

Ponce De Leon Fed. Bank v Kaplan

2014 NY Slip Op 32138(U)

August 14, 2014

Supreme Court, New York County

Docket Number: 810277/11

Judge: Joan A. Madden

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. JOAN A. MADDEN
J.S.C.

SA
8/13/14
B

PRESENT: _____
Justice

PART 11

Index Number : 810277/2011
PONCE DE LEON FEDERAL BANK
vs.
KAPLAN, MARY E.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

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 *granted in accordance with the annexed decision. Settle order on notice.*

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

Dated: *August 6, 2014*

[Signature]
_____, 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

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
PONCE DE LEON FEDERAL BANK,

Plaintiff,

-against-

INDEX NO. 810277/11

MARY E. KAPLAN, BOARD OF MANAGERS OF PARC
VENDOME CONDOMINIUM, NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE,
NEW YORK CITY PARKING VIOLATIONS
BUREAU, NEW YORK CITY TRANSIT ADJUDICATION
BUREAU, NEW YORK CITY ENVIRONMENTAL CONTROL
BOARD, UNITED STATES DEPARTMENT OF TREASURY
INTERNAL REVENUE SERVICE, and "JOHN DOE" #1-10,
"MARY DOE" #1-10, and "JANE DOE" #1-10, the names
being fictitious, their true names being unknown to plaintiff,
persons intended being persons in possession of portions of
the premises described in the complaint in this action,

Defendants.

-----X
JOAN A. MADDEN, J.:

This an action to foreclose on a mortgage on condominium Unit 9A, at the Parc Vendome
Condominium, 353 West 56th Street, New York, New York.¹ Plaintiff moves for an order: 1)
striking the answer of defendant Mary E. Kaplan and granting plaintiff summary judgment
against defendant Kaplan; 2) amending the caption of the summons and complaint, the notice of
pendency and all other papers filed in this action by discontinuing the action against "John Doe"
#1-10, "Mary Doe" #1-10, and "Jane Doe" #1-10; and 3) appointing a referee to ascertain and
compute the amount due under the mortgage. Defendant Kaplan opposes the motion.

¹Plaintiff has another action against defendant Kaplan to foreclose on a separate mortgage
on another apartment, Unit 9B, in the same building, Ponce de Leon Federal Bank v. Kaplan,
Index No. 810320/11 (Sup Ct, NY Co). Plaintiff is also moving for summary judgment in that
action.

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In moving for summary judgment in a mortgage foreclosure action, plaintiff establishes a prima facie right to foreclose by producing the mortgage, the assignment, if any, the unpaid note and evidence of default. See CitiFinancial Co. (DE) v. McKinney, 27 AD3d 224 (1st Dept 2006); LPP Mortgage, Ltd v. Card Corp, 17 AD3d 103 (1st Dept), lv app den, 6 NY3d 702 (2005); Bank of America, N.A. v. Tatham, 305 AD2d 183 (1st Dept 2003). Once plaintiff satisfies that burden, it is incumbent on the party opposing foreclosure to come forward with evidence sufficient to raise a triable issue of fact as to a bona fide defense such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of plaintiff. See Nassau Trust Co v. Montrose Concrete Products Corp, 56 NY2d 175, reargmt den 57 NY2d 674 (1982); CitiFinancial Co (DE) v. McKinney, *supra*; Mahopac National Bank v. Baisley, 244 AD2d 466 (2nd Dept 1997), lv app disp 91 NY2d 1003 (1998).

Plaintiff has established its prima facie entitlement to judgment as a matter of law by producing the note, the mortgage, the assignment of the mortgage and evidence of the defendant Kaplan's default. See CitiFinancial Co. (DE) v. McKinney, *supra*; LPP Mortgage, Ltd v. Card Corp, *supra*; Bank of America, N.A. v. Tatham, *supra*. Plaintiff's submits an affidavit stating that defendant Kaplan "failed to make all of the regular monthly payments due as of May 1, 2011," and that "no payments in reduction of or on account of [the] principal sum, or on account of the interest thereon, have been made since the commencement of this action."

In opposing plaintiff's motion, defendant Kaplan does not deny that money is owed, or that she defaulted on the mortgage. Rather, defendant Kaplan submits an affidavit asserting that: 1) plaintiff did not include the required RPAPL §1303 notice when "purporting to serve the summons and complaint, as the "notice included with the papers that were delivered contained a

notice printed on white paper” and the “type was smaller than the required size and unclear from apparently being copied many times”; 2) the subject property, “a residential condominium unit,” is not an “investment property” as alleged in the complaint, as it is “occupied by my relative, there is no lease agreement and I do not collect rent,” so according to defendant, a “RPAPL 1302 notice to cure was required to be served”; 3) the amount claimed to be due and owing is incorrect; 4) plaintiff states “no basis for the Court to ‘strike’ my answer.”

Defendant Kaplan’s first assertion is based on her fifth affirmative defense that plaintiff “has not complied with RPAPL §1303.” Section 1303 requires service of a mandated notice with the summons and complaint. See Aurora Loan Services, LLC v. Weisblum, 85 AD3d 95 (2nd Dept 2011). The statute prescribes the content and form of the notice and the method of service. RPAPL §1303; see Deutsche Bank National Trust Co v. Spanos, 102 AD3d 909 (2nd Dept), app dism 21 NY3d 1068 (2013). Proper service of a RPAPL §1303 notice a condition precedent to the commencement of a foreclosure action, and plaintiff has the burden of establishing satisfaction of this condition. See Aurora Loan Services, LLC v. Weisblum, supra. Hence, if the condition is not satisfied, the complaint must be dismissed. See id; First National Bank of Chicago v. Silver, 73 AD3d 162 (2nd Dept 2010).

Here, plaintiff has made a sufficient showing that it satisfied the condition precedent of properly serving the RPAPL §1303 notice on defendant Kaplan at the commencement of this action, by submitting an affidavit of service from the process server that the summons and complaint was personally delivered to defendant Kaplan on November 11, 2011 at 3:24 p.m. at 66 Morton Street, New York, New York, along with an “Additional Notice, Help For Homeowners in Foreclosure, on colored paper in compliance with RPAPL Sect 1303 served

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therewith.” Notably, the summons and complaint filed with Court contains the RPAPL 1303 notice with the statutorily-required content, clearly printed in the required type size on yellow and orange paper. See Aurora Loan Services, LLC v. Weisblum, supra at 103. In view of the foregoing, defendant Kaplan’s objections to the form of the section 1303 notice are insufficient to raise a material issue as to plaintiff’s compliance with RPAPL §1303. See US Bank National Association v. Tate, 102 AD23d 859 (2nd Dept 2013).

Defendant Kaplan’s second assertion is based on her fourth affirmative defense that plaintiff “has not complied with RPAPL §1302(1).” Section 1302(1) requires a complaint in a foreclosure action involving “high-cost home loan or a subprime home loan,” to contain certain allegations, including an allegation that plaintiff has complied with RPAPL §1304. While section 1304 requires a borrower to serve a mandated notice 90 days prior to the commencement of a foreclosure action, that provision is applicable only where the property or condominium unit at issue is “used or occupied, or intended to be used or occupied wholly or partly, as the home or residence of one or more persons and which is or will be *occupied by the borrower as the borrower’s principal dwelling*” (emphasis added). Here, regardless of whether Kaplan’s condominium unit is an “investment property,” she admits in her affidavit that the unit is occupied by her “relative.” Since Kaplan submits no evidence showing that she occupies the unit as her “principal dwelling,” the 90-day notice requirement of RPAPL §1304 is inapplicable, and plaintiff was not required to comply with the pleading and notice requirements of RPAPL §§1302 and 1304.

Defendant Kaplan’s additional objection to the amount claimed as due and owing is not a defense, but rather a matter for the referee appointed to determine the amount due and owing on

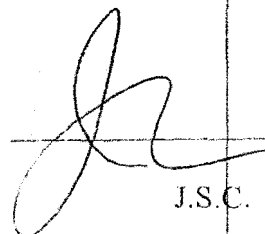
the mortgage. See Mortgage Electronic Registration Systems, Inc v. Schuh, 48 AD3d 838 (3rd Dept), app dismissed 10 NY3d 951 (2008); Long Island Savings Bank of Centereach, F.S.B. v. Denkensohn, 222 AD2d 659 (2nd Dept 1995).

Based on the foregoing, defendant Kaplan has failed to raise a material issue of fact as to an available defense. Plaintiff is, therefore, entitled to summary judgment, and plaintiff's motion is granted in its entirety.

Settle order on notice which includes a provision for the appointment of a Referee to Compute.

DATED: August 6, 2014

ENTER:



J.S.C.