

Chevy Chase Bank, FSB v Zaneski

2012 NY Slip Op 31193(U)

April 20, 2012

Supreme Court, Suffolk County

Docket Number: 32502-09

Judge: Ralph T. Gazzillo

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SUPREME COURT - STATE OF NEW YORK
IAS PART 6 - SUFFOLK COUNTY

PRESENT: Hon. RALPH T. GAZZILLO
Justice of the Supreme Court

MOTION DATE 10-20-11
ADJ. DATE _____
Mot. Seq. # 001-MG

CHEVY CHASE BANK, FSB, x

Plaintiff,

-against-

MARY ANNE A. ZANESKI A/K/A MARY ANNE A.
ROTHENBERG, CHASE BANK USA, NA,
CITIBANK SOUTH DAKOTA, NA, ASSIGNEE OF
UNIFUND CCR PARTNERS,

"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,

Defendants,

_____ x

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Upon the following papers numbered 1 to 17 read on this motion for summary judgment; Notice of Motion/
Order to Show Cause and supporting papers 1 - 10; Notice of Cross Motion and supporting papers _____;
Answering Affidavits and supporting papers 11 - 13; Replying Affidavits and supporting papers 14 - 17; Other
_____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (001) by plaintiff for, inter alia, an order: (1) pursuant to CPLR
3212 awarding it summary judgment against the answering defendant (a) striking the defendant's
answer and affirmative defenses; and (b) dismissing the defendant's counterclaim; (2) pursuant to
RPAPL § 1321 appointing a referee to (a) compute amounts due under the subject mortgage; and (b)
examine and report whether the subject premises should be sold in one parcel or multiple parcels; (3)
amending the caption by excising the defendants, sued herein as "John Doe #1" through "John Doe
#12"; and awarding the costs of this motion to the plaintiff, is determined as indicated below.

The plaintiff commenced this residential foreclosure action by the filing of a summons and complaint on August 14, 2009 alleging that Mary Anne A. Zaneski also known as Mary Anne A. Rothenberg (hereinafter “the defendant mortgagor”) defaulted in repaying a note in the principal sum of \$200,000 which was secured by certain real property known as 224 North Sea Road, S. Hampton, New York 11968. The note dated March 24, 2003 provides for the repayment of principal and interest to the plaintiff in monthly installments in the approximate sum of \$1,264.14 for thirty years commencing on May 1, 2003. As security for the loan, the defendant mortgagor gave the plaintiff a mortgage also dated March 24, 2003.

In the complaint, the plaintiff alleges, inter alia, that it is the owner and holder of the note and mortgage. The plaintiff also alleges, among other things, that the defendant mortgagor allegedly defaulted under the terms of the note and mortgage by failing to make monthly payments from November 1, 2008 to date, despite due demand; and that, as a result, the plaintiff has elected to declare due and owing the entire unpaid balance of principal, together with applicable interest. Issue was joined when the defendant mortgagor interposed an answer dated September 21, 2009. None of the other defendants have answered or appeared in this action.

By her answer, the defendant mortgagor, denies some of the allegations in the complaint, asserts five affirmative defenses and interposes a “first” counterclaim. By her affirmative defenses, the defendant mortgagor asserts: the plaintiff’s alleged lack of capacity to sue; the statute of frauds; the doctrine of unclean hands; the plaintiff’s alleged wrongful conduct; and the claims are allegedly barred by documentary evidence. By her counterclaim, the defendant mortgagor admits that she obtained a mortgage loan from the plaintiff and the arrears, but alleges, among other things, that she tendered partial payments which were rejected by the plaintiff prior to the commencement of this action.

The plaintiff has filed a reply to the defendant mortgagor’s counterclaims denying some allegations and asserting five affirmative defenses (the last of which is mislabeled a “FOURTH” affirmative defense): the plaintiff duly accelerated the principal balance of the mortgage due and owing; any dispute as to the amount due and owing to the plaintiff will be determined by a court appointed referee; the defendant mortgagor admits that the amount remitted to the plaintiff was not the full amount due and owing; the defendant mortgagor’s counterclaim fails to state a cause of action; and rejection of partial payment.

Parenthetically, according to the records maintained by the Court’s computerized database, settlement conferences were held in this Court’s Specialized Mortgage Foreclosure Conference Part on March 25, June 3, July 21 and September 15, 2010. At the last conference, this matter was marked “held” and referred as an IAS case since a settlement or other resolution had not been reached. Accordingly, there has been compliance with CPLR 3408 and no further settlement conference is required.

The plaintiff now moves for an order pursuant to CPLR 3212 granting summary judgment in its favor and striking the defendant mortgagor’s answer and affirmative defenses; dismissing the

defendant mortgagor's counterclaim; amending the caption by excising the defendants sued herein as "John Doe #1" through "John Doe #12"; pursuant to RPAPL § 1321 appointing a referee to ascertain and compute amounts due; and awarding the costs of this motion to the plaintiff. In response to the motion, the defendant mortgagor has filed opposition papers. A reply has also been filed by the plaintiff.

A plaintiff in a mortgage foreclosure action establishes a prima facie case for summary judgment by submission of the mortgage, the mortgage note, bond or obligation, and evidence of default (*see, Valley Nat'l Bank v Deutsche*, 88 AD3d 691, 930 NYS2d 477 [2d Dept 2011]; *Wells Fargo Bank v Karla*, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; *Washington Mut. Bank FA v O'Connor*, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]). The burden then shifts to the defendant to demonstrate "the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff" (*Capstone Bus. Credit, LLC v Imperia Family Realty, LLC*, 70 AD3d 882, 883, 895 NYS2d 199 [2d Dept 2010]). In the instant case, the plaintiff produced the note and mortgage executed by the defendant mortgagor, evidence of nonpayment, and the notice of default. As the plaintiff demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted to the defendant mortgagor (*see, HSBC Bank USA v Merrill*, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]). Accordingly, it was incumbent upon the defendant mortgagor to produce evidentiary proof in admissible form sufficient to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action (*see, Argent Mtge. Co., LLC v Mentosana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]; *Aames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]). In opposition to this motion, the defendant mortgagor has offered no proof or arguments in support of any of their pleaded affirmative defenses other than arguments in support of the third, fourth and fifth affirmative defenses and the counterclaim (*see, Argent Mtge. Co., LLC v Mentosana*, 79 AD3d 1079; *see generally, Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

The first affirmative defense, in which it is alleged that the plaintiff lacks capacity to sue herein (*see, CPLR 3211 [a] [3]*), is factually unsupported and without merit (*see generally, Zuckerman v City of New York*, 49 NY2d 557, *supra*). The plaintiff already demonstrated its prima facie showing of entitlement to judgment as a matter of law (*see, Wells Fargo Bank v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). Further, in support of the motion, the plaintiff has submitted an affidavit of merit from an officer of the plaintiff by which it is alleged that the plaintiff was and still is a Federal Savings Bank, FSB formed and existing under the laws of the United States of America, having its principal place of business in the State of Maryland (*see generally, Security Pac. Nat'l. Bank v Evans*, 31 AD3d 278, 820 NYS2d 2 [1st Dept 2006]). The officer also alleges, inter alia, that it is the owner and holder of the note and mortgage. Additionally, the allegations concerning the plaintiff's legal status, which are referenced by the plaintiff's officer, are set forth in the complaint (*see, CPLR 3015 [b]*). In response to this motion, the defendant mortgagor has neither alleged nor demonstrated that the plaintiff does not exist as a valid legal entity, or that it does not have the authority to sue herein. Accordingly, the first affirmative defense is stricken.

With respect to the second affirmative defense based upon the statute of frauds, the defendant mortgagor has failed to allege or prove any facts supporting this defense (*see, Bank of Am., N.A. v*

414 Midland Ave. Assoc., LLC, 78 AD3d 746, 911 NYS2d 157 [2d Dept 2010]; **Glenesk v Guidance Realty Corp.**, 36 AD2d 852, 321 NYS2d 685 [2d Dept 1971], *abrogated on other grounds by Butler v Catinella*, 58 AD3d 145, 868 NYS2d 101 [2d Dept 2008]). All of the loan agreements were in writing and signed by the defendant mortgagor (*see*, Gen Oblig § 5-701). Accordingly, the second affirmative defense is stricken as entirely without merit.

The third affirmative defense pleading the doctrine of unclean hands is stricken as the defendant mortgagor has failed to come forward with any facts demonstrating that the plaintiff's conduct was immoral or unconscionable (*see, Citibank, N.A. v Walker*, 12 AD3d 480, 787 NYS2d 48 [2d Dept 2004], *abrogated on other grounds by Butler v Catinella*, 58 AD3d 145, *supra*; **CFSC Capital Corp. XXVII v Bachman Mech. Sheet Metal Co.**, 247 AD2d 502, 669 NYS2d 329 [2d Dept 1998]; **Connecticut Natl. Bank v Peach Lake Plaza**, 204 AD2d 909, 612 NYS2d 494 [3d Dept 1994]).

The fourth affirmative defense of contributory and comparative negligence does not constitute a defense to this mortgage foreclosure action. The concept of apportioning culpable conduct is one related to tort. Since the claims asserted by the plaintiff in this case sound in breach of contract, as opposed to tortious conduct, an affirmative defense based upon the notion of culpable conduct is unavailable herein (*see*, CPLR 1401; **Pilewski v Solymosy**, 266 AD2d 83, 698 NYS2d 660 [1st Dept 1999]; **Nastro Contracting v Augusta**, 217 AD2d 874, 629 NYS2d 848 [3d Dept 1995]; **Schmidt's Wholesale, Inc. v Miller & Lehman Const., Inc.**, 173 AD2d 1004, 569 NYS2d 836 [3d Dept 1991]). Thus, the fourth affirmative defense is stricken.

The fifth affirmative defense that documentary evidence bars the plaintiff's claims for foreclosure and sale is belied by or unsupported by the record and otherwise without basis in fact or law (*see, Wells Fargo Bank v Karla*, 71 AD3d 1006, *supra*; **U.S. Bank, N.A. v Flynn**, 27 Misc3d 802, 897 NYS2d 855 [Sup Ct, Suffolk County, Mar. 12, 2010, Whelan, J.]). In any event, the plaintiff has established its prima facie entitlement to summary judgment. Therefore, the fifth affirmative defense is stricken.

With respect to the defendant mortgagor's counterclaim, the plaintiff demonstrated its prima facie entitlement to judgment as a matter of law by establishing that there is no contractual provision or fiduciary relationship which would have obligated it to furnish the defendant mortgagor with a modification of mortgage loan or to accept less than full payment due (*see, Euba v Euba*, 78 AD3d 761, 911 NYS2d 402 [2d Dept 2010]; **O'Connell v Soszynski**, 46 AD3d 644, 847 NYS2d 605 [2d Dept 2007]). As the plaintiff demonstrated its prima facie showing, the burden shifts to the defendant mortgagor. In opposition, the defendant mortgagor failed to raise a triable issue of fact by demonstrating by documents or other evidentiary proof that the plaintiff had a duty or contractual obligation to extend a mortgage loan modification to the defendant mortgagor, or that it acted in "bad faith" (*see, O'Connell v Soszynski*, 46 AD3d 644, *supra*; **Fine Arts Enterprises, N.V. v Levy**, 149 AD2d 795, 539 NYS2d 827 [3d Dept 1989]; **Aurora Bank FSB v CSP Realty Assoc. LLP**, 2011 NY Slip Op 32407U, 2011 NY Misc LEXIS 4365 [Sup Ct, Suffolk County, Sept. 7, 2011, Mayer, J.]; *cf.*, **Wells Fargo Bank, N.A. Meyers**, 30 Misc 3d 697, 913 NYS2d 500 [Sup Ct, Suffolk County, Nov. 10, 2010, Sweeney, J.]). In any event, the defendant mortgagor admits the default in payment and the

attempted tender of less than the full amount due and owing to the plaintiff which the plaintiff rejected (*see, EMC Mortg. Corp. v Stewart*, 2 AD3d 772, 769 NYS2d 408 [2d Dept 2003]; *First Federal Savings Bank v Midura*, 264 AD2d 407, 694 NYS2d 121 [2d Dept 1999]; *see also, Charter One Bank, FSB v Leone*, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007]; *United Companies Lending Corp. v Hingos*, 283 AD2d 764, 724 NYS2d 134 [3d Dept 2001]).

Under these circumstances, because the defendant mortgagor failed to come forward with any evidence showing the existence of a triable issue of fact with respect to any defense or counterclaim, the plaintiff is entitled to summary judgment against her (*see, Rossrock Fund II, L.P. v Commack Inv. Group, Inc.*, 78 AD3d 920, 912 NYS2d 71 [2d Dept 2010]; *Matter of Augustine v BankUnited FSB*, 75 AD3d 596, 905 NYS2d 652 [2d Dept 2010]). Accordingly, the plaintiff is awarded summary judgment striking the defendant mortgagor's answer and affirmative defenses and dismissing the defendant mortgagor's counterclaim (*see, Fed. Home Loan Mtge. Corp. v Karastathis*, 237 AD2d 558, 655 NYS2d 631[2d Dept 1996]).

The branch of the instant motion wherein the plaintiff seeks an order amending the caption by excising the defendants, sued herein as "John Doe #1" through "John Doe #12", is granted pursuant to CPLR 1024. By its submissions, the plaintiff established the basis for this relief (*see, Neighborhood Hous. Servs. N.Y. City, Inc. v Meltzer*, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]). All future proceedings shall be captioned accordingly.

By its moving papers, the plaintiff further established the default in answering on the part of the remaining defendants, Chase Bank USA, NA and Citibank South Dakota, NA, Assignee of Unifund CCR Partners, who have not served answers to the plaintiff's complaint. Accordingly, the default in answering of all such defendants is fixed and determined. Since the plaintiff has been awarded summary judgment against the defendant mortgagor and has established a default in answering or appearing by the non-answering defendants, the plaintiff is entitled to an order appointing a referee to compute amounts due under the subject note and mortgage (*see, RPAPL § 1321; Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *Bank of East Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

Accordingly, this motion for, inter alia, summary judgment and to appoint a referee to compute is determined as indicated above. All matters not decided herein are deemed denied. The Proposed Order appointing a referee to compute pursuant to RPAPL § 1321 is signed as modified by the Court.

Dated: 4/20/12
Riverhead, NY


HON. RALPH T. GAZZILLO, A.J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION