

Trustco Bank v Khan
2014 NY Slip Op 30648(U)
March 17, 2014
Sup Ct, Albany County
Docket Number: 6133-13
Judge: Joseph C. Teresi
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

TRUSTCO BANK,

Plaintiff,

-against-

DECISION and ORDER
RJI NO.: 01-14-112672
INDEX NO.: 6133-13

SHEREEN C. KHAN a/k/a SHREEN KHAN;
CITY OF ALBANY; "JOHN DOE" (said name
being fictitious, it being the intention of the plaintiff
to designate any and all persons in possession of the
mortgaged premises),

Defendants.

Albany County Supreme Court All Purpose Term, March 6, 2014
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Law Offices of Overton, Russell, Doerr & Donovan, LLP
Linda Donovan, Esq.
Attorneys for Plaintiff
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Clifton Park, New York 12065

Cooper, Erving & Savage, LLP
Brian Matula, Esq.
Attorneys for Defendant Shreen C. Khan
39 North Pearl Street
Albany, New York 12207

TERESI, J.:

Trustco Bank (hereinafter "Plaintiff") commenced this action to foreclose its mortgage on real property located at 178-184 Central Avenue, Albany, New York (hereinafter "the premises") and owned by defendant Shreen C. Khan (hereinafter "Khan"). Issue was joined by Khan. No mandatory settlement conference is required because, as is undisputed, the premises is used for

commercial purposes.

Plaintiff now moves for summary judgment and an order appointing a referee. Khan opposes the motion. Although Plaintiff demonstrated its entitlement to judgment, because Khan raised a triable issue of fact, the motion is denied.

“Entitlement to a judgment of foreclosure may be established, as a matter of law, where a mortgagee produces both the mortgage and unpaid note, together with evidence of the mortgagor’s default.” (Zanfini v Chandler, 79 AD3d 1031, 1031 [2d Dept 2010], quoting HSBC Bank USA v Merrill, 37 AD3d 899 [3d Dept 2007]; Citibank, N.A. v Van Brunt Properties, LLC, 95 AD3d 1158 [2d Dept 2012]; La Salle Bank Nat. Ass’n v Kosarovich, 31 AD3d 904 [3d Dept 2006]; Pritchard v Curtis, 95 AD3d 1379 [3d Dept 2012]; Charter One Bank, FSB v Leone, 45 AD3d 958 [3d Dept 2007]). If such showing is made, the burden then shifts to “the defendants to produce evidentiary proof in admissible form sufficient to demonstrate the existence of a triable issue of fact as to a bona fide defense.” (Solomon v Burden, 104 AD3d 839 [2d Dept 2013]; Citibank, N.A. v Van Brunt Properties, LLC, 95 AD3d 1158 [2d Dept 2012]).

On this record, Plaintiff met its initial burden. Plaintiff first produced the Promissory Note and the Mortgage, both dated August 18, 2009 (hereinafter “Note and Mortgage”), underlying this action. Plaintiff then established Khan’s default with factual allegations made by its Vice President, Michelle Simmonds (hereinafter “Simmonds”). Plaintiff also sufficiently alleged Khan’s default in its Verified Complaint, which was verified by Simmonds. Both the Simmonds affidavit and the Verified Complaint alleged that Khan defaulted on the Note and Mortgage by failing to “pay the installment of principal and interest due on June 18, 2013, and all subsequent installments.” Upon such showing, Plaintiff demonstrated its entitlement to

judgment as a matter of law.

With the burden shifted, Khan raised a triable issue of fact. She proffered her own affidavit and alleged that she authorized her mother, Mahadaye Khan (hereinafter “Mahadaye”), to deal with the Note and Mortgage’s repayment. She then offered Mahadaye’s affidavit. Mahadaye stated that she timely made the payments required under the Note and Mortgage from May through September 2013, when Plaintiff rejected her payment. In support of such contention, she submitted the receipts she allegedly received when she made each payment. She also submitted the “payment history” she allegedly received from Plaintiff. She explained that although one of the payments she allegedly made was not reflected in the payment history, it was due to Plaintiff’s clerical error in entering the loan number for her August 2013 payment. She then specified the clerical notation error on the alleged August 2013 receipt. In addition, Mahadaye discussed her unusual payment arrangement. Based upon such arrangement she opined that Plaintiff failed to correctly allocate, between this and other loans she had with Plaintiff, the payments she made on the Note and Mortgage. In “viewing th[is] evidence in a light most favorable to defendants,” Khan raised a triable issue of fact relative to her default under the Note and Mortgage. (PHH Mortg. Corp. v Davis, 111 AD3d 1110 [3d Dept 2013]).

In reply, Plaintiff did not resolve all factual issues to re-establish its entitlement to judgment as a matter of law. Plaintiff submits only its attorney’s affidavit, with attachments. Because such affidavit is not based upon personal knowledge, and does not set forth the requisite CPLR§4518 allegations relative to Plaintiff’s business records, such submission is of no “probative value” on the issue of default. (2 North Street Corp. v Getty Saugerties Corp., 68 AD3d 1392 [3d Dept 2009]; Groboski v Godfroy, 74 AD3d 1524 [3d Dept 2010]; Zuckerman v.

City of New York, 49 NY2d 557 [1980). While Plaintiff's counsel duly refuted Khan's claimed lack of notice with her own admissible documentary submissions, proof of notice does not equate to proof of default. Nor did Plaintiff demonstrate that Khan had given her attorney the authority to admit default. On this record, because Plaintiff did not establish Khan's default as a matter of law with evidentiary proof in admissible form, Plaintiff is not entitled to summary judgment.

Accordingly, Plaintiff's motion for summary judgment is denied.

This Decision and Order is being returned to the attorney for the Defendant. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Respondent is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
March 17, 2014


Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated January 31, 2014; Affidavit of Michelle Simmonds, dated January 21, 2014, with attached Exhibits A-B; Affidavit of Michelle Simmonds, dated January 21, 2014; Affidavit of Linda Donovan, dated January 31, 2014, with attached Exhibits A-B; Affirmation of Linda Donovan, dated January 31, 2014; Affirmation of Linda Donovan, dated January 31, 2014.
2. Affidavit of Shereen Khan, dated February 20, 2014, with attached Exhibit A; Affidavit of Mahadaye Khan, dated February 20, 2014, with attached Exhibits A-C; Affirmation of Brian Matula, dated February 20, 2014, with attached Exhibits A-C.
3. Affidavit of Linda Donovan, dated February 27, 2014, with attached unnumbered Exhibits.