

Aurora Loan Servs., LLC v Baritz

2014 NY Slip Op 32242(U)

August 12, 2014

Supreme Court, Suffolk County

Docket Number: 0014076/2009

Judge: William B. Rebolini

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This opinion is uncorrected and not selected for official publication.

Short Form Order

SUPREME COURT - STATE OF NEW YORK**I.A.S. PART 7 - SUFFOLK COUNTY****PRESENT:****WILLIAM B. REBOLINI**
Justice

Aurora Loan Services, LLC,

Plaintiff,

-against-

Steven Baritz, Mortgage Electronic Registration
Systems, Inc., as Nominee for Greenpoint
Mortgage Funding, Inc., New York State
Department of Taxation and Finance, United States
of America acting through the IRS,

Defendant.

Index No.: 14076/2009Motion Sequence No.: 005; MGMotion Date: 3/19/13Submitted: 4/19/14Motion Sequence No.: 006; MDMotion Date: 3/19/13Submitted: 4/19/14Attorney for Plaintiff:Knuckles, Komosinski & Elliott, LLP
565 Taxter Road, Suite 590
Elmsford, NY 10523Attorney for Defendant Steven Baritz:Charles Wallshein, Esq.
135 Pinelawn Road, Suite 120S
Melville, NY 11747Clerk of the Court

Upon the following papers numbered 1 to 70 read upon these motions for summary judgment and leave to amend defendant's answer: Notice of Motion and supporting papers, 1 - 22, 41 - 54; Answering Affidavits and supporting papers, 23 - 35, 55 - 70; Replying Affidavits and supporting papers, 36 - 40; it is

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ORDERED that the motion (005) by plaintiff Aurora Loan Services, LLC (Aurora) and the order to show cause (006) brought on by defendant Steven Baritz (Baritz), are consolidated for purposes of this determination; and it is further

ORDERED that this motion by plaintiff Aurora pursuant to CPLR 3212 for an order granting summary judgment on its complaint against defendant Baritz, fixing the defaults as against the non-answering and non-appearing defendants, to amend the caption of this action pursuant to CPLR 3025 (b) and, for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is granted; and it is further

ORDERED that the caption is hereby amended by substituting Nationstar Mortgage, LLC in place of Aurora Loan Services, LLC, as plaintiff and by striking therefrom the names of defendants "John Doe"; 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
Nationstar Mortgage, LLC,

Plaintiff,

-against-

Steven Baritz, Mortgage Electronic
Registration Systems, Inc. as Nominee for
Greenpoint Mortgage Funding, Inc.,
New York State Department of Taxation and Finance,
and United States of America acting through the IRS,

Defendants.

-----X

ORDERED that defendant Baritz's submission entitled "Cross Motion" is summarily rejected by the Court for failure to include a notice of cross motion specifying the time and place of the hearing on the motion, the relief demanded and the grounds therefor, in contravention of CPLR 2214(a) and will be considered by the Court as defendant's affirmation in opposition; and it is further

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ORDERED that defendant Baritz's order to show cause seeking leave to amend his answer pursuant to CPLR 3025(b) is denied.

This is an action to foreclose a mortgage on premises known as 4 Clematis Court, Lake Grove, New York. On May 27, 2005, defendant Steven Baritz (Baritz) executed an adjustable rate note in favor of defendant GreenPoint Mortgage Funding, Inc. (GreenPoint) agreeing to pay the sum of \$960,000.00. On the same date defendant Baritz also executed a first mortgage in the principal sum of \$960,000.00 on the subject property. The mortgage indicated GreenPoint to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of GreenPoint as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on August 8, 2005 in the Suffolk County Clerk's Office. Thereafter, the note and mortgage were transferred by assignment of mortgage dated March 12, 2009 from MERS to Aurora, the plaintiff herein. The assignment of mortgage was recorded on April 2, 2009 with the Suffolk County Clerk's Office. An allonge to the note contains the indorsement in blank of Thomas K. Mitchell, vice president of GreenPoint.

Aurora sent a notice of default dated October 21, 2008 to defendant Baritz stating that he had defaulted on his mortgage loan. As a result of defendant's continuing default, plaintiff commenced this foreclosure action on April 13, 2009. In its complaint, plaintiff alleges in pertinent part that defendant breached his obligations under the terms of the note and mortgage by failing to make his monthly payments commencing with the September 1, 2008 payment. Defendant interposed an answer with five affirmative defenses.

The Court's computerized records indicate that a foreclosure settlement conference was held on April 6, 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 conferences are required.

Plaintiff now moves for summary judgment on its complaint contending that defendant Baritz breached his obligations under the terms of the loan agreement and mortgage by failing to tender monthly payments commencing with his September 1, 2008 payment and subsequent payments thereafter. In support of its motion, plaintiff submits among other things: the sworn affidavit of Jaelyn Holloway, assistant secretary of Nationstar Mortgage, LLC, assignee of the named plaintiff Aurora; the affirmation of Snead J. Daly, Esq. in support of the instant motion; the affirmation of Snead J. Daly, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the pleadings; the note, mortgage and assignments; notices pursuant to RPAPL §§ 1320 and 1304; affidavits of service for the summons and complaint; an affidavit of service for the instant summary judgment motion upon defendant's counsel; and a proposed order appointing a referee to compute.

Defendant Baritz has moved by order to show cause seeking, *inter alia*, leave to serve an amended answer. Initially addressing defendant's application for leave to serve an amended answer, the Court notes that as a general rule, motions for leave to amend pleadings are to be

liberally granted absent prejudice or surprise resulting from the delay (*see, Glaser v County of Orange*, 20 AD3d 506, 799 NYS2d 120 [2d Dept 2005]). The movant, however, must make some evidentiary showing that the proposed amendment has merit or a proposed amendment will not be permitted (*see Buckholz v Maple Garden Apts., LLC*, 38 AD3d 584, 832 NYS2d 255 [2d Dept 2007]; *Curran v Auto Lab Serv. Cetr.*, 280 AD2d 636, 721 NYS2d 662 [2d Dept 2001]). In this instance, it is noted that defendant's original verified answer is dated May 6, 2009. Defendant, after a five year delay, seeks to file an amended answer without providing a credible explanation for such delay. Defendant Baritz's unsupported excuse that "[a]s soon as Defendant switched counsel the answer was amended and served. It was not until Plaintiff served it [*sic*] motion for summary judgment that Defendant had any opportunity to inspect the executed collateral mortgage file documents..." is factually insufficient to sustain his burden for the requested relief given the prolonged delay. Likewise, defendant has failed to demonstrate by any credible evidence a lack of prejudice to the plaintiff, who has already moved for summary judgment (*see generally Majestic Investors, Ltd. v Lopez*, 111 AD2d 844, 490 NYS2d 585 [2d Dept 1985]). Lastly, the defendant's application fails to make a sufficient evidentiary showing as to the proposed added affirmative defenses and counterclaims, other than standing, which was raised in defendant's initial answer. In view of the foregoing, the Court in exercising its discretion, denies that branch of defendant's order to show cause seeking leave to amend his answer.

Also unavailing is the defendant's assertion that plaintiff's summary judgment motion should be denied as premature. CPLR 3212(f) provides that "should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just". Appellate case authorities have long instructed that to avail oneself of the safe harbor this rule affords, the claimant must "offer an evidentiary basis to show that discovery may lead to relevant evidence and that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff" (*Martinez v Kreychmar*, 84 AD3d 1037, 923 NYS2d 648 [2d Dept 2011]; *see Seaway Capital Corp. v 500 Sterling Realty Corp.*, 94 AD3d 856, 941 NYS2d 871 [2d Dept 2012]). In addition, the party asserting the rule must demonstrate that he or she made reasonable attempts to discover facts which would give rise to a genuine triable issue of fact on matters material to those at issue (*see Swedbank, AB v Hale Ave. Borrower, LLC*, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]). Here, the papers submitted by defendant Baritz were insufficient to satisfy the aforementioned statutory burden. Thus, defendant failed to sufficiently demonstrate that he made reasonable attempts to discover the facts which would give rise to a triable issue of fact or that further discovery might lead to relevant evidence (*see CPLR 3212 [f]; Cortes v Whelan*, 83 AD3d 763, 922 NYS2d 419 [2d Dept 2011]; *Sasson v Setina Mfg. Co., Inc.*, 26 AD3d 487, 810 NYS2d 500 [2d Dept 2006]). Accordingly, defendant's claim is thus rejected as unmeritorious.

As to plaintiff's summary judgment application, "[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" (*see Republic Natl. Bank of N.Y. v O'Kane*, 308 AD2d 482, 482, 764 NYS2d 635 [2d Dept 2003]; *Village Bank v Wild Oaks Holding*, 196 AD2d 812, 601 NYS2d 940

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[2d Dept 1993]). 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 on 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]). 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]).

Here, plaintiff has established its entitlement to summary judgment against the answering defendant as such papers included a copy of the mortgage, a copy of the assignment of mortgage, the unpaid note together with due evidence of his default in payment under the terms of the loan documents (*see* CPLR 3212; RPAPL §1321; *Neighborhood Hous. Serv. of New York City v Hawkins*, 97 AD3d 554, 947 NYS2d 321 [2d Dept 2012]; *Baron Assoc., LLC v Garcia Group Enter.*, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; *Citibank, N.A. v Van Brunt Prop., LLC*, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]; *Archer Capital Fund, L.P. v GEL, LLC*, 95 AD3d 800, 944 NYS2d 179 [2d Dept 2012]; *Swedbank, AB v Hale Ave. Borrower, LLC.*, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]; *Rossrock Fund II, L.P. v Osborne*, 82 AD3d 737, 918 NYS2d 514 [2d Dept 2011]).

The standing of a plaintiff in a mortgage foreclosure action is measured by its ownership, holder status or possession of the note and mortgage at the time of the commencement of the action (*see U.S. Bank of N.Y. v Silverberg*, 86 AD3d 274, 279, 926 NYS2d 532 [2d Dept 2011]; *U.S. Bank, N.A. v Adrian Collymore*, 68 AD3d 752; *Wells Fargo Bank, N.A. v Marchione*, 69 AD3d 204, 887 NYS2d 615 [2d Dept 2009]). Because “a mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation” (*Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909, 961 NYS2d 200 [2d Dept 2013] [internal citations omitted]), a mortgage passes as an incident of the note upon its physical delivery to the plaintiff. Holder status is established where the plaintiff is the special indorsee of the note or takes possession of a mortgage note that contains an indorsement in blank on the face thereof as the mortgage follows as incident thereto (*see* UCC § 3-202; § 3-204; § 9-203[g]). Here, the plaintiff established that it took possession of the note prior to the commencement of the action and was the holder thereof as such note contained an indorsement in blank on the face thereof (*see Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674, 838 NYS2d 622 [2d Dept 2007]). The plaintiff thus established, *prima facie*, its has standing to prosecute this action.

It was thus incumbent upon the answering defendant to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's *prima facie* showing or in support of the affirmative defenses asserted in his answer or otherwise available to him (*see Flagstar Bank v Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Grogg Assocs. v South Rd. Assocs.*, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; *Wells Fargo Bank v Karla*, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; *Washington Mut. Bank v O'Connor*, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009];

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J.P. Morgan Chase Bank, N.A. v Agnello, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; *Ames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]).

In his opposing papers, defendant Baritz re-asserts his pleaded affirmative defense that the plaintiff lacks standing to prosecute its claims for foreclosure and sale. Neither the defenses raised in his answer nor those asserted on this motion rebut the plaintiff's *prima facie* showing of its entitlement to summary judgment. Defendant contends that a question of fact exists with respect to the plaintiff's standing by reason of the fact that plaintiff as servicing agent does not have an interest in the subject mortgage loan; plaintiff has no enforceable rights in the mortgage; plaintiff has no authority to affect any interest in defendant's real property and that plaintiff is unlawfully in the chain of title to the mortgage.

The court finds, however, that none of these allegations give rise to questions of fact that implicate a lack of standing on the part of the plaintiff. Here, the plaintiff established that at the time of the commencement of this action it possessed the requisite standing to prosecute its pleaded claims for foreclosure and sale of the mortgaged premises. The defendant's contentions are thus unavailing.

Accordingly, the motion for summary judgment is granted against defendant Baritz. In addition, plaintiff's request for an order fixing the default of the non-appearing, non-answering defendants and 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 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.

The defendant's order to show cause seeking, *inter alia*, leave to amend his answer, is denied in its entirety.

Dated:

8/12/2014


HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION