

Wells Fargo Bank, N.A. v Cullen

2010 NY Slip Op 31983(U)

June 30, 2010

Supreme Court, New York County

Docket Number: 109028/2008

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER
Justice

IA PART 16

Index Number : 109028/2008

WELLS FARGO BANK, NA

vs.

CULLEN, VERONICA

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SER. NO. _____

MOTION CAL. NO. _____

FILED
JUL 08 2010

this motion to file
COUNTY CLERK'S OFFICE
NEW YORK

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

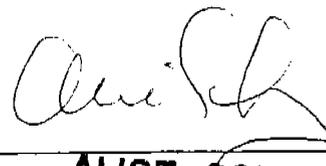
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

by plaintiff for
summary judgment in foreclosure and to
appoint a referee to compute is denied
and this action is dismissed in accordance
with the memorandum decision accompanying
motion sequence 002.

Dated: June 30, 2010 JUN 30 2010



ALICE SCHLESINGER ^{J.S.C.}

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

ALICE SCHLESINGER

PLA PART 16

PRECEDENT

Index Number : 109028/2008

WELLS FARGO BANK, NA

vs

CULLEN, VERONICA

Sequence Number : 002

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

FILED

JUL 08 2010

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits _____

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion by defendant

Veronica Cullen to dismiss is granted in accordance with the accompanying memorandum decision. The Clerk is directed to enter judgment dismissing this action without costs or disbursements to either party.

JUN 30 2010

Dated: June 30, 2010

Alice Schlesinger

ALICE SCHLESINGER *s.c.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK IA PART 16

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

Plaintiff,

Index No. 109028/08
Mot. Seq. Nos. 001 & 002

-against-

VERONICA CULLEN, BOARD OF MANAGERS OF
THE DOWNTOWN CONDOMINIUM,
LANDESBANK HESSEN THURINGEN
GIROZENTRALE, NATIONAL CITY BANK, NEW
YORK CITY ENVIRONMENTAL CONTROL BOARD;
NEW YORK CITY TRANSIT ADJUDICATION BUREAU
PEOPLE OF THE STATE OF NEW YORK,

FILED
JUL 08 2010
COUNTY CLERK'S OFFICE
NEW YORK

"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
SCHLESINGER, J.

Before the Court in this hotly contested mortgage foreclosure action are two motions. In the first (sequence 001), the plaintiff Wells Fargo Bank, NA, moves for summary judgment and the appointment of a referee to compute. In the second (sequence 002), the defendant Veronica Cullen moves to dismiss on various grounds. Each party vigorously opposes the motion made by the other. The two motions are consolidated herein for disposition.

The subject property is a residential condominium, Unit 2506 located at 15 Broad Street, New York, NY. The original loan was made on June 29, 2004 for \$999,950.00 between Wells Fargo Bank, NA, as the Lender, and Veronica Cullen, as the Borrower. The last payment was allegedly made for the month of February 2008, and this action was

commenced in June of 2008. After extensive settlement negotiations failed, plaintiff moved for summary judgment in March of 2009, and defendant moved to dismiss in December 2009 following a conference with the Court.

Plaintiff's motion for summary judgment is denied, and defendant's motion to dismiss is granted. Copies of the Note and Mortgage have been provided, and they appear to be in order, there not having been any assignment by the original lender to any third party. Further, contrary to plaintiff's claim, the affidavits of Heather C. Carrico, Vice President Loan Documentation, and Valorie Y. Wallace, Vice President Loan Documentation, are sufficient to establish defendant's default; the affiants' reliance on the Lender's books and records does not discredit them, as the documentary evidence is a sufficient basis for their assertions.

Wholly unavailing is defendant's attempt to dismiss this action based on improper service. While her affidavit denying receipt of the summons and complaint arguably contains enough details to raise an issue of fact warranting a traverse hearing, the motion is untimely. Pursuant to CPLR §3211(e), an objection in a pleading as to lack of personal jurisdiction is waived if the "objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship." Counsel here agree that the answer was served in or about August of 2008, and the motion was not made until December 2009, more than a year after the service of the pleading. The Appellate Division has strictly construed the sixty-day limit for service of such a motion to dismiss, even rejecting the argument that the time should be extended five days for mailing. *Thompson v Cuadrado*, 277 AD2d 151 (1st Dep't 2000). Contrary to plaintiff's claim, ongoing negotiations between able counsel do not constitute undue hardship justifying an extension of time to move to dismiss.

However, dismissal is warranted here and summary judgment must be denied because of the various defects in the default notice sent to advise the Borrower that the loan was being called based on the Borrower's default (a copy of the notice is attached to plaintiff's motion as Exh. D and to defendant's motion as Exh. C). Pursuant to paragraph 22 of the Mortgage (plaintiff's motion, Exh. E), the Lender may require immediate payment in full of the loan only if the Lender sends to the Borrower, "in the manner described in Section 15 of this Security Instrument," a notice that states, among other things, the following information:

- (1) The promise or agreement that [the Borrower] failed to keep or the default that has occurred;
- (2) The action that [the Borrower] must take to correct that default; and
- (3) A date by which [the Borrower] must correct the default. That date will be at least 30 days from the date on which the notice is given.

The referenced Section 15 requires that all notices be in writing and that the "notice address is the address of the property unless I [the Borrower] give notice to Lender of a different address." As plaintiff correctly notes, the property address as defined in the mortgage expressly includes the Unit number 2506 as part of the address, but the default notice does not. The subject property is, in fact, the single condominium Unit 2506, which is real property separate and apart from the other Units or the building itself. The reference to 15 Broad Street, the building as a whole, is improper and fails to satisfy the terms of the mortgage.

Plaintiff further correctly argues that the notice fails to clearly and unequivocally advise the Borrower that she has thirty days to pay a specific amount to correct the default

and avoid the acceleration of the loan, in accordance with subdivision 3 of Section 15, quoted above. The notice is dated April 13, 2008. It does begin with an implicit reference to the thirty-day period by advising the Borrower that: "unless the payments on your loan can be brought current by May 13, 2008, it will become necessary to accelerate your Mortgage Note and pursue the remedies provided for in your Mortgage or Deed of Trust." However, the amount that must be paid and the payment deadline that must be met to avoid acceleration are ambiguous. The notice first specifies three amounts:

Total Delinquency as of 4/13/08	\$11,151.53
Payments due in next 30 days	\$ 5,520.56
Total due to cure default and bring loan current as of May 13, 2008	\$16,672.09

Thus, the notice first states that only \$5,520.56 is due in 30 days, and then states that \$16,672.09 is due May 13, which is also 30 days from the date of the notice.

As the notice continues, the ambiguity is further compounded by stating:

To avoid the possibility of acceleration you must pay
 \$11,151.53 By April 30, 2008, 2:00 P.M. Central Time
 \$16,672.09 By May 13, 2008, 2:00 P.M. Central Time

in CERTIFIED funds, to Wells Fargo Home Mortgage, 1 Home Campus, X2302-04A, Des Moines, IA 50328. If funds are not received by the above stated time, we will proceed with acceleration.

Thus, this part of the notice specifies two separate amounts that must be paid on two separate dates to avoid the default, and the first of those payments (\$11,151.53) must be made by April 30, a deadline undeniably less than thirty days from the April 13 date of the notice.

In sum, the notice fails to clearly and unequivocally advise the Borrower of the minimum amount she must pay to correct the default and avoid the acceleration of the loan, and it fails to clearly explain that the Borrower has a full thirty days to pay. In light of this finding, no need exists to address the other issues raised by the parties. Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is denied; and it is further ORDERED that the motion by defendant Veronica Cullen to dismiss is granted. As all the other defendants are nominal defendants only, the Clerk is directed to enter judgment dismissing the action in its entirety without costs or disbursements to either party.

Dated: June 30, 2010

JUN 30 2010



J.S.C.
ALICE SCHLESINGER

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JUL 08 2010
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