HSBC Bank USA, N.A. v Carll
2018 NY Slip Op 30056(U)
January 11, 2018
Supreme Court, Suffolk County
Docket Number: 038520/2012
Judge: James Hudson
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Short Form Order

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Supreme Court of the County of Suffolk
State of New York - Part XL

PRESENT:
HON. JAMES HUDSON
Acting Justice of the Supreme Court

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HSBC BANK USA, N.A.,

Plaintiff,

-against-

JAMES CARLL, TONG POOL CARLL;
FIA CARD SERVICES NA;
HSBC-ATLANTIC CREDIT & FINANCE INC.;
"JOHN DOES" and "JANE DOES," said names being fictitious, parties intended being possible tenants or occupants of premises, and corporations, other entities or persons who claim, or may claim, a lien against the premises,

Defendants.

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INDEX NO.:038520/2012

SEQ. NO.:001-MG
001-MD

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Upon the following papers numbered 1 to 25 read on this Motion/Order to Show Cause for an Order for Summary Judgnent and the Appointment of a Referee; Notice of Motion/ Order to Show Cause and supporting papers 1-25 (Mot. Seq. 001); Notice of Cross Motion and supporting papers 26-41 (Mot. Seq. 002);Replying Affidavits and supporting papers 42-48; ~~Other 0; (and after hearing counsel in support and opposed to the motion)~~, it is

ORDERED, that Plaintiff's motion for an order for summary judgment in its favor and against the Defendants and for the appointment of a referee to ascertain the sums due and owing (mot. seq. no.:001) is granted under the circumstances presented (CPLR 3212). Defendants' cross-motion (mot. seq. no.: 002) is denied.

The matter before the Court is an action to foreclose upon a Note and mortgage. Plaintiff moves for summary judgment and for an order of reference. Defendants James Carll and Tong Pool Carll oppose the application and cross-move for an order directing: a foreclosure conference; good faith negotiation and compelling disclosure.

Summary judgment is a drastic remedy to be granted only when the Court determines there is no clear triable issue of fact. Even the color of a triable issue forecloses the remedy (***Benincasa v. Garrubbo***, 141 A.D.2d 636 [2d Dept.1988]). When applied to an allegation of breach of contract, a *prima facie* case for summary judgment is satisfied when the movant shows: the existence of the contract; performance pursuant to its terms; and non-performance by the Defendant (***Carltun on Bay Kosher Caterers, Ltd. v. Makani***, 295 A.D.2d 464, 744 N.Y.S.2d 674 [2d Dept. 2002]). When the contract in question consists of a note and guaranty "...a plaintiff must establish 'the existence of a note and guaranty and the Defendants' failure to make payments according to their terms'" (***JPMorgan Chase Bank, N.A. v. Galt Group, Inc.***, 1028, 1029 [2d Dept 2013], quoting ***Verela v. Citrus Lake Dev., Inc.***, 53 AD3d 574, 575 [2d Dept 2008]).

Once the burden has been met, the respondent cannot escape summary judgment "...unless [their] opposing papers [raise] genuine factual issues" ***Badische Bank v. Ronel Systems, Inc.*** 36 A.D.2d 763, 321 N.Y.S.2d 320 [2nd Dept.1971]; ***Leumi Fin. Corp. v. Richter***, 24 A.D.2d 855, 264 N.Y.S.2d 707, *affd.* 17 N.Y.2d 166, 269 N.Y.S.2d 409, 216 N.E.2d 579; ***Stagg Tool & Die Corp. v. Weisman***, 12 A.D.2d 99, 102, 208 N.Y.S.2d 585, 588]).

In the case at bar Plaintiff has established all the requisite elements under ***JPMorgan Chase Bank, N.A. v. Galt Group, Inc.***, *supra*. We shall now examine the relevant defenses presented by the Respondent. We shall consider these arguments *ad seriatim*.

Initially, the Defendants contend that there is outstanding discovery which precludes summary relief for the Plaintiff. In the case of ***Betz v. N.Y.C. Premier Properties, Inc.***, 38 A.D.3d 815, 833 N.Y.S.2d 153 (2nd Dept 2007) the Court stated "CPLR 3212 [f] permits a party opposing summary judgment to obtain further discovery when it appears the facts supporting the position of the opposing party exist but cannot be stated" [***Id***. at 816 *citing* ***Juseinoski v. New York Hosp. Med. Ctr. of Queens,*** 29 A.D.3d 636, 637, 815 N.Y.S.2d 183 [2nd Dept. 2006]).

The holding in ***Betz*** is clearly distinguishable from the case at bar. Once a party establishes a *prima facie* entitlement to summary relief, a respondent cannot prevent the granting of same by speculating that further discovery might lead to relevant evidence (***Tone***

v. Studin, 148 A.D.3d 1205, 1206, 51 N.Y.S.3d 548, 549 [2nd Dept.2017], *citing* ***Singh v. Avis Rent A Car Sys., Inc.***, 119 A.D.3d at 770, 989 N.Y.S.2d 302 [2nd Dept.2014]; ***Lopez v. WS Distrib., Inc.***, 34 A.D.3d 759, 760, 825 N.Y.S.2d 516 [2nd Dept.2006]). We remind the Respondent that "...bald, conclusory assertions or speculation and '[a] shadowy semblance of an issue' are insufficient to defeat summary judgment (***S.J. Capelin Assoc. v. Globe Mfg. Corp.***, 34 N.Y.2d 338, 341, 357 N.Y.S.2d 478, 313 N.E.2d 776 [1974]), as are merely conclusory claims" ***(Putrino v. Buffalo Athletic Club***, 82 N.Y.2d 779, 781, 604 N.Y.S.2d 539, [1993]" [***Stonehill,*** *supra* at 448]).

Unfortunately for the Respondent, its contentions regarding purported factual issues are speculative to the point of being considered chimerical.

Defendants also contend that Plaintiff's proof is insufficient evidence under the hearsay rule. As the Court discussed in ***Aurora Loan Servs., LLC v. Baritz***, 144 A.D.3d 618, 41 N.Y.S.3d 55 (2nd Dept. 2016), the absence of non-hearsay proof can be fatal to a motion for summary judgment.

The holding in ***Aurora***, however, is clearly distinguishable from the case before us. The more recent holding in ***Wells Fargo Bank, NA v. Thomas***, [2nd Dept. May 31st, 2017], 150 A.D.3d 1312, 52 N.Y.S.3d 894, stands for the principle that Ms. Denise Dickman's affidavit is acceptable proof. The ***Thomas*** Court cited to the decision in ***Citigroup v. Kopelowitz***, 147 A.D.3d 1014, 48 N.Y.S.3d 223, (N.Y. App. Div. 2nd Dept. 2017). In turn, the ***Kopelowitz*** Court discussed a fact pattern which we find to be analogous to the evidence in the instant case. The Court stated:

> "Here, the Plaintiff established its *prima facie* entitlement to judgment as a matter of law by producing the note and mortgage, and the affidavit of Phonesay Say, a vice president of the Plaintiff's loan servicer, attesting to the appellants' default based upon his review of payment records kept in the regular course of the loan servicer's business...Contrary to the appellants' contentions, Say's affidavit was sufficient proof of their default because the business records he relied upon satisfied the admissibility requirements of CPLR 4518 (a), and the records themselves actually evinced the facts underlying the appellants' default" (***Id.*** at 1015 *citing* ***North Am. Sav. Bank, FSB v. Esposito-Como***,141 A.D.3d 706, 35 N.Y.S.3d 491; ***Pennymac Holdings, LLC v. Tomanelli***, 139 A.D.3d 688, 32 N.Y.S.3d 181; ***HSBC Bank USA, N.A. v. Spitzer***, 131 A.D.3d 1206, 18 N.Y.S.3d 67). The Court finds the decisions in ***Kopelowitz*** and ***Thomas*** to be controlling.

Defendants assert that Plaintiff has failed to prove it has standing to bring this action. This is predicated on the following contention: "The Note contains a blank endorsement from HSBC Mortgage Corporation. There is no proof that the Note was transferred to Plaintiff." (Affirmation of Ronald Weiss Esq. dated February 7th, 2017, p.8 line 33).

Defendant relies on the holding in ***Bank of New York v. Silverberg***, 86 A.D.3d 274, 283, 926 N.Y.S.2d 532, 539 (2nd Dept. 2011) where the Court held:

> "In sum, because MERS was never the lawful holder or assignee of the notes described and identified in the consolidation agreement, the corrected assignment of mortgage is a nullity, and MERS was without authority to assign the power to foreclose to the Plaintiff. Consequently, the Plaintiff failed to show that it had standing to foreclose." (***Id.*** at 283).

In response to these claims by the Defendants, Plaintiff asserts that it has demonstrated standing. We agree. It is well settled law that: "A Plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced" (***Bank of Am.. N.A. v. Paulsen***, 125 AD3d 909, 910 [2015]; *see* ***US Bank N.A. v. Faruaue***, 120 AD3d 575, 577 [2014]; ***Homecomings Fin.. LLC v. Guldi***, 108 AD3d 506, 507 [2013]; *see* ***Peak Fin. Partners, Inc. v. Brook***, 119 AD3d 539 [2nd Dept.2014]).

Contrary to Defendant's contention, Plaintiff established its standing as the holder of the Note by demonstrating that the Note was in its possession and the Mortgage had been assigned to it prior to the commencement of the action, as evidenced by its attachment of the indorsed Note Summons and Complaint (NYSCEF Doc. No.:01) at the time the action was commenced (***JPMorgan Chase Bank, N.A. v. Weinberger,*** 142 A.D.3d 643, [2nd Dept.2016] 37 N.Y.S.3d 286; ***Emigrant Bank v. Larizza***, 129 AD3d 904, 905 [2nd Dept.2015] 13 N.Y.S.3d 129]).

The Defendants do not adequately counter the affidavit of Assistant Vice President Denise Dickman which shows "...that it [Plaintiff] has been in possession of the original Note, endorsed in blank, since at least October 25th, 2011 (this action was commenced on or about December 27th, 2012) and continues to hold the Note in the possession of its custodian, Bank of New York Mellon." Likewise, the Defendant's reliance on ***U.S. Bank, N.A. v. Adrian Collymore***, 68 A.D.3d 752, 754, 890 N.Y.S.2d 578, 580 (2nd Dept. 2009) is misplaced. In contrast to the matter at hand, the ***Collymore*** Court stated that the "...the Bank failed to establish that the note was physically delivered to it prior to the commencement of the action." (***Id.*** at 754).

The Defendants also assert that the Plaintiff failed to give the proper 90 (ninety) day notice required under RPAPL §1304. Specifically, Defendants state:

> "The 90 Day Notice was sent by HSBC Bank USA, NA. According to the Assignment of Mortgage, the mortgage was not assigned to HSBC Bank USA, NA, until November 8th, 2011, the day after HSBC Bank USA, N.A. is alleging to have mailed the 90 Day Notice…The letter states the loan was 402 days in default and gave the Defendant until 1st, 2011 to cure the default. This only gave the Defendant 24 days to cure the default, not the required 90 days…There is no proof that the Defendant received the 90 Day Notice." (Affirmation of Mr. Weiss dated Feb 7th, 2017 page 23, para 91).

We find this contention to be repudiated by the unequivocal documentary proof before the Court. Plaintiff's Exhibit No.:4 shows that a RPAPL § 1304 Notice; more than ninety (90) days prior to initiating the case at bar. In accordance with venerable common law practice, RPAPL §1304 (2) provides that: "Notice is considered given as of the date it is mailed." This has been established. At this juncture, it is critical for the Defendants to go beyond a conclusory denial of receipt (***Emigrant Mortg. Co. v. Persad***, 117 A.D.3d 676, 985 N.Y.S.2d 608 [2nd Dept. 2014]) they have failed to do so.

Finally, the Court examines Defendants' claim that the Plaintiff failed to negotiate in Good Faith (CPLR 3408). "[T]he issue of whether a party failed to negotiate in "good faith" within the meaning of CPLR 3408 (f) should be determined by considering whether the totality of the circumstances demonstrates that the party's conduct did not constitute a meaningful effort at reaching a resolution" (***U.S. Bank Nat. Ass'n v. Sarmiento***, 121 A.D.3d 187, 203, 991 N.Y.S.2d 68, 79 [2nd Dept. 2014]). In the case before us, the Plaintiff has established that it is the Defendants who have engaged in inexplicable dilatory behavior by failing to provide a modification application. "Good Faith" is a burden that the Law imposes on both parties (CPLR 3408 (f); 22 NYCRR §202.12-a [c][4]). Accordingly, lack of good faith appears to lie at the feet of the Defendants. We have considered the remainder of the Defendants' arguments and although presented with commendable zeal, they fail to persuade the Court. The Plaintiff's motion is granted in its entirety and the Defendants' answer shall be stricken and counterclaims dismissed.

Submit Order of Reference on Notice.

DATED: JANUARY 11th, 2018

RIVERHEAD, NY

HON. JAMES HUDSON, A.J.S.C.