

Wells Fargo Bank, N.A. v La Franca

2018 NY Slip Op 31051(U)

May 29, 2018

Supreme Court, Suffolk County

Docket Number: 029087/2011

Judge: C. Randall Hinrichs

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SUPREME COURT - STATE OF NEW YORK
IAS PART 49 - SUFFOLK COUNTY

PRESENT: Hon. C. RANDALL HINRICHS
Justice of the Supreme Court

Motion Date: 003: 12-7-2017; 004: 1-25-2018

Adjourned Date: 3-8-2018

Motion Sequence: 003: MotD; 004: MD

WELLS FARGO BANK, N.A., AS TRUSTEE FOR
CARRINGTON MORTGAGE LOAN TRUST, SERIES
2007-RFC1, ASSET-BACKED PASS THROUGH
CERTIFICATES,

ROSICKI, ROSICKI & ASSOCIATES, P.C.
Attorneys for Plaintiff
51 E. Bethpage Road
Plainview, NY 11803

Plaintiff,

GIANCARLO MALINCONICO, ESQ.
Attorney for Defendant
Salvatore La Franca
43 West 43rd Street, Suite 71
New York, NY 10036-7424

-against-

SALVATORE LA FRANCA; "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,

MARCOS LA FRANCA
Defendant Pro Se
474 A Meadow Road
Kings Park, NY 11754

Defendants.

Upon consideration of the notice of motion (denominated as a cross motion) by the plaintiff WELLS FARGO BANK, N.A., AS TRUSTEE FOR CARRINGTON MORTGAGE LOAN TRUST, SERIES 2007-RFC1, ASSET-BACKED PASS THROUGH CERTIFICATES ["the plaintiff"], for an order dismissing certain defenses and counterclaims, extending the plaintiff's time to renew a motion for summary judgment or file a note of issue, and amending the caption, the supporting affirmation, affidavit, and exhibits (003), the notice of motion on behalf of the defendant Salvatore LaFranca ["the defendant"], for an order dismissing the plaintiff's complaint for failure to strictly comply with RPAPL §1304 and with an order of the court dated June 9, 2017, the supporting affirmation, affidavit, amended affidavit, and exhibits (004), the plaintiff's opposition to the defendant's motion and the plaintiff's reply in further support of its motion and supporting exhibits, and the defendant's reply affirmation, it is

ORDERED that motion sequences 003 and 004 are considered together for purposes of this determination; and it is further

ORDERED that the branch of the plaintiff's motion (denominated as a cross motion), for an order dismissing the first, second, fourth, fifth, sixth, eighth, ninth, tenth, twelfth, thirteenth, and fourteenth affirmative defenses as well as the defendant's second and third counterclaims is granted and that branch of the plaintiff's motion is otherwise denied, without prejudice; and it is further

ORDERED that the branch of the plaintiff's motion for an order extending the plaintiff's time to renew its motion for summary judgment or file a note of issue is granted in part and denied in part in accordance herewith; and it is further

ORDERED that the branch of the plaintiff's motion for an order amending the caption is granted; and it is further

ORDERED that the amended caption shall appear henceforth as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X
WELLS FARGO BANK, N.A., AS TRUSTEE FOR
CARRINGTON MORTGAGE LOAN TRUST, SERIES 2007-
RFC1, ASSET-BACKED PASS THROUGH CERTIFICATES,

Plaintiff,

Index Number:
29087-2011

-against-

SALVATORE LA FRANCA and MARCOS LA FRANCA,

Defendants.

-----X

and it is further

ORDERED that the plaintiff shall serve a copy of the order amending the caption upon the calendar clerk of this Court; and it is further

ORDERED that the defendant's motion to dismiss the complaint is denied; and it is further

ORDERED that the attorneys for the parties shall appear for a pre-trial conference in in Part 49 in the Cromarty Court Building, 4th Floor, Courtroom 16, on **June 26, 2018 at 9:30 a.m.**, to fix a date for the plaintiff to file a note of issue and to select a date for a limited issue trial in accordance herewith; and it is further

ORDERED that the plaintiff is directed to serve a copy of this order with notice of entry upon the answering defendant and any party entitled to notice pursuant to CPLR 2103 (b) (1), (2), or (3) within thirty (30) days of the date herein, and to promptly file the affidavit of service with the Clerk of the Court.

This residential foreclosure action was commenced on September 15, 2011. The complaint alleges that the defendant defaulted under the terms of a note, mortgage, and loan modification agreement for the payment due on April 1, 2009, and the payments due thereafter. By order dated June 9, 2017, the plaintiff's motion for summary judgment, an order of reference, and related relief (motion sequence 001), was denied, without prejudice to renew the summary judgment motion, or file a note of issue within 120 days of the date of the order. The parties' familiarity with the underlying facts is assumed and will not be repeated here except as necessary to inform the instant decision.

In the prior order, the Court concluded that the plaintiff 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 RPAPL §1304. The prior order also determined that the plaintiff failed to demonstrate that it complied with the condition precedent contained in the subject mortgage agreement requiring the lender to provide the defendant with a notice of default prior to demanding payment of the loan in full. The court concluded that in view of the open question of whether plaintiff complied with statutory and contractual notice requirements, the remaining branches of plaintiff's motion were denied without prejudice to renew the motion or file a note of issue within 120 days.

On November 13, 2017, the defendant moved to dismiss the complaint based on the plaintiff's alleged lack of standing, or alternatively, for failure to prosecute the action pursuant to CPLR 3216 (motion sequence 002). The plaintiff opposed the dismissal motion and cross moved for an order dismissing the defendant's first, second, fourth, fifth, sixth, eighth, ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth affirmative defenses as well as the defendant's three counterclaims (motion sequence 003). The plaintiff also sought leave to have Marcos LaFranca substituted in place and stead of "John Does" and "Jane Does" pursuant to CPLR 1024 and to amend the caption accordingly. In addition, the plaintiff sought an extension of time pursuant to CPLR 2004 to renew its motion for summary judgment, specifically addressing whether the plaintiff complied with statutory and contractual notice requirements, respectively, or file a note of issue. Plaintiff announced its intention (at ¶ 77 of the cross moving affirmation), to demonstrate that plaintiff satisfied both notice requirements, either in a renewed summary judgment motion or at trial, citing the difficulty in locating a witness to establish mailing of the statutory and contractual notices some eight years after the fact. Shortly thereafter, the defendant withdrew his motion to dismiss the complaint (motion sequence 002).

The defendant opposed the plaintiff's "cross motion" and again moved by notice of motion dated December 20, 2017, to dismiss the complaint for failure to comply with the statutory notice requirement of RPAPL 1304 and alternatively, for failure to comply with the prior order of the court to file a note of issue or renew its motion for summary judgment within 120 days of the date of the order (motion sequence 004). The defendant's motion did not address any other affirmative defenses or the counterclaims asserted in his answer.

In support of that branch of the defendant's motion for an order dismissing the complaint for failure to strictly comply with RPAPL §1304, the defendant submitted two affidavits by defendant Salvatore LaFranca dated December 5, 2017, and December 26, 2017, respectively. In both affidavits the defendant attested:

"I unequivocally deny receiving any such 1304 Notice at any time in any form of service. I deny receiving the specific 1304 Notice allegedly served upon [sic] by Plaintiff. See allegedly served 1304 Notice, attached hereto as Exhibit A."

In opposition to the defendant's motion to dismiss the complaint based upon non-compliance with RPAPL 1304, the plaintiff submitted, inter alia, the affidavit of Chris Lechtanski, AVP of Default at Carrington Mortgage Services, LLC ["Carrington"], dated January 19, 2018 ["the Lechtanski affidavit"]. The following facts are taken from the Lechtanski affidavit.

Carrington is the plaintiff's attorney-in-fact and servicing agent. Lechtanski was personally familiar with Carrington's regular office practices and procedures with regards to mailing of mortgage-related notices. The notices are prepared and sent to ensure that they are sealed in an envelope with

proper postage and placed in a receptacle under the exclusive control of the United States Postal Service. Prior to the commencement of this action Carrington sent a notice of intent to foreclose on behalf of the plaintiff to the defendant on May 7, 2009, by first-class mail addressed at the subject premises in accordance with Carrington's standard office mailing practices. Prior to the commencement of this action, Carrington also sent a 90 Day Notice of Intent to Foreclose to the defendant by both first class and certified mail to the subject premises in an envelope separate from any other mailing or notice in accordance with Carrington's standard office mailing practices. According to the Lechtanski affidavit, the content of the 90 Day Notice sent to the defendant complied with RPAPL 1304. Notably, the Lechtanski affidavit omitted the date on which the 90 Day Notices were allegedly mailed. The plaintiff submitted no other mailing proof with respect to the contractual and statutory notices in opposition to the defendant's dismissal motion.

So much of the plaintiff's motion seeking an order dismissing the defendant's first, second, fourth, fifth, sixth, eighth, ninth, tenth, twelfth, thirteenth, and fourteenth affirmative defenses as well as the defendant's second and third counterclaims is granted. As to those affirmative defenses and counterclaims, the plaintiff has demonstrated that they have no merit and the defendant has not opposed the motion. However, so much of the plaintiff's motion that seeks an order striking the eleventh affirmative defense and first counterclaim to the extent that they seek attorneys' fees pursuant to Real Property Law §282, the plaintiff's motion is denied without prejudice as premature. The plaintiff has not demonstrated as a matter of law that it complied with every covenant and agreement in the mortgage, namely, the default notice condition precedent in the mortgage (*U.S. Bank Nat. Ass'n v. Milstein*, 50 Misc 3d 1203(A), 28 NYS3d 651 [NY Sup Ct 2015]). Further, it remains to be seen whether the defendant will ultimately successfully defend the action (RPL §282 [1]).

So much of the plaintiff's motion that seeks an extension of time to renew its summary judgment motion is denied. A plaintiff may prove its compliance with RPAPL §1304 by submission of documents meeting the requirements of the business records exception to the rule against hearsay under CPLR 4518 (see *CitiMortgage, Inc. v. Pappas*, 147 AD3d 900, 901, 47 NYS3d 415 [2d Dept 2017]; see also *Viviane Etienne Med. Care, P.C. v. Country-Wide Ins. Co.*, 25 NY3d 498, 508, 14 NYS3d 283, 35 NE3d 451 [2015]; *Lindsay v. Pasternack Tilker Ziegler Walsh Stanton & Romano LLP*, 129 AD3d 790, 793, 12 NYS3d 124 [2d Dept 2015]). In this regard, the plaintiff must submit, inter alia, "proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed" (*CitiMortgage, Inc. v. Pappas*, supra; see *Viviane Etienne Med. Care, P.C. v. Country-Wide Ins. Co.*, 25 NY3d at 508, 14 NYS3d 283, 35 N.E.3d 451; *Lindsay v. Pasternack Tilker Ziegler Walsh Stanton & Romano LLP*, 129 AD3d at 793, 12 NYS3d 124; *Nocella v. Fort Dearborn Life Ins. Co. of N.Y.*, 99 AD3d 877, 955 NYS2d 70 [2012]).

In opposition to the defendant's dismissal motion based on alleged non-compliance with RPAPL §1304, the plaintiff failed to submit an affidavit of service or any proof of mailing issued by the USPS demonstrating that it properly served the defendant in accordance with RPAPL §1304 (see *Citibank, N.A. v. Wood*, 150 AD3d 813, 814, 55 NYS3d 109 [2d Dept 2017]; *CitiMortgage, Inc. v. Pappas*, 147 AD3d at 901, 47 NYS3d 415). The Lechtanski affidavit was insufficient to establish that the notices were sent to the defendant in the manner required by RPAPL §1304, as Lechtanski did not establish proof of Carrington's standard office mailing procedure and provided no independent proof of the actual mailing (see *Citibank, N.A. v. Wood*, 150 AD3d at 814, 55 NYS3d 109; *CitiMortgage, Inc. v. Pappas*, 147 AD3d at 901, 47 NYS3d 415; *JPMorgan Chase Bank, N.A. v. Kutch*, 142 AD3d 536, 537, 36 NYS3d 235 [2d Dept 2016]). Lechtanski's affidavit, like the Ostermann affidavit submitted in support of the plaintiff's original summary judgment motion, was unsubstantiated and conclusory. Notably,

RPAPL §1304 (2) provides that notice is considered given as of the date the notice is mailed. The Lechtanski affidavit did not contain the date that the notices were allegedly mailed to the defendant. Thus, regarding that branch of the plaintiff's motion for an order extending the plaintiff's time to renew its summary judgment motion, the relief requested is denied. The plaintiff has now had two opportunities to establish compliance with contractual and statutory notice requirements vis-a-vis the Ostermann and Lechtanski affidavits, respectively, and has failed to do so.

Addressing that branch of the defendant's motion for an order dismissing the plaintiff's complaint based on the plaintiff's failure to renew its summary judgment motion or file a note of issue by October 7, 2017, the application is denied. CPLR 2004 provides that, "[e]xcept where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed." In exercising its discretion to grant an extension of time pursuant to CPLR 2004, a court may consider such factors as the length of the delay, the reason or excuse for the delay, and any prejudice to the party opposing the motion (see *U.S. Bank Nat. Ass'n v. Adler*, 148 AD3d 858, 49 NYS3d 148, 149 [2d Dept 2017]). In light of the foregoing, and recognizing that the law strongly prefers that matters be decided on the merits, that branch of the defendant's motion for dismissal of the plaintiff's complaint based on the plaintiff's failure to renew its summary judgment motion or file a note of issue by October 7, 2017, is denied.

Addressing that branch of the defendant's motion for an order dismissing the plaintiff's complaint based on the plaintiff's failure to strictly comply with the statutory notice requirements of RPAPL 1304, the motion is likewise denied. The defendant's mere denial of receipt, without more, was insufficient to establish his prima facie entitlement to judgment as a matter of law (*HSBC Bank USA, Nat. Ass'n. v. Ozcan*, 154 AD3d 822, 828, 64 NYS3d 38, 44 [2d Dept 2017]; *U.S. Bank Nat. Ass'n v. Sabloff*, 153 AD3d 879, 881, 60 NYS3d 343, 345 [2d Dept 2017]).

Regarding so much of the plaintiff's motion that seeks an extension of time to file a note of issue, the motion is granted to the extent that the attorneys for the parties are directed to appear for a pretrial conference in Part 49 in the Cromarty Court Building, 4th Floor, Courtroom 16, on **June 26, 2018 at 9:30 a.m.** to fix a date for the plaintiff to file a note of issue and schedule a framed issue hearing as to whether the plaintiff strictly complied with RPAPL §1304, and properly served the defendant with the notice required under the terms of the mortgage.

Dated: May 29, 2018



C. RANDALL HINRICHS, J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION