

Wells Fargo Bank, N.A. v Kahya
2013 NY Slip Op 33091(U)
November 27, 2013
Supreme Court, Suffolk County
Docket Number: 10482-2009
Judge: Jr., John J.J. Jones
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SHORT FORM ORDER

Index No.: 10482-2009
 Motion Seq.#: 004 & 006
 Submit Date: 10-17-2013

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 SUFFOLK COUNTY

Present: **HON. JOHN J.J. JONES, JR.**
Justice

Motion Date: 004: 9-10-2013
006: 10-17-2013
 Motion No.: 004: MOT D
006: MOT D

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WELLS FARGO BANK, N.A.,
 3476 Stateview Boulevard
 Ft. Mill, SC 29715,

Plaintiff,

McCabe, Weisberg & Conway, P.C.
By Brian R. Elliott, Esq.
 Attorneys for Plaintiff
 145 Huguenot Street
 New Rochelle, NY 10801

-against-

AYSE KAHYA, WELLS FARGO BANK, N.A.,
 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.)

Van Leer & Greenberg, Esqs.
By Howard B. Greenberg, Esq.
 Guardian Ad Litem/Military Attorney
 132 Nassau Street
 New York, NY 10038

Defendants.

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Upon the following papers numbered 1 to 55 read on this application for an order granting the Guardian Ad Litem additional fees and an order awarding the plaintiff summary judgment and other relief; Notice of Motion/Order to Show Cause and supporting papers 1-9; 10-28; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 006: 29-46; Replying Affidavits and supporting papers 006: 47-55; Other ____; it is

ORDERED that the ex parte application of the Court-appointed Guardian Ad Litem and Military Attorney for an award of additional fees and compensation (motion sequence 004), and the application of the plaintiff, Wells Fargo Bank, N.A., ["the plaintiff" or "Wells Fargo"], for an order

granting summary judgment in its favor, striking the Answer of the defendant, Ayse Kahya [“the defendant”], fixing the defaults of the remaining non-answering defendants, appointing a referee to compute the sum due and owing the plaintiff, and amending the caption (motion sequence 006), are considered and decided together; and it is further

ORDERED that the ex parte application of the Court-appointed Guardian Ad Litem and Military Attorney for an award of additional fees and compensation is granted in accordance herewith; and it is further

ORDERED that the application of Wells Fargo for an order granting summary judgment in its favor, striking the defendant’s Answer, fixing the defaults of the remaining non-answering defendants, appointing a referee to compute the sum due and owing the plaintiff, and amending the caption (motion sequence 006), is granted in part and denied in part in accordance herewith.

On September 16, 2005, the defendant obtained a mortgage loan of \$332,000.00 from Wells Fargo Bank, N.A. The defendant has not controverted, with proof in admissible form, Wells Fargo’s proof on summary judgment that the defendant defaulted with the mortgage payment due and owing on November 1, 2008. On March 24, 2009, the plaintiff commenced the within action for foreclosure of the mortgage.

An affidavit of Attempted Service dated April 8, 2009, states that the process server spoke with a “Mr. Kahya” at the subject premises and that Mr. Kahya, a relative of the defendant, stated that the defendant lived in Turkey and not at the subject premises. An inquiry to the local post office to obtain a possible forwarding address for the defendant revealed that the defendant had moved and left no forwarding address.

Plaintiff’s application to serve the defendant by publication was granted in this Court’s Order dated October 14, 2009. The Order provided that the summons and complaint be delivered on behalf of the defendant to Howard B. Greenberg, Esq., who the Court authorized to appear in the action as Guardian Ad Litem and Military Attorney (if applicable) to protect the defendant’s interests. Mr. Greenberg interposed an Answer on the defendant’s behalf.

In support of its summary judgment motion, the plaintiff produced a copy of the note and mortgage, both purportedly executed by the defendant, and an affidavit from an individual identifying himself as the Vice President of Loan Documentation of Wells Fargo Bank, N.A. dated July 30, 2013. The affidavit attested, inter alia, that when the action was commenced Wells Fargo was in possession of the note and mortgage of record, and that upon a review by the affiant of Wells Fargo’s records maintained in the regular course of business, the defendant defaulted on the loan with the payment due on November 1, 2008.

The supporting affidavit also stated that at least 90 days prior to the commencement of the action, Wells Fargo provided **RPAPL** § 1304 notice to the borrower by first class and certified mail to the borrower’s last known address located at 418 17th Street, West Babylon, NY 11704-2603. The

copy of the notice attached to the supporting papers was dated December 15, 2008, and was sent by “Wells Fargo Home Mortgage”, rather than Wells Fargo Bank, N.A., the mortgagee. Imprinted on the copy of the notice was a stamp with a “Certified Article Number”. Notably, the plaintiff did not submit an affidavit of service to establish proper service on the borrower “by registered or certified mail and also by first-class mail” to her last known address (*see RPAPL 1304[2]*; *see also Aurora Loan Services, LLC v. Weisblum*, 85 A.D.3d 95, 106, 923 N.Y.S.2d 609 [2d Dept. 2011]; *Deutsche Bank Nat. Trust Co. v. Spanos*, 102 A.D.3d 909, 911, 961 N.Y.S.2d 200 [2d Dept. 2013]).

A plaintiff in a mortgage foreclosure action establishes a prima facie case for summary judgment by submission of the mortgage, the note, bond or obligation, and evidence of default (*see, Valley Natl. Bank v Deutsch*, 88 A.D.3d 691, 930 N.Y.S.2d 477 [2d Dept. 2011]; *Wells Fargo Bank v Das Karla*, 71 A.D.3d 1006, 896 N.Y.S.2d 681 [2d Dept. 2010]; *Washington Mut. Bank, F.A. v O'Connor*, 63 A.D.3d 832, 880 N.Y.S.2d 696 [2d Dept. 2009]). The burden then shifts to the 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” (*Capstone Bus. Credit, LLC v Imperia Family Realty, LLC*, 70 A.D.3d 882, 883, 895 N.Y.S.2d 199 [2d Dept. 2010], *quoting Mahopac Natl. Bank v Baisley*, 244 A.D.2d 466, 467, 644 N.Y.S.2d 345 [2d Dept. 1997]).

In addition, “proper service of RPAPL §1304 notice on the borrower or borrowers is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition” (*Aurora Loan Servs., LLC*, 85 A.D.3d at 106, 923 N.Y.S.2d 609).

The fourth affirmative defense and the affirmation in opposition to the motion assert that the plaintiff failed to comply with the mortgage foreclosure notice provisions required by RPAPL § 1304. RPAPL 1304 provides that, “at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower, including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower in at least fourteen-point type” (RPAPL 1304[1]). RPAPL 1304 sets forth the requirements for the content of such notice (*see RPAPL 1304[1]*), and further provides that such notice must be sent by registered or certified mail, and also by first-class mail, to the last known address of the borrower (*see RPAPL 1304[2]*).

RPAPL § 1304 currently applies to any “home loan,” as defined in RPAPL 1304(5)(a). RPAPL § 1304(5)(a) defines a “home loan” in pertinent part as “a loan ... in which ... (I) [t]he borrower is a natural person; (ii)[t]he debt is incurred by the borrower primarily for personal family, or household purposes; [and] (iii) “[t]he loan is secured by a mortgage ... on real estate improved by a one to four family dwelling ... used or occupied, or intended to be used or occupied wholly or partly, as the home or residence of one or more persons and which is or will be occupied by the borrower as the borrower's principle dwelling.” Notwithstanding the use of the singular, there may be more than one “borrower” on a “home loan” (*see Aurora Loan Services v. Weisblum*, 85 A.D.3d at 105).

Further, when the statute was first enacted, and when this action was commenced, it applied only to “high cost,” “subprime,” and “non-traditional” home loans (*Aurora Loan Servs., LLC v. Weisblum*, 85 A.D.3d at 104, [citing L. 2008, ch. 472, § 2]). The moving papers fail to address whether the subject loan was a “high cost,” “subprime,” or “non-traditional” home loan when made.

“[P]roper service of **RPAPL** 1304 notice on the borrower or borrowers is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition” or that service of the notice was not required under the version of the statute that was in effect at the time the action was commenced (*Aurora Loan Servs., LLC*, 85 A.D.3d at 106, 923 N.Y.S.2d 609).

Here, the plaintiff failed to submit an affidavit of service evincing that it properly served the borrower pursuant to **RPAPL** 1304, or in the alternative, demonstrate that the subject loan was not a “high cost,” “subprime,” or “non-traditional” home loan to which the former version of **RPAPL** §1304 applied (*see id.*). Thus, the plaintiff failed to meet its prima facie burden of establishing its entitlement to judgment as a matter of law in connection with the fourth affirmative defense (*see Aurora Loan Servs., LLC*, 85 A.D.3d at 106, 923 N.Y.S.2d 609; *see also Deutsche Bank Nat. Trust Co. v. Spanos*, 102 A.D.3d 909, 911, 961 N.Y.S.2d 200 [2d Dept. 2013]).

Since on the motion for summary judgment the plaintiff did not argue that the defendant did not reside at the subject premises when the action was commenced, and the pre-foreclosure notice requirement of **RPAPL** § 1304 only applies to statutorily defined “home loans”, and further, since the defendant did not have an opportunity to address that issue in opposing the motion, the Court likewise declines to address it here.

Accordingly, that branch of the plaintiff's motion which is for summary judgment dismissing the fourth affirmative defense alleging that the plaintiff failed to comply with **RPAPL** 1304 is denied, without regard to the sufficiency of the defendant's opposition papers (*see Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642). The denial is without prejudice to renew upon proper papers as indicated herein within one-hundred twenty days of the date of this order. Any renewal shall include a copy of this Order and the supporting papers on this application.

The remaining affirmative defenses numbered First through Third and Fifth through Nineteenth are stricken. These affirmative defenses are not supported by any proof in admissible form sufficient to raise a triable issue of fact. The opposition consisted solely of the affirmation of the appointed Guardian Ad Litem and Military Attorney who has no personal knowledge of the facts (*see Zuckerman v City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980] [party opposing summary judgment may not rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine issue of material fact for trial]). “Defenses which merely plead conclusions of law without supporting facts are insufficient and should be stricken” (*see CPLR* § 3018(b); *see also Petracca v. Petracca*, 305 A.D.2d 566, 567, 760 N.Y.S.2d 513 [2d Dept. 2003]; *Bruno v. Sant’Elia*, 52 A.D.3d 556, 557, 860 N.Y.S.2d 589 [2d Dept. 2008]; *Cohen Fashion Optical, Inc. v. V & M Optical, Inc.*, 51 A.D.3d 619, 858 N.Y.S.2d 260 [2d Dept. 2008]).

Unlike the failure to demonstrate either compliance with or the inapplicability of **RPAPL** §1304, a condition precedent to the commencement of the action which may be raised at any time, as to the remaining affirmative defenses it was incumbent on the defendant to offer proof in admissible form to raise an issue of fact (*Charter One Bank, FSB v. Houston*, 300 A.D.2d 429, 751 N.Y.S.2d 573 [2d Dept. 2002]). The failure to do so warrants an order striking the remaining affirmative defenses.

So much of the plaintiff's motion that seeks an amendment of the caption substituting Mr. Kahya and Yilmaz Kahya in place of "John Doe" is granted and the caption shall read as follows:

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WELLS FARGO BANK, N.A.,
3476 Stateview Boulevard
Ft. Mill, SC 29715,

Plaintiff,

-against-

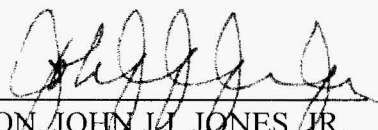
AYSE KAHYA, WELLS FARGO BANK, N.A.,
MR. KAHYA and YILMAZ KAHYA,

Defendants.

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The application of the Court-appointed Guardian Ad Litem and Military Attorney for an award of additional fees and compensation is granted to the extent that the movant is granted the sum of \$3,750.00 in attorney's fees in connection with opposing the plaintiff's summary judgment motion, and an additional \$45.00 for the costs of the motion in applying for additional fees, and is otherwise denied. The proposed Order submitted with counsel's application, as modified, is being signed simultaneously with this Order.

DATED: 27 Nov. 2013


HON. JOHN J. JONES, JR.
J.S.C.

CHECK ONE: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION