

Bank of Am., N.A. v Oztimurlenk
2015 NY Slip Op 31372(U)
July 6, 2015
Supreme Court, Suffolk County
Docket Number: 19455/2012
Judge: William B. Rebolini
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

COPY

Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Bank of America, N.A., Successor by merger
to BAC Home Loans Servicing LP
f/k/a Countrywide Home Loans Servicing LP

Plaintiff,

- against -

Birol Oztimurlenk, Hayriye A. Oztimurlenk,
Mortgage Electronic Registration Systems Inc.,
as nominee for Countrywide Bank, N.A. and
"John Doe #1" through "John Doe #10", the last
ten names being fictitious and unknown to the
plaintiff, the person or parties intended being the
persons or parties, if any, having or claiming an
interest in or lien upon the Mortgaged premises
described in the Complaint,

Defendants.

Motion Sequence No.: 001; MG
Motion Date: 5/22/14
Submitted:

Index No.: 19455/2012

Attorney for Plaintiff:

Frenkel, Lambert, Weiss,
Weisman & Gordon, LLP
53 Gibson Street
Bay Shore, New York 11706

Defendants Pro Se:

Birol Oztimurlenk
280 33rd Street
Lindenhurst, New York 11757

Hayriye A. Oztimurlenk
280 33rd Street
Lindenhurst, New York 11757

Clerk of the Court

Upon the following papers numbered 1 to 35 read upon this motion for summary judgment and an order of reference: Notice of Motion and supporting papers, 1 - 28; Answering Affidavits and supporting papers, 29 - 35; it is

ORDERED that the motion by plaintiff, Bank of America, N.A., Successor by merger to BAC Home Loans Servicing LP fka Countrywide Home Loans Servicing LP (Bank of America), pursuant to CPLR 3212 for summary judgment on its complaint as against defendants Birol Oztimurlenk and Hayriye A. Oztimurlenk (defendants), fixing the defaults as against the non-

Bank of America v. Oztimurlenk, et al.

Index No.: 19455/2012

Page 2

appearing, non-answering defendants, for leave 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 the truncated version of the plaintiff's name, Bank of America, N.A. in place of Bank of America, N.A., Successor by merger to BAC Home Loans Servicing LP fka Countrywide Home Loans Servicing LP, by substituting Ender Oztimurlenk in place of "John Doe #1" and, by striking therefrom defendants "John Doe #2" through "John Doe #10"; 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
Bank of America, N.A.,

Plaintiff,

- against -

Birol Oztimurlenk, Hayriye A. Oztimurlenk,
Mortgage Electronic Registration Systems Inc.,
as nominee for Countrywide Bank, N.A.,
Ender Oztimurlenk,

Defendants.

_____ X

This is an action to foreclose a mortgage on premises known as 280 33rd Avenue, Lindenhurst, New York. On September 30, 2005, defendants executed a fixed rate note in favor of America's Wholesale Lender agreeing to pay the sum of \$347,320.00 at the yearly rate of 6.000 percent. On the same date, defendants also executed a mortgage in the principal sum of \$347,320.00 on their home. The mortgage indicated America's Wholesale Lender to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of America's Wholesale Lender as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on October 31, 2005 with the Suffolk County Clerk's Office. Thereafter, on September 20, 2011, the mortgage was transferred by assignment of mortgage from MERS, as nominee for

Bank of America v. Oztimurlenk, et al.

Index No.: 19455/2012

Page 3

America's Wholesale Lender, to plaintiff Bank of America. The assignment of mortgage was recorded on June 12, 2012 with the Suffolk County Clerk's Office.

Plaintiff sent a notice of default dated May 13, 2010 to defendants stating that they had defaulted on their mortgage loan and that the amount past due was \$12,019.71. As a result of defendants' continuing default, plaintiff commenced this foreclosure action on June 27, 2012. 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 their monthly payments commencing with the installment due on February 1, 2010. Defendants interposed an answer with affirmative defenses.

The Court's computerized records indicate that a foreclosure settlement conference was held on October 1, 2013 at which time 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 Norene Beatrice Johnson, assistant vice president of Bank of America, N.A.; the affirmation of Patricia Esdinsky, Esq. in support of the instant motion; the affirmation of Patricia Esdinsky, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the pleadings; the note, mortgage and an assignment of mortgage; 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 defendants; and a proposed order appointing a referee to compute. Defendants oppose the application.

"[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 Mentosana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). 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 of their defenses (see *Aames 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]; see also *Washington Mut. Bank v Valencia*, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]).

Here, plaintiff produced the unpaid note and mortgage executed by the defendants, an assignment of mortgage, as well as evidence of 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]). The affidavit of Norene Beatrice Johnson avers that defendants defaulted on their payments commencing with the installment due on February 1, 2010 and subsequent payments thereafter; that a notice of default dated May 13, 2010 was mailed to defendants; that a 90 day pre-foreclosure notice was mailed to defendants by certified and first class mail; and, that defendants have not cured their default.

Once plaintiff has made a prima facie showing, it is incumbent on 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” (see *Cochran Inv. Co., Inc. v Jackson*, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007] quoting *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 664 NYS2d 345 [2d Dept 1997]).

Addressing defendants’ opposition which asserts that plaintiff failed to act in good faith in reviewing defendants’ loan modification, CPLR 3408(a) requires a mandatory settlement conference in every residential foreclosure action during which the plaintiff, through its servicer, and the defendants are required to negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible (see CPLR 3408[a], [f]). While the goal of CPLR 3408 negotiations is that the parties reach a mutually agreeable resolution to help the defendant avoid losing his or her home (see CPLR 3408[a]), the statute requires only that the parties enter into and conduct negotiations in good faith (see CPLR 3408 [f]; *Wells Fargo Bank, N.A. v Van Dyke*, 101 AD3d 638, 958 NYS2d 331 [1st Dept 2012]). In *Van Dyke*, the court noted that “there are situations in which the statutory goal is simply not financially feasible for either party” and that “the mere fact that plaintiff refused to consider a reduction in principal or interest rate does not establish that it was not negotiating in good faith. Nothing in CPLR 3408 requires plaintiff to make the exact offer desired by [the] defendant[] [mortgagors], and the plaintiff’s failure to make that offer cannot be interpreted as a lack of good faith” (*Wells Fargo Bank, N.A. v Van Dyke*, 101 AD3d 638; see also *Wells Fargo Bank, N.A. v Meyers*, 108 AD3d 9, 20, 966 NYS2d 108 [2d Dept 2013] [“it is obvious that the parties cannot be forced to reach an agreement, CPLR 3408 does not purport to require them to, and the courts may not endeavor to force an agreement upon the parties”]).

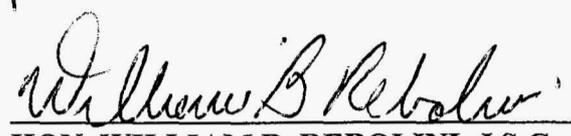
To conclude that a party failed to negotiate in good faith pursuant to CPLR 3408(f), a court must determine that “the totality of the circumstances demonstrates that the party’s conduct did not constitute a meaningful effort at reaching a resolution” (*US Bank N.A. v Sarmiento*, 121 AD3d 187, 203, 991 NYS2d 68 [2d Dept 2014]). Here, defendants’ bald and unsupported assertions are without merit. Guided by the foregoing principles, the Court finds that the totality of the circumstances do not support a finding that plaintiff failed to negotiate in good faith. 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]). The remaining contentions of defendants are rejected by the court as being without merit.

Based upon the foregoing, the motion for summary judgment is granted against 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]).

Bank of America v. Oztimurlenk, et al.
Index No.: 19455/2012
Page 5

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

Dated: 7/6/2015


HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION NON-FINAL DISPOSITION