

Accredited Home Lenders, Inc. v Walker

2014 NY Slip Op 30864(U)

March 30, 2014

Sup Ct, Suffolk County

Docket Number: 6441-08

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

COPY

P R E S E N T :

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE: 12/6/13
XMOTION DATE: 1/10/14
SUB. DATE: 2/28/14
Mot. Seq. # 005 - MD
Mot. Seq. # 006 - XMD
CDISP - No

-----X

ACCREDITED HOME LENDERS, INC., a
California Corporation,

Plaintiff,

-against-

WESLEY D. WALKER, JUDITH WALKER and
"JOHN DOE #1" through "JOHN DOE #10", the
last names being fictitious and unknown to the
plaintiff, the persons or parties intended being the
persons or parties, if any, having or claiming an
interest in or lien upon the premises described in
the verified complaint,

Defendants.

-----X

Cohn & Roth. Esqs.
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Mineola, NY 11501

JOSEPH C. VOZZA, ESQ.
Atty. For Def. Judith Walker
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Upon the following papers numbered 1 to 14 read on this motion for a judgment of foreclosure and sale and cross motion by Judith Walker to amend pleadings; Notice of Motion/Order to Show Cause and supporting papers 1 - 3; Notice of Cross Motion and supporting papers 4-6; Opposing papers 7-9; Reply papers 10-12; Other 13 (affirmation); 14 (supplemental affirmation); ~~(and after hearing counsel in support of and in opposition to the motion)~~ it is,

ORDERED that this motion (#005) by the plaintiff for an order confirming the report of the referee, a substitution of the plaintiff by a successor-in-interest and a judgment of foreclosure and sale is considered under CPLR 4309 and RPAPL 1351 and is denied; and it is further

ORDERED that the cross motion (#006) by defendant, Judith Walker, for an order granting her leave to amend her answer and an order "rejecting and disaffirming" the October 28, 2008 order of reference, dismissing the complaint and a vacatur of any judgment is considered under CPLR 3025(b) and 3211 and is denied.

The plaintiff commenced this mortgage foreclosure action in February of 2008 against defendant, Wesley Walker, the sole obligor under a May 25, 2007 note secured by a mortgage of the same date encumbering certain residential real property owned by Mr. Walker. The plaintiff moved for and was granted an order fixing the default in answering of Mr. Walker in an order of reference issued on October 28, 2008.

In February of 2009, Judith Walker, the divorced wife of defendant, Wesley Walker, moved to intervene herein upon allegations that she was the holder of a money judgment dated April 26, 2007, in the amount of \$355,403.53 that was entered in the office of the clerk of the court but not recorded or indexed under RPL § 297-b. Ms. Walker claimed that her judgment was prior and superior to the mortgage lien of the plaintiff. In July of 2009, counsel stipulated to joinder of Judith Walker as a party defendant and the filing of a supplemental summons and amended complaint that included a third cause of action for declaratory and equitable relief against the newly added defendant and her former husband. Therein, the plaintiff sought a judgment declaring that the plaintiff's mortgage was subrogated to the rights and priorities of two earlier mortgages given by defendant Wesley Walker in 2005 that were satisfied at the closing of the plaintiff's loan and that the plaintiff's mortgage lien, so subrogated, was superior to, and prior in right and in time, to the money judgment of defendant, Judith Walker.

In the amended verified complaint served by the plaintiff, defendant Judith Walker is described as a resident of the mortgaged premises (*see* ¶ 3 of the amended verified complaint attached as Exhibit C to the moving papers), and by virtue of such residency, was joined as a known party defendant. In addition, Ms. Walker is described as having some interest or claim in the mortgaged premises which the plaintiff characterizes as accruing subsequent to the lien of the plaintiff's mortgage (*see id.*, at ¶ 16). The plaintiff further describes Ms. Walker, along with her former husband, as a party defendant due to the plaintiff's awareness of Ms. Walker's claim to a superior right or interest in the subject premises which is the subject of the plaintiff's third cause of action in which it seeks to have its mortgage lien elevated to the priority of the 2005 mortgages upon the court's application of the doctrine of equitable subrogation as demanded in the third cause of action in its amended complaint (*see id.*, at ¶¶ 28-32). In her November 28, 2011 verified answer to the plaintiff's amended verified complaint, Ms. Walker asserted but one affirmative defense. It targeted only the plaintiff's third cause of action, namely, that Ms. Walker's judgment "is a duly recorded and prior in time lien against the mortgaged premises having accrued in full previous to the interests and liens, if any of the plaintiff" (*see* verified answer of Judith Walker attached as Exhibit D to the plaintiff's papers in opposition to cross motion).

In August of 2012, the plaintiff moved for partial summary judgment on its third cause of action. Defendant Judith Walker, aided by an affidavit of her co-defendant former husband, whose default in answering was adjudicated in the October 28, 2008 order of reference, vigorously opposed the plaintiff's motion for partial summary judgment. However, the court found that such opposition was unfounded and that the plaintiff had established its entitlement to the equitable and declaratory relief demanded in its moving papers (#003) (*see* Order dated November 30, 2012). The plaintiff's lien was thus declared to be subrogated to the rights and priorities of the two prior mortgage liens dated January 14, 2005 to the extent of the payoff and as such the plaintiff's lien was superior to the rights, title and interests of the Walker defendants including the unrecorded judgment of defendant, Judith Walker, dated April 26, 2011 (*see* Order dated November 30, 2012). The court stayed entry of the judgment pending resolution of the plaintiff's remaining claims, namely, a judgment of

foreclosure and sale and an award of counsel fees. No appeal from the court's November 30, 2012 order awarding partial summary judgment against the Walker defendants on the plaintiff's Third cause of action was perfected by defendant, Judith Walker.

The plaintiff now moves for an order confirming the report of the referee appointed in the October 28, 2008 order of reference to compute amounts due under the note and mortgage, for a substitution of an assignee of the named plaintiff pursuant to CPLR 1018 and for a judgment of foreclosure and sale. Defendant, Judith Walker, opposes and cross moves for an order granting her leave to serve an amended answer containing two new affirmative defenses, namely, that the plaintiff failed to comply with applicable provisions of the note and mortgage and that the plaintiff lacks the capacity or standing to prosecute its claims. She further seeks an order denying confirmation the order of reference and vacating any judgment and for dismissal of the amended complaint on the grounds that the plaintiff lacks capacity or standing to sue.

The plaintiff opposes the cross motion principally on grounds that the cross moving defendant's interest in this foreclosure action is limited to her status as a person claiming to be a judgment creditor whose lien is alleged to be prior and superior to that of the lien of the plaintiff. Plaintiff's counsel argues that because the cross moving defendant's claims as to the priority of her judgment were rejected by the court in its November 30, 2012 order in which the plaintiff was awarded summary judgment in its favor, defendant Judith Walker may not re-litigate or reargue her original affirmative defense under *res judicata* principles. With respect to the new defenses, the plaintiff alleges that the defendant herself lacks standing to raise the issue of the plaintiff's compliance with the note and mortgage or to challenge the plaintiff's standing to sue because Ms. Walker is not a signatory of either the note or the mortgage. In addition, the plaintiff claims that the undue delay in moving to amend is prejudicial to the plaintiff and that the cross motion should be denied on that basis. Finally, the plaintiff claims that the newly asserted affirmative defenses are palpably insufficient or devoid of merit which provides an independent basis for denial of the motion.

First considered is the cross motion of defendant, Judith Walker, as the court's determination thereof may render the plaintiff's motion, academic. The standard for granting applications for leave to amend pleadings is statutorily prescribed as one which should be "freely granted" (*see* CPLR 3025[b]). Case authorities provide that in the absence of prejudice or surprise to the non-moving party, leave should be granted without an examination of the merits of the proposed amendments nor any obligation to support them with evidentiary materials (*see Carroll v Motola*, 109 AD3d 629, 970 NYS2d 820 [2d Dept 2013]; *Rosicki & Rosicki Assocs. PC v Cochems*, 59 AD3d 512, 873 NYS2d 184 [2d Dept 2009]; *Mackenzie v Croce*, 54 AD3d 825, 864 NYS2d 474 [2d Dept 2008]; *Lucido v Mancuso*, 49 AD3d 220, 851 NYS2d 238 [2d Dept 2008]). Defenses that were waived by the defendant's failure to raise them in its original answer or on a pre-answer motion to dismiss may nonetheless be asserted in an amended answer (*see* CPLR 3211[e]; *Ingrami v Rovner*, 45 AD3d 806, 847 NYS2d 132 [2d Dept 2007]; *Deutsche Bank Trust Co. Am. v Cox*, 110 AD3d 760, 973 NYS2d 662 [2d Dept 2013]; *U.S. Bank, Natl. Ass'n v Sharif*, 89 AD3d 723, 933 NYS2d 293 [2d Dept 2011]; *Aurora Loan Serv., LLC v Thomas*, 70 AD3d 986, 897 NYS2d 140 [2d Dept 2010]). However, proposed amendments that are palpably insufficient or patently devoid of merit will be rejected without any showing of surprise or prejudice to non-moving parties (*see Vista Prop., LLC v Rockland Eye, Ear, Nose and Throat Assocs. PC*, 60 AD3d 846, 875 NYS2d 248 [2d Dept 2009]).

Where the proposed amendments arise out of materially different, rather than the same facts as those underlying the action, prejudice or surprise may be found to have inured to adverse parties (see *Koenig v Action Target, Inc.*, 76 AD3d 997, 907 NYS2d 692 [2d Dept 2010]); *Maloney Carpentry, Inc. v Budnik*, 37 AD3d 558, 830 NYS2d 262 [2d Dept 2007]). Prejudice may also be found where an opposing party demonstrates that material change in position or hindrance in the preparation of his or her case has been sustained which could have been avoided had the original pleading contained the proposed amendment (see *RCLA, LLC v 50-09 Realty, LLC*, 48 AD3d 538, 852 NYS2d 211 [2d Dept 2008]; *Yemini v Goldberg*, 46 AD3d 806, 848 NYS2d 676 [2d Dept 2007]). “Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine” (*Deutsche Bank Trust Co. Am. v Cox*, 110 AD3d 760, *supra*).

Contrary to the contentions of the plaintiff, neither the interests of Judith Walker nor her joinder as a defendant to this foreclosure action are limited to her status as a judgment creditor of the obligor/mortgagor who claims that her judgment lien has priority over the mortgage lien of the plaintiff (see RPAPL § 1311[3]). The residential occupancy of the subject premises by Ms. Walker provides an additional basis for joining her as a necessary party defendant, as such occupancy gives rise to a possessory interest in the premises which may be adversely by the judgment demanded, as such judgment, if granted, shall provide for the extinguishment of such interest upon the sale of the premises (see RPAPL §1311[1]; *1426 46 St., LLC v Klein*, 60 AD3d 740, 876 NYS2d 425 [2d Dept 2009]). Ms. Walker thus has standing to challenge the standing of the plaintiff *provided* that her cross motion for leave to serve the proposed amended answer containing the standing defenses is granted (see *Deutsche Bank Trust Co. Americas v Cox*, 110 AD3d 760, *supra*; *U.S. Bank, Natl. Ass'n v Sharif*, 89 AD3d 723, *supra*).

However, Ms. Walker's application for leave to serve an amended answer as proposed in her moving papers is denied as the proposed amendments are palpably improper and/or totally devoid of merit. Ms. Walker's reassertion of her original defense as to the purported priority of her judgment lien is precluded by the law of the case doctrine as that issue was decided in favor of the plaintiff and against Ms. Walker in the November 30, 2011 order of this court. The newly added affirmative defense that the plaintiff failed to comply with the contractual terms and conditions of the note and mortgage is palpably improper and devoid since Ms. Walker is not a signatory to either the note or mortgage, a third party beneficiary thereof or other person entitled to insist upon the plaintiff's compliance with the terms thereof (see *M. Paladino, Inc. v J. Lucchese & Son Contr. Corp.*, 247 AD2d 515, 669 NYS2d 318 [2d Dept 1998]; *Centennial Estates, Inc. v Filor*, 33 AD2d 1042, 308 NYS2d 732 [2d Dept 1970]). Equally devoid of merit is Ms. Walker's proposed standing defense as it is premised solely upon note and/or mortgage assignments made by agents or successors of the plaintiff following the commencement of this action. The challenges to such subsequent writings are unavailing since the plaintiff was the original lender and as such the note holder at the time of the commencement of this action. Since plaintiff's standing was in place and thereby fixed at the time of such commencement, no event occurring subsequent thereto could effect a divestiture of the plaintiff's standing (see CPLR 1018; *LaSalle Bank, NA v Pace*, 31 Misc3d 627, 919 NYS2d 794 [Sup. Ct. Suffolk County 2011], *aff'd* 31 Misc3d 627, 919 NYS2d 794 [2d Dept 2011]).

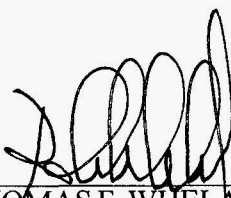
The remaining portions of the cross motion are also denied. The request for a rejection or disaffirmance of the order of reference is neither addressed nor supported in the supporting papers

attached to the notice of cross motion. Also denied are the demands for dismissal of the complaint on the grounds of standing. The cross moving defendant has no pleaded defense that the plaintiff lacks standing as none was asserted in her original answer. The standing defense was thus waived by Ms. Walker and remains so due to the denial of her application to amend her answer to assert such a defense and others for the reasons stated above.

The plaintiff's motion-in-chief (#005) for an order confirming the report of the referee to compute and for a judgment of foreclosure and sale with an award of attorneys' fees is considered under CPLR 1351 and is denied. The motion, which is posited as though it was one on default as to all defendants, fails to reflect the joinder of defendant, Judith Walker, following the issuance of the order of reference containing the fixation of the default in answering by the defendant mortgagor, Wesley Walker. It also fails to reflect the service of Ms. Walker's original answer containing denials of some or all of the allegations advanced in the amended complaint served by the plaintiff in which its claims for foreclosure and other incidental relief are advanced against both Walker defendants. The court's denial of this motion by the plaintiff for a judgment of foreclosure and sale is without prejudice to plaintiff's interposition of a new application for summary judgment against Ms. Walker and for an order confirming the referee's report and a judgment of foreclosure and sale against all defendants joined herein on all claims against them including those adjudicated by the court in its November 30, 2011 order in which the plaintiff was awarded summary judgment on its third cause of action for equitable subrogation and declaratory relief. Any new proposed judgment must reflect all of the proceedings held and the relief granted under the separate orders previously issued by the court.

The proposed judgment attached to the moving paper has been marked "not signed without prejudice" in light of the terms of this order.

DATED: 3/30/14


THOMAS F. WHELAN, J.S.C.