

Nassau Educators Fed. Credit Union v O'Connor

2014 NY Slip Op 32961(U)

November 12, 2014

Supreme Court, Suffolk County

Docket Number: 09-47392

Judge: Jerry Garguilo

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 1-30-14
ADJ. DATE 11-12-14
Mot. Seq. # 001 - MG

-----X
NASSAU EDUCATORS FEDERAL CREDIT UNION.

Plaintiff,

- against -

KERRY A. O'CONNOR AND JENNIFER L. PIETRZYK, "JOHN DOE," "JANE DOE" and "XYZ CORPORATION" whose names are unknown to plaintiff, the persons or parties intended being the tenants, persons or corporations in Possession, if any, having a claim or interest.

Defendants.
-----X

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Upon the following papers numbered 1 to 15 read on this motion for summary judgment and an order of reference; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers ___; Replying Affidavits and supporting papers ___; Other ___; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this unopposed motion by plaintiff Nassau Educators Federal Credit Union pursuant to CPLR 3212 for summary judgment on its complaint as against defendants Kerry A. O'Connor (O'Connor) and Jennifer L. Pietrzyk (Pietrzyk), for leave to amend the caption of this action pursuant to CPLR 3025 (b) and, for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is granted; and it is further

ORDERED that the caption is hereby amended by substituting Patrick O'Connor for "John Doe" and by striking therefrom defendants "John Doe 1", "Jane Doe" and "XYZ Corporation"; and it is further

ORDERED that plaintiff is directed to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court; and it is further

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

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF SUFFOLK

 NASSAU EDUCATORS FEDERAL CREDIT UNION,

Plaintiff,

- against -

KERRY A. O'CONNOR AND JENNIFER L. PIETRZYK,
 PATRICK O'CONNOR

Defendants.

This is an action to foreclose a mortgage on premises known as 272 Locust Avenue, Babylon, New York. On April 27, 2006, defendants O'Connor and Pietrzyk executed a fixed rate note in favor of Nassau Educators Federal Credit Union agreeing to pay the sum of \$327,700.00 at the yearly rate of 6.625 percent. On the same date, defendants O'Connor and Pietrzyk executed a mortgage in the principal sum of \$327,700.00 on the subject property. The mortgage was recorded in Reel/Liber 21297, page 667, in the Suffolk County Clerk's Office.

A notice of default dated July 22, 2009 was sent to defendants O'Connor and Pietrzyk stating that they had defaulted on their note and mortgage and that the unpaid principal balance due was \$315,747.57. As a result of defendants' continuing default, plaintiff commenced this foreclosure action on November 30, 2009. In its complaint, plaintiff alleges in pertinent part that defendants breached their obligations under the terms of the note and mortgage by failing to make their monthly payments commencing with the May 1, 2009 installment. Defendants O'Connor and Pietrzyk interposed an answer with three affirmative defenses.

The Court's computerized records indicate that a foreclosure settlement conference was held on November 24, 2010 at which time this matter was referred as an IAS case since a resolution or settlement had not been achieved. Thus, there has been compliance with CPLR 3408 and no further settlement conferences are required.

Plaintiff now moves for summary judgment on its complaint contending that defendants breached their obligations under the terms of the note and mortgage by failing to tender payments commencing with the installment due on May 1, 2009. In support of its motion, plaintiff submits among other things: the sworn affidavit of Matthew Johnson, collections manager of Nassau Educators Federal Credit Union; the affirmation of James G. Marsh, Esq. in support of the instant motion; the affirmation of James G. Marsh, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the

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Courts (AO/431/11): the pleadings; the note and mortgage; notices pursuant to RPAPL 1320 and 1303; affidavits of service for the summons and complaint; an affidavit of service for the instant summary judgment motion upon defendants' counsel; and a proposed order appointing a referee to compute.

"[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 *Argent Mtge. Co., LLC v Mentesana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Once a plaintiff has made this showing, the burden then shifts to defendant to establish by admissible evidence the existence of a triable issue of fact as to a defense (see *Washington Mut. Bank v Valencia*, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]).

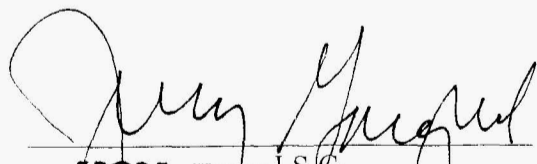
Here, plaintiff produced the note and mortgage executed by defendants O'Connor and Pietrzyk, as well as evidence of defendants' nonpayment, thereby establishing a prima facie case as a matter of law (see *Wells Fargo Bank Minnesota, Natl. Assn. v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). Matthew Johnson avers that as of January 13, 2014 there was due and owing to plaintiff the amount of \$315,747.57; that by letter dated July 22, 2009, a notice of default was sent to defendants; and, that defendants have not cured the default.

Defendants O'Connor and Pietrzyk have not submitted opposition to the motion. Defendants' answer is insufficient, as a matter of law, to defeat plaintiff's unopposed motion (see *Argent Mtge. Co., LLC v Mentesana*, 79 AD3d 1079, 915 NYS2d 591; *Citibank, N.A. v Souto Geffen Co.*, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]; *Greater N.Y. Sav. Bank v 2120 Realty Inc.*, 202 AD2d 248, 608 NYS2d 463 [1st Dept 1994]). Since no opposition to the instant motion was filed by defendants, no triable issue of fact was raised in response to plaintiff's prima facie showing (see *Flagstar Bank v Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Wells Fargo Bank Minnesota v Perez*, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]; see also *Zanfini v Chandler*, 79 AD3d 1031, 912 NYS2d 911 [2d Dept 2010]).

Based upon the foregoing, the motion for summary judgment is granted against defendants O'Connor and Pietrzyk. Plaintiff's request for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is also granted (see *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]).

The proposed order appointing a referee to compute pursuant to RPAPL 1321 is signed simultaneously herewith as modified by the court.

Dated: 11/12/14


 HON. JERRY GARGUILO

FINAL DISPOSITION NON-FINAL DISPOSITION