

BAC Home Loans Serv., LP v Bernadotte

2013 NY Slip Op 31094(U)

April 26, 2013

Sup Ct, Suffolk County

Docket Number: 09-34279

Judge: Joseph C. Pastorella

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq. # 003 MG

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BAC Home Loans Servicing, LP fka Countrywide
Home Loans Servicing LP,

Plaintiff,

- against -

Joseph Bernadotte and Suzette Fleurisca, if living
and if any be dead, any and all persons who are
spouses, widows, grantees, mortgagees, lienors,
heirs, devisees, distributees, or successors in
interest of such of the above as may be dead, and
their spouses, heirs, devisees, distributees and
successors in interest, all of whom and whose
names and places of residence are unknown to
Plaintiff, Michel Fleurisca, United States of
America - Internal Revenue Service, New York
State Department of Taxation and Finance,

Defendants.

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Upon the following papers numbered 1 to 26 read on this motion for an order of reference; Notice of Motion/ Order to Show Cause and supporting papers 1 - 25; ~~Notice of Cross Motion and supporting papers~~; Answering Affidavits and supporting papers 26; ~~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 hereby

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ORDERED that this motion by plaintiff BAC Home Loans Servicing, L.P. F/K/A Country Wide Home Loans Servicing, LP (BAC) for leave to amend the caption of this action pursuant to CPLR 3025 (b); for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321; for leave to amend the amended complaint *nunc pro tunc* to reflect that the plaintiff was a limited partnership; and for leave to amend the affidavits of service *nunc pro tunc* to reflect the proper spelling of the defendant's name as Michel Fleurisca, is granted; and it is further

ORDERED that the caption is hereby amended by substituting Bank of America, N.A., successor by merger to BAC Home Loans Servicing L.P. F/K/A Countrywide Home Loans Servicing, LP in place and stead of BAC Home Loans Servicing, L.P. F/K/A Countrywide Home Loans Servicing, LP; 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**

Bank of America, N.A., Successor by Merger to BAC Home
 Loans Servicing LP f/k/a Countrywide Home Loans Servicing, LP

Plaintiff,

-against -

Joseph Bernadotte and Suzette Fleurisca, if living and if any be dead, any and all persons who are spouses, widows, grantees, mortgagees, lienors, heirs, devisees, distributees, or successors in interest of such of the above as may be dead, and their spouses, heirs, devisees, distributees and successors in interest, all of whom and whose names and places of residence are unknown to Plaintiff, Michel Fleurisca, United States of America - Internal Revenue Service, New York State Department of Taxation and Finance,

Defendants.

This is an action to foreclose a mortgage on premises known as 51 Prospect Avenue, Brentwood, New York. On October 23, 2007, defendants Joseph Bernadotte (Bernadotte) and Michel Fleurisca (Fleurisca) executed a note in favor of First Rate Capital Corp. (First Rate), agreeing to pay the sum of \$297,334.00 at the rate of 7.125 percent. On October 23, 2007, defendants Bernadotte and Fleurisca also executed a first mortgage in the principal sum of \$297,334.00 on the subject property. The mortgage indicated First Rate to be the lender and Mortgage Electronic Registration Systems, Inc.

(MERS) to be the nominee of First Rate as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on May 7, 2008 in the Suffolk County Clerk's Office. Thereafter, the note and mortgage were transferred by assignment of mortgage dated August 25, 2009 from MERS to BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing, LP, the plaintiff herein. The assignment of mortgage was recorded on November 23, 2009 with the Suffolk County Clerk's Office. The note contains the indorsement of Kim DiBlasi, assistant secretary for First Rate transferring the note to Countrywide Bank FSB and the indorsement of Laurie Meder, senior vice president to Countrywide Bank, FSB transferring the note to plaintiff BAC.

Countrywide Home Loans sent a notice of default dated April 8, 2009 to defendants Bernadotte and Fleurisca stating that they had defaulted on their mortgage loan and that the amount past due was \$7,929.20. As a result of defendants' continuing default, plaintiff commenced this foreclosure action on August 28, 2009. 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 monthly payments commencing with their February 1, 2009 payment and each month thereafter. None of the defendants, except Joseph Bernadotte and Suzette Fleurisca, appeared, answered or made any motion raising any objection to the complaint.

The Court's computerized records indicate that a foreclosure settlement conference was held on October 1, 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.

Plaintiff now moves for an order of reference contending that defendants Bernadotte and Fleurisca failed to comply with the terms of the loan agreement and mortgage by not making monthly payments commencing with the February 1, 2009 payment and payments thereafter. In support of its motion, plaintiff submits among other things: the sworn affidavits of Charles M. Lischner, assistant vice president of loan documentation to BAC Home Loans Servicing, L.P. fka Countrywide Home Loans Servicing, LP (BANA); the affirmation of Robert Tremaroli, Esq. in support of the instant motion; the affirmation of Robert Tremaroli, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the summons and complaint; the supplemental summons and amended complaint; the note, mortgage and assignment; a notice of default; notices pursuant to RPAPL §§ 1320, 1304 and 1303; affidavits of service for the summons and complaint and instant motion; and, a proposed order appointing a referee to compute.

Defendant Michel Fleurisca opposed the instant motion asserting that he needed more time to work out a loan modification. It is noted however, the defendant Fleurisca failed to include an affidavit of service with his opposition papers evidencing service on the plaintiff in this matter.

"[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 Mentasana*, 79 AD3d 1079 [2d Dept 2010]). Once a plaintiff has made this showing, the burden then shifts to defendant to produce evidentiary proof

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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 and mortgage executed by defendants Bernadotte and Fleurisca, the assignment of mortgage, 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]). Charles M. Lischner, assistant vice president of BANA, avers that defendants failed to comply with the terms of the note and mortgage by failing to make monthly payments commencing in February 1, 2009 and thereafter; that a notice of default dated April 8, 2009 was mailed to defendants and that the default was not cured; that a 90 day pre-foreclosure notice was sent to defendants Bernadotte and Fleurisca; and that plaintiff is the holder of the note and was assigned the mortgage prior to commencement of the instant action.

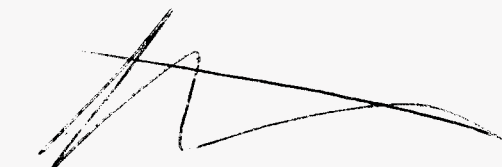
Once plaintiff has made a prima facie showing, it is incumbent on defendant "to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff" (*see Cochran 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, defendant Fleurisca has 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]).

Based upon the foregoing, plaintiff's application 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. PASTORESSA, J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION

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TO: NEW YORK STATE DEPARTMENT
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