

Hudson City Sav. Bank v Cody

2013 NY Slip Op 30633(U)

March 22, 2013

Sup Ct, Suffolk County

Docket Number: 5917/11

Judge: Elizabeth H. Emerson

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SHORT FORM ORDER

INDEX
NO.: 5917-11**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 8 SUFFOLK COUNTY**PRESENT: Honorable Elizabeth H. EmersonMOTION DATE: 9-14-12
SUBMITTED: 9-14-12
MOTION NO.: 002-MG_____
X

HUDSON CITY SAVINGS BANK,

Plaintiff,

-against-

COHN & ROTH
Attorneys for Plaintiff
100 E. Old Country Road
Mineola, New York 11501JANICE M. CODY, and "JOHN DOE #1"
through "JOHN DOE #10", the last 10 names
being fictitious and unknown to the Plaintiff, the
persons or parties intended being the persons or
parties, if any, having or claiming an interest in
or lien upon the mortgaged premises described in
the verified complaint,**YOUNG LAW GROUP, PLLC**
Attorney for Defendant Janice M. Cody
80 Orville Drive, Suite 100
Bohemia, New York 11716

Defendants.

X

Upon the following papers numbered 1-29 read on this motion for summary judgment and an order of reference; Notice of Motion and supporting papers 1-13; 16-20; 22-28; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 14; Replying Affidavits and supporting papers 15 and 21; Memorandum of Law 29; it is,

ORDERED UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is hereby

ORDERED that this motion by plaintiff Hudson City Savings Bank (Hudson) pursuant to CPLR 3212 for summary judgment on its verified complaint, to strike the answer of Janice M. Cody (Cody), awarding plaintiff a default judgment as to the remaining non-appearing defendants, and for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is granted; and it is further

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ORDERED that plaintiff's application for leave to amend the caption of this action pursuant to CPLR 3025 (b), is granted; and it is further

ORDERED that the caption is hereby amended by substituting the name of Brittany Hulser in place of "John Doe #1" and by striking the names of defendants "John Doe #2 through "John Doe #10"; and it is further

ORDERED that the caption of this action hereinafter appear as follows:

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK**

HUDSON CITY SAVINGS BANK,

Plaintiff,

-against-

JANICE M. CODY, BRITTANY HULSER,

Defendants.

X

This is an action to foreclose a mortgage on premises known as 1 East Ridge Court, Westhampton, New York. On February 2, 2009, defendant Janice M. Cody (Cody) executed an adjustable rate note in favor of plaintiff Hudson, agreeing to pay the sum of \$600,000.00 at the starting interest rate of 6.500 percent per annum. On February 2, 2009, defendant Cody executed a first mortgage in the principal sum of \$600,000.00 on the subject property. The mortgage was recorded on February 20, 2009 in the Suffolk County Clerk's Office. Hudson asserts that it is the owner and holder of the subject note and mortgage.

Hudson sent a notice of default dated December 8, 2010 to defendant Cody stating that she had defaulted on her mortgage loan and that the amount past due was \$20,347.50. As a result of defendant's continuing default, plaintiff commenced this foreclosure action on February 16, 2011. In its complaint, plaintiff alleges, in pertinent part, that defendant breached her obligations under the terms and conditions of the note and mortgage by failing to make the monthly payments commencing with her August 1, 2010 payment and every month thereafter. Defendant Cody has interposed an answer consisting of a denial with eight affirmative defenses and five counterclaims.

The Court's computerized records indicate that a foreclosure settlement conference was held on June 6, 2011 at which time this matter was referred as an IAS case since a resolution or

settlement had not been achieved. Thus, there has been compliance with CPLR 3408 and no further settlement conference is required.

Plaintiff now moves for summary judgment on its complaint contending that defendant failed to comply with the terms of the loan agreement and mortgage and that defendant Cody's answer lacks merit and substance. In support of its motion, plaintiff submits among other things: the sworn affidavit of Lorenzo Apercho, assistant vice president of Hudson; the affirmations of Michael C. Nayar, Esq. in support of the instant motion; the affirmation of Michael H. Cohn, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); an order dated July 5, 2012 (Emerson, J.); the summons and verified complaint; the note and mortgage; defendant's verified answer; plaintiff's verified reply; defendant's affirmation in opposition to the summary judgment motion; plaintiff's reply to instant summary judgment motion; a notice of default; notices pursuant to RPAPL §§ 1320 and 1304; affidavits of service for the summons and complaint; and, a proposed order appointing a referee to compute.

Defendant Cody opposes the summary judgment motion asserting, *inter alia*, that plaintiff failed to respond to defendant's discovery demands; that plaintiff's motion fails to give factual details of a physical delivery of the note by a person with personal knowledge of such facts which is required to establish standing; and, that defendant requested the opportunity to inspect the original documents as well as delivery records of said documents.

"[I]n an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default" (*see Republic Natl. Bank of N.Y. v O'Kane*, 308 AD2d 482, 482, 764 NYS2d 635 [2d Dept 2003]; *Village Bank v Wild Oaks Holding*, 196 AD2d 812, 601 NYS2d 940 [2d Dept 1993]; *see also Argent Mtge. Co., LLC v Mentosana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Once a plaintiff has made this showing, the burden then shifts to defendant to produce evidentiary proof in admissible form sufficient to require a trial of their defenses (*see Ames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]; *Household Fin. Realty Corp. of New York v Winn*, 19 AD3d 545, 796 NYS2d 533 [2d Dept 2005]; *see also Washington Mut. Bank v Valencia*, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]).

Here, plaintiff produced the note and mortgage executed by defendant Cody, as well as evidence of defendant's nonpayment, thereby establishing a prima facie case as a matter of law (*see Wells Fargo Bank Minnesota, Natl. Assn. v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). Lorenzo Apercho, vice president to Hudson, avers that on or about February 2, 2009 defendant Cody executed and delivered a note to Hudson in the amount of \$600,000.00; that as collateral security of such indebtedness, defendant also executed and delivered to Hudson a mortgage dated February 2, 2009; that defendant failed to comply with the terms of the note and mortgage by failing to make monthly payments commencing on August 1, 2010 and each

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month thereafter; that notice of default was sent to the defendant in the manner required by paragraph 15 of the mortgage; and, that a 90 day notice dated November 9, 2010 was sent to the defendant pursuant to RPAPL § 1304.

Once plaintiff has made a prima facie showing, it is incumbent on 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” (see *Cochran Inv. Co., Inc. v Jackson*, 38 AD3d 704, 834 NYS2d 198, 199 [2d Dept 2007] quoting *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 467, 664 NYS2d 345 [2d Dept 1997]). Here, defendant Cody has failed to demonstrate, through the production of competent and admissible evidence, a viable defense which could raise a triable issue of fact (*Deutsche Bank Natl. Trust Co. v Posner*, 89 AD3d 674, 933 NYS2d 52 [2d Dept 2011]). “Motions for summary judgment may not be defeated merely by surmise, conjecture or suspicion” (see *Shaw v Time-Life Records*, 38 NY2d 201, 379 NYS2d 390 [1975]).

Where, as here, standing is put into issue by the defendant, the plaintiff is required to prove it has standing in order to be entitled to the relief requested (see *Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680, 954 NYS2d 551 [2d Dept 2011]; *US Bank, NA v Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; *Wells Fargo Bank Minn., NA v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). In a mortgage foreclosure action “[a] plaintiff has standing where it is the holder or assignee of both the subject mortgage and of the underlying note at the time the action is commenced” (*HSBC Bank USA v Hernandez*, 92 AD3d 843, 939 NYS2d 120 [2d Dept 2012]; *US Bank, NA v Collymore*, 68 AD3d at 753; *Countrywide Home Loans, Inc. v Gress*, 68 AD3d 709, 888 NYS2d 914 [2d Dept 2009]). “Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation” (*HSBC Bank USA v Hernandez*, 92 AD3d 843).

In the matter at hand, plaintiff has established, *prima facie*, that it had standing to commence this action. The evidence submitted by the plaintiff in support of its motion demonstrated that plaintiff Hudson was the originating bank and current holder of the note and mortgage. Defendant Cody’s unsupported assertions failed to establish a viable defense which could raise a triable issue of fact.

Based upon the foregoing, the motion for summary judgment is granted and the defendant’s answer is stricken. That branch of the motion for a default judgment against the remaining defendants who have not answered or appeared herein is granted.

In addition, plaintiff’s request for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is granted (see *Vermont Fed. Bank v*

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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]).

The proposed order appointing a referee to compute pursuant to RPAPL §1321 is signed as modified by the court.

Plaintiff is directed to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court

Dated: March 22, 2013

HON. ELIZABETH HAZLITT EMERSON

J.S.C.