

Citimortgage, Inc. v Levy
2014 NY Slip Op 33488(U)
December 22, 2014
Supreme Court, Suffolk County
Docket Number: 10822/11
Judge: Jeffrey Arlen Spinner
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 3-19-14
ADJ. DATE _____
Mot. Seq. # 002 - MG

-----X		
CITIMORTGAGE, INC.,	:	DAVIDSON FINK LLP
	:	Attorney for Plaintiff
	:	28 East Main Street, Suite 1700
	:	Rochester, New York 14614
	:	
Plaintiff,	:	
	:	
- against -	:	
	:	
	:	ELAINE LEVY, ProSe
ORAL LEVY; ELAINE LEVY; CLERK OF THE	:	84 Locust Drive
RIVERHEAD TOWN JUSTICE COURT;	:	Amityville, New York 11701
CONTINENTAL MORTGAGE BANKERS, INC.,	:	
D/B/A FINANCIAL EQUITIES; JOSEPH H.	:	ORAL LEVY, ProSe
LEVINE, M.D., P.C.; SUFFOLK COUNTY	:	84 Locust Drive
CLERK; UNITED STATES OF AMERICA	:	Amityville, New York 11701
ACTING THROUGH THE IRS; UNITED	:	
STATES OF AMERICA ACTING THROUGH	:	
THE SECRETARY OF HOUSING AND URBAN	:	
DEVELOPMENT; WELLS FARGO BANK, N.A.,	:	
SUCCESSOR BY MERGER TO WELLS FARGO	:	
HOME MORTGAGE, INC., F/K/A NORWEST	:	
MORTGAGE, INC.; and "JOHN DOE" and	:	
"MARY DOE," (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.)	:	
	:	
	:	
Defendants.	:	
-----X		

Upon the following papers numbered 1 to 11, read on this motion for summary judgment and an order of reference; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; ~~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 CitiMortgage, Inc., for summary judgment on its complaint as against defendants Oral Levy and Elaine Levy (defendants), for leave to amend the

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caption of this action pursuant to CPLR 3025 (b), for leave to reform the legal description 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 striking therefrom defendants "John Doe" and "Mary Doe "; 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

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

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF SUFFOLK

 CITIMORTGAGE, INC.,

x

Plaintiff,

- against -

:

ORAL LEVY; ELAINE LEVY; CLERK OF THE
 RIVERHEAD TOWN JUSTICE COURT;
 CONTINENTAL MORTGAGE BANKERS, INC.,
 D/B/A FINANCIAL EQUITIES; JOSEPH H.
 LEVINE, M.D., P.C.; SUFFOLK COUNTY
 CLERK; UNITED STATES OF AMERICA
 ACTING THROUGH THE IRS; UNITED
 STATES OF AMERICA ACTING THROUGH
 THE SECRETARY OF HOUSING AND URBAN
 DEVELOPMENT; WELLS FARGO BANK, N.A.,
 SUCCESSOR BY MERGER TO WELLS FARGO
 HOME MORTGAGE, INC., F/K/A NORWEST
 MORTGAGE, INC.;

Defendants.

 x

This is an action to foreclose a mortgage on premises known as 84 Locust Drive, Amityville, New York. On June 23, 2006, defendants executed a fixed rate note in favor of 1st Republic Mortgage Bankers Inc. (1st Republic) agreeing to pay the sum of \$304,500.00 at the yearly rate of 5.500 percent. On the same date, defendants executed a mortgage in the principal sum of \$304,500.00 on the subject

property. The mortgage indicated 1st Republic to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of 1st Republic. The mortgage was recorded on July 12, 2006 in the Suffolk County Clerk's Office. Thereafter, on February 18, 2011, the mortgage was transferred by assignment of mortgage from MERS as nominee for 1st Republic to plaintiff CitiMortgage. The assignment of mortgage was recorded on March 4, 2011 in the Suffolk County Clerk's Office.

CitiMortgage sent a notice of default dated November 30, 2010 to defendants stating that they had defaulted on their note and mortgage and that the amount past due was \$28,365.40. As a result of defendants' continuing default, plaintiff commenced this foreclosure action on March 31, 2011. 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 February 1, 2010 installment. Defendants interposed an answer with affirmative defenses.

The Court's computerized records indicate that a foreclosure settlement conference was held on July 11, 2011 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. In support of its motion, plaintiff submits among other things: the sworn affidavit of Michelle Roark, vice president-document control of CitiMortgage; the affirmation of William A. Santmyer, Esq. in support of the instant motion; the affirmation of William A. Santmyer, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the pleadings; the note, mortgage and an assignment of mortgage; notices pursuant to RPAPL 1320, 1304 and 1303; affidavits of service for the summons and complaint; an affidavit of service for the instant summary judgment motion upon defendants; 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 Montesana*, 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, 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]). Michelle Roark avers that defendants defaulted under the terms and conditions of the note and mortgage by failing to tender payment for the monthly installment due on February 1, 2010; that a notice of default was sent to defendants on November 30, 2010; that a 90 day pre-foreclosure notice was sent to defendants on April 8, 2010; and, that the default has not been cured.

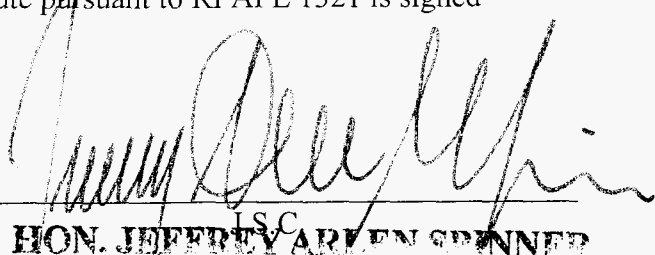
Defendants have not submitted opposition to the motion. Defendants' answer is insufficient, as a

matter of law, to defeat plaintiff's unopposed motion (*see Argent Mtge. Co., LLC v Montesana*, 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 Levy. 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: DEC 22 2014



HON. JEFFREY ARLEN SPINNER
LSC

 FINAL DISPOSITION X NON-FINAL DISPOSITION