

Central Mtge. Co. v Abraham
2014 NY Slip Op 31936(U)
July 1, 2014
Supreme Court, Suffolk County
Docket Number: 11-22860
Judge: Joseph C. Pastoressa
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 12-16-13 (#001)
MOTION DATE 2-26-14 (#002)
ADJ. DATE 3-26-14
Mot. Seq. #001- MD
 #002 -XMG

-----X

CENTRAL MORTGAGE COMPANY
801 John Barrow Road, Suite 1
Little Rock, AR 72205

Plaintiff,

- against -

SARAMMA ABRAHAM, CAVALRY
PORTFOLIO SERVICES LLC AS ASSIGNEE
OF CAVALRY SPV I LLC AS ASSIGNEE OF
FIA CARD SERVICES NA, CAVALRY
PORTFOLIO SERVICES, LLC AS ASSIGNEE
OF CAVALRY SPV I, LLC AS ASSIGNEE OF
RIVERWALK HOLDINGS, LTD AS ASSIGNEE
OF WASHINGTON MUTUAL BANK,

JOHN DOE (Said names being fictitious, it being
the intention of Plaintiff to designate any and all
occupants of premises being foreclosed herein,
and any parties, corporations or entities, if any,
having or claiming an interest or lien upon the
mortgaged premises.)

Defendants.

-----X

McCABE, WEISBERG & CONWAY, P.C.
Attorney for Plaintiff
145 Huguenot Street, Suite 499
New Rochelle, New York 10801

THE RANALLI LAW GROUP PLLC
Attorney for Defendant Abraham
742 Veterans Memorial Highway
Hauppauge, New York 11788

Upon the following papers numbered 1 to 94 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 30; Notice of Cross Motion and supporting papers 31 - 71; Answering Affidavits and supporting papers 72 -90; Replying Affidavits and supporting papers 91 - 94; Other ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

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ORDERED that this motion by defendant Saramma Abraham for an order pursuant to CPLR 3212 granting summary judgment in her favor dismissing the complaint as against her is denied; and it is further

ORDERED that this cross motion by plaintiff for an order pursuant to CPLR 3212 granting summary judgment against defendant Saramma Abraham, fixing the defaults of the non-appearing, non-answering defendants, appointing a referee to compute the sum due and owing to plaintiff, and amending the caption is granted; and it is further

ORDERED that the caption is hereby amended by substituting Abraham Abraham in place of "John Doe #1," substituting Alyssa Abraham in place of "John Doe #2," substituting Julie Abraham in place of "John Doe #3," and striking "John Doe #4," through "John Doe #10"; and it is further

ORDERED that plaintiff is directed to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court; and it is further

ORDERED that the caption of this action hereinafter appear as follows:

**SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF SUFFOLK**

-----X
 CENTRAL MORTGAGE COMPANY

Plaintiff,

- against -

SARAMMA ABRAHAM, CALVARY PORTFOLIO
 SERVICES, LLC, ABRAHAM ABRAHAM,
 ALYSSA ABRAHAM, JULIE ABRAHAM,

Defendants.
 -----X

This is an action to foreclose a mortgage on property known as 8 Moran Court, Manorville, New York. On October 6, 2008, defendant Saramma Abraham (Abraham) executed a note in favor of Fairmont Funding, LTD., New York Corporation (Fairmont) agreeing to pay the sum of \$360,000.00 at the yearly rate of 6.875 percent. On said date, defendant Abraham also executed a mortgage in the principal sum of \$310,000.00 on the subject property. The mortgage was recorded on November 12, 2008 in the Suffolk County Clerk's Office. By assignment dated May 23, 2011, Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for Fairmont, assigned said mortgage to plaintiff,

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Central Mortgage Company. The note contains an indorsement in blank by Mordechai D. Husarsky, Managing Director of Fairmont.

Plaintiff sent a notice of default dated February 15, 2011 to defendant Abraham stating that she had defaulted on her mortgage loan and that the amount past due was \$17,922.10. As a result of defendant Abraham's continuing default, plaintiff commenced this foreclosure action on July 14, 2011. In its complaint, plaintiff alleges in pertinent part that defendant Abraham breached her obligations under the terms of the note and mortgage by failing to make her monthly payments. Defendant Abraham interposed a verified answer with 13 affirmative defenses and four counterclaims. The Court's computerized records indicate that a foreclosure settlement conference was held on July 12, 2012, the calendar was marked "not eligible," and this matter was referred as an IAS case. Thus, there has been compliance with CPLR 3408 and no further settlement conference is required. In addition, the instant action was stayed on January 24, 2013 for a bankruptcy proceeding.

Defendant Abraham now moves for summary judgment dismissing the complaint as against her on the grounds that plaintiff failed to comply with the requirements of RPAPL 1303 and 1304, conditions precedent to commencement of a foreclosure action. Specifically, defendant Abraham asserts by affidavit that she does not recall receiving the RPAPL 1303 notice, that in any event the form of said notice filed with the County Clerk does not conform to RPAPL 1303 requirements, and that she never received the RPAPL 1304 90-day notice. Her submissions in support of the motion include her affidavit, her verified answer, the affidavit of service upon her, the affidavit of Celeste Martinez, president of 742 Vets Hwy Tax Grievance & Audit Co, LLC, a copy of the RPAPL 1303 notice on blue paper filed by plaintiff, and the final decree dated October 1, 2013 of the Bankruptcy Court closing her Chapter 7 bankruptcy case.

Plaintiff cross-moves for summary judgment on its complaint contending that defendant Abraham breached her obligations under the terms of the loan agreement and mortgage by failing to tender monthly payments. Plaintiff's submissions include the pleadings, the note, mortgage and assignment, affidavits of service, and a copy of the RPAPL 1304 90-day notice dated January 10, 2011 sent to defendant Abraham.

"[I]n an 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" (Republic Natl. Bank of N.Y. v O'Kane, 308 AD2d 482 [2d Dept 2003]; see Argent Mtge. Co., LLC v Mentosana, 79 AD3d 1079 [2d Dept 2010]). Once a plaintiff has made this showing, the burden then shifts to defendant to produce evidentiary proof in admissible form sufficient to require a trial of their defenses (see Washington Mut. Bank v Valencia, 92 AD3d 774 [2d Dept 2012]). Jesse R. Womack, plaintiff's vice president, avers by affidavit that plaintiff has had continuous possession of the note and mortgage since May 23, 2011, that defendant Abraham defaulted on her loan payments on October 1, 2010 and thereafter, that a notice of default was sent to her on February 15, 2011, that a 90-day pre-foreclosure notice pursuant to RPAPL § 1304 was sent to her on January 10, 2011, and that her default has not been cured and the loan balance has been accelerated. Here, plaintiff produced the note and mortgage executed by defendant Abraham, as well as evidence of her nonpayment, thereby establishing a prima facie case as a matter of law (see Wells Fargo Bank Minnesota, Natl. Assn. v Mastropaolo, 42 AD3d 239 [2d Dept 2007]).

Once plaintiff has made a prima facie showing, it is incumbent on defendant “to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff” (see Cochran Inv. Co., Inc. v Jackson, 38 AD3d 704 [2d Dept 2007] quoting Mahopac Natl. Bank v Baisley, 244 AD2d 466 [2d Dept 1997]; see also Emigrant Mtge. Co., Inc. v Beckerman, 105 AD3d 895 [2d Dept 2013]).

The Court initially notes that defendant Abraham did not deny in her affidavit that she is in default on her mortgage loan payments. Instead, she is relying on purported defects in the RPAPL 1303 notice and failure to receive an RPAPL 1304 notice. Celeste Martinez states in her affidavit in support of defendant Abraham’s motion that she conducted a “forensic review” of the foreclosure file in the instant case, including the RPAPL 1303 notice, and found that said notice does not comply with the statute. She asserts that the RPAPL 1303 “notice filed with the Clerk of the Court contains information not permitted in the statute and the heading ‘HELP FOR HOMEOWNERS IN FORECLOSURE’ is not the heading in the notice and is not in bold twenty-type point.” Ms. Martinez adds her observation that “plaintiff’s prior counsel submitted various altered notices” pursuant to RPAPL 1303 on uncontested matters before the court.

Pursuant to RPAPL 1303 (1), in a residential foreclosure action, the foreclosing party must serve, together with the summons and complaint, a specific notice to the homeowner. RPAPL 1303 (2) specifically provides that “[s]uch notice shall be in bold, fourteen-point type and shall be printed on colored paper that is other than the color of the summons and complaint, and the title of the notice shall be in bold, twenty-point type. The notice shall be on its own page.”

RPAPL 1304 provides that in a residential foreclosure action, at least 90 days before the lender commences an action against the borrower, the lender must send a notice to the borrower including certain language and the notice must be in 14-point type. The notice must be sent by registered or certified mail and also by first-class mail to the last known address of the borrower, and if different, to the residence that is the subject of the mortgage (see RPAPL 1304). The statute further provides that the notice shall contain a list of at least five housing counseling agencies that serve the region where the borrower resides (id.).

It is well settled that proper service of the notices required by RPAPL 1303 and 1304 is a condition precedent to the commencement of a residential foreclosure action, and is the plaintiff’s burden to establish (see Deutsche Bank Natl. Trust Co. v Spanos, 102 AD3d 909 [2d Dept 2013]; Aurora Loan Servs., LLC v Weisblum, 85 AD3d 95 [2d Dept 2011]; First Natl. Bank of Chicago v Silver, 73 AD3d 162 [2d Dept 2010]). Here, plaintiff satisfied its burden by submitting a copy of the affidavit of service establishing proper service pursuant to CPLR 308 (1) on defendant Abraham of the RPAPL 1303 notice with the statutorily-required content, printed in the required type size on colored paper (see Aurora Loan Servs., LLC v Weisblum, supra). Defendant Abraham’s vague and unsubstantiated denial of receipt of the RPAPL 1303 notice was insufficient to rebut the presumption of proper service created by the affidavit of service (see id.; Deutsche Bank Natl. Trust Co. v Hussain, 78 AD3d 989 [2d Dept 2010]). In addition, her mere denial of receipt was insufficient to rebut Jesse R. Womack’s affidavit that a proper mailing of the RPAPL 1304 notice was made (see Kihl v Pfeffer, 94

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NY2d 118 [1999]). Contrary to defendant Abraham's contention, there is no requirement that plaintiff submit an affidavit of service for said notice (see RPAPL 1304 [2]). Moreover, any alleged failure of plaintiff to satisfy the RPAPL 1304 notice requirements, even if true, merely constitutes a defense to the action and did not deprive the Court of subject matter jurisdiction to render an order of reference (see Deutsche Bank Trust Co. Americas v Shields, 116 AD3d 653 [2d Dept 2014]; Pritchard v Curtis, 101 AD3d 1502 [3d Dept 2012]; Signature Bank v Epstein, 95 AD3d 1199 [2d Dept 2012]).

As for defendant Abraham's contention that the complaint should be dismissed because the RPAPL 1303 notice was not statutorily compliant, while it has been held that the failure to properly serve said notice will result in dismissal of the complaint (see Deutsche Bank Natl. Trust Co. v Spanos, 102 AD3d 909, supra; Aurora Loan Servs., LLC v Weisblum, 85 AD3d 95, supra), the Court has found no appellate authority affirming the dismissal of a complaint where, as alleged here, the heading or title of the notice did not comply with the type size and the one-page requirements of RPAPL 1303. Inasmuch as the alleged defects in the RPAPL 1303 notice do not prejudice any substantial right of defendant Abraham, they should be disregarded (see CPLR 2001; cf. Aurora Loan Servs., LLC v Weisblum, supra).

With respect to her remaining affirmative defenses and counterclaims, defendant Abraham has failed to raise any triable issues of fact. The Court notes that plaintiff demonstrated its standing through assignment of the mortgage and possession of the note indorsed in blank, all prior to commencement of this proceeding (see U.S. Bank of N.Y. v Silverberg, 86 AD3d 274 [2d Dept 2011]; Wells Fargo Bank, N.A. v Marchione, 69 AD3d 204 [2d Dept 2009]; U.S. Bank, N.A. v Adrian Collymore, 68 AD3d 752 [2d Dept 2009]; UCC § 3-202; § 3-204; § 9-203[g]). Based on the foregoing, defendant Abraham's motion for summary judgment dismissing the complaint and vacating the notice of pendency is denied and plaintiff's cross motion for summary judgment is granted.

Regarding plaintiff's default request, plaintiff has met all of the requirements with respect to the non-appearing, non-answering defendants (see CPLR 3215[f]; Green Tree Serv., LLC v Cary, 106 AD3d 691 [2d Dept 2013]; Dupps v Betancourt, 99 AD3d 855 [2d Dept 2012]; Atlantic Cas. Ins. Co. v RJNJ Servs., Inc., 89 AD3d 649 [2d Dept 2011]). Therefore, that portion of plaintiff's motion for an order fixing the defaults of the non-answering, non-appearing defendants is granted (see Green Tree Serv., v Cary, supra). Accordingly, that portion of plaintiff's motion for an order of reference appointing a referee to compute the amount due under the note and mortgage is granted (see Vermont Fed. Bank v Chase, 226 AD2d 1034 [3d Dept 1996]; Bank of East Asia, Ltd. v Smith, 201 AD2d 522 [2d Dept 1994]).

The proposed order appointing a referee to compute pursuant to RPAPL 1321 is signed as modified by the court.

Dated: July 1, 2014


 HON. JOSEPH C. PASTORESSA, J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION