

OneWest Bank FSB v Koppelman

2013 NY Slip Op 31590(U)

June 10, 2013

Supreme Court, Suffolk County

Docket Number: 8754-10

Judge: Daniel Martin

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SUPREME COURT OF THE STATE OF NEW YORK
I.A.S PART 9 SUFFOLK COUNTY

INDEX NO.: 8754-10

PRESENT: HON. DANIEL MARTIN

-----X
ONEWEST BANK FSB,

Plaintiff,

-against-

MELISSA KOPPELMAN, POSSIBLE HEIR OF THE ESTATE OF PAUL J. POUTOUVES A/K/A PAUL KONSTANTINOS POUTOUVES; CYNTHIA SCHEITER, POSSIBLE HEIR OF THE ESTATE OF PAUL J. POUTOUVES A/K/A PAUL KONSTANTINOS POUTOUVES; PAUL P. POUTOUVES; UNKNOWN HEIRS TO THE ESTATE OF PAUL J. POUTOUVES a/k/a PAUL KONSTANTINOS POUTOUVES , DECEASED; NYS DEPARTMENT OF TAXATION AND FINANCE; USA O/B/O DEPARTMENT OF THE TREASURY INTERNAL REVENUE SERVICE; "JOHN DOE # 1-5" AND "JANE DOE # 1-5" said names being fictitious, it being the intention of Plaintiff to designate any and all occupants, tenants, persons or corporations, if any, having or claiming an interest in or lien upon the premises being foreclosed herein

Defendants.

-----X

The following named papers have been read on this motion: for summary judgment and an order of reference

Order to Show Cause/Notice of Motion	1 - 14
Cross-Motion	15 - 37
Answering Affidavits	38 - 40
Supplemental Affidavit of Plaintiff	41 - 44
Replying Affidavits	0

MOTION DATE: 9-7-12
ADJ. DATE:
MOT. SEQ. # 002 - MG
003 - XMD

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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 OneWest Bank, FSB (OneWest) pursuant to CPLR 3212 for summary judgment on its complaint, to strike the answer of defendant the Paul J. Poutouves Revocable Trust dated March 25, 2006 by Melissa Koppelman Trustee, Pro Se (Koppelman), for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, and for leave to amend the caption of this action pursuant to CPLR 3025 (b), is granted; and it is further

ORDERED that the caption is hereby amended by striking from the caption the names of defendants "JOHN DOE #1" through "JOHN DOE #5" and "JANE DOE #1" through "JANE DOE #5"; 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**

ONEWEST BANK FSB,

Plaintiff,

-against-

MELISSA KOPPELMAN, POSSIBLE HEIR OF THE ESTATE OF PAUL J. POUTOUVES A/K/A PAUL KONSTANTINOS POUTOUVES; CYNTHIA SCHEITER, POSSIBLE HEIR OF THE ESTATE OF PAUL J. POUTOUVES A/K/A PAUL KONSTANTINOS POUTOUVES; PAUL P. POUTOUVES; UNKNOWN HEIRS TO THE ESTATE OF PAUL J. POUTOUVES a/k/a PAUL KONSTANTINOS POUTOUVES, DECEASED; NYS DEPARTMENT OF TAXATION AND FINANCE; USA O/B/O DEPARTMENT OF THE TREASURY INTERNAL REVENUE SERVICE;

Defendants.

ORDERED that the branch of this cross motion (002) by defendant Koppelman for an order pursuant to CPLR 3212(a) dismissing the complaint with prejudice on the grounds that the complaint fails to state a complete, accurate, viable and truthful cause of action, that there exists on this record a pattern of intrinsic fraud upon this Court is denied; and it is further

ORDERED that the branch of this cross motion (002) by defendant Koppelman seeking an order pursuant to CPLR 6501 and 6514 vacating and cancelling the Notice of Pendency in this action is denied; and it is further

ORDERED that the branch of this cross motion (002) by defendant Koppelman seeking in the alternative, should the complaint not be dismissed with prejudice and the notice of pendency not be canceled, then an order pursuant to CPLR 3025(b) granting defendants leave to file with the Clerk and

serve upon plaintiff an amended verified complaint containing affirmative defenses and counterclaims is denied; and it is further

ORDERED that the branch of this cross motion (002) by defendant Koppelman seeking costs, fees, and a monetary award as sanctions against plaintiff and plaintiff's counsel in an amount of no less than \$20,000.00 for a violation of 22 NYCRR Rule 130-1.1 is denied.

This is an action to foreclose a mortgage on premises known as 235 Sprigtree Path, Southampton, New York. On November 30, 2006, defendant Paul J. Poutouves (Poutouves) executed an adjustable rate note in favor of Quicken Loans, Inc. agreeing to pay \$900,000.00 at the yearly starting rate of 6.875 percent. On November 30, 2006, defendant Poutouves also executed a first mortgage in the principal sum of \$900,000.00 on his home, the subject property. The mortgage indicated Quicken Loans, Inc. to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of Quicken Loans, Inc. as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on May 22, 2007 in the Suffolk County Clerk's Office. Thereafter, the mortgage was transferred by assignment of mortgage dated October 6, 2009 from MERS to OneWest. The assignment of mortgage was recorded on October 28, 2009 with the Suffolk County Clerk's Office. The adjustable rate note contains an indorsement from Quicken Loans, Inc. to IndyMac Bank, FSB and a blank indorsement from IndyMac Bank, FSB.

IndyMac Bank FSB sent a notice of default dated March 2, 2009 to defendant stating that Poutouves' loan was in serious default and that the amount past due was \$11,877.52. As a result of defendant Poutouves' continuing default, plaintiff commenced this foreclosure action on March 3, 2010. In its complaint, plaintiff alleges in pertinent part that defendant, the Estate of Paul J. Poutouves a/k/a Paul Konstantinos Poutouves breached its obligations under the terms of the note and mortgage by failing to make monthly payments. Defendant Koppelman interposed an answer consisting of a general denial.

The Court's computerized records indicate that a foreclosure settlement conference was held on June 29, 2010 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 summary judgment on its complaint contending that defendant defaulted under the terms of the loan agreement and mortgage for failure to pay the December 1, 2008 payment and all subsequent payments thereafter and that defendant's answer is without merit. In support of its motion, plaintiff submits among other things: the sworn affidavit of Autumn Barrow, assistant secretary of OneWest Bank, FSB the plaintiff herein; the sworn affidavit of Andrea Yanez, assistant secretary of OneWest Bank, FSB; the affirmation of Richard A. Gerbino, Esq.; the summons and complaint; defendant's answer; the note, mortgage and assignment; a notice of default; notices pursuant to RPAPL §§ 1320, 1303 and 1304; the affirmation of Richard A. Gerbino, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); affidavits of service for the summons and complaint; an affidavit of service for the instant summary judgment motion; and a proposed order appointing a referee to compute.

Defendant Koppelman cross-moves seeking summary judgment in favor of defendants and dismissing the complaint with prejudice pursuant to CPLR 3212 (a); vacating and cancelling the Notice of Pendency pursuant to CPLR 6501 and 6514; should the complaint not be dismissed with

prejudice and the Notice of Pendency not be canceled, then an order pursuant to CPLR 3025 (b) granting defendants leave to file an amended verified answer.

Plaintiff in reply opposes defendant's cross-motion to dismiss the complaint with prejudice and for other relief.

"[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, 764 NYS2d 635 [2d Dept 2003]; *Village Bank v Wild Oaks Holding*, 196 AD2d 812, 601 NYS2d 940 [2d Dept 1993]; see also *Argent Mtge. Co., LLC v Mentosana*, 79 AD3d 1079, 915 NYS2d 591 [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, 843 NYS2d 660 [2d Dept 2007]; *Household Fin. Realty Corp. of New York v Winn*, 19 AD3d 545, 796 NYS2d 533 [2d Dept 2005]; see also *Washington Mut. Bank v Valencia*, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]).

Here, plaintiff produced the note and mortgage executed by defendant Poutouves, the assignment of mortgage, as well as evidence of defendant's nonpayment, thereby establishing a prima facie case as a matter of law (see *Wells Fargo Bank Minnesota, Natl. Assn. v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). Autumn Barrow, assistant secretary to OneWest, avers that defendant Poutouves defaulted on paying the monthly payment due December 1, 2008 and thereafter; that a notice of default was sent to the defendant; that defendant failed to timely cure; that plaintiff accelerated the debt and commenced the present action on March 3, 2010; and that plaintiff is the holder and is in possession of the original note. Andrea Yanez, assistant secretary to OneWest, avers that plaintiff is the holder and is in possession of the subject note; that defendant Poutouves defaulted on his payment due December 1, 2008; and, that the default has not been cured.

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, 834 NYS2d 198, 199 [2d Dept 2007] quoting *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 467, 664 NYS2d 345 [2d Dept 1997]). Here, answering defendant has failed to demonstrate, through the production of competent and admissible evidence, a viable defense which could raise a triable issue of fact (*Deutsche Bank Natl. Trust Co. v Posner*, 89 AD3d 674, 933 NYS2d 52 [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, 379 NYS2d 390 [1975]). Notably, defendant does not deny that she has not made payments of interest or principal on the note (see *Citibank, N.A. v Souto Geffen Co.*, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]).

Defendant Koppelman has cross-moved for an order pursuant to CPLR 3025 (b) permitting her to serve an amended answer. Included in defendant's cross motion is a copy of the proposed amended answer. As a general rule, motions for leave to amend pleadings are to be liberally granted absent prejudice or surprise resulting from the delay (see, *Glaser v County of Orange*, 20 AD3d 506, 799

OneWest v Koppelman
Index No. 10-08754
Page No. 5

NYS2d 120 [2d Dept 2005]). The movant, however, must make some evidentiary showing that the proposed amendment has merit or a proposed amendment will not be permitted (*see Buckholz v Maple Garden Apts., LLC*, 38 AD3d 584, 832 NYS2d 255 [2d Dept 2007]; *Curran v Auto Lab Serv. Cetr.*, 280 AD2d 636, 721 NYS2d 662 [2d Dept 2001]). In this instance, it is noted that defendant's original verified answer is dated March 25, 2010. Defendant, after a two and one-half year delay, seeks to file an amended answer without providing a credible explanation for such delay. Defendant Koppelman's proffered excuse that "[she] did not have full knowledge of the many facts that are now available to [her]" is factually insufficient to sustain her burden for the requested relief given the prolonged delay. Likewise, defendant's conclusory self-serving statement that "there is no prejudice to plaintiff" fails to demonstrate by credible evidence a lack of prejudice to the plaintiff, who has already moved for summary judgment (*see generally Majestic Investors, Ltd. v Lopez*, 111 AD2d 844, 490 NYS2d 585 [2d Dept 1985]). Similarly, defendant has failed to establish that there is any merit to the defenses contained in her amended answer.

Defendant also seeks summary judgment in her favor and an order cancelling the Notice of Pendency. As stated above, "[m]otions for summary judgment may not be defeated merely by surmise, conjecture or suspicion" and accordingly those branches of defendant's cross-motion are denied (*see Shaw v Time-Life Records, supra*). Likewise, defendant's assertion attacking the validity of the affidavit of service based upon a dispute in the height description of Koppelman is rejected by the court. Here, the process server's affidavit of service constituted prima facie evidence of proper service upon defendant Koppelman (*see Wachovia Bank, Natl. Assn. v Carcano* 2013 NY Slip Op 03083 [2d Dept 2013]). Strangely, defendant Koppelman does not deny service in her opposition papers or in her original verified answer. Accordingly, defendant has failed to rebut the presumption of proper service and that branch of defendant's cross-motion is denied.

The remaining assertions contained in the cross-motion of defendant Koppelman pertaining to the falsity of Attorney Richard A. Gerbino's Affirmation; the legal sufficiency of Andrea Yanez's affidavit; the falsity of Erica A. Johnson-Seck's affidavit; the falsity of Denis Kirkpatrick's affidavit; the legal sufficiency of Autumn Barrow's affidavit do not establish a defense as a matter of law and are thereby rejected by the court.

Accordingly, the motion for summary judgment is granted against defendant Koppelman and the defendant's answer is stricken.

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, 641 NYS2d 440 [3d Dept 1996]; *Bank of East Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

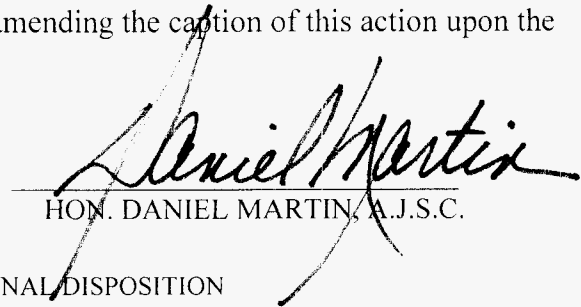
The proposed order appointing a referee to compute pursuant to RPAPL §1321 is signed simultaneously herewith as modified by the court.

The defendant's cross-motion seeking, *inter alia*, dismissal of the complaint, is denied in its entirety.

To the extent that either plaintiff or defendant have requested other forms of relief but have not supported such noticed forms of relief with any allegations of law or fact, the court denies such applications.

Plaintiff is directed to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court.

Dated: JUNE 10, 2013.
Riverhead, NY


HON. DANIEL MARTIN, A.J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION