

Astoria Fed. Sav. & Loan Assn. v Hytner

2013 NY Slip Op 30944(U)

April 16, 2013

Supreme Court, Suffolk County

Docket Number: 48670/09

Judge: Hector D. LaSalle

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SUPREME COURT - STATE OF NEW YORK
IAS PART 48 - SUFFOLK COUNTYPRESENT: Hon. HECTOR D. LASALLE
Justice of the Supreme Court

ASTORIA FEDERAL SAVINGS AND LOAN
ASSOCIATION, Successor by merger to
the Long Island Savings Bank, FSB

Plaintiff,

-against-

JAMES T. HYTNER, CATHERINE M. HYTNER,
JP MORGAN CHASE BANK NA formally
known as The Chase Manhattan Bank, UNITED
STATES OF AMERICA, COMMISSIONER OF
TAXATION AND FINANCE OF THE STATE OF
NEW YORK, ESTATE OF VINCENT O'BRIEN,
CHASE BANK USA, NATIONAL ASSOCIATION,
and, "JOHN DOE", 1-10, said names being
fictitious true names being unknown to
plaintiff, parties intended being persons
having an interest in the premises, and
tenants or occupants in possession,Defendants.

MOTION DATE: 8-07-12
ADJ. DATE: 8-14-12
Mot. Seq. #002 -MGDEUTSCHE & SCHNEIDER, LLP
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Lois M. Rosenblatt
Public Administrator as Administrator
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Upon the following papers numbered 1 to 20 read on this motion for summary judgment and an order of reference; Notice of Motion/Order to Show Cause and supporting papers 1 - 9; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 10 - 12; Replying Affidavits and supporting papers 13 - 19; Other _____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED, that this motion by the plaintiff for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor against the defendant, Catherine M. Hytner, and striking her answer; (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; and (3) amending the caption, is granted; and it is further

ORDERED that the plaintiff is directed to serve a copy of this Order with notice of entry upon opposing counsel, and upon all parties who have appeared herein and not waived further notice, pursuant to CPLR 2103 (b)(1), (2) or (3) within thirty (30) days of the date herein, and to file the affidavit of service with the Clerk of the Court.

The plaintiff commenced this residential foreclosure action by the filing of a summons and verified complaint on December 11, 2009, alleging that the defendants James T. Hytner and Catherine M. Hytner (the defendant mortgagors) defaulted in repaying an adjustable rate note given to The Long Island Savings Bank, FSB (the lender), in the principal sum of \$224,500.00. The note dated June 18, 1993 provides for the repayment of principal and interest in initial monthly installments in the approximate sum of \$1,565.56 for thirty years commencing on August 1, 1993. As security for the loan, the defendant mortgagors gave the lender a mortgage also dated June 18, 1993 against the real property known as 1 Sergeant Court, St. James, NY 11780. By undated endorsement in blank as well as by allonge dated January 12, 2011, Astoria Federal Savings and Loan Association (Astoria) as successor by merger to the lender transferred the note to Secured Asset Management LLC (Secured). Additionally, by Assignment and Omnibus Assignment each dated January 12, 2011 and sworn to on January 28, 2011, Astoria transferred the mortgage, and memorialized the transfer all of its right, title and interest in the note, to Secured. By separate instrument sworn to on January 28, 2011, Astoria also assigned the cause of action, together with all rights in this action, to Secured. Parenthetically, the Court notes that on November 21, 2012 the plaintiff filed a new notice pendency in the Office of the Suffolk County Clerk.

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 mortgagors allegedly defaulted under the terms of the note and mortgage by failing to make monthly payments from August 1, 2009 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. The plaintiff also alleges that the subject loan does not fit the definition of a high-cost home loan, subprime home loan or non-traditional home loan as defined by the laws of New York State because the loan was consummated before January 1, 2003.

On May 10, 2010, the defendant Catherine M. Hytner (Hytner) served an answer. By her answer, Hytner generally denies all of the allegations in the complaint, but does not assert any affirmative defenses. Prior to the interposition of Hytner's answer, the defendant mortgagors had filed a joint notice of appearance and demand for papers. Also, Lois M. Rosenblatt, Public Administrator, As Administrator of the Estate of Vincent O'Brien, a creditor of the defendant, James T. Hytner (Rosenblatt) filed a notice of appearance and claim/demand for surplus monies pursuant to RPAPL § 1361. Additionally, the Commissioner of Taxation and Finance of the State of New York (New York), and the United States of America (United States) filed notices of appearance and waivers. JP Morgan Chase Bank N.A., formerly known as The Chase Manhattan Bank (JP Morgan), has neither answered nor appeared herein and is in default.

The plaintiff's previously moved (001) for, inter alia, an order awarding summary judgment in its

favor against the defendant, Catherine M. Hytner, and striking her answer and appointing a referee. By Order dated May 22, 2012 (LaSalle, J.), the plaintiff's prior motion was denied, without prejudice to renewal, due to the plaintiff's failure to provide evidentiary proof, including an affidavit or affirmation from one with personal knowledge, that Secured has received a Certificate of Authority by the New York State Department of State to do business in New York pursuant to Business Corporation Law § 1304(a).

The plaintiff now moves again for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor against the defendant, Catherine M. Hytner, and striking her answer; (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; and (3) amending the caption.

In support of the renewed motion for summary judgment, the plaintiff offers, inter alia, the pleadings, the endorsed note with an allonge, the mortgage, the assignment, an affidavit of facts by a vice president of Secured, a supplemental affidavit in further support of the renewed motion by another vice president of Secured and the affirmation of counsel. In the affidavit of facts, Secured's representative alleges, inter alia, that the defendant mortgagors have failed to comply with the conditions set forth in the note and mortgage by omitting to pay installments of \$1,565.56, each of which became due on August 1, 2009, and subsequent thereto, and that the plaintiff has declared the entire amount due. According to the officer, the plaintiff has provided notices of default to the defendant mortgagors and is, therefore, in compliance with all conditions precedent to the commencement of this action. In the supplemental affidavit, Secured's other representative alleges, inter alia, that he personally filed, on Secured's behalf, an application for authority pursuant to Business Corporation Law § 1304(a) on April 18, 2012 with the Department of State, New York. The officer requests that the Court grant summary judgment to the plaintiff, substitute Secured as the new plaintiff in this action, and that Hytner's answer be stricken. In his affirmation, counsel avers, among other things, that this application was re-submitted in accordance with the Court's prior Order dated May 22, 2012. Counsel avers that the plaintiff assigned the mortgage, the note and the cause of action herein to Secured by way of various assignment documents which were recorded on April 5, 2011. Counsel requests that summary judgment in favor of the plaintiff be granted, asserting that the general denials in Hytner's answer are without merit and that the defendant mortgagors have not demonstrated proof of payment.

In opposition to the motion, Hytner submits the affirmation of counsel. In his affirmation, counsel argues, inter alia, that the plaintiff's motion should be denied because the assignment by the plaintiff to Secured occurred after this action was commenced. In an apparent oblique argument as to standing, counsel also argues that this motion is defective because the plaintiff has failed to indicate the whereabouts of the original note. Counsel further asserts that Hytner did not receive a full and fair settlement conference as required by CPLR 3408.

In reply, the plaintiff has submitted, among other things, the affirmation of counsel. In his affirmation, counsel argues that the substitution of Secured as the new plaintiff in this action is proper because the plaintiff was the owner and holder of the note and mortgage at the time of commencement. The plaintiff further asserts that Secured has registered with the New York State Department of State, and

that any such defect would not bar Secured from being substituted as the plaintiff herein. Counsel further contends that more than one conference was held before the Court pursuant to CPLR 3408, the last one on December 10, 2010, and that this action was referred as an IAS case since a settlement could not be reached.

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 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]).

Where the issue of standing is raised by a defendant, a plaintiff must prove its standing in order to be entitled to relief (*see, CitiMortgage, Inc. v Rosenthal*, 88 AD3d 759, 931 NYS2d 638 [2d Dept 2011]). The defense of a lack of standing is waived, however, unless it is raised in either the answer or in a pre-answer motion to dismiss the complaint (*see, Bank of New York v Alderazi*, 99 AD3d 837, 951 NYS2d 900 [2d Dept 2012]; *U.S. Bank Natl. Assn. v Denaro*, 98 AD3d 964, 950 NYS2d 581 [2d Dept 2012]; *Citibank, N.A. v Swiatkowski*, 98 AD3d 555, 949 NYS2d 635 [2d Dept 2012]; *CitiMortgage, Inc. v Rosenthal*, 88 AD3d 759, *supra*).

It is also well established that once a mortgagor defaults on loan payments, a mortgagee is not required to accept less than the full repayment as demanded (*see, EMC Mtge. Corp. v Stewart*, 2 AD3d 772, 769 NYS2d 408 [2d Dept 2003]; *First Fed. Sav. v Midura*, 264 AD2d 407, 694 NYS2d 121 [2d Dept 1999]). Further, "when a mortgagor defaults on loan payments, even if only for a day, a mortgagee may accelerate the loan, require that the balance be tendered or commence foreclosure proceedings, and equity will not intervene" (*Home Sav. Of Am., FSB v Isaacson*, 240 AD2d 633, 633, 659 NYS2d 94 [2d Dept 1997]).

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 v Delphonse*, 64 AD3d 624, 883 NYS2d 135 [2d Dept 2009]). The plaintiff produced the endorsed note, the allonge, the mortgage executed by the defendant mortgagors, assignments of the note and the cause of action herein, as well as evidence of nonpayment (*see, 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]). In the instant case, Hytner waived any defense based upon the plaintiff's lack of standing as she failed to interpose that defense in her answer, or in a timely pre-answer motion to dismiss the complaint (*see, CPLR 3211[e]; U.S. Bank Natl. Assn. v Denaro*, 98 AD3d 964, *supra*; *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). Nevertheless, by its submissions, the plaintiff demonstrated that, as holder of the note, with proper endorsement, and as the assignee of the mortgage and note, it has standing to commence this action (*see, Bank of N.Y. v Silverberg*, 86 AD3d 274, 926 NYS2d 532 [2d Dept 2011]; *First Trust Natl. Assn. v Meisels*, 234 AD2d 414, *supra*). As the plaintiff

duly demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted to Hytner (*see, HSBC Bank USA v Merrill*, 37 AD3d 899, 830 NYS2d 598 [2007], *lv dismissed* 8 NY3d 967, 836 NYS2d 540 [2007]). Accordingly, it was incumbent upon Hytner 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, Ames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2007], *lv denied* 10 NY3d 704, 857 NYS2d 37 [2008]; *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]).

Initially, Hytner's assertions that this foreclosure action is defective due to an assignment of the mortgage to Secured after commencement are misplaced, and apparently based upon an incorrect understanding of recent appellate authority emanating from the Second Department (*compare, Deutsche Bank Trust Co., Ams. v Stathakis*, 90 AD3d 983, 935 NYS2d 651 [2d Dept 2011], *with Wells Fargo Bank, N.A. v Marchione*, 69 AD3d 204, 887 NYS2d 615 [2d Dept 2009]). As the owner and holder of the note and mortgage prior to commencement of this action, the plaintiff properly assigned the note and mortgage to Secured (*see, E. Coast Props. v Galang*, 308 AD2d 431, 765 NYS2d 46 [2d Dept 2003]).

Hytner's request for an additional mandatory settlement conference, which was improperly asserted in her opposition papers and served without the benefit of a cross motion, must be denied (*see, CPLR 2215; see also, Citimortgage Inc. v Lepore*, 2012 NY Misc LEXIS 4282, 2012 WL 3947031, 2012 NY Slip Op 32290 [U] [Sup Ct, Suffolk County 2012]). In any event, Hytner's assertion that she did not receive a full and fair settlement conference is without merit. In compliance with CPLR 3408, at least two full settlement conferences were held in this Court's specialized mortgage foreclosure part on October 21 and December 20, 2010. On the last date, the matter was dismissed from the conference program as a settlement or other resolution had not been achieved. Accordingly, the conference requirement imposed upon the Court by CPLR 3408 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.

Equally unavailing is Hytner's contention that she is entitled to a judicially mandated loan modification, as a foreclosing plaintiff has no obligation to modify the terms of its loan before or after a default in payment (*see, EMC Mtge. Corp. v Stewart*, 2 AD3d 772, *supra*; *United Cos. Lending Corp. v Hingos*, 283 AD2d 764, 724 NYS2d 134 [3d Dept 2001]; *First Fed. Sav. Bank v Midura*, 264 AD2d 407, *supra*; *OneWest Bank, FSB v Davies*, 38 Misc3d 1230 [A], 2013 NY Misc LEXIS 921, 2013 WL 846573, 2013 NY Slip Op 50341 [U] [Sup Ct, Suffolk County 2013]; *Citimortgage Inc. v Lepore*, 2012 NY Slip Op 32290 [U], *supra*; *JP Morgan Chase Bank, N.A. v Ilardo*, 36 Misc3d 359, 940 NYS2d 829 [Sup Ct, Suffolk County 2012]).

Thus, even when viewed in the light most favorable to Hytner, her submission is insufficient to raise any genuine question of fact requiring a trial on the merits of the plaintiff's claims for foreclosure and sale, and insufficient to demonstrate any bona fide defenses (*see, CPLR 3211[e]; see, Rossrock Fund II, L.P. v Commack Inv. Group, Inc.*, 78 AD3d 920, 912 NYS2d 71 [2d Dept 2010]; *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]). The plaintiff, therefore, is awarded

summary judgment in its favor against Hytner (*see, Fed. Home Loan Mtge. Corp. v Karastathis*, 237 AD2d 558, *supra*; *see also, Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *2 N. St. Corp. v Getty Saugerties Corp.*, 68 AD3d 1392, 892 NYS2d 217 [3d Dept 2009]). Accordingly, Hytner's answer is stricken.

The branch of the motion wherein the plaintiff seeks an order amending the caption by excising the names of the fictitious defendants, John Doe #1 through #10, is granted pursuant to CPLR 1024. By its submissions, the plaintiff established the basis for this relief (*see, Flagstar v Bellafigliore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Neighborhood Hous. Servs. N.Y. City, Inc. v Meltzer, supra*). All future proceedings shall be captioned accordingly.

The branch of the motion whereby the plaintiff requests that Secured be substituted as the new plaintiff in this action is granted (*see CPLR 1018; 3025[b]; Citibank, N.A. v Van Brunt Props., LLC*, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]; *see also, IndyMac Bank F.S.B. v Thompson*, 99 AD3d 669, 952 NYS2d 86 [2d Dept 2012]; *Greenpoint Mtge. Corp. v Lamberti*, 94 AD3d 815, 941 NYS2d 864 [2d Dept 2012]; *Maspeth Fed. Sav. & Loan Assn. v Simon-Erdan*, 67 AD3d 750, 888 NYS2d 599 [2d Dept 2009]). As discussed above, the plaintiff established that the note, mortgage and cause of action herein were validly assigned to Secured after the commencement of this action, and that Secured is now the real party in interest.

By its moving papers, the plaintiff further established the default in answering on the part of the defendants, Rosenblatt, New York, United States and JP Morgan (*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 Misc LEXIS 3377, 2012 WL 3134214, 2012 NY Slip Op 31854 [U] [Sup Ct, Suffolk County 2012]). Accordingly, the defaults of the above-noted defendants are fixed and determined. Since the plaintiff has been awarded summary judgment against Hytner, and has established the default in answering by Rosenblatt, New York, United States and JP Morgan, 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 [2005], *appeal dismissed* 5 NY3d 824, 804 NYS2d 37 [2005]; *Vt. Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *Bank of E. Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

Accordingly, this motion by the plaintiff is granted. The proposed order appointing a referee to compute pursuant to RPAPL § 1321 has been signed simultaneously herewith.

The foregoing constitutes the Order of this Court.

Dated: April 16, 2013
Riverhead, NY



HON. HECTOR D. LASALLE, J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION