

Agai v Mihalatos

2011 NY Slip Op 33092(U)

November 21, 2011

Supreme Court, Nassau County

Docket Number: 4089/09

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

JACOB AGAI,

Plaintiff,

- against -

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 4089/09
Motion Seq. No.: 04
Motion Date: 11/14/11

DENNIS MIHALATOS, ELIZABETH MIHALATOS,
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS,
INC., as nominee for ALLIANCE MORTGAGE BANKING
CORP., THE PEOPLE OF THE STATE OF NEW YORK,
UNITED STATES OF AMERICA
AND JOHN DOE # 1 through JOHN DOE #5,
the last five 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.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation, Affidavit and Exhibits and Memorandum of Law	1

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiff moves, pursuant to CPLR § 3212 and RPAPL § 1351, for an order granting
him summary judgment and an order of foreclosure and sale and the appointment of a Referee to

compute the present amount due to him and to defendant Mortgage Electronic Registration Systems, Inc., as nominee for/and Alliance Mortgage Banking Corp. No opposition was submitted to the instant motion.

Plaintiff and defendants Dennis Mihalatos and Elizabeth Mihalatos (hereinafter defendants "Mihalatos") entered into a loan agreement, where plaintiff loaned proceeds in the amount of \$450,000.00 to defendants Mihalatos. Plaintiff distributed the funds to defendants Mihalatos on or about October 2005 and defendants Mihalatos were to pay the same in full, including interest of 6% per annum, on October 5, 2008, pursuant to a document entitled "Mortgage Note." The Mortgage, executed by defendants Mihalatos on or about June 4, 2007, and duly recorded in the Office of the Nassau County Clerk on or about July 6, 2007, was to be secured by the defendant Mihalatos' improved real property located at 85 Knollwood Road West, Roslyn, New York (Section 6, Block B-01, Lot 26). Defendants Mihalatos defaulted in paying on the Note on the agreed upon the maturity date.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v.*

Associated Fur Mfrs., Inc., 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. See CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. See *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. See *Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. See *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. See *Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

When a mortgagee produces the mortgage and unpaid note, together with evidence of the mortgagor's default, the mortgagee demonstrates its entitlement to a judgment of foreclosure as a matter of law, thereby shifting the burden to the mortgagor to assert and demonstrate by competent and admissible evidence, any defense that could properly raise a questions of fact to his or her default. See *United Companies Lending Corp. v. Hingus*, 283 A.D.2d 764, 724

N.Y.S.2d 134 (3d Dept. 2001); *Trustco Bank, Nat. Ass'n v. Labriola*, 246 A.D.2d 735, 667 N.Y.S.2d 450 (3d Dept 1998); *Aurora Loan Services, LLC v. Sattar*, 17 Misc.3d 1109(A), 851 N.Y.S.2d 62 (Kings County Sup. Ct. 2007). Plaintiff has produced a copy of the mortgage, a fully executed mortgage note and evidence of a recording of the same. *See* Plaintiff's Affirmation in Support Exhibit A. Plaintiff has further provided evidence of defendants Mihalatos' default.

Plaintiff has established its *prima facie* entitlement to judgment against defendants Mihalatos upon submission of the Mortgage and the unpaid Note together with evidence of defendants' default. *See HSBC Bank USA, NA v. Schwartz*, ___ A.D.3d ___, 2011 WL 5085755 (2d Dept. 2011); *JPMorgan Chase Bank, N.A. v. Galt Group, Inc.*, 84 A.D.3d 1028, 923 N.Y.S.2d 643 (2d Dept. 2011); *Emigrant Mortg. Co., Inc. v. Turk*, 71 A.D.3d 721, 895 N.Y.S.2d 722 (2d Dept. 2010); *Neighborhood Housing Services of New York City, Inc. v. Meltzer*, 67 A.D.3d 872, 889 N.Y.S.2d 627 (2d Dept. 2009).

In opposition to the motion, the burden shifted to defendants to produce evidentiary proof in admissible form sufficient to require a trial of their defenses and claims. *See Jin Sheng He v. Sing Huei Chang*, 83 A.D.3d 788, 921 N.Y.S.2d 128 (2d Dept. 2011); *Washington Mut. Bank, F.A. v. O'Connor*, 63 A.D.3d 832, 880 N.Y.S.2d 696 (2d Dept. 2009); *JPMorgan Chase Bank, N.A. v. Agnello*, 62 A.D.3d 662, 878 N.Y.S.2d 397 (2d Dept. 2009). Since, as previously stated, no opposition was submitted to the instant motion, defendants Mihalatos have failed to do so. *See Jin Sheng He v. Sing Huei Chang, supra* at 789; *Constructamax, Inc. v. CBA Associates, Inc.*, 294 A.D.2d 460, 742 N.Y.S.2d 555 (2d Dept. 2002). Accordingly, it is hereby

ORDERED that plaintiff's motion, pursuant to CPLR § 3212, for an order granting him summary judgment and an order of foreclosure is hereby **GRANTED**. And it is further

ORDERED that the names “John Doe # 1” through “John Doe # 5” are hereby excised from the caption of this action without prejudice to any of the proceedings heretofore had herein or to be had herein. And it is further

ORDERED that this action be and the same hereby is referred to Michael Cardello, III, Esq., Fiduciary No. 221577, having an office at Moritt Hock and Hamroff, LLP, 400 Garden City Plaza, Garden City, New York 11530, telephone number (516) 873-2000, as Referee, to ascertain and compute the amount due to plaintiff for principal, interest, penalties and fees, except for attorney’s fees, as provided for in the Note and Mortgage upon which this action was brought, and to examine and report whether the mortgaged premises can be sold either as one or as several parcels according to the law, and to report to the Court with all convenient speed. And it is further

ORDERED that, pursuant to CPLR § 8003(a), in the discretion of the Court, a fee of \$350.00 shall be paid to the Referee for the computation stage and upon the filing of his report. And it is further

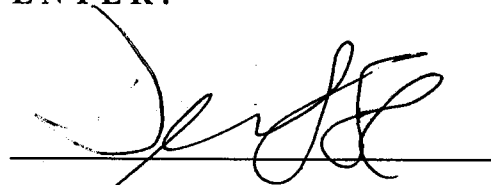
ORDERED that, by accepting this appointment, the Referee appointed herein is subject to the requirements of Rule 36.2(c) of the Chief Judge, and, if the Referee is disqualified from receiving an appointment pursuant to the provision of that Rule, the Referee shall notify the Appointing Judge forthwith. And it is further

ORDERED that, by accepting this appointment, the Referee certifies that he is in compliance with Part 36 Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to, Section 36.2(c) (“Disqualifications from appointment”) and Section 36.2(d) (“Limitations on appointments based upon compensation”). And it is further

ORDERED that the Referee is prohibited from accepting or retaining any funds for himself or paying funds to himself without compliance with Part 36 of the Rules of the Chief Judge.

This constitutes the Decision and Order of this Court.

ENTER:

A handwritten signature in black ink, appearing to read 'Denise L. Sher', is written over a horizontal line.

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
November 21, 2011

ENTERED
NOV 23 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE