

Onewest Bank, FSB v Victor
2013 NY Slip Op 30682(U)
March 29, 2013
Sup Ct, Queens County
Docket Number: 20847/11
Judge: Bernice Daun Siegal
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MEMORANDUM

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19

Justice

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Onewest Bank, FSB,

Plaintiff,

-against-

Index No.: 20847/11
Motion Date: 1/22/13
Motion Cal. No: 98
Motion Seq. No: 1

Villanie A. Victor, John David Victor, City of
New York Department of Transportation Parking
Violations Bureau, City of New York Transit
Adjudication Bureau,

“John Doe,” “Richard Roe,” “Jane Doe,” “Cora Coe,”
“Dick Moe” and “Ruby Poe,” the six defendants last
named in quotation marks being intended to designate
tenants or occupants in possession of the herein
described premises or portions thereof, if any there be,
said names being fictitious, their true name being
unknown to plaintiff,

Defendants.

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The following papers numbered 1 to 12 read on this motion for an order (a) striking and denying the answer with affirmative defenses and counterclaim of defendant Villanie A. Victor; (b) granting summary judgment for the relief demanded in the complaint pursuant to CPLR §3212, upon the grounds that there are no triable issues of fact and that there is no merit to the defenses asserted the defendant’s answer (c) discontinuing this action against defendants sued herein as “John Doe”, “Richard Roe”, “Jane Doe”, “Cora Coe”, “Dick Moe” and “Ruby Poe”; (d) appointing a referee to ascertain and compute the amount due to the plaintiff on the note and mortgage upon which this action is brought and to examine and report whether the mortgaged premises can be sol on more parcels and (e) awarding the costs of this motion to the plaintiff.

PAPERS
NUMBERED

Notice of Motion - Affidavits-Exhibits..... 1 - 4

Affidavit in Opposition.....	5 - 9
Reply Affirmation.....	10 - 12

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

Plaintiff, OneWest Bank, FSB (“OneWest”) moves for an order an order striking and denying defendant Villanie Victor’s (“Villanie”) answer with affirmative defenses and counterclaim; granting summary judgment for the relief demanded in the complaint pursuant to CPLR §3212, upon the grounds that there are no triable issues of fact and that there is no merit to the defenses asserted in the defendant’s answer; discontinuing this action against defendants sued herein as “John Doe”, “Richard Roe”, “Jane Doe”, “Cora Coe”, “Dick Moe” and “Ruby Poe”; and appointing a referee to ascertain and compute the amount due to the plaintiff on the note and mortgage upon which this action is brought and to examine and report whether the mortgaged premises can be sold in one or more parcels.

Facts

The within foreclosure action was brought concerning a property located at 111-10 Witthoff Street, Queens Village, New York 11429. On August 7, 2007, Villanie executed and delivered her Note to IndyMac Bank, FSB regarding the subject premises in the sum of \$385,000. The original Note and Mortgage were later assigned to OneWest. On June 1, 2010, defendants defaulted in making the monthly payments.

Plaintiff served the Summons and Complaint upon Villanie and John David Victor. Villanie has appeared and interposed an answer which assert general denials and asks that the court consider personal hardships along with her assertion that plaintiff has acted in bad faith in settlement discussions. The matter was released from the Settlement Conference Part on April 2, 2012.

Discussion

A plaintiff seeking foreclosure must establish that it was the owner or holder of the note and mortgage at the time that it commenced the foreclosure action (*see Mortgage Elec. Registration Sys. v. Coakley*, 41 AD3d 674 [2nd Dept. 2007]; *Federal Natl. Mtge. Assn. v. Youkelsone*, 303 A.D.2d 546 [2nd Dept., 2003]; see also, *Wells Fargo Bank, N.A. v. Marchione*, 69 AD3d 204 [2nd Dept., 2009]). A plaintiff may do so by demonstrating that it was the assignee of the mortgage and the underlying note or the assignee of the mortgage and by indorsement the holder of the note at the time that the action was commenced (*see Federal Natl. Mtge. Assn. v. Youkelsone*, 303 A.D.2d at 546 [2nd Dept.2003]; *First Trust Natl. Assn v. Meisels*, 234 A.D.2d 414 [2nd Dept. 1996]; *Slutsky v. Blooming Grove Inn, Inc.*, 147 A.D.2d 208 [2nd Dept.1989]).

In order to establish prima facie entitlement to summary judgment in a foreclosure action, a plaintiff must submit the mortgage and unpaid note, along with evidence of default (*see Capstone Business Credit, LLC v. Imperia Family Realty, LLC*, 70 AD3d 882 [2nd Dept., 2010]). 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” (*id.*, quoting *Mahopac Natl. Bank v. Baisley*, 244 A.D.2d 466 [2nd Dept., 1997], lv dismissed 91 N.Y.2d 1003[1998]). The plaintiff established, prima facie, its entitlement to judgment as a matter of law by submitting the affidavit of Forrest McKnight (“McKnight”), Assistant Secretary of OneWest, proof of the note and mortgage and proof of default.

In opposition, the defendants merely assert general denials of plaintiff’s claims which were insufficient to raise a triable issue of fact. (*Gruen v. Deyo*, 218 A.D.2d 865 [2nd Dept 1995]; *Stern v. Stern*, 87 A.D.2d 887 [2nd Dept 1982].) It is well settled that in order to defeat a motion for

summary judgment, the opposing party must come forward with evidentiary facts to demonstrate the existence of a genuine issue of fact. (See *Zuckerman v The City of New York*, 49 NY2d 557 [1980]; *Washington Mutual Bank v O'Connor*, 63 AD3d 832 [2nd Dept.2009]; *U.S. Bank Trust N.A Trustee v. Butti*, 16 AD3d 408 [2nd Dept 2005].) Defendant fails to do so. Villanie does not dispute the existence of the Note and Mortgage, nor does she dispute the default.

In addition, Villanie contends that plaintiff lacks standing because the assignment from IndyMac to OneWest was improper and because defendant was allegedly not told of the assignment. McKnight testified, and it is undisputed, that on March 19, 2009, prior to the commencement of the within action, the original Note and Mortgage were assigned to OneWest by physical delivery. On December 23, 2010, prior to the commencement of the within action, the assignment was memorialized in writing by written assignment. Here, the evidence submitted by plaintiff, including the affidavit from McKnight, establishes that an assignment of the note had been effectuated by physical delivery of the note and the memorialization of that assignment in the written assignment prior to the commencement of the instant action. (See *OneWest Bank FSB, Plaintiff-Respondent, v. Gregory Carey, Defendant-Appellant, HTFC*, 2013 WL 828014 [1st Dept March 7, 2013]; see also *HSBC Bank USA v. Hernandez*, 92 A.D.3d 843 [2nd Dept 2012]; *U.S. Bank, N.A. v. Adrian Collymore*, 68 A.D.3d 752 [2nd Dept 2009].) Accordingly, the assignment is valid.

Finally, Villanie's contention that plaintiff's failure to accept her loan modification is proof of bad faith is without merit. Villanie contends that she accepted a trial modification from IndyMac and that IndyMac failed to finalize the modification. However, Villanie failed to submit proof of payment towards the alleged modification, proof of a loan modification or any other admissible evidence proving her claim that plaintiff acted in bad faith. A promise to negotiate a modification

“cannot be equated with a promise to finalize an agreement on a restructured mortgage.”
(*Massachusetts Mutual Life Insurance Co. v Gramercy Twins Associates*, 199 AD2d 214, 217 [1st
Dept 1993]; *see also Citibank, N.A. v Silverman*, 85 AD3d 463, 465-6 [2nd Dept. 2011].)¹

Conclusion

For the reasons set forth above, plaintiff’s motion is granted in it’s entirety.

Submit Order.

Dated: March 29, 2013

Bernice D. Siegal, J. S. C.

¹Although not dispositive of either good faith or lack of a modification, the court notes that the parties attended and were later released from the Foreclosure Settlement Conference.