

New York Community Bank v Florio

2013 NY Slip Op 30814(U)

April 3, 2013

Sup Ct, Suffolk County

Docket Number: 29798-11

Judge: Elizabeth H. Emerson

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**SUPREME COURT - STATE OF NEW YORK
IAS PART 8 - SUFFOLK COUNTY**

PRESENT: Hon. ELIZABETH H. EMERSON
Justice of the Supreme Court

MOTION DATE 6-29-12
ADJ. DATE 8-2-12
Mot. Seq. # 001 - Mot D

NEW YORK COMMUNITY BANK,

Plaintiff,

FEIN, SUCH & CRANE, LLP
Attorneys for Plaintiff
747 Chestnut Ridge Road, Suite 200
Chestnut Ridge, N. Y. 10977-6216

-against-

JOHN E. FLORIO, SHARON FLORIO;
BETHPAGE FEDERAL CREDIT UNION;
"JOHN DOE #1-5" AND "JANE DOE #1-5"
said names being fictitious, it being the intention
of Plaintiff to designate any and all occupants,
tenants, persons or corporations, if any,
having or claiming an interest in or lien
upon the premises being foreclosed herein,

THE RANALLI LAW GROUP, PLLC
Attorneys for Defendant John E. Florio
742 Veterans Memorial Highway
Hauppauge, N. Y. 11788

SHARON FLORIO
Defendant Pro Se
18 Islip Drive
Sound Beach, N. Y. 11789

Defendants,
_____x

BERKMAN, HENOCH, PETERSON
PEDDY & FENCHEL, P.C.
Attorneys for Defendant
Bethpage Federal Credit Union
100 Garden City Plaza
Garden City, N. Y. 11530

Upon the following papers numbered 1 to 28 read on this motion for summary judgment and order of reference; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17; ~~Notice of Cross Motion and supporting papers~~; Answering Affidavits and supporting papers 18 - 24; Replying Affidavits and supporting papers 25 - 28; Other _____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that this motion by the plaintiff pursuant to CPLR 3212 for summary judgment on its complaint, to strike the answer of the defendants JOHN FLORIO and SHARON FLORIO for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law 1321; and for leave to amend the caption of this action pursuant to CPLR 3025 (b), is granted to the extent indicated herein; and it is further

516-877-1769

ORDERED that William F. Mackey, Esq. with an office at 90 Miaeola Blvd, Miaeola, NY 11501 is hereby appointed Referee to ascertain and compute the amount due upon the note and mortgage documents which this action was brought to foreclose, and to examine and report whether the mortgaged premises can be sold as one parcel; and it is further

[Handwritten signature]

ORDERED that pursuant to CPLR 8003 (a) the Referee be paid the statutory fee for the computation of the amount due plaintiff; and it is further

ORDERED that by accepting this appointment the Referee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including but not limited to, section 36.2 (c) (“Disqualifications from appointment”) and section 36.2 (d) (“Limitations on appointments based upon compensation”); and it is further

ORDERED that the pleadings and papers served and filed in this action be amended by substituting the name of Bennett Hildreth as John Doe #1 and striking from the caption of this action the names of “John Doe #2 through John Doe #5” and “Jane Doe #1 through Jane Doe #5; and it is further

ORDERED that the caption of this action hereinafter appear as follows:

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK**

_____x
NEW YORK COMMUNITY BANK,

Plaintiff,

-against-

**JOHN E. FLORIO, SHARON FLORIO;
BETHPAGE FEDERAL CREDIT UNION;
and BENNETT HILDRETH,**

Defendants.

_____x
This is an action to foreclose a mortgage on premises known as 18 Islip Drive, Sound Beach, New York. On March 9, 1999, defendant John E. Florio executed a note on said premises with CFS Bank, which merged on January 31, 2001 with New York Community Bank (Community Bank), the plaintiff herein. The note was secured by a mortgage in the principal sum of \$94,500.00. Plaintiff, Community Bank, sent defendant Florio a notice of default dated November 8, 2010 stating that defendant had defaulted on his monthly loan payments beginning with the first installment due on August 1, 2010.

Plaintiff subsequently commenced this foreclosure action. In its complaint, plaintiff alleged that defendant John E. Flores had failed to pay the monthly payments due and as of the date of default, October 21, 2010, the amount due and owing was \$32,428.13.

By their answers, *pro se* defendants John E. Florio and Sharon Florio, in pertinent part, assert as a first affirmative defense that they have attempted to resolve this issue with the lender, that their loan modification has been denied and that they have been frustrated in their dealings with them. They further believe that the amount owed is incorrect and would like to have their account audited for an accurate figure.

Plaintiff now moves for summary judgment on its complaint contending that defendant Florio failed to comply with the terms of the loan agreement and mortgage and that his affirmative defenses lack merit. In support of its motion, plaintiff submits, among other things, the sworn affidavit of Donna Wilson, plaintiff's senior vice president; agreement and plan to merger, summons and complaint with attached deed, note executed by John E. Florio on March 9, 1999, mortgage executed by John E. Florio on March 9, 1999, You Could Lose Your Home notification dated March 2, 2011, notice of pendency, affidavits of service for the summons and complaint, notice of pendency and notice of default.

“[I]n an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default” (*Republic Natl. Bank of N.Y. v O’Kane*, 308 AD2d 482, 482, 764 NYS2d 635 [2d Dept 2003]; *see, Village Bank v Wild Oaks Holding*, 196 AD2d 812, 601 NYS2d 940 [2d Dept 1993]). Once a plaintiff has made this showing, the burden then shifts to defendant to produce evidentiary proof in admissible form sufficient to require a trial of their defenses (*see, Aames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]; *Household Finance Realty Corp. of New York v Winn*, 19 AD3d 545, 796 NYS2d 533 [2d Dept 2005]).

Here, plaintiff produced the note and the mortgage executed by defendant John E. Florio as well as evidence of defendant John E. Florio's nonpayment, thereby establishing a prima facie case as a matter of law (*see, Aames Funding Corp. v Houston, supra; Wells Fargo Bank Minnesota, Nat. Assn. v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). Plaintiff's senior vice president, Donna Wilson, stated in her affidavit that defendant Florio borrowed funds totaling \$94,500.00 and that defendant Florio's first date of default was October 21, 2010, that the total principal sum due as of that date was \$32,428.13 and that defendant had not cured the default. The law is clear that when a mortgagor defaults on loan payments, even if only for a day, a mortgagee may accelerate the loan, require that the balance be tendered or commence foreclosure proceedings, and equity will not intervene (*see, First Federal Sav. Bank v Midura*, 264 AD2d 407, 694 NYS2d 121, 122 [2d Dept 1999] *quoting New York Guardian Mortgage Corp. v Olexa*, 176 AD2d 399, 401, 574 NYS2d 107 [3d Dept 1991]). Once a mortgagor defaults on loan payments, a mortgagee is not required to accept less than the full repayment as demanded (*see, First Federal Sav. Bank v Midura*, 264 AD2d at 408). Ms. Wilson also stated in her affidavit that notice of default was mailed to John E. Florio at least 30 days prior to the acceleration of the subject loan. Ms. Wilson further stated in her affidavit that defendant John E. Florio failed to cure his default and thus, plaintiff accelerated the note. Thus, plaintiff's submission of the note and mortgage and the affidavit of its senior vice president established its prima facie entitlement to summary judgment (*see, Charter One Bank, FSB v Leone*, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007]).

In opposition to the motion, defendant John E. Florio, through his attorney, asks this court to exercise its equitable powers and attempt to give the defendant another opportunity to obtain a loan modification. In support of his opposition, defendant submits, among other things, his affidavit, an

amended verified answer dated June 12, 2012, notice of appearance, the subject note dated March 9, 1999, and, a self-generated mortgage amortization schedule. Defendant Sharon Florio did not submit any opposition to the motion.

In his affidavit, defendant John E. Florio explains that the subject premises was purchased in 1987 and is his residence. According to defendant Florio, when he was served with papers, he filed a pro-se answer to the complaint. Subsequently, he retained an attorney who prepared an amended verified answer with counterclaim and notice of appearance. Defendant Florio states that he borrowed the sum of \$94,500.00 on a 15 year loan from CFS Bank and that if he had not run into financial trouble, the mortgage would have been fully paid on April 1, 2004. In addition, defendant Florio believes that the monies claimed due and owing are not accurate and by his calculation he believes he owes the sum of \$30,495.17. According to defendant, he attended the initial foreclosure settlement conference without an attorney and was given loan modification paperwork to complete, which he admittedly did not complete. Another settlement conference was held on May 7, 2012 which defendant concedes he did not attend.

Plaintiff, by way of reply affirmation dated July 26, 2012, asserts that the action was commenced on September 23, 2011 to foreclose a mortgage securing a loan in the amount of \$94,500.00 made to the defendant on March 9, 1999 affecting the premises known as 18 Islip Drive, Sound Beach, New York; that defendant *pro se* interposed an answer to the complaint; that the plaintiff filed a request for judicial intervention and the matter was referred to the mandatory foreclosure settlement conference part; that the conference was scheduled for March 2, 2012, that defendant appeared at the March 2, 2012 conference and was directed to complete and submit a loan modification application to the plaintiff by March 16, 2012, that defendant failed to appear at the conference scheduled for May 7, 2012 and did not complete the necessary paperwork for a loan modification, that defendant John E. Florio attempted to interpose an amended answer, via counsel, on or about June 12, 2012 and same was rejected as untimely. In addition, plaintiff asserts that defendant's opposition has no legal basis.

Here, defendant John E. Florio has failed to submit any evidence raising a triable issue of fact rebutting plaintiff's showing or as to the merit of any of his affirmative defenses (*see, Wells Fargo Bank Minnesota v Perez*, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]). Once plaintiff has made a prima facie showing, it is incumbent on defendant "to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff" (*see, Cochran Inv. Co., Inc. v Jackson*, 38 AD3d 704, 834 NYS2d 198, 199 [2d Dept 2007] quoting *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 467, 664 NYS2d 345 [2d Dept 1997]). Defendant has failed to do so.

Therefore, the answers of defendants John S. Florio and Sharon Florio are stricken and plaintiff is granted summary judgment as against defendants John S. Florio and Sharon Florio. In addition, plaintiff's request for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is granted (*see generally, Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept. 1996]; *Bank of East Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept. 1994]).

Finally, the Court grants plaintiff's request that the pleadings and papers served and filed in this action be amended by substituting the name of Bennett Hildreth as John Doe #1 and striking from

the caption of this action the names of "John Doe #2 through John Doe #5" and "Jane Doe #1 through Jane Doe #5."

Plaintiff is directed to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court.

Dated: April 3, 2013

Elizabeth H. Emerson
J.S.E.

ELIZABETH H. EMERSON

 FINAL DISPOSITION X NON-FINAL DISPOSITION