

Kondaur Capital Corp. v Argyros

2013 NY Slip Op 30479(U)

February 20, 2013

Supreme Court, Queens County

Docket Number: 700769/2012

Judge: Robert J. McDonald

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MEMORANDUM

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

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KONDAUR CAPITAL CORPORATION, Index No.: 700769/2012

Plaintiff, Motion Date: 12/21/12

- against - Motion No.: 63

CHRISTOPHER ARGYROS, WMC MORTGAGE Motion Seq.: 1

CORP., NYS DEPARTMENT OF TAXATION AND
FINANCE, NEW YORK CITY PARKING
VIOLATIONS BUREAU, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, NEW YORK
CITY TRANSIT ADJUDICATION BUREAU and
"JOHN DOE #1" THROUGH "JOHN DOE #10."
the last ten names being fictitious
and unknown to plaintiff, the person
or parties intended being the persons
or parties, if any, having or claiming
an interest in or lien upon the
mortgage premises described in the
complaint,

Defendants.

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The following papers numbered 1 to 20 were read on this motion by the plaintiff for an order striking the answer with affirmative defenses of defendant, Christos Argyros; granting summary judgment for the relief demanded in the verified complaint pursuant to CPLR 3212; substituting certain named defendants as necessary party defendants in stead and place of "John Doe # 1 through John Doe # 9; and pursuant to RPAPL § 1321 appointing a referee to ascertain and compute the amount due to the plaintiff:

Papers
Numbered

Notice of Motion Affidavits-Exhibits-Memo of Law.....1 - 7
Affirmation in Opposition-Affidavits8 - 12
Reply Affirmation.....13 - 20

In this mortgage foreclosure action, plaintiff moves for an order striking the answer with affirmative defenses of defendant Christos Argyros; granting summary judgment against defendant Argyros on the grounds that the answer contains no valid defense and that no triable issue of fact exists; granting a default judgment against the remaining defendants who have not answered; appointing a referee to compute the sums due and owing to plaintiff; and amending the caption.

This foreclosure action pertains to the property located at 25-88 41st Street, Astoria, New York. The property is not owner occupied and is leased to tenants. Based upon the record before this court the defendant entered into a mortgage with WMC Mortgage Corp. on August 30, 2006 in the principal amount of \$548,000.00. Defendant also executed and delivered an "Adjustable Rate Note" to WMC Mortgage Corp. acknowledging the loan, the rate of interest, and the monthly installments. The plaintiff asserts that defendant defaulted on his mortgage when he failed to make his monthly mortgage payments beginning in October 2006.

The plaintiff subsequently accelerated the defendant's mortgage and brought an action to foreclose by filing a lis pendens and summons and complaint on May 3, 2012. Counsel asserts that all of the defendants have been duly served with a copy of the summons and verified complaint. Plaintiff also asserts that it is the holder of the note and the mortgage and has complied with RPAPL§ 1304 by sending a 90 day notice and has also sent notices in compliance with RPAPL § 1306. The complaint states that the amount due to the plaintiff as of April 25, 2012 totals \$861,532.00 which consists of the entire principal balance, interest from 9/01/06 through 04/25/12, late charges, escrow advances and corporate advances.

Defendant served a verified answer on June 19, 2012 containing a general denial and asserting eleven affirmative defenses including lack of personal jurisdiction, failure to serve a notice of default, violation of the Federal Truth in Lending Act, improper rejection of payments tendered, predatory lending and misrepresentation regarding the adjustable rate mortgage, violation of debt collection practices, fraud and misrepresentation, unclean hands, lack of standing to prosecute, champerty, and release of lien on one of the lots belonging to the defendant.

In support of the motion for summary judgment, the plaintiff submits, the affirmation of counsel, Michael P. Amodio, Esq., the affidavit of William Suh, Foreclosure Specialist for Kondaur Capital Corporation, a copy of the note and mortgage, copies of the affidavits of service on all the defendants; a copy of the pleadings; a copy of the mortgage foreclosure certificate

describing the first and second assignments of the mortgage; 90 day notice of intent to foreclose dated December 30, 2011; copy of the RPAPL 1304 notices sent to the defendant with the summons and complaint; and a customer account activity statement.

In his affirmation, plaintiff's counsel asserts that at the time the action was commenced plaintiff Kondaur Capital was the holder of the note and mortgage. The record contains a copy of the mortgage and the note with the allonge indorsed in blank dated October 26, 2009. Counsel asserts that the endorsement of the note in blank made the instrument payable to plaintiff as bearer. Plaintiff also submits a copy of "Affidavit of Possession of Note" executed by Hanh Nguyen, Collateral Manager for Kondaur Capital Corporation stating that based upon his personal knowledge and review of the business records the original note was in the possession of Kondaur's document custodian, Deutsche Bank as of January 15, 2010. Defendant Christos Argyros is named as the mortgagor and payor on the note. Counsel asserts that the plaintiff was served with a 90 day notice pursuant to RPAPL 1304 and with all notices in compliance with RPAPL 1303. Counsel also asserts that the defendant's answer contains only a general denial but does not affirmatively assert that the delinquent payments required by the note and mortgage have been made. In addition, counsel contends that defendant's defense of improper service has been waived as the defendant failed to move to dismiss the complaint for lack of personal jurisdiction within 60 days from service of his answer pursuant to CPLR 3211(e).

The affidavit of William Suh, Foreclosure Specialist for Kondaur Capital Corporation states that he is in charge of servicing the loan in question and that he reviewed the entire file. He states that plaintiff failed to make his monthly payments on the mortgage commencing October 1, 2006 and that demand for payment was made but that no payments have been received. He states that the affirmative defense of lack of jurisdiction has been waived, that plaintiff has complied with all conditions precedent to filing the action and that the defendant has failed to submit specific allegations to support the remaining conclusory affirmative defenses.

Counsel states that based upon the evidence submitted, the plaintiff has made a prima facie showing that it is entitled to a judgment of foreclosure and sale. Further counsel asserts that the plaintiff was lawfully served with a summons and complaint and that the court therefore has personal jurisdiction. In addition, the plaintiff asserts, contrary to the defendant's contention, that it had standing to bring the action by presenting sufficient evidence of its possession of the note and mortgage prior to the commencement of the action.

It is well settled that a Plaintiff in a mortgage foreclosure action establishes a prima facie case of entitlement to summary judgment through submission of proof of the existence of the underlying note, mortgage and default in payment after due demand (see Witelson v Jamaica Estates Holding Corp. I, 40 AD3d 284 [1st Dept. 2007]; Marculescu v Ouanez, 27 AD3d 701 [2d Dept. 2006]; US. Bank Trust National Assoc. v Butti, 16 AD3d 408 [2d Dept. 2005]; Layden v Boccio, 253 AD2d 540 [2d Dept.1998]; State Mortgage Agency v Lang, 250 AD2d 595(2d Dept.1998]). Upon such a showing, the burden shifts to the defendant to produce evidence in admissible form sufficient to raise a material issue of fact requiring a trial.

Here, the plaintiff's submissions are sufficient to establish its entitlement to summary judgment against defendant mortgagor Christos Argyros. The moving papers demonstrated, prima facie, that none of the asserted defenses set forth in the answer of defendant are meritorious and that plaintiff is entitled to summary judgment on its claims against Argyros (see EMC Mortg. Corp. v Riverdale Assocs., 291 AD2d 370 [2d Dept. 2002]; State of New York v Lang, 250 AD2d 595 [2d Dept. 1998]). As stated above, the complaint herein sufficiently sets forth a valid cause of action for foreclosure. The affidavit of service of the process server constitutes prima facie evidence that Argyros was validly served pursuant to CPLR 308(4) (see Bank of N.Y. v Segui, 68 AD3d 908 [2d Dept. 2009]; Cavalry Portfolio Servs., LLC v Reisman, 55 AD3d 524 [2d Dept. 2008]; Jefferson v Netusil, 44 AD3d 621 [2d Dept. 2007]). Moreover, the defense of lack of personal jurisdiction was waived by the defendant's failure to move for dismissal on this ground within 60 days of interposing the answer (see CPLR 3211(e)). Plaintiff has submitted a copy of the mortgage, note and affidavit establishing Argyros' default in payment. The plaintiff demonstrated proper service of the summons and complaint and showed by admissible evidence that it had been properly assigned the note and mortgage as of the date of the commencement of the action. Plaintiff also demonstrated when it became the lawful holder of the note by valid assignment of the note. Therefore, the moving papers demonstrated, prima facie, that none of the asserted defenses set forth in the answer of defendant are meritorious and that plaintiff is entitled to summary judgment on its claims against Argyros (see State of New York v Lang, 250 AD2d 595).

The burden then shifted to defendant to establish the existence of a triable issue of fact (see State Bank of Albany v Fioravanti, 51 NY2d 638, 647 [1980]). In opposition, defendant submits an affirmation and memo of law from his counsel George M. Gavalas asserting that the plaintiff has not submitted any valid

assignments of the mortgage and states that as a result Kondaur Capital Corp has not substantiated that it is the equitable owner of the mortgage and note. Counsel states that the plaintiff has not shown that it is the current holder of the note obligating defendant to make payments to the plaintiff. Counsel states that the lack of an allonge creates a triable issues of fact as to whether the plaintiff is the holder of the note and that as such plaintiff has failed to demonstrate that it has standing precluding the granting of the motion for summary judgment.

Here, this Court finds that the evidence submitted by the plaintiff including a copy of the note and allonge endorsed in blank and an affidavit stating that plaintiff was in possession of the note and mortgage at the time the action was commenced was sufficient to confer standing to commence the action (see Bank of N.Y. v Silverberg, 86 AD3d 274 [2d Dept. 2011] ["In a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced"]; U.S. Bank, N.A. v Collymore, 68 AD3d 752 [2d Dept. 2009]). "Where a note is transferred, a mortgage securing the debt passes as an incident to the note" (Deutsche Bank Natl. Trust Co. v Spanos, 2013 NY Slip Op 451 [2d Dept. 2013]). Therefore, "either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation" (HSBC Bank USA v Hernandez, 92 AD3d 843 [2d Dept. 2012]). Here, the plaintiff established its standing based upon the affidavit from the plaintiff's servicing agent which provided sufficient factual details of a physical delivery of the note. Since the mortgage passes with the debt that is evidenced by the note as an inseparable incident thereto, the plaintiff established its standing to commence the within action (see US Bank Natl. Assn. v Cange, 96 AD3d 825 [2d Dept. 2012]; U.S. Bank, NA v Sharif, 89 AD3d 723[2d Dept 2011]; Bank of New York v Silverberg, supra)).

Accordingly, this court finds that the conclusory allegations of the affirmative defenses set forth in defendant's answer are insufficient to defeat the motion for summary judgment. Therefore, the motion for summary judgment is granted and the affirmative defenses contained in the defendant's answer are stricken. The submissions further reflect that Plaintiff is entitled to amend the caption to substitute Astoria Play School, Maya Feliciano, Maria D. Valencia, Maria Baez, Kimberly Maldonado, Destiny Maldonado, Patricio Maldonado, Wimper Mendez and Margaret Perez as party-defendants. Plaintiff's further application for the appointment of a referee to compute the amounts due under the subject mortgage is also granted.

Settle order on Notice.

Dated: February 20, 2013
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.