

Washington Mut. Bank v Hickey

2008 NY Slip Op 33028(U)

November 5, 2008

Supreme Court, Suffolk County

Docket Number: 00-23926

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 8-5-08
ADJ. DATE 8-15-08
Mot. Seq. # 003 - MotD

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WASHINGTON MUTUAL BANK,	:	CULLEN & DYKMAN, LLP
	:	Attorneys for Plaintiff
Plaintiff,	:	Garden City Center
	:	100 Quentin Roosevelt Boulevard
- against -	:	Garden City, New York 11530-4850
	:	
JOHN H. HICKEY, JR.,	:	EDWARD J. TROY, ESQ.
	:	Attorney for Defendant
Defendant.	:	44 Broadway
	:	Greenlawn, New York 11740
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Upon the following papers numbered 1 to 43 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 28; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 29 - 38; Replying Affidavits and supporting papers 39 - 43; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by Washington Mutual Bank for summary judgment dismissing all the counterclaims against it, is granted to the extent that the fourth counterclaim is dismissed.

On August 18, 1998, defendant Jon H. Hickey, Jr., received a loan in the amount of \$139,500.00 from Cendant Mortgage Corporation (hereinafter "Cendant"). The loan was evidenced by a note and secured by a mortgage on Mr. Hickey's residence. In June, 1999, Mr. Hickey's mortgage was assigned to Mortgage Electronic Registration Systems, Inc. (hereinafter "MERS") as nominee for HomeSide Lending, Inc. (hereinafter "Homeside"). Thereafter, Mr. Hickey allegedly defaulted on his mortgage payments and in October, 2000, MERS commenced a foreclosure action. In his answer, Mr. Hickey raised four counterclaims: breach of contract, breach of fiduciary duty, failure to provide an accounting, and defamation. In 2002, plaintiff Washington Mutual Bank (hereinafter "Washington Mutual") purchased the assets of Homeside and became the holder of Mr. Hickey's mortgage. Washington Mutual was then substituted as the plaintiff herein. The parties eventually settled the foreclosure action, so that only the four counterclaims remain.

The first counterclaim alleges that at the closing, Mr. Hickey executed a form entitled "Election of Hazard Insurance Payment Option." This form had an option which was chosen by Mr. Hickey and which provided, "I am requesting that you collect monthly payments towards the annual hazard insurance bills with my regular monthly payment. I understand that you will pay these bills when due and I will immediately forward any bills that I receive in error from my Agent or Insurance Company." Mr. Hickey alleges that the closing agent for Cendant acknowledged the receipt of the election form, and further alleges to the effect that the mortgagee¹ thus became bound by the terms of the election. This counterclaim also alleges that the mortgagee took possession of his escrow funds, and that in spite of the mortgagee's obligations, it failed to pay the hazard insurance when bills became due, breaching the terms of the agreement and permitting the hazard insurance to lapse.

The second counterclaim alleges that after wrongfully permitting the hazard insurance to lapse, the mortgagee procured an insurance policy at a greatly increased rate and sought to compel Mr. Hickey to reimburse it for this expense. Additionally, this counterclaim alleges that the mortgagee wrongfully invaded Mr. Hickey's escrow account and improperly depleted the sums therein, thus, breaching the mortgagee's fiduciary duty.

The third counterclaim alleges that in wrongfully depleting Mr. Hickey's escrow account, the mortgagee breached its fiduciary duty and failed to provide an accounting as to the sums entrusted to it.

Finally, the fourth counterclaim alleges that the mortgagee filed a *lis pendens*, which was later republished in "The Landpaper," a paper of general circulation on the east end of Long Island. This counterclaim alleges that the filing of the *lis pendens* has caused Mr. Hickey to be made the subject of public ridicule and scorn, all to his detriment as a local businessman. It also alleges that since there was no basis for the mortgagee's claim, Mr. Hickey has been wrongfully libeled.

Washington Mutual now moves for summary judgment dismissing the four counterclaims against it. As to the first counterclaim, Washington Mutual alleges that pursuant to the terms of Mr. Hickey's mortgage, Mr. Hickey was solely obligated to maintain hazard insurance on the property. In support of its motion Washington Mutual submits, *inter alia*, a copy of the note, the mortgage, the notice of pendency, and the affidavit of Charles Herndon, a section manager for its "Default Process Risk Oversight." Mr. Herndon alleges that in this case, the mortgagee never collected a monthly escrow payment from Mr. Hickey to pay the hazard insurance for the property. He states that the mortgagee did not have a reserve for such a payment and only procured "force placed" insurance when it did not receive evidence of the proper insurance from Mr. Hickey.

As to the second counterclaim, Washington Mutual argues that it should be dismissed in its entirety because the mortgage herein permits the mortgagee to procure hazard insurance for the property and to recover the sums expended from Mr. Hickey. In support of such argument, Mr. Herndon states

¹For purposes of discussion, the court will refer to Cendant, MERS, Homeside, and Washington Mutual interchangeably as the mortgagee.

that Mr. Hickey failed to provide the Bank with evidence of insurance for the property. In addition, Washington Mutual alleges that there was no fiduciary relationship between the mortgagee and Mr. Hickey, but rather, the relationship was a contractual one of debtor and creditor.

As to the third counterclaim, Washington Mutual contends that Mr. Hickey's demand for an accounting of the bond and escrow account should be dismissed as moot, since Mr. Hickey's attorney was provided with an account history during the foreclosure action and during discovery in this matter. In support of its argument, Washington Mutual submits a page from Mr. Hickey's deposition transcript wherein, when Mr. Hickey was asked whether he ever remembered receiving a payment history, Mr. Hickey responded in pertinent part, that he recollected receiving a payment history after the foreclosure action was commenced.

As to the fourth counterclaim, Washington Mutual alleges that it is not clear whether Mr. Hickey is asserting a claim for slander of title or defamation per se, but under either theory, Mr. Hickey's claim fails. It states that Mr. Hickey is a landscaper, and that the lis pendens filed against the property in connection with the foreclosure action suggests nothing derogatory concerning Mr. Hickey's skill as a landscaper. Additionally, Washington Mutual argues that a notice of pendency does not give rise to a cause of action sounding in slander of title.

Mr. Hickey opposes this motion on procedural grounds, as well as on the merits. Initially, he claims that the mortgagee, on or about April 30, 2002, previously moved for summary judgment. In support, he submits a copy of an order dated September 20, 2002, wherein the Hon. William L. Underwood, Jr., granted summary judgment solely to the extent that a conference was directed to be held on October 22, 2002. Mr. Hickey contends that this motion is, therefore, a successive summary judgment motion and that the mortgagee never sought the court's prior permission. Mr. Hickey also argues that Washington Mutual's proof is not in admissible form. He points out that Mr. Herndon's affidavit was allegedly attested in the County of Duval, State of Florida, and allegedly notarized by Sean Waelde. He contends that an oath taken outside of New York State needs a certificate of authentication and a certificate of conformity, and without such certifications, the affidavit is not in admissible form. In addition, Mr. Hickey claims that the portion of his deposition testimony which was submitted by Washington Mutual was improper since it failed to disclose the certification of the stenographic reporter, and was missing the cover page and signature page. Mr. Hickey maintains that since there is a complete failure to provide proper proof in admissible form, Washington Mutual's motion must be denied.

As to the merits, Mr. Hickey explains that at the closing he was required to produce evidence of a fully paid insurance policy covering the mortgaged premises for one year. He states that he did in fact provide such proof of insurance. He alleges that also at this closing he was given the option of having the mortgagee collect monthly payment to be put in escrow to pay the hazard insurance premium when it came time to renew, and submits a copy of the "Election of Hazard Insurance Payment Option" form which he signed. Mr. Hickey also submits copy of the first coupon provided to him by Cendant at the closing. This coupon indicates that \$48.00 of each month's installment would be used to fund hazard insurance escrow. Mr. Hickey alleges that despite making his monthly payments, which included the

\$48.00 in escrow funds, he eventually received a notice that his homeowner's insurance was in danger of being cancelled. Mr. Hickey states that to prevent cancellation, he paid the premiums. He contends that in spite of his efforts, he could not get an answer as to why his insurance was almost cancelled and as to what was being done with his escrow money. Mr. Hickey further alleges that he thereafter received a notice that his monthly installment payments were being increased because a "force placed" policy was put into effect for the property. He states that during this time, he continued to make his monthly payments at the proper rate, not at the increased rate, and his payments were consistently returned by the mortgagee.

In further opposition to this motion, Mr. Hickey argues that nowhere in Mr. Herndon's affidavit does he attest to any personal knowledge as to the procedures and documents used by Cendant. In support, he submits a transcript of Mr. Herndon's deposition testimony and points to the portion wherein, when Mr. Herndon was asked, "Do you know why they [Cendant] would have Mr. Hickey sign a document selecting the hazard insurance payment option and then not escrow for it?" he replied, "I can't speak for what Cendant did." Mr. Hickey also submits a copy of a letter he received from Cendant dated November 23, 1999, which requests Mr. Hickey's help and provides in pertinent part, "A bill has not been received from your insurance company... Without a bill, a payment may not be paid and your insurance coverage may lapse or be canceled for nonpayment. Please contact your insurance agent at once and have a bill sent to us... A check will be mailed to your insurance company in two (2) business days after a bill is received from you." Mr. Hickey argues that this letter confirms that Cendant agreed to escrow the premiums, and subsequently, Homeside was required and did continue to escrow. He further claims that a fiduciary duty did exist based upon the escrow account. Mr. Hickey also asserts that he is entitled to an accounting because there was never any explanation as to the escrow money. Lastly, Mr. Hickey argues that he was defamed because the underlying action was improperly commenced since he was not in default. He alleges that prior to this action and the filing of the *lis pendens*, he had an excellent credit rating, but that after the foreclosure action was commenced his ability to finance his business was impeded. Mr. Hickey asserts that based upon all of this evidence, Washington Mutual's motion for summary judgment must be denied.

As a preliminary matter, the court rejects Mr. Hickey's argument that this motion should not be considered because a prior summary judgment motion was made. Although successive summary judgment motions are generally disfavored (*see Oppenheim v Village of Great Neck Plaza, Inc.*, 46 AD3d 527, 846 NYS2d 628 [2d Dept 2007]), where, as in this case, the merits of the first motion were never addressed, there is sufficient cause for the court to consider a second motion (*see Carreras v Weinreb*, 33 AD3d 953, 826 NYS2d 72 [2d Dept 2006]; *Wit's End Giftique Inc. v Ianniello*, 277 AD2d 684, 716 NYS2d 123 [3d Dept 2000]). Nor does the court find any merit in Mr. Hickey's argument that the deposition transcript submitted by Washington Mutual was improper because it was missing the stenographer's certification, cover page and signature page. Even though Washington Mutual failed to provide a complete transcript with its original motion papers, the stenographer's certification and cover page were submitted with its reply papers. In addition, Washington Mutual has explained in its reply papers that after forwarding the deposition transcript to Mr. Hickey's counsel for his signature, it never received the signed original deposition transcript back from Mr. Hickey's attorney. Under these

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circumstances, Mr. Hickey was not prejudiced by the original omission of these pages and such omission will be disregarded (*see Mazzarelli v 54 Plus Realty Corp.*, 54 AD3d 1008, 2008 NY Slip Op 07219 [2d Dept 2008]).

However, the court does agree with Mr. Hickey's argument that the affidavit of Mr. Herndon is not in proper form. Mr. Herndon's affidavit was sworn before Sean Waelde in Duval County, Florida. Mr. Waelde has signed the affidavit and affixed his stamp thereto indicating he is a notary public in Florida. Initially, the court notes that when "the person administering the oath for an out-of-state affidavit is a notary, the affidavit does not require a certificate authenticating the notary's authority" (*Firstcom Broadcast Services v New York Sound Inc.*, 184 Misc2d 524, 525, 709 NYS2d 329 [Civ Ct, New York County 2000]; CPLR 2309[c]; Real Property Law §§ 299 and 311; *see also* 2 Carmody Wait 2d §4:24, at 28). That notwithstanding, Mr. Herndon's affidavit is still not in admissible form since it fails to comply with CPLR 2309[c], which requires that an out-of-state affidavit be accompanied by a certificate of conformity (*see* Real Property Law § 299-a[1]; *see also PRA III, LLC v Gonzalez*, 54 AD3d 917, 864 NYS2d 140 [2d Dept 2008]; *Boai Zhong Yi Acupuncture Services, P.C. v New York Central Mut. Fire Ins Co.*, 8 Misc3d 1011[A], 801 NYS2d 776 [Civ Ct Queens 2005]; *Ford Motor Credit Company v Prestige Gown Cleaning Service, Inc.*, 193 Misc2d 262, 748 NYS2d 235 [Civ Ct Queens 2002]). Due to the lack of a certificate of conformity, the affidavit of Mr. Herndon is in effect unsworn (*see Worldwide Asset Purchasing LLC v Simpson*, 17 Misc3d 1128[A], 851 NYS2d 75 [Auburn City Ct 2007]).

As such, an issue of fact remains as to whether the mortgagee ever collected escrow payments for hazard insurance and what was done with such money. Therefore, Washington Mutual has failed to introduce competent evidence in admissible form establishing that it did not breach the mortgage agreement or any fiduciary duty. Moreover, as to Washington Mutual's claim that a mortgagor's relationship with a mortgagee is simply one of debtor and creditor, it is important to note that, "Although the relationship between a borrower and a bank is a contractual one which generally does not give rise to a fiduciary duty... a bank, in its capacity as escrow holder of funds... may be held liable on the theory of breach of fiduciary duty for the failure to make required... payments (*Standard Federal Bank v Healy*, 7 AD3d 610, 612; 777 NYS2d 499, 501 [2d Dept 2004] [internal citations omitted]). Accordingly, Washington Mutual has failed to meet its prima facie burden as to summary judgment on the first and second counterclaim.

Washington Mutual has also failed to meet its prima facie burden on the third counterclaim for an accounting. A mortgagor is entitled to an accounting if the mortgage documents require it (*see 2 Bergman on New York Mortgage Foreclosures* §23.52). In this case, paragraph 2(B) of the mortgage provides in relevant part, "Lender will use the Funds to pay the Escrow items. Lender will give to me, without charge, an annual accounting of the Funds. That accounting must show all additions to and deductions from the Funds *and the reason for each deduction*" (emphasis added). Washington Mutual's proof that Mr. Hickey acknowledges receiving a "payment history" is insufficient to show that he received an accounting with an explanation of all deductions. Accordingly, Washington Mutual's motion for summary judgment on the third counterclaim must be denied.

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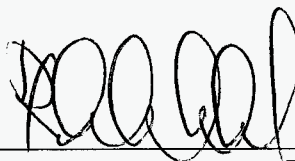
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As to the fourth counterclaim for defamation based upon the underlying foreclosure action and the filing of the lis pendens, the court finds that Washington Mutual has met its prima facie burden on this summary judgment motion and the plaintiff has failed to raise a triable issue of fact. First, CPLR 3016(a) requires that, “[i]n an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally.” In the case at hand, Mr. Hickey’s fourth counterclaim fails to set forth the particular words that the mortgagee allegedly used to defame him (see *Acosta v Fidelity New York*, 227 AD2d 424, 643 NYS2d 361 [2d Dept 1996]). Furthermore, to the extent that this counterclaim is based upon statements made by the mortgagee in its foreclosure complaint, this counterclaim must be dismissed since such statements were absolutely privileged (see *Ghaly v Mardiros*, 204 AD2d 272, 611 NYS2d 582 [2d Dept 1994]). Moreover, to the extent that this counterclaim is predicated upon the mortgagee having filed a notice of pendency, it is well settled that a notice of pendency does not give rise to a cause of action sounding in slander of title or defamation (*Sopher v Martin*, 243 AD2d 459, 663 NYS2d 83 [2d Dept 1997]; see also *34-45 May Associates v Mayloc Associates*, 162 AD2d 389, 557 NYS2d 41 [1st Dept 1990]). Therefore, the fourth counterclaim must be dismissed.

Accordingly, Washington Mutual’s motion for summary for summary judgment dismissing all the counterclaims against it, is granted to the extent that the fourth counterclaim is dismissed.

Dated: 11/5/08



 J.S.C.

THOMAS F. WHELAN