

Wells Fargo Bank, N.A. v Isaacs

2014 NY Slip Op 33252(U)

December 9, 2014

Supreme Court, Suffolk County

Docket Number: 10-14005

Judge: Arthur G. Pitts

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

COPY

P R E S E N T :

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 10-24-13
ADJ. DATE _____
Mot. Seq. # 001 - MG

-----X

WELLS FARGO BANK, NA
3476 Stateview Boulevard
Ft. Mill, SC 29715

Plaintiff,

- against -

STEVEN T. ISAACS, JESSICA D. ISAACS,
MANUFACTURERS AND TRADERS TRUST
COMPANY.

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.

-----X

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Upon the following papers numbered 1 to 19, 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 _____~~;
Answering Affidavits and supporting papers 13 - 17; Replying Affidavits and supporting papers 18 - 19; ~~Other _____~~; (and after
hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by plaintiff, Wells Fargo Bank, NA (Wells Fargo) pursuant to CPLR 3212 for summary judgment on its complaint against defendants Steven T. Isaacs and Jessica D. Isaacs (defendants), fixing the defaults as to the non-appearing, non-answering defendants, for leave to amend the caption of this action pursuant to CPLR 3025 (b) and, to appoint a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is granted; and it is further

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ORDERED that the caption is hereby amended by striking therefrom defendants “John 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

-----X

WELLS FARGO BANK, NA
 3476 Stateview Boulevard
 Ft. Mill, SC 29715

Plaintiff,

- against -

STEVEN T. ISAACS, JESSICA D. ISAACS,
 MANUFACTURERS AND TRADERS TRUST
 COMPANY,

Defendants.

-----X

This is an action to foreclose a mortgage on property known as 4 Bowman Lane, Commack, New York. On April 6, 2007, defendants executed a fixed rate note in favor of Wells Fargo agreeing to pay the sum of \$375,000.00 at the yearly rate of 6.250 percent. On the same date, defendants executed a mortgage in the principal sum of \$375,000.00 on the subject property. The mortgage was recorded on May 16, 2007 in the Suffolk County Clerk’s Office.

Wells Fargo Home Mortgage sent a notice of default dated January 10, 2010 to defendants stating that they had defaulted on their mortgage loan and that the amount past due was \$14,179.07. As a result of defendants’ continuing default, plaintiff commenced this foreclosure action on April 14, 2010. In its complaint, plaintiff alleges in pertinent part that defendants breached their obligations under the terms and conditions of the note and mortgage by failing to make monthly payments commencing with the October 1, 2009 payment. Defendants interposed a verified answer with affirmative defenses.

The Court’s computerized records indicate that a foreclosure settlement conference was held on October 27, 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 conference is required.

Plaintiff now moves for summary judgment on its complaint. In support of its motion, plaintiff submits among other things: the sworn affidavit of Kathy L. Gamboa, vice president loan documentation of Wells Fargo; the affirmation of Matthew Russell, Esq. in support of the motion; the affirmation of Matthew Russell, 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; an affidavit of service of the instant summary judgment motion upon the defendants' counsel in this action; and, a proposed order appointing a referee to compute. 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” (*Republic Natl. Bank of N.Y. v O’Kane*, 308 AD2d 482, 764 NYS2d 635 [2d Dept 2003]; see *Argent Mtge. Co., LLC v Mentasana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]; *Wells Fargo Bank, N.A. v Webster*, 61 AD3d 856, 877 NYS2d 200 [2d Dept 2009]). “The burden then shifts to the defendant to demonstrate ‘the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff’ ” (*U.S. Bank Natl. Assn. TR U/S 6/01/98 [Home Equity Loan Trust 1998–2] v Alvarez*, 49 AD3d 711, 711, 854 NYS2d 171 [2d Dept 2008], quoting *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 664 NYS2d 345 [2d Dept 1997], *lv to appeal dismissed* 91 NY2d 1003, 676 NYS2d 129 [1998]; see also *Emigrant Mtge. Co., Inc. v Beckerman*, 105 AD3d 895, 895, 964 NYS2d 548 [2d Dept 2013]).

Here, plaintiff has established its entitlement to summary judgment against the answering defendants as its submissions included a copy of the mortgage, the assignments of mortgage, the unpaid note together with due evidence of defendants' default in payment under the terms of the loan documents (see *Jessabell Realty Corp. v Gonzales*, 117 AD3d 908, 985 NYS2d 897 [2d Dept 2014]; *Bank of New York Mellon Trust Co. v McCall*, 116 AD3d 993, 985 NYS2d 255 [2d Dept 2014]; *North Bright Capital, LLC v 705 Flatbush Realty, LLC*, 66 AD3d 977, 889 NYS2d 596 [2d Dept 2009]; *Countrywide Home Loans, Inc. v Delphonse*, 64 AD3d 624, 883 NYS2d 135 [2d Dept 2009]).

The burden then shifted to defendants to lay bare their proof in opposition to plaintiff's prima facie showing (see *Jessabell Realty Corp. v Gonzales*, *supra*). It was thus incumbent upon them 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 Bellafiore*, 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]).

Here, the only pleaded affirmative defense raised by the answering defendants in opposition to this motion was the assertion that plaintiff violated the Federal Truth in Lending Act (TILA). Defendants assert that plaintiff failed to disclose the information regarding the subject mortgage loan as required under TILA (15 USC § 1601 *et seq.*), and the TILA implementing regulations (found in Federal Reserve Board Regulation Z [Regulation Z], 12 CFR 226), and in particular, failed to provide them with a preliminary disclosure of same.

The declared purpose of the TILA is to assure a meaningful disclosure of credit terms so that consumers will be able to compare more readily the various credit terms available to them and avoid the uninformed use of credit (*see Beach v Ocwen Federal Bank*, 523 US 410, 118 SCt 1408 [1998]; *see also* 15 USC § 1601(a)). In furtherance of this goal, TILA requires that creditors provide borrowers with clear and accurate disclosures of terms dealing with things like finance charges, annual percentage rates of interest, and the borrower's rights, [*Beach v Ocwen Federal Bank*, 523 US 410] as well as notice of the borrower's right of rescission (*see* 12 CFR 226.23 [b][1]).

“TILA's mandatory disclosures must be made prior to consummation of the transaction, which is defined as the time that a consumer becomes contractually obligated on a credit transaction” (*see* 12 CFR 226.17[b], 226.2[a][13]; *see also Ngwa v Castle Point Mortg., Inc.*, 2008 WL 3891263 [SDNY 2008]). In this instance, defendants became contractually obligated on April 6, 2007, when their loan documents were executed. Here, the uncontroverted evidence before the court established that defendants were supplied with Truth in Lending Disclosures on the day of their closing. Thus, to the extent defendants assert an affirmative defense based upon failure to provide a preliminary disclosure, such defense lacks merit.

Addressing defendants' allegation of lack of standing raised for the first time in their opposition papers, 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 went on to hold 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 US Bank, NA v Emmanuel*, 83 AD3d 1047, 921 NYS2d 320 [2d Dept 2011]; *Deutsche Bank Natl. Trust Co. v Hussain*, 78 AD3d 989, 912 NYS2d 595 [2d Dept 2010]; *Deutsche Bank Natl. Trust Co. v Young*, 66 AD3d 819, 886 NYS2d 617 [2d Dept 2009] [standing issue unavailing on application to vacate default judgment]; *HSBC Bank, USA v Dammond*, 59 AD3d 679, 875 NYS2d 490 [2d Dept 2009] [waived standing issues does not constitute meritorious defense on application to vacate default]). Based upon the foregoing, defendants' assertion of a standing defense 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 an answer (*see Deutsche Bank Natl. Trust Co. v Young*, 66 AD3d 819).

Thus, a review of the opposing papers submitted by the answering defendants reveals that the same were insufficient to raise any genuine question of fact requiring a trial on the merits of the plaintiff's claims for foreclosure and sale and insufficient to demonstrate any bona fide defense to the plaintiff's claim for a judgment of foreclosure and sale (*see Cochran Inv. Co., Inc. v Jackson*, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007]). Defendants' failure to raise and/or assert all of his pleaded affirmative defenses in opposition to the plaintiff's motion for summary judgment warrants the dismissal of the abandoned affirmative defenses (*see Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 369 NYS2d [1975]; *Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]). The court notes that defendants do not deny having received the loan proceeds or having defaulted on their mortgage loan payments in their submitted affidavits (*see Citibank, N.A. v Souto Geffen Co.*, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]).

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Based on the foregoing, plaintiff's motion for summary judgment is granted as against defendants Isaacs. 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: December 9, 2014


J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION