

HSBC Bank USA, N.A. v Clemente

2013 NY Slip Op 31155(U)

May 30, 2013

Supreme Court, Albany County

Docket Number: 168-12

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

HSBC BANK USA, N.A. SOLE SHAREHOLDER OF
HSBC MORTGAGE CORPORATION (USA),

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 168-12
RJI NO. 01-12-107968

THOMAS A. CLEMENTE, JR. A/K/A THOMAS A.
CLEMENTE; HSBC BANK USA, N.A.; UNITED
STATES OF AMERICA; NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE
COMMISSIONER OF TAXATION AND FINANCE;
JOHN DOE AND "JANE DOE" said names being fictitious,
it being the intention of Plaintiff to designate any and all
occupants of premises being foreclosed herein,

Defendants.

Supreme Court Albany County All Purpose Term, May 7, 2013
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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Attorneys for Defendants Thomas A. Clemente
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TERESI, J.:

HSBC Bank USA, NA (hereinafter "Plaintiff") commenced this action to foreclose its mortgage on real property located at 204 Van Rensselaer Boulevard, Colonie, New York

(hereinafter “the property”) and owned by defendant Thomas A. Clemente (hereinafter “Clemente”). Clemente answered and the parties engaged in this Court’s mandatory settlement conference. No resolution, however, was reached.

Plaintiff now moves for summary judgement and an order striking Clemente’s answer, for the appointment of a referee to compute and to amend the caption of the action. Clemente opposes the motion. Because Plaintiff demonstrated its entitlement to the relief it seeks, its motion is granted.

It is now well established that “[e]ntitlement to a judgment of foreclosure may be established, as a matter of law, where a mortgagee produces both the mortgage and unpaid note, together with evidence of the mortgagor’s default.” (Zanfini v Chandler, 79 AD3d 1031, 1031 [2d Dept 2010], quoting HSBC Bank USA v Merrill, 37 AD3d 899 [3d Dept 2007]; Citibank, N.A. v Van Brunt Properties, LLC, 95 AD3d 1158 [2d Dept 2012]; La Salle Bank Nat. Ass’n v Kosarovich, 31 AD3d 904 [3d Dept 2006]; Pritchard v Curtis, 95 AD3d 1379 [3d Dept 2012]; Charter One Bank, FSB v Leone, 45 AD3d 958 [3d Dept 2007]). If such showing is made, the burden then shifts to “the defendants to produce evidentiary proof in admissible form sufficient to demonstrate the existence of a triable issue of fact as to a bona fide defense.” (Solomon v Burden, 104 AD3d 839 [2d Dept 2013]; Citibank, N.A. v Van Brunt Properties, LLC, 95 AD3d 1158, 1159 [2d Dept 2012]).

On this record, Plaintiff met its initial burden. Plaintiff supports its motion with the affidavit of its “VP and Asst. Sec, AdminServe.Div” (hereinafter “Wood”), who alleged sufficient knowledge of the Plaintiff’s business records and the transaction at issue. Plaintiff then attached a copy of the Note, dated December 13, 2007 (hereinafter “Note”), Clemente gave

to HSBC Mortgage Corporation (USA) (HSBC Mtg”).¹ Wood’s affidavit established that Plaintiff was in possession of the original Note as of the date this action was commenced and remains in possession of it. Plaintiff also submitted the Mortgage, dated December 13, 2007 (hereinafter “Mortgage”), and its assignment. It was initially given to HSBC Mtg, with Mortgage Electronic Registration Systems, Inc. (hereinafter “MERS”) as its nominee for recording purposes. Plaintiff further attached the Assignment of Mortgage, dated November 17, 2011, which assigned the Mortgage from MERS as nominee for HSBC Mtg to Plaintiff. Lastly, Woods’ affidavit duly established that Clemente defaulted on the Note and Mortgage by failing to make his November 2010 payment, and all payments thereafter. Upon such showing, Plaintiff demonstrated its entitlement to judgment as a matter of law.

With the burden shifted, Clemente neither raised an issue of fact nor asserted a viable defense. Conspicuously absent from Clemente’s opposition is any allegation that he has not defaulted on his Note and Mortgage. Nor has he raised any issue relative to the corporate relationship between HSBC Mtg and Plaintiff. Rather, Clemente relies solely on the hearsay statements made in two letters he recently received. He failed to demonstrate, however, their admissibility and offered no excuse for his “failure to present the evidence in admissible form.” (Kaufman v Quickway, Inc., 64 AD3d 978, 981 [3d Dept 2009] *affd.*, 14 NY3d 907 [2010]). “Nor [are] such hearsay statement[s] of sufficient probative force to defeat the motion for summary judgment.” (Scherer v Golub Corp., 101 AD3d 1286, 1288 [3d Dept 2012]). The letters explicitly state only that Plaintiff “engaged PHH Mortgage Corporation [“PHH”]... to

¹ Plaintiff submits HSBC Mtg’s Secretary’s Certificate, which establishes that Plaintiff is the sole shareholder of HSBC Mtg.

provide mortgage loan processing and sub-servicing.” Neither state that the Note and Mortgage have been transferred; but even if they had been transferred CPLR §1018 allows Plaintiff to continue this action unless this “court directs the [entity] to whom the interest is transferred to be substituted or joined in the action.” (GRP Loan, LLC v Taylor, 95 AD3d 1172, 1174 [2d Dept 2012]). In addition, PHH’s letter’s statement that “the amount [Clemente] owe[s] is \$79,752.01. FREDDIEMAC is the owner of the mortgage loan,” creates no triable issue of fact. Rather, because Plaintiff is currently claiming an amount due of “\$476,149.10,” such statement appears (assuming its accuracy) to refer to a different loan altogether. The existence of a subordinate loan does not affect Plaintiff’s entitlement to summary judgment. (Bd. of Managers of Parkchester N. Condominium v Alaska Seaboard Partners Ltd. Partnership, 37 AD3d 332 [1st Dept 2007]; Polish Nat. Alliance of Brooklyn, U.S.A. v White Eagle Hall Co., Inc., 98 AD2d 400 [2d Dept 1983]). Moreover, the letters submitted cannot be reasonably interpreted as establishing the Note and Mortgage’s pre-commencement transfer to “FREDDIEMAC.”

Accordingly, Plaintiff’s motion for summary judgment is granted.

With Plaintiff’s motion for summary judgment granted, a referee must be appointed. (Neighborhood Housing Services of New York City, Inc. v Meltzer, 67 AD3d 872 [2d Dept 2009]; US Bank, NA v Boyce, 93 AD3d 782 [2d Dept 2012]; Vermont Fed. Bank v Chase, 226 AD2d 1034 [3d Dept 1996]; Bank of E. Asia v Smith, 201 AD2d 522 [2d Dept 1994]).

Accordingly, Plaintiff’s motion for the appointment of a referee is granted.

Plaintiff is similarly entitled to amend the caption of this action to delete the fictitiously named John and Jane Doe defendants, and add Cynthia Clemente in their place. A plaintiff may commence an action designating an unknown party pursuant to “CPLR §1024, [but] the

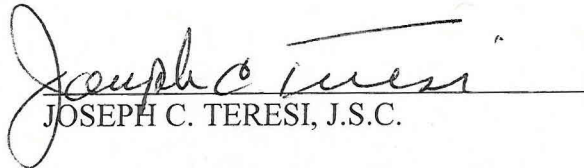
description of the unknown party must be sufficiently complete to fairly apprise that entity that it is the intended defendant.” (Olmsted v Pizza Hut of America, Inc., 28 AD3d 855, 856 [3d Dept 2006], Benware v Schoenborn, 198 AD2d 710 [3d Dept 1993]). Here, Plaintiff’s unknown “Jane Doe” defendant was described as “any and all occupants of the premises.” Plaintiff sufficiently established, with affidavits of service, that Ms. Clemente resided at the premises and was duly served with process. As such, the caption’s description fairly apprised her that she was an intended defendant. Plaintiff further demonstrated that Ms. Clemente defaulted in this action and, although she received notice, on this motion. Accordingly, Plaintiff’s motion to amend the caption is granted. (Flagstar Bank v Bellafiore, 94 AD3d 1044, 1046 [2d Dept 2012]).

In accord with the above, the proposed Order Plaintiff submitted is being modified and executed herewith.

This Decision and Order is being returned to the attorneys for the Plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: May 30, 2013
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated April 4, 2013; Affirmation of V.S. Vilku, dated April 4, 2013; Affidavit of Tanya Wood, dated March 27, 2013, Affirmation of V.S. Vilku, dated August 31, 2012; Affirmation of V.S. Vilku, dated April 4, 2013; with attached Exhibits A-O.
2. Affidavit of Stephen Rehfuss, dated April 23, 2013, with attached Exhibits A-B.
3. Affirmation of Craig Beideman, dated May 6, 2013.