

Wells Fargo Bank, N.A. v Hilary

2017 NY Slip Op 31009(U)

March 27, 2017

Supreme Court, Suffolk County

Docket Number: 18479/2008

Judge: C. Randall Hinrichs

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SHORT FORM ORDER

INDEX NO. 18479-2008

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 49 SUFFOLK COUNTY

PRESENT: HON. C. RANDALL HINRICHS
 Justice of the Supreme Court

Motion Seq: 003: 2-19-2014 / 004: 3-24-2014
 Adjourned Date: 8-18-2016
 Mot. Seq. 003: MotD / Mot. Seq. 004: XMD

-----X
 WELLS FARGO BANK, N.A.,

Plaintiff,

-against-

SCOTT A HILARY, KELLY A HILARY
 a/k/a KELLY HILARY, MORTGAGE
 ELECTRONIC REGISTRATION SYSTEMS,
 INC., AS NOMINEE FOR COUNTRYWIDE
 HOME LOANS INC., 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.

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Kozeny, McCubbin & Katz, LLP
 By Lauren Currie, Esq.
 Attorneys for Plaintiff
 40 Marcus Drive
 Suite 200
 Melville, NY 11747

Christopher Thompson & Associates, P.C.
 By Christopher Thompson, Esq.
 Attorneys for Scott A. and Kelly A. Hilary
 35 Pinelawn Road
 Suite LL-4
 Melville, NY 11747

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the plaintiff, dated January 16, 2014, and supporting papers (Mot. Seq. 003); (2) Notice of Cross-Motion by the defendant, dated March 14, 2014, and supporting papers (Mot. Seq. 004); (3) Affirmation in Opposition to Defendant's Cross Motion and in Further Support of Plaintiff's Motion by plaintiff, dated May 1, 2014; (4) Further Reply Affirmation in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Cross Motion by defendant, dated May 1, 2014; (5) Supplemental Affirmation in Support of Motion for Summary Judgment and in Opposition to Cross Motion to Dismiss by plaintiff, dated July 26, 2016, and supporting papers; and (6) Supplemental Affirmation in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Cross-Motion dated August 18, 2016; it is

ORDERED that so much of the motion by Wells Fargo Bank, N.A. ["the plaintiff"], for an order (1) granting summary judgment in its favor against the defendants Scott A. Hilary and Kelly A. Hilary a/k/a Kelly Hilary ["the defendants"], (2) striking the defendants' verified answer (3) identifying and/or deleting unknown defendants, (4) amending the caption to reflect the proper party plaintiff by striking Wells Fargo Bank, N.A. and substituting U.S. Bank National Association, as Trustee Successor in Interest to Wachovia Bank, National Association as Trustee for Wells Fargo Asset Securities Corporation, Mortgage-Pass Through Certificates, Series 2005-AR16, and (5) appointing a referee to compute, is considered under CPLR 3212, 3215, 1003 and RPAPL §1321, and is granted in part and denied in part in accordance herewith; and it is further

ORDERED that so much of the plaintiff's motion seeking leave to withdraw so much of the application that sought to amend the complaint *nunc pro tunc* to correct typographical errors and reflect the date of the defendants' default as June 1, 2007, with interest accruing from May 1, 2007, is granted; and it is further

ORDERED that so much of the plaintiff's motion seeking to amend the caption to reflect the proper party plaintiff and deleting unknown defendants is granted; and it is further

ORDERED that within 30 days of the date of this order the plaintiff is directed to serve a copy of the order amending the caption upon the Clerk of the Court; and it is further

ORDERED that so much of the plaintiff's motion for an order granting summary judgment in its favor, striking the defendants' verified answer, and appointing a referee to compute is denied; and it is further

ORDERED that the defendants' cross-motion for an order (1) awarding summary judgment in their favor and against the plaintiff, (2) amending the mortgage default date *nunc pro tunc* to June 1, 2007, and (3) dismissing the action (004), is considered under CPLR 3212, and is denied; and it is further

ORDERED that the attorneys for the parties shall appear for a pre-trial conference on **May 24, 2017 at 9:30 a.m.** at the Arthur M. Cromarty Court Complex, 4th Floor, Courtroom 16, Riverhead, New York at which time the plaintiff shall be prepared to file a note of issue; and it is further

ORDERED that plaintiff is directed to serve a copy of this order with notice of entry upon all parties who have appeared herein and not waived further notice pursuant to CPLR 2103(b)(1), (2) or (3) within thirty (30) days of the date herein, and to promptly file the affidavits of service with the Clerk of the Court.

In this foreclosure action, plaintiff Wells Fargo Bank, N.A. ["the plaintiff" or "Wells Fargo"], seeks to foreclose a mortgage on premises known as 1620 Mill Creek Road, Southold, New York 11971 ["the subject premises"]. On June 16, 2004, the defendants Scott A. Hilary and Kelly A. Hilary [collectively "the defendants"], executed a first promissory note payable to Wells Fargo in the principal sum of \$568,800.00 and executed a mortgage securing the loan and encumbering the subject premises. On April 25, 2005, the defendants executed a second promissory note payable to Wells Fargo and second mortgage agreeing to pay the principal sum of \$34,200.90. That same day, the defendants executed and delivered to Wells Fargo a Consolidation, Extension and Modification Agreement ["CEMA"], in the amount of \$593,000.00 consolidating the first and second notes and corresponding mortgages, respectively. The second mortgage and CEMA were recorded in the Suffolk County Clerk's Office on May 18, 2005.

The complaint alleges that the defendants defaulted on their monthly payments of principal and interest due on March 1, 2007, and each month thereafter. Wells Fargo commenced the first of two foreclosure actions against the defendants based on the March 1, 2007 default, on July 20, 2007, under Suffolk County Index Number 21732/2007 [“the 2007 action”]. The 2007 action was discontinued by order dated June 13, 2008 (Whelan, J.). The present action was commenced on May 15, 2008.

On August 8, 2011, the second mortgage was assigned to U.S. Bank National Association, As Trustee Successor in Interest to Wachovia Bank, National Association as Trustee for Wells Fargo Asset Securities Corporation, Mortgage-Pass Through Certificates, Series 2005-AR16 [“U.S. Bank as Trustee”]. The assignment of the second mortgage was recorded with the Suffolk County Clerk on September 6, 2011. Shortly thereafter on November 1, 2011, the CEMA was assigned from Wells Fargo to U.S. Bank as Trustee and recorded with a corrected assignment of mortgage with the Suffolk County Clerk on November 17, 2011.

The plaintiff commenced the instant action against the defendants on May 15, 2008. The defendants served a timely answer to the complaint asserting various affirmative defenses, only one of which is arguably in issue on the pending motions before the court. Notably, in the 2008 complaint, the plaintiff did not allege that it provided the defendants with notice of their default in accordance with the terms of the note and mortgage, and the defendants did not raise the plaintiff’s failure to serve a notice of default on them as an affirmative defense in the answer. In 2009, the plaintiff moved for summary judgment, an order of reference, and related relief and the defendants cross-moved for summary judgment. In an order dated June 30, 2009 (Cohen, J.), the court denied both motions without prejudice to renew after a mandatory settlement conference.

A series of foreclosure settlement conferences began on September 8, 2009. On August 22, 2012, the action was referred to this court since a resolution or settlement had not been achieved. Compliance with the requirements of CPLR § 3408 was shown and plaintiff renewed its motion for summary judgment on February 19, 2014. In support of the motion, the plaintiff submitted the affidavit of Shae Smith, Vice President Loan Documentation for Wells Fargo, dated November 8, 2013 [“the Smith affidavit”]. The Smith affidavit asserted that the affiant had access to the business records relating to the loan at issue which are maintained in the course of regularly conducted business activities. Smith attested that he made his affidavit based on his review of the facts contained in those records, Smith attesting that there was in fact a default under the terms and conditions of the Promissory Note and Mortgage, because the June 1, 2007 and subsequent payments were not made. The Smith affidavit asserted that “[i]n accordance with the provisions of the Mortgage, a notice of default was mailed to the mortgagor(s) at the last known address provided to [the plaintiff] by the mortgagor”, and referenced as proof a copy of the notice of default dated May 21, 2007, attached to the motion papers. The notice of default advised the borrowers that their loan was in default and that the total to cure the default and bring the loan current as of June 20, 2007, was \$12,971.03.

In the attorney’s moving affirmation in support of summary judgment dated January 16, 2014 (at ¶ 48), it states that “due to a clerical error, the Complaint reflects the default date of March 1, 2007, with interest accruing from February 1, 2007. However the correct default date is June 1, 2007 with interest accruing May 1, 2007.” The moving affirmation requested that the Complaint be amended *nunc pro tunc* to reflect the correct date of default and interest date.

In seeking summary judgment, the plaintiff relied on the Smith affidavit to prove the underlying default, and to support so much of its motion that initially included a request for leave to amend the complaint to correct the mortgage default date from March 1, 2007, to June 1, 2007, *nunc pro tunc*. Notably, the Smith affidavit is the only document before the Court with a default date that differs from the default date alleged in the complaint, that is, March 1, 2007. The affidavit of Jaime Walls, a foreclosure litigation specialist of Wells Fargo, dated April 10, 2009 [“the Walls affidavit”], submitted in support of the first motion for summary judgment, states (at ¶¶ 7, 19, 20), that the affiant checked the records kept in the regular course of Wells Fargo’s business and that there was an unpaid principal balance calculated from February 1, 2007, the defendants having defaulted on their loan for the payment due on March 1, 2007. Another affidavit supporting the plaintiff’s previous summary judgment motion by Dianna Hudgins, a Wells Fargo Litigation Specialist, dated July 28, 2008 [“the Hudgins affidavit”], likewise attested that the defendants defaulted for the monthly payment due on March 1, 2007. By letter to the defendants from Wells Fargo Home Mortgage dated July 20, 2010, the plaintiff offered the defendants a “Special Forbearance Agreement” based upon 41 missed payments commencing from March 1, 2007, through July 1, 2010.

In response to the plaintiff’s motion, the defendants cross moved to dismiss the complaint on the basis that, assuming a June 1, 2007 default date, the plaintiff failed to comply with the contractual notice provisions in the note and mortgage. By sending a notice of default dated May 21, 2007, stating a default date of March 1, 2007, the plaintiff virtually conceded that the notice of default would have pre-dated the defendants’ June 1, 2007 default. In other words, if the default did not occur until June 1, 2007, than by plaintiff’s own admission no default existed on May 21, 2007, when the notice was allegedly sent. By way of affidavits, the defendants denied having received a notice of default. The plaintiff’s reply, for all intents and purposes, did not address this apparent inconsistency.

After several more settlement conferences conducted in May, June, and July of 2016 proved unsuccessful, the parties were granted leave to supplement their 2014 motion papers. On July 27, 2016, the plaintiff filed a supplemental affirmation in support of its summary judgment motion and in opposition to the defendants’ cross motion. The supporting affirmation detailed that as a result of court supervised settlement conferences the defendants executed a Forbearance Agreement dated August 3, 2010. Three payments were made under the terms of the Forbearance Agreement on or about August 10, 2010, September 8, 2010, and October 12, 2010, which were applied to the payments due on March 1, 2007, April 1, 2010, and May 1, 2010,¹ respectively. After applying the three payments made pursuant to the Forbearance Agreement, the “due date” under the subject note and mortgage was advanced to June 1, 2007, but the default date remained March 1, 2007. Therefore, the plaintiff admitted that the request in the underlying summary judgment motion to amend the default date to June 1, 2007 was made in error. The three payments changed the “due date” but the “default date” of March 1, 2007 was unchanged. The plaintiff requested leave to withdraw so much of the motion that sought amendment of the complaint to alter the default date.

¹ The Court is unable to resolve from the papers before it whether this statement contains a typographical error(s) in that the three payments were actually applied to the March, April, and May, 2007 amounts due thereby advancing the “default date” to June 1, 2007.

In further support of its application and accompanying its supplemental affirmation was the affidavit of Jennifer DeMonde, Assistant Vice President of Wells Fargo and current servicer for the plaintiff, dated July 27, 2016 [“the DeMonde affidavit”]. The DeMonde affidavit establishes the affiant’s familiarity with the “business records maintained by Wells Fargo for the purpose of servicing mortgage loans.” The DeMonde affidavit attests that 1) the default date in the complaint of March 1, 2007 was indeed correct, 2) the default date recited in the Smith affidavit was advanced to June 1, 2007, based on the application of three payments that were made by the defendants under a Forbearance Agreement between the parties dated August 3, 2010, and 3) the March 1, 2007 default date was the correct default date.

So much of the plaintiff’s motion seeking leave to withdraw so much of the original application that sought to amend the complaint *nunc pro tunc* to correct typographical errors and reflect the date of the defendants’ default as June 1, 2007, with interest accruing from May 1, 2007, is granted. CPLR 2004 vests the court with the discretion to correct mistakes. The mistake in the Shea affidavit has been more than adequately explained in the supplemental affirmation and the defendants have offered nothing of a factual nature to dispute that the default date is indeed March 1, 2007.

However, this does not end the Court’s inquiry with regard to the parties’ motions. Regarding the *mailing* of the default notice dated May 21, 2007, the DeMonde affidavit asserts that a notice of default was sent, separate from any other mailing or notice, enclosed in a first-class mail, postage prepaid, sealed envelope. The envelope was provided to the United States Post Office for mailing, addressed to the borrowers at *1820 Mill Creek Dr.*, Southold, NY 11971, described by DeMonde as the address of the residence that is subject to the Mortgage. The affiant further certifies and affirms that the notice was mailed on May 21, 2007, and was not returned as undeliverable.

The notice address is defined in the mortgage (at ¶ 15) as the address of the property. The address of the property is *1620 Mill Creek Drive*, Southold, NY 11971, not 1820 Mill Creek Drive where DeMonde attests that the notice was mailed. Thus, as the Court views the evidence before it, the issue that precludes an accelerated judgment in either parties’ favor is not whether the notice of default preceded the actual default date, but rather, whether the notice of default was mailed to the notice address, an issue that was not raised by either party in any of the voluminous papers reviewed by the court.


Since the plaintiff has failed to demonstrate that it complied with the condition precedent in the mortgage to serve a notice of default with an opportunity to cure addressed to the borrowers at the notice address, that is, the address of the property, so much of the plaintiff’s motion that seeks an order granting summary judgment in its favor and striking the defendants’ answer, and appointing a referee to compute is denied (*Emigrant Bank v. Myers*, 147 A.D.3d 1027, 47 N.Y.S.3d 446, 447).

Since the defendants have not asserted that the plaintiff failed to comply with the notice provisions of the mortgage by mailing the notice of default to an address other than the notice address as defined in the mortgage, and have not asserted it in their answer to the complaint, their cross-motion for summary judgment dismissing the complaint is likewise denied (*First N. Mortgagee Corp. v. Yatrakis*, 154 A.D.2d 433, 433, 546 N.Y.S.2d 9, 10; *Signature Bank v. Epstein*, 95 A.D.3d 1199, 1200, 945 N.Y.S.2d 347, 348).

The attorneys for the parties shall appear for a pre-trial conference on **May 24, 2017 at 9:30 a.m.** at the Arthur M. Cromarty Court Complex, 4th Floor, Courtroom 16, Riverhead, New York, at which time the plaintiff shall be prepared to file a note of issue.

The proposed order granting summary judgment in the plaintiff's favor and appointing a referee to compute submitted with the moving papers has been marked "NOT SIGNED".

Dated: March 27, 2017



C. RANDALL HINRICHS, J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION