

Valley Natl. Bank v Fowkes
2012 NY Slip Op 32797(U)
October 26, 2012
Supreme Court, Suffolk County
Docket Number: 32875-10
Judge: John J.J. Jones Jr
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SHORT FORM ORDER

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NO.: 32875-10

SUPREME COURT - STATE OF NEW YORK
IAS PART 10 - SUFFOLK COUNTY

PRESENT: Hon. JOHN J. J. JONES, JR.
Justice of the Supreme Court

VALLEY NATIONAL BANK,

Plaintiff,

-against-

WILLIAM J. FOWKES, JENNIFER FOWKES,

"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,

Motion Date: 5-29-2012
Adj. Date: 6-20-2012
Seq. #: 002-MotD

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Upon the following papers numbered 1 to 12 read on this motion for summary judgment: Notice of Motion/Order to Show Cause and supporting papers 1 - 5; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 6 - 8; Replying Affidavits and supporting papers 9 - 11; Other Stipulation - 12 it is,

ORDERED that this renewed motion by the plaintiff for, inter alia, an order pursuant to CPLR 3212 awarding summary judgment in its favor and striking the joint answer of the defendants, William J. Fowkes and Jennifer Fowkes, amending the caption, fixing the defaults in answering of the non-answering defendants, and appointing a referee to compute amounts due, is determined as indicated below, and it is further

ORDERED that the notice of pendency and verified complaint filed herein on September 3, 2010 is amended nunc pro tunc to reflect that the correct name of the assignor is Mortgage Electronic Registration Systems, Inc. as nominee for Continental Home Loans, Inc., instead of Countrywide Home Loans, Inc.; and it is further

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ORDERED that the plaintiff shall serve a copy of this Order with notice of entry upon counsel for the defendants within forty-five (45) days of the date of this Order and thereafter file the affidavit(s) of service with the Clerk of the Court.

The plaintiff commenced this residential foreclosure action by the filing of a summons and complaint on September 3, 2010 alleging that William J. Fowkes (hereinafter the defendant mortgagor) defaulted in repaying an interest only period fixed rate note dated December 21, 2006 and given to Continental Home Loans, Inc. (Continental) in the principal sum of \$427,500.00. The note provides, among other things, for initial payments of interest only commencing on February 1, 2007 in the approximate amount of \$2,894.53 for the first 120 months of the note, and payments of principal and interest thereafter in the approximate of \$3,609.11 through to January 1, 2037, the maturity date. As security for the loan, the defendant mortgagor gave Continental a mortgage also dated December 21, 2006 against the real property known as 567 Accabonac Road, East Hampton, New York 11937. The mortgage indicates that Mortgage Electronic Registration Systems, Inc. (MERS) was acting solely as a nominee for Continental and its successors and assigns and that, for the purposes of recording the mortgage, MERS was the mortgagee of record. By undated allonge, Continental allegedly transferred the note to VNB Mortgage Loans, Inc. (VNB), which is now known as Valley National Bank (Valley). By assignment dated June 23, 2010, MERS purportedly assigned the mortgage and note to the plaintiff, Valley National Bank (Valley).

In the complaint, the plaintiff alleges, inter alia, that the defendant mortgagor allegedly defaulted under the terms of the note and mortgage by failing to make monthly payments on February 1, 2010 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 by the service of a joint answer dated September 20, 2010 filed by the defendant mortgagor and the defendant Jennifer Fowkes (collectively the defendants Fowkes). In their answer, the defendants Fowkes admit the execution of the subject mortgage and the note, but generally deny the other allegations set forth in the complaint. The remaining defendants have not appeared or answered the complaint.

According to the records maintained by the Court's computerized database, this case was assigned to the specialized mortgage foreclosure part and settlement conferences were held on March 22, 2011 (pre-screening) and April 11, 2011 (full conference). At the last conference, this matter was marked to indicate that the defendants Fowkes were not eligible for an additional conference. As a result, this matter was dismissed from the conference program. Accordingly, the conference requirement imposed upon the Court by CPLR 3408

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and/or the Laws of 2008, Ch. 472 § 3-a as amended by Laws of 2009 Ch. 507 § 10 has been satisfied. No further conference is required under any statute, law or rule.

The plaintiff's previously moved (001) for, inter alia, an order appointing a referee. By Order dated January 3, 2012 (Jones, Jr., J.), the plaintiff's prior motion was denied, without prejudice to resubmit, due to the plaintiff's failure to provide, among other things, evidentiary proof as to whether the subject mortgage is a "home loan" as defined in RPAPL § 1304(5)(a); whether the plaintiff was required to comply with the 90-day notice requirements of RPAPL § 1304; and whether there was a nexus between VNB and Valley.

The plaintiff now moves again (002) for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and striking the joint answer of the defendants Fowkes; (2) pursuant to CPLR 1024 amending the caption; (3) fixing the defaults in answering of the non-answering defendants; (4) pursuant to RPAPL § 1321 appointing a referee to compute amounts due; (5) awarding the costs of this motion to the plaintiff; and (6) amending the notice of pendency and verified complaint nunc pro tunc to reflect the correct name of the assignor as MERS as nominee for Continental, instead of Countrywide Home Loans, Inc. (Countrywide). In response, the defendants Fowkes have filed opposition papers. A reply has been filed by the plaintiff. Upon reargument and renewal of this Court's prior order dated January 3, 2012, this motion is considered.

A plaintiff in a mortgage foreclosure action establishes a prima facie case for summary judgment by submission of the mortgage, the note, bond or obligation, and evidence of default (*see, Valley Natl. 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]; *Wash. Mut. Bank, F.A. 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 the mortgage executed by the defendant mortgagor, the allonge and the assignment, as well as evidence of nonpayment (*see, Deutsche Bank Trust Co. Ams. v Codio*, 94 AD3d 1040, 943 NYS2d 545 [2d Dept 2012]; *Fed. Home Loan Mtge. Corp. v Karastathis*, 237 AD2d 558, 655 NYS2d 631 [2d Dept 1997]; *First Trust Natl. Assn. v Meisels*, 234 AD2d 414, 651 NYS2d 121 [2d Dept 1996]). The plaintiff also submitted, inter alia, an affidavit from an officer of the plaintiff, whereby it is alleged that the plaintiff is the holder and is in possession of the note and mortgage that were delivered to it on August 1, 2008, and subsequently memorialized by the assignment dated June 23, 2010 (*cf., HSBC Bank USA v*

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Hernandez, 92 AD3d 843, 939 NYS2d 120 [2d Dept 2012]; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]). More specifically, the officer alleges that, by the allonge, Continental endorsed the note to the order of VNB, which is now known as Valley. With respect to compliance with RPAPL § 1304, the officer alleges that, although a 90-day foreclosure notice was not required, four notices were mailed to the defendant mortgagor, two at the mortgaged property, and two at the mailing address provided to Valley. According to the officer, a 90-day notice was not required because the subject property was purchased as investment property. He further alleges that the subject property was not resided in, or intended to be resided in, as indicated by the defendant mortgagor's uniform residential mortgage application. In another affidavit, the plaintiff's officer alleges that the subject mortgage loan is not a "home loan" as defined in RPAPL 1304(5)(a) (*see, Meyerson Capital X LLC v Kats*, 33 Misc3d 1017, 935 NYS2d 257 [Sup Ct, Kings County 2011]; *Eastern Sav. Bank v Aguirre*, 30 Misc3d 1230A, 924 NYS2d 308 [Sup Ct, Queens County 2011]). Parenthetically, the Court notes that the defendant mortgagor executed a 1-4 family rider (assignment of rents) dated December 21, 2006, whereby section "6" of the mortgage concerning occupancy of the property by him is deleted (*see, RPAPL § 1304 [3]; see, Emigrant Savs. Bank v Sia*, 2012 NY Misc LEXIS 3377, 2012 WL 3134214, 2012 NY Slip Op 31854U [Sup Ct, Suffolk County, July 11, 2012, Martin, J.]).

By its submissions, the plaintiff established its prima facie entitlement to summary judgment on the complaint (*see, CPLR 3212; RPAPL § 1321; HSBC Bank USA, N.A. v Schwartz*, 88 AD3d 961, 931 NYS2d 528 [2d Dept 2011]; *Countrywide Home Loans, Inc. v Delphonse*, 64 AD3d 624, 883 NYS2d 135 [2d Dept 2009]; *Citimortgage Inc. v Lepore*, 2012 NY Misc LEXIS 4282, 2012 WL 3947031, 2012 NY Slip Op 32290U [Sup Ct, Suffolk County, July 13, 2012, Whelan, J.]). As the plaintiff duly demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted to the defendants Fowkes 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, Baron Assoc., LLC v Garcia Group Enters., Inc.*, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; *Wash. Mut. Bank v Valencia*, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]; *Aames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]; *HSBC Bank USA v Merrill*, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]).

In opposition to the motion, the defendants Fowkes have offered the affirmation of their counsel. Counsel argues, inter alia, that the plaintiff did not establish standing and that the defendants Fowkes should be awarded reverse summary judgment against the plaintiff dismissing the complaint. Initially, the defendants Fowkes' request for summary judgment, which was improperly asserted in their opposition papers and served without the benefit of a cross motion, is denied as procedurally and substantively deficient (*see, CPLR 2215; see also,*

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U.S. Bank, NA v Crocitto, 2012 NY Misc LEXIS 4597, 2012 NY Slip Op 32455U [Sup Ct, Suffolk County, Sept. 20, 2012, Whelan, J.]). Concerning the opposition, the defendants Fowkes waived any defense based upon the plaintiff's lack of standing as they failed to interpose that defense in their joint answer, or in a timely pre-answer motion to dismiss the complaint (*see*, CPLR 3211 [c]; *U.S. Bank Natl. Assn. v Denaro*, ___ AD3d ___, 950 NYS2d 581 [2d Dept 2012]; *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). Further, the defendants Fowkes' answer, consisting of general denials and no affirmative defenses, is without apparent merit especially in light of their admission that they executed the subject note and mortgage (*see*, *EMC Mtge. Corp. v Stewart*, 2 AD3d 772, 769 NYS2d 408 [2d Dept 2003]). Moreover, the affirmation of the defendants Fowkes' attorney, who has no personal knowledge of the operative facts, is without probative value and insufficient to defeat the motion (*see, e.g., Zuckerman v City of New York*, 49 NY2d 557, 563, 427 NYS2d 595 [1980]; *2 N. St. Corp. v Getty Saugerties Corp.*, 68 AD3d 1392, 1395, 892 NYS2d 217 [3d Dept 2009]).

Even when viewed in the light most favorable to defendants Fowkes, their submission is insufficient to raise a triable issue of fact (*see, Neighborhood Hous. Servs. N.Y. City, Inc. v Meltzer*, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]; *Cochran Inv. Co. Inc. v Jackson*, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007]). Under these circumstances, the Court finds that the defendants Fowkes failed to rebut the prima facie showing made by the plaintiff of its entitlement to summary judgment (*see, Valley Natl. Bank v Deutsche*, 88 AD3d 691, *supra*; *Rossrock Fund II, L.P. v Commack Inv. Group, Inc.*, 78 AD3d 920, 912 NYS2d 71 [2d Dept 2010]; *Wells Fargo Bank Minn., N.A. v Perez*, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]). The plaintiff, therefore, is awarded summary judgment in its favor and against the defendants Fowkes (*see, Argent Mtge. Co., LLC v Montesana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]; *Fed. Home Loan Mtge. Corp. v Karastathis*, 237 AD2d 558, *supra*). Accordingly, the defendants Fowkes' answer is stricken.

The branch of the instant motion wherein the plaintiff seeks an order amending the caption by substituting Mike Mazzar, Natalie Sheppard and Cheryl Bennett as party defendants for John Doe #1 through John Doe #3, and excising the fictitious defendants sued herein as John Doe #4 through John Doe #12, is granted pursuant to CPLR 1024. By its submissions, the plaintiff established the basis for this relief (*see, Flagstar Bank v Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Neighborhood Hous. Servs. N.Y. City, Inc. v Meltzer*, 67 AD3d 872, *supra*). All future proceedings shall be captioned accordingly.

By its moving papers, the plaintiff further established the default in answering on the part of the newly substituted defendants, Mike Mazzar, Natalie Sheppard and Cheryl Bennett,

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since these defendants never interposed answers to the complaint (*see*, RPAPL § 1321; **HSBC Bank USA, N.A. v Roldan**, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]; **Emigrant Savs. Bank v Sia**, 2012 NY Slip Op 31854U, *supra*). Accordingly, the defaults of all such defendants are fixed and determined. Since the plaintiff has been awarded summary judgment against the defendants Fowkes, and has established a default in answering or appearing by the remaining defendants, the plaintiff is entitled to an order appointing a referee to compute amounts due under the subject note and mortgage (*see*, RPAPL § 1321; **Ocwen Fed. Bank FSB v Miller**, 18 AD3d 527, 794 NYS2d 650 [2d Dept 2005]; **Vt. Fed. Bank v Chase**, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; **Bank of E. Asia, Ltd. v Smith**, 201AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

The plaintiff's request that the notice of pendency and verified complaint filed herein on September 3, 2010 be amended nunc pro tunc to reflect that MERS as nominee for Continental is the correct name of the assignor, instead of Countrywide, is granted (*see*, CPLR 2001; **Bank of Suffolk County v All Shores Wholesale Foods, Inc.**, 90 AD3d 530, 455 NYS2d 33 [2d Dept 1982]). By its submissions, the plaintiff demonstrated that the inclusion of Countrywide in the notice of pendency and the complaint was due to a scrivener's error, and no prejudice has been shown to any of the defendants.

The plaintiff's request for the costs of this motion is denied without prejudice, leave to renew upon proper documentation for costs at the time of submission of the judgment.

Accordingly, this motion by the plaintiff is determined as indicated above. The proposed order appointing a referee to compute pursuant to RPAPL § 1321 has been signed simultaneously herewith as modified by the Court.

Dated: 26 Oct. 2012


 Hon. JOHN J. J. JONES, Jr., J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION