

Voto v Sutphen

2011 NY Slip Op 32422(U)

September 12, 2011

Supreme Court, Nassau County

Docket Number: 18215/07

Judge: Joel K. Asarch

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: PART 17

-----X
ROBERT A. VOTO and EDITH K. SPIEGEL,

Plaintiff,

- against -

Action 1
Index No. 18215/07

DECISION AND ORDER

MATHEW SUTPHEN, CORNERSTONE BANCOR
MORTGAGE CORP., MELCO LIMITED LIABILITY
COMPANY, NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE, "JOHN DOE #1" through
"JOHN DOE #12," the last twelve names being fictitious
and unknown to plaintiff, the persons or parties intended
being the tenants, occupants, persons or corporations, if
any, having or claiming an interest in or lien upon the
premises, described in the complaint,

Original Return Date: 10-22-10
Motion Seq. No. 001

Original Return Date: 12-3-10
Motion Seq. No. 003

Defendants.

-----X
ROBERT A. VOTO and EDITH K. SPIEGEL,

Plaintiff,

-against-

Action 2
Index No. 004955/10

MATHEW SUTPHEN, "JOHN DOE #1" and "JANE DOE #1"
through "JOHN DOE #12," and "JANE DOE #12," the last
twelve names being fictitious and unknown to plaintiff, the
persons or parties intended being the tenants, occupants, persons
or corporations, if any, having or claiming an interest in or lien
upon the premises, described in the complaint,

Defendants.

-----X
P R E S E N T :

HON. JOEL K. ASARCH,
Justice of the Supreme Court.

The following named papers numbered 1 to 8 were submitted on this Notice of Motion on May 18,
2011:

	<u>Papers numbered</u>
Notice of Motion, Affirmation and Affidavit	1-3
Notice of Cross Motion, Affirmation and Affidavit	4-6
Reply Affirmation	7
Stipulation withdrawing Cross-Motion as moot	8

The plaintiffs, Robert A. Voto and Edith K. Spiegel, move for the following relief: [a] an order pursuant to CPLR §3212, granting the plaintiffs summary judgment; [b] an order striking the Affirmative Defenses contained in the Answers interposed by defendants, Mathew Sutphen and Cornerstone Bancor Mortgage Corp.; [c] an order appointing a referee to compute the total sums due and owing to the plaintiffs; [d] an order amending the caption and changing the names “John Doe” and “Jane Doe” to “Jane” Sutphen; [e] an order extending the Notice of Pendency filed on October 17, 2007, for an additional three year period; [f] an order consolidating the within foreclosure action with the foreclosure action commenced on March 12, 2010, bearing Index No. 4955/10, and: [g] an award of costs and disbursements attendant to the prosecution of the within action (Sequence #001).

The defendant Mathew Sutphen had cross-moved for an order dismissing the within complaint, as well as for an order compelling the plaintiffs to produce, for copying and inspection, the original written mortgage documents, promissory notes and assignment of mortgage, together with any other related loan documents (Sequence #003). However, by Stipulation dated May 18, 2011, the cross-motion has been withdrawn as moot.

On August 3, 2005, plaintiff Robert Voto extended a loan to South Street Investors Corp. (a non-party) [hereinafter South Street], in the amount of \$750,000, in relation to which a Commercial Note was executed on said date (*see* Mikolay Affirmation in Support at ¶5; Exh. A; *see also* Voto Affidavit at ¶3). As partial security for this loan, defendants Sutphen and Cornerstone executed a

mortgage, the scope of which encumbered the premises located at 85 Shinnecock Avenue, Massapequa, New York, as well as the land adjacent thereto (*see* Mikolay Affirmation in Support at ¶5; *see also* Exhs. B,G). Defendant Mathew Sutphen is the owner of the premises located at 85 Shinnecock Avenue, Massapequa, New York, and the adjacent land is owned by defendant Cornerstone, of which Mr. Sutphen is allegedly the President (*see* Mikolay Affirmation at ¶5; *see also* Exh. G at ¶5).

In addition to the aforementioned mortgage, on August 3, 2005, defendants Sutphen and Cornerstone executed a Guaranty whereby they unconditionally guaranteed the repayment of the loan made by Mr. Voto to South Street (*see* Mikolay Affirmation at Exh. D; *see also* Voto Affidavit at ¶4). On August 17, 2005, Robert Voto assigned to plaintiff Edith K. Spiegel a 20% interest in the aforementioned note and mortgage, both of whom remain “the owners and holders of the note and mortgage being foreclosed”(see Voto Affidavit at ¶5; *see also* Mikolay Affirmation at Exh. E). Thereafter, on August 31, 2006, a Modification Agreement was executed whereby the maturity date of the loan was extended from August 3, 2006 to February 3, 2007 and the *per annum* interest rate was increased from 15 % to 18% (*see* Mikolay Affirmation in Support at ¶¶8,9; Exh. F).

The plaintiffs herein allege that South Street, as well as the defendants herein, have breached their obligations as recited in the Note, Mortgage and the Modification Agreement, by failing to remit the installment payment due on November 3, 2006 (*see* Voto Affidavit at ¶7). The plaintiffs further allege that as a result of said default they have elected to accelerate and declare due and payable all sums due thereunder (*see* Mikolay Affirmation in Support at ¶¶10,11; *see also* Voto Affidavit at ¶7).

As a result of the foregoing, the underlying action was commenced on October 17, 2007

(see Mikolay Affirmation in Support at Exh.G). In connection therewith, a Notice of Pendency was simultaneously filed with the Nassau County Clerk (*id.* at Exh. H). Thereafter, so as to comply with the recently enacted notice requirements embodied in RPAPL §§1303 and 1320, the plaintiffs commenced a second cause of action against defendant Mathew Sutphen on March 12, 2010 (see Mikolay Affirmation at ¶ 12). The applications thereafter ensued and are determined as set forth hereinafter.

In support of the First branch of the instant application, counsel for the plaintiffs argues that based upon the documents as provided herein, the plaintiffs have demonstrated their entitlement to judgment as a matter of law (see Mikolay Affirmation in Support at ¶¶16,17,18). Counsel for defendant Mathew Sutphen opposes the within application and simultaneously cross-moved for an order dismissing the complaints, as well as for an order compelling production of the original loan documents (subsequently withdrawn). In opposing the application, counsel contends that as the plaintiffs have failed to produce the original documents upon which they predicate the within actions for foreclosure, the instant application should be denied (see generally Binger Affirmation; see also Sutphen Affidavit dated November 18, 2010). Counsel further asserts that the plaintiffs' have failed to provide an itemization of all the payments made by Mathew Sutphen in connection to the subject loan (*id.*).

In moving for summary judgment in an action to foreclose upon a mortgage, it is well settled that the plaintiff can establish entitlement to judgment as a matter of law via the introduction of the mortgage, the unpaid note, as well as evidence of the defendant's default thereunder (*Rossrock Fund II, L.P. v Osborne*, 82 AD3d 737 [2d Dept 2011]; *U. S. Bank Trust National Association Trustee v Butti*, 16 AD3d 408 [2d Dept 2005]; *Republic Natl. Bank of N.Y. v O' Kane*, 308 AD2d 482 [2d Dept

2003]; *Village Bank v Wild Oaks Holding*, 196 AD2d 812 [2d Dept 1993]). Once the plaintiff has established a *prima facie* showing, it becomes incumbent upon the defendant to raise a triable issue of fact by either rebutting the plaintiffs' showing or by demonstrating the merit of the defenses asserted in response to the complaint (*Wells Fargo Bank Minnesota Natl. Assn. v Perez*, 41 AD3d 590 [2d Dept 2007]).

In the instant matter, the plaintiffs have demonstrated their entitlement to judgment by providing a copy of the Note, the Mortgage, as well as the affidavit of Robert Voto, attesting to the defendants' default as to the terms thereof (*Rossrock Fund II, L.P. v Osborne*, 82 AD3d 737 [2d Dept 2011], *supra*; *U. S. Bank Trust National Association Trustee v Butti*, 16 AD3d 408 [2d Dept 2005], *supra*; *Republic Natl. Bank of N.Y. v O' Kane*, 308 AD2d 482 [2d Dept 2003], *supra*; *Village Bank v Wild Oaks Holding*, 196 AD2d 812 [2d Dept 1993], *supra*).

In opposition to the plaintiffs' *prima facie* showing, the defendant has failed to raise a triable issue of fact (*Wells Fargo Bank Minnesota Natl. Assn. v Perez*, 41 AD3d 590 [2d Dept 2007], *supra*). Here, the contentions set forth in the defendant's opposition do not, in any respect, rebut the plaintiffs' assertions with respect to either the very existence of the debt purportedly owed or the amount which is claimed to be outstanding (*id.*). Moreover, while counsel for the defendant posits that the plaintiffs have failed to itemize the payments which Mr. Sutphen has made against the mortgage, any dispute with respect to the outstanding amounts due in connection thereto is not a basis upon which to deny a motion for summary judgment and rather should be determined by the referee (*Long Island Savings Bank of Centerreach, F.S.B. v Denkensohn*, 222 AD2d 659 [2d Dept 1995]).

Based upon the foregoing, that branch of the plaintiffs' application, which seeks an order

granting summary judgment against defendants Mathew Sutphen and Cornerstone Bancor Mortgage Corp., is hereby GRANTED. In consideration thereof, the Second branch of the plaintiffs' application which seeks an order dismissing the affirmative defenses interposed by said defendants is hereby denied as moot.

The Third branch of the plaintiffs' application, which seeks an appointment of a Referee to Compute, is hereby GRANTED and this action is referred to **ALAN M. PARENTE, ESQ. (Fiduciary identification number 253358), with offices of 6 Westfield Place, Glen Cove, New York 11542, and with telephone number (516) 277-2263** to ascertain and compute the amount due to the plaintiffs herein for principal, interest, water and sewer rentals, insurance premiums, taxes, repairs, securing, protecting and maintaining the premises, mortgage insurance premiums, if any, and any other charges, and to examine and report whether the mortgages premises should be sold in one parcel, and that the said Referee make his report to this Court with all convenient speed. That if required, the Referee shall take testimony pursuant to RPAPL 1321 and that pursuant to CPLR 8003 and in the discretion of the court, a fee of \$250.00 shall be paid to the Referee for the computation stage and the filing of his report.

As to the Fourth branch of the instant application, the plaintiffs moves pursuant to a non-denominated section of law, seeking leave to amend the caption by deleting the names "John Doe" and "Jane Doe" and substituting therefor the name "Jane" Sutphen. Counsel posits when service of process was effected in connection to the original action, it was served upon a "Jane" Sutphen at 85 Shinnecock Avenue, at which point it was determined that "Jane" Sutphen was a tenant occupying said premises (*see* Affirmation in Support at ¶14). Counsel contends that given the discovery of this individual, leave should be granted to add her name to the caption herein (*id.*).

CPLR §1024, provides the following: “A party who is ignorant, in whole or in part, of the name or identity of a person who may properly be made a party, may proceed against such person as an unknown party by designating so much of his name and identity as is known. If the name or remainder of the name becomes known all subsequent proceedings shall be taken under the true name and all prior proceedings shall be deemed amended accordingly.”

While the statute clearly provides for an amendment upon the discovery of a party’s true identity, here no such discovery has yet to be made. Rather, the Affidavit of Service upon which counsel relies indicates that while a “Jane” Sutphen was served with process on behalf of defendant Mathew Sutphen, she plainly refused to provide her first name. Moreover, once the party’s complete identity is ascertained, the plaintiffs’ are not required to seek court approval so as to amend the caption and insert the proper name (*Woodburn Court Associates I v Wingate Management Co., Inc.*, 243 AD2d 1043 [3d Dept 1997]; Siegel, NY Prac § 188, at 318 [4th ed]). Thus, for the foregoing reasons, this branch of the plaintiffs’ application is DENIED.

The Fifth branch of the plaintiffs’ application seeks an order extending the Notice of Pendency, which was originally filed on October 17, 2007. As a general proposition, “[a] notice of pendency is valid for three years from the date of filing and may be extended for additional three year periods upon a showing of good cause” (*In re Sackow*, 97 NY2d 436 [2002] at 442; CPLR §6513). Moreover, any extension which is requested must be applied for prior to the expiration of the previous notice of pendency and the “extension order shall be filed, recorded and indexed before expiration of the prior period”(CPLR §6513). However, “[i]n a foreclosure action, a successive notice of pendency may be filed to comply with section thirteen hundred thirty one of the real property actions and proceedings law, notwithstanding that a previously filed notice of pendency in

such action or in a previous foreclosure action has expired pursuant to section 6513 of this article ...” (CPLR§6516[a]).

In the instant matter, while the Notice of Pendency filed under Action 1 index number 18215/07 expired on October 17, 2010, the application to extend same was not made returnable until October 22, 2010, and hence no extension order was filed prior to the expiration of the prior notice (CPLR §6513). However, given that the within action sounds in foreclosure, the plaintiffs’ instant application is hereby GRANTED to the extent that the plaintiffs’ are directed to file a Notice of Pendency in accordance with the provisions of CPLR §6516 and under the consolidated action index number 4955/2010 (see below).

The Sixth branch of the plaintiffs’ application seeks an order consolidating the within foreclosure action commenced under Index No. 18215/2007 with the foreclosure action commenced under Index No. 004955/2010. CPLR §602[a] provides, in relevant part, “When actions involving a common questions of law or fact are pending before a court, the court, upon motion, * * * may order the actions consolidated.” Here, the two foreclosure actions are predicated upon the same documents and involve the identical properties and parties (*id.*). Accordingly, the plaintiffs’ application is hereby GRANTED and the two actions are hereby consolidated under Index No.004955/2010. The caption shall henceforth read as follows:

Robert A. Voto and Edith K. Spiegel,

Plaintiffs,

-against-

Mathew Sutphen, Cornerstone Bancor Mortgage Corp., Melco Limited Liability Company, New York State Department of Taxation and Finance, “John Doe #1” and

“Jane Doe #1” through “John Doe #12” and “Jane Doe #12”, the last twelve names being fictitious and unknown to the plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises, described in the complaint,
Defendants.



Applications not specifically addressed are DENIED.
This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
September 12, 2011

ENTER:

JOEL K. ASARCH, J.S.C.

Copies mailed to:
Adam E. Mikolay, Esq.
Attorney for Plaintiffs

Alan Jay Binger, Esq.
Attorney for Defendant

ENTERED
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