

Wells Fargo Bank, N.A. v Martin

2015 NY Slip Op 30774(U)

April 23, 2015

Supreme Court, Suffolk County

Docket Number: 11-9797

Judge: James C. Hudson

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**Supreme Court State of New York
Suffolk County J.A.S. Part XL**

PRESENT:

HON. JAMES HUDSON
Acting Justice of the Supreme Court

X-----X
WELLS FARGO BANK, N.A. A/K/A
WACHOVIA MORTGAGE A DIVISION OF
WELLS FARGO BANK, N.A., F/K/A
WACHOVIA MORTGAGE, FSB, F/K/A WORLD
SAVING BANK, FSB,

Plaintiff,

- against -

WILLIAM MARTIN, ELIZABETH MARTIN,
CLERK OF THE SUFFOLK COUNTY DISTRICT
COURT, PORTFOLIO RECOVERY
ASSOCIATES, LLC, STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY, AS
SUBROGEE OF MCCOY, FRANK A.,
DEPARTMENT OF TREASURY INTERNAL
REVENUE SERVICE, "JOHN DOE 1 to JOHN
DOE 25", said names being fictitious, the persons
or parties intended being the persons, parties,
corporations or entities, if any, having or claiming
an interest in or lien upon the mortgaged premises
described in the complaint,

Defendants

X-----X

MOTION DATE 2-20-14
ADJ. DATE _____
MOT. SEQ. # 001 - MG

DRUCKMAN LAW GROUP PLLC
Attorneys for Plaintiff
242 Drexel Avenue, Suite 2
Westbury, NY 11590

DAVID LEE HELLER
Attorney for Defendants
WILLIAM MARTIN and ELIZABETH MARTIN
3334 Noyac Road, Suite 1
Sag Harbor, NY 11963

Upon the following papers numbered 1 to 21 read on this motion for summary judgment and an order of reference;
Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; ~~Notice of Cross Motion and supporting papers _____~~;
Affirmation in Opposition and supporting papers 13 -17; Corrected Affirmation in Opposition and supporting papers 18 - 21;
Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff Wells Fargo Bank, N.A. a/k/a Wachovia Mortgage
a Division of Wells Fargo Bank, N.A., f/k/a Wachovia Mortgage, FSB, f/k/a World Saving Bank,

FSB, (Wells Fargo) pursuant to CPLR 3212 for, *inter alia*, summary judgment on its complaint against defendants William Martin and Elizabeth Martin (defendants), to amend the caption of this action pursuant to CPLR 3025 (b), 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 the names of James Martin, Christopher Martin and Jonathan Martin in place of “John Doe #1” through “John Doe #3” and by striking therefrom defendants “John Doe #4” through “John Doe #25”; 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

x_____x
WELLS FARGO BANK, N.A. A/K/A WACHOVIA
MORTGAGE A DIVISION OF WELLS FARGO BANK, N.A.,
F/K/A WACHOVIA MORTGAGE, FSB, F/K/A WORLD
SAVING BANK, FSB,

Plaintiff,

- against -

WILLIAM MARTIN, ELIZABETH MARTIN, CLERK OF
THE SUFFOLK COUNTY DISTRICT COURT, PORTFOLIO
RECOVERY ASSOCIATES, LLC, STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY, AS SUBROGEE
OF MCCOY, FRANK A., DEPARTMENT OF TREASURY
INTERNAL REVENUE SERVICE, JAMES MARTIN,
CHRISTOPHER MARTIN, JONATHAN MARTIN,

Defendants.

x_____x

This is an action to foreclose a mortgage on property known as 30 NW Landing Road, East Hampton, New York. On January 4, 2008, defendants executed an adjustable rate note in favor of World Savings Bank, FSB, a Federal Savings Bank (World Savings) agreeing to pay the sum of \$650,000.00 at the starting yearly rate of 7.800 percent. On said date, defendants also executed a mortgage in the principal sum of \$650,000.00 on the subject property. The mortgage was recorded

on January 16, 2008 in the Suffolk County Clerk's Office. Thereafter, as a result of a series of mergers and acquisitions, Wells Fargo acquired World Savings. Plaintiff asserts that at the time this action was commenced, it was the owner and holder of the subject note and mortgage.

A notice of default dated November 29, 2010 was sent to defendants stating that they had defaulted on their mortgage loan and that the amount past due was \$11,244.76. As a result of defendants continuing default, plaintiff commenced this foreclosure action on March 22, 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 the monthly installment due on October 15, 2010 and subsequent payments thereafter. Defendants interposed a verified answer with two affirmative defenses.

The Court's computerized records indicate that a foreclosure settlement conference was held on May 1, 2013 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 Rosa M. Gutierrez, vice president loan documentation of Wells Fargo; the affirmation of Lisa M. Browne, Esq. in support of the instant motion; the affirmation of Alyssa H. Solarsh, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the pleadings; the note and mortgage; notices pursuant to RPAPL 1320, 1304 and 1303; affidavits of service for the summons and complaint; and, an affidavit of service for the instant summary judgment motion upon defendants' counsel. Defendants have submitted opposition to the summary judgment motion.

“[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” (*see Republic Natl. Bank of N.Y. v O’Kane*, 308 AD2d 482, 482, 764 NYS2d 635 [2d Dept 2003]; *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 on their defenses (*see, Ames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]; *Household Fin. Realty Corp. of New York v Winn*, 19 AD3d 545, 796 NYS2d 533 [2d Dept 2005]).

Here, plaintiff has established its *prima facie* entitlement to summary judgment against the answering defendants as such papers included a copy of the mortgage, the unpaid note together with due evidence of their default in payment under the terms of the loan documents (*see* CPLR 3212; RPAPL 1321; *Neighborhood Hous. Serv. of New York City v Hawkins*, 97 AD3d 554, 947 NYS2d 321 [2d Dept 2012]; *Baron Assoc., LLC v Garcia Group Enter.*, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; *Citibank, N.A. v Van Brunt Prop., LLC*, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]; *Archer Capital Fund, L.P. v GEL, LLC*, 95 AD3d 800, 944 NYS2d 179 [2d Dept 2012];

Swedbank, AB v Hale Ave. Borrower, LLC, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]; *Rossrock Fund II, L.P. v Osborne*, 82 AD3d 737, 918 NYS2d 514 [2d Dept 2011]). Rosa M. Gutierrez 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 October 15, 2010; that at least 90 days prior to the commencement of the action, plaintiff provided RPAPL 1304 notice to defendants; and, that as of March 22, 2011, plaintiff was in possession of the note and was the mortgagee of record.

It was thus incumbent upon the answering defendants to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's *prima facie* showing or in support of the affirmative defenses asserted in their answer or otherwise available to them (*see, Flagstar Bank v Bellafore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Grogg Assocs. v South Rd. Assocs.*, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; *Wells Fargo Bank v Karla*, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; *Washington Mut. Bank v O'Connor*, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]; *J.P. Morgan Chase Bank, N.A. v Agnello*, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; *Aames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]).

Here defendants' contention that plaintiff's summary judgment motion should be denied in order to afford defendants an opportunity to obtain discovery is unavailing. CPLR§ 3212(f) provides that "should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just". Appellate case authorities have long instructed that to avail oneself of the safe harbor this rule affords, the claimant must "offer an evidentiary basis to show that discovery may lead to relevant evidence and that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff" (*Martinez v Kreychmar*, 84 AD3d 1037, 923 NYS2d 648 [2d Dept 2011]; *see Garcia v Lenox Hill Florist III, Inc.*, 120 AD3d 1296, 993 NYS2d 86 [2d Dept 2104]; *Seaway Capital Corp. v 500 Sterling Realty Corp.*, 94 AD3d 856, 941 NYS2d 871 [2d Dept 2012]). In addition, the party asserting the rule must demonstrate that he or she made reasonable attempts to discover facts which would give rise to a genuine triable issue of fact on matters material to those at issue (*see, Swedbank, AB v Hale Ave. Borrower, LLC*, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]). The opposing papers submitted by defendants were insufficient to satisfy the aforementioned statutory burden. Thus, defendants failed to sufficiently demonstrate that they made reasonable attempts to discover the facts which would give rise to a triable issue of fact or that further discovery might lead to relevant evidence (*see* CPLR 3212 [f]; *Anzel v Pisotino*, 105 AD3d 784, 962 NYS2d 700 [2d Dept 2013]; *Cortes v Whelan*, 83 AD3d 763, 922 NYS2d 419 [2d Dept 2011]; *Sasson v Setina Mfg. Co., Inc.*, 26 AD3d 487, 810 NYS2d 500 [2d Dept 2006]). Defendants' claim is thus rejected as unmeritorious.

As to defendants' assertion of lack of standing, it is well established that "where a defendant does not challenge a plaintiff's standing, the plaintiff may be relieved of its obligation to prove that it is the proper party to seek the requested relief." (*Wells Fargo Bank Minnesota Natl. Assn. v*

Mastropaolo, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). The Court further held that “an argument that a plaintiff lacks standing, if not asserted in the defendant’s answer or in a pre-answer motion to dismiss the complaint, is waived pursuant to CPLR 3211(e)” [citations omitted] (see, *Wells Fargo Bank Minn., NA v Mastropaolo*, 42 AD3d 239; see also *Deutsche Bank Natl. Trust Co. v Hussain*, 78 AD3d 989, 912 NYS2d 595 [2d Dept. 2010]; *Countrywide Home Loans Serv., LP v Albert*, 78 AD3d 983, 912 NYS2d 96 [2d Dept 2010]). Based upon the foregoing, defendants’ assertion of a defense sounding in standing is unavailing since the defendants waived such defense by failing to assert it in a timely pre-answer motion to dismiss or as an affirmative defense in their answers (see, *Deutsche Bank Natl. Trust Co. v Hussain*, 78 AD3d 989, citing *Deutsche Bank Natl. Trust Co. v Young*, 66 AD3d 819, 886 NYS2d 619 [2d Dept 2009]).

With respect to their remaining affirmative defenses, defendants have failed to raise any triable issues of fact. Notably, the defendants did not deny having received the loan proceeds and having defaulted on their loan payments in their opposition papers (see *Citibank, N.A. v Souto Geffen Co.*, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]). Accordingly, the motion for summary judgment is granted against the answering defendants. That branch of the motion seeking to fix the defaults as against the remaining defendants who have not answered or appeared herein is granted. 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, *Green Tree Serv. v Cary*, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]; *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: APRIL 23, 2015
RIVERHEAD, NY



HON. JAMES HUDSON, A.J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION