

Wells Fargo Bank, N.A. v DeSouza

2014 NY Slip Op 30699(U)

March 10, 2014

Sup Ct, Kings County

Docket Number: 503174/12

Judge: Larry D. Martin

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This opinion is uncorrected and not selected for official publication.

At an I.A.S. Trial Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 10th day of March, 2014.

PRESENT:

Hon. LARRY D. MARTIN, J.S.C.

WELLS FARGO BANK, NATIONAL ASSOCIATION,

PLAINTIFF,

-VS-

INDEX No. 503174/12

GARVIN DeSOUZA, et al

DEFENDANTS.

The following papers numbered 1 to	read on this motion	Papers Numbered
Notice of Motion - Order to Show Cause		
and Affidavits (Affirmations) Annexed	_____	_____
Answering Affidavit (Affirmation)	_____	_____
Reply Affidavit (Affirmation)	_____	_____

Upon the foregoing papers, plaintiff Wells Fargo Bank, National Association (“Wells Fargo”) moves for an order, pursuant to CPLR 3212, granting summary judgment in its favor, striking the answer interposed by defendant Garvin DeSouza (“defendant”) and appointing a referee to compute and ascertain the amounts due and owing to plaintiff.

Wells Fargo commenced the instant action to foreclose on the multi-family mortgage encumbering the premises located at 3004 Clarendon Road in Brooklyn, New York. The subject mortgage, along with an adjustable rate rider, were executed by defendant on December 13, 2005 in favor of BMC Capital, LP (“BMC”) to secure a multi-family note in the amount of \$850,000. By assignment dated December 13, 2005, BMC assigned a note and mortgage to LaSalle Bank National Association (“LaSalle”). The December 13, 2005 assignment from BMC to LaSalle refers to a “[s]ecurity [i]nstrument dated December 14, 2005, entered into by Garvin DeSouza, a married man

(the ‘Borrower’) for the benefit of the Assignor, securing an indebtedness of the Borrower to the Assignor in the principal amount of Eight Hundred Fifty Thousand and 00/100 (\$850,000.00).” By assignment dated March 30, 2006, LaSalle assigned the note and mortgage to Wells Fargo Bank, N.A., as Trustee for the Registered Holders of LaSalle Commercial Mortgage Securities, Inc. 2006-MF2, Commercial Mortgage Pass-through Certificates. By assignment dated March 18, 2012, Wells Fargo Bank, N.A., as Trustee for the Registered Holders of LaSalle Commercial Mortgage Securities, Inc. 2006-MF2, Commercial Mortgage Pass-through Certificates assigned the subject note and mortgage to Wells Fargo. Defendant defaulted in making a payment on May 1, 2012 as well as the subsequent instalments. Thereafter, Wells Fargo commenced the instant action on or about October 4, 2012. During the pendency of the instant action, by assignment dated September 17, 2013, Wells Fargo assigned the subject note and mortgage to LSREF2 APEX 2, LLC.

“ ‘[I]n 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’ ” (*Emigrant Mtge. Co., Inc. v Beckerman*, 105 AD3d 895, 895 [2d Dept 2013] quoting *Argent Mtge. Co., LLC v Mentosana*, 79 AD3d 1079, 1080 [2d Dept 2010] [internal quotation marks omitted]). “The burden then shifts to the defendant to demonstrate ‘the defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff’” (*Emigrant Mtge. Co., Inc. [Beckerman]*, 105 AD3d at 895 [internal quotation marks omitted]).

Here, Wells Fargo met its initial burden of proof demonstrating its entitlement to judgment as a matter of law (*see* CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) by submitting the multi-family mortgage, the unpaid note and the affidavit of Monica Knake (“Ms. Knake”), Assistant Vice President of Hudson Americas, LLC, attorney-in-fact for Wells Fargo attesting to the default (*see Emigrant Mtge. Co., Inc. [Beckerman]*, 105 AD3d at 895). The court

notes that in her affidavit, Ms. Knake avers that by assignment dated December 13, 2005, BMC assigned the subject note and mortgage to LaSalle (Affidavit of Monica Knake, April 9, 2013, ¶ 7) and that she further avers that BNC [sic] assigned the [n]ote and [m]ortgage to Wells Fargo Bank, N.A., as Trustee for the Registered Holders of LaSalle Commercial Mortgage Securities, Inc. 2006-MF2, Commercial Mortgage Pass-through Certificates ..." (*id.*, ¶ 8). However, the court also notes that Wells Fargo has submitted documentary evidence demonstrating that on March 30, 2006, LaSalle, not BNC as referred to in Ms. Knake's Affidavit (*id.*, ¶ 7), assigned the note and mortgage to Wells Fargo Bank, N.A., as Trustee for the Registered Holders of LaSalle Commercial Mortgage Securities, Inc. 2006-MF2, Commercial Mortgage Pass-through Certificates (*id.*, Exh. D). Additionally, Marc L. Lipshy ("Mr. Lipshy"), Vice President of LSREF2 Apex 2, LLC, Wells Fargo's successor-in-interest, submits an affidavit in which he confirms that LaSalle, not BNC, assigned the note and mortgage to Wells Fargo Bank, N.A., as Trustee for the Registered Holders of LaSalle Commercial Mortgage Securities, Inc. 2006-MF2, Commercial Mortgage Pass-through Certificates (Affidavit of Marc L. Lipshy, September 20, 2013, ¶ 5, Exh. D).

The court notes, although this issue was not raised by defendant, that the December 13, 2005 assignment from BMC to LaSalle refers to a "Security Instrument dated December 14, 2005" but that the security instrument in the case at bar is dated December 13, 2005. However, the NYC Department of Finance Office of the City Register print-out sheet for the December 13, 2005 assignment to LaSalle lists the document being assigned as a mortgage dated December 13, 2005, Document ID: 2005122200475002. As such, the court deems that the subject multi-mortgage is sufficiently identified in the December 13, 2005 assignment to LaSalle despite the inconsistency of the date.

In opposition, defendant fails to submit sufficient evidence in admissible form to raise a triable

issue of fact (*Zuckerman*, 49 NY2d at 562). Indeed, defendant’s counsel’s affirmation fails to constitute admissible evidence as he does not have personal knowledge of the facts. Assuming arguendo that defendant submitted an affidavit attesting to the same, it still would not suffice. The affidavit does not dispute of the validity of the agreements or that defendant defaulted on the loan (*see Emigrant Mtge. Co., Inc. [Beckerman]*, 105 AD3d at 895; *see Independence Bank v Valentine*, 2013 NY Slip Op 504 [2d Dept 2013]). Furthermore, defendant has failed to demonstrate any waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff (*see Emigrant Mtge. Co., Inc. [Beckerman]*, 105 AD3d at 895). In this regard, plaintiff’s motion is granted to the following extent: (1) that branch of plaintiff’s motion requesting summary judgment on its complaint is granted; and (2) that branch of plaintiff’s motion requesting an order of reference is granted. Plaintiff has not submitted a proposed order of reference and is directed to submit a proposed order of reference to Chambers within 30 days of service of this decision and order with notice of entry. That branch of plaintiff’s motion requesting that defendant Garvin DeSouza’s answer be stricken is denied.

The foregoing constitutes the decision, order and judgment of the court.

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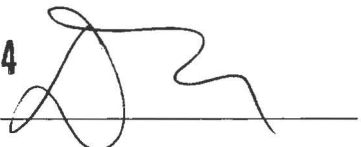
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Motion Seq. #

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HON. LARRY D. MARTIN

J.S.C.

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