

HSBC Bank USA, N.A. v Fuller

2011 NY Slip Op 30749(U)

March 31, 2011

Supreme Court, Albany County

Docket Number: 6373-09

Judge: Joseph C. Teresi

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

HSBC BANK USA, N.A. F/K/A HSBC
BANK USA F/K/A MARINE MIDLAND
BANK SUCCESSOR BY MERGER TO
FIRST FEDERAL SAVINGS AND LOAN
ASSOCIATION OF ROCHESTER,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 6373-09
RJI NO. 01-10-100100

JEFFREY FULLER A/K/A JEFFREY A. FULLER,
KATHLEEN HARRISON FULLER,

JOHN DOE (Said name being fictitious, it being the
intention of Plaintiff to designate any and all
occupants of premises being foreclosed herein, and
any parties, corporations or entities, if any, having or
claiming an interest or lien upon the mortgaged premises.),

Defendants.

Supreme Court Albany County All Purpose Term, March 17, 2011
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Steven J. Baum, P.C.
Joseph F. Gogan, Esq.
Attorneys for Plaintiff
220 Northpointe Parkway, Suite G
Amherst, New York 14228

Michael Phillip Weinstein, Esq
Former Attorney for Defendants Jeffrey and Kathleen Fuller
10 Overlook Drive
Voorheesville, New York 12186

Jeffrey and Kathleen Fuller
Defendants, Pro Se
9 Debbie Court
Albany, New York 12205

TERESI, J.:

Plaintiff commenced this action to foreclose the mortgage it holds on property owned by Jeffrey and Kathleen Fuller (hereinafter “the Fullers”). Issue was joined by the Fullers, and discovery is ongoing. This Court held a mandatory settlement conference (CPLR §3408) in this action on June 9, 2010.

Plaintiff now moves for summary judgment, for the appointment of a referee, to amend the caption of this action¹ to add “JOHN DOE” as a Defendant and for a default judgment against the non-appearing Defendants. The Fullers both oppose the motion and cross move² to dismiss the complaint. Because Plaintiff demonstrated its entitlement to summary judgment and the appointment of a referee, those portions of its motion are granted. The balance of Plaintiff’s motion and the Fullers’ cross-motion are, however, unsupported on this record and denied.

Considering first Plaintiff’s motion for summary judgment, it seeks “a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue.” (Napierski v. Finn, 229 AD2d 869 [3d Dept. 1996]). On a summary judgment motion, “[e]ntitlement to a judgment of foreclosure may be established, as a matter of law, where a mortgagee produces both the mortgage and unpaid note, together with evidence of the mortgagor’s default, thereby shifting the burden to the mortgagor to demonstrate, through both competent and admissible evidence, any defense which could raise a question of fact.” (HSBC Bank USA v. Merrill, 37 AD3d 899,

¹ The Fullers’ opposition does not oppose Plaintiff’s motion to amend the caption to the extent it seeks to delete its address therefrom. As such, this portion of Plaintiff’s motion to amend is granted.

² To the extent the Fullers’ opposition/motion are premised upon their assertion that no mandatory settlement conference had been held herein, because this Court has held a mandatory settlement conference in this action such objections are moot and will not be further addressed.

900 [3d Dept. 2007]; Charter One Bank, FSB v. Leone, 45 AD3d 958 [3d Dept. 2007]).

Here, Plaintiff properly produced both the note and mortgage being foreclosed and sufficiently demonstrated the Fullers' default. Attached to Plaintiff's motion papers are the "Note" and duly recorded "Mortgage", demonstrating the Fullers' indebtedness to Sibley Mortgage Corporation. Plaintiff further attached a duly recorded "Assignment", wherein both the Note and Mortgage were assigned by Sibley Mortgage Corporation to First Federal Savings and Loan Association of Rochester. A Vice President and an Assistant Vice President of Plaintiff both alleged that Plaintiff is a successor by merger to First Federal Savings and Loan Association of Rochester. Additionally, both the Vice President and Assistant Vice President reviewed Plaintiff's business records to establish the Fullers' default in payment of the Note and Mortgage. From the foregoing, Plaintiff duly demonstrated its entitlement to judgment as a matter of law, shifting the burden of proof onto the Fullers. (HSBC Bank USA v. Merrill, supra).

In opposition, the Fullers failed to raise a triable issue of fact.

The Fullers' assertion that summary judgment is premature because discovery is ongoing and their demands have not been answered, is not supported with an "evidentiary showing suggesting that completion of discovery will yield material and relevant evidence." (Saratoga Assoc. Landscape Architects, Architects, Engrs. & Planners, P.C. v Lauter Dev. Group, 77 AD3d 1219, 1222 [3d Dept. 2010], quoting Zinter Handling, Inc. v. Britton, 46 AD3d 998 [3d Dept. 2007]). Rather, the Fullers speculation about Plaintiff's lack of standing constitutes "mere hope that evidence sufficient to defeat the motion may be uncovered." (Stoian v Reed, 66 AD3d 1278, 1280 [3d Dept. 2009]).

Similarly unavailing is the Fuller's contention that this action must be dismissed due to

their entering into a loan modification with Plaintiff. The Fullers attached Plaintiff's offer to modify their loan, but such offer was explicitly conditional. It stated that "[t]his modification approval is subject to the condition of clear title, evidenced by a title report... [Plaintiff] reserves the right to cancel the offer to modify should this condition not be satisfied." Both Mr. and Ms. Fuller acknowledged the existence of a "Federal Tax Lien" on their premises and neither allege that such lien has been satisfied, to establish their property's "clear title." As such, the Fullers failed to raise a triable issue of fact as to their acceptance of a loan modification or the right of Plaintiff to continue this foreclosure action.

Nor have the Fullers sufficiently demonstrated Plaintiff's bad faith in negotiating a modification. Although the Fullers allege circumstances involving Plaintiff's miscommunication during the loss mitigation process, because Plaintiff made a mitigation offer which the Fullers wished to accept, but were unable to because of a lien attached to their premises, the Plaintiff's mitigation efforts cannot rise to the level of bad faith.

Accordingly, because Plaintiff demonstrated its right to judgment as a matter of law and the Fullers raised no triable issue of fact, Plaintiff's motion for summary judgment is granted. Correspondingly, the Fullers motion to dismiss the complaint is denied.

With Plaintiff's motion for summary judgment granted, a referee must be appointed. (Neighborhood Housing Services of New York City, Inc. v. Meltzer, 67 AD3d 872 [2d Dept. 2009]; Vermont Fed. Bank v Chase, 226 AD2d 1034 [3d Dept. 1996]; Bank of E. Asia v Smith, 201 AD2d 522 [2d Dept. 1994]). Accordingly, Plaintiff's motion for the appointment of a referee is granted. Plaintiff shall submit a proposed order of reference in ninety days of the date of this Decision and Order, on notice to the Fullers.

Turning next to Plaintiff's motion to amend the caption of the action to include an unidentified "JOHN DOE" tenant, although its "John Doe" caption would "fairly apprise [a proposed defendant that he was an]... intended defendant" the amendment request is insufficiently supported. (Olmsted v. Pizza Hut of America, Inc., 28 AD3d 855 [3d Dept. 2006], CPLR §3025). To support this portion of its motion Plaintiff submits its attorney's affirmation, an Assistant Vice President's affidavit and an "affidavit of service", not one of which is of any probative value because they are not based upon personal knowledge of the "JOHN DOE" Defendant's status as a tenant. (2 North Street Corp. v. Getty Saugerties Corp., 68 AD3d 1392 [3d Dept. 2009]; Groboski v. Godfroy, 74 AD3d 1524 [3d Dept. 2010]). Moreover, the Fullers specifically allege that they reside at the premises with their children, and have no tenants living with them. Accordingly, as Plaintiff failed to demonstrate its entitlement to amend the caption of the action to include an unidentified "JOHN DOE" tenant, this portion of their motion is denied.

Plaintiff likewise failed to demonstrate its entitlement to a default judgment against the non appearing Defendants, because there are no such non-appearing Defendants.

Notwithstanding the above, this Decision and Order is stayed for a period of ninety days because this Court has yet to receive the required Attorney's Affirmation certifying that counsel has taken reasonable steps - including inquiry into their clients careful review of papers filed in the action - to insure that the case is free of any deficiencies in notarization and "robosigning" of supporting documents, as recently directed by Administrative Order. As such, Plaintiff's attorney shall deliver his/her Affirmation to this Court within ninety days of the date of this Decision and Order. The form for the Affirmation is available on the Unified Court System public website (www.nycourts.gov). In the event this Court does not receive the Plaintiff's

Attorney's Affirmation within ninety days, this Decision and Order shall be vacated and this file will be marked off the calendar pursuant to CPLR §3404.

The Court is also aware, through a conference held on March 30, 2011, that Defendants have submitted to Plaintiff an application and requested documents for a mortgage modification. Plaintiff's counsel represents that a full and complete review of that application will be made within sixty days. Plaintiff is directed to expedite that review and regularly communicate to defendants on the status and progress of that review both by postal mail and telephone in an effort to resolve this case in good faith.

This Decision and Order is being returned to the attorneys for the Plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: March 31, 2011
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Affirmation of Joseph Gogan, dated March 31, 2010; Notice of Motion, dated March 16, 2010, Affidavit of Kevin Elliott, dated December 10, 2009, with attached Exhibits A-J.
2. Notice of Cross-Motion, dated May 5, 2010; Affirmation of Michael Weinstein, dated May 4, 2010, with attached Exhibits A-D; Affidavit of Kathleen Fuller, dated May 4, 2010, with attached unnumbered exhibit and Exhibits 1-13 (including Affidavit of Jeffery Fuller, dated May 4, 2010).
3. Affirmation of Amy Rohe-Kipp, dated November 30, 2010, with attached Exhibits A-B.