Everhome Mtge. Co. v Yilmaz
2014 NY Slip Op 33349(U)
December 10, 2014
Supreme Court, Suffolk County
Docket Number: 10-33041
Judge: Joseph Farneti
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[* 1]

SHORT FORM ORDER

INDEX No. 10-33041

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 10-3-13 (#001)
MOTION DATE 10-11-13 (#002)
Mot. Seq. # 001- MD
Mot. Seq . # 002 - MG

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EVERHOME MORTGAGE COMPANY
8120 Nations Way
Building 100
Jacksonville, FL 32256

Plaintiff,

- against -

TURGAY YILMAZ, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR OPTEUM FINANCIAL SERVICES, LLC,

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 a interest or lien upon the mortgaged premises.)

Defendants.

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ROSICKI, ROSICKI & ASSOCIATES, P.C.
Attorneys for Plaintiff
26 Harvester Avenue
Batavia, NY 14020

TURGAY YILMAZ
Defendant Pro Se
10 Breston Drive West
Shirley, NY 11967

Upon the following papers numbered 1 to 28 read on this motion for a temporary restraining order and a motion for summary judgment and an order of reference; ~~Notice of Motion~~/ Defendant's Order to Show Cause and supporting papers 1 - 9; Affirmation in Oppostion and supporting papers 10 - 15; Plaintiff's Notice of Motion and supporting papers 16 - 28; ~~Replying Affidavits and supporting papers _____; Other ____~~; it is,

ORDERED that the order to show cause (seq. #001) by defendant Turgay Yilmaz ("defendant") and the motion (seq. #002) by plaintiff EverHome Mortgage Company ("EverHome"), are consolidated for purposes of this determination; and it is further

ORDERED that this order to show cause (seq. #001) by defendant seeking a stay of the foreclosure action and an opportunity to obtain a modification of his home loan, is denied; and it is further

ORDERED that this unopposed motion (seq. #002) by plaintiff EverHome for an Order, pursuant to CPLR 3212, granting summary judgment on its complaint against defendant, fixing the defaults as to the non-appearing, non-answering defendants, to amend the caption of this action pursuant to CPLR 3025 (b), 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 substituting EverBank in place of plaintiff EverHome, by substituting Asiye Aydin in place of defendants "John Doe," and by striking therefrom the names of the remaining "John Does"; 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

EVERBANK,

Plaintiff,

- against -

TURGAY YILMAZ, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR OPTEUM FINANCIAL SERVICES, LLC, ASIYE AYDIN,

Defendants.

_____x

At the outset, the Court notes that on September 8, 2010, plaintiff EverHome commenced a foreclosure action against defendant and defendant in turn interposed an answer with affirmative defenses. The submissions before the Court reveal that on October 19, 2005, defendant executed an adjustable rate note in favor of Opteum Financial Services, LLC ("Opteum") agreeing to pay the sum of $280,000.00 at the starting yearly rate of 6.000 percent. On the same date, defendant also executed a mortgage in the principal sum of $280,000.00 on the subject property located at 10 Breston Drive West, Shirley, New York. The mortgage indicated Opteum to be the lender and Mortgage Electronic

Registration Systems, Inc. ("MERS") to be the nominee of Opteum as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on November 9, 2005, in the Suffolk County Clerk's Office. Thereafter, on August 13, 2010, the mortgage was transferred by assignment of mortgage from MERS, as nominee for Opteum, to plaintiff EverHome. The assignment of mortgage was recorded on September 2, 2010, in the Suffolk County Clerk's Office. Defendant defaulted by not making any payments on or after September 1, 2009. The Court's computerized records indicate that a foreclosure settlement conference was held on May 24, 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.

Defendant now moves for an Order enjoining the plaintiff from foreclosing on the property located at 10 Breston Drive West, Shirley, New York and staying the foreclosure sale and/or the appointment of a referee to conduct such sale as defendant is in the process of obtaining a loan modification with the plaintiff. Plaintiff opposes the application.

In order to be entitled to a preliminary injunction, the moving party has the burden of demonstrating: (1) a likelihood of success on the merits; (2) irreparable injury absent granting the preliminary injunction; and (3) a balancing of the equities in the movant's favor (*see* CPLR 6301; ***Aetna Ins. Co. v Capasso***, 75 NY2d 860, 552 NYS2d 918 [1990]; ***Dixon v Malouf***, 61 AD3d 630, 875 NYS2d 918 [2009]; ***Coinmach Corp. v Alley Pond Owners Corp.***, 25 AD3d 642, 808 NYS2d 418 [2006]). The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual (*see* ***Dixon v Malouf***, *supra*; ***Ruiz v Meloney***, 26 AD3d 485, 810 NYS2d 216 [2006]; ***Ying Fung Moy v Hohi Umeki***, 10 AD3d 604, 781 NYS2d 684 [2004]). The decision to grant or deny a preliminary injunction rests in the sound discretion of the court (*see* ***Dixon v Malouf***, *supra;* ***Ruiz v Meloney***, *supra*). Further, preliminary injunctive relief is a drastic remedy that will not be granted unless the movant establishes a clear right to such relief which is plain from the undisputed facts (*see* ***Blueberries Gourmet v Aris Realty Corp.***, 255 AD2d 348, 680 NYS2d 557 [1998]; *see*, ***Hoeffner v John F. Frank, Inc.***, *supra*; ***Peterson v Corbin***, 275 AD2d 35, 713 NYS2d 361 [2000], *lv dismissed* 95 NY2d 919, 719 NYS2d 646 [2000]; ***Nalitt v City of New York***, 138 AD2d 580, 526 NYS2d 162 [1988]).

The Court finds that defendant has not sufficiently demonstrated his entitlement to injunctive relief pending the determination of the action by showing a likelihood of success on the merits, irreparable injury in the absence of a preliminary injunction, and a balance of the equities in his favor (*see* CPLR 6301). Here, in support of his application, defendant asserts that he requires additional time to complete a loan modification with plaintiff. Plaintiff however, affirms that borrower does not have an application for a modification awaiting review and has not applied for a modification in well over a year. In any event, there is no requirement that a foreclosing plaintiff modify its mortgage loan prior to or after a default in payment (*see* ***Graf v Hope Bldg. Corp.***, 254 NY 1, 171 NE 884 [1930]; ***Wells Fargo Bank, NA v Meyers***, 108 AD3d 9, 966 NYS2d 108 [2d Dept 2013]; ***Wells Fargo Bank, NA v Van Dyke***, 101 AD3d 638, 958 NYS2d 331 [1st Dept 2012]; ***Key Intern. Mfg. Inc. v Stillman***, 103 AD2d 475, 480 NYS2d 528 [2d Dept 1984]). While the parties to a mortgage are generally required to enter into good faith negotiations aimed at reaching a mutual resolution, including a loan modification, if possible (*see*

CPLR 3408), same does not qualify as a defense to a foreclosure action. Based upon the foregoing defendant's application is denied.

Everbank now moves for summary judgment on its complaint. In support of its motion, plaintiff submits, among other things, the sworn affidavit of Lori Beltz, assistant vice president of EverBank, successor by merger to plaintiff EverHome; the affirmation of Richard Fay, Esq. in support of the instant motion; the affirmations of Richard Fay, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the pleadings; the note, mortgage and assignments of mortgage; an Order terminating the automatic stay by the Bankruptcy Court dated November 5, 2012; 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 defendant; 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 Mentesana***, 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 defendant, as well as evidence of defendant's 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]). Lori Beltz avers that defendant defaulted under the terms and conditions of the note and mortgage by failing to tender payment for the monthly installment due for September 1, 2009, and subsequent payments thereafter; that a notice of default was sent to defendant on June 21, 2010, in accordance with the provisions of the mortgage; that a 90-day pre-foreclosure notice was sent to defendant on February 2, 2010, and that the default has not been cured.

Defendant has not submitted opposition to the motion. Defendant's answer is insufficient, as a matter of law, to defeat plaintiff's unopposed motion (*see* ***Argent Mtge. Co., LLC v Mentesana***, 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 defendant, 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 defendant. 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]). Defendant's Order to Show Cause is denied in its entirety.

The proposed order appointing a referee to compute pursuant to RPAPL 1321 is signed simultaneously herewith as modified by the Court.

Dated: December 10, 2014

Hon. Joseph Farneti
Acting Justice Supreme Court

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**