

HSBC Mtge. Corp. (USA) v Gonzalez
2013 NY Slip Op 33476(U)
December 18, 2013
Supreme Court, Queens County
Docket Number: 21033/2010
Judge: Howard G. Lane
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MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 6

HSBC MORTGAGE CORPORATION (USA),
Plaintiff,

- against -

MARIA E. GONZALEZ, et al.,
Defendants.

INDEX NO. 21033/2010

MOTION SEQ. NO. 1

BY: LANE, J.

DATED: December 18, 2013

MOTION DATE: July 30, 2013

MOTION CAL. NO. 66

Plaintiff commenced this action on August 18, 2010 to foreclose a mortgage encumbering the real property known as 104-28 89th Avenue, Richmond Hill, New York given by defendants Maria E. Gonzalez and Ines Lazo as security for the payment of a note, evidencing an obligation in the principal amount of \$468,000.00 plus interest. Plaintiff alleged in the complaint that it is the holder of the note and mortgage by virtue of an assignment of mortgage recorded on August 19, 2010. Plaintiff also alleged that because defendant Gonzalez and Lazo defaulted in paying the mortgage installment due on September 1, 2009, it elected to accelerate the entire mortgage debt.

Defendant Lazo, appearing pro se, served an answer dated September 1, 2010, consisting of general denials of the allegations of the complaint. Thereafter, on August 1, 2012, a notice of appearance was filed by counsel on behalf of defendants Lazo and Gonzalez, but defendant Gonzalez has failed to show that any answer has been served

by her, or on her behalf. Plaintiff caused Jaime Lopez, Maria Amaya and Pablo Rubio to be served with process as “John Doe” and “Jane Doe” defendants, but they have not appeared in the action or answered the complaint. Defendant City of New York Environmental Control Board has not appeared or answered.

Plaintiff moves for summary judgment against defendant Lazo, for leave to substitute HSBC Bank USA, N.A. for HSBC Mortgage Corporation (USA) as party plaintiff, leave to amend the caption naming HSBC Bank USA, N.A. as party plaintiff, and Jaime Lopez, Maria Amaya and Pablo Rubio as defendants in place and stead of defendants “John Doe” and “Jane Doe”, and for leave to appoint a referee to ascertain and compute the amounts due and owing plaintiff and to examine and report on whether the mortgaged premises can be sold in parcels.

Defendant Lazo opposes the motion. Defendant Gonzalez seeks to oppose the motion, but has failed to move to vacate her default in answering the complaint. In addition, she has failed to demonstrate a reasonable excuse for her default in answering, and a meritorious defense, which would warrant vacatur. The remaining defendants have not appeared in relation to the motion.

That branch of the motion by plaintiff for leave to amend the caption substituting HSBC Bank USA, N.A. as party plaintiff in place and stead of HSBC Mortgage Corporation (USA) is granted (*see* CPLR 1018, 3025[b]). Plaintiff HSBC Mortgage Corporation (USA) assigned its interest in the mortgage to HSBC Bank USA,

N.A. after this action had been commenced, and now is the real party in interest (*see Citibank, N.A. v Van Brunt Properties, LLC*, 95 AD3d 1158 [2d Dept 2012]; *Maspeth Federal Savings and Loan Assn v Simon-Erdan*, 67 AD3d 750 [2d Dept 2009]). That branch of the motion by plaintiff for leave to amend the caption substituting Jaime Lopez, Maria Amaya and Pablo Rubio in place and stead of defendants “John Doe 1” and “Jane Doe” is granted (*see* CPLR 1018, 3025[b]).

It is well established that the proponent of a summary judgment motion “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). In support of that branch of the motion for summary judgment against defendant Lazo, plaintiff offers: a copy of the pleadings, affidavits of service, and the subject mortgage, underlying note and assignments, an affirmation of regularity of its counsel, and an affidavit of Daniel Kowalsk, a vice president and assistant secretary in the administrative service division of plaintiff HSBC Bank USA, N.A., attesting to the default by defendants Lazo and Gonzalez in payment on November 1, 2009, and the amount due plaintiff.

Plaintiff’s submissions establish its prima facie entitlement to summary judgment as against defendant Lazo (*see GRP Loan, LLC v Taylor*, 95 AD3d 1172, 1173 [2d Dept 2012]; *Deutsche Bank Natl. Trust Co. v Posner*, 89 AD3d 674, 674-675

[2d Dept 2011)).

The burden shifts to defendant Lazo rebutting plaintiff's showing (*see Cochran Inv. Co., Inc. v Jackson*, 38 AD3d 704 [2d Dept 2007]; *EMC Mtge. Corp. v Riverdale Assoc.*, 291 AD2d 370 [2d Dept 2002]; *First Nationwide Bank, FSB v Goodman*, 272 AD2d 433 [2d Dept 2000]).

To the extent defendant Lazo asserts plaintiff lacked standing to bring the action, she has failed to demonstrate she raised that defense (or any defense) in a pre-answer motion to dismiss the complaint, or in her answer, and has failed to cross move for leave to amend her answer to assert the defense of lack of standing (*cf. Aurora Loan Services, LLC v Thomas*, 70 AD3d 986 [2d Dept 2010]). Defendant Lazo therefore has waived any defense based upon lack of standing (*see CPLR 3211[e]; Wells Fargo Bank Minnesota, Nat. Assn. v Mastropaolo*, 42 AD3d 239 [2d Dept 2007]).

Defendant Lazo has failed to raise a triable issue of fact rebutting plaintiff's showing. As a consequence, plaintiff is entitled to summary judgment in its favor as against her (*see Countrywide Home Loans, Inc. v Delphonse*, 64 AD3d 624 [2d Dept 2009]; *Cochran Inv. Co., Inc. v Jackson*, 38 AD3d 704). That branch of the motion by plaintiff for summary judgment against defendant Lazo is granted.

To the extent defendants Lazo and Gonzalez assert plaintiff has failed to negotiate in settlement discussions in good faith pursuant to CPLR 3408, a residential foreclosure conference was held on July 23, 2012. By order of the same date, the Court

Attorney Referee, noted the case had not settled, and “defendant/borrower” had failed to demonstrate sufficient financial ability to qualify for “plaintiff/lender[‘s] in-house traditional styled loan modification product.” Defendant Gonzalez asserts that she lost her job, fell behind on her mortgage payments, and then obtained a new job and has attempted to modify the mortgage loan for the past two years, but plaintiff keeps delaying the process by asking for the same documentation “over and over.” Defendants Lazo and Gonzalez offer a completed “uniform borrower assistant” form dated July 3, 2013, which calls for them to provide certain documentation relative to income to the lender or servicer of the mortgage loan. The affidavit of defendant Gonzalez and the July 3, 2013 form, however, do not constitute sufficient proof that plaintiff engaged in wrongful conduct to cause the unwarranted accumulation of interest, entitling defendants Lazo and Gonzalez to a hearing or a new conference on the issue (*see South Shore Fed. Sav. & Loan Assn. v Shore Club Holding Corp.*, 54 AD2d 978 [2d Dept 2008]; *Dayan v York*, 51 AD3d 964 [2d Dept 2008]; *Danielowich v PBL Dev.*, 292 AD2d 414 [2d Dept 2002]; *Sloane v Gape*, 216 AD2d 285, 286 [2d Dept 1995]).

That branch of the motion by plaintiff for leave to appoint a referee is granted.

Settle order.

Howard G. Lane, J.S.C.