

GMAC Mtge., LLC v Salvador
2013 NY Slip Op 33596(U)
November 19, 2013
Supreme Court, Queens County
Docket Number: 22251/2011
Judge: Augustus C. Agate
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IA Part 24
Justice

GMAC MORTGAGE, LLC., x

Index
Number 22251/2011

Plaintiff,

Motion
Date August 5, 2013

-against-

EDITHA SALVADOR A/K/A EDITHA F.
SALVADOR, ET AL.,
Defendants.

Motion Seq. No. 5

_____ x

The following numbered papers read on this motion by plaintiff for leave to amend the caption substituting Gary Salvador in place and stead of “John Doe” and deleting reference to “Jane Doe” defendant, for summary judgment against defendant Editha Salvador a/k/a Editha F. Salvador, to strike the answer of defendant Editha Salvador, for leave to enter a default judgment against the non-appearing defendants and for leave to appoint a referee to compute the amount due and owing plaintiff.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-8
Answering Affidavits - Exhibits	9-10
Reply Affidavits	11-12

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff commenced this action on September 26, 2011 to foreclose a mortgage encumbering the real property known as 30-01 34th Avenue, Astoria, New York given by defendant Editha Salvador to GreenPoint Mortgage Funding, Inc., as security for the payment of a note, evidencing an obligation in the principal amount of \$633,600.00 plus interest. In the complaint, plaintiff alleges it is the holder of the note and mortgage, defendant Editha

Salvador defaulted in payment under the note and mortgage and it elected to accelerate the entire mortgage debt. Plaintiff also seeks to reform the mortgage to include nunc pro tunc a proper and accurate legal description as contained in the deed recorded on February 4, 1980. Plaintiff used the fictitious names of “Jane Doe” and “John Doe” in the caption so to name, as defendants, those persons who were occupants of the premises, and communicate an intention to cut off their interests in the subject premises.

Defendant Editha Salvador served an answer, while appearing pro se, seeking to declare the subject mortgage null and void, and obtain recoupment of the moneys paid thereunder.

Defendant Editha Salvador, now appearing by counsel, opposes the motion. Leodegario Salvador, the husband of defendant Editha Salvador, appears by the same counsel, and opposes the motion, claiming to be the defendant fictitiously-named “John Doe,” and that the answer served by his wife constitutes his answer as well.

Although the answer served by defendant Editha Salvador refers to the appointment of Leodegario Salvador as the attorney-in-fact for defendant Editha Salvador, it specifically states in its preamble that it is “her” answer. The answer bears only Editha Salvador’s signature and includes a notarized verification by defendant Editha Salvador. Thus, such answer cannot be considered to have been a joint answer interposed by defendant Editha Salvador and Leodegario Salvador, as defendant “John Doe.” In addition, to the extent plaintiff contends it caused one “Gary Salvador” as defendant “John Doe” to be served with process, it cannot be determined whether Leodegario Salvador has been joined as a party defendant in the action. Leodegario Salvador makes no demonstration that he has any interest in the property sufficient to permit him to intervene in the action (*see* CPLR 1002[b], 1012[a][3]; RPAPL 1311, 1313; *see Capital Resources Co. v Prewitt*, 266 AD2d 176 [2d Dept 1999]; *see generally Empire Sav. Bank v Towers Co.*, 54 AD2d 574 [2d Dept 1976]).

That branch of the motion by plaintiff for leave to amend the caption substituting Gary Salvador in place and stead of defendant “John Doe” is denied. It is unclear from these submissions whether Leodegario Salvador is the same person as Gary Salvador. That branch of the motion by plaintiff for leave to amend the caption deleting reference to defendant “Jane Doe” is granted.

“ ‘Entitlement to a judgment of foreclosure may be established, as a matter of law, where a mortgagee produces both the mortgage and unpaid note, together with evidence of the mortgagor's default, thereby shifting the burden to the mortgagor to demonstrate, through both competent and admissible evidence, any defense which could raise a question of fact’ ” (*Zanfini v Chandler*, 79 AD3d 1031, 1031–1032 [2d Dept 2010], quoting *HSBC Bank USA*

v Merrill, 37 AD3d 899, 900 [3d Dept 2007]; *see U.S. Bank, Nat. Assn. v Sharif*, 89 AD3d 723 [2d Dept 2011]). Foreclosure of a mortgage, however, may not be brought by one who has no title to it (*see Kluge v Fugazy*, 145 AD2d 537, 538 [2d Dept 1988]). Where standing is raised as a defense by the defendant, the plaintiff is required to prove its standing before it may be determined whether the plaintiff is entitled to relief (*see U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 753 [2d Dept 2009]; *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 242 [2d Dept 2007]).

To the extent defendant Editha Salvador asserts plaintiff has failed to show it has any ownership interest in the mortgage, she raised the affirmative defense of lack of standing, albeit inartfully, in paragraph 11 of her answer. Plaintiff, in bringing this action, relies upon an assignment dated September 16, 2011 whereby Mortgage Electronic Registration Systems, Inc. (MERS), as the nominee for GreenPoint Mortgage Funding, Inc., purportedly assigned the mortgage, together with note to plaintiff. GreenPoint Mortgage Funding, Inc. is not a party to the assignment, and the mortgage itself does not specifically give MERS the right, as the nominee or agent of GreenPoint Mortgage Funding, Inc., to assign the underlying note (*see Bank of N.Y. v Silverberg*, 86 AD3d 274, 279 [2d Dept 2011]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 108 [2d Dept 2011]). Insofar as plaintiff also relies upon its physical possession of the original note at the time of the commencement of the action (*see e.g. U.S. Bank Natl. Assn. v Cange*, 96 AD3d 825, 827 [2d Dept 2012]), plaintiff has failed to present a copy of the note, or an affidavit by someone with personal knowledge explaining its failure to do so. Furthermore, the affidavit of Stephen Maxwell, a “Sr. Litigation Analyst of Ocwen Loan Servicing, LLC, the servicing agent of plaintiff, does not identify the payee on the note and whether the note was endorsed by the payee over to plaintiff or in blank, by the time plaintiff came into physical possession of the note (*see Mortgage Electronic Registration Systems, Inc. v Coakley*, 41 AD3d 674 [2d Dept 2007]; *cf. First Trust Nat. Assn. v Meisels*, 234 AD2d 414 [2d Dept 1996]; *see generally Slutsky v Blooming Grove Inn, Inc.*, 147 AD2d 208 [2d Dept 1989]). Hence, plaintiff has not submitted sufficient evidence to demonstrate that it had standing to commence this action. Under such circumstances, that branch of the motion by plaintiff for summary judgment against defendant Editha Salvador is denied (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851; *see Deutsche Bank Nat. Trust Co. v Haller*, 100 AD3d 680, 682 [2d Dept 2012]). It cannot be said that the affirmative defense of lack of standing asserted in the answer of defendant Editha Salvador is patently devoid of merit (*see Homecomings Financial, LLC v Guldi*, 108 AD3d 506, 509 [2d Dept 2013]; *Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d at 682; *HSBC Bank USA v Hernandez*, 92 AD3d 843, 844 [2d Dept 2012]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d at 109). That branch of the motion by plaintiff to strike such affirmative defense is denied.

With respect to that branch of the motion by plaintiff to strike the affirmative defense of defendant Editha Salvador based upon her claim that plaintiff wrongfully rejected her tender of payments in August and September 2011, the mortgage provides for payment of the loan pursuant to the note, and in absence of the note or sufficient evidence of its terms, it cannot be said the defense is without merit. That branch of the motion by plaintiff to strike the affirmative defense of defendant Editha Salvador based upon tender is denied.

Defendant Editha Salvador claims that the subject mortgage loan was the result of predatory lending practices committed by plaintiff's predecessor in interest, and is unconscionable. She, however, has failed to show an absence of meaningful choice on her part together with mortgage terms which are unreasonably favorable to plaintiff (*see Matter of State of New York v Avco Fin. Serv. of N.Y.*, 50 NY2d 383, 389 [1980]; *Baron Associates, LLC v Garcia Group Enterprises, Inc.*, 96 AD3d 793 [2d Dept 2012]; *see generally Matter of Friedman*, 64 AD2d 70, 84 [2d Dept 1978]). Defendant Editha Salvador also has failed to demonstrate the terms of the mortgage and note were unconscionable, or that plaintiff's predecessor in interest acted unconscionably in the transaction (*see Zuckerman v City of New York*, 49 NY2d 557, 562; *Argent Mtge. Co., LLC v Mentosana*, 79 AD3d 1079, 1081 [2d Dept 2010]; *Quest Commercial, LLC v Rovner*, 35 AD3d 576, 577 [2d Dept 2006]; *FGH Contr. Co. v Weiss*, 185 AD2d 969, 971 [2d Dept 1992]). That branch of the motion by plaintiff to strike the affirmative defenses asserted by defendant Editha Salvador based upon unconscionability and predatory lending is granted.

To the degree defendant Editha Salvador also asserts the negative amortization feature of the mortgage loan violates Banking Law § 6-1(2) and banking regulations (3 NYCRR, Part 41), the version of Banking Law § 6-1 in effect at the time of the making of the subject mortgage loan (August 21, 2006) was inapplicable to a loan transaction in which the principal amount exceeded \$300,000.00 (*see former Banking Law § 6-1[1][d] and [e][i][B][L 2002, c 626 § 1]*). The original principal amount of the subject mortgage loan as recited in the mortgage clearly exceeds that amount. The banking regulations in Part 41 define a "high cost home loan" to be a residential mortgage loan, including an open-end line of credit but not including a reverse mortgage transaction, in which the principal amount of the loan does not exceed the lesser of the conforming loan size limit for a comparable dwelling as established from time to time by the Federal National Mortgage Association, or \$300,000 (*see 3 NYCRR 41.1[e]*). That branch of the motion by plaintiff to strike the affirmative defenses asserted by defendant Editha Salvador based upon breach of Banking Law § 6-1(2) and Part 41 of the banking regulations is granted.

To the extent defendant Editha Salvador further asserts the negative amortization feature of the mortgage loan violates 15 USC § 1639 (the "Home Ownership and Equity Protection Act" [HOEPA], an amendment to the "Truth in Lending Act" [TILA]

[15 USC 1601 *et seq.*]), she has failed to demonstrate that the subject mortgage loan is governed by HOEPA (*see Fremont Inv. and Loan v Haley*, 23 Misc 3d 1138[A] [Queens County Sup Ct 2009]). Defendant Editha Salvador therefore has no valid claim that the instant action was commenced by plaintiff “to cover up” an illegal scheme to violate the law.

In addition, defendant Editha Salvador executed the final “Truth in Lending” disclosure statement, setting forth disclosures regarding the loan’s annual percentage rate, the number and amount of payments, the total payments, the finance charge and amount financed and the variable rate, late charges and prepayment penalty features, acknowledging her receipt and reading of the statement. To the degree she alleges the disclosed annual percentage rate of mortgage interest is erroneous because it does not take in account “undisclosed fees,” defendant Editha Salvador has failed to identify the type of fees purportedly undisclosed. To the extent she asserts plaintiff’s predecessor in interest otherwise failed to “explain” the mortgage terms to her, she has failed to allege or demonstrate it owed any duty to her to do so (*see Bank Leumi Trust Co. of New York v Block 3102 Corp.*, 180 AD2d 588, 589 [1st Dept 1992]) [“The legal relationship between a borrower and a bank is a contractual one of debtor and creditor and does not create a fiduciary relationship between the bank and its borrower or its guarantors]). That branch of the motion by plaintiff to strike the affirmative defense raised by defendant Editha Salvador based upon violation of HOEPA is granted.

Defendant Editha Salvador’s claim that plaintiff misrepresented her income is without merit, since it is undisputed plaintiff was not involved in the original mortgage loan transaction. Furthermore, to the extent defendant Editha Salvador claims she was misled by plaintiff’s predecessor in interest as to her ability to repay the loan based upon her income, “[a] defendant cannot claim to have been misled by an inaccurate statement of income in a loan application as the defendant is aware of his or her own income (*see Deutsche Bank Nat. Trust Co. v Sinclair*, 68 AD3d 914 [2nd Dept 2009]; *accord, Morales v AMS Mortg. Servs.*, 69 AD3d 691 [2nd Dept 1010] [reversing lower court, Appellate Division ruled that mortgagee was not liable for fraud])” (*Deutsche Bank Nat. Trust Co. v Garvin*, 29 Misc 3d 1215[A] [Queens County Sup Ct 2010]). The application for the subject mortgage loan, moreover, sets forth defendant Editha Salvador’s purported income, and bears her signature under a specific representation that the information in the application is true and correct as of August 21, 2006. Therefore, the branch of the motion by plaintiff to strike the affirmative defense raised by defendant Editha Salvador based upon misrepresentation is granted.

That branch of the motion by plaintiff seeking to amend nunc pro tunc the subject mortgage dated August 21, 2006, and recorded on October 19, 2006, in CRFN 2006000586041, to include the legal description as contained in the deed for the subject property recorded on February 4, 1980 in Reel 1235 of Deeds at Page 1790 in the

Queens County Clerk's office, is denied without prejudice to renewal based upon proper papers. Plaintiff has failed to provide a copy of the deed conveying title to defendant Editha Salvador for the subject property, including the legal description therein.

That branch of the motion by plaintiff for leave to enter a default judgment against the non-appearing defendants is denied. That branch of the motion by plaintiff for leave to appoint a referee is denied.

Dated: November 19, 2013

AUGUSTUS C. AGATE, J.S.C.