

Indymac Federal Bank FSB v Zamboli
2013 NY Slip Op 32646(U)
October 11, 2013
Supreme Court, Suffolk County
Docket Number: 24689-09
Judge: Emily Pines
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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 23, SUFFOLK COUNTY

Present: HON. EMILY PINES
J. S. C.

Original Motion Date: 5-2-13
Motion Submit Date:
Motion Sequence No.: 001 MG

[] FINAL
[x] NON FINAL

X

IndyMac Federal Bank FSB,

Plaintiff,

- against -

Joseph Zamboli a/k/a Joseph A. Zamboli,
Dayna Bruno, Matthew Raymond Zamboli,
People of the State of New York, Workers’
Compensation Board of the State of New
York, and “JOHN DOE #1" through “JOHN
DOE #10", the last ten names being fictitious
and unknown to the plaintiff, the person or
parties, if any, or claiming an interest in or
lien upon the Mortgage premises described in
the Complaint,

Defendants.

X

Attorney for Plaintiff

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& GORDON, LLP
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Attorney for Defendant

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DAYNA BRUNO
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PEOPLE OF THE STATE OF NY
Justice Building
Albany, N. Y. 12210

PEOPLE OF THE STATE OF NY
Justice Building/The Capitol
Real Property Bureau
Albany, N.Y. 12210

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

ORDERED that this unopposed motion by plaintiff IndyMac Federal Bank, FSB (IndyMac) pursuant to CPLR 3212 for summary judgment on its complaint against defendant Joseph Zamboli (Zamboli), to strike the answer of defendant Zamboli, awarding plaintiff a default judgment against the non-appearing, non-answering defendants, to amend the caption of this action pursuant to CPLR 3025 (b), and, 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 the caption is hereby amended by substituting OneWest Bank, FSB as plaintiff; and it is further

ORDERED that the caption is further amended by substituting Jerilynn Zamboli in place and instead of “John Doe #1” and by striking therefrom the names of defendants “John Doe #2” through “John Doe #10”; and it is further

ORDERED that plaintiff is directed to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court; 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 -

**Joseph Zamboli a/k/a Joseph A. Zamboli, Dayna
Bruno, Matthew Raymond Zamboli, People of the
State of New York, Workers’ Compensation Board
of the State of New York, Jerilynn Zamboli**

Defendants.

_____x

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This is an action to foreclose a mortgage on premises known as 18 Beverly Court, Moriches, New York. On November 29, 2006, defendant Zamboli executed an adjustable rate note in favor of IndyMac Bank, FSB agreeing to pay the sum of \$145,000.00 at the starting yearly rate of 10.875 percent. On November 29, 2006, defendant Zamboli also executed a first mortgage in the principal sum of \$145,000.00 on the subject property. The mortgage indicated IndyMac Bank FSB to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of IndyMac Bank FSB as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on January 25, 2007 in the Suffolk County Clerk's Office. Thereafter, the mortgage was transferred by assignment of mortgage dated March 16, 2009 from MERS to plaintiff IndyMac. The assignment of mortgage was recorded on July 7, 2009 with the Suffolk County Clerk's Office. The mortgage was subsequently assigned by plaintiff IndyMac to OneWest Bank FSB by assignment of mortgage dated August 17, 2009. Said assignment of mortgage was recorded on September 15, 2009 in the Suffolk County Clerk's Office. The note contains the endorsement of Vincent Dombrowski, vice president of plaintiff IndyMac, paying to the order of OneWest Bank FSB without recourse.

A notice of default dated December 19, 2008 was sent to defendant Zamboli stating that he had defaulted on his mortgage loan and that the amount past due was \$17,076.80. As a result of defendant's continuing default, plaintiff commenced this foreclosure action on June 26, 2009. In its complaint, plaintiff alleges in pertinent part that defendant breached his obligations under the terms of the note and mortgage by failing to make his monthly payments commencing on September 1, 2008. Defendant interposed an answer with three affirmative defenses.

The Court's computerized records indicate that a foreclosure settlement conference was held on April 4, 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 conferences are required.

Plaintiff now moves for summary judgment on its complaint contending that defendant Zamboli breached his obligations under the terms of the loan agreement and mortgage by failing to tender monthly payments commencing with his September 1, 2008 payment and subsequent payments thereafter. In support of its motion, plaintiff submits among other things: the sworn affidavit of Steve Irwin, assistant secretary of OneWest Bank, FSB, the servicer of the subject loan; the affirmation of Patricia Esdinsky, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the

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Courts (AO/431/11); the pleadings; the note, mortgage and assignment of mortgage; notices pursuant to RPAPL §§ 1320 and 1303, 1304; affidavits of service for the summons and complaint; an affidavit of service for the instant summary judgment motion upon defendant's counsel; and a proposed order appointing a referee to compute.

"[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 AD2d 482, 482, 764 NYS2d 635 [2d Dept 2003]; *see Argent Mtge. Co., LLC v Montesana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Once a plaintiff has made this showing, the burden then shifts to defendant to establish by admissible evidence the existence of a triable issue of fact as to a defense (*see Washington Mut. Bank v Valencia*, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]).

Here, plaintiff produced the note and mortgage executed by defendant Zamboli, 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]). Steve Irwin, assistant secretary to plaintiff's servicer, avers that defendant Zamboli defaulted on his payments commencing with the September 1, 2008 payment and payments thereafter; that a notice of default was tendered to defendant; that the default was not cured; and, that a 90-day pre-foreclosure notice was sent to defendant by registered or certified mail and also by first class mail prior to February 13, 2010.

Defendant Zamboli has not submitted opposition to the motion. Defendant's answer is insufficient, as a matter of law, to defeat plaintiff's unopposed motion (*see Argent Mtge. Co., LLC v Montesana*, 79 AD3d 1079, 915 NYS2d 591; *Citibank, N.A. v Souto Geffen Co.*, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]; *Greater N.Y. Sav. Bank v 2120 Realty Inc.*, 202 AD2d 248, 608 NYS2d 463 [1st Dept 1994]). Since no opposition to the instant motion was filed by defendant Zamboli, no triable issue of fact was raised in response to plaintiff's prima facie showing (*see Flagstar Bank v Bellafigiore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Wells Fargo Bank Minnesota v Perez*, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]; *see also Zanfini v Chandler*, 79 AD3d 1031, 912 NYS2d 911 [2d Dept 2010]).

Based upon the foregoing, the motion for summary judgment is granted against defendant

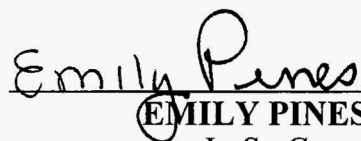
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Zamboli and the defendant's answer is stricken. Plaintiff's request for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is granted (*see Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 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.

Dated: 10-11-13
Riverhead, New York



EMILY PINES
J. S. C.

WORKERS' COMPENSATION BOARD OF THE STATE OF NY
111 Livingston Avenue, 21st Floor
Brooklyn, N. Y. 11201

JERILYNN ZAMBOLI
s/h/a John Doe #1
18 Beverly Court
Moriches, N. Y. 11955