

Wells Fargo Bank, N.A. v Dennis

2010 NY Slip Op 32179(U)

August 11, 2010

Sup Ct, Queens County

Docket Number: 4555/08

Judge: Denis J. Butler

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MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 12

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| | X | INDEX NO. 4555/08 |
| WELLS FARGO BANK NATIONAL ASSOCIATION AS TRUSTEE, | | MOTION SEQ. NO. 3 |
| Plaintiff, | | BY: BUTLER, J. |
| - against - | | DATED: August 11, 2010 |
| PATRICIA DENNIS, et al, | | |
| Defendants. | X | |
| | | |

Plaintiff moves to strike the answer of the defendant Patricia Dennis; for summary judgment against defendant Patricia Dennis; to amend the caption substituting “John” Dennis for “John Does” and “Jane Does;” and for leave to appoint a referee to compute the sums due and owing plaintiff.

Plaintiff commenced this action by filing a copy of the summons and complaint on February 20, 2008. Plaintiff seeks to foreclose on a mortgage on the subject real property known as 110-47 199th Street, St. Albans, New York 11412, to secure repayment of a note, evidencing a loan in the original principal amount of \$348,000, plus interest, extended to Patricia Dennis, as the record owner of the premises, by Fremont Investment & Loan. Plaintiff alleges that it is the holder of the mortgage and underlying obligation pursuant to an assignment and that the defendant Patricia Dennis defaulted under the terms of the

mortgage and note by failing to make the monthly installment payment due on December 1, 2007, and as a consequence, it elected to accelerate the entire mortgage debt.

All the defendants were served with copies of summons and complaint. All defendants defaulted in answering the complaint or otherwise appearing in the action. Plaintiff then moved for an Order of Reference with notice sent to the defendant Patricia Dennis, among others on July 1, 2008. The Order of Reference was issued on October 21, 2008 and notice of entry was thereafter served on the defendant Patricia Dennis. Patricia Dennis then attempted to interpose an answer in July 2008. That answer was rejected by the plaintiff as untimely. On October 21, 2008, the defendant Patricia Dennis, moved by order to show cause to vacate her default and plaintiff opposed the motion. On April 29, 2009, the parties settled the motion, with the defendant Patricia Dennis withdrawing the order to show cause and consenting to the jurisdiction of this Court, and the plaintiff accepting the defendant Patricia Dennis' answer without the in personum jurisdiction defense, and withdrawing its motion for an order of reference. However, in the interim the referee issued a report of the amount due on March 24, 2009. Patricia Dennis then served another answer on May 18, 2009, and the plaintiff replied to the defendant's counterclaims on June 11, 2009. The Note of Issue was filed on December 14, 2009.

That branch of the motion by plaintiff for leave to amend the caption as proposed, is granted.

On a motion for summary judgment in a foreclosure action, a plaintiff must make a prima facie showing by producing the mortgage, the unpaid note, bond or obligation and the evidence of default and the assignment of the mortgage documents to it (*see EMC Mtge. Corp. v Riverdale Assoc.*, 291 AD2d 370 [2002]; *IMC Mtge. Co. v Griggs*, 289 AD2d 294 [2001]; *Paterson v Rodney*, 285 AD2d 453 [2001]; *see also Bercy Investors, Inc. v Sun*, 239 AD2d 161 [1997]).

In support of the motion for summary judgment against defendant Patricia Dennis, plaintiff offers a copy of the pleadings, affidavits of service, a copy of the subject mortgage, underlying note and assignment, and an affidavit of Noriko Colston, the Assistant Secretary of Barclays Capital Real Estate, Inc. d/b/a/ Homeq Servicing, the attorney in fact for the plaintiff, indicating, among other things, that defendant Patricia Dennis is in default in payment of the monthly mortgage installment due under the mortgage.

The submissions establish plaintiff's prima facie entitlement to summary judgment as against defendant Patricia Dennis (*see EMC Mtge. Corp. v Riverdale Assoc.*, 291 AD2d 370 [2002], *supra*; *IMC Mtge. Co. v Griggs*, 289 AD2d 294 [2001], *supra*; *Paterson v Rodney*, 285 AD2d 453 [2001], *supra*; *see also Bercy Investors, Inc. v Sun*, 239 AD2d 161 [1997], *supra*). The burden thus shifts to defendant Patricia Dennis to raise a triable issue of fact regarding her defenses (*see Barcov Holding Corp. v Bexin Realty Corp.*, 16 AD3d 282 [2005]; *EMC Mtge. Corp. v Riverdale Assoc.*, 291 AD2d 370 [2002], *supra*; *First Nationwide Bank, FSB v Goodman*, 272 AD2d 433 [2000]).

Defendant's affirmative defenses of misrepresentation, negligent hiring and unclean hands are all unavailing. Defendant Patricia Dennis argues that she was misled into signing the loan based on the promises from the mortgage broker that she would be able to refinance the loan within one year's time. She claims she believed the broker's representation that the fees she was paying would enable her to refinance the subject mortgage for a more favorable interest rate within the year subsequent to the closing. However, she failed to allege or demonstrate that Fremont itself engaged in any fraudulent conduct to her to induce her to enter into the mortgage loan. Defendant Patricia Dennis makes no claim that she had any oral or written communication with Fremont in advance of the closing, but rather asserts that the broker made oral misrepresentations to her regarding fees and her ability to obtain future modification of the loan terms following the closing. She does not allege that any oral explanations were provided to her at the closing by anyone attending it.

Furthermore, defendant Patricia Dennis has failed to demonstrate any agency relationship between the mortgage broker and Fremont, by which Fremont may be held responsible for the broker's negligent or fraudulent misrepresentation (*see Sutherland v Remax 2000*, 20 Misc 3d 1131[A] [2008]; *see also Fremont Inv. & Loan v Laroc*, 21 Misc 3d 1124(A) [2008]).

As such, defendant Patricia Dennis' predatory lending counterclaim is without merit as it fails to state the factual basis for such a claim. Additionally, the loan at issue

cannot be considered a high-cost home loan because the principal amount of the loan exceeded \$300,000 and the interest rate is below the applicable threshold (Banking Law § 6-1).

Finally, defendant Patricia Dennis has failed to demonstrate the manner in which discovery might reveal the existence of a triable issue of fact in relation to her defenses, which would warrant the denial of summary judgment in plaintiff's favor on its complaint (*see JP Morgan Chase Bank, N.A. v Agnello*, 62 AD3d 662 [2009]).

Plaintiff, therefore, is entitled to summary judgment in its favor against defendant Patricia Dennis (*see Fed. Home Loan Mtge. Corp. v Karastathis*, 237 AD2d 558 [1997]; *DiNardo v Patcam Serv. Station*, 228 AD2d 543 [1996]). Those branches of the motion by plaintiff for summary judgment in its favor against defendant Patricia Dennis and to strike the answer and counterclaims of the defendant Patricia Dennis are granted.

Plaintiff was not required to provide defendant Patricia Dennis with the notices set forth in RPAPL 1302, 1303 and 1304, as those statutes became effective after the commencement of this action (*see* L 2008, c 472, §§ 1, 17, effective August 5, 2008; L 2008, c 472, § 2, effective September 1, 2008).

That branch of the motion by plaintiff for leave to appoint a referee is granted.

Settle order.

J.S.C.