Citimortgage, Inc. v Rock
2018 NY Slip Op 31289(U)
June 25, 2018
Supreme Court, Suffolk County
Docket Number: 14340-2012
Judge: Robert F. Quinlan

[* 1]

SHORT FORM ORDER

INDEX NO.14340-2012

SUPREME COURT - STATE OF NEW YORK
PART 27 SUFFOLK COUNTY

PRESENT: HON. ROBERT F. QUINLAN
Justice of the Supreme Court

Motion Date: 10/16/2017
Submit Date: 10/19/2017
Motion Sequence.: 002-MG

----------X

CITIMORTGAGE, INC.,

Plaintiff,

-against-

EDWARD J. ROCK; JILL MARTONE; NICK MARTONE

Defendant(s).

----------X

KNUCKLES, KOMOSINKI & MANFRO, LLP
Attorneys for Plaintiff
565 Taxter Rd., Suite 590
Elmsford, NY 10523

RICHARD LAVORATTA, JR., ESQ.
Attorney for Defendant Edward J. Rock
101 No. Wellwood Ave., Suite 1
Lindenhurst, NY 11757

Upon the following papers numbered 1 to 67 read on this application for an order granting summary judgment and dismissal of the complaint; Notice of Motion/Order to Show Cause and supporting papers 1-40; ~~Notice of Cross Motion and supporting papers~~_____; Answering Affidavits and supporting papers 41-60 ; Replying Affidavits and supporting papers 61-67 ; ~~Other~~ ; it is,

ORDERED that plaintiff Citimortgage, Inc.'s motion seeking dismissal of defendant Edward J. Rock's remaining affirmative defense, upon such dismissal for full summary judgment striking defendant's answer, and granting the appointment of a referee to compute pursuant to RPAPL § 1321 is granted; and it is further

ORDERED that plaintiff's proposed order submitted with this motion, as modified by the court, is to be signed contemporaneously with this order; and it 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ORDERED, that, if a prior notice of pendency is outdated, plaintiff is directed to file a successive notice of pendency at least twenty (20) days prior to the submission of any proposed judgment of foreclosure and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, and defendants who have appeared, all papers and documents necessary for the referee to perform the determinations required

by this order, "plaintiff's submissions"; defendant(s) may submit written objections and proof in support thereof, "defendant's objections," to the referee within 14 days of the mailing of plaintiff's submissions; and it is further

ORDERED that the referee's report is to be prepared and submitted to plaintiff within 30 days of receipt of plaintiff's submissions, and the referee's report is to be submitted by plaintiff with its application for a judgement of foreclosure and sale; and it is further

ORDERED that the referee's duties are defined by this order of reference (CPLR 4311, RPAPL § 1321), and the referee has no power beyond that which is limited by this order of reference to the ministerial functions of computing amounts due and owing to plaintiff and determining whether the premises can be sold in parcels; the referee shall hold no hearing, take no testimony or evidence other than by written submission, and make no ruling on admissibility of evidence; the referee's report is merely advisory and the court is the ultimate arbiter of the issues, if defendant's objections raise issues as to the proof of amounts due and owing the referee is to provide advisory findings within his/her report; and it is further

ORDERED that if defendant's objections have been submitted to the referee, defendant(s) shall also submit them to the court if opposing plaintiff's application for a judgment of foreclosure and sale; failure to submit defendant's objections to the referee will be deemed a waiver of objections before the court on an application for a judgment of foreclosure and sale; failure to raise and submit defendant's objections made before the referee in opposition to plaintiff's application for a judgment of foreclosure and sale shall constitute a waiver of those objections on the motion; 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, October 24, 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 on residential real property known as 1 Washington Drive, Lindenhurst, Suffolk County, New York ("the property") given by defendant Edward J. Rock ("defendant") on August 31, 2007 to ABN-AMRO Mortgage Group, Inc. ("the lender"), a predecessor in interest which eventually merged with plaintiff Citimortgage, Inc. ("plaintiff"), to secure a note given by defendant to the lender of the same date. Plaintiff commenced this action by filing a summons, complaint and notice of pendency with the Suffolk County Clerk on May 8, 2012. Defendant filed a timely answer by counsel which consisted of general denials and two affirmative defenses. On January 21, 2014 plaintiff moved for summary judgment dismissing defendant's affirmative defenses, striking his answer, setting the default of the non-appearing, non-answering defendants and for an order appointing a referee to compute pursuant to RPAPL § 1304, which defendant opposed. Upon assignment of the case and motion to this court, the motion was set for oral argument on June 9, 2016. A fuller history of the case, and the parties arguments, are set forth in the court's decision placed upon the record on June 9, 2016 which granted plaintiff partial summary judgment pursuant to CPLR 3212 (g) as plaintiff had established the basic proof necessary to establish a prima facie case in a mortgage foreclosure action, dismissed defendant's first affirmative defense, granted plaintiff's application to amend the caption to substitute defendants Jill Martone and Nick Martone for the "John Doe" defendants, but denied dismissal of defendant's

second affirmative defense as questions of fact remained as to that defense which required further discovery. The court's order also set that issue for a limited issue trial pursuant to CPLR § 2218. At that time the court issued a discovery and scheduling order, authorizing further discovery on the second affirmative defense, setting a limited time for such discovery, as well as setting a conference date at which the parties were to enter into a compliance conference order so that a note of issue could be filed, after which the parties were authorized to file successive summary judgment motions. The court suggested to the parties that depositions might help clarify this remaining issue.

The parties apparently took the court's advice and a deposition of defendant was held on September 16, 2016, sworn to before his attorney acting as a notary, on November 2, 2016. Upon completion of discovery and filing of a note of issue, plaintiff filed this motion for summary judgment seeking to dismiss defendant's second affirmative defense. Defendant filed his opposition, to which plaintiff replied.

Plaintiff's motion is granted, defendant's second affirmative defense is dismissed, defendant's answer is stricken and plaintiff is granted the appointment of a referee to compute pursuant to RPAPL § 1321.

This foreclosure action appears to be an unfortunate circumstance brought about when a father attempts to help his divorced son try to keep the son's home and pay his ex-wife her share of the home, and then after entering into the loan agreement on behalf of his son, relies upon his son to make payments, deal with any issues involving the loan and keep the father abreast of any problems with the loan. It is also a cautionary tale about a person who does not read documents he signs, assumes things that he is not told, and is unrepresented by a lawyer at a real estate closing.

As an exhibit to its motion, plaintiff submitted a copy of the transcript of defendant's deposition. At the deposition, defendant testified that his original purpose for entering into the loan and mortgage was to help his divorced son. He had anticipated it would be a joint venture between him and his son. This evaporated when defendant learned that his son's poor credit made it impossible for the son to be on the loan documents, and defendant went forward alone. From his deposition testimony, it is clear that defendant left most of the preparatory work in arranging the loan to his son. After the closing, although he was the only signatory on the loan documents, defendant also left the responsibility for payment and management of the loan to his son. At his deposition, defendant admitted that no one directly told him that his monthly payment pursuant to the loan would include monies to be escrowed for taxes and insurance; rather, he testified it was his understanding that the loan payments would include monies to be escrowed for taxes and insurance because that was the way his son's original loan was handled (see deposition testimony p. 26, l.8 - p. 27, l.6). It was his intent to pay no more than a certain amount each month, which was the amount of the monthly payment set by the loan. This payment did not include an escrow for taxes and insurance. The proof established by the documents he signed shows that it was his responsibility to pay taxes and insurance independent of the loan payment.

Defendant's second affirmative defense is more than what is just stated therein: " The plaintiff failed to bill and pay for the real estate taxes as required by the closing documents. It now seeks an unreasonable increase in the monthly payment due to its error." Defendant claims, in both his affidavit submitted in opposition and his deposition testimony, that he thought the closing documents required his monthly payment include both principal and interest on the loan, and an escrow amount for taxes and insurance on the property. In support of this claim he submits an unsigned pre-closing advisory document received from the lender which states that his loan contract will require monthly escrow payments for real estate and/or hazard insurance, and two documents he signed at the closing which appeared to authorize a tax service to have all real estate tax bills forwarded to them on his behalf.

Unfortunately for defendant's claim, at his deposition, he identified and acknowledged his signature on a number of other documents that superceded the documents he relies upon, documents he testified he never read. If he had read them, he would have learned that the lender had agreed to waive it's normal requirement to include an escrow for taxes and insurance in the monthly payment, that as they were not collecting an escrow for tax and insurance purposes his monthly payment only included payments of principal and interest on the loan, and that independent of his loan payments, he was responsible to pay taxes and insurance. At his deposition he acknowledged that paragraph 3 of the mortgage he signed said he will pay escrows for taxes and insurance "unless lender tells me, in writing, that I do not have to do so...." (Plaintiff's Exhibit "A" on the motion [note: all references to exhibits will be to the motion]). In his deposition testimony, he further acknowledged that at the closing of the loan he signed an "Escrow Waiver" (Plaintiff's Exhibit "D") that specifically states that the lender waived the requirement of a monthly escrow for taxes and insurance , that as borrower, he was responsible for "direct and timely payment of any and all property taxes... hazard or property insurance premiums...." The document went on to state that the borrower understood that the standard escrow provisions would remain in the mortgage documents, and that if defendant failed to pay taxes or insurance in a timely manner, or failed to provide proof thereof, the lender reserved the right to enforce those requirements. The Escrow Waiver clearly met the requirement of written notice set forth in paragraph 3 of the mortgage.

Also, at his deposition he acknowledged his signature on the Settlement Statement (HUD-1A), which indicates interest was collected on the loan from September 6, 2007 to October 1, 2007, does not indicate any reserves taken for property taxes or insurance at the closing (Plaintiff's Exhibit "E"). Among the documents submitted by defendant in support of his opposition is a "Good Faith Estimate" from the lender of estimated charges at the closing, dated August 14, 2007 (Defendant's Exhibit "C"), which sets forth the information applicable to the HUD-1A, as estimated prior to closing. This document provides estimates of the interest on the loan to be collected prior to defendant's first monthly payment and clearly shows that there was no escrow to be taken for taxes and insurance. Finally, among plaintiff's submission of documents included in Plaintiff's Exhibit "C," is the "First Payment Letter" to be used by defendant to make his first payment under the loan. On the "Temporary Coupon" to be used to make the payment is listed $2,378.49, in the box entitled "Principal & Int.;" in the box entitled "Escrow," there is nothing entered.

At his deposition, defendant acknowledged his signatures on the various documents referred to above, but under questioning by his own lawyer said that he did not read any of the documents he was handed to sign because it would take too long (see deposition, p. 44, l.3 - l.18). He also testified that he wasn't aware of any payment problems or issues with the claimed escrow until 2010 when told by his son, who defendant testified was living at the property and was, defendant believed, making the payments required by the loan and communicating with the lender. At his deposition, he also admitted that the statement in his affidavit in opposition to Mot. Seq. #001 that he made the first mortgage payment due on October 2007 was "inaccurate." When questioned if he made the payment, he responded "Well, my son did it, I assume." (Deposition, p. 41, l. 21 - p. 42, l.10).

Clearly, based upon defendant's deposition testimony, defendant's own exhibits, the exhibits submitted by plaintiff, both those acknowledged by defendant as signed by him and the other documents presented before and at the closing, the record establishes defendant was advised in a written document he signed, that he was only paying principal and interest on the loan, that the payment he would make would not include an escrow amount for taxes and insurance, that he, and not the lender, was responsible to pay taxes and insurance, until the lender or its successor in interest changed that upon a failure by defendant to make those payments. If the lender, or a successor in interest, became aware of defendant's failure to pay taxes and insurance, it would make such payments itself, and increase defendant's monthly payments to include taxes and insurance, as well as to recoup

the amounts it had paid. This would of necessity increase defendant's monthly payment. Plaintiff's affiant's affidavit is sufficient to establish not only this, but the facts applicable to the original conditions of the loan. Defendant's testimony acknowledged his signature on the documents that he failed to read. All of this, along with the other exhibits submitted by both plaintiff and defendant, establish that there is no question of fact that would preclude summary judgment and dismissal of the issues raised by defendant's second affirmative defense.

It is a well settled principle that a party who signs documents without showing a valid excuse for not reading them, is bound by the documents terms (*see Martino v. Kaschak,* 208 AD2d 698 [2d Dept 1994]; *Patterson v. Somerset Ins. Corp.*, 96 AD3d 817 [2d Dept 2012]; *Anderson v. Dinkes & Schwitzer*, 150 AD3d 805 [2d Dept 2017]). So is the principle that a borrower may not claim to have reasonably relied upon claimed representations that are clearly at odds with the loan documents which cover the loan (*see Aurora Loan Servs, LLC v. Enaw*, 126 AD3d 830 [2nd Dept 2015]; *Grand Pacific Finance Corp. v 97-11 Hale, LLC*, 123 AD3d 764 [2d Dept 2014]). This is even more true in a situation as here, where at his deposition, defendant testified that he does not recall anyone specifically telling him that his payments would include taxes and insurance, but that he just assumed it because that was the way his son's original loan had been structured.

Plaintiff's motion to dismiss defendant's second affirmative defense it is granted.

As the court has already dismissed the other affirmative defense and held that plaintiff's submissions on Mot. Seq. #001 established the elements necessary for a prima facie case to foreclose this mortgage, plaintiff is granted judgment against defendant and his answer is stricken. Plaintiff's application for the appointment of a referee to compute is granted and its proposed order, as modified by the court, is signed contemporaneously with this decision and order.

This constitutes the Order and decision of the Court.

Dated: June 25, 2018

HON. ROBERT F. QUINLAN, JSC

[ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION