

Aurora Loan Servs., LLC v Lopa

2008 NY Slip Op 32318(U)

August 15, 2008

Supreme Court, Richmond County

Docket Number: 0101539/2008

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.:101539/2008
Motion No.:001**

AURORA LOAN SERVICES, LLC,

Plaintiff

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

**FRANK LOPA,
ROSEMARIE LOPA,
MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS , INC., as Nominee for
Lehman Brothers Bank, FSB,
MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., as Nominee for
Wachovia Mortgage, Inc.,
NEW YORK CITY ENVIRONMENTAL CONTROL
BOARD,
NEW YORK CITY PARKING VIOLATIONS BUREAU,
NEW YORK CITY TRANSIT ADJUDICATION BUREAU,
NEW YORK STATE DEPARTMENT OF TAXATION,
PEOPLE OF THE STATE OF NEW YORK, and
JOHN DOE,**

Defendants

The following items were considered in the review of this motion to dismiss plaintiff’s complaint.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers

Defendants, Frank Lopa and Rosemarie Lopa (“the Lopas”) move this court pursuant to CPLR § 3211 for an order dismissing the plaintiffs complaint. Defendants’ motion is granted in its entirety.

Facts

On or about April 8, 2008 the plaintiff commenced this action seeking 1) to foreclose on property held by the Lopas located at 283 Nugent Street, Staten Island, New York; and 2) seeking damages for the defendants breach of a concurrently executed note. The complaint demands judgment in pertinent part as follows:

1. adjudging and decreeing the amounts due the plaintiff for principal, interest, costs, late charges, expenses of sale, allowances and disbursements, reasonable attorney's fees if provided for in the mortgage and any monies advanced and paid which are secured by the mortgage.

2. that the defendants an all persons claiming by, through or under them and and every other person or entity whose right, title, conveyance or encumbrance is subsequent to or subsequently recorded or whose lien is being challeged by being a defendant in this action, be barred and foreclosed of and from all right, claim, lien, interest or equity of redemption in and to said mortgaged premises.

3. That the said mortgaged premises, or such part thereof as may be necessary to raise the amounts due as aforesaid, be decreed to be sold according to law subject to the provisions of paragraph "TWELFTH" of this complaint.

Where paragraph TWELFTH states:

Plaintiff requests that in the event this action proceeds to judgment of foreclosure and sale, said premises be sold subject to: any state of facts an inspection f the premises would disclose or an accurate survey of the premises would show; covenants, restrictions, easements and public utility agreements of record, if any; building and zoning ordinances and possible violations of the same; any

rights of tenants or persons in possession of the premises; any equity of redemption of the United States of America to redeem the premises within 120 days; prior mortgages and liens, if any. If the mortgage secures more than one parcel, Plaintiff requests the judgment of foreclosure provide for the sale of the parcels in a particular order to the extent necessary to satisfy the indebtedness.

The Lopas attorney argues that the plaintiff's complaint is fatally flawed in that it must elect to proceed against the Lopas either in an action on the note or in foreclosure. The plaintiff argues that the Election of Remedies doctrine does not preclude it from maintaining two causes of action against the Lopas. Rather, the plaintiff contends that it is merely prevented from filing two separate actions concurrently seeking differing remedies.

Discussion

The Court of Appeals stated that it is “[i]t is fundamental that the holder of a note (or bond) and mortgage has two remedies: one at law in a suit on the debt as evidenced by the note, the other in equity to foreclose the mortgage.”¹

The Lopas base their argument primarily on Real Property Actions and Proceedings Law § 1301, that states in pertinent part:

While the action is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought.²

The Appellate Division, Second Department held that

¹ *Copp v. Sands Point Mar.*, 17 NY2d 291 [1966].

² RPAPL § 1301(3)

RPAPL 1301 (3) prohibits a party from commencing an action at law to recover any part of the mortgage debt while the foreclosure proceeding is pending or has not reached final judgment, without leave of the court in which the foreclosure action was brought (see, *Marine Midland Bank v Lake Huntington Dev. Group*, 185 AD2d 395, 396). Thus, the statute contemplates a stay or dismissal of the later commenced action at law if leave is not obtained, not a dismissal of the foreclosure action.³

This holding contemplates multiple actions brought in succession by the plaintiff. In this case, the plaintiff chose to institute an action in both law in equity within the same complaint. The Appellate Division, Third Department confronted a very similar set of facts in *Wyoming County Bank & Trust Company v. Kiley*.⁴ In that case the Appellate Division, Third Department held:

Heretofore, it has been recognized that the holder of a bond and mortgage has a choice of two remedies: he may proceed at law to bring an action on the debt as evidenced by the note (or bond) or he may proceed at equity by bringing an action to foreclose the mortgage . . . The note represents the primary personal obligation of the mortgagor while the mortgage is merely the security for such obligation. The creditor in a mortgage transaction has the choice of two remedies, pursuing either the land or the borrower . . . Under section 1301 of the Real Property Actions and Proceedings Law, the mortgagee, however, must make an election as to which remedy he will pursue and cannot prosecute the two actions concurrently . . . For this reason, section 1301 of the Real Property Actions and Proceedings Law proscribes a mortgagee of real property from seeking to enforce rights upon default by pursuing a legal remedy and an equitable remedy at the same time.⁵

Prior to the enactment of RPAPL § 1301 the Appellate Division, Second Department evaluated a fact pattern where the plaintiffs sought

³ *First Nationwide Bank v. Brookhaven Realty Assoc.*, 223 AD2d 618 [2d Dep't 1996].

⁴ *Wyoming County Bank & Trust Co. v. Kiley*, 75 AD2d 477 [3rd Dep't 1980].

⁵ *Id.* (Internal citations omitted)

[i]n the first cause of action . . . the usual judgment of foreclosure and sale and the entry of the usual deficiency judgment against the [defendants], such deficiency judgment to included principal, interest and taxes. In the second, third and fourth causes of action plaintiffs ask for separate money judgments against the obligors for the amount of the interest and taxes.⁶

The court went on to hold that these two separate causes of actions based on the same default cannot be maintained simultaneously. The court stated that:

the interest and taxes constitute an integral part of the mortgage debt and, hence, a separate action for the recovery of such interest may not be maintained concurrently with the action to foreclose the mortgage, which is predicated on defaults in the payment of principal, interest and taxes.⁷

Indeed, New York foreclosure law has a long history of requiring a plaintiff in a foreclosure action to elect a remedy sounding in law or equity. As long ago as 1893 the Court of Appeals held that:

[t]he peculiar statutory provisions applicable to actions of foreclosure above referred to indicate that it was never intended to permit the joinder in the same complaint of two separate causes of action, one at law to recover a personal judgment on the bond for the debt, and the other in equity to procure a sale of the land covered by the mortgage, given to secure the same debt and the application of the proceeds thereon, and if not, then the complaint in this case does not contain but a single cause of action, and that in equity, for the foreclosure of the mortgage lien. It is true that the giving of the bond is stated, but that is incidental to the main facts alleged and only necessary, if at all, for the purpose of showing the consideration of the mortgage and the amount of the deficiency, if any.⁸

⁶ *White v. Wielandt*, 259 AD 676 [2d Dep't 1940]

⁷ *Id.*

⁸ *Dudley v Congregation of Third Order of St. Francis*, 138 NY 451 [1893].

After evaluating New York law relating to foreclosure, the Federal district court for the Southern District of New York observed that, “[t]he New York courts interpret this statute [RPAPL § 1301] as requiring the holder of a note and mortgage to make an election of remedies-either to foreclose on the mortgage or to recover on the note.”⁹ This court agrees.

Conclusion

It is clear from the plaintiff’s complaint that it sought to exercise the two remedies available to it simultaneously. This court does not find the plaintiff’s arguments persuasive that it did not need to elect a remedy within the complaint. As such, this court grants the Lopas motion for summary judgment dismissing the plaintiff’s complaint in its entirety.

Accordingly, it is hereby:

ORDERED, that the defendants Frank Lopa and Rosemarie Lopa’s motion for summary judgment dismissing the plaintiff’s complaint is granted; and it is further

ORDERED, that the plaintiff’s complaint is dismissed without prejudice.

ENTER,

DATED: August 15, 2008

Joseph J. Maltese
Justice of the Supreme Court

⁹ *First Fidelity Bank, N.A., New Jersey v. Best Petroleum, Inc.*, 757 F.Supp. 293, [S.D.N.Y.,1991].

