

Central Mtge. Co. v Jahnsen

2014 NY Slip Op 32447(U)

September 3, 2014

Sup Ct, Suffolk County

Docket Number: 11-19080

Judge: Jr., Andrew G. Tarantino

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. ANDREW G. TARANTINO, JR.
Acting Justice Supreme Court

MOTION DATE 6-28-13
MOTION DATE 9-19-13
Mot. Seq. # 002 - MG
Mot. Seq. # 003 - XMD

-----X

CENTRAL MORTGAGE COMPANY,

Plaintiff,

BERKMAN, HENOCH, PETERSON,
PEDDY & FENCHEL, P.C.
Attorneys for Plaintiff
100 Garden City Plaza
Garden City, New York 11530

- against -

SUSAN JAHNSEN A/K/A SUSAN E. JAHNSEN
A/K/A SUSAN FERRARA A/K/A SUSAN
GULOTTA A/K/A SUSAN GENTILE,
ANTONIO J. FERRARA, NEW YORK STATE
DEPARTMENT OF TAXATION AND
FINANCE, HOUSEHOLD ARROW
FINANCIAL SERVICES, LLC, CAPITAL ONE
BANK, PEOPLE OF THE STATE OF NEW
YORK, UNITED STATES OF AMERICA
(EASTERN DISTRICT),

MACCO & STERN LLP
Attorney for Defendant
Susan Jahnsen a/k/a Susan E. Jahnsen a/k/a
Susan Ferrara a/k/a Susan Gulotta a/k/a
Susan Gentile
135 Pinelawn Road, Suite 120 S
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ANTONIO J. FERRARA
Defendant Pro Se
21 Egret Way
Center Moriches, New York 11934

"JOHN DOE #1" through "JOHN DOE #12", the
last twelve names being fictitious and unknown to
plaintiff, the persons or parties intended being the
tenants, occupants, persons or corporations, if any,
having or claiming an interest in or lien upon the
premises, described in the complaint,

Defendants.

-----X

Upon the following papers numbered 1 to 39 read on this motion for summary judgment and an order of reference and cross motion for leave to amend answer; Notice of Motion/ Order to Show Cause and supporting papers 1 - 21; Notice of Cross Motion and supporting papers 22 - 35; Answering Affidavits and supporting papers 36 - 39; ~~Replying Affidavits and supporting papers _____; Other _____; (and after hearing counsel in support and opposed to the motion) it is,~~

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ORDERED that the motion by plaintiff, Central Mortgage Company (Central Mortgage), for an order pursuant to CPLR 3212 granting summary judgment in its favor against defendants Susan Jahnsen a/k/a Susan E. Jahnsen a/k/a Susan Ferrara a/k/a Susan Gulotta a/k/a Susan Gentile (defendant Jahnsen), for leave to amend the caption, for an order fixing the defaults of the non-appearing, non-answering defendants, and for an order of reference pursuant to RPAPL 1321 is granted; and it is further

ORDERED that the caption is hereby amended by deleting therefrom defendants "John Doe #1" through "John Doe #12"; and it is further

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

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

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF SUFFOLK

 CENTRAL MORTGAGE COMPANY, X

Plaintiff,

- against -

SUSAN JAHNSEN A/K/A SUSAN E. JAHNSEN A/K/A
 SUSAN FERRARA A/K/A SUSAN GULOTTA A/K/A
 SUSAN GENTILE, ANTONIO J. FERRARA, NEW
 YORK STATE DEPARTMENT OF TAXATION AND
 FINANCE, HOUSEHOLD ARROW FINANCIAL
 SERVICES, LLC, CAPITAL ONE BANK, PEOPLE OF
 THE STATE OF NEW YORK, UNITED STATES OF
 AMERICA (EASTERN DISTRICT),

Defendants.

 X

ORDERED that the cross motion by defendant Jahnsen for an order pursuant to CPLR 3025 for leave to amend her answer is denied.

This is an action to foreclose a mortgage on property known as 21 Egret Way, Center Moriches, New York. On March 17, 2005, defendant Jahnsen executed an adjustable rate note in favor of Downey Savings and Loan Association, F.A. (Downey) agreeing to pay the sum of \$337,500.00. On said date, defendant Jahnsen also executed a mortgage in the principal sum of \$337,500.00 on the subject property.

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The mortgage was recorded on June 14, 2005 in the Suffolk County Clerk's Office. By assignment dated December 13, 2005, Downey assigned said note and mortgage to Mortgage Electronic Registration Systems, Inc. (MERS), a Delaware Corporation, its successors or assigns, as nominee for Central Mortgage Company, an Arkansas Corporation. Said assignment was recorded in the Suffolk County Clerk's Office on January 20, 2006. Thereafter, by assignment dated May 23, 2011, MERS, as nominee for Central Mortgage Company, assigned the subject mortgage to plaintiff Central Mortgage. Said assignment was recorded in the Suffolk County Clerk's Office on June 21, 2011.

Central Mortgage Company sent a notice of default dated December 7, 2009 to defendant Jahnsen stating that she had defaulted on her mortgage loan and that the amount past due was \$10,141.86. As a result of her continuing default, plaintiff commenced this foreclosure action on June 13, 2011. In its complaint, plaintiff alleges in pertinent part that defendant Jahnsen breached her obligations under the terms of the note and mortgage by failing to make her monthly payments due on October 1, 2009 and thereafter.

Defendant Jahnsen interposed an answer with six affirmative defenses. The affirmative defenses asserted by defendant Jahnsen in her answer include: the complaint fails to state a cause of action upon which relief may be based; plaintiff lacks capacity to maintain this action; plaintiff has materially breached the loan agreement by demanding mortgage payments of principal and interest calculated at a rate in excess of that provided or authorized by the loan agreement; plaintiff has acted with unclean hands and in bad faith; plaintiff has failed to comply with all conditions precedent to the commencement of this action; plaintiff lacks standing.

The Court's computerized records indicate that a foreclosure settlement conference was held on February 1, 2012 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 defendant Jahnsen breached her obligations under the terms of the loan agreement and mortgage by failing to tender monthly payments. In support of its motion, plaintiff submits among other things, the affirmation of Alan J. Waintraub, Esq. in support of the motion, the affidavit of Teresa Swayze, assistant vice president of Central Mortgage Company, the affirmation of Alan Waintraub, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11), the affidavit of Ben A. Coleman, vice president of Central Mortgage Company, the pleadings, the note, mortgage and assignments of mortgage, a notice of default, proof of notices pursuant to RPAPL 1320, 1303 and 1304, affidavits of service of the summons and complaint, and an affidavit of service of the instant summary judgment motion upon the defendants in this action.

"[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, 764 NYS2d 635 [2d Dept 2003]; see *Argent Mtge. Co., LLC v Mentosana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]; *Wells Fargo Bank, N.A. v Webster*, 61 AD3d 856, 877 NYS2d 200 [2d Dept 2009]). "The burden then shifts to the 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

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oppressive or unconscionable conduct on the part of the plaintiff” (*U.S. Bank Natl. Assn. TR U/S 6/01/98 [Home Equity Loan Trust 1998–2] v Alvarez*, 49 AD3d 711, 711, 854 NYS2d 171 [2d Dept 2008], quoting *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 664 NYS2d 345 [2d Dept 1997], *lv to appeal dismissed* 91 NY2d 1003, 676 NYS2d 129 [1998]; see also *Emigrant Mtge. Co., Inc. v Beckerman*, 105 AD3d 895, 895, 964 NYS2d 548 [2d Dept 2013]).

Here, plaintiff established its prima facie entitlement to summary judgment by providing evidence of the assignment, the mortgage, the note, the default of defendant Jahnsen, and by demonstrating that her affirmative defenses are without merit (see *Jessabell Realty Corp. v Gonzales*, 117 AD3d 908, 985 NYS2d 897 [2d Dept 2014]; *Bank of New York Mellon Trust Co. v McCall*, 116 AD3d 993, 985 NYS2d 255 [2d Dept 2014]; *North Bright Capital, LLC v 705 Flatbush Realty, LLC*, 66 AD3d 977, 889 NYS2d 596 [2d Dept 2009]; *Countrywide Home Loans, Inc. v Delphonse*, 64 AD3d 624, 883 NYS2d 135 [2d Dept 2009]). Ben A. Coleman, vice president of Central Mortgage Company, attests that defendant Jahnsen defaulted on her loan payments; that a notice of default was sent to her; that a 90-day pre-foreclosure notice pursuant to RPAPL 1304 was sent to defendant Jahnsen by certified mail; and, that the default has not been cured.

The burden then shifted to defendant Jahnsen to lay bare her proof in opposition to plaintiff’s prima facie showing (see *Jessabell Realty Corp. v Gonzales, supra*).

Defendant Jahnsen cross-moves for leave to amend her answer and opposes plaintiff’s motion based on lack of standing when the action was commenced. She asserts that she was only able to inspect the mortgage file documents when plaintiff made its summary judgment motion inasmuch as the documents were in the exclusive possession and control of plaintiff and its predecessors in interest. She asserts that plaintiff does not own the loan and has no cognizable interest in the loan. Defendant argues that upon information and belief that defendant’s note is owned and has been in the possession of a Real Estate Mortgage Investment Conduit (REMIC).

By her proposed amended answer, defendant Jahnsen seeks, *inter alia*, rescission of the assignment of the mortgage pursuant to Real Property Law § 329 and a declaration that the transfer of the loan by endorsement of the note and by assignment of the mortgage is null and void.

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]). “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]). “Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation” (*HSBC Bank USA v Hernandez, supra*). Because “a mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation,” it “passes as an incident to the note” when the note is transferred (*Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909, 961 NYS2d 200 [2d Dept 2013] [internal citations omitted]). Holder status is demonstrated when the

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plaintiff is the special endorsee of the note or takes possession of a mortgage note containing an endorsement in blank since the mortgage follows as an incident to the note (*see* UCC § 3-202; § 3-204; § 9-203[g]).

Teresa Swayze, assistant vice president of Central Mortgage Company, avers in her affidavit in support of plaintiff's motion that she has reviewed the business records concerning the subject loan and has determined that "the subject Note was physically delivered, surrendered and conveyed from DOWNEY SAVINGS AND LOAN ASSOCIATION, F.A. to PLAINTIFF, along with all right, title, and interest in and thereto, on 12/1/05 (the 'Delivery Date')." Furthermore, "[t]he transfer and assignment of the Note first became effective on the said Delivery Date, when DOWNEY SAVINGS AND LOAN ASSOCIATION, F.A. physically delivered the Note to Plaintiff with the full intent of surrendering all rights therein and thereto, and Plaintiff accepted all rights, title, and interest in and thereto." Swayze further avers that "[s]ince the Delivery Date, and therefor prior to the commencement of this action, Plaintiff has had actual physical possession of the Note, Mortgage and all other loan documentation necessary to establish the mortgage indebtedness and its standing to commence and maintain this foreclosure action." Here, plaintiff established through admissible evidence its standing as the holder of the note and mortgage by demonstrating that it obtained physical possession of the note on December 1, 2005, almost six years prior to the commencement of this action (*see Aurora Loan Services, LLC v Taylor*, 114 AD3d 627, 980 NYS2d 475 [2d Dept 2014]; *Deutsche Bank Nat Trust Co. v Whalen*, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]). Defendant Jahnsen offers no evidence to contradict said factual averments and, therefore, failed to raise a triable issue of fact concerning plaintiff's standing (*see id.*). In addition, inasmuch as there was physical delivery of the note, and the mortgage passes as an incident to the note, any alleged lack of authority of MERS to assign the mortgage is rendered immaterial (*see MLCFC 2007-9 Mixed Astoria, LLC v 36-02 35th Ave. Development, LLC*, 116 AD3d 745, 983 NYS2d 604 [2d Dept 2014]; *Bank of New York v Silverberg*, 86 AD3d 274, 926 NYS2d 532 [2d Dept 2011]).

The remaining arguments in opposition to plaintiff's motion fail to raise a triable issue of fact concerning any bona fide defense to foreclosure in opposition to the motion for summary judgment and by the remaining affirmative defenses (*see Rimbambito, LLC v Lee*, 118 AD3d 690, 986 NYS2d 855 [2d Dept 2014]; *Bank of Smithtown v 219 Sagg Main, LLC*, 107 AD3d 654, 968 NYS2d 95 [2d Dept 2013][unclean hands]; *American Airlines Federal Credit Union v Mohamed*, 117 AD3d 974, 986 NYS2d 530 [2d Dept 2014] [lack of good faith in denying loan modification]; *Putnam County Sav. Bank v Mastrantone*, 111 AD3d 914, 975 NYS2d 684 [2d Dept 2013] [lack of personal jurisdiction]). Notably, defendant Jahnsen in her affidavit does not deny that she defaulted on her mortgage payments. Accordingly, the motion for summary judgment is granted in favor of plaintiff against defendant Jahnsen.

As to defendant's application seeking leave to amend her answer and for, inter alia, a declaration that the transfer of the loan by endorsement of the note and by assignment of the mortgage is null and void, such is denied. Leave to amend a pleading should be "freely given absent prejudice or surprise" (*Rosicki, Rosicki & Assoc., P.C. v Cochems*, 59 AD3d 512, 873 NYS2d 184 [2d Dept 2009]) and "[a] court should not examine the merits or legal sufficiency of the proposed amendment unless it is palpably insufficient or patently devoid of merit on its face" (*Rosicki*, 59 AD3d 512; *see Greco v Christoffersen*, 70 AD3d 769, 896 NYS2d 363 [2d Dept 2010]). If it is neither, leave to amend should be granted unless an adverse party demonstrates that surprise or prejudice will directly result from the amendment (*see Koenig v Action Target, Inc.*, 76 AD3d 997, 907 NYS2d 692 [2d Dept 2010]; *Yemini v Goldberg*, 46 AD3d 806, 848 NYS2d 676

[2d Dept 2007]). Furthermore, “[a] determination whether to grant such leave is within the Supreme Court’s broad discretion, and the exercise of that discretion will not be lightly disturbed” (*Greco v Christoffersen*, 70 AD3d at 770, 896 NYS2d 363 [internal quotation marks omitted]).

The proposed first and second counterclaims for declaratory judgment are based on the alleged failure to include the mortgage in the servicing pool within the pooling and servicing agreement’s (PSA’s) time frame and the trust’s terms, plaintiff’s not being the lawful owner of the note and its lack of standing, and the defendant being a beneficiary of the PSA. The proposed third counterclaim for declaratory judgment is based on the aforementioned allegations as well as the assertion that the recorded assignment of mortgage to plaintiff is without force and effect, that plaintiff has no authority to take any action affecting title to interest in the real property, plaintiff has rendered title to defendant’s real property unmarketable and there exists another entity that is the only entity that can satisfy the instant mortgage lien.

To the extent that defendant Jahnsen argues failure to demonstrate compliance with the PSA, she lacks standing to void any purported unauthorized acts of plaintiff trustee on said basis inasmuch as defendant is not a party to, nor beneficiary of, the securitization trusts (*see Rajamin v Deutsche Bank Natl. Trust Co.*, ___ F3d ___, 2014 WL 2922317, 2014 US App LEXIS 12251 [2d Cir 2014]). Based on the foregoing, those proposed affirmative defenses and counterclaims lack merit (*see Mishal v Fiduciary Holdings, LLC*, 109 AD3d 885, 971 NYS2d 334 [2d Dept 2013]). Likewise, to the extent that defendant Jahnsen otherwise argues plaintiff’s lack of standing, those affirmative defenses were raised in defendant’s cross motion and are addressed herein. As such, they are without merit. Therefore, the cross motion by defendant Jahnsen for leave to amend her answer is denied.

Also unavailing is the defendant’s assertion that plaintiff’s summary judgment motion should be denied in order to afford defendant an opportunity to obtain discovery. 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]). The opposing papers submitted by defendant Jahnsen were insufficient to satisfy the aforementioned statutory burden. Thus, defendant failed to sufficiently demonstrate that she 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]). Defendant’s claim is thus rejected as unmeritorious.

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,

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965 NYS2d 511[2d Dept 2013]; *Dupps v Betancourt*, 99 AD3d 855, 952 NYS2d 585 [2d Dept 2012]; *Atlantic Cas. Ins. Co. v RJNJ Servs., Inc.*, 89 AD3d 649, 932 NYS2d 109 [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, 641 NYS2d 440 [3d Dept 1996]).

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

Dated: Sept 3 2014



A.J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION