

Wells Fargo Bank, N.A. v Leguillow

2010 NY Slip Op 30574(U)

March 9, 2010

Supreme Court, Richmond County

Docket Number: 103711/08

Judge: Joseph J. Maltese

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

**Index. 103711/08
Motion No.: 002
001**

WELLS FARGO BANK, N.A.,

Plaintiffs

DECISION & ORDER

against

HON. JOSEPH J. MALTESE

**RALPH LEGUILLOW,
BOARD OF DIRECTORS OF GRYMES HILL ESTATES
OWNERS ASSOCIATION,
NEW YORK CITY ENVIRONMENTAL CONTROL
BOARD,
NEW YORK CITY TRANSIT ADJUDICATION BUREAU,
PEOPLE OF THE STATE OF NEW YORK**

Defendants

The following items were considered in the review of the following motions (1) to Amend the Answer, (2) Compel Production of Documents, and (3) for Summary Judgment.

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

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Plaintiff Wells Fargo Bank's motion for summary judgment to foreclose on the mortgage of the Defendant Ralph Leguillow ("Leguillow") pursuant to CPLR 3211 is denied with leave to renew.

Defendant Leguillow's cross-motion allowing him to submit an amended answer pursuant to CPLR 3025(b) is granted.

Defendant Leguillow's cross-motion for an Order compelling Plaintiff to respond to Defendant's Request for Production of Documents pursuant to CPLR 3124 is granted, in part, to the extent discussed herein.

PROCEDURAL HISTORY

Plaintiff initiated this foreclosure action against Defendant on August 27, 2008. Defendant filed an answer pro se on September 30, 2008. No action was taken until May 11, 2009, when Defendant sent Plaintiff a Request for Production of Documents. Plaintiff did not respond to Defendant's request. Instead, Plaintiff filed the instant motion for summary judgment to allow Plaintiff to foreclose on the mortgage on May 18, 2009.

FACTS

Defendant Ralph Leguillow ("Leguillow") is a retired firefighter and earns a pension of approximately \$4,200 per month. In addition to his pension, Leguillow worked in construction until 2008. The total income combined from Leguillow's pension and construction work totaled approximately \$6,450 per month. Leguillow contacted an agent named "Don" with Grymes Hills Estate about purchasing a house. Don referred Leguillow to a mortgage broker named "Craig" at CTX Mortgage Company, LLC ("CTX"). Leguillow provided Craig with documentation of his monthly income and disclosed that he could not afford a monthly payment above \$3,000. Craig assured Leguillow that the monthly payments on his loan would not exceed \$2,800. Don then referred Leguillow to a closing attorney named Joann Monaco, whom he met a week prior to the closing. At no time prior to the closing was Leguillow informed of the terms of the loan. Leguillow purchased the property located at 15 Tessa Court, Staten Island, New York (the "Property") on September 11, 2007 with a mortgage originally from CTX. The mortgage was for \$464,412 with a 30-year fixed interest rate of 6.875%. The initial monthly payments began at \$3,565 and rose to as high as \$4,100. Subsequent to the closing, title to the mortgage and the note was assigned to Plaintiff Wells Fargo Bank, N.A. When construction work slowed down, Leguillow lost the additional income and was left with only his firefighter's pension. In May 2008, seven months after beginning payments, Leguillow defaulted on the mortgage.

DISCUSSION

Plaintiff's Motion for Summary Judgment

A motion for summary judgment must be denied if there are “facts sufficient to require a trial of any issue of fact” (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. “Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion”¹ Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.² On a motion for summary judgment, the function of the court is issue finding, and not issue determination.³ In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.⁴

A prima facie entitlement to summary judgment is shown by providing evidence of the assignment, the mortgage, the note, and the defendants' default.⁵ In order to demonstrate a valid assignment, either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the

¹ *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 (2d Dept 1990)

² *American Home Assurance Co., v. Amerford International Corp*, 200 AD2d 472 (1st Dept 1994)

³ *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff'd* 65 NY2d 732 [1985]

⁴ *Glennon v. Mayo*, 148 AD2d 580 [2d Dept 1989]

⁵ *North Bright Capital, LLC v 705 Flatbush Realty, LLC*, 2009 NY Slip Op 7809, 1 (2d Dept 2009)

mortgage passes with the debt as an inseparable incident.

Plaintiff has presented sufficient evidence to satisfy its initial burden of demonstrating its entitlement to summary judgment. Plaintiff has presented the note along with the mortgage, as well as a recordation of the assignment of the mortgage and the note to Plaintiff.⁶ Further, Plaintiff asserts that the mortgage and the note were physically delivered prior to the commencement of the action. Defendant also acknowledges being in default on the mortgage payments.⁷ Once the moving party has made a showing of sufficient evidence, the burden shifts to the party opposing summary judgment to put forth evidence in admissible form to establish a triable issue of fact.⁸ The burden now shifts to Defendant to come forward with evidence showing the existence of a triable issue of material fact.

Defendant satisfies his burden of establishing the existence of a triable issue of material fact. CPLR 3408 states in part,

“In any residential foreclosure action involving a high-cost home loan consummated between January 1, 2003 and September 1, 2008 or a subprime...home loan, as those terms are defined under Section 1304 of the Real Property Actions and Proceedings Law [RPAPL]...the court shall hold a mandatory conference...for the purpose of ...determining whether the parties can reach a mutually agreeable resolution.”

A subprime home loan under Section 1304 of the RPAPL is defined as a loan with an interest rate more than three percentage points over the yield on Treasury securities having comparable periods of maturity to the loan at issue.⁹

⁶ Exhibit A, Plaintiff’s Affirmation in Opposition to Defendant’s Cross-Motions

⁷ ¶ 30, Notice of Cross-Motion, Affidavit of Ralph Leguillow

⁸ *Zuckerman v. City of New York*, 49 NY2d 557 [1980]

⁹ See RPAPL §1304(5)(d)

Defendant has asserted that his loan qualifies as “subprime” and that, by virtue of the subprime classification, he is entitled to a mandatory settlement conference pursuant to CPLR 3408. At the time the loan was made on September 11, 2007, the yield on a comparable U.S. Treasury security with a 30-year maturity was 4.72%.¹⁰ As such, in order to qualify as a “subprime” home loan, the Annual Percentage Rate (APR) on Defendant’s loan must have been higher than 7.72%.

This Court currently does not have the documents necessary to make the determination whether the loan at issue qualifies as a “subprime” loan. In order for this court to make such a determination, the HUD-1 Settlement Form must be provided because the form contains the accurate APR. Such documents necessary for this determination are solely in the possession of Plaintiff. Since there is a question of fact whether Defendant is entitled to a mandatory settlement conference, and any settlement conference must take place prior to a judgment being rendered, Plaintiff’s motion for summary judgment must be denied with leave to renew.¹¹

Defendant’s Motion to Amend Answer

Under CPLR 3025(b), leave to amend pleadings is freely granted absent prejudice or surprise resulting from delay.¹² An amended answer is permitted unless it is patently devoid of merit, palpably insufficient, or prejudices the other party.¹³ Mere lateness or the passage of time alone, without a showing of significant prejudice, does not justify the denial of an application for amendment.¹⁴

¹⁰ Exhibit D, Defendant’s Notice of Cross-Motion

¹¹ *Fremont Inv. & Loan v. Haley*, 2009 NY Slip Op 51186U (Queens Cty. 2009)

¹² *Edenwald Contracting Co. v. New York*, 60 N.Y.2d 957, 959 [1983]

¹³ *Pelligrini v. Richmond County Ambulance Service, Inc.*, 48 A.D.3d 436 [2d Dept 2008]

¹⁴ *Edenwald*, supra; *Abrahamian v. Tak Chan*, 33 A.D.3d 947 [2d Dept 2006]; *Northbay Const. Co. v. Bauco Const. Corp.*, 275 A.D.2d 310 [2d Dept 2000]

Plaintiff waited nearly eight months to submit its motion for summary judgment, having taken no action between September 30, 2008 and May 18, 2009. Further, Plaintiff filed their motion only after being contacted by Defendant in the form of a demand for discovery on May 11, 2009. In addition, this court cannot say that the counterclaims asserted in Defendant's Proposed Amended Answer are patently devoid of merit or palpably insufficient. The Proposed Amended Answer contains a statement of factual circumstances surrounding the origination of the note and mortgage that, if true, may establish that Plaintiff was negligent and thereby entitle Defendant to the relief requested.

Since Plaintiff will not be prejudiced by allowing Defendant to submit an Amended Answer, he is permitted to submit an Amended Answer.

Defendant's Motion to Compel Production of Documents

Disclosure of requested documents is not usually required prior to a Court's ruling on a motion for summary judgment. However, summary judgment prior to disclosure is not justified where documents in the possession of the movant would be critical to the non-movant's ability to assert potentially meritorious defenses.¹⁵

In this case, Plaintiff is in control of documents and facts that are necessary for Defendant to oppose Plaintiff's motion for summary judgment. For example, Plaintiff is in exclusive possession of the entire package of documents that were presented at closing and, more specifically, the HUD-1 Settlement Form. As discussed above, these documents are critical not only to the determination of Defendant's eligibility for a mandatory settlement conference, but also to establishing the presence of any negligent behavior in the consummation of the loan. Therefore, Plaintiff is required to produce documents which would allow Defendant to submit an informed opposition to Plaintiff's motion including the documents listed in paragraphs 8 and 16 of Defendant's Request for Production of

¹⁵ *Terranova v. Emil*, 20 N.Y.2d 493, 497 [1967]

Documents.¹⁶

Accordingly, it is hereby:

ORDERED, that Plaintiff Wells Fargo Bank's motion for summary judgment to foreclose on the mortgage is denied with leave to renew; and it is further

ORDERED, that Defendant Ralph Leguillow's motion to submit an amended answer is granted; and it is further

ORDERED, that Defendant's motion to compel production of documents is granted to the extent that Plaintiff shall provide:

The complete loan and closing files relating to the subject mortgage, including underwriting documentation, file notations, telephone logs, and correspondence.

All documents notes correspondence or e-mails that were prepared by, commissioned by, mention, comment upon, describe, or refer to the originator of the subject mortgage, CTX Mortgage Company, LLC or its agents, that relate to the subject mortgage, including any loan applications, underwriting documents, appraisals, broker price opinions, or loan purchase agreements.

and it is further;

ORDERED, that the amended answer annexed to Defendant's papers as Exhibit A is deemed served; and it is further

¹⁶ Exhibit C, Defendant's Cross-Motion to Permit Amendment and Compel Production

ORDERED, that the parties return to DCM Part 3 on Tuesday, April 13, 2010 at 9:30a.m. for a preliminary conference.

ENTER,

DATED: March 9, 2010

Joseph J. Maltese
Justice of the Supreme Court