

IndyMac Fed. Bank, FSB v Kallman

2010 NY Slip Op 30220(U)

February 1, 2010

Supreme Court, Greene County

Docket Number: 09-797

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF GREENE

INDYMAC FEDERAL BANK, FSB,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 09-797
RJI NO. 19-09-4360

ROBERT KALLMAN, WORKERS
COMPENSATION BOARD OF THE STATE
OF NEW YORK, BOARD OF MANAGERS
OF THE COLUMNS CONDOMINIUM and
"JOHN DOE #1" through "JOHN DOE #10" the
last ten names being fictitious and unknown to the
plaintiff, the person or parties, if any, having or
claiming an interest in or a lien upon the Mortgage
premises described in the Complaint,

Defendant.

Supreme Court Greene County All Purpose Term, January 25, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Frenkel, Lambert, Weiss, Weissman & Gordon, LLP
Nicole E. Schiavo, Esq.
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Greg Lubow, Esq.
Attorney for Defendant Robert Kallman
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Tannersville, New York 12485

TERESI, J.:

IndyMac Federal Bank, FSB (hereinafter "Plaintiff") commenced this action to foreclose
the mortgage it holds on property owned by defendant Robert Kallman (hereinafter
"Defendant"), located in Greene County, New York. Issue was joined by the Defendant and

Plaintiff now moves for summary judgment, for the appointment of a referee and to amend the caption of the action. Because plaintiff failed to establish its entitlement to judgment as a matter of law, its motions for summary judgment and for the appointment of a referee are denied. Additionally, because plaintiff did not set forth sufficient evidence to amend the caption of the action for all of the amendments sought, that portion of its motion is denied in part.

Where a mortgagee moves for summary judgment in a foreclosure action “[e]ntitlement 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.” (HSBC Bank USA v. Merrill, 37 AD3d 899 [3d Dept. 2007]).

On this record, plaintiff failed to meet its initial burden. Plaintiff supports its motion by attaching a copy of the Mortgage, with its riders. However, it failed to submit a copy of the note with its initial moving papers. Such failure of proof requires denial of Plaintiff's summary judgment motion. The note was “submitted for the first time in [Plaintiff's] reply papers, and therefore cannot be considered in determining whether or not Plaintiff demonstrated its prima facie entitlement to judgment as a matter of law” (Morales v. Coram Materials Corp., 51 AD3d 86, 95 [2d Dept. 2008], see also Crawmer v. Mills, 239 AD2d 844-845 [3d Dept. 1997]; see also Roanoke Sand & Gravel Corp. v. Town of Brookhaven, 24 AD3d 783 [2d Dept. 2005], Albany County Dept. of Social Services v. Rossi, 62 AD3d 1049 [3d Dept. 2009], Supreme Co2 North Street Corp. v. Getty Saugerties Corp., 68 AD3d 1392 [3d Dept. 2009]).

Accordingly, plaintiff's motion for summary judgment is denied.

Plaintiff's motion for the appointment of a referee is likewise denied. RPAPL §1321 provides that "if the defendant fails to answer within the time allowed or the right of the plaintiff is admitted by the answer, upon motion of the plaintiff, the court shall ascertain and determine the amount due, or direct a referee to compute the amount due to the plaintiff." Here, Defendant timely answered the complaint and denied its allegations relative to Plaintiff's right to foreclose this mortgage. Moreover, as set forth above, Plaintiff has not demonstrated its entitlement to summary judgment and an order striking the answer. As such, Plaintiff failed to demonstrate its entitlement to the appointment of a referee to compute, pursuant to RPAPL §1321, and this portion of its motion is also denied.

Plaintiff also moves to amend the caption of the action by 1) deleting Plaintiff and substituting One West Bank, FSB (hereinafter "One West") in its place, 2) deleting "John Doe #2" through "John Doe #10", and 3) substituting Kallman Realty, Inc. in place of "John Doe #1". A motion to "amend pleadings is generally freely given." (Gersten-Hillman Agency, Inc. v. Heyman, 68 AD3d 1284 [3 Dept. 2009]). However, the proponent of a motion to amend "is required to make an evidentiary showing sufficient to support the proposed claim." (D'Orazio v. Mainetti, 39 AD3d 981, 982 [3d Dept. 2007], CPLR §3025).

First, Plaintiff demonstrated its entitlement to delete itself and substitute One West as the plaintiff herein. Plaintiff submits the duly executed and filed Assignment of Mortgage, transferring the mortgage "together with the indebtedness or obligation described in [the mortgage]" to One West. Additionally, a Vice President of One West states, by affidavit, that the note and mortgage have been assigned to it. In light of the fact that amendments are freely given, the foregoing constitutes a sufficient evidentiary showing to support this amendment. While

Defendant's opposition papers correctly note ambiguities in Plaintiff's moving papers, he did not rebut Plaintiff's showing nor demonstrate prejudice. (Pritzakis v. Sbarra, 201 AD2d 797 [3d Dept. 1994]). Accordingly, IndyMac Federal Bank, FSB is deleted from the caption of the action and One West Bank, FSB is substituted in its place.


Likewise, Plaintiff demonstrated its entitlement to delete "John Doe #2" through "John Doe #10". Plaintiff's attorney's affirmation establishes that such proposed defendants were not served with the summons and complaint, and are not necessary parties to the action. Defendant does not oppose this portion of the motion, nor is he prejudiced. Accordingly, "John Doe #2" through "John Doe #10" are deleted from the caption of the action.

Plaintiff failed to demonstrate, however, its entitlement to substitute Kallman Realty, Inc. for "John Doe #1" in the caption of the action. Plaintiff submits no affidavit, affirmation or documentary evidence to support this portion of its motion. As Plaintiff made no evidentiary showing supporting this portion of its motion, it is denied.

This Decision and Order is being returned to the attorney for the Defendant. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Greene County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: February 1, 2010
Albany, New York


Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated December 21, 2009, Attorney Affirmation of Nicole Schiavo, dated December 21, 2009, Affidavit of Erica Johnson-Seck, dated December 11, 2009, with attached Exhibits A - H.
2. Affirmation in Opposition of Greg Lubow, dated January 14, 2010.
3. Reply of Nicole Schiavo, dated January 22, 2010, with attached Exhibit A.