

U.S. Bank N.A. v Buettner-Howes

2010 NY Slip Op 31151(U)

May 14, 2010

Sup Ct, Columbia County

Docket Number: 09-862

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF GREENE

U.S. BANK NATIONAL ASSOCIATION,
AS INDENTURE TRUSTEE FOR CMLTI 2006-AR1,
3476 Stateview Boulevard
Ft. Mill, SC 29715

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 09-862
RJI NO. 19-09-4461

JOYCE BUETTNER-HOWES,
WELLS FARGO BANK, N.A., and
JOHN DOE (said name being fictitious, it being the
intention of the Plaintiff to designate any and all
occupants of premises being foreclosed herein, and
any parties, corporations or entities, if any having or
claiming an interest or lien upon the mortgaged premises),

Defendants.

Supreme Court Greene County All Purpose Term, April 26, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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Legal Aid Society of Northeastern NY
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TERESI, J.:

US Bank National Association, As Indenture Trustee for CMLTI 2006-AR1 (hereinafter
“Plaintiff”) commenced this action to foreclose the note and mortgage it holds on property owned

by Joyce Buettner-Howes (hereinafter “Buettner-Howes”). Issue was joined by Buettner-Howes and discovery is ongoing. Plaintiff now moves for summary judgment against Buettner-Howes, to amend the caption of the action, for a default judgment against the co-defendants and for the appointment of a referee to compute. Buettner-Howes opposes Plaintiff’s motion. Because Plaintiff demonstrated its entitlement to judgment as a matter of law and Buettner-Howes raised no issue of material fact, Plaintiff’s motion for summary judgement is granted. Although Plaintiff did not demonstrate its entitlement to amend the caption of the action in part, it did demonstrate its entitlement to a default judgment and to the appointment of a referee to compute.

“[S]ummary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue.” (Napierski v. Finn, 229 AD2d 869 [3d Dept. 1996]).

On a motion for summary judgment, the movant must “make a prima facie showing of entitlement to judgment as a matter of law.” (Ferluckaj v. Goldman Sachs & Co., 12 NY3d 316 [2009] quoting Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). “It... is incumbent upon the proponent to tender sufficient evidentiary proof in admissible form to warrant a judgment in its favor.” (Salas v. Town of Lake Luzerne, 265 AD2d 770 [3d Dept. 1999]; see CPLR §3212[b]). Only if the movant establishes their right to judgment as a matter of law, will the burden then shift to the opponent of the motion to establish the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]).

“Entitlement 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, 900 [3d Dept. 2007]; United Cos. Lending Corp. v. Hingos, 283 AD2d 764 [3d Dept.2001]; Charter One Bank, FSB v. Leone, 45 AD3d 958 [3d Dept. 2007]).

On this record, Plaintiff properly produced both the note and mortgage being foreclosed, and sufficiently demonstrated Buettner-Howes' default in payment. Attached to Plaintiff's attorney's affirmation is the "Note" and duly recorded "Mortgage" demonstrating Buettner-Howes' indebtedness to Wells Fargo Bank, N.A. Plaintiff further attached a duly recorded "Assignment of Mortgage" (hereinafter "Assignment"), wherein both the Note and Mortgage were assigned by Wells Fargo Bank, N.A. to Plaintiff. Additionally, Plaintiff's Vice President for Loan Documentation of Wells Fargo Bank, N.A., as servicer for Plaintiff alleged, based upon her personal knowledge and review of Plaintiff's business records, that Buettner-Howes failed to make her April 1, 2008 monthly mortgage payment or any payment thereafter. From the foregoing, Plaintiff duly demonstrated its entitlement to judgment as a matter of law, shifting the burden of proof onto Buettner-Howes. (Merrill, supra; Hingos, supra).

In opposition, Buettner-Howes raised no triable issue of fact. First, because Buettner-Howes' opposition papers were untimely they cannot be considered. "If a motion is made at least 16 days before the return date and includes a proper demand, then answering papers must be mailed at least seven days before the return date." (Associates First Capital v. Crabill, 51 AD3d 1186 [3d Dept. 2008] citing CPLR 2214 [b] and Siegel, NY Prac § 247 [4th ed]). Here, Plaintiff made its motion more than 16 days before the return date and demanded opposition papers be served at least seven days prior to the return date. As Buettner-Howes' opposition papers, according to her affidavit of service, were not mailed until three days prior to the return date they

were untimely and cannot be considered unless “a valid excuse for the delay is offered.”

(Associates First Capital, supra). On this record, Buettner-Howes offered no excuse for her delay, requiring rejection of her opposition papers and the granting of Plaintiff’s summary judgment motion.

Moreover, even if Buettner-Howes’ opposition papers were considered, no issues of fact were raised. Buettner-Howes’ claim that the assignment of the note and mortgage herein were not in conformance with industry standards and invalid “[a]ccording to UCC §3-302”, are wholly speculative, conclusory and directly contradicted by the Assignment (executed prior to commencement of this action). As the Assignment was complete upon execution, Plaintiff had standing to bring this action. (Lasalle Bank Nat. Ass’n v. Ahearn, 59 AD3d 911 [3d Dept.2009]). Similarly, Buettner-Howes offers no law or admissible facts to support her contention that Plaintiff’s purported failure to “engage in proper loss mitigation” requires denial of its motion. Relative to such allegation, this Court notes that it held a mandatory mortgage foreclosure conference, which was adjourned for the parties to continue negotiations. Subsequently, this Court was informed that the parties were unable to resolve the matter and this action was allowed to proceed. Additionally, Buettner-Howes has “failed to demonstrate that further discovery could be expected to yield material and relevant evidence raising triable material issues of fact.” (Judd v. Vilardo, 57 AD3d 1127, 1131 [3d Dept. 2008]).

Accordingly, Plaintiff’s motion for summary judgment is granted.

Turning next to Plaintiff’s motion to amend the caption of the action, although its “John Doe” caption “fairly apprise[d the proposed defendants that they were]... the intended defendant[s]” the amendment requested is not supported by any factual allegations. (Olmsted v.

Pizza Hut of America, Inc., 28 AD3d 855 [3d Dept. 2006], CPLR §3025). This portion of Plaintiff's motion is supported solely by its attorney's affirmation, which does not allege to be based upon personal knowledge. Nor do the "affidavits of service", alleging service on the two individuals to be inserted in the caption, set forth any factual basis to establish their status as tenants. Moreover, Buettner-Howes specifically alleged that she lives at the premises being foreclosed and has no "roommates or tenants." Accordingly, as Plaintiff's proposed amendment to the caption is wholly conclusory and unsupported by any evidentiary showing, it is denied. Plaintiff has demonstrated, however, the propriety of deleting its address from the caption of the action and, in light of Buettner-Howes's affidavit, deleting the "John Doe" defendant.

Plaintiff also demonstrated its entitlement to a judgment fixing Wells Fargo Bank, N.A.'s default. On this record, Plaintiff submits Wells Fargo Bank, N.A.'s notice of appearance, reserving its right to receive all papers served in this action but not denying any allegations of the complaint. Thus, Wells Fargo Bank, N.A. has admitted the allegations of the Complaint (CPLR §3018[a]), and Plaintiff demonstrated its entitlement to judgment.

With Plaintiff's motions for summary judgment and default judgment granted, a referee must be appointed. (Neighborhood Housing Services of New York City, Inc. v. Meltzer, 67 AD3d 872 [2d Dept. 2009]; Vermont Fed. Bank v Chase, 226 AD2d 1034 [3d Dept. 1996]; Bank of E. Asia v Smith, 201 AD2d 522 [2d Dept. 1994]). Accordingly, Plaintiff's proposed order of reference, previously submitted, is being modified and executed herewith.

This Decision and Order is being returned to the attorneys for the Plaintiff. 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: May *14*, 2010
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated April 1, 2010, Affidavit of China Brown, dated February 23, 2010, Affirmation of Charles Case, dated April 1, 2010, with attached Exhibits A-M.
2. Affirmation of Monique Thomas, dated April 23, 2010, Affidavit of Joyce Buettner-Howes, dated April 22, 2010, with attached Exhibits A-F.
3. Affirmation of Charles Case, dated April 26, 2010, with attached Exhibits A-C.