

One W. Bank FSB v Carey

2014 NY Slip Op 31759(U)

July 9, 2014

Supreme Court, New York County

Docket Number: 117855/2009

Judge: Carol E. Huff

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

EA
7/9/14
E

CAROL E. HUFF

Index Number : 117855/2009

ONE WEST BANK FSB

vs

CAREY, GREGORY

Sequence Number : 002

STRIKE ANSWER

PART 32

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this ~~_____~~

*motion is decided in accordance
with accompanying memorandum decision*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: JUL 09 2014


CAROL E. HUFF, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

S/D

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

-----X

ONE WEST BANK FSB, : Index No. 117855/09
 :
 Plaintiff, :
 :
 - against - :

GREGORY CAREY, HTFC CORPORATION, BANK :
 OF AMERICA, NA, NEW YORK CITY :
 ENVIRONMENTAL CONTROL BOARD, NEW YORK :
 CITY PARKING VIOLATIONS BUREAU, NEW YORK :
 CITY TRANSIT ADJUDICATION BUREAU, and :
 "JOHN DOE #1" through "JOHN DOE #10", the last ten :
 names being fictitious and unknown to the plaintiff, the :
 person or parties, if any, having or claim an interest in or :
 lien upon the Mortgage premises described in the :
 Complaint, :
 :
 Defendants. :

-----X

CAROL E. HUFF, J.:

In this mortgage foreclosure action with respect to property located at 259 West 138th Street, New York, New York, plaintiff moves for orders granting summary judgment, striking the answer and counterclaim of defendant Gregory Carey, awarding default judgments as to the remaining defendants, appointing a referee to compute and amending the caption. Carey cross moves to dismiss the complaint.

Plaintiff presents evidence of the mortgage securing an indebtedness of \$1.5 million and an accompanying note executed by Carey on June 13, 2006, in favor of non-party HTFC Corporation. The mortgage and note were plaintiff on March 21, 2009. Plaintiff's standing is not in dispute as a result of this court's ruling dated October 4, 2011, aff'd 107 AD3d 444 (1st

Dept 2013).

Plaintiff has further provided evidence of Carey's default on the loan, in the form of an affidavit submitted by Nicole Washington, dated January 30, 2013, attesting to the default.

Accordingly, plaintiff has demonstrated prima facie entitlement to a judgment of foreclosure by submitting proof of the mortgage and default (Barcov Holding Corp. v Bexin Realty Corp., 16 AD3d 282 [1st Dept 2005]). The defendants must raise a viable defense or triable issue of material fact in order to defeat the motion. Bank of India v Sanghvi, 224 AD2d 347 (1st Dept 1996).

Carey contends that he was not in default at the time notice was sent citing a default on the February 2009 payment. He presents evidence of a payment made February 3, 2009. Plaintiff, however, presents evidence (see 1/31/14 affidavit of Nicholas Collins, the contract management coordinator of the loan servicing company) indicating that Carey had been making payments a month late, and that the February 3 payment was for the prior month. Whether or not the documents submitted with the Collins affidavit are deemed admissible, the bank statements Carey attaches to his papers show payments for every month except for an omitted month, October 2008. Accordingly, Carey has failed to present evidence of no default sufficient to defeat plaintiff's prima facie showing of entitlement to summary judgment.

Carey also argues that plaintiff failed to demonstrate that it properly gave notice of default in order to accelerate the mortgage in accordance with the terms of the mortgage. He contends that the default notice was mailed to the wrong address. The notice address in the mortgage is 210 Lenox Avenue, New York, New York. Plaintiff mailed the notice to 459 Columbus Avenue, New York, New York.

The mortgage provides: “Any notice to me [Carey] in connection with this Security Instrument is considered given to me when mailed by first class mail or when actually delivered to my notice address if sent by other means. . . . The notice address is the address of the Property [210 Lenox] unless I give notice to Lender of a different address. . . . If Lender specifies a procedure for reporting my change of address, then I will only report a change of address through that specified procedure.” Mortgage, ¶15.

There is no requirement that a report of a change of address is required to be in writing. Collins states that Carey provided the new Columbus Avenue address (Collins aff. at ¶ 4). The 1/31/14 affidavit of Debra Ali, plaintiff’s counsel’s employee, states that plaintiff attempted to serve the summons and complaint at the Lenox Avenue address but were told by the current tenant that Carey did not reside there. Ali details the process for confirming Carey’s Columbus Avenue address, including a search of driver’s license records and contact with the United States Postal Service. Carey does not contend that he does not reside at 459 Columbus Avenue. He does state that he did not receive the default notice, but a simple denial of receipt is insufficient to rebut the presumption of delivery. Countrywide Home Loans, Inc. v Brown, 305 AD2d 626 (2d Dept 2003). Accordingly, the delivery of the default notice was in accordance with the terms of the mortgage. Carey’s remaining contentions with respect to the purported insufficiency of the default notice are without merit.

Carey counterclaims that he made payments to plaintiff’s predecessor during the period from 2007 through 2009 for which he is entitled to judgment to the extent that plaintiff has failed to credit the payments toward the mortgage. The predecessor, IndyMac Bank F.S.B., failed in July 2008, and the Federal Deposit Insurance Company (“FDIC”) was appointed receiver of the

bank's assets. Plaintiff acquired the servicing rights to the loan from FDIC pursuant to an agreement dated March 19, 2009, which includes the provision that plaintiff would not assume liability for claims such as the one asserted by Carey. See Asset Purchase Agreement at § 2.04(m-n). See also 12 USC § 1821(d)(3)-(13). In any event, as plaintiff points out, had Carey's payments not been credited as early as 2007, he would have received a default notice at that time, rather than in 2009.

Finally, Carey asserts fifteen affirmative defenses, including such pro forma defenses as estoppel, waiver and lack of jurisdiction. To the extent that any of the affirmative defenses are not disposed of otherwise in this decision, they are dismissed as unsubstantiated. See US 7 Inc. v Transamerica Ins. Co., 173 AD2d 311 (1st Dept 1991).

Accordingly, the cross motion is denied and plaintiff's motion is granted in its entirety.

Settle order.

Dated: **JUL 09 2014**



CAROL E. HUFF
J.S.C.