

Thornburg Mtg. Home Loans, Inc. v Beltrami

2011 NY Slip Op 32035(U)

July 11, 2011

Supreme Court, New York County

Docket Number: 106026/09

Judge: Joan A. Madden

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

HON. JOAN A. MADDEN

PRESENT: _____ J.S.C. _____
Justice

PART 11

Index Number : 106026/2009
THORNBURG MORTGAGE
VS.
BELTRAMI, MICHAEL
SEQUENCE NUMBER : 002
APPT REF COMPUTE/EXAMINE ACCOUNT

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 *is determined in accordance with the annexed decision and order.*

FILED

JUL 22 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: July 11, 2011

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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
THORNBURG MORTGAGE HOME LOANS, INC.,

INDEX NO. 106026/09

Plaintiff,

-against-

MICHAEL BELTRAMI; CORNELIS B. SPIERING; 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; UNITED STATES OF AMERICA – INTERNAL REVENUE SERVICE; “JOHN DOES” AND “JANE DOES,” said names being fictitious, parties intended being possible tenants or occupants of premises, and corporations, other entities or persons who claim, or may claim, a lien against the premises.

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Defendants.

-----X

JOAN A. MADDEN, J.:

In this action to foreclose a \$3 million mortgage, plaintiff Thornburg Mortgage Home Loans, Inc. (“Thornburg”) moves for an order granting summary judgment against defendants Michael Beltrami and Cornelis B. Spiering (hereinafter “defendants”), granting a default judgment against the remaining defendants, and appointing a Referee to compute. Defendants Beltrami and Spiering are co-mortgagors, and are appearing in this action by separate counsel. Beltrami opposes the motion and cross-moves for summary judgment dismissing the complaint. Spiering initially opposed the motion, but has changed his position and favors granting Thornburg’s motion and denying co-defendant Beltrami’s cross-motion.¹

¹Beltrami and Spiering served and filed a joint answer dated June 19, 2009, which only Beltrami verified. Spiering subsequently retained separate counsel, who submits an affirmation

On September 21, 2007, Beltrami and Spiering borrowed the sum of \$3 million from Thornburg. The loan was secured by a mortgage on their townhouse located at 30 Commerce Street in Manhattan. They also executed an "Interest-Only Promissory Adjustable Rate Note." The mortgage indicates that the property is a single family dwelling, to be occupied by the borrowers as their principal residence.² The mortgage refers to Thornburg as the "lender" and Mortgage Electronic Registration Systems, Inc. ("MERS") as "a separate corporation that is acting solely as a nominee for Lender," and states that "[f]or purposes of recording this mortgage, MERS is the mortgagee of record." On October 15, 2007, the mortgage was recorded, listing Beltrami and Spiering as the "mortgagor/borrower," and MERS as the "mortgagee/lender." On May 8, 2009, MERS, as nominee for Thornburg executed an assignment of mortgage, assigning the mortgage to Thornburg. The assignment was recorded on September 22, 2009, and states that it is "effective as of October 4, 2008."

In June 2008, defendants defaulted on the mortgage and have not made any payments since that time. On April 29, 2009, Thornburg commenced this action to foreclose on the mortgage. As noted above, Beltrami and Spiering served and filed an answer, asserting affirmative defenses of lack of personal jurisdiction, incomplete and improper notice under RPAPL 1303, and an incomplete and improper description of the property. Thornburg is now

that his client never saw the answer and "respectfully disavows the Answer in its entirety." Spiering's counsel advises that his client is willing to file a late answer, if the court deems it appropriate, "the gist of which would admit almost every allegation of the Complaint," or "[o]therwise Spiering will consent to a default judgment against him and in the Plaintiff's favor."

² While the mortgage is for a single family home, the record suggests that the property is a one or two-family residence. Even if the townhouse is a two-family home, that fact would not alter the outcome of this action.

moving for summary judgment and related relief. Beltrami is cross-moving for summary judgment dismissing the complaint on the following grounds: 1) Thornburg did not comply with the Foreclosure Prevention and Responsibility Lending Act of 2008, as incorporated in RPAPL 1303 and 1304, and CPLR 3408; 2) Thornburg lacks standing to maintain this action, since it “changed” its name in the bankruptcy proceeding and “no longer exists”; 3) Thornburg did not “own” the mortgage when it commenced this action in April 2009; 4) Beltrami did not receive a notice of default; 5) the notice of default is defective on its face; and 6) the mortgage documents he and Spiering signed were not with Thornburg but with MERS.

Thornburg is not entitled to summary judgment, and complaint must be dismissed based on its failure to comply with the statutory notice requirement of RPAPL 1304, which is a mandatory condition precedent to the commencement of this mortgage foreclosure action. See Aurora Loan Services, LLC v. Weisblum, ___ AD3d ___, 923 NYS2d 609, 611 (2nd Dept 2011). As the plaintiff in a mortgage foreclosure action, Thornburg has the burden of demonstrating compliance with the notice requirement of RPAPL 1304, and noncompliance results in dismissal of the complaint. See id.

Although RPAPL 1304 was amended in 2009 (effective January 1, 2010) so as to be applicable to any “home loan,” when that section was originally enacted in 2008, its applicability was limited to “high-cost,” “sub-prime,” and “non-traditional” home loans. RPAPL 1304(1); see Aurora Loan Services, LLC v. Weisblum, supra at 615. Section 1304(5)(e) defined a “non-traditional home loan” as “a payment option adjustable rate mortgage or an interest only loan consummated between January first, two thousand three and September first, two thousand eight.” RPAPL 1304 as originally enacted became effective with foreclosure actions

commenced on or after September 1, 2008. See id.

RPAPL 1304(1) requires that “at least ninety days before a lender or mortgage loan servicer commences legal action against the borrower, including mortgage foreclosure, the lender or mortgage loan servicer shall give notice to the borrower in at least fourteen-point type which shall include” certain specified language.³ RPAPL 1304(2) provides that the “notice shall be sent by the lender or mortgage loan servicer to the borrower, by registered or certified mail and also by first class mail to the last known address of the borrower, and if different, to the residence

³RPAPL 1304(1) mandates the following content of the notice:

YOU COULD LOSE YOUR HOME. PLEASE
READ THE FOLLOWING
NOTICE CAREFULLY

As of . . . your home loan is . . . days in default. Under New York State Law, we are required to send you this notice to inform you that you are at risk of losing your home. You can cure this default by making the payment of . . . dollars by

If you are experiencing financial difficulty, you should know that there are several options available to you that may help you keep your home. Attached to this notice is a list of government approved housing counseling agencies in your area which provide free or very low-cost counseling. You should consider contacting one of these agencies immediately. These agencies specialize in helping homeowners who are facing financial difficulty. Housing counselors can help you assess your financial condition and work with us to explore the possibility of modifying your loan, establishing an easier payment plan for you, or even working out a period of loan forbearance. If you wish, you may also contact us directly at and ask to discuss possible options.

While we cannot assure that a mutually agreeable resolution is possible, we encourage you to take immediate steps to try to achieve a resolution. The longer you wait, the fewer options you may have.

If this matter is not resolved within 90 days from the date this notice was mailed, we may commence legal action against you (or sooner if you cease to live in the dwelling as your primary residence).

If you need further information, please call the New York State Banking Department’s toll-free help line at 1-877-BANK-NYS (1-877-226-5697) or visit the Department’s website at <http://www.banking.state.ny.us>.

* 6]

which is the subject of the mortgage.” RPAPL 1304(2) also provides that the notice “is considered given as of the date it is mailed,” and that the notice “shall contain a list of at least five United States department of housing and urban development approved housing counseling agencies, or other housing counseling agencies, as designated by the division of housing and community renewal, that serve the region where the borrower resides.”

The instant action was commenced in April 2009, when the original provisions of RPAPL 1304 were applicable. Thornburg’s complaint contains an allegation that “plaintiff . . . is in compliance with sending the ninety (90) day notices as required by RPAPL 1304, if the underlying mortgage qualifies.” The parties do not dispute that the loan at issue is an interest only home loan, which falls within the RPAPL 1304(5)(e) pre-amendment definition of a non-traditional home loan. As indicated above, defendants executed an *Interest-Only* Promissory Adjustable Rate Note (emphasis added). The Appellate Division Second Department recently issued a decision holding that “[p]roper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition.” Aurora Loan Services, LLC v. Weisblum, *supra* at 616.

Here, Thornburg fails to meet its burden, as it concedes that a RPAPL 1304 notice was not served on either Beltrami or Spiering. Rather, Thornburg argues that the RPAPL 1304 notice requirement is inapplicable because Spiering resides in Europe, and RPAPL 1304 requires both Beltrami and Spiering to reside at the property together, since they are “the borrower” under the terms of the mortgage. Alternatively, Thornburg argues that even if RPAPL 1304 applies, Beltrami has not been prejudiced, as he has participated in this action, including settlement

* 7] ,
discussions, since its inception more than three years ago, and “equity dictates that Beltrami should not be permitted to hold up these proceedings based on illusory notice violations.”

Thornburg asserts that Beltrami’s strategy throughout this action has been to delay the resolution as long as possible while he continues to reside at the property, at the expense of both Thornburg and co-owner Spiering, who is in poor health and simply seeks to have the property, which has been appraised at \$5 million, sold on the open market as soon as possible.

Notwithstanding Spiering’s unfortunate circumstances, in light of the Appellate Division Second Department’s holding in Aurora Loan Services, LLC v. Weisblum, Thornburg’s arguments are without merit. Notably, the Second Department explicitly rejected the lender’s contention that the borrowers had received proper RPAPL 1303 notice and appeared at the mandatory settlement conference after commencement of the action, explaining that such contention “does not address the statutory purpose of the pre-foreclosure notice afforded by RPAPL 1304.” Id at 617. “Since RPAPL 1304 notice must be sent at least 90 days prior to the commencement of an anticipated foreclosure action, its manifest purpose is to aid the homeowner in an attempt to avoid litigation. The legislative history noted a typical lack of communication between distressed homeowners and their lenders prior to the commencement of litigation, leading to needless foreclosure proceedings. The bill sponsor sought ‘to bridge that communication gap in order to facilitate a resolution that avoids foreclosure’ by providing a pre-foreclosure notice advising the borrower of ‘housing counseling services available in the Borrower’s area’ and an ‘additional period of time . . . to work on a resolution.’” Id (quoting Senate Introducer Mem. In Support, Bill Jacket, L. 2008, ch. 472, at 10). The Second Department also rejected the lender’s suggestion that the failure to give RPAPL 1304 notice is a

mistake, omission or irregularity that can be disregarded if a party is not prejudiced, holding that “[w]here as here, the condition sought to be disregarded is a mandatory condition precedent, the plaintiff’s failure to comply cannot be disregarded.” Id.

Based on the foregoing, the complaint must be dismissed on the ground that Thornburg failed to comply with RPAPL 1304. Id. In view of this conclusion, the court need not determine the additional grounds for dismissal raised by Beltrami. The court notes, however, that Thornburg complied with the RPAPL 1303 notice requirement, which is a separate condition precedent to the commencement of this action. See First National Bank of Chicago v. Silver, 73 AD3d 162 (2nd Dept 2010). Also, in the event Thornburg commences a new mortgage foreclosure action, the issues raised herein as to the assignment of the mortgage by MERS, would presumably be rendered academic, since the assignment would necessarily pre-date the commencement of any subsequent action.

Accordingly, it is

ORDERED that plaintiff’s motion is denied in its entirety; and it is further

ORDERED that defendant Beltrami’s cross-motion for summary judgment dismissing the complaint is granted and the complaint is dismissed in its entirety without prejudice, and the Clerk is directed to enter judgment accordingly.

FILED

JUL 22 2011

DATED: July 11, 2011

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