

TD Bank, N.A. v Seaman
2013 NY Slip Op 31005(U)
April 26, 2013
Supreme Court, Suffolk County
Docket Number: 26123/11
Judge: Joseph C. Pastorella
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SUPREME COURT - STATE OF NEW YORK
IAS PART 34 - SUFFOLK COUNTY

COPY

PRESENT: Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq. #001 MG
#002 XMD

TD BANK, N.A. SUCCESSOR BY MERGER TO
COMMERCE BANK N.A.

Plaintiff,

COHN & ROTH
Attorneys for Plaintiff
100 E. Old Country Road
Mineola, N. Y. 11501

-against-

THERESA SEAMAN, FRANK O'BRIEN,
COMMERCE BANK, N.A., CLERK OF THE
SUFFOLK COUNTY DISTRICT COURT,
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,

Defendants.

NIERODA & NIERODA, PC
Attorney for Defendants
Courthouse Corporate Center
320 Carleton Avenue
Suite 6400
Central Islip, N. Y. 11722

X

Upon the following papers numbered 1 to 23 read on this motion for summary judgment and order of reference;
Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; Notice of Cross Motion and supporting papers 17
-20; Affirmation in Opposition and supporting papers 21 - 23; ~~Replying Affidavits and supporting papers~~ _____
; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

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

ORDERED that this motion (001) by plaintiff TD Bank, N.A. Successor by Merger to
Commerce Bank N.A. (TD Bank), for an order pursuant to CPLR 3212 for summary judgment on its
complaint, to strike the combined answer of defendants Theresa Seaman (Seaman) and Frank O'Brien
(O'Brien), awarding plaintiff a default judgment against defendants Commerce Bank N.A. and the
Clerk of the Suffolk County District Court, 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

ORDERED that plaintiff's application for leave to amend the caption of this action pursuant to

TD Bank v Seaman
 Index No.: 11-26123
 Page No. 2

CPLR 3025 (b), is granted; and it is further

ORDERED that the caption is hereby amended by substituting the name Keith Seaman for “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**

**TD BANK, N.A. SUCCESSOR BY MERGER TO
 COMMERCE BANK N.A.**

Plaintiff,

-against-

**THERESA SEAMAN, FRANK O'BRIEN,
 COMMERCE BANK, N.A., CLERK OF THE
 SUFFOLK COUNTY DISTRICT COURT,
 KEITH SEAMAN**

Defendants.

X

ORDERED that this cross motion (002) by defendants Seaman and O'Brien seeking, *inter alia*, to restore the instant matter to the court's Residential Mortgage Foreclosure Settlement Conference Calendar is denied.

The plaintiff commenced this action to foreclose a mortgage on August 18, 2011 in connection with the premises known as 79 Hammond Road, Centereach, New York. On March 8, 2005, defendant Seaman executed a note in favor of Commerce Bank, N.A. (Commerce Bank), agreeing to pay the sum of \$249,000.00 at the rate of 5.990 percent. On March 8, 2005, defendants Seaman and O'Brien executed a first mortgage in the principal sum of \$249,000.00 on the subject property. The mortgage was recorded on May 9, 2005 in the Suffolk County Clerk's Office.

Plaintiff TD Bank, successor by merger to Commerce Bank, sent a notice of default dated January 11, 2011 to defendants Seaman and O'Brien stating that they had defaulted on their mortgage loan and that the amount past due was \$3,663.79. Thereafter, on or about March 1, 2011, plaintiff sent defendants Seaman and O'Brien a 90 day notice pursuant to RPAPL § 1304. As a result of the defendants' continuing default, plaintiff commenced this foreclosure action on August 18, 2011. In its complaint, plaintiff alleges in pertinent part that defendants breached their obligations under the terms

and conditions of the note and mortgage by failing to make their monthly payment payable on November 12, 2010 and subsequent payments due thereafter.

The Court's computerized records indicate that a foreclosure settlement conference was held on June 28, 2012 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. Defendants interposed a combined answer consisting of a denial and six affirmative defenses.

Plaintiff now moves for summary judgment on its complaint contending that defendants Seaman and O'Brien failed to comply with the terms of their loan agreement and mortgage, that notice of default was mailed to the defendants, that the defendants failed to timely cure the default, and that the answer and defenses of the defendants fail to establish the existence of a triable issue of a fact. In support of its motion, plaintiff submits among other things: the sworn affidavit of Tonya Daigneault, assistant vice president and collection supervisor II for plaintiff; 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); the summons and complaint; the note and mortgage; a notice of default; notices pursuant to RPAPL §§ 1320, 1304 and 1303; affidavits of service for the summons and complaint and instant motion; a memorandum of law; and, a proposed order appointing a referee to compute.

Defendants Seaman and O'Brien by notice of cross motion, oppose the summary judgment motion, seek to restore the instant matter to the court's residential mortgage foreclosure settlement conference calendar and request an order pursuant to CPLR 3126 (2), (3) for plaintiff's failure to answer defendants' discovery demands. No affidavit by the defendant or anyone else with personal knowledge of the circumstances of this case was offered to refute the facts established by plaintiff in the underlying motion.

Plaintiff's reply affirmation asserts that defendants failed to state any facts that would establish a triable issue with regard to a *bona fide* defense. Plaintiff avers that defendants were given several opportunities to submit a complete and full loan modification to plaintiff yet, defendants habitually failed to abide by the Court's directives to submit same. On April 17, 2012, it was finally determined that defendants did not qualify for a loan modification based upon their high debt to income ratio.

"[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 [2d Dept 2003]; *Village Bank v Wild Oaks Holding*, 196 AD2d 812 [2d Dept 1993]; see also *Argent Mtge. Co., LLC v Montesana*, 79 AD3d 1079 [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 *Aames Funding Corp. v Houston*, 44 AD3d 692 [2d Dept 2007]; *Household Fin. Realty Corp. of New York v Winn*, 19 AD3d 545 [2d Dept 2005]; see also *Washington Mut. Bank v Valencia*, 92 AD3d 774 [2d Dept 2012]).

Here, plaintiff produced the note executed by defendant Seaman and mortgage executed by defendants Seaman and O'Brien, as well as evidence of defendants' nonpayment, thereby establishing a prima facie case as a matter of law (*see Wells Fargo Bank Minnesota, Natl. Assn. v Mastropaolo*, 42 AD3d 239 [2d Dept 2007]). Tonya Daigneault, assistant vice president and collection supervisor II for plaintiff, avers that the defendants defaulted under the terms of the note and mortgage by failing to tender payment for the monthly installment due for November 12, 2010 and subsequent payments thereafter. Defendants were mailed a notice of default dated January 11, 2011 which was not cured. Thereafter, notice required by RPAPL 1304 (the 90 day notice) was mailed to defendants on or about March 1, 2011. As a result of the continuing default, plaintiff elected to accelerate the mortgage debt and declared all sums secured thereby due and payable on the mortgage. Plaintiff maintains that they are in physical possession of the original note.

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, 705 [2d Dept 2007] *quoting Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 467 [2d Dept 1997]). Here, defendants have failed to demonstrate, through the production of competent and admissible evidence, a viable defense which could raise a triable issue of fact (*see Deutsche Bank Natl. Trust Co. v Posner*, 89 AD3d 674 [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 [1975]). Here, the defendants' papers are devoid of sufficient evidence to support their contentions. This court finds that the answer, affirmative defenses and averments contained in the affirmation in opposition to summary judgment submitted by defendants, which contain mere denials and unsupported declarations, to be insufficient so as to raise a triable issue of fact.

The defendants have cross-moved seeking to restore the instant matter to the court's residential mortgage foreclosure settlement conference calendar. Defendants through their attorney, in pertinent part, contend that "[p]laintiff, by this motion, attempts to negate all of the hard work and effort [d]efendant and his attorney have put into the loan modification process" as a basis for this Court's denial of summary judgment and restoration of the matter to the conference calendar. In support of their application, defendants submit, among other things: a copy of defendants' demand for discovery; a copy of a TD Bank financial analysis worksheet; bank statements; and various correspondence. While it appears that very limited efforts were made by the defendants to attempt to obtain a loan modification, same cannot be characterized as "hard work" or "substantial efforts". Furthermore, the Court's computerized records indicate that foreclosure settlement conferences were held on October 18, 2011; January 3, 2012; February 23, 2012; April 17, 2012 and June 28, 2012 at which time the matter was finally marked "not settled" and referred to this part.

Here, the evidence in support of the cross motion as offered by defendants is patently insufficient to warrant this Court to grant the relief requested. As such, the court denies such application.

TD Bank v Seaman
Index No.: 11-26123
Page No. 5

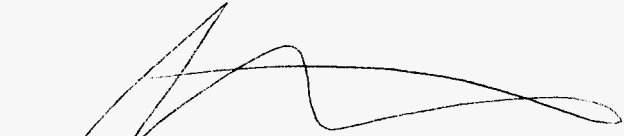
Based upon the foregoing, the motion for summary judgment is granted, the combined answer and affirmative defenses of defendants Seaman and O'Brien are stricken. The cross motion is denied.

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 Chase*, 226 AD2d 1034 [3d Dept 1996]; *Bank of East Asia, Ltd. v Smith*, 201 AD2d 522 [2d Dept 1994]).

The proposed order appointing a referee to compute pursuant to RPAPL §1321 is signed simultaneously herewith 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: April 26, 2013



HON. JOSEPH C. PASTORELLA, J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION