

U.S. Bank N.A. v Matolka

2007 NY Slip Op 32739(U)

August 30, 2007

Supreme Court, Broome County

Docket Number: 0010582/0071

Judge: Ferris D. Lebus

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse in the City of Binghamton, New York, on the 24th day of August, 2007.

PRESENT: HON. FERRIS D. LEBOUS
Justice, Supreme Court

STATE OF NEW YORK
SUPREME COURT : : BROOME COUNTY

U.S. BANK NATIONAL ASSOCIATION,
AS TRUSTEE FOR CREDIT SUISSE
FIRST BOSTON HEAT 2004-6
C/O America's Servicing Company,

Plaintiff,

-vs-

LISA M. MATOLKA,
JOHN DOE,

Defendants.

DECISION AND ORDER

Index No. 2007-1058
RJI No. 2007-0729

APPEARANCES:

COUNSEL FOR PLAINTIFF:

STEVEN J. BAUM, P.C.
BY: MICHAEL J. WRONA, ESQ., OF
COUNSEL
OFFICE & POST OFFICE ADDRESS:
220 NORTHPOINTE PARKWAY, SUITE G
AMHERST, NY 14228

COUNSEL FOR DEFENDANT:

LAUREN S. COHEN, ESQ.
OFFICE & POST OFFICE ADDRESS:
142 FRONT STREET
BINGHAMTON, NY 13905

HON. FERRIS D. LEBOUS, J.S.C.

This is an action to foreclose a mortgage executed by defendant on May 7, 2004. Plaintiff U.S. Bank National Association, as Trustee for Credit Suisse First Boston Heat 2004-6 c/o America's Servicing Company (hereinafter "plaintiff") moves for an order granting summary judgment dismissing the answer of defendant Lisa M. Matolka and for permission to treat said answer as a limited notice of appearance. The motion was returnable on August 24, 2007 and, at the parties' request, was heard on submission.

BACKGROUND

On May 7, 2004, defendant executed a note in the amount of \$60,350 at 8.60% interest to Decision One Mortgage Company, LLC. Said note was secured by a mortgage executed on the same date by defendant as mortgagor to Decision One Mortgage Company, LLC with Mortgage Electronic Registration Inc. as nominee thereof as mortgagee. Said mortgage was thereafter assigned to plaintiff by way of an assignment of mortgage filed May 21, 2007.

Plaintiff avers that the last payment made by defendant was applied to the monthly payment due December 12, 2006 (Brown Affidavit, ¶ 3). Based on said non-payment, plaintiff commenced this action by the filing of a summons and complaint in the Broome County Clerk's Office on May 8, 2007. Defendant was served personally with the summons and complaint on May 10, 2007. Defendant appeared by a verified answer dated and served by facsimile on May 25, 2007 by defense counsel. Defendant then served an amended answer and counterclaim sworn to June 1, 2007. The parties disagree whether the amended answer and counterclaim were served with a letter from defense counsel dated June 1, 2007 or with defendant's opposing papers hereto

on or about July 9, 2007.¹

DISCUSSION

It is well-settled that plaintiff's burden on this motion for summary judgment is to establish a prima facie case by proof of the existence of a note and mortgage, the assignment of mortgage, and the defendant's default in payment (*Bercy Investors, Inc. v Sun*, 239 AD2d 161 [1997]). Here, the court finds that plaintiff has established a prima facie case by presentation of the note, mortgage, and assignment of mortgage, together with an affidavit of merit showing defendant's default in payment thereof. Thus, the burden shifted to defendant to demonstrate the existence of a triable issue of fact with respect to any defense (*Federal Home Loan Mortg. Corp. v Karastathis*, 237 AD2d 558 [1997]).

Neither defendant's answer, amended answer and/or opposing papers deny that she is in default of the aforementioned note. In fact, defendant's answer and amended answer contain only general denials. In and of itself, defendant's concession that she is in default on the note is sufficient for this court to grant plaintiff's motion.

However, defendant's opposing papers also argue that plaintiff's counsel impeded her ability to obtain alternate financing by failing to relay her proper payoff figure to another lender in a timely manner. It is this allegation that forms the basis for defendant's counterclaim seeking

¹Plaintiff filed this motion on June 15, 2007 and alleges it did not receive the amended answer and counterclaim until July 9, 2007. As such, the court does not accept defense counsel's characterization of plaintiff's counsel failure to submit the amended answer and counterclaim with the moving papers as a "[d]eliberate attempt by plaintiff's counsel to mislead this court as to the issues in this case" (Affidavit of Lauren S. Cohen, Esq., sworn to July 3, 2007, ¶ 2).

damages against plaintiff for said acts and/or omissions. Plaintiff objects to defendant's amended answer and counterclaim on both procedural and substantive grounds.

From a procedural posture, plaintiff argues that defendant's amended answer and counterclaim are untimely. Defendant's original answer was dated and served on May 25, 2007. As such, defendant's time to amend her answer as of right expired on June 14, 2007. The court cannot determine from this record whether the amended answer and counterclaim were served on June 1, 2007 as alleged by defendant or July 9, 2007 as alleged by plaintiff. In either event, the court finds it most prudent to address the substance of said amended answer and counterclaim as if the same were timely in the first instance or, if not, that this court had granted permission to file an amended answer.

Defendant's allegations regarding plaintiff's cooperation or lack thereof may or may not be true, but in either case are irrelevant to whether defendant has raised the existence of any triable issue of fact with respect to any defense. In short, the court finds that defendant's amended answer contains only general denials which are insufficient to raise an issue of fact as to any defense. With respect to the merits of defendant's counterclaim, any contention by defendant that her closing in March of 2007 was delayed due to plaintiff's actions and/or inactions are irrelevant with respect to this default in payment which occurred in January 2007. As noted by plaintiff, "[d]efendant defaulted on this loan and the loan went into a foreclosure status based on her nonpayment of her January 12, 2007 mortgage payment, not because of a failure by Plaintiff to provide payoff figures to the Defendant in March 2007" (Affirmation of Michael J. Wrona, Esq. dated July 24, 2007, ¶ 19). It is well-settled that the amount owed to a plaintiff is not a

defense to a foreclosure action and does not preclude the issuance of summary judgment directing the sale of the mortgaged property (*Crest/Good Mfg. Co., Inc. v Baumann*, 160 AD2d 831 [1990]). Consequently, the court finds that defendant's counterclaim must be dismissed.

CONCLUSION

For the reasons stated, plaintiff's motion for summary judgment against defendant seeking dismissal of the answer; for permission to treat said answer as a limited notice of appearance; amending the caption to reflect the deletion of "John Doe" as a party defendant; and for an order appointing a referee to determine the amount due to plaintiff and to determine whether the premises being foreclosed can be sold in parcels; is GRANTED; provided, however, that defendant shall be entitled to notice of all future proceedings; and defendant's counterclaim is DISMISSED. The court has this same date signed a separate order appointing a referee in this case.

The foregoing constitutes an order of the court upon which judgment may be entered according to its terms.

It is so ordered.

Dated: August 30, 2007
Binghamton, New York

s/ Ferris D. Lebous
Hon. Ferris D. Lebous
Justice, Supreme Court

ALL PAPERS SUBMITTED IN CONNECTION WITH THIS MOTION HAVE BEEN FILED, ALONG WITH THE ORIGINAL DECISION AND ORDER, WITH THE BROOME COUNTY CLERK