Nationstar Mtge., LLC v Saintval
2016 NY Slip Op 31881(U)
August 3, 2016
Supreme Court, Suffolk County
Docket Number: 27699/2012
Judge: Robert F. Quinlan

[* 1]

SHORT FORM ORDER

INDEX No. 27699-2012

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT F. QUINLAN
Justice of the Supreme Court

MOTION DATE 2-18-15
MOTION DATE 3-30-15
ADJ. DATE 4-27-15
Mot. Seq. # 001 -MotD
Mot. Seq. # 002 -XMD

---X

Nationstar Mortgage, LLC,

Plaintiff,

- against -

Dieula Saintval, "JOHN DOE", said name 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

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

RONALD D. WEISS, ESQ.
Attorney for Defendant
Dieula Saintval
734 Walt Whitman Road
Suite 203
Melville, New York 11747

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the plaintiff, dated January 14, 2015, and supporting papers; (2) Notice of Cross Motion by the defendant Dieula Saintval, dated March 16, 2015, and supporting papers; (3) Affirmation in Opposition/Reply by the plaintiff, dated April 24, 2015, and supporting papers; (4) Other: Stipulation dated March 30, 2015; (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now it is

ORDERED that this motion (001) by plaintiff, and the motion (002) by defendant Dieula Saintval, which was improperly labeled a cross motion, are consolidated for the purposes of this determination and decided together; and it is further

ORDERED that the portion of plaintiff's motion seeking an order amending the caption is granted, and the caption is amended by excising the fictitious defendants "JOHN DOE" as well as the descriptive wording relating thereto; and it is further

ORDERED that the portion of plaintiff's motion seeking to fix the defaults of the non-answering defendants is denied, for as the result of the amendment of the caption, the only defendant is Dieula Saintyal; and it is further

ORDERED that pursuant to CPLR 3212 (g), plaintiff is granted partial summary judgment in its favor against the defendant Dieula Saintval, to the extent indicated below, and that portion of its motion seeking the appointment of a referee pursuant to RPAPL § 1321 is denied, subject to the limited issue trial indicated below; and it is further

ORDERED that the motion by defendant Dieula Saintval for an order compelling the production of certain discovery; or, in the alternative, dismissing the complaint insofar as asserted against her pursuant to CPLR 3211 is denied; and it is

ORDERED that plaintiff shall serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court within thirty (30) days of the date of this order; and it is further

ORDERED that plaintiff is directed to file a statement of readiness and note of issue relating to the limited issue trial set by this order within thirty (30) days of the date of this order; and it is further

ORDERED that this action is scheduled for a conference before this court on September 14, 2016 at 9:30 AM to set a date for the limited issue trial. .

This is an action to foreclose a mortgage on real property known as 180 Howard Street, Port Jefferson Station, Suffolk County, New York 11776 ("the property"). On October 27, 2008, defendant Dieula Saintval ("defendant") executed a fixed-rate note in favor of Golden First Mortgage Corp. ("lender") in the principal sum of $365,268.00; at the same time defendant gave lender a mortgage on the property to secure the note. The mortgage, recorded on November 3, 2008 with the Suffolk County Clerk ("Clerk"), indicates that Mortgage Electronic Registration Systems, Inc. ("MERS") was the mortgagee of record for the purposes of recording the mortgage, acting solely as a nominee for the lender and its successors and assigns.

By way of an undated endorsement with physical delivery and two assignments, the original promissory note was allegedly transferred to Nationstar Mortgage, LLC ("plaintiff") prior to commencement of this action. The mortgage was allegedly transferred from MERS to the Federal National Mortgage Association ("FNMA") by an assignment executed on August 4, 2009, subsequently recorded with the Clerk on September 8, 2009. A second assignment of the mortgage, executed on May 11, 2012, allegedly transferred the mortgage and note from FNMA to plaintiff and was recorded with the Clerk on October 10, 2012.

On September 30, 2010, defendant and plaintiff entered into a loan modification agreement which adjusted the outstanding principal balance to reflect a new unpaid principal balance of $423,498.18, a lower interest rate and a maturity date extended to October 1, 2040. Pursuant to section 5 (c) of the modification agreement, defendant waived set-offs, counterclaims and defenses as to the obligations of the note or mortgage.

Defendant allegedly defaulted in payments on the modification agreement by failing to make the monthly payment of principal and interest due on February 1, 2011, and each month thereafter. Defendant allegedly failed to cure the default in payment, and plaintiff commenced this action by the filing of a lis pendens, summons and complaint on September 7, 2012 with the Clerk. After an extension of time to answer, issue was joined by the interposition of defendant's verified answer, sworn to on November 9, 2012.

By her answer, defendant denies all of the allegations in the complaint, and asserts sixteen affirmative defenses as well as six counterclaims. In response, plaintiff interposed a reply denying the material allegations in the counterclaims and asserting four affirmative defenses.

The plaintiff now moves for an order pursuant to CPLR 3212 awarding summary judgment in its favor against defendant, striking her answer and dismissing the counterclaims; pursuant to CPLR 3215 fixing the defaults of the non-answering defendants; pursuant to RPAPL § 1321 appointing a referee to compute and examine and report whether the subject premises should be sold in one parcel or multiple parcels; and amending the caption.

Defendant opposes plaintiff's motion and moves for an order compelling the production of certain discovery; or, in the alternative, dismissing the complaint insofar as asserted against her pursuant to CPLR 3211. In response to defendant's motion, plaintiff has submitted opposition and reply papers. After the submission of these motions, this action was transferred from the inventory of the Honorable Carol Mackenzie to this IAS Part pursuant to Suffolk County Administrative Order No. 33-16, dated June 23, 2016.

At the outset, the court notes that defendant's motion was improperly denominated a cross motion as it was not made returnable at the same time as plaintiff's motion (CPLR 2215; *see Kershaw v Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]). By stipulation executed on March 30, 2015, the parties agreed to adjourn these motions to April 27, 2015, or to a date convenient to the court. Thus, in the interest of judicial economy, the motions are consolidated and determined together.

The court also notes that defendant's motion is also procedurally defective to the extent that the moving papers submitted do not fully recite the grounds for the relief sought along with the specific provisions of the civil practice law and rules relating thereto (CPLR 2214 [a]). To the extent that the requested relief is supported by the affirmation of counsel and/or the affidavit from defendant, it has been considered.

The branch of defendant's motion for an order, ostensibly pursuant to CPLR 3124, compelling the production of certain documents is denied because it neither supported by an affirmation of good-faith effort to resolve the issues raised therein, nor an order scheduling discovery (Uniform Rules for Trial Cts [22 NYCRR] § 202.7 [a]; *see Ponce v Miao Ling Liu*, 123 AD3d 787 [2d Dept 2014]). In any event, this branch of the motion is denied as academic for the reasons set forth below.

To the extent that defendant's motion is predicated upon dismissal pursuant to CPLR 3211 subdivision (a) (2) and (3) it was not timely made. Motions under CPLR 3211 (a), with exceptions that do not apply here, are to be made at any time before service of the responsive pleading (CPLR 3211 [e]; CPLR

3018 [b]; *see Hendrickson v Philbor Motors, Inc.*, 102 AD3d 251 [2d Dept 2012]). Therefore, defendant's post-answer motion to dismiss pursuant to CPLR 3211 (a) will not be considered.

Even though CPLR 3211 (c) empowers the court to treat a motion to dismiss as a motion for summary judgment, conversion is inappropriate here because this action does not exclusively involve issues of law which were fully appreciated and argued by the parties, and since notice has not been provided to the parties (*see Bennett v Hucke*, 64 AD3d 529 [2d Dept 2009]; *Bank of N.Y. Mellon v Green*, 132 AD3d 706, [2d Dept 2015]; *Meredith v Siben & Siben*, 130 AD3d 791 [2015]).

To the extent that defendant moves for dismissal of the complaint pursuant to CPLR 3408 on the grounds that plaintiff failed to negotiate with her in good faith, it is denied. CPLR 3408 requires that parties at mandatory foreclosure settlement conferences negotiate in good faith to reach a mutually agreeable resolution (*see U.S. Bank v Smith*, 123 AD3d 914 [2d Dept 2014]; *Wells Fargo Bank v Meyers* 108 AD3d 9 [2d Dept 2013]; *Wells Fargo Bank v Miller*, 138 AD3d 1024 [2d Dept 2016]). To determine if plaintiff failed to negotiate in good faith, the totality of circumstances must show plaintiff did not conduct a meaningful effort to reach a resolution (*see U.S. Bank, N.A. v Sarmiento*, 121 AD3d 187 [2d Dept 2014]; *Bank of New York v Castillo*, 120 AD3d 598 [2d Dept 2014]). The mere fact that plaintiff refused to consider a reduction in principal or interest rate, or to offer the reduction that defendant requests, does not establish that it was not negotiating in good faith (*see Wells Fargo Bank, N.A. v Van Dyke*, 101 AD3d 638 [1st Dept 2012]; *Bank of America v Lucido*, 114 AD3d 714 [2d Dept 2014]). The proof here submitted by defendant does not support a conclusion that plaintiff did not negotiate in good faith. In any event, such a finding does not allow the court to impose a settlement, nor would it support dismissal of the action (*see Indymac Bank, FSB v Yano-Horoski*, 78 AD3d 895 [2d Dept 2010].

Defendant's request to restore the case to a foreclosure conference calendar for an additional settlement conference is denied. The court's records indicate a settlement conference was held before this court's specialized mortgage foreclosure part on February 1, 2013. A representative of plaintiff attended and participated in the conference. The action was marked to indicate that the parties could not reach an agreement to modify the loan or otherwise settle this action. Accordingly, there has been compliance with CPLR 3408, and no further conference is required under any statute, law or rule.

Defendant's motion is denied.

The court next addresses plaintiff's motion and the issue of plaintiff's compliance with certain conditions precedent to commencement of this action. RPAPL § 1304 requires that at least 90 days before commencing a residential mortgage foreclosure action, the lender, assignee or mortgage loan servicer, must send a notice, the requirements of which are set forth in the statute, to the "borrower" by registered or certified mail, and also by first-class mail. Where to serve the "borrower," a term not defined in the statute (*see Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, [2d Dept 2011]), is also set forth in the statute.

Unlike a contractual condition precedent which must be pleaded (CPLR 3015 [a]; 3018), the notice requirement of RPAPL § 1304, including the sufficiency of mailing, it may be raised by a non-defaulting party any time prior to judgment (*see Citimortgage, Inc. v Espinal*, 134 AD3d 876 [2d Dept 2015]; *U.S. Bank N.A. v Carey*, 137 AD3d 894 [2d Dept 2016]). Defendant has raised it here.

Proper service of the notice is a condition precedent to the commencement of a residential foreclosure action, once raised, and is plaintiff's burden to establish (*see Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909 [2d Dept 2013]). Where plaintiff has pleaded compliance with the notice requirements of RPAPL §1304 or defendant has properly asserted non-compliance therewith, plaintiff must adduce due proof that the pre-action foreclosure 90 day notice requirements have been satisfied (*see Zarabi v. Movahedian*, 136 AD3d 895 [2d Dept 2016]; *Cenlar, FSB v. Weisz*, 136 AD3d 855 [2d Dept 2016]; *Bank of New York v. Aquino*, 131 AD3d 1186 [2d Dept 2015]).

Here plaintiff has failed to establish its prima facie entitlement to judgment as a matter of law because it did not supply adequate evidentiary proof of compliance with the mailing requirements of RPAPL § 1304. Unsubstantiated and conclusory statements in the affidavit of plaintiff's representative, along with dated copies of the notice of default, are insufficient to prove that the notices required by RPAPL § 1304 or the mortgage were properly mailed (*see HSBC Mtge. Corp. v Gerber,* 100 AD3d 966 [2d Dept 2012]; *Citimortgage, Inc. v Espinal, supra*; *Cenlar, FSB v Weisz, supra*; *U. S. Bank, N.A. v Carey,* 137 AD3d 894 [2d Dept 2016]). To establish mailing, plaintiff may provide proof of actual mailing or description of its office's practice and procedure for mailing (*see New York& Presbyt. Hosp. v Allstate Ins. Co.* 29 AD3d 547 [2d Dept 2006]). Here plaintiff's affiant provides neither, and therefore defendant's timely raising of the issue precludes the full granting of plaintiff's motion.

The court reaches a different conclusion with respect to the remaining affirmative defenses and the counterclaims asserted in the answer. Plaintiff demonstrated its prima facie entitlement to judgment as a matter of law dismissing the remaining affirmative defenses and all of the counterclaims, which the defendant mortgagor validly waived under the express terms of the modification agreement (*see KeyBank, N.A. v Chapman Steamer Collective, LLC*, 117 AD3d 991 [2d Dept 2014]; *Baron Assoc., LLC v Garcia Group Enters., Inc.*, 96 AD3d 793 [2d Dept 2012]; *Petra CRE CDO 2007-1, Ltd v 160 Jamaica Owners, LLC*, 73 AD3d 883 [2d Dept 2010]). Such waivers are enforceable as they do not contravene the public policy of this State (*see Chemical Bank NY Trust Co. v Batter*, 31 AD2d 802 [1st Dept 1969]).

As plaintiff's submissions demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted to defendant (*see HSBC Bank USA v Merrill*, 37 AD3d 899 [3d Dept 2007]). Defendant's answer and affirmative defenses alone are insufficient to defeat plaintiff's unopposed motion (*see*, *Flagstar Bank v Bellafiore*, 94 AD3d 1044 [2d Dept 2012]). Accordingly, it was incumbent upon defendant to produce evidentiary proof in admissible form sufficient to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action (*see*, *Washington Mut. Bank v Valencia*, 92 AD3d 774 [2d Dept 2012]; *Baron Assoc., LLC v Garcia Group Enters., Inc.,, supra; Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

The failure to raise pleaded affirmative defenses in opposition to a motion for summary judgment renders those defenses abandoned and thus subject to dismissal (see *New York Commercial Bank v. J. Realty F. Rockaway, Ltd.*, 108 AD3d 756 [2d Dept 2013]; *Starkman v. City of Long Beach*, 106 AD3d 1076 [2d Dept 2013]; *Kuehne & Nagel Inc. v Baiden*, 36 NY2d 539 [1975]); additionally, where a defendant fails to oppose a motion for summary judgment, the facts, as alleged in the moving papers, may be deemed admitted and there is, in effect, a concession that no question of fact exists (*see*, *Kuehne & Nagel v Baiden*, supra; *see also*, *Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606 [1st Dept 2012]; *Argent Mtge. Co.,*

LLC v Mentesana, 79 AD3d 1079 [2d Dept 2010]). Additionally, uncontradicted facts are deemed admitted (*Tortorello v Carlin*, 260 AD2d 201 [1st Dept 1999]).

Contrary to defendant's contentions, plaintiff's motion for summary judgment imposed an automatic stay of discovery (CPLR 3214 [b]; *see, Schiff v Sallah Law Firm, P.C.*, 128 AD3d 668 [2d Dept 2015]). In any event, defendant failed to demonstrate that she made reasonable attempts to discover the facts which would give rise to a triable issue of fact or that further discovery might lead to relevant evidence. CPLR 3212 (f) provides that if it appears from affidavits in opposition that facts essential to opposition may exist, but cannot then be stated, the court may deny the motion or grant a continuance to permit discovery. In order to invoke this, the party must offer an evidentiary basis to show discovery would lead to relevant evidence or that facts essential to opposition were exclusively in control of and knowledge of the plaintiff (*see Singh v Avis Rent A Car Sys., Inc.*, 119 AD3d 768 [2d Dept, 2014]; *Williams v Spencer-Hall*, 113 AD3d 759 [2d Dept 2014]). The party must also show that its ignorance of those facts was unavoidable and reasonable attempts had been made to discover those facts which would give rise to a triable issue of fact (*see KeyBank v Natl. Ass'n v Chapman Steamer Collective*, LLC, 117 AD3d 991 [2d Dept 2014]; *Swedbank, AB v Hale Ave. Borrower, LLC*, 89 AD3d 922 [d Dept 2011]). Mere hope or speculation that such evidence may exist to defeat a motion for summary judgment is an insufficient basis to deny summary judgment (*see Friedlander Org. LLC v Ayorinde*, 94 AD3d 693 [2d Dept 2012]). Failure to demonstrate that additional discovery may lead to relevant evidence or facts essential to opposition were exclusively in control of plaintiff dooms defendants claim to defeat summary judgment (*see Wells Fargo Bank, N. A. v Hallock*, 138 AD3d 735 [2d Dept 2016]). The court finds that defendant's submissions have failed to satisfy these burdens, therefore defendant's claim that further discovery is needed is not a bar to summary judgment.

Even if there were no waiver by defendant, a review of defendant's submissions shows that they are insufficient to demonstrate the validity of the remaining affirmative defenses asserted in the answer, or any bona fide counterclaims (CPLR 3211[e]; *see, Rimbambito, LLC v Lee*, 118 AD3d 690 [2d Dept 2014]; *Bank of Smithtown v 219 Sagg Main, LLC*, 107 AD3d 654 [2d Dept 2013]; *Argent Mtge. Co., LLC v Mentesana, supra*). Accordingly, all of the affirmative defenses asserted in the answer, except for the twelfth, are stricken, and all of defendant's counterclaims are thus dismissed in their entirety.

The branch of plaintiff's motion seeking an order pursuant to CPLR 1024 amending the caption by excising the fictitious defendant "JOHN DOE" is granted, as plaintiff has established the basis for this relief (*see, Deutsche Bank Nat. Trust Co. v Islar*, 122 AD3d 566,[2d Dept 2014]). All future proceedings shall be captioned accordingly.

The court has considered all other demands for relief interposed by the parties on these motions and denies the same because it finds that such demands are entirely without merit. Accordingly, the motion by plaintiff for summary judgment is determined as indicated. All of the affirmative defenses asserted in the answer, except for the twelfth, are stricken, and all of defendant's counterclaims are dismissed. Plaintiff's application for the appointment of a referee pursuant to RPAPL § 1321 is denied, subject to renewal after the limited issue trial.

Pursuant to CPLR 3212 (g) the court grants plaintiff partial summary judgment, finding the only remaining issue of fact is whether plaintiff has proven its compliance with the mailing requirements relevant

to the notice required by RPAPL § 1304. The court sets the action down for trial, pursuant to CPLR § 2218, which shall be limited to the proof of that issue. The plaintiff is directed to file a statement of readiness and note of issue within thirty (30) days of the date of this order.

The trial of this matter will remain with this IAS Part 27 and will not be placed in the inventory of the general Calendar Control Part. The action shall appear on this part's calendar for conference on September 14, 2016 at 9:30 AM to set a trial date.

In view of the foregoing the proposed order submitted by the plaintiff has been marked "not signed."

Defendant's motion for an order compelling discovery and for dismissal of the complaint is denied in its entirety.

Dated: August 3, 2016

HON. ROBERT F. QUINLAN, J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**