

Countrywide Home Loans, Inc. v Hasho

2014 NY Slip Op 32213(U)

July 21, 2014

Sup Ct, Suffolk County

Docket Number: 09-20817

Judge: Peter H. Mayer

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

**PRESENT:**

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 6-11-13
ADJ. DATE _____
Mot. Seq. # 002 - MG

-----X
COUNTRYWIDE HOME LOANS, INC.,

Plaintiff,

- against -

HOPE HASHO INDIVIDUALLY AND AS TRUSTEE UNDER THE HOPE HASHO LIVING TRUST; ROBERT HASHO INDIVIDUALLY AND AS TRUSTEE UNDER THE HOPE HASHO LIVING TRUST; UNITED STATES OF AMERICA DEPARTMENT OF THE TREASURY INTERNAL REVENUE SERVICE; SUFFOLK COUNTY TREASURER; NEW YORK STATE COMMISSIONER OF TAXATION AND FINANCE;; "JOHN DOE 1 to JOHN DOE 25", said names being fictitious, the persons or parties intended being the persons, parties, corporations or entities, if any, having or claiming an interest in or lien upon the mortgaged premises described in the complaint,

Defendants.
-----X

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Attorneys for Defendants
Hope Hasho and Robert Hasho
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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the Plaintiff, dated May 22, 2013, and supporting papers (including Memorandum of Law); (2) ~~Notice of Cross Motion by the~~, dated ~~supporting papers~~; (3) Affirmation in Opposition by the defendants Hasho, dated June 27, 2013, and supporting papers; (4) Reply Affirmation by the plaintiff, dated July 10, 2013, and supporting papers; ~~(5) Other~~ (and after hearing counsels' oral arguments in support of and opposed to the motion); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that this motion by plaintiff Countrywide Home Loans, Inc. (Countrywide) for an order pursuant to CPLR 3212 for summary judgment on its complaint against defendants Hope Hasho, individually and as trustee under the Hope Hasho living trust and Robert Hasho, individually and as trustee under the Hope Hasho living trust (collectively Hasho); to strike the combined answer of defendants Hasho; fixing the defaults as to the non-appearing, non-answering defendants; for leave to amend the caption of this action pursuant to CPLR 3025 (b) and, to appoint a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is granted; and it is further

ORDERED that plaintiff's application for leave to amend the caption of this action pursuant to CPLR 3025 (b), is granted; and it is further

ORDERED that the caption is hereby amended by substituting the Bank of New York Mellon fka the Bank of New York, as successor trustee to JPMorgan Chase Bank, N.A., as Trustee for the Certificateholders of CWABS Master Trust, Revolving Home Equity Loan Asset Backed Notes, Series 2004-B in place of plaintiff Countrywide; and it is further

ORDERED that the caption is hereby amended by striking therefrom defendants "John Doe #1" through "John Doe #25"; 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

 THE BANK OF NEW YORK MELLON FKA THE BANK OF
 NEW YORK, AS SUCCESSOR TRUSTEE TO JPMORGAN
 CHASE BANK, N.A., AS TRUSTEE FOR THE CERTIFICATE-
 HOLDERS OF CWABS MASTER TRUST, REVOLVING HOME
 EQUITY LOAN ASSET BACKED NOTES, SERIES 2004-B

Plaintiff,

-against-

HOPE HASHO INDIVIDUALLY AND AS TRUSTEE UNDER
 THE HOPE HASHO LIVING TRUST; ROBERT HASHO
 INDIVIDUALLY AND AS TRUSTEE UNDER THE HOPE
 HASHO LIVING TRUST; UNITED STATES OF AMERICA
 DEPARTMENT OF THE TREASURY INTERNAL REVENUE
 SERVICE; SUFFOLK COUNTY TREASURER; NEW YORK
 STATE COMMISSIONER OF TAXATION AND FINANCE,

Defendant.

_____X

This is an action to foreclose a credit line mortgage (mortgage) on premises known as 12 Cedarfield Terrace, St. James, New York. On January 5, 2004, defendants Hasho executed a home equity credit line agreement (note) in favor of America's Wholesale Lender in the principal sum of \$120,000.00. On the same date, defendants Hasho also executed a mortgage in the principal sum of \$120,000.00 on the subject property. The mortgage was recorded on January 7, 2005 in the Suffolk County Clerk's Office. Thereafter, the note and mortgage were transferred by assignment of mortgage dated October 22, 2008 from America's Wholesale Lender to plaintiff Countrywide.

Countrywide, as servicer of the mortgage loan, sent a notice of default dated January 7, 2008 to defendant Hope Hasho stating that she had defaulted on her mortgage loan and that the amount past due was \$69,735.06. As a result of defendant's continuing default, plaintiff commenced this foreclosure action on June 3, 2009. In its complaint, plaintiff alleges in pertinent part that the defendants Hasho breached their obligations under the terms of the note and mortgage by failing to make their monthly payments commencing with the October 20, 2007 payment and subsequent payments thereafter. Defendants interposed a combined answer with one affirmative defense.

The Court's computerized records indicate that a foreclosure settlement conference was held on September 22, 2010 at which time this matter was referred as an IAS case since a resolution or settlement had not been achieved. Thus, there has been compliance with CPLR 3408 and no further settlement conference is required.

Plaintiff now moves for summary judgment on its complaint contending that defendants Hasho breached their obligations under the terms of the loan agreement and mortgage by failing to tender monthly payments commencing with their October 20, 2007 payment and subsequent payments thereafter. In support of its motion, plaintiff submits among other things: the sworn affidavit of Jennifer A. Bartholomew, assistant vice president of Bank of America, N.A. successor by merger to BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing, LP (BANA), the servicer of the mortgage loan; the affirmation of Hans H. Augustin, Esq. in support of the motion; the affirmation of Hans H. Augustin, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the pleadings; the note, mortgage, and assignment of mortgage; a notice of default; notices pursuant to RPAPL 1320, 1303 and 1304; affidavits of service for the summons and complaint; an affidavit of service for the instant summary judgment motion upon defendants' counsel; and a proposed order appointing a referee to compute. Defendants Hasho, through their attorney, oppose the summary judgment motion.

"[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, 482, 764 NYS2d 635 [2d Dept 2003]; see *Argent Mtge. Co., LLC v Mentosana*, 79 AD3d 1079, 915 NYS2d 591 [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 *Aames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]; *Household Fin. Realty Corp. of New York v Winn*, 19 AD3d 545, 796 NYS2d 533 [2d Dept 2005]; see also *Washington Mut. Bank v Valencia*, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]). Jennifer A. Bartholomew, assistant vice president of BANA avers that defendants Hasho failed to comply with the terms of the note and mortgage by failing to make monthly payments commencing with their November 20, 2007 payment and subsequent payments thereafter; that a notice of default dated January 7, 2008 was mailed to

defendants Hasho; that a 90-day Notice dated November 26, 2008 was mailed to defendants Hasho; and, that defendants have not cured their default.

Where, as here, standing is put into issue by the defendant, the plaintiff is required to prove it has standing in order to be entitled to the relief requested (*see Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680, 954 NYS2d 551 [2d Dept 2011]; *US Bank, NA v Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; *Wells Fargo Bank Minn., NA v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). In a mortgage foreclosure action “[a] plaintiff has standing where it is the holder or assignee of both the subject mortgage and of the underlying note at the time the action is commenced” (*HSBC Bank USA v Hernandez*, 92 AD3d 843, 939 NYS2d 120 [2d Dept 2012]; *US Bank, NA v Collymore*, 68 AD3d at 753; *Countrywide Home Loans, Inc. v Gress*, 68 AD3d 709, 888 NYS2d 914 [2d Dept 2009]). Here, plaintiff has established, *prima facie*, that it had standing to commence this action. The uncontroverted evidence submitted by the plaintiff in support of its motion demonstrated that America’s Wholesale Lender, who was the originator of the loan, transferred the note and mortgage to plaintiff, Countrywide, by assignment of mortgage prior to the commencement of the action.

Likewise, defendants’ claim that the mandatory foreclosure settlement conference has not been held in accordance with CPLR 3408 is unavailing. The Court’s computerized records indicate that a foreclosure settlement conferences were held on April 13, 2010; June 10, 2010; July 28, 2010; September 22, 2010, February 27, 2013 and March 27, 2013, wherein this matter was marked not settled. There is no requirement that a foreclosing plaintiff modify its mortgage loan prior to or after a default in payment (*see Graf v Hope Bldg. Corp.*, 254 NY 1, 171 NE 884 [1930]; *Wells Fargo Bank, NA v Meyers*, 108 AD3d 9, 966 NYS2d 108 [2d Dept 2013]; *Wells Fargo Bank, NA v Van Dyke*, 101 AD3d 638, 958 NYS2d 331 [1st Dept 2012]; *Key Intern. Mfg. Inc. v Stillman*, 103 AD2d 475, 480 NYS2d 528 [2d Dept 1984]). While the parties to a mortgage are required to enter into good faith negotiations aimed at reaching a mutual resolution, including a loan modification if possible (*see* CPLR 3408), the failure to negotiate in good faith is not a defense to a foreclosure action (*see Wells Fargo Bank, NA v Meyers*, 108 AD3d 9; *Wells Fargo Bank, NA v Van Dyke*, 101 AD3d 638; *US Bank Natl. Assn. v Slavinski*, 78 AD3d 1167). The moving defendants’ unsupported reliance upon loan modification discussions with representatives of the plaintiff and upon claims of purported bad faith on the part of the plaintiff are rejected as unmeritorious.

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, 834 NYS2d 198, 199 [2d Dept 2007] *quoting Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 467, 664 NYS2d 345 [2d Dept 1997]). Here, defendants Hasho have failed to demonstrate, through the production of competent and admissible evidence, a viable defense which could raise a triable issue of fact (*see Deutsche Bank Natl. Trust Co. v Posner*, 89 AD3d 674, 933 NYS2d 52 [2d Dept 2011]). “Motions for summary judgment may not be defeated merely by surmise, conjecture or suspicion” (*see Shaw v Time-Life Records*, 38 NY2d 201, 379 NYS2d 390 [1975]). Notably, defendants Hasho did not deny having received the loan proceeds and having defaulted on their loan payments in their opposition papers.

Based upon the foregoing, the motion for summary judgment is granted against defendants Hasho and the defendants’ answer is stricken. Plaintiff’s request to fix the defaults as to the non-appearing, non-answering defendants and for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is granted (*see Green Tree Serv. v Cary*, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]; *Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *Bank of East*

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Asia, Ltd. v Smith, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

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

Dated: July 21, 2014



PETER H. MAYER, J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION