

Onewest Bank, F.S.B. v Fernandez

2010 NY Slip Op 32717(U)

September 24, 2010

Supreme Court, New York County

Docket Number: 117245/09

Judge: Saliann Scarpulla

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

SALIANN SCARPULLA

PRESENT: _____

PART 19

Justice

Index Number : 117245/2009

ONEWEST BANK, F.S.B.

VS.

FERNANDEZ, BENITO

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

motion and ~~cross-motion~~^{is} are decided in accordance with accompanying memorandum decision.

FILED
OCT 01 2010
COUNTY CLERK'S OFFICE
NEW YORK

This constitutes decision & order of the court

Dated: September 24, 2010

Saliann Scarpulla
SALIANN SCARPULLA J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X

ONEWEST BANK, F.S.B.,

Plaintiff,

-against-

BENITO FERNANDEZ; HIC, LLC; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; "JOHN DOE # 1-5" AND "JANE DOE # 1-5" said names being fictitious, it being the intention of Plaintiff to designate any and all occupants, tenants, persons or corporations, if any, having or claiming an interest in or lien upon the premises being foreclosed herein.

Defendants.

-----X

Appearances:

For Plaintiff :

Fein, Such & Crane, LLP
By Richard A. Gerbino, Esq.
747 Chestnut Ridge Road, Ste 200
Chestnut Ridge, New York 10977
845-371-4700

For Defendants:

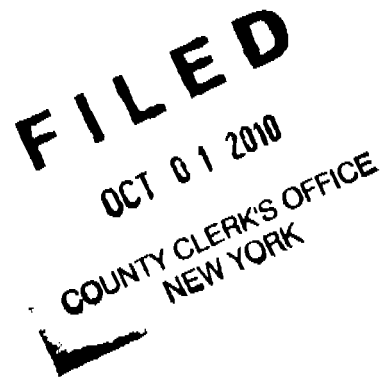
Cesar A. Fernandez, Esq
2298 First Avenue
New York, New York 10038
212-348-3334

Papers considered in review of this motion for summary judgment:

Papers	Numbered
IAC's Notice of Mot. and Affirm in Supp with Exhib. Attached.....	<u>1</u>
Turner's Affirm. in Opp with Exhib. Attached	<u>2</u>
IAC's Reply Affirm. in Further Supp and Opp.....	<u>3</u>

HON SALIANN SCARPULLA, J.:

In this action to foreclose on the property located at the address 405 East 118th Street, New York, New York 10035 ("the premises") for failure to stay current on the mortgage loan, Plaintiff Onewest Bank, F.S.B. ("Onewest") moves to strike the answer and defenses of the defendants Benito Fernandez ("Fernandez") and HIC, LLC ("HIC")



(herein collectively “defendants”) pursuant to CPLR 3211(b) and for summary judgment under CPLR 3212 on the grounds that the offered defenses have no merit.

Further, Onewest moves to substitute “John Doe” and “Jane Doe” designations in the caption with the names of present tenants, all of whom have been previously served with the summons and complaint, and to refer this foreclosure matter to a certified 22 NYCRR Part 36 referee to ascertain and compute the amount due upon the subject mortgage note and to report whether the premises be sold in one parcel.

In support of the motion, Onewest submits copies of the note and mortgage agreements, an assignment from IndyMac Bank, F.S.B., receipts of filings with the New York City Department of Finance, Office of the City Register, an affidavit of merit by Dennis Kirkpatrick, Vice President of Onewest, and proof of defendants’ default, together with monthly invoices and notices legally required upon default.

In opposition, defendants argue that the Court does not have jurisdiction over the action, because Onewest allegedly did not attempt to serve defendants at 131 Lancaster Street, Albany, New York 12210 as required by the mortgage agreement. Defendants further argue that the original lender, IndyMac Bank F.S.B. reneged on its oral promise to lower the interest rate from 6.250% to 4.250% immediately after the closing, given to defendants’ authorized agent, Aureo Cardona. Fernandez claims that at the time of the closing on August 17, 2007, Aureo Cardona had allegedly been authorized by

Fernandez's power of attorney to sign the mortgage note at the interest rate of 4.250% only, and not any higher.

Discussion

Under CPLR 3212(b), summary judgment "shall be granted if, upon all papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." The motion for summary judgment need not await the closing of discovery, but may be brought as soon as the defendant joins issue. CPLR 3212 (a). The motion must be supported by (1) an affidavit, (2) by a copy of the pleadings and (3) by other available proof, such as depositions and written admissions. CPLR 3212 (b).

To warrant a court's directing judgment as a matter of law, it must clearly appear that no material issue is presented for trial. *Epstein v Scally*, 99 A.D.2d 713 (1st Dep't 1984). When a party has made a prima facie showing to entitle it to summary judgment, the burden shifts to the opposing party to show by evidentiary facts that the defense is real and can be established at trial. *Indig v Finkelstein*, 23 N.Y.2d 728 (1968); *see also Vogel v Blade Contr. Inc.*, 293 A.D.2d 376, 377 (1st Dep't 2002). Conclusory allegations or denials are insufficient to either warrant or defeat summary judgment. *McGahee v Kennedy*, 48 N.Y.2d 832, 834 (1979).

Upon review of the evidence submitted by the parties, the Court finds that Onewest has met its burden of showing entitlement to judgment and defendants have

failed to submit sufficient, competent evidence to raise a material issue of fact in opposition. Onewest submitted an affidavit of service, dated January 5, 2010, by Stephen Moeske, a person of eighteen years of age, who is not a party to this proceeding. Moske affirms that he attempted to serve process on Fernandez at 131 Lancaster Street, Albany, New York 12210 on five occasions, December 14, 2009 at 7:39 p.m., December 17, 2009 at 5:36p.m., December 19, 2009 at 4:26 p.m., December 21, 2009 at 7:50 a.m. and January 4, 2010 at 3:53 p.m., of which the third attempt occurred on Sunday. Being unable to serve process in person, Moske affixed process and completed service by mailing a duplicate copy of the same on January 4, 2010. Moske's affidavit fully complies with the requirements of CPLR 308(4), which governs the affix-and-mail service. *See* Siegel, *New York Practice*, sec 74 (4th ed. 2005); *see also* *Maines Paper & Food Service, Inc. v Boulevard Burgers Corp.*, 52 A.D.3d 1150, 1151 (3rd Dep't 2008).

Onewest also submitted an affidavit from Mark Mclsosky, who affirmed that on December 14, 2009, he served process on HIC pursuant to New York Limited Liability Company Law § 303(a) by delivering a copy of the summons and complaint to the Secretary of State. Therefore, Onewest has shown proper service of process on both primary defendants in compliance with CPLR and the terms of the mortgage note.

Defendants' second argument, that IndyMac Bank, F.S.B., Onewest's predecessor in interest, breached an oral promise to lower the loan's interest rate, is precluded by the General Obligations Law § 5-701 and 5-703. Moreover, defendants' claim of an oral

[* 6]

promise is precluded by the common-law doctrine of parol evidence. The alleged oral promise directly conflicts with the clear, express language of the note and mortgage, which unambiguously sets the interest rate at 6.500%. *See Korff v Corbett*, 18 A.D.3d 248, 251 (1st Dep't 2005) (describing a contemporary application of the parol evidence rule); *see also Mermelstein v Realty Associates Securities Corp.*, 272 A.D. 205, 207 (1st Dep't 1947).

Finally, Fernandez's self-serving statement that his attorney-in-fact was not authorized to close the loan at the higher interest rate cannot forestall summary judgment. *See e.g. Duane Morris LLP v Astor Holdings Inc.*, 61 A.D.3d 418, 419 (1st Dep't 2009) (citations omitted); *see also American Holdings Investment Corp. v Josey*, 71 A.D.3d 927, 930 (2nd Dep't 2010) (permitting good-faith purchaser to rely on a facially valid power of attorney); 1-11 Warren's Weed New York Real Property § 11.20 (Matthew Bender).

Fernandez did not take any contemporaneous attempts to modify the terms of the note once it became clear that the interest rate would remain at 6.500%. Defendants did not raise the issue of Cardona's lack of authority to close on the mortgage at 6.500% for almost two years until May 1, 2009, the date of default. Further, defendants did not submit a copy of the alleged power of attorney, showing the alleged limitations of the agency relationship. Because defendants have not submitted any competent evidence to raise a genuine issue of material fact regarding the terms of the note and mortgage

