BNY Mellon v Mowla
2018 NY Slip Op 33228(U)
November 29, 2018
Supreme Court, Kings County
Docket Number: 506110/13
Judge: Noach Dear

At an IAS Term, Part FRP-1, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 29th day of November 2018.

P R E S E N T:

HON. NOACH DEAR,
J.S.C.

Index No.: 506110/13

_____ x

MS 4+5

BNY MELLON,

Plaintiff,

DECISION AND ORDER

-against-

FAIZUN MOWLA et al,

Defendant,

_____ x

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion:

Papers	**Numbered**
Motion(MS 4)	1
Opp/Cross (MS 5)	2
Reply/Opp to Cross	3
Cross-Reply	4

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Plaintiff moves for summary judgment and an order of reference. Wells Fargo (whose status will be discussed below) opposes and cross-moves for dismissal of the instant action based on an order issued in a parallel action.

I. Wells Became the Successor-in-Interest to MERS During the Pendency of this Action and is in Default

It is undisputed that Plaintiff served MERS and Associated Mortgage Bankers ("AMB") with

the summons and complaint in this action. Wells Fargo argues that it had already acquired the note originated by AMB in July 2013 and that the corresponding mortgage assignment from MERS was executed on 10/16/13 (between the filing of the instant action and service upon MERS and AMB) and recorded on 10/24/13 (which was after the date of service). As public record included no mention of Wells until after commencement and service upon its predecessors, service upon MERS and AMB (rather than Wells) was proper. The Court further notes that Wells' prior counsel, Gross Polowy, previously sought to have the action dismissed against it pursuant to 3215[c] - -implying that it was already a party (seemingly as successor in interest to MERS; see, Strauss Aff ¶1)– and stated that "Defendant's" (used therein to refer to Wells Fargo; see, *id.*) time to answer had already expired (see, id., ¶¶3-5).

Based on the foregoing, Wells became the successor-in-interest during the action to a defendant that was served. There was no necessity to serve it and it, like its predecessor-in-interest, remains in default. As such, its remaining arguments cannot be raised absent vacatur of its default – which has not been sought.

II. Even were the Court to Need to Reach Wells' Priority and Res Judicata Arguments, they are Unavailing

The Court is somewhat confused and troubled[1] by Wells' arguments as to priority. It is undisputed that Plaintiff's lien was both incurred and recorded prior to that of Wells. In its 2014 complaint, Wells repeatedly stated that Plaintiff's lien appeared to be "prior and adverse" (¶¶ 16, 19, 20, Schedule C) – rather than junior. Therein, its counsel argued that Plaintiff's lien "had been paid in full" (Schedule C; see also ¶¶15-16) – and its second cause of action (repeatedly misconstrued by

[1] Wells Fargo's papers appear to include serious misrepresentations of the record and directly contradict prior representations by its various counsel.

its current counsel) sought to extinguish it as being invalid rather than junior. In this action, Judge Fisher already found that Wells Fargo is "the holder of the **subordinate** lien" (Fisher 10/21/15 order, emphasis added). In its motion for an order of reference in the 2014 action, Plaintiff requested a referee to be appointed to determine the amount due, substitution of the Does, the caption to be amended, and for all non-answering defendants to be deemed in default – but no mention is made about judgment on its second cause of action and priority is not mentioned at all (again contrary to counsel's contention). The order of reference itself – submitted for signature by Wells' counsel in that action – also includes that the various defendants therein (including Plaintiff herein) were held to be in default – but again omits any mention of the second cause of action or priority (again contrary to counsel's contention).

Put differently, Wells Fargo has admitted throughout (until the instant motion) that it is in subordinate position and there has already been a judicial finding that Wells Fargo's lien is junior. Additionally, the 2014 complaint, motion for summary judgment, and order of reference are all silent on priority.

III. Plaintiff's Motion

Plaintiff moves for summary judgment against the Mowlas and default judgment against the remaining defendants (including Wells' predecessors). Though the Mowla's fail to oppose the motion, the Court is still required to consider their defenses.

Plaintiff has failed to demonstrate its standing. The affiant, an employee of the current servicer, states that its records reflect that Plaintiff was in possession of the original note at the commencement of the action. Such testimony –that another entity was in possession – is, at best, based on hearsay.

Plaintiff has also failed to demonstrate compliance with mortgage default notice requirements.

The affiant states that the notice was sent. However, per the letterhead, it appears that the letter originated with a prior servicer and was ostensibly sent by certified mail – which, per the terms of the mortgage, would require delivery rather than mailing to be effective.

Plaintiff has demonstrated that 1304 notices were not required as this was not a "home loan" – rather for investment purposes. Likewise, CPLR 3012-b is inapplicable.

The Mowlas "Other" defense and counterclaim both relate to Wells Fargo's mortgage and are irrelevant to Plaintiff's claims and, even if true, present neither a defense to this action nor a claim against Plaintiff.

IV. In Conclusion

Plaintiff's motion is granted in part. Mowla's 1304, 3012-b, and "other" defense and Mowla's counterclaim are stricken. (Their standing and default notice defenses remain.) All non-answering defendants are adjudged to be in default. The caption is amended to remove the "John Doe" and "Jane Doe" defendants. Plaintiff's motion is otherwise denied. Wells Fargo's cross-motion is denied in its entirety.

In light of the age of this case, Plaintiff to file a note of issue within 90 days of entry of this order and the parties are to proceed to trial (or, if Mowla fails to appear, for inquest).

ENTER:

Hon. Noach Dear, J.S.C.