

Bank of Am., N.A. v Jimenez

2010 NY Slip Op 31343(U)

May 17, 2010

Sup Ct, NY County

Docket Number: 110608/09

Judge: Eileen A. Rakower

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5-19-10

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PRESENT: _____
Justice

PART 15

Index Number : 110608/2009
BANK OF AMERICA
vs.
JIMENEZ, VICTOR
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 110608/09
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

In this motion to/for _____

Notice of Motion/Order to Show Cause _____ Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED
3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED
MAY 19 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/17/10



HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
BANK OF AMERICA, NATIONAL ASSOCIATION
AS SUCCESSOR BY MERGER TO LASSALE BANK NA
AS TRUSTEE FOR WAMU MORTGAGE PASS-THROUGH
CERTIFICATES SERIES 2007-0A5,

Plaintiff,

Index. No.
110608/09

-against-

VICTOR JIMENEZ; ALICE JIMENEZ; THE BOARD OF
MANAGERS OF 200 CHAMBERS STREET
CONDOMINIUM; SNAP ON CREDIT CORP;
UNITED STATES OF AMERICA INTERNAL
REVENUE SERVICE; WASHINGTON MUTUAL
BANK; CRIMINAL COURT OF THE CITY OF NEW YORK;
FIRST DATA MERCHANT SERVICES CORP; NEW YORK
CITY ENVIRONMENTAL CONTROL BOARD; NEW YORK
CITY PARKING VIOLATIONS BUREAU; NEW YORK CITY
TRANSIT ADJUDICATION BUREAU; NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE; WORKERS
COMPENSATION BOARD OF NEW YORK STATE; ADRIEL
GONZALEZ; CANDACE VAN NESS,

Decision and
Order

Mot. Seq. 001

Defendants.

FILED
MAY 19 2010
NEW YORK
COUNTY CLERK'S OFFICE

-----X
HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff brings this action to foreclose a mortgage lien on real property located at 200 Chambers Street, Unit 7N, in the County and State of New York. Plaintiff now moves for an order of this court (1) granting it summary judgment against defendants Victor Jimenez and Alice Jimenez ("defendants") and granting it a default judgment against the remaining non-answering defendants; (2) striking the answer of Victor and Alice Jimenez and deem it an appearance and waiver in foreclosure; (3) dismissing the counterclaims interposed by Victor and Alice Jimenez; (4) appointing a referee to compute; and (3) amending the caption to substitute Adriel Gonzalez and Candace Can Ness for "John Does" and "Jane Does."

Plaintiff submits: the affidavit of Shay B. Winebarger, Senior Lead Operations Specialist of JP Morgan Chase Bank NA, servicing agent for plaintiff bank; a copy of an

“Adjustable Rate Note;” a copy of the recording and endorsement cover page and the mortgage document; a “90 day notice;” addressed to Victor Jimenez, dated February 3, 2009; a copy of Victor Jimenez’ answer and counterclaim; plaintiff’s reply to counterclaims; a “Uniform Residential Loan Application;” the summons and complaint; affidavits of service of plaintiff’s summons and complaint upon all defendants; and two Notices of Appearance and Waiver in Foreclosure, served by the United States of America and the New York State Workers’ Compensation Board.

Plaintiff asserts that defendants agreed to repay a loan of \$692,000.00, beginning on June 1, 2007 and continuing monthly until May 1, 2037. Plaintiff claims that defendants defaulted on the loan beginning with the February 1, 2009 payment. Plaintiff avers that it complied with the “90 day notice” requirements of RPAPL §1304, and that it scheduled a settlement conference, in compliance with CPLR §3408. A settlement conference was scheduled for December 9, 2009. When defendants did not appear on that date, the conference was rescheduled for January 20, 2010. Defendants again failed to appear.

Defendants, in opposition, submit the affidavit of Victor Jimenez, who states that he did “not even sign [the] mortgage,” and if he knew that the payments were going to increase he would not have bought the property. Further, Mr. Jimenez states in his affidavit, that if plaintiff had responded to his discovery demands, he would be able to prove that he had been “defrauded.” In reply, plaintiff points out that Mr. Jimenez’ son, acting under the authority of a Power of Attorney, signed the documents.

Where a moving party makes a *prima facie* showing of entitlement to summary judgment, “[t]he party opposing the [summary judgment] motion must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests.” (*Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 967, 525 N.Y.S.2d 793, 520 N.E.2d 512 [1988].) Bald, conclusory allegations, even if believable, are not enough. (*Id.*; *Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 309 N.Y.S.2d 341, 257 N.E.2d 890 [1970]; *Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252, 538 N.Y.S.2d 249 [1st Dept. 1989]).

In mortgage foreclosure actions, it is well settled that a mortgagee makes a *prima facie* showing of entitlement to judgment as a matter of law when it “produce[s] the mortgage documents underlying the transaction and undisputed evidence of nonpayment (*Red Tulip, LLC v. Neiva*, 2007 NY Slip Op 6340, *5 [1st Dept. 2007]) (citation omitted). Once a mortgagee fulfills its initial burden, it becomes incumbent on the party opposing summary judgment to come forward with competent evidence of any defenses to raise an issue of fact (*see Barcov Holding Corp. v. Bexin Realty Corp.*, 16 A.D.3d 282, 283 [1st Dept. 2005]).

[* 4]

Here, plaintiff has made its *prima facie* showing of entitlement to summary judgment. Plaintiff annexes copies of the mortgage documents underlying the subject property, and has submitted proof of nonpayment in the form of Ms. Winebarger's Affidavit, which states:

Defendants breached said obligation by failing to tender the installment which became due on February 1, 2009 and by failing to tender subsequent installments . . . [b]y reason of the aforesaid default, plaintiff elected to accelerate the mortgage and declared all sums secured thereby due and payable. There is presently due and owing to plaintiff the sum of \$726,852.02, together with interest thereon from January 1st 2009 . . .

Accordingly, the burden shifted to defendants to submit competent evidence establishing the existence of an issue of material fact. To this end, defendants submit Victor Jimenez' affidavit, in which he alleges that his signature was fraudulently obtained. Plaintiff submits a "Durable General Power of Attorney," ("POA") which names Eric Jimenez, Victor Jimenez' son as his Attorney in Fact. The document is signed by Victor Jimenez and specifically grants Eric Jimenez the authority to enter into "real estate transactions; **200 Chambers Street, Unit 7N, New York, NY 10007.**" The POA was entered into on April 16, 2007, ten days before the mortgage was executed. For a Power of Attorney to be valid, the principal must have sufficient mental capacity at the time he executes it (*Matter of Ferrara*, 3 Misc.3d 944[Rockland Cnty Sur Ct. 2004, *aff'd* 22 AD3d 578[2nd Dept. 2005] *order reversed on other grounds by* 7 NY3d 244 [2006]). The Jimenez' do not suggest that Victor Jimenez was incompetent when he signed the POA, or that it was otherwise invalid.

Finally, defendants fail to specify what, if any, outstanding discovery is required in order to effectively oppose the within motion. The "mere hope" that evidence will be uncovered that will allow defendants to formulate and prove a defense is insufficient to defeat plaintiff's motion for summary judgment as a matter of law (*see Fulton v. Allstate Ins. Co.*, 14 A.D.3d 380, 381[1st Dept. 2005]). In any event, defendants were given the opportunity to raise their objections at two scheduled settlement conferences, neither of which they elected to attend.

Wherefore it is hereby

ORDERED that the motion is granted; and it is further

ORDERED that plaintiff is awarded summary judgment against defendants VICTOR JIMENEZ and ALICE JIMENEZ; and it is further

ORDERED that plaintiff's motion for entry of a default judgment against defendants THE BOARD OF MANAGERS OF 200 CHAMBERS STREET CONDOMINIUM; SNAP ON CREDIT CORP; UNITED STATES OF AMERICA INTERNAL REVENUE SERVICE; WASHINGTON MUTUAL BANK; CRIMINAL COURT OF THE CITY OF NEW YORK; FIRST DATA MERCHANT SERVICES CORP; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; NEW YORK CITY PARKING VIOLATIONS BUREAU; NEW YORK CITY TRANSIT ADJUDICATION BUREAU; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; WORKERS' COMPENSATION BOARD OF NEW YORK STATE; ADRIEL GONZALEZ s/h/a JOHN DOE #1; and CANDACE VAN NESS s/h/a JANE DOE #2; and it is further

ORDERED that an assessment of damages against said defendants is directed; and it is further

ORDERED that a copy of this order with notice of entry be served upon the Clerk of the Trial Support Office (Room 158), who is directed, upon the filing of a note of issue, to place this action on the appropriate trial calendar for the assessment hereinabove directed; and it is further

ORDERED that this action be and the same is hereby referred to PETER V. CHRISTIANSEN 48 E POPLAR STREET FLORAL PARK, NY 11001, 917-584-2268, as Referee to Compute the amount due to the plaintiff, to ascertain and compute the amount due to the plaintiff for principal, interest, and other disbursements advances as provided for in the note and mortgage upon which this action was brought, to examine and report whether or not the mortgaged premises can be sold in parcels, and that the referee make his/here report to the Court with all convenient speed; and it is further

ORDERED that the Referee's hearing be had in the County of New York; and it is further

ORDERED that the caption be amended by substituting ADRIEL GONZALEZ and CANDACE VAN NESS for "JOHN DOES" and "JANE DOES;" and all other papers and proceedings heretofore filed herein shall be deemed amended accordingly; and it is further

ORDERED that the caption as amended shall read as follows:

-----X
BANK OF AMERICA, NATIONAL ASSOCIATION
AS SUCCESSOR BY MERGER TO LASSALE BANK NA
AS TRUSTEE FOR WAMU MORTGAGE PASS-THROUGH
CERTIFICATES SERIES 2007-0A5,

Plaintiff,

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VICTOR JIMENEZ; ALICE JIMENEZ; THE BOARD OF MANAGERS OF 200 CHAMBERS STREET CONDOMINIUM; SNAP ON CREDIT CORP; UNITED STATES OF AMERICA INTERNAL REVENUE SERVICE; WASHINGTON MUTUAL BANK; CRIMINAL COURT OF THE CITY OF NEW YORK; FIRST DATA MERCHANT SERVICES CORP; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; NEW YORK CITY PARKING VIOLATIONS BUREAU; NEW YORK CITY TRANSIT ADJUDICATION BUREAU; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; WORKERS COMPENSATION BOARD OF NEW YORK STATE; ADRIEL GONZALEZ; CANDACE VAN NESS,

Defendants.

-----X

;and it is further

ORDERED that by accepting this appointment the referee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to, section 36.20 (Disqualifications From Appointment), and section 36.2(d) (Limitations on Appointments Based on Compensation); and it is further

ORDERED that plaintiff's attorney serve a conformed copy of this order upon the County Clerk and the Trial Support Office for amendment of their records.

DATED: May 17, 2010



EILEEN A. RAKOWER, J.S.C.

FILED
MAY 19 2010
NEW YORK
COUNTY CLERK'S OFFICE