

EverBank v Porter

2013 NY Slip Op 32451(U)

September 26, 2013

Sup Ct, Suffolk County

Docket Number: 35025-11

Judge: Joseph C. Pastoressa

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SUPREME COURT - STATE OF NEW YORK
IAS PART 34 - SUFFOLK COUNTY

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

MOTION DATE 9-2-12

ADJ. DATE 10-12-12

Mot. Seq. #002 MG
mot. seq #003 mD

EverBank,

Plaintiff,

SHAPIRO, DICARO & BARAK, LLC
Attorneys for Plaintiff
250 Mile Crossing Blvd.
Suite One
Rochester, N. Y. 14624

-against-

Evon Porter a/k/a Evon K. Porter; Town and Country Repair, Inc.; Beneficial New York, Inc.; Pensavall Fuel Corp.; Spada, Ardham, and Sibener, P.C.; Ford Motor Credit Company, LLC; Atlantic Credit & Finance Co.; Good Samaritan Hospital; Suffolk County Clerk, and "JOHN DOE", said name being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein,, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises,

PETROFF LAW FIRM, P.C.
Attorney for Defendant
Evon Porter a/k/a Evon K. Porter
1795 Coney Island Avenue, 3rd Fl.
Brooklyn, N. Y. 11230

Defendants.

Upon the following papers numbered 1 to 38 read on this motion for summary judgment, an order of reference and other related relief; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; Notice of Cross Motion and supporting papers 17- 24; Answering Affirmations in opposition and supporting papers 25-32; 33-34; Replying Affidavits and supporting papers 35-36; 37-38; Other 0; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by the plaintiff for an Order: (1) directing the entry of summary judgment in favor of the plaintiff and against the defendant, Evon Porter a/k/a Evon K. Porter, for the relief demanded in the complaint upon the grounds that there is no defense to the cause of action asserted in the complaint; (2) granting a default judgment against all other parties in default of answering; (3) directing the appointment of a referee to compute; (4) amending the title of this action by dropping the defendant heretofore mentioned in the summons and complaint as "John Doe"; (4) allowing plaintiff to

record a copy of the loan modification agreement in place of the original; (5) directing the Suffolk County Clerk to set aside and expunge the Satisfaction of Mortgage , recorded in the Suffolk County Clerk's Office on August 8, 2007 in Liber M00021580, page 409; and (6) for such other and further relief as may be just and proper is granted; and it is further

ORDERED that the cross motion by the defendant Evon Porter a/k/a Evon K. Porter for an Order: (1) denying the plaintiff's motion for summary judgment; (2) tolling the interest due on the underlying mortgage from the beginning of the instant action; (3) finding the plaintiff in the instant action to have acted in bad faith pursuant to CPLR 3408; (4) attorney's costs, fees, and disbursements to the defendant; and (5) for such other and further relief as to this Court may deem just and proper is denied; and it is further

ORDERED that the plaintiff shall serve a copy of this Order with Notice of Entry upon counsel for the answering defendant, Evon Porter a/k/a Evon K. Porter, within ninety (90) days of the date the Order is signed by the Court pursuant to CLR 2103 (b), (1), (2), or (3) and thereafter file the affidavit of service with the Clerk of the Court; and it is further

ORDERED that the plaintiff shall also serve a copy of this Order with Notice of Entry upon the Calendar Clerk of this IAS Part 34 and the Clerk of the Court by first class mail with a certificate of mailing. The Calendar Clerk and the Clerk of the Court shall both note in their respective computerized records the amendment of the caption to reflect the excising of the "John Doe" defendant and as set forth in the Order of Reference and incorporated herein by reference. That all future submission of documents under this Index Number shall reflect the amended caption.

The present action involves the foreclosure on a note and mortgage pertaining to and alleging that the defendant mortgagor on the note Evon Porter a/k/a Evon K. Porter (hereinafter " Porter ") defaulted in repaying a note and mortgage secured by real property located at 71 Sammis Avenue, Deer Park, NY 11720. The action was commenced on the 10th of November 2011.

Issue was joined by the service of an answer by counsel for Porter on or about November 17 , 2011 which consisted of general denials, three affirmative defenses and three counterclaims four affirmative defenses/counterclaims. Plaintiff served a reply to the counterclaims with five affirmative defenses on or about December 5, 2011. The court's computerized records indicate that a settlement conference was scheduled and held pursuant to CLR 3408, on March 30, 2012. Accordingly, the conference requirements imposed upon the court by CLR 3408 and/or the Laws of 2008, Ch 472 § 3 as amended by the Laws of Ch 507 § 10 have been satisfied. No further conference is required under any statute, law or rule and the matter was referred to this IAS Part for the plaintiff to proceed with an order of reference.

Plaintiff additionally moves for summary judgment (*see* CPLR 3212 [a]: *Myung Chun v North American Mortgage Co.*, 285 AD 2d 42; 729 NYS 2d 716 [1st Dept 2001]) to dismiss Fuentes' s answer, affirmative defenses/counterclaims and for the issuance of an order of reference. "[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” (*Republic Natl. Bank of N.Y. v O’Kane*, 308 AD 2d 482, 764 NYS 2d 635 [2d Dept 2003]) (citation omitted) see also *Wells Fargo Bank v Cohen*, 80 AD3d 753, 915 NYS 2d 569 [2d Dept 2011]).

Plaintiff has established a prima facie case in this foreclosure action by the submission of the affidavit testimony Lorri Beetz a AVP of plaintiff and counsels’ affirmation along with copies of the pleadings, and relevant mortgage documents, such as the CEMA note and mortgage signed by Porter on January 26, 2005 and documentary evidence of Porter’s default since February 2, 2011 and every month thereafter and that the default to date has not been cured (see *Valley Natl. Bank v Deutsch*, 88 AD 3d 691, 930 NYS 2d 477 [2d Dept 2011]; *Wells Fargo Bank v Karla*, 71 AD 3d 1006, 896 NYS 2d 681 [2d Dept 2010]; *Wash. Mut Bank F.A. v O’Conner*, 63 AD 3d 832, 889 NYS 2d 696 [2d Dept 2009]; *Bercy Invs. v Sun*, 239 AD2d 161, 657 NYS2d 47 [1st Dept 1997]; *Bank of Leumi Trust Co. of New York v Lightning Park, Inc.*, 215 AD2d 246, 626 NYS2d 202 [1st Dept 1995]; *Village Bank v Wild Oaks Holding, Inc.*, 196 AD2d 812, 601 NYS2d 940 [2d Dept 1993]; *Dart Assoc. v Rosa Meat Mkt.*, 39 AD2d 564, 321 NYS2d 853 [2d Dept 1972]; *Gould v McBride*, 36 AD2d 706, 319 NYS2d 125 [1st Dept 1971]; *aff’d* 29 NY2d 708, 36 NYS2d 565 [1971]), and other documentary proof that it is a current holder in due course of a valid note and mortgage executed by Porter (see *Deutsche Bank Natl’ Trust Co. v Pietranoico*, 33 Misc 3d 528, 928 NYS 2d 818 [Sup Ct Suffolk County 2011]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Plaintiff has established and Fuentes does not deny the existence of a valid note and mortgage. Plaintiff also alleges and noticed the past due, unpaid mortgage balance, which Porter has not contested in her cross-motion and affidavit in support thereof as well as the acceleration default notice (see *Fed. Home Loan Mtge Corp. v Karastathis*, 237 AD 2d 558, 655 NYS 2d 631 [2d Dept 1997]; *First Trust Natl. Ass’n v Meisels* 234 AD 2d 414, 651 NYS 2d 121 [2d Dept 1996]). Thus, plaintiff has made a prima facie showing of entitlement to summary judgment in its favor (see *Northeast Sav. v Rodriguez*, 159 AD2d 820, 553 NYS2d 490 [3d Dept 1991]; *app disp* 76 NY2d 889, 561 NYS2d 550 [1990]).

Since plaintiff has presented documentary evidence of its entitlement to summary judgment as a matter of law, it now becomes incumbent upon Porter to come forward with evidentiary facts proving the existence of a triable issue with regards to bona fide defenses to the action such as waiver, estoppel, bad faith, fraud, oppressive and/or unconscionable conduct on the part of the plaintiff or its predecessor in interest (see *Capstone Bus. Credit, LLC v Imperia Family Realty, LLC*, 70 AD 3d 882 *Marine Midland Bank, N.A. v Freedom Rd. Realty Assoc.*, 203 AD2d 538, 611 NYS2d 34 [2d Dept 1994]; *Village Bank v Wild Oaks Holding, Inc.*, 196 AD2d 812, *supra*; *Marion Assoc. v Vitale*, 172 AD2d 501, 568 NYS2d 119 [2d Dept 1991]; *Andre v Pomery*, 35 NY2d 362 NYS2d 131 [1974]). Porter has not met that burden. Porter’s denials and denial of information sufficient to form a belief, are insufficient, as a matter of law, and summary judgment will be granted when “the Answer proffers nothing more than general denials” (*Fairbanks Co. v Simplex Supply Co.*, 126 AD2d 882, 511 NYS2d 171 [3d Dept 1987]; (see also *1130 Anderson Ave. Realty Corp. v Mina Equities Corp.*, 95 AD2d 169, 465 NYS2d 511 [1st Dept 1983]). “Where . . . the cause of action is based upon documentary evidence, the authenticity of which is not disputed, a general denial, without more, will not suffice to raise an issue of fact” (*Gould v McBride*, 36 AD2d 706, 319 NYS 2d 125 [1st Dept 1971]; *aff’d* 29 NY2d 768, 326 NYS2d 565 [1971]).

Porter moves ever so obliquely in seeking an order dismissing the plaintiff's complaint in its entirety as the plaintiff lacked standing to commence this action and lacks standing to maintain this action and denying plaintiff's motion for summary judgment. The opposition papers ignores and does not even address the remaining affirmative defenses and counterclaims Porter submitted in her answer. Counsel in his affirmation in opposition ingeniously attempts to divert the affirmative defense in defendant's answer into a separate issue, wherein Porter did not have to submit proof sufficient to raise a genuine question of fact casting doubt on the plaintiff's prima facie showing or implicating support for the affirmative defenses and/or counterclaims asserted in Porter's answer (*see Grogg v South Road Assocs.*, 74 AD 3d 1021, 907 NYS 2d [2d Dept 2010]; *Washington Mut. Bank v O'Conner*, 63 AD 3d 832, 880 NYS 2d 696 [2d Dept 2009]). In effect The general contentions of Porter's counsel in his affirmation does not provide sufficient basis under CPLR 3212(f) addressed herein, for delaying determination of plaintiff's motion for summary judgment (*see Lewis v Safety Disposal Sys. of Pennsylvania, Inc.*, 12 AD3d 324, 786 NYS2d 146 [1st Dept 2004]).

"In order to commence a foreclosure action, the plaintiff must have a legal or equitable interest in the mortgage" (*Wells Fargo Bank, N.A. v Marchione*, 69 AD 3d 204, 207, *supra*). A plaintiff has standing where it is both (1) the holder or assignee of the subject mortgage and; (2) the holder or assignee of the underlying note, either by physical delivery or execution of a written assignment prior to the commencement of the action with the filing of the complaint (*see Wells Fargo Bank, N.A. v Marchione*, 69 AD 3d 204, *supra* ; *U.S. Bank, N.A. v Collymore*, 68 AD 3d 752, 890 NYS 2d [2d Dept 2009]).

The documentary evidence submitted herein consisted of a note transferred via an endorsement in blank. The effect of the endorsement is to make the note " payable to bearer pursuant to UCC § 1-201 [5]. When an instrument is indorsed in blank (and thus payable to bearer) it may be negotiated by transfer of possession alone (*see* UCC §§ 3-202 [1]; 3-204[2]). Furthermore, UCC § 9-203 [g] explicitly provides that the assignment of an interest of the seller or other grantor of a security interest in the note automatically transfers a corresponding interest in the mortgage to the assignee. The relevant provision states, "The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security in the security instrument, mortgage or other lien." Under UCC § 9-203 [g], if the holder of the note in question demonstrated that it had an attached security in the note, the holder of the note in question would also have a security interest the mortgage securing the note even in the absence of a separate assignment of the mortgage. Plaintiff has been in continuous possession of the note and includes in its moving papers the affidavit testimony of Kim McManus an officer of plaintiff attesting to the veracity of the submitted application as per the Administrative Order of the Chief Judge AO431/11. Here the plaintiff has established its lawful status as assignee, by the written assignment and physical delivery of the note prior to the filing of the complaint and which is noted in the complaint. Where as in this foreclosure action plaintiff has produced sufficient documentary evidence and has eliminated all material issues of fact, the Court finds that the affirmation of counsel alone in his affirmation and cross motion is insufficient (*see Zuckerman v City of New York*, 49 NY 2d 557, *supra*), and is without probative value in opposition to plaintiff's motion (*see Dicupe v City of New York*, 124 AD2d 542, 507 NYS2d 687 [2d Dept 1986]).

Further, speculation and conjecture is insufficient to defeat plaintiff's motion (*see Capobianco v Mari*, 267 AD2d 191, 699 NYS2d 487 [2d Dept 1999]; *Presta v Houssian*, 186 AD2d 542, 589 NYS2d 791 [2d Dept 1992]). In opposition, Porter has failed to offer any valid evidentiary defense or counterclaim to the motion (*see Castro v Liberty Bus Co.*, 79 AD 2d 1014, 435 NYS 2d 340 [2d Dept 1981]). As noted herein, Porter does not even deny in her affidavit that she is in default in her mortgage payments. Porter states in her affidavit that unfortunately because of a debilitating illness and other family personal issues she was forced to leave her long time employment position with Suffolk County.

In essence, Porter seeks a stay of the foreclosure proceedings to allow her to recover from personal misfortunes which occurred after the issuance of the mortgage. However, she has not provided any legally sufficient grounds to support a stay of the foreclosure sale. Furthermore, [a]ny sympathy which the mortgagors situation might arouse cannot be permitted to undermine the stability of contractual obligations (“*Jamaica Savings Bank v Cohen*, 36 AD 2d 743, 320 NYS 2d 471 [2d Dept 1971]). While this court is sympathetic to Porters plight, the plaintiff has demonstrated that all the proceedings in this foreclosure action have been regular and in accordance with contract principles and accordingly, the contract must be upheld, it cannot relieve the defendant from the consequences of her failure to pay the mortgage payments because the results are harsh (*see Graf v Hope Bldg Corp.* 254 NY 1 [1930] *internal citations omitted*),

The assertions by Porter's counsel that summary judgment is premature because discovery is ongoing and their demands have not been answered is rejected. CPLR 3212 [f] provides that “should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but that it cannot be then stated, a court may deny the motion or may order a continuance to permit affidavits or disclosure to be had and may make such other order as may be just.” One seeking discovery “must offer an evidentiary basis to show that discovery may lead to relevant evidence and that essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff.” (*Martinez v Kreychmar*, 84 AD 3d 1037, 923 NYS 2d 648 [2d Dept 2011]; *see Seaway Capital Corp. v 500 Sterling Realty Corp.*, 94 AD 3d 856, 941 NYS 2d 871 [2d Dept 2012]; *Swedbank AB v Hale Ave. Borrower, LLC*, 89 AD 3d 922, 540 [2d Dept 2011]; *McFadyen Consulting Group, Inc. v Puritan Pride*, 87 AD 3d 620, 928 NYS 2d 87 [2d Dept 2011]; *Urstadt Biddle Prop., inc. v Excelsior Realty*, 65 AD 3d 1135, 885 NYS 2d 510 [2d Dept 2009]). The “mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered by further discovery is an insufficient basis for denying the motion” (*Woodard v Thomas* 77 AD 3d 738, 740, 913 NYS 2d 103 [2d Dept 2010] *internal citations omitted*); *see also Friendlander Org., LLC v Ayoride*, 94 AD 3d 693, 943 NYS 538 [2d Dept 2012]; *Stoian v Reed*, 66 AD 3d 1278, 888 NYS 2d 639 [3d Dept 2009]). “In the absence of some evidentiary showing suggesting that discovery will yield material and relevant evidence it is not an abuse of the courts discretion to deny the request (*Saratoga Assoc. Landscape Architects, Architects, Engrs. & Planners, P.C. v Lauler Dev Group*, 77 AD 3d 1219, 1222, 910 NYS 2d 571 [3d Dept 2010] *internal citation omitted*). Furthermore, there is no court order requiring plaintiff to comply with discovery (*see Emigrant Mtge. Co., Inc. v Beckerman*, 105 AD 3d 895, 964 NYS 2d 548 [2d Dept 2013]).

Accordingly, the plaintiff's motion for summary judgment, an order of reference and other unopposed affirmative relief is granted. The Order of Reference is being contemporaneously signed with this Short Form Order. This constitutes the Order and decision of the Court.

Dated: September 26th 2013
Riverhead, NY



Hon JOSEPH C. PASTORESSA J.S. C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION