

Wells Fargo Bank, N.A. v Fabiani

2017 NY Slip Op 32006(U)

September 8, 2017

Supreme Court, Suffolk County

Docket Number: 26481-2013

Judge: Robert F. Quinlan

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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: 04/26/2016
SUBMIT DATE: 05/25/ 17, 06/08/2017
Mot. Seq.: # 001 - MG

-----X
WELLS FARGO BANK, N.A.,

Plaintiff,

- against -

STACIFABIANI, STEVEN FABIANI, AMERICAN
EXPRESS, CENTURION BANK, and "JOHN
DOES" and "JANE DOES", etc.

Defendant(s).
-----X

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Upon the following papers read on this motion by plaintiff for summary judgment, dismissing the affirmative defenses, fixing the default of non-answering defendants, appointment of a referee pursuant to RPAPL §1321, to correct and reform a scrivener's error in the mortgage and to amend the caption; plaintiffs notice of motion, affirmations of counsel, affidavit of an employee of plaintiff and attached exhibits; affirmation in opposition of defendant Staci Fabiani's counsel; affirmation in reply of plaintiff's counsel and attached exhibit; it is,

ORDERED that this motion by Wells Fargo Bank, N.A. for summary judgment, dismissing the answer of defendant Staci Fabiani, correcting and reforming a scrivener's error in the mortgage, amending the caption, fixing the default of the non-appearing, non-answering defendants, and for an order of reference pursuant to RPAPL § 1321, is granted; and it is further

ORDERED that plaintiff's application to amend the caption of the action is granted, and the caption shall read as follows:

-----X
WELLS FARGO BANK, N.A.

Plaintiff,

- against -

STACI FABIANI, STEVEN FABIANI, AMERICAN
EXPRESS and CENTURION BANK

Defendant(s).
-----X

plaintiff is to serve a copy of this order upon the Calendar Clerk within 30 days of this date and all further proceeding will be under the amended caption; and it is further

ORDERED that plaintiff's application to reform the legal description in the mortgage is granted, and the preamble to the mortgage is reformed as of April 13, 2010 to state "February 5, 1963 as Map No. 3716, as Lot No. 16...." in place and instead of "21511983"; and it is further

ORDERED that the plaintiff shall serve a copy of this order upon the Suffolk County Clerk within sixty (60) days of this order, and the Suffolk County Clerk shall cause a copy of this order, with the reformed language above, to be recorded with the mortgage herein, which has been recorded on 4/13/2010 under Mortgage Number DB001619, Liber M00021937, Page 250, after the payment of such costs and fees as required by the Suffolk County Clerk; and it is further

ORDERED that plaintiff's application for an order of reference pursuant to RPAPL § 1321 is granted upon the order submitted, as modified by the court; and it is further

ORDERED that plaintiff is to include in any proposed order of judgment of foreclosure and sale language complying with the Suffolk County Local Rule for filing of the Suffolk County Foreclosure Surplus Monies form contained in Suffolk County Administrative Order # 41-13; and it is further

ORDERED, that, if a prior notice of pendency is outdated, plaintiff is directed to file a successive notice of pendency at least twenty (20) days prior to the submission of any proposed judgment of foreclosure and sale, submitting a copy thereof with proof of filing with any proposed judgment of foreclosure and sale; and it is further.

ORDERED that within 30 days of the date of this order, plaintiff is to serve a copy of the order of reference upon all parties who have appeared in this action, as well as upon the referee and thereafter file the affidavits of service with the Clerk of the Court; and it is further

ORDERED that within 60 days of the date of this order, plaintiff is to provide the referee all papers and documents necessary for him/her to perform the determinations required by this order, and prepare his/her report which referee's report is to be submitted to plaintiff within 30 days of receipt the papers and documents aforementioned; and it is further

ORDERED that the referee is to serve notice upon defendant-mortgagor(s) of the hearing before the referee to compute the amount due to plaintiff (CPLR 4313); and it is further

ORDERED that plaintiff is to file an application for a judgment of foreclosure and sale within 120 days of the date of this order; and it is further

ORDERED that this action shall be calendared for a status conference on Wednesday, January 10, 2018 at 9:30 AM in Part 27 for the court to monitor the progress of this action. If a judgment of foreclosure and sale is filed with the court before that date, no appearance will be necessary; and it is further

ORDERED that failure to comply with any term of this order will not form the basis for a motion to dismiss the action, but will be the subject of the status conference at which future compliance will be determined.

This is an action to foreclose a mortgage upon residential real property located at 24 Nowick Lane, Smithtown, Suffolk County, New York ("the property") executed by Staci Fabiani and Steven Fabiani in favor of the original lender, Franklin First Financial, Ltd. ("Franklin") on March 25, 2010 to secure a note given to Franklin at the same time in the amount of \$396,000 dollars.

Wells Fargo Bank, N.A. (“plaintiff”) commenced the action by filing a summons and complaint on October 1, 2013. Issue was joined by defendant Staci Fabiani (“defendant”) filing her answer dated October 14, 2013. Defendant Steven Fabiani neither appeared nor answered.

Nine conferences were held in the court’s Foreclosure Settlement Conference Part (“FSC Part”) between March 12, 2014 and December 9, 2015, and after the last conference the action was released from the part as “not settled.” Compliance with CPLR § 3408 has been established. Upon the filing of the motion, the case was initially assigned to Acting Supreme Court Justice Daniel Martin, but was reassigned to this part by Administrative Order of District Administrative Judge C. Randall Hinrichs

Plaintiff moves for summary judgment dismissing the affirmative defenses of defendant, treating her answer as a limited notice of appearance, fixing the default of the non-appearing, non-answering defendants, for appointment of a referee, amending the caption and to reform an error in the legal description in the mortgage. In deciding the motion the court has considered plaintiff’s submissions in support consisting of attorneys’ affirmations, an affidavit of an employee of plaintiff’s servicer, Rushmore Loan Management Services, LLC (“Rushmore”), and attached exhibits; defendant’s counsel’s affirmation in opposition with an attached exhibit, and plaintiff’s counsel’s reply affirmation with attached exhibits.

CPLR § 3215 (c) CLAIM DENIED

Although not representing defendant Steven Fabiani, nor cross-moving to dismiss, defendant’s counsel argues that the claims against him must be dismissed because plaintiff failed to move upon his default within one year. A co-defendant has no ability to raise defenses personal to the other defendant, such as the requirements of service, statute or a condition of the mortgage, they are personal to the defaulting defendant who has failed to raise them (*see Home Savings of America, F.A. v Gkianos*, 233 AD2d 422 [2d Dept 1996]; *NYCTL 1996-1 Trust v King*, 13 AD3d 429 [2d Dept 2004]; *Wells Fargo Bank v Bowie*, 89 AD3d 931 [2d Dept 2011]; *IMC Mgte Co v Vetere*, 142 AD3d 954 [2d Dept 2016]; *Wells Fargo Bank, NA v Bachmann*, 145 AD3d 712 [2d Dept 2016]). As the claim was raised by defendant’s counsel in opposition, plaintiff’s counsel properly addressed it in the reply, although defendant’s counsel argues otherwise.

Even if this had been raised by defendant Steven Fabian on a motion to dismiss based upon a claim of non-compliance with CPLR § 3215 (c), the court would have denied such a motion. CPLR § 3215 (c) was enacted to dispose of abandoned cases and provides a saving provision to what is otherwise mandatory dismissal, allowing denial of such a motion, or the sua sponte duty of the court, by stating that the court “shall dismiss the complaint as abandoned, without costs, ..., unless sufficient cause is shown why the complaint should not be dismissed.” This saving provision has been applied when plaintiff’s conduct has shown that there was no intent to abandon the complaint (*see LNV Corp v Forbes*, 122 AD3d 805 [2d Dept 2014]; *US Bank National Assoc v Wolnerman*, 135 AD3d 850 [2d Dept 2016]). Where the evidence shows merit to plaintiff’s claim and sufficient cause for any alleged delay the court should not dismiss the action for failure to move for the default within a year (*see Bank of New York v Gray*, 228 AD2d 399 [2d Dept 1996]; *LNV Corp. v Forbes*, supra; *Golden Eagle Capital Corp v Paramount Mtg Corp*, 143 AD3d 438 [2d Dept 2016]). Here, plaintiff’s submissions have established the merit of its claim. Sufficient cause for the delay in seeking a default is established when defendant Steven Fabiani’s bankruptcy and the long negotiation period in the FSC Part are considered, additionally the court finds plaintiff’s decision not to move forward on the default until moving for summary judgment against defendant is reasonable under the circumstances of the case, as well as an appropriate exercise in judicial economy and also establishes sufficient cause for the delay. The claim is dismissed.

NOTARIZATION SUFFICIENT

Defendant's counsel's claim that the affidavit of merit submitted by an employee of plaintiff is insufficient because it was made out of state and was not in conformity with CPLR 2309 (a) and RPL § 299-a [1] is without merit and dismissed. The out of state affidavit of notarization need merely conform substantially with the template set out to be adequate in RPL § 309 b [1] [2] (*see Midfirst Bank v Agho*, 121 AD3d 343 [2d Dept 2014]). The court finds the affidavit and notarization here substantially complies.

AFFIRMATIVE DEFENSES DISMISSED

Defendant's opposition fails to raise any claims other than the two disposed of above. The submission provides no support for any of her affirmative defenses. The failure to raise and support pleaded affirmative defenses and counterclaims in opposition to a motion for summary judgment renders them abandoned and subject to dismissal (*see Kuehne & Nagel Inc. v Baiden*, 36 NY2d 539 [1975]; *Kronick v L. P. Therault Co., Inc.*, 70 AD3d 648 [2d Dept 2010]; *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]; *Katz v Miller*, 120 AD3d 768 [2d Dept 2014]). Defendant's first through ninth and eleventh affirmative defenses are dismissed. Defendant's tenth affirmative defense raise the issue of plaintiff's standing to bring the action and is considered below and dismissed.

SUMMARY JUDGMENT

Entitlement to summary judgment in favor of a foreclosing plaintiff is established, *prima facie*, by plaintiff's production of the mortgage and the unpaid note, and evidence of default in payment (*see Wells Fargo Bank, N.A. v. DeSouza*, 126 AD3d 965 [2d Dept 2015]; *Wells Fargo, NA v Erobo*, 127 AD3d 1176 [2d Dept 2015]; *Wells Fargo Bank, NA v Morgan*, 139 AD3d 1046 [2d Dept 2016]). If established by proof submitted in evidentiary form, plaintiff has demonstrated its entitlement to summary judgment (CPLR 3212; RPAPL § 1321; *see Federal Home Loan Mtge. Corp. v Karastathis*, 237 AD2d 558 [2d Dept 1997]). The burden then shifts to defendants to demonstrate the existence of a triable issue of fact as to a bona fide defense (*see Capstone Bus. Credit, LLC v Imperia Family Realty, LLC*, 70 AD3d 882 [2d Dept 2010], *Zanfini v Chandler*, 79 AD3d 1031 [2d Dept 2010]; *Citibank, NA v Van Brunt Properties, LCC*, 95 AD3d 1158 [2d Dept 2012]). Defendants then must produce evidentiary proof in admissible form sufficient to demonstrate the existence of a triable issue of fact (*see Washington Mut. Bank v Valencia*, 92 AD3d 774 [2d Dept 2012]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Defendants' answer and affirmative defenses alone are insufficient to defeat plaintiff's motion (*see, Flagstar Bank v Bellafigliore*, 94 AD3d 1044 [2d Dept 2012]). Defendant's counsel's affirmation in opposition provides no personal knowledge of the facts nor does it provide evidence in admissible form in opposition, as such his affirmation is without probative value and insufficient to defeat the motion (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). In deciding the motion the court is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*see Vega v Restani Corp.*, 18 NY3d 499 [2012]).

Plaintiff's submissions have established the mortgage, unpaid note and evidence of defendant's default in payment, thereby demonstrating its entitlement to summary judgment. Where, as here, plaintiff's standing has been placed in issue by defendant's answer, plaintiff must also establish its standing as part of its *prima facie* showing (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355 [2015]; *Loancare v. Firshing*, 130 AD3d 787 [2d Dept 2015]; *HSBC Bank USA, N.A. v Baptiste*, 128 AD3d 773 [2d Dept 2015]).

PLAINTIFF PROVED ITS STANDING

Plaintiff has standing if it establishes that it was the holder of the note at the time the action was commenced

(see *Emigrant Bank v Larizza*, 129 AD3d 904 [2d Dept 2015]; *M&T Bank v Cliffside Prop. Mgt., LLC*, 137 AD3d 876 [2d Dept 2016]). Plaintiff demonstrated its standing as holder of the note by establishing that it had been assigned to it prior to the commencement of the action by attaching a copy of the indorsed note, with an undated allonge from the original lender, to the complaint at the time the action was commenced (see *Nationstar Mortg., LLC v Catizone*, 127 AD3d 1151 [2d Dept 2015]; *Deutsche Bank Natl. Trust v Leigh*, 137 AD3d 841 [2d Dept 2016]; *JPMorgan Chase Bank, NA v Weinberger*, 142 AD3d 643 [2d Dept 2016]; *Nationstar Mortg., LLC v Weisblum*, 143 AD3d 866 [2d Dept 2016]; *Deutsche Bank National Trust Co. v Logan*, 146 AD3d 861 [2d Dept 2017]; *Deutsche Bank Trust v Garrison*, 147 AD3d 725 [2d Dept 2017]; *Wells Fargo Bank v Thomas*, 150 AD3d 1312 [2d Dept 2017]; *Deutsche Bank Natl Trust Co. v Carlin*, 152 AD3d 491 [2d Dept 2017]; *US Bank, NA v Sabloff, _AD3d_*, 2017 NY Slip Op 06313 [2d Dept 2017]). As no claim as to the sufficiency of affixing of the allonge to the note was raised, any such claim is waived. Defendant's tenth affirmative defense is dismissed and plaintiff is awarded summary judgment dismissing and striking defendant's answer.

ANCILLARY RELIEF

The default of the non-appearing, non-answering defendants, including defendant Steven Fabiani, are fixed and set (see *U.S. Bank N.A. v Wolherman*, 135 AD3d 850 [2d Dept 2016]; *HSBC USA, N.A. v Alexander*, 124 AD3d 838 [2d Dept 2015]; *U.S. Bank, N.A. v Razon*, 115 AD3d 739 [2d Dept 2014]).

Plaintiff's submissions support its applications to amend the caption and reform the scrivener's error in the mortgage which improperly listed incorrect information as to the description of the property subject to the mortgage, as there is no question that the parties intended the property to be security for the note, therefore those applications are granted (see *Wells Fargo Bank, NA v Ambrosov*, 120 AD3d 1225 [2d Dept 2014]; *Bank of New York v Stein*, 130 AD3d 552 [2d Dept 2015]). To effect the reformation of the mortgage, plaintiff is to serve a copy of this order, with the reformed language contained herein, upon the Suffolk County Clerk within sixty (60) days of this order, to be recorded with the mortgage, paying such costs and fees as required by the Suffolk County Clerk.

Plaintiff's application for the appointment of a referee pursuant to RPAPL§1321 is granted. Plaintiff's proposed order submitted with this motion, as modified by the court consistent with this decision is signed contemporaneously with this order.

This constitutes the Order and decision of the Court.

Dated: September 8, 2017


 Hon. Robert F. Quinlan, J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION