Maspeth Fed. Sav. & Loan Assn. v Calle
2016 NY Slip Op 30333(U)
February 22, 2016
Supreme Court, Queens County
Docket Number: 5656/2013
Judge: David Elliot
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MEMORANDUM

SUPREME COURT - QUEENS COUNTY
I.A.S. PART 14

MASPETH FEDERAL SAVINGS AND LOAN ASSOCIATION, Plaintiff(s),	Index No. 5656/2013
	By: **ELLIOT, J.**
-against-	Date: February 22, 2016
PATRICIO CALLE, Defendant(s).	Motion Cal. No. 107
	Motion Seq. No. 1
	Motion Date: January 19, 2016

Plaintiff commenced this action to foreclose a mortgage against real property known as 99-05 Christie Avenue, Corona, New York. Defendant Patricio Calle (defendant) executed a note in the amount of $645,000.00 in favor of plaintiff on June 5, 2008. As security for the payment of said indebtedness, defendant executed a corresponding mortgage on that same date. Pursuant to its verified complaint, plaintiff alleges it is the sole owner and holder of the subject note and mortgage, that defendant has failed to comply with the terms and conditions contained in the loan documents by defaulting in payment in accordance therewith and, as a result, plaintiff elected to accelerate the debt by virtue of the commencement of this action on March 25, 2013.

Defendant, together with Miguel Rojas, s/h/a "John Doe 1," Arturo Garida, s/h/a "John Doe 2," and Steven Criollo, s/h/a "John Doe 3," were served with process, and

none answered nor appeared herein except for defendant who, by prior counsel, served a verified answer, set-offs and counterclaims, the latter to which plaintiff replied.

The matter appeared in the Foreclosure Conference Part on November 19, 2014, and was released therefrom by Residential Foreclosure Conference Order, whereby it was determined that defendant "failed to establish residency as per the criteria maintained under the H.A.M.P. guidelines" (Evans, CA-R).

Plaintiff now moves for an order granting it summary judgment against defendant, dismissing his counterclaims, appointing a referee to compute, and amending the caption. Defendant opposes the motion and cross-moves for an order restoring the matter to the Foreclosure Conference Part and/or dismissing the action in its entirety for, *inter alia*, failure to comply with statutory conditions precedent.

In a mortgage foreclosure action, a plaintiff establishes its *prima facie* entitlement to judgment as a matter of law by producing the mortgage and the unpaid note, and evidence of the default (*see Emigrant Funding Corp. v Agard*, 121 AD3d 935 [2014]; *KeyBank N.A. v Chapman Steamer Collective, LLC*, 117 AD3d 991 [2014]; *Mendel Group, Inc. v Prince*, 114 AD3d 732 [2014]; *Independence Bank v Valentine*, 113 AD3d 62 [2013]). Further, where, as here, plaintiff's standing is placed in issue by the answering defendant, plaintiff must also prove its standing as part of its *prima facie* showing, which may be established either by written assignment of the underlying note or the physical delivery of the note prior to commencement of the action (*see LNV Corp. v Francois*, 134 AD3d 1071

[2015]; *Citimortgage, Inc. v Goldberg*, 134 AD3d 880 [2015]; *YMJ Meserole, LLC v 98 Meserole Street, LLC*, 133 AD3d 848 [2015]).

Plaintiff has met its *prima facie* burden of establishing its entitlement to judgment on its action to foreclose a mortgage by submission of, *inter alia*, a copy of the complaint, verified by plaintiff's vice president, the vice president's affidavit in support of the motion which details, among other things, defendant's default in payment, as well as a copy of the note and mortgage (*see RBS Citizens, N.A. v Galperin*, 135 AD3d 735 [2016]). Plaintiff has also established its standing herein by way of the above documents, as well as by the affirmation of counsel – who is also outside counsel to plaintiff – all of which demonstrate that plaintiff was the originator of the loan and was still the holder of the note and mortgage at the time of commencement of the action (*see Wachovia Mtge. Corp. v Lopa*, 129 AD3d 97 [2015]; *Emigrant Mtge. Co., Inc. v Persad*, 117 AD3d 676 [2014]).

It is also noted that, while plaintiff would ordinarily be required to show, as part of its *prima facie* showing, compliance with RPAPL § 1304 as a condition precedent to suit (*see Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95 [2001]), plaintiff has submitted ample evidence demonstrating that this section does not apply to this action since the loan at issue is not a "home loan" as defined by RPAPL § 1304 (5) in that it was not incurred for personal, family, or household purposes (RPAPL § 1304 [5] [a] [ii]) and it is not used or occupied by defendant as his principal dwelling (RPAPL § 1304 [5] [a] [iii]) (*see Josovich v Ceylan*, 133 AD3d 570 [2015]; *Fairmont Capital, LLC v Laniado*, 116 AD3d 998 [2014];

Mendel Group, Inc. v Prince, 114 AD3d 732 [2014]).

Plaintiff has also established, *prima facie*, its entitlement to dismissal of defendant's counterclaims, sounding in (1) overcharges; (2) inducement; (3) fabricated documents and false statements; and (4) violations of the Fair Credit Reporting Act, as they are lacking in specificity, conclusory, and without merit as a matter of law (*see e.g.* CPLR § 3013).

In opposition to the motion, and in support of his cross motion, defendant does not dispute the plaintiff having met its burden of establishing its entitlement on its action to foreclose on its mortgage but, rather, urges that the matter should be restored to the Residential Foreclosure Part since: he resides at the subject premises and has done so since on or about 2000; he intends to amend his tax returns to reflect the fact that he resides at the subject premises, to the extent that they show otherwise; it was, "upon information and belief . . a mistake" to list his home address as any other address than the subject address on his loan application; and even though he was served with process at a different address – 91-19 85th Avenue, Woodhaven, New York (Woodhaven property) – that is where his wife (from whom he is separated) and children reside and he was only able to be served thereat since "I may have been at that address visiting his [sic] children" and "have even, on occasion, spent the night at said residence."

Defendant has not sufficiently demonstrated that he is entitled to an order remanding this matter back to the Foreclosure Conference Part, or that there is any reason

to disturb the finding made by the Court Attorney-Referee who held the foreclosure conference on November 19, 2014. Assuming, *arguendo*, defendant currently resides at the mortgage premises, CPLR 3408 does not apply to every residential foreclosure action; it is limited to "home loans" as they are defined in RPAPL § 1304 (5) (a) (*see Independence Bank v Valentine*, 113 AD3d 62 [2013]). Here, defendant has not disputed plaintiff's showing that the loan was not incurred for "personal, family or household purposes" (RPAPL § 1304 [5] [a] [2]; *see Josovich*, 133 AD3d at 572). The loan application signed by defendant on April 8, 2008, a copy of which is annexed to the moving papers as Exhibit B, indicates that he resided at 99-03 Christie Avenue, Corona New York and, notably, that the property was to be utilized for investment purposes. Moreover, in Schedule E to defendant's 2013 federal income tax return, he lists the Woodhaven property as his home address and the subject premises as rental real estate. Further, as recently as July 2014, defendant, in connection with an application for a modification of the subject mortgage loan, submitted to plaintiff an IRS form listing his address as the Woodhaven property (the premises at which he was served with process). That his belief that if he had listed his "actual address," the IRS would not have been able to process his request, is only made upon information and belief.

Neither is defendant entitled to dismissal of the complaint or denial of plaintiff's motion for the latter's alleged failure to comply with RPAPL §§ 1302, 1303,[1] 1304, and 1306, for the same reason discussed, *supra* (*see Bayview Loan Serv., LLC v 254*

1. Defendant does not affirmatively state in his affidavit that he was not served with the RPAPL § 1303 notice.

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Church Street, LLC, 129 AD3d 650 [2015]; *Mendel Group, Inc.*, 114 AD3d at 733).

Finally, defendant has pointed to no "substantial issues of fact" which exist as to his first counterclaim for overcharges. It does not appear that this issue is addressed at all by way of defendant's affidavit or by way of documentary evidence. In any event, it is noted that any dispute as to the amount owed herein shall be resolved by the reference to be entered hereon (RPAPL § 1321).

Accordingly, defendant's cross motion is denied. Plaintiff's motion is granted. Plaintiff is awarded summary judgment in its favor and against defendant. Defendant's counterclaims are dismissed. Plaintiff is granted leave to submit an order of reference. The caption is amended by substituting "Miguel Rojas," "Arturo Garida," and "Steven Criollo," in the place and stead of the respective John Does and by deleting the remaining John Does therefrom.

Submit order on notice to defense counsel.

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J.S.C.