

OneWest Bank FSB v Pallotta
2014 NY Slip Op 32499(U)
September 10, 2014
Sup Ct, Suffolk County
Docket Number: 43691/09
Judge: Joseph Farneti
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SUPREME COURT - STATE OF NEW YORK
IAS PART 37 - SUFFOLK COUNTYPRESENT: Hon. JOSEPH FARNETI
Acting Justice Supreme CourtMOTION DATE 2-22-13
ADJ. DATE 6-5-14
Mot. Seq. #001 MG

ONEWEST BANK FSB,

Plaintiff,

-against-

GERARD A. PALLOTTA; MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC. AS NOMINEE
FOR AMNET MORTGAGE IN LIEU OF TRUE
CORPORATE NAME AMERICAN MORTGAGE
NETWORK, INC.; "JOHN DOE #1-5 and "JANE
DOE #1-5" said names being fictitious, it being the
intention of Plaintiff to designate any and all
occupants, tenants, persons or corporations, if any,
having or claiming an interest in or lien upon the
premises being foreclosed herein,

FEIN, SUCH & CRANE, LLP
Attorneys for Plaintiff
747 Chestnut Ridge Road, Suite 200
Chestnut Ridge, N. Y. 10977-6216DOUGLAS A DURNIN, ESQ.
Attorney for Defendant
Gerard A. Palotta
5355 Merrick Road
Massapequa, N. Y. 11758Defendants.

Upon the following papers numbered 1 to 23 read on this motion for summary judgment and an order of reference;
Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; ~~Notice of Cross Motion and supporting papers _____~~;
Answering Affidavits and supporting papers 15 - 19; Replying Affidavits and supporting papers 20 - 23; ~~Other _____; (and after
hearing counsel in support and opposed to the motion) it is;~~

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

ORDERED that this motion by plaintiff OneWest Bank FSB ("OneWest"), pursuant to CPLR
3212, for summary judgment on its verified complaint, to strike the answer of Gerard A. Pallotta
("Pallotta") 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 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 Deutsche Bank National Trust Company, as Trustee of the Residential Asset Securitization Trust 2006-A6, Mortgage Pass-Through Certificates, Series 2006-F under the Pooling and Servicing Agreement Dated May 1, 2006 in place and stead of plaintiff OneWest and by striking therefrom the names of defendants “John Doe #1” through “John Doe #5” and “Jane Doe #1” through “Jane Doe #5”; 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

DEUTSCHE BANK NATIONAL TRUST COMPANY,
 AS TRUSTEE OF THE RESIDENTIAL ASSET
 SECURITIZATION TRUST 2006-A6, MORTGAGE
 PASS-THROUGH CERTIFICATES, SERIES 2006-F
 UNDER THE POOLING AND SERVICING
 AGREEMENT DATED MAY 1, 2006

Plaintiff,

-against-

GERARD A. PALLOTTA; MORTGAGE ELECTRONIC
 REGISTRATION SYSTEMS, INC. AS NOMINEE
 FOR AMNET MORTGAGE IN LIEU OF TRUE
 CORPORATE NAME AMERICAN MORTGAGE
 NETWORK, INC.,

Defendants.

x

This is an action to foreclose a mortgage on premises known as 214 Tahlulah Lane, West Islip, New York. On March 17, 2006, Pallotta executed a note in favor of Amnet Mortgage in lieu of true corporate name American Mortgage Network, Inc. (“Amnet”) agreeing to pay the sum of \$649,000.00 at the yearly rate of 7.500 percent. On the same date, Pallotta executed a first mortgage in the principal sum of \$649,000.00 on the subject property. The mortgage indicated Amnet to be the lender and Mortgage Electronic Registration Systems, Inc. (“MERS”) to be the nominee of Amnet as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on May 18, 2006 in the Suffolk County Clerk’s Office. Thereafter, on October 16, 2009, the mortgage was transferred by assignment of mortgage from MERS, as nominee for Amnet, to plaintiff

OneWest and recorded on November 5, 2009.

A notice of default dated July 3, 2009 was sent to Pallotta stating that he had defaulted on his mortgage loan and that the amount past due was \$9,389.79. As a result of Pallotta's continuing default, plaintiff commenced this foreclosure action on November 4, 2009. In its complaint, plaintiff alleges in pertinent part that Pallotta breached his obligations under the terms of the note and mortgage by failing to make monthly payments. Pallotta interposed an answer consisting of a general denial.

The Court's computerized records indicate that a foreclosure settlement conference was held on May 13, 2010, at which time this matter was referred as an IAS case as 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 Pallotta failed to comply with the terms of the loan agreement and mortgage and, that Pallotta's general denials raised no issues of fact for trial. In support of its motion, plaintiff submits among other things: the sworn affidavits of Forrest McKnight and Caryn Edwards, assistant secretaries of OneWest; the affirmations of Michael S. Hanusek, Esq. and Deana Cheli, Esq. in support of the instant motion; the affirmation of Michael S. Hanusek, 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; notice of default; notices pursuant to RPAPL 1320, 1304 and 1303; affidavits of service for the summons and complaint; and, an affidavit of service for the instant summary judgment motion upon Pallotta's counsel. Pallotta has submitted opposition to 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 Mentasana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Once a plaintiff has made this showing, the burden then shifts to the defendant to establish by admissible evidence the existence of a triable issue of fact as to a defense (see *Washington Mut. Bank v Valencia*, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]).

Here, plaintiff produced the note and mortgage executed by Pallotta, as well as evidence of defendant's nonpayment, thereby establishing a *prima facie* case as a matter of law (see *Wells Fargo Bank Minnesota, Natl. Assn. v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). Forrest McKnight, assistant secretary of OneWest, avers that Pallotta failed to comply with the terms of the note and mortgage by failing to make monthly payments commencing with the payment due on May 1, 2009 and subsequent payments thereafter. Caryn Edwards, assistant secretary of OneWest, states that Pallotta initially defaulted on his payment due on May 1, 2009; that the default has not been cured; that a notice of default was mailed to Pallotta on July 3, 2009 at his last known address; and, that 90 day pre-foreclosure notices was mailed to Pallotta prior to February 13, 2010 by registered or certified mail and also by first class mail to the address of the subject property and to Pallotta's last known address, if different.

In opposition to the instant motion for summary judgment, Pallotta asserts that plaintiff lacks standing to prosecute this action as it has failed to submit sufficient evidence that it has physical possession of the note and that the mortgage loan was validly assigned to plaintiff. In addition, Pallotta asserts that plaintiff failed to properly comply with the requirements of RPAPL 1304.

Initially addressing Pallotta's argument that plaintiff herein lacks standing, it is well established that "where a defendant does not challenge a plaintiff's standing, the plaintiff may be relieved of its obligation to prove that it is the proper party to seek the requested relief." (*Wells Fargo Bank Minnesota Natl. Assn. v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). "[A]n argument that a plaintiff lacks standing, if not asserted in the defendant's answer or in a pre-answer motion to dismiss the complaint, is waived pursuant to CPLR 3211 (e)" [citations omitted] (see *Wells Fargo Bank Minn., NA v Mastropaolo*, 42 AD3d 239, 242; see also *US Bank, NA v Emmanuel*, 83 AD3d 1047, 921 NYS2d 320 [2d Dept 2011]; *Deutsche Bank Natl. Trust Co. v Hussain*, 78 AD3d 989, 912 NYS2d 595 [2d Dept. 2010]; *Countrywide Home Loans Serv., LP v Albert*, 78 AD3d 983, 912 NYS2d 96 [2d Dept 2010]; *Aames Funding Corp. v Houston*, 57 AD3d 808, 872 NYS2d 134 [2d Dept 2008]). Here, the assertion of lack of standing is unavailing as Pallotta waived such defense by failing to assert it in a timely pre-answer motion to dismiss or as an affirmative defense in his answer (see *Deutsche Bank Natl. Trust Co. v Young*, 66 AD3d 819, 886 NYS2d 617 [2d Dept 2009]).

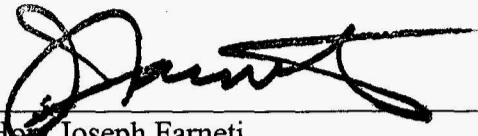
It is also well-settled that proper service of the notice required by RPAPL 1304 is a condition precedent to the commencement of a residential foreclosure action, and is the plaintiff's burden to establish (see *Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909, 961 NYS2d 200 [2d Dept 2013]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]; *First Natl. Bank of Chicago v Silver*, 73 AD3d 162, 899 NYS2d 256 [2d Dept 2010]). Here, the plaintiff satisfied its burden that service of the RPAPL 1304 notice was properly made. Pallotta's bare and unsubstantiated denial of receipt of the RPAPL 1304 notice was insufficient to rebut the presumption of proper service created by the affidavit of service (see *id.*; *Deutsche Bank Natl. Trust Co. v Hussain*, 78 AD3d 989, 912 NYS2d 595 [2d Dept 2010]). In addition, annexed to the plaintiff's motion is a copy of the RPAPL 1304 notice, an affidavit of mail service by Robert Eisele, a certified mail receipt, and a copy of the addressed envelope containing the reference number for certified mail. Thus, Pallotta's mere denial of receipt was insufficient to rebut the affidavits of Robert Eisele and Caryn Edwards that a proper mailing was made (see *Kihl v Pfeffer*, 94 NY2d 118, 700 NYS2d 87 [1999]).

In light of the foregoing, the motion for summary judgment is granted against Pallotta and his answer is stricken. Plaintiff's request for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is also granted (see *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]).

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

Dated: September 10, 2014



Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION X NON-FINAL DISPOSITION