

Bank of N.Y. v Canales
2018 NY Slip Op 33035(U)
November 7, 2018
Supreme Court, Suffolk County
Docket Number: 02149/2013
Judge: Robert F. Quinlan
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SHORT FORM ORDER

INDEX NO.02149/2013

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: 05/04/17
Adj Date: --
Motion Sequence.:001-Mot D

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THE BANK OF NEW YORK AS TRUSTEE FOR
THE BENEFIT OF THE ASSET-BACKED
CERTIFICATES, SERIES 2007-2,

Plaintiff,

- against -

EDGAR CANALES, OLGA CEPEDA A/K/A OLGA
SEDANO CEPEDA, et al.,

Defendant(s).

-----X

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Defendant Pro Se
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Commissioner of Taxation and Finance
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Albany, NY 12227

People of the State of NY
252 Old Country Road, Mineola, NY 11501

NYS Department of taxation and Finance
300 Motor Pkwy, Hauppauge, NY 11788

Desiret Canales
19 Plaza Lane, Selden, NY 11784

Upon the following papers read on this motion for an order granting summary judgment, and order of reference; Notice of Motion/Order to Show Cause and supporting papers Doc # 19-34 ; ~~Notice of Cross Motion and supporting papers~~ ; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers ; Other ; it is

ORDERED that this unopposed motion by plaintiff for an order striking defendants' Edgar Canales and Olga Cepeda a/k/a Olga Sedano Cepeda's answer, for summary judgment, appointment of a referee to compute and to amend the caption is granted to the extent that plaintiff is granted partial summary judgment as to defendants dismissing their second through fifth affirmative defenses; and it is further

ORDERED that upon the proof submitted plaintiff's application to dismiss defendants' first affirmative defense alleging plaintiff's failure to establish standing to commence the action is denied; and it is further

ORDERED that upon the proof submitted plaintiff's application to amend the paragraphs 3 and 4 of the complaint *nunc pro tunc* to include the amount of the note and mortgage as \$260,000.00 and that on July 18, 2008

defendants EDGAR CANALES and OLGA CEPEDA A/K/A OLGA SEDANO CEPEDA executed a loan modification agreement creating an unpaid principal balance of \$260,027.51 is granted; and it is further

ORDERED that portion of plaintiff's motion seeking to amend the caption to add NYS Department of Taxation and Finance as party defendant in place of "John Doe" is denied; and it is further

ORDERED that portion of plaintiff's motion seeking to amend the caption to add Desiret Canales as party defendant in place of "Jane Doe" is granted and the caption shall now appear as follows:

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THE BANK OF NEW YORK AS
TRUSTEE FOR THE BENEFIT OF THE
ASSET-BACKED CERTIFICATES,
SERIES 2007-2,

Plaintiff,

- against -

EDGAR CANALES, OLGA CEPEDA
A/K/A OLGA SEDANO CEPEDA, CLERK
OF THE SUFFOLK COUNTY DISTRICT
COURT, COMMISSIONER OF
TAXATION AND FINANCE, PEOPLE
OF THE STATE OF NEW YORK,
DESIRET CANALES,

Defendant(s).

-----X

; and it is further

ORDERED that plaintiff is to serve a copy of this order upon the calendar clerk of this part within thirty (30) days of this order, and all further proceedings are to be under the amended caption; and it is further

ORDERED that upon the proof submitted plaintiff's application to amend paragraphs 3 and 4 of the verified complaint *nunc pro tunc* to include the amount of the note and mortgage is \$260,000.00 and that on July 18, 2008 defendants Edgar Canales and Olga Sedano Cepeda executed a loan modification agreement creating an unpaid principal balance of \$260,027.51 is granted; and it is further

ORDERED that in all other respects, plaintiff's motion is denied; and it is further

ORDERED that plaintiff's application to appoint a referee pursuant to RPAPL§ 1321 is denied and its proposed order submitted with this motion is marked "Not Signed"; and it is further

ORDERED that pursuant to CPLR 3212 (g) and §2218, the action is set for trial limited to proof of standing, defendants' first affirmative defense, and proof of defendants' default; and it is further

ORDERED that plaintiff is to file a note of issue within 90 days of the date of this order and is to attach a copy of this order to the note of issue; and it is further

ORDERED that upon filing the note of issue the court will entertain renewed summary judgment motions from the parties, but in no case will such a motion be entertained more than 60 days after the filing of the note of issue; and it is further

ORDERED that the action is scheduled for a pre-trial conference on **March 13, 2019 at 9:30 AM** in Part 27 unless a successive summary judgment motion authorized by this order has been filed before the scheduled conference.

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 19 Plaza Lane, Selden, Suffolk County, New York given by defendants Edgar Canales and Olga Sedano Cepeda ("defendants") to Mortgage Electronic Registration Systems, Inc., as nominee for Countrywide Home Loans, Inc., plaintiff's predecessor in interest, on January 22, 2007 to secure a note given on the same date. The loan was modified pursuant to an agreement dated July 18, 2008. Plaintiff the Bank of New York as Trustee for the Benefit of the Asset-Backed Certificates, Series 2007-2 ("plaintiff") commenced this action by filing the summons and complaint with the Suffolk County Clerk on January 17, 2013. Defendants interposed an answer dated February 18, 2013 consisting of general denials and five affirmative defenses including *inter alia* failure to establish plaintiff's standing to prosecute the action (first affirmative defense).

A total of six foreclosure settlement conferences were calendared between February 28, 2014 and March 5, 2015 at which time the action was released to an IAS Part, thus there has been compliance with CPLR 3408.

Plaintiff now moves for an order granting summary judgment against defendants, striking their answer and affirmative defenses, amending the caption, amending the complaint *nunc pro tunc*, and for an order of reference appointing a referee to compute pursuant to RPAPL § 1321. Defendants do not oppose the motion. The action, and pending motion, were administratively adjourned to the general inventory of this part pursuant to Administrative Order 23-18 dated March 29, 2018/

SUMMARY JUDGMENT

Entitlement to summary judgment in favor of a foreclosing plaintiff is established, *prima facie*, by plaintiff's production of the mortgage, 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 Erobobo*, 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 defendant 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], *Zanfina v Chandler*, 79 AD3d 1031 [2d Dept 2010]; *Citibank, NA v Van Brunt Properties, LCC*, 95 AD3d 1158 [2d Dept 2012]). Defendant must then 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]). 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 MUST ESTABLISH STANDING

Where plaintiff's standing has been placed in issue by defendants' answer, plaintiff also must 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 77 [2d Dept 2015]; *US Bank, NA v Richard*, 151 AD3d 1001 [2d Dept 2017]; *Citimortgage v Rockefeller*, 155 AD3d 998 [2d 2017]; *US Bank, N. A. v Cohen*, 156 AD3d 844 [2d Dept 2017]). Plaintiff establishes its standing by demonstrating that, when the action was commenced, it was either the holder or assignee of the underlying note (*see Aurora Loan Servs., LLC v Taylor, supra*; *Wells Fargo Bank, NA v Rooney*, 132 AD3d 980 [2d Dept 2015]). A written assignment or physical delivery prior to the commencement of the action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident thereto (*see U.S. Bank, NA v Collymore*, 68 AD3d 752 [2d Dept 2009]; *Bank of N.Y. Mellon v Gales*, 116 AD3d 723 [2d Dept 2014]).

PLAINTIFF FAILS TO ESTABLISH 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]). Here plaintiff attempts to establish its standing through the affidavit of an AVP at Ditech Financial LLC f/k/a Green Tree Servicing LLC ("Ditech"), attorney in fact and servicer for plaintiff. The employee of Ditech establishes her ability to testify to the business records of Ditech pursuant to CPLR 4518 (a). But her affidavit fails to establish her ability to testify to plaintiff's business records pursuant to CPLR 4518 (a) or that she even reviewed those records. She fails to establish in admissible form evidence that plaintiff "was in possession of the note at the time this action was commenced" or that Ditech held the note at that time on behalf of plaintiff.

An affidavit of plaintiff's servicer's employee, which fails to establish the affiant's personal knowledge of business record keeping practices and procedures of plaintiff, is inadmissible and as such fails to provide proof establishing plaintiff's possession of the note prior to commencement of the action and therefore its standing (CPLR 4518; *see Aurora Loan Servs., LLC v Mercius*, 138 AD3d 650 [2d Dept 2016]; *Aurora Loan Servs v. Komarovsky*, 151 AD3d 924 [2d Dept 2017]; *Bank of New York Mellon v Lopes*, 158 AD3d 662 [2d Dept 2018]; *One West Bank, FSB vv Berino*, 158 AD3d 811 [2d Dept 2018]). Plaintiff's application to dismiss defendants' first affirmative defense is denied.

PLAINTIFF FAILS TO ESTABLISH DEFENDANTS' DEFAULT

Entitlement to summary judgment in favor of a foreclosing plaintiff is established, prima facie, by plaintiff's production of the mortgage, 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 Erobobo*, 127 AD3d 1176 [2d Dept 2015]; *Wells Fargo Bank, NA v Morgan*, 139 AD3d 1046 [2d Dept 2016]). In the same way the evidence submitted in support of the motion failed to establish, prima facie, plaintiff's standing to commence the action pursuant to CPLR 4518(a), the affidavit of plaintiff's servicer's representative fails to provide proof establishing defendants default in payment (*see also Fulton Holding Group, LLC v Lindoff, _AD3d_, 2018 N.Y. Slip Op. 07096 [2d Dept 2018]*).

AMENDMENT OF CAPTION TO SUBSTITUTE PARTIES

As plaintiff demonstrated that it had served Desiret Canales as "JANE DOE" occupying the mortgaged premises, that part of its motion to amend the caption to substitute Desiret Canales as party defendant in place of the defendant sued herein as "JANE DOE" is granted (CPLR 1024; *see Flagstar Bank v Bellafiore*, 94 AD3d 1044 [2d Dept 2012]). However that part of plaintiff's motion to amend the caption to substitute the NYS Department of Taxation and Finance as "JOHN DOE" is denied as that entity was served in Hauppauge, Suffolk County, NY and not as a tenant or occupant of the mortgaged premises. It appears to this court that the proper way to proceed is to

amend the pleadings by leave of court or stipulation pursuant to CPLR 3025 (b).

AMENDMENT OF VERIFIED COMPLAINT

Plaintiff's application to amend paragraphs 3 and 4 of the verified complaint *nunc pro tunc* to include the amount of the note and mortgage is \$260,000.00 and that on July 18, 2008 defendants executed a loan modification agreement creating an unpaid principal balance of \$260,027.51 is granted upon the proof submitted (CPLR 3025 (b); see *Long Is. Tit Agency, Inc. v Frisa*, 45 AD3d 649 [2d Dept 2007]).

**DEFENDANTS' REMAINING AFFIRMATIVE DEFENSES
DEEMED ABANDONED**

As to defendants' remaining 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]). Defendants second through fifth affirmative defenses are dismissed.

SUCCESSIVE SUMMARY JUDGMENT MOTIONS ALLOWED

Although multiple summary judgment motions are discouraged without a showing of newly discovered evidence or other sufficient cause, a court may properly entertain a subsequent summary judgment motion when it is substantively valid and when granting the motion will further the ends of justice while eliminating an unnecessary burden on court resources (see *Detko v McDonald's Restaurants of New York, Inc.*, 198 Ad2d 208 [2d Dept 1993]; *Valley National Bank v INI Holding, LLC*, 95 AD3d 1108 [2d Dept 2012]; *Kolel Damsek Eliezer, Inc. v Schlesinger*, 139 AD3d 810 [2d Dept 2016]). It is clearly appropriate to consider a second summary judgment motion where the court has already granted a party partial summary judgment and limited the issues to a few, or where such a motion would correct a simple defect, eliminating the burden on judicial resources which would otherwise require a trial (see *Rose v Horton Med. Ctr.*, 29 AD3d 977 [2d Dept 2006]; *Landmark Capital Investments, Inc. v Li-Shan Wang*, 94 AD3d 418 [1st Dept 2012]). The denial of a subsequent summary judgment motion which could be dispositive for the sole reason of the prohibition against second summary judgment motions has been held to be an improvident exercise of the court's discretion (see *Burbige v Siben & Ferber*, 152 AD3d 641 [2d Dept 2017]). Therefore, the court grants plaintiff the opportunity to file a successive motion for summary judgment on the issues remaining.

Such a motion is to be filed within 120 days of the date of this decision and order. Failure of plaintiff to avail itself of this opportunity will result in the court directing that a note of issue be filed and the action proceed to trial.

Plaintiff's proposed order is marked "not signed."

To monitor the progress of this action, a conference is scheduled in this part for **Wednesday, March 13, 2019 at 9:30 AM.**

This constitutes the Order and decision of the Court.

Dated: November 7, 2018


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