations (see General Obligations Law § 17-105 [1]; Nat'l Loan Inv'rs, L.P. v Piscitello, 21 AD3d 537, 538 [2005]; Albin v Dallacqua, 254 AD2d 444 [1998]).

Moreover, the plaintiff demonstrated that the statute of limitations was tolled for approximately 21 months of the four years, March, 2009 through August, 2013 duration of defendant's bankruptcy proceeding as a result of the parties engaging in loss mitigation procedures in the Bankruptcy Court at the request of the defendant after the automatic stay was lifted. The defendant failed to submit any evidence to rebut the plaintiff's showing. Thus, plaintiff demonstrated that whether the six year statute of limitations is calculated from the defendant's original default in August, 2007 as defendant asserts, or from the date of defendant’s default on the bankruptcy payment plan in March, 2009 as plaintiff claims, this action was timely commenced.

The defendant's fourth affirmative defense asserts that plaintiff lacks standing to maintain this action based upon allegations that the mortgage was not properly assigned. Where a plaintiff's standing is placed in issue by the defendant, it is incumbent upon the plaintiff to prove its standing to be entitled to relief (see U.S. Bank N.A. v Sharif, 89 AD3d 723 [2011]). A plaintiff establishes that it has standing where it demonstrates that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note (see Flagstar Bank, FSB v Anderson, 129 AD3d 665 [2015]; Bank of N.Y. v Silverberg, 86 AD3d 274 [2d Dept 2011]; Aurora Loan Servs., LLC v Weisblum, 85 AD3d 95 [2011]). "Either a written assignment of the

underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident" (U.S. Bank, N.A. v Collymore, 68 AD3d 752, 754 [2009]; see US Bank N. Assn. v Faruque, 120 AD3d 575, 577 [2014]).

The plaintiff established that it has standing through the affidavit of Karter Nelson which demonstrated that the plaintiff had physical possession of the original note prior to commencing this action which was delivered on March 26, 2014, prior to the commencement of the action. The mortgage passed as an incident of the debt (see Aurora Loan Servs., LLC v Taylor, 25 NY3d 355, 361 [2015]; Deutsche Bank Nat. Trust Co. v Weiss, 133 AD3d 704 [2015]).

The defendant's fifth affirmative defense is the failure to join as a defendant Wayne Wiggins, an indispensable party. The defendant claims that Wayne Wiggins is an indispensable party because he executed the mortgage as attorney in fact for the defendant, and because he resides at the property. Necessary defendants in a foreclosure action are all persons having an estate or interest in possession or otherwise in the property (see RPAPL 1311[1]); and "[e]very person having any lien or incumbrance upon the real property which is claimed to be subject and subordinate to the lien of the plaintiff" (RPAPL 1311[3]), unless the interest in the property was obtained after the mortgagee filed a notice of pendency (RPAPL 1353[3]; see Slattery v Schwannecke, 118 NY 543 [1890]; Polish National Alliance of Brooklyn, U.S.A. v White Eagle Hall Company, Inc. 98 AD2d 400 [1983]). The fact that a tenant or occupant is a necessary party pursuant to RPAPL 1311, does not make the tenant or occupant an indispensable party (CPLR 1001[b]; Polish National Alliance of Brooklyn, U.S.A. v White Eagle Hall Company, Inc., supra at

406))and the failure to join a tenant or occupant does not render the judgment of foreclosure and sale defective (see, 1 Bergman, New York Mortgage Foreclosures, § 12.03[1]; Balt v J.S. Funding Corp., 230 AD2d 699, 699 [1996]) nor mandate dismissal of the action (see Polish National Alliance of Brooklyn, U.S.A. v White Eagle Hall Company, Inc., supra at 406).

The defendant, however, has failed to submit any evidence to demonstrate that Wayne Wiggins was a record owner of the property at the time of the commencement of the action and filing of the Notice of Pendency, or that he was an occupant or had any other interest in the property (see generally Nationwide Associates, Inc. v. Brunne, 216 AD2d 547 [1995]; Polish Nat. Alliance of Brooklyn v. White Eagle Hall Co., supra; Green Point Sav. Bank v. Defour, 162 Misc.2d 476 [1994]) or to raise an issue of fact in this regard. The fact that he executed the note and mortgage as "Attorney in Fact" for defendant is not evidence of any interest in the property.

Insofar as defendant's sixth affirmative defense merely states that her defenses are based upon documentary evidence it is insufficient to raise a triable issue. CPLR 3211(a)(1) permits the court to dismiss an action based upon documentary evidence where the documentary evidence that forms the basis of the defense is such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (see Leon v Martinez, 84 NY2d 83 (1994); Sheridan v Town of Orangetown, 21 AD3d 365 [2005]). The defendant's documentary evidence does not establish or even support her affirmative defenses or raise any issue of fact to warrant denial of plaintiff's motion or conclusively dispose of the plaintiff's .

Finally, defendant's reliance on CPLR 6512, CPLR 6514(a) to in support of her cross-motion to dismiss the complaint and vacate the Notice of Pendency it is misplaced. It is undisputed

that plaintiff complied with CPLR 6512 since the summons and complaint was served within 30 days after filing and, thus, defendant has failed to establish any basis for mandatory cancellation of the Notice of Pendency pursuant to CPLR 6514(a). Equally without merit is defendant's claim that filing a Notice of Pendency in this action constitutes a "successive filing" which is prohibited by CPLR 6516 (c) inasmuch as the plaintiff's previously filed a notice of pendency in its prior action to foreclose this mortgage. However, CPLR 6516(a) expressly permits successive filings of notices of pendency in foreclosure actions.

Accordingly, the defendant's cross-motion to dismiss the complaint and vacate the Notice of Pendency is denied in its entirety.

The defendant's affirmative defenses are dismissed and the plaintiff's motion is granted except that branch of plaintiff's motion to strike the defendant's answer, which is denied. Plaintiff has failed to submit any basis for striking the defendant's answer which is tantamount to a default in answering (see e.g. Wilson v Galicia Contr. & Restoration Corp., 10 NY3d 827, 830 [2008]; Rokina Optical Co., Inc. v Camera King, Inc., 63 NY2d 728, 730,[1984]; Fappiano v City of New York, 5 AD3d 627 [2004] lv denied 4 NY3d 702 [2004]). Granting summary judgment does not require striking the defendant's answer.

Settle Order.

Dated: December 16, 2015
D# 52

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J. S. C.