

Bankers Trust Co. v Haber

2007 NY Slip Op 34334(U)

December 31, 2007

Supreme Court, Nassau County

Docket Number: 5167-07/

Judge: James P. McCormack

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JAMES P. McCORMACK
Justice

TRIAL/IAS PART 51

BANKERS TRUST COMPANY
c/o Saxon Mortgage Services, Inc.
4708 Mercantile Drive North
Fort Worth, TX 76137

Plaintiff(s),

- against -

SHARON W. HABER, IRIS CARLEY,
JOHN DOE (said name being fictitious, etc.)

Defendant(s).

INDEX NO. 5167/07

MOTION SEQUENCE
NO. 001, 002

MOTION SUBMISSION
DATE: 10/31/07

The following papers read on this motion:

Notice of Motion.....	1
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Motion (seq. No. 1) by the attorney for the plaintiff for an order granting summary judgment dismissing the verified answer of the defendants Iris Carley and Sharon W. Haber pursuant to CPLR 3212 and CPLR 3211, and for permission to treat said verified answer as a limited notice of appearance, entitling said defendants' attorney Lance Grossman, Esq. to receive without prior notice a copy of the notice of sale, notice of discontinuance and notice of surplus money

proceedings, if any, that this court appoint a referee to determine the amount due and ascertain whether the premises may be sold in parcels, and that “John Doe” be dropped as a party defendant in this action as not tenants reside at the premises , and that the caption of this action be amended to reflect the deletion of “John Doe” as a party defendant, and that all non-appearing and non-answering defendants be deemed in default and said defaults be fixed and determined and that the caption be amended by dropping the plaintiff’s address is denied. Cross motion (seq. No. 2) for an order pursuant to CPLR 3211(a)(3) dismissing the complaint due to the failure of the plaintiff to maintain standing and lacks capacity to sue in this action; CPLR 3211(a)(7) for failure to state a cause of action, and legal fees is denied in its entirety.

The defendants Sharon W. Haber and Iris Carley executed a mortgage with United Mortgage Corp. on January 17, 2001 in the sum of \$50,000.00 at 12.625 percent interest. United Mortgage Corp. assigned the mortgage to Banker’s Trust Company. The mortgage required the defendants to make monthly payments in the amount of \$538.48. The plaintiff claims that since on or about November 1, 2008 the defendants have failed to make the required payments and that the principal amount due is approximately \$45,792.00 plus interest, expenses, late charges and tax escrow advances.

The defendants admit to the existence of the mortgage and their responsibilities thereunder. The defendants' cross motion seeks to dismiss the complaint on the ground that the plaintiff lacks standing. To support this allegation defendants assert that the power of attorney used to support defendant Saxon's servicing of the account is from Deutsche Bank to Saxon, rather than from Banker's Trust, while the assignment of the mortgage is to Banker's Trust. Defendants assert there are no documents evidencing the transfer of assets or change in name of Banker's Trust to Deutsche Bank. The power of attorney clearly demonstrates that Deutsche Bank Trust Company Americas was formerly known as Banker's Trust Company. Plaintiff has also demonstrated that Banker's Trust Company was renamed Deutsche Bank Trust Company Americas and the power of attorney gives the appropriate authority for defendant Saxon to sign the affidavit in support of the motion for summary judgment. The defendants' cross motion to dismiss for lack of standing pursuant to CPLR 3211(a)(3) is denied.

The execution of the note and mortgage, the defendants' default, plaintiff's ownership of the note and mortgage, demand for payment and acceleration are all described in detail. Within the context of a mortgage foreclosure action, the plaintiff "establishes its case as a matter of law through the production of the mortgage, the unpaid note, and the evidence of default." *First Trust National*

Association v Pinter, 264 AD2d 464; *EMC Mortgage Corp. v Riverdale Assocs.*, 291 AD2d 370, 370 quoting *Republic Nat. Bank of New York v Zito*, 280 AD2d 657, 658; *see also U.S. Bank Trust Nat. Ass'n Trustee v Butti*, 16 AD3d 408.

Copies of the relevant documents, including the mortgage, unpaid note, evidence of the default, and the assignment of mortgage to the plaintiff and allonge to the note are all attached to plaintiff's motion for summary judgment.

A party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact in controversy. *See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851; *see also Zuckerman v City of New York*, 49 NY2d 557. Once the plaintiff has established its case, the burden shifts to the defendant to assert any viable defenses that could properly raise a triable issue of fact as to the default. *See DiNardo v Patcam Serv. Station, Inc.*, 228 AD2d 543; *see also Village Bank v Wild Oaks Holding, Inc.*, 196 AD2d 812. The plaintiff has satisfied its *prima facie* burden of establishing entitlement to judgment as a matter of law. In support of its motion, plaintiff produced copies of the note and recorded mortgage. These documents demonstrated that plaintiff's predecessor loaned money to defendant in return for a promise to repay the debt. Defendant Sharon W. Haber does not deny that the principal balance due is \$45,791.99, with interest

of 12.625% from November 1, 2006, plus advanced taxes, insurance, costs, disbursements, and reasonable attorney's fees. The fact that defendant defaulted is undisputed. Based upon the submission of the unpaid note and mortgage, as well as evidence of defendant's default, plaintiff has demonstrated its *prima facie* entitlement to summary judgment. The burden now shifts to defendant to assert defenses sufficient to raise a triable issue of fact regarding the validity of the note and mortgage, or the validity of the default. *See DiNardo*, 228 AD2d at 543. The defendant presents no evidence or argument to the court regarding the validity of the note and mortgage. In her affidavit in opposition to plaintiff's motion, defendant does not deny that she signed the note and mortgage. Furthermore, defendant does not deny that she is in default.

Defendant claims that she and her "agents" were in good faith negotiations with the plaintiff about a resolution of this matter and the plaintiff prematurely commenced the within foreclosure action without satisfying the notice requirements of the Note. Defendant alleges she never received a Notice of Default while trying to negotiate with the bank to reinstate the loan. Plaintiff alleges a Notice of Default letter was mailed. Paragraph 6(c) Notice of Default of the Note states that:

(c) Notice of Default

[* 6]

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal which has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means.

Plaintiff has failed to submit a copy of a document which conforms to the requirements of Paragraph 6(c) that was allegedly mailed to the defendants. The alleged failure to send a Notice of Default as provided by Paragraph 6(c) of the Note raises a question of fact that precludes the granting of summary judgment.

A Preliminary Conference (see 22 NYCRR 202.12) shall be held at the Preliminary Conference part, located at the Nassau County Supreme Court on the 30th day of January, 2008, at 9:00 AM. This directive, with respect to the date of the Conference, is subject to the right of the Clerk to fix an alternate date should scheduling require. The attorneys for the plaintiff shall serve a copy of this order on the Preliminary Conference Clerk and the attorneys for the plaintiffs.

In the event this action is settled, counsel shall notify chambers of same in writing,

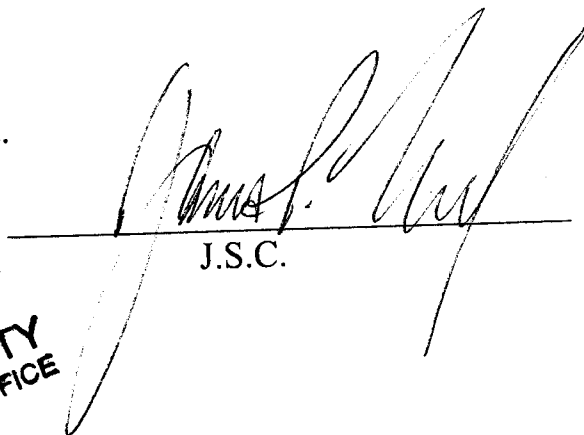
This decision is the order of the Court.

Dated: 12/31/07

ENTERED

JAN 18 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE



J.S.C.