SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: Part 36

US BANK NATIONAL ASSOCIATION,

Index No.: 502725/13
Motion Calendar No.
Motion Sequence No.

Plaintiff(s),

-against-

MENACHEM RAB, et al.,

Defendant(s).

DECISION / ORDER

Present:
Hon. Judge Bernard J. Graham
Supreme Court Justice

Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion for summary judgment and the appointment of a referee

Papers	**Numbered**
Notice of Motion and Affidavits Annexed.....	1-2
Order to Show cause and Affidavits Annexed.....	
Answering Affidavits	
Replying Affidavits.....	
Exhibits.....	
Other:.....	

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Plaintiff, US Bank National Association ("US Bank"), has moved for an Order awarding summary judgment in favor of the plaintiff and against defendant Menachem Rab ("Mr. Rab") and to strike said defendant's answer. Plaintiff also seeks an Order to appoint a referee to compute the amount due the plaintiff pursuant to the terms of the underlying mortgage. Defendant (Mr. Rab) has not appeared to oppose the plaintiff's motion for summary judgment, but an answer to the underlying summons and complaint was served and filed by counsel for the

defendant.

Background

This action was brought to foreclose upon a first mortgage dated October 24, 2002, in the principal amount of $385,000 between GreenPoint Mortgage Funding, Inc., as mortgagee and defendant Menachem Rab as mortgagor, as to the property located at 1840 49th Street, Brooklyn, New York. As collateral security for the payment of the mortgage, the defendant executed, acknowledged and delivered to GreenPoint Mortgage Funding, Inc., a note, whereby the defendant agreed to pay the sum of $385,000 with interest thereon, installments of principal and interest to be paid pursuant to the Note in substantially equal payments on the same date of each month until maturity.

Plaintiff, in commencing this action, filed a summons, verified complaint and notice of pendency in the Office of the Clerk of Kings County on May 23, 2013. Thereafter, the summons and verified complaint was served upon the defendants, which is evidenced by the affidavits of service which are annexed to the movant's papers. Service of process upon Mr. Rab was effectuated on June 3, 2013, by service upon a person of suitable age and discretion (Mrs. Rab) at 1840 49th Street, Brooklyn, New York. Mr. Rab appeared in this proceeding by counsel, Charles Mandelbaum, Esq., who served an answer, dated July 5, 2013, which included affirmative defenses and counterclaims. None of the other defendants have appeared in this proceeding or served an answer to the verified complaint.

Plaintiff's contention

Plaintiff alleges that they are holder and owner of the subject note and mortgage. The subject note, dated October 24, 2002, had been indorsed in blank prior to the commencement of this action. As security for the note, Mr. Rab entered into a mortgage agreement with GreenPoint Mortgage Funding Inc., which mortgage was originally assigned to MERS as nominee for Greenpoint. The mortgage was thereafter assigned to Wells Fargo Bank, N.A. on March 16, 2012 and later assigned to US Bank National Association, as Legal Title Trustee for LVS Title Trust I on May 30, 2012.

Mr. Rab defaulted by failing to timely pay each and every installment of principal and interest which became due and payable on May 1, 2012, and continuing thereafter to date. Plaintiff sent a 90 day pre-foreclosure notice to the defendant on January 25, 2013, pursuant to RPAPL § 1304, and the default having not been cured, the plaintiff elected to accelerate the mortgage debt and declare all sums secured thereunder to be due and payable.

The plaintiff in seeking to strike the affirmative defenses of the defendant, sets forth the following argument, in which they maintain that the affirmative defenses are without substance and are frivolous.

Defendant's first and second affirmative defenses allege that the plaintiff failed to comply with the Notice of Default provision of the note and mortgage. In response, the plaintiff maintains that a default letter, dated January 25, 2013, was mailed to the borrower's last known address. This default notice was in compliance with the provisions of paragraph 22 of the mortgage.

Defendant's third affirmative defense alleges that he had tendered the amount due under the note and mortgage, but that the plaintiff wrongfully refused to accept the amounts tendered. In response, plaintiff maintains that no proof has been adduced of the alleged attempt to make payment to the plaintiff or that defendant had the funds available to make payment.

Defendant's fourth affirmative defense alleges that defendant has the right to reinstate the mortgage. In response, plaintiff maintains that defendant always has the right to repay the arrears and costs which could be done at any stage of this proceeding until the foreclosure sale.

Defendant's fifth and sixth affirmative defense alleges that plaintiff as a foreign corporation cannot maintain this action unless they post a bond. In response, plaintiff maintains that BCL § 1312 does not cover out of state banking institutions which merely lend money in New York secured by real property mortgages. In addition, Banking Law § 200 created an exception for foreign banking corporations which do not maintain an office in this state for the transaction of business.

Defendant's seventh affirmative defense alleges that the court lacks personal jurisdiction due to the failure of the plaintiff to serve the summons upon the defendant by either personal or substituted service. In response, the plaintiff maintains that service was effectuated upon Mr. Rab by serving a person of suitable age and discretion, by serving a family member at 1840 49^{h} Street,

Brooklyn, New York. A copy of the summons and complaint was then mailed to the defendant. In addition, pursuant to CPLR § 3211 (e), a party objecting to sufficiency of service of process within its answer will waive their objection to service if they do not move for judgment within 60 days.

Defendant's eighth affirmative defense alleges that the plaintiff lacks standing to commence this action. In response, plaintiff maintains that they have standing where they are both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time of commencement of the action.

Defendant's ninth affirmative defense alleges that the plaintiff failed to comply with the provisions of the Home Equity Protection Act of 2007. In response, plaintiff maintains that the statute of limitations for actions for damages pursuant to this statute is one year after the loan origination. Since the loan originated in 2002 and the defendant's answer is in 2013, this claim would be time barred.

Defendant's tenth affirmative defense alleges that the mortgage is the product of predatory lending practices. In response, plaintiff argues that the defendant failed to assert any facts or provide any evidence of these alleged predatory practices.

Defendant's eleventh affirmative defense alleges a violation of the disclosure requirements of the Truth in Lending Act ("TILA") and Regulation Z. In response, plaintiff maintains that the statute of limitations for TILA claim damages run one year after the loan origination. Since the loan originated in 2002 and the defendant's answer is in 2013, this claim would be time barred.

Defendant's twelfth affirmative defense alleges that the plaintiff and/or its predecessors in interest violated the Deceptive Practices Act (General Business Law § 349) . In response, plaintiff contends that in order to assert a violation of the General Business Law § 349 (GBL § 349), a party must prove that the alleged acts would potentially affect similarly situated consumers. In addition, the plaintiff would have to set forth that the plaintiff was involved in a broad scheme that involved efforts to mislead home purchasers.

Defendant's thirteenth affirmative defense alleges that the plaintiff and/or its predecessors in interest fraudulently and knowingly induced the defendant to enter into the subject transaction. In response, plaintiff maintains that in order to establish fraud, a plaintiff must show "a material

misrepresentation of an existing fact, made with knowledge of its falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages (MBIA Ins. Corp. v. Countrywide Home Loans, Inc., 87 AD3d 287, 928 NYS2d 229 (1st Dept. 2011)). Defendant failed to offer any evidence that plaintiff committed any of these elements of fraud nor was the fraud claim plead in detail.

Defendant's fourteenth affirmative defense alleges that the mortgage sued upon is a high cost loan as defined by section § 6 of the Banking Law and that the plaintiff failed to comply with the requirements of the Banking Law. In response, plaintiff maintains that the defendant did not identify which portion of the statute has been violated.

Defendant's fifteenth affirmative defense alleges the failure of the plaintiff to comply with RPAPL § 1303 and § 1304. In response, plaintiff submits proof of the mailing of ninety day default notices to the defendant by regular mail and certified mail at defendant's last known address as well as a copy of the help for homeowners notice which was attached to the complaint.

Defendant's sixteenth affirmative defense alleges that the plaintiff waived enforcement of the terms of the note by its inaction. In response, plaintiff maintains that in order to have a waiver there has to be an intentional relinquishment of a known right (see Heller Financial, Inc. v. Apple Tree Realty Assoc., 238 AD2d 198, 656 NYS2d 247 (1st Dept. 1997).

Defendant's seventeenth affirmative defense alleges that the plaintiff had agreed to alter the terms of the note and mortgage either orally or through its conduct. In response, the plaintiff maintains that the parol evidence rule would bar the modification of the note and mortgage.

A foreclosing lender establishes its prima facie case by submitting the relevant mortgage, the underlying note, and evidence of a default (see Countrywide Home Loans, Inc. v. Delphonse, 64 AD3d 624, 883 NYS2d 135 (2nd Dept. 2009); LPP Mortgage, Ltd. v. Card Corp., 17 AD3d 103, 793 NYS2d 346 (1st Dept. 2005)). Here, US Bank demonstrated its entitlement to summary judgment by submitting the note, mortgage, assignment of mortgage and evidence that defendants defaulted on its obligations under the note and mortgage. It is undisputed that the defendants failed to make the payments due and owing commencing on or about May 1, 2012, or any payment due subsequent thereto. After the lender establishes its prima facie claim, the burden shifts to the defendants to provide proof in admissible form of the existence of a triable issue of

fact (see Wells Fargo Bank v. Webster, 61 Ad3d 856, 877 NYS2d 200 (2nd Dept. 2009); Rose v. Levine, 52 AD3d 800, 861 NYS2d 374 (2nd Dept. 2008)). The defendants have not opposed the motion for summary judgment nor have they appeared in opposition thereto.

Discussion:

This Court has reviewed the submissions of the plaintiff and considered the argument presented herein, as well as the court file and the applicable law in making its determination with respect to the underlying mortgage and note, and the relief sought herein.

It appears from the documents submitted that the plaintiff has demonstrated its prima facie entitlement to summary judgment by submitting the note, mortgage, the assignment of mortgage and an affidavit that the borrower defaulted in the payment of its obligations under the note and mortgage (see Wells Fargo Bank v. Karla, 71 AD3d 1006, 896 NYS2d 681 (2nd Dept. 2010); Capstone Bus. Credit v. Imperia Family Realty, 71 AD3d 1006, 895 NYS2d 199 (2nd Dept. 2010)). Here the defendant/borrower does not deny in its answer that the documents related to the note and mortgage were executed, and that the loan proceeds were received by the defendant.

A mortgagee establishes a prima facie case for foreclosure when it presents the mortgage, unpaid note with mortgagor's signature and evidence of a default (see Cochran Inv. v. Jackson, 38 AD3d 704, 705, 834 NYS2d 198 (2nd Dept. 2007)).

This Court has reviewed the affirmative defenses set forth by the defendants in their answer, the responses by plaintiff and has addressed several of these arguments below.

As to the issue of standing, this Court is not persuaded by the attempt by Mr. Rab to challenge the standing of the plaintiff. The plaintiff has established that it has standing as it was in possession of the indorsed in blank note at the time of commencement of this proceeding. A plaintiff has standing in a foreclosure action where it is both the holder of the note and mortgage or assignee or holder of the subject mortgage and the holder or assignee of the underlying note, either by physical delivery or execution of a written assignment (see Wells Fargo Bank, N.A. v. Marchione, 69 AD3d 204, 207-09, 887 NYS2d 615 (2nd Dept. 2009) and has been in continuous possession of the note and mortgage since prior to the commencement of this proceeding. A note and mortgage may be transferred either by a written assignment or the physical delivery of the

note prior to the commencement of the foreclosure action. The mortgage passes with the debt as an inseparable incident (see MERS v. Coakley, 41AD2d 674, 838 NYS2d 622 (2nd Dept. 2007)).

As to the defense of lack of personal jurisdiction and service of process, plaintiff has submitted the affidavit of service which provides that service of process was effectuated upon Mr. Rab by serving a person of suitable age and discretion followed by a mailing in accordance with CPLR § 308. An affidavit of a process server constitutes prima facie evidence of proper service pursuant to CPLR § 308 (see Wells Fargo v. McGloster, 48 AD 3d 457, 849 NYS2d 784 (2nd Dept. 2010; MERS v. Schotter, 50 AD3d 983, 8572d 592 (2nd Dept. 2008)).

The plaintiff has satisfactorily set forth its compliance with RPAPL § 1304 by submitting a copy of the 90 day notice letter which was mailed to defendant's last known address by certified and regular mail. In addition, the plaintiff set forth its compliance with RPAPL § 1304 by submitting a copy of the Help for Homeowners notice and the affidavit of service that the summons and complaint were served upon the defendant on blue colored paper (see Exhibit "D" and "F" annexed to plaintiff's motion).

As to any alleged violation of the Truth in Lending Act (TILA), there has been no proof adduced that the plaintiff violated this statute. There has been no allegation that the defendant did not acknowledge receipt of the TILA disclosure document as well as the notice of the right to cancel the transaction which provides for a period for rescission.

As to the claim of a possible waiver by the plaintiff, to establish that the plaintiff waived any of their rights under this loan agreement, it is necessary to show there has been an intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it (see Wild Oaks LLC v. Beehan, 2012 NY Misc. Lexis 1128, 2012 NY Slip Op. 30601(u) (Sup. Ct. Suffolk Cty., 2012)).

As to the defense of estoppel, defendants must establish the elements of equitable estoppel, which include a material misrepresentation, reliance upon the material misrepresentation and a prejudicial change in position or an injury to a party who relied upon the material misrepresentation. This defense cannot be asserted by a party who was induced to do what he is already legally required to do (see Bank Leumi Tr. Co. v. D'Evori Int'l., Inc., 163 AD2d 26, 33, 558 NYS2d 909 (1st Dept. 1990)). Here, there was no valid argument presented that the note and

mortgage were anything but clear and unambiguous and there has not been a showing that any misrepresentation has been made or that there was reliance upon such misrepresentation.

While, no proof has been adduced by the defendant that the plaintiff has made any fraudulent representations, a mortgage may not be set aside solely because the underlying transaction is tainted by a fraudulent representation (see Jo Ann Homes at Bellmore, Inc. v. Dworetz, 25 NY2d 112, 122, 302 NYS2d 799 (1969)). There has been no proof adduced that the plaintiff performed any improper acts in the servicing of the loan and had violated any statute.

As to the alleged violation of the Banking Law, the defendant failed to identify which section of the statute was violated by the plaintiff.

As to the alleged violation of the General Business Law § 349, the defendant has not offered any specific details as to whether this statute has been violated. Whether a representation or omission is a deceptive act or practice depends upon the likelihood that it will mislead a reasonable consumer acting reasonable under the circumstances (see Gomez v. New York Law School, 103 AD3d 13, 956 NYS2d 54 (1st Dept. 2012)). In Karakus v. Wells Fargo Bank, N.A., 941 F. Supp 2d 318, 340 (EDNY 2013), the Court held that a reasonable consumer should know the state of his/her own finances and whether or not he/she can afford a certain monthly payment. The fact that a borrower sought and received a loan that was not affordable does not mean that one could proceed on a claim based upon an alleged violation of GBL § 349 against the party that made the mistake possible (the bank).

Accordingly, this Court can not find that the affirmative defenses of the defendant are supported in law or in fact and, as a result, the affirmative defenses set forth by the defendant is stricken. Summary judgment shall be granted if upon all the papers and proof submitted, the cause of action shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party (see Zuckerman v. City of New York, 49 NY2d 557 (1980)).

Conclusion

This Court finds that the defendant has not raised any defense in his answer, sufficient to prevent the Court from awarding summary judgment to the plaintiff. By reason of there being no triable issues of fact in dispute, the affirmative defenses of the defendant are stricken and an

award of summary judgment to the plaintiff is granted. This Court will appoint a referee to compute the sums due and owing the plaintiff pursuant to the terms of the mortgage upon submission to chambers of a proposed order.

This constitutes the decision and order of the Court.

Enter:

Dated: June 26 ,2014
Brooklyn, New York

Hon. Bernard J. Graham, Justice
Supreme Court, Kings County