

Sand Canyon Corp. v Marino
2014 NY Slip Op 31386(U)
May 16, 2014
Supreme Court, Suffolk County
Docket Number: 11-20890
Judge: W. Gerard Asher
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 1-31-12
MOTION DATE 1-22-13
ADJ. DATE 10-7-13
Mot. Seq. # 001 - MD
002 - XMotD

-----X
SAND CANYON CORPORATION, f/k/a
OPTION ONE MORTGAGE CORPORATION,

Plaintiff,

- against -

CHARLES MARINO, III, WELLS FARGO
BANK, NATIONAL ASSOCIATION, GOOD
SAMARITAN HOSPITAL MEDICAL
CENTER, JUDITH PASCALE, in her capacity as
Suffolk County Clerk,

“JOHN DOE #1” through “JOHN DOE #12”, the
last twelve names being fictitious and unknown
to plaintiff, the persons or parties intended being
the tenants, occupants, persons or corporations, if
any, having or claiming an interest in or lien upon
the premises, described in the complaint,

Defendants.
-----X

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Upon the following papers numbered 1 to 35 read on this motion for summary judgment and default judgment and cross motion to vacate a default and to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19; Notice of Cross Motion and supporting papers 20 - 25; Answering Affidavits and supporting papers 26 - 31; Replying Affidavits and supporting papers 32 - 35; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

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ORDERED that this motion by plaintiff for an order pursuant to CPLR 3212 granting summary judgment as against defendant Good Samaritan Hospital Medical Center and pursuant to CPLR 3215 for a default judgment as against defendants Charles Marino III and Wells Fargo Bank, National Association is denied; and it is further

ORDERED that this cross motion by defendant Charles Marino III for an order pursuant to CPLR 5015 vacating his default, and pursuant to CPLR 3211 (a)(1) for dismissal of the complaint based on documentary evidence and pursuant to CPLR 3211 (a)(7) for dismissal of the complaint for failure to state a cause of action, and for costs and attorney's fees in the sum of \$10,000.00 is determined herein.

Plaintiff commenced this action on July 1, 2011 for specific performance and equitable subrogation. Defendant Charles Marino III (Marino) obtained a loan from Option One Mortgage Corp. (Option One) and executed a note dated March 17, 2006 agreeing to pay the sum of \$348,000.00. As security for said loan, he also executed a mortgage of the same date in favor of Option One on his residential premises known as 31 Evergreen Place, Deer Park, New York. Plaintiff is the successor to Option One pursuant to a Certificate of Amendment of Articles of Incorporation dated May 29, 2008 changing the name of Option One to Sand Canyon Corporation. The original mortgage was allegedly given to plaintiff's agent, Summit Abstract Corporation, at the closing for the purpose of recording it with the Suffolk County Clerk's Office but it was never recorded. A portion of the Option One loan was allegedly used to satisfy a prior mortgage loan in the sum of \$300,000.00 given to defendant Marino by New Century Mortgage Corporation (New Century) on December 16, 2004. The New Century mortgage had been recorded in the Suffolk County Clerk's Office on December 16, 2004. A satisfaction of mortgage, from New Century by Saxon Mortgage Services, Inc. (Saxon Mortgage), dated October 29, 2007 was recorded in the Suffolk County Clerk's Office on October 29, 2007.

Plaintiff asserts that it possesses only a copy of the Option One mortgage and that it has attempted to obtain the original but that the original cannot be located. Plaintiff relies on paragraph 1 of a Compliance Agreement executed by defendant Marino, as borrower, on March 17, 2006 agreeing that

In the event of the loss, theft or destruction of the Note, any other Note secured by the Security Instrument, or any other documents or instruments executed in connection with the Security Instrument, Note or Notes (collectively, the "Loan Documents"), upon Borrower(s) receipt of an indemnification executed in Borrower(s) favor by Lender, Borrower(s) shall execute and deliver to Lender a Loan Document in form and content identical to, and to serve as a replacement of, the lost, stolen or destroyed Loan Document, and may be treated for all purposes as the original copy of such Loan Document.

By letter dated March 10, 2011, mailed by certified mail, return receipt requested to defendant Marino, plaintiff requested that defendant Marino execute a duplicate original Option One mortgage pursuant to the Compliance Agreement. Defendant Marino did not respond to plaintiff's request. By its first cause of action, plaintiff seeks specific performance of the Compliance Agreement requiring defendant Marino to execute an identical duplicate Option One mortgage upon receipt by defendant Marino of an indemnification from plaintiff. By its second cause of action, plaintiff seeks an order directing that a

certified copy of the Option One mortgage be recorded nunc pro tunc as of March 17, 2006. By its third cause of action, plaintiff requests that the portion of its mortgage lien that satisfied the prior New Century mortgage be equitably subrogated to the rights and priorities of the New Century mortgage such that the liens of defendants Wells Fargo Bank, National Association (Wells Fargo) and Good Samaritan Hospital Medical Center (Good Samaritan) are subject to and subordinate to plaintiff's mortgage. Defendants Marino and Wells Fargo did not answer or serve a notice of appearance or bring a pre-answer motion to dismiss. Defendant Good Samaritan served a notice of appearance and waiver waiving service of all papers and notices of all proceedings except the notice of sale, notice of proceedings to obtain surplus money and notice of discontinuance.

Plaintiff now moves for summary judgment against defendant Good Samaritan and for a default judgment against defendants Marino and Wells Fargo. Plaintiff submits the summons and complaint, a purported copy of the Option One mortgage stamped "certified to be a true copy of the original," a certificate of amendment of articles of incorporation of Option One changing its name to Sand Canyon, and the Compliance Agreement signed by defendant Marino on March 17, 2006. Plaintiff's submissions also include the letter dated March 11, 2011 from plaintiff's attorney to defendant Marino requesting that he execute another original mortgage; affidavits of service of process upon defendants; an affidavit of additional mailing pursuant to CPLR 3215 upon defendant Wells Fargo; the answer of Judith Pascale in her capacity as Suffolk County Clerk admitting that the County Clerk records do not reflect the recording of the subject mortgage; the notice of appearance and waiver of defendant Good Samaritan; and the affidavit of Brian McConnell, plaintiff's vice president, stating that "[f]or reasons and under circumstances unknown, the original Option One Mortgage was never filed or recorded with the County Clerk of Suffolk County", "[t]he Plaintiff has been unable to locate the original Option One Mortgage", and "[a]s a result, the Plaintiff only has a copy of the Option One Mortgage."

Defendant Marino opposes plaintiff's motion contending that the Compliance Agreement does not require him to sign another security instrument, plaintiff no longer owns the note and mortgage and should not be allowed to record a copy of the mortgage, nunc pro tunc or otherwise, without the original for comparison, and plaintiff has not submitted admissible proof of payment of the prior mortgage loan for subrogation, specifically, a copy of the cancelled check(s) evidencing satisfaction of the prior mortgage loan, proof that the prior mortgage loan was satisfied at his request, a HUD-1 Statement, and a copy of the satisfaction of mortgage. Defendant Marino submits his affidavit and his proposed verified answer and counterclaims.

In its opposition to cross motion and reply, plaintiff provides a copy of the HUD-1 Statement from March 17, 2006 signed by defendant Marino indicating that \$298,938.05 of the loan amount of 348,000.00 was to be disbursed to Saxon Mortgage, a pay-off letter dated March 15, 2006 from Saxon Mortgage for the aforementioned \$298,938.05, and the satisfaction of mortgage dated October 12, 2007 and recorded in the Suffolk County Clerk's Office on October 29, 2007 from New Century by Saxon Mortgage indicating that the mortgage dated December 3, 2004 given by defendant Marino to New Century in the principal sum of \$300,000.00 and recorded in the Suffolk County Clerk's Office on December 16, 2004 had been paid. Plaintiff asserts that it is merely seeking to protect its rights and that this is not a foreclosure action.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (*S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*Benincasa v Garrubbo*, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). “Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez v Prospect Hosp.*, 68 NY2d at 324, 508 NYS2d 923, citing to *Zuckerman v City of New York*, 49 NY2d at 562, 427 NYS2d 595).

An applicant for a default judgment pursuant to CPLR 3215 against a defendant must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting defendant’s failure to answer or appear (*see* CPLR 3215 [f]; *U.S. Bank, Natl. Assn. v Razon*, 115 AD3d 739, 981 NYS2d 571, 572 [2d Dept 2014]; *Loaiza v Guzman*, 111 AD3d 608, 609, 974 NYS2d 282 [2d Dept 2013]; *Green Tree Servicing, LLC v Cary*, 106 AD3d 691, 692, 965 NYS2d 511 [2d Dept 2013]; *Dupps v Betancourt*, 99 AD3d 855, 855, 952 NYS2d 585 [2d Dept 2012]). “A plaintiff’s right to recover upon a defendant’s default in answering is governed by CPLR 3215 ... which requires that the plaintiff state a viable cause of action” (*Fappiano v City of New York*, 5 AD3d 627, 628, 774 NYS2d 773 [2d Dept 2004]). “Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due” (*see* CPLR 3215 [f]). “ ‘Where a valid cause of action is not stated, the party moving for judgment is not entitled to the requested relief, even on default’ ” (*Cardo v Board of Mgrs. Jefferson Vil. Condo 3*, 29 AD3d 930, 932, 817 NYS2d 315 [2d Dept 2006], quoting *Green v Dolphy Constr. Co.*, 187 AD2d 635, 636, 590 NYS2d 238 [2d Dept 1992]; *see Venturella-Ferretti v Ferretti*, 74 AD3d 792, 793, 901 NYS2d 551[2d Dept 2010]).

Plaintiff submitted an affidavit of service indicating that defendant Marino was served pursuant to CPLR 308 (2) by service of the summons, complaint and notice of pendency upon his wife Candice Marino at the subject premises on July 13, 2011. Defendant Marino did not appear in the action until January 31, 2012 when he appeared in Court on the return date of the motion. Plaintiff also submitted an affidavit of service indicating that defendant Wells Fargo was served pursuant to CPLR 311 (a)(1) on July 12, 2011. Defendant Wells Fargo never answered or appeared in this action.

To establish title by a lost deed or a lien by a lost mortgage there must be clear and certain evidence showing that the deed or mortgage was properly executed with all the formalities required by law and a showing of the contents of such instrument (*Sadow v Poskin Realty Corp.*, 63 Misc 2d 499, 312 NYS2d 901 [Sup Ct, Queens County 1970] citing *Edwards v Noyes*, 65 NY 125, 127 [1875]; *City of Oneida v Drake*, 133 Misc 382, 385-386, 232 NYS 248, 251-252 [Sup Ct, Madison County 1928]).

Initially, the Court notes that the complaint is not verified (*see* CPLR 3215 [f]). Although plaintiff submits a purportedly certified copy of the original mortgage, there is no affidavit from someone with personal knowledge averring that it is a certified copy. The affidavit of plaintiff's vice president is insufficient for this purpose. In addition, plaintiff cannot rely on the statement of defendant Marino in his affidavit that he "originally signed a note and mortgage with the plaintiff in or about March 17, 2006 ..." to demonstrate that the submitted copy is a certified copy of the original mortgage. Moreover, the express terms of the Compliance Agreement do not apply to a lost Security Agreement. When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties' reasonable expectations (*see W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157, 162, 565 NYS2d 440 [1990]; *Costello v Casale*, 281 AD2d 581, 583, 723 NYS2d 44 [2d Dept 2001], *lv denied* 97 NY2d 604, 737 NYS2d 52 [2001]). Therefore, plaintiff cannot rely on the specific performance of the Compliance Agreement to obtain a duplicate copy of the Option One mortgage from defendant Marino. Based on the foregoing, the first cause of action fails to state a viable cause of action against defendant Marino. The Court notes that if plaintiff submitted an affidavit from someone with personal knowledge together with the "certified" copy of the mortgage, plaintiff could instead seek specific performance of paragraph 29 of the mortgage entitled "Lost, Stolen, Destroyed or Mutilated Security Instrument and Other Documents" to obtain a duplicate replacement mortgage from defendant Marino.

With respect to the second cause of action, the failure to record the mortgage does not render the mortgage and note unenforceable (*see Commonwealth Land Tit. Ins. Co. v Lituchy*, 161 AD2d 517, 518, 555 NYS2d 786 [1st Dept 1990]; *see also* Real Property Law § 291; *Hopper v Lockey*, 17 AD3d 912, 795 NYS2d 103 [3d Dept 2005]; *Commonwealth Land Title Ins. Co. v Lituchy*, 188 AD2d 353, 591 NYS2d 770 [1st Dept 1992], *lv denied* 81 NY2d 706, 597 NYS2d 936 [1993]). However, "New York has a "race-notice" recording statutory scheme" (*see Alliance Funding Co. v Taboada*, 39 AD3d 784, 784, 832 NYS2d 814 [2d Dept 2007]; Real Property Law § 291). "Under New York's Recording Act (Real Property Law § 291), a mortgage loses its priority to a subsequent mortgage where the subsequent mortgagee is a good-faith lender for value, and records its mortgage first without actual or constructive knowledge of the prior mortgage" (*Rite Capital Group, LLC v LMAG, LLC*, 91 AD3d 741, 743, 936 NYS2d 280 [2d Dept 2012], *lv to appeal dismissed* 19 NY3d 992, 951 NYS2d 107 [2012], quoting *Washington Mut. Bank, FA v Peak Health Club, Inc.*, 48 AD3d 793, 797, 853 NYS2d 112 [2d Dept 2008]; *see Mortgage Elec. Registration Sys., Inc. v Rambaran*, 97 AD3d 802, 803-804, 949 NYS2d 694 [2d Dept 2012]). Thus, even if defendant Marino executed a duplicate mortgage, an order directing that the duplicate mortgage be recorded *nun pro tunc* to the date of the original execution would constitute unprecedented relief running contrary to Real Property Law § 291 as well as the expectations of bona fide purchasers for value (*see Reynolds v Springer Serv. Sta., Inc.*, 151 AD2d 466, 542 NYS2d 256 [2d Dept 1989]; *Wells Fargo Bank, NA v Perry*, 23 Misc 3d 827, 830-831, 875 NYS2d 853 [Sup Ct, Suffolk County 2009]). Therefore, the second cause of action is invalid and plaintiff cannot obtain either a default judgment or summary judgment on said claim.

Regarding the third cause of action, even if a mortgage loses its priority to a subsequent mortgagee that is a good faith lender for value who first records its mortgage without actual or constructive knowledge of the prior mortgage, to the extent that the proceeds of the prior mortgage were used to satisfy a preexisting mortgage on the same property, the holder of the prior mortgage will be

equitably subrogated to the rights of the preexisting mortgage (*see Rite Capital Group, LLC v LMAG, LLC*, 91 AD3d 741, 936 NYS2d 280). Therefore, plaintiff has a valid third cause of action.

The doctrine of equitable subrogation applies “where the funds of a mortgagee are used to satisfy the lien of an existing, known incumbrance when, unbeknown to the mortgagee, another lien on the property exists which is senior to his but junior to the one satisfied with his funds. In order to avoid the unjust enrichment of the intervening, unknown lienor, the mortgagee is entitled to be subrogated to the rights of the senior incumbrance” (*King v Pelkofski*, 20 NY2d 326, 333-334, 282 NYS2d 753 [1967]; *see Arbor Commercial Mtge., LLC v Associates at the Palm, LLC*, 95 AD3d 1147, 1149, 945 NYS2d 694 [2d Dept 2012]). Here, the proffered proof, in the form of the HUD-1 Statement signed by defendant Marino and the pay off letter, sufficiently established that \$298,938.05 of the mortgage proceeds plaintiff loaned to defendant Marino was allocated to satisfy an existing mortgage upon the subject real property held by New Century (*see LaSalle Bank Natl. Assn. v Ally*, 39 AD3d 597, 835 NYS2d 264 [2d Dept 2007]; *Zeidel v Dunne*, 215 AD2d 472, 626 NYS2d 509 [2d Dept 1995]). However, a lender’s actual notice of an intervening interest or lien operates as an absolute bar to the application of the doctrine of equitable subrogation (*see Arbor Commercial Mtge., LLC v Associates at the Palm, LLC*, 95 AD3d 1147, 1149, 945 NYS2d 694). Plaintiff has failed to submit proof of when the liens of the defendants Wells Fargo and Good Samaritan were recorded in the Suffolk County Clerk’s Office so as to demonstrate that it satisfied the New Century mortgage loan prior to the recording of said liens and thus without actual notice of said liens (*compare LaSalle Bank Natl. Assn. v Ally*, 39 AD3d 597, 835 NYS2d 264). Therefore, plaintiff’s request for a default judgment and summary judgment on its third cause of action is denied for insufficient proof.

By his cross motion, defendant Marino seeks to vacate his default and thereafter, to dismiss the complaint and to recover costs and attorneys’ fees.

“A defendant who has failed to appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a potentially meritorious defense to the action to avoid the entering of a default judgment or to extend the time to answer” (*Wells Fargo Bank, N.A. v Cervini*, 84 AD3d 789, 789, 921 NYS2d 643 [2d Dept 2011]; *see Equicredit Corp. of America v Campbell*, 73 AD3d 1119, 1120, 900 NYS2d 907 [2d Dept 2010]; *Maspeth Federal Sav. and Loan Assn. v McGown*, 77 AD3d 889, 890, 909 NYS2d 403 [2d Dept 2010]). The showing of reasonable excuse that a defendant must make to be entitled to serve a late answer under CPLR 3012 (d) is the same as the showing a defendant must make to be entitled to the vacatur of a default under CPLR 5015 (a) (1) (*see Stephan B. Gleich & Assocs. v Gritsipis*, 87 AD3d 216, 226, 927 NYS2d 349 [2d Dept 2011]). To vacate a default in appearing or answering pursuant to CPLR 5015 (a) (1), a defendant must demonstrate a reasonable excuse for the default and a potentially meritorious defense to the action (*see Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 501 NYS2d 8 [1986]; *Wells Fargo Bank, N.A. v Cean Owens, LLC*, 110 AD3d 872, 972 NYS2d 713 [2d Dept 2013]).

In his affidavit, defendant Marino avers that he has a reasonable excuse for the default, that he recently successfully completed a HAMP loan modification of the mortgage loan with American Home Mortgage Servicing, Inc. (AHMSI), with whom he has been dealing for years and whom he believed was the current holder of the note and mortgage, and that during the loan modification process AHMSI never

indicated that the mortgage was missing. He expresses his reservations in accepting an indemnification in return for executing a duplicate mortgage based on plaintiff's allegations in its complaint in an action pending in New York County entitled *Sand Canyon Corporation, plaintiff v American Home Mortgage Servicing, Inc., defendant* under Index number 650504/2012 that "[u]ntil it ceased operations and sold its servicing portfolio to AHMSI in 2008, Sand Canyon (then Option One) was engaged in the business of originating and servicing residential mortgage loans," arguing the ineffectual nature of an indemnification from an entity that is no longer in business or is in the process of winding down. Plaintiff acknowledges that defendant Marino executed a loan modification but emphasizes that AHMSI does not own the note and is only the servicer.

Here, under the particular circumstances of this action, defendant Marino provided a reasonable excuse for his default (*see generally Aames Funding Corp. v Houston*, 85 AD3d 1070, 926 NYS2d 639 [2d Dept 2011]; *Northeast Steel Products, Inc. v. John Little Designs, Inc.*, 80 AD3d 585, 914 NYS2d 279 [2d Dept 2011]; *Suffolk County Natl. Bank v Columbia Telecom. Group, Inc.*, 38 AD3d 644, 832 NYS2d 80 [2d Dept 2007]). Plaintiff acknowledged that defendant Marino had successfully completed a loan modification with AHMSI, provided no explanation concerning its allegations in the New York County action that plaintiff had ceased operations in 2008, and submitted no evidence that it is currently the owner and holder of the note. Notably, plaintiff failed to submit a copy of the note with its papers. In addition, defendant Marino demonstrated that he has a potentially meritorious defense of lack of standing alleging that plaintiff is no longer the owner and holder of the note and mortgage. Therefore, defendant Marino's default is vacated. The Court notes that defendant Marino did not concomitantly seek leave in his notice of cross motion to serve and file his late proposed verified answer with counterclaims that he submitted with his cross motion papers (*compare Northeast Steel Products, Inc. v John Little Designs, Inc.*, 80 AD3d 585, 914 NYS2d 279 [2d Dept 2011]).

In addition, defendant Marino's request for dismissal of the complaint is granted solely as to the first cause of action seeking specific performance of the Compliance Agreement and the second cause of action for an order directing that a certified copy of the subject mortgage be recorded nunc pro tunc inasmuch as both fail to state a valid cause of action (*see CPLR 3211 [a][7]*). Inasmuch as the third cause of action remains, defendant Marino's request for costs and counsel fees is denied as premature at this juncture.

Accordingly, plaintiff's motion for summary judgment and default judgment is denied, and the cross motion of defendant Marino is granted solely to the extent that his default is vacated and the first and second causes of action are dismissed. The third cause of action is severed and continued.

Dated: May 16, 2014

W. Gerard Asher
J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION