

**Central Mtge. Co. v Davis**

2014 NY Slip Op 32532(U)

September 25, 2014

Supreme Court, Suffolk County

Docket Number: 09-50074

Judge: Joseph A. Santorelli

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 10 - SUFFOLK COUNTY

COPY

**PRESENT:**

Hon. JOSEPH A. SANTORELLI  
Justice of the Supreme Court

MOTION DATE 9-17-13  
ADJ. DATE \_\_\_\_\_  
Mot. Seq. # 001 - MG  
              # 002 - XMD

-----X  
CENTRAL MORTGAGE COMPANY, :  
  : Plaintiff, :  
  : - against - :  
ROSEMARY E. DAVIS, GEORGE M. SIKORA, :  
COREY DAVIS, CITIBANK, N.A., TRISTATE :  
CAPITAL CORPORATION, DISCOVER BANK, :  
PALISADES ACQUISITION XVI, LLC, UNITED :  
STATES OF AMERICA (EASTERN DISTRICT), :  
"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 or lien upon the :  
premises, described in the complaint, :  
  : Defendants. :  
-----X

BERKMAN, HENOCH, PETERSON,  
PEDDY & FENCHEL, P.C.  
Attorney for Plaintiff  
100 Garden City Plaza  
Garden City, New York 11530  
  
RICHARD J. SULLIVAN, ESQ.  
Attorney for Defendants Davis  
P.O. Box 582  
Port Jefferson, New York 11777  
  
GEORGE SIKORA  
4520 Sherwood Forest Drive, #67  
Delray Beach, Florida 33445  
  
CITIBANK, N.A.  
150 Motor Parkway  
Hauppauge, New York 11788  
  
TRISTATE CAPITAL CORP.  
1650 Sycamore Avenue, Suite 15  
Bohemia, New York 11716

Upon the following papers numbered 1 to 36 read on this motion for summary judgment and order of reference, and cross motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1 - 22; Notice of Cross Motion and supporting papers 23 - 29; Answering Affidavits and supporting papers \_\_\_\_\_; Replying Affidavits and supporting papers 30 - 36; Other \_\_\_\_\_; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion (001) by plaintiff Central Mortgage Company and the cross motion (002) brought on by defendants Rosemary E. Davis and Corey Davis, are consolidated for purposes of this determination; and it is further

Central Mortgage Company v Davis

Index No. 09-50074

Page 2

**ORDERED** that this motion by plaintiff Central Mortgage Company for an order pursuant to CPLR 3212 granting summary judgment on its verified complaint; to strike the answer interposed by defendant Rosemary E. Davis and Corey Davis; to discontinue the action against the defendants sued as “John Doe #1” through “John Doe #12;” for a default judgment pursuant to CPLR 3215 against George M. Sikora, Citibank,

N.A., Tristate Capital Corporation, Discover Bank, Palisades Acquisition XVI, LLC, and the United States of America (Eastern District); and for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law (“RPAPL”) § 1321 is granted; and it is further

**ORDERED** that the caption is hereby amended by striking therefrom defendants “John Doe 1-12,” and it is further

**ORDERED** that the cross motion by defendants Rosemary E. Davis and Corey Davis to dismiss the action is denied; 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  
CENTRAL MORTGAGE COMPANY,

Plaintiff,

- against -

ROSEMARY E. DAVIS, GEORGE M. SIKORA, COREY  
DAVIS, CITIBANK, N.A., TRISTATE CAPITAL CORP.,  
DISCOVER BANK, PALISADES ACQUISITION XVI,  
UNITED STATES OF AMERICA (EASTERN DISTRICT),

Defendants.  
\_\_\_\_\_ X

This is an action to foreclose a mortgage on premises known as 538 N. Bicycle Path, Port Jefferson Station, New York. On November 4, 2004, defendant George M. Sikora executed a note in favor of First National Bank of Arizona, agreeing to pay the sum of \$360,000.00 at the yearly interest rate at 6.625 percent. On the same day, defendants George M. Sikora and Rosemary E. Davis executed a mortgage in the principal sum of \$360,000.00. The mortgage indicated First National Bank of Arizona to be the lender and Mortgage Electronic Registration Systems, Inc. (“MERS”) to be the nominee of First National Bank of Arizona as well

as the mortgagee of record for the purpose of recording the mortgage. The mortgage was recorded on April 4, 2005 with the Suffolk County Clerk's Office. Thereafter, the mortgage was transferred by an assignment of mortgage dated June 20, 2008 from MERS, as nominee for First National Bank of Arizona to plaintiff Central Mortgage Company. The assignment of mortgage was recorded on July 24, 2008.

By letter dated April 2, 2008, a notice of default was sent to defendant George M. Sikora at the premises stating that the loan was in default and that the amount past due was \$9,597.88. Plaintiff commenced a prior foreclosure action on June 13, 2008.<sup>1</sup> The action was voluntarily discontinued by plaintiff after defendants submitted evidence which demonstrated that the subject mortgage was not assigned to plaintiff until June 20, 2008, after the action was commenced.

Plaintiff commenced the instant foreclosure action on December 24, 2009. In its complaint plaintiff alleges, in pertinent part, that defendants failed to comply with the terms, covenants and conditions of the note and mortgage by failing to make monthly payments. Defendants Rosemary E. Davis and Corey Davis interposed an answer with general denials, six affirmative defenses, and four counterclaims.

The Court's computerized records indicate that this matter was eligible for a foreclosure settlement conference, however, the conferences were adjourned. The matter was subsequently referred as an IAS case since a resolution or settlement had not been achieved, despite the opportunity to do so. 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' mortgage loan went into default on February 1, 2008, and, that the affirmative defenses asserted by defendants Rosemary E. Davis and Corey Davis raised no issues of fact for trial. The defendants cross-move pursuant to CPLR 3211 (a) (3) for an order dismissing the action on the ground that plaintiff lacks standing to commence the action, and pursuant to CPLR 3211 (a) (10) for an order dismissing the complaint for failure to join a necessary party, and for an order cancelling the notice of pendency.

"[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 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]).

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 *Bank of N.Y. v Silverberg*, 86 AD3d 274, 279, 926 NYS2d 532 [2d Dept 2011]; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; *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

---

<sup>1</sup> The prior action was captioned *Central Mortgage Company v George M. Sikora, Rosemary E. Davis, Citibank, N.A., Tristate Capital Corp, Discover Bank, and "John Does #1 - 12,"* Index No. 22627/08.

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.

Here, plaintiff produced the notes and the mortgage executed by defendant George Sikora and Rosemary E. Davis, as well as evidence of nonpayment, thereby establishing a *prima facie* case as a matter of law (see *Wells Fargo Bank Minn. v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). Ben A. Coleman, vice president of plaintiff, avers in his affidavit that the loan went into default on February 1, 2008, and the outstanding principal balance of \$345,781.55 at a rate of 6.625 percent per annum from January 1, 2008 remains unpaid. Mr. Coleman also stated that plaintiff had physical possession of the subject note and mortgage at the time of the filing of the action. Therefore, plaintiff established in the affidavit of Mr. Coleman, that it took possession of the note by physical delivery prior to the commencement of the action (see *Central Mtge. Co. v McClelland*, 119 AD3d 885, 991 NYS2d 87 [2d Dept 2014]). In addition, Mr. Coleman stated that the notice of default was sent to Mr. Sikora by first class mail to the mailing address pursuant to the terms of the mortgage, which was not returned to plaintiff as undeliverable. Moreover, Mr. Coleman avers that Mr. Sikora failed to inform plaintiff of a change of address for notification purposes, as was required by the note and mortgage.

The court finds that plaintiff established, *prima facie*, that at the time of the commencement of this action that it possessed the requisite standing to prosecute its pleaded claims for foreclosure and sale of the mortgaged premises. The record further establishes that plaintiff was validly assigned the note and mortgage that is the subject of this foreclosure action and that it took possession of the note and mortgage prior to the commencement of the action (*Id.*).

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 its answer or otherwise available to it (see *Flagstar Bank v Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Grogg. v South Road Assocs., LP*, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; *Wells Fargo Bank v Karla*, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]).

The defendants’ submissions in opposition are insufficient to raise a triable issue of fact. Defendants re-assert their pleaded affirmative defenses that the plaintiff lacks standing to prosecute its claims for foreclosure and sale, and that defendant Sikora was improperly served with process. Defendants submit a hearing transcript dated February 3, 2011 (Baisley, J.), conducted in the prior action,<sup>2</sup> the personal affidavit of Rosemary E. Davis, a notarized letter from Leo Bonfadini, a licensed social worker, and copies of the note and mortgage. Defendant Rosemary Davis avers in her affidavit that her father, defendant George Sikora, was not living at the premises where service was effected, and that the summons and complaint were improperly served upon her brother, non-party Michael Sikora, at her father’s former

---

<sup>2</sup> The purpose of the hearing was to determine if sanctions were warranted against plaintiff after waiting more than one year to discontinue the prior action. Notably, at the hearing, the court determined that plaintiff’s records reflected that, in the normal course of business, it obtained physical delivery of the original note and mortgage from Deutsche Bank, its custodian of records, on May 5, 2008. The loan and the custodial file were referred for foreclosure action on May 28, 2008.

address, at 128 Tuscany-B, Delray Beach Florida. Mr. Bonfadini's letter reveals that Mr. Sikora has been a patient and resident in the Veteran's Administration Medical Center in Florida since December 28, 2009. A review of the hearing transcript reveals that, contrary to defendants' contentions, the testimony of Lu Ann Howard, plaintiff's vice president and loan servicing manager, established that plaintiff is the holder of the note and mortgage.

In its reply and opposition to the cross motion, plaintiff reiterates that defendant Sikora was required under the terms of the mortgage to notify plaintiff of any change of address and contends that it properly served Mr. Sikora according to his last-known address, 128 Tuscany-B, Delray Beach Florida. Inasmuch as Mr. Sikora owns real property within the State of New York (CPLR 302), he may be served with process outside the state in the same manner as a person within the state (CPLR 313) by personal or substituted service (CPLR 308). In addition, the process server's affidavit of service reveals that Michael Sikora did not deny that Mr. Sikora lived at the address stated on the affidavit of service.

A "proper affidavit of a process server attesting to personal delivery upon a defendant constitutes prima facie evidence of proper service" (*NYCTL 1998-1 Trust v Rabinowitz*, 7 AD3d 459, 460, 777 NYS2d 483 [1st Dept 2004]). To defeat this prima facie showing, a defendant must provide a "sworn, nonconclusory denial of service" requiring a traverse hearing (*id.*). An attorney affirmation denying personal service on defendant is insufficient (*Walkes v Benoit*, 257 AD2d 508, 684 NYS2d 533 [1st Dept 1999]). Here, plaintiff duly served Mr. Sikora at his last-known address in Florida. In the affidavit of service, the process server stated under oath that Michael Sikora admitted that Mr. Sikora lived there. The social worker's notarized letter and the attorney's affirmation are insufficient to rebut the presumption of proper service. In any event, defendants may not contest service upon Mr. Sikora on his behalf, since they have not asserted that they are his legal representatives. Mr. Sikora has waived the defense inasmuch as he failed to answer and move to dismiss the complaint on that ground within 60 days after serving his answer (*see Putnam County Sav. Bank v Mastrantone*, 111 AD3d 914, 975 NYS2d 684 [2d Dept 2013]; *JP Morgan Chase Bank v Munoz*, 85 AD3d 1124, 1126-1127, 927 NYS2d 364 [2d Dept 2011]; CPLR 3211 [e]).

The remaining arguments in opposition to plaintiff's motion fail to raise a triable issue of fact concerning any bonafide defense to foreclosure in opposition to the motion for summary judgment (*see People's United Bank v Hallock Landing Associates, LLC*, 114 AD3d 835, 980 NYS2d 797 [2d Dept 2014]; *Bank of Smithtown v 219 Sagg Main, LLC*, 107 AD3d 654, 968 NYS2d 95 [2d Dept 2014]). Notably, defendants do not deny that they defaulted on their mortgage payments. In addition, the allegations in the counterclaims are palpably insufficient (*see 805 Third Ave. Co. v M.W. Realty Associates*, 58 NY2d 447, 451, 461 NYS2d 778 [1983]; *Precision Mech., Inc. v Dormitory Auth.*, 5 AD3d 653, 654, 774 NYS2d 734 [2d Dept 2004]).

In light of the foregoing, defendants' cross motion pursuant to CPLR 3211 (a) (3) to dismiss for lack of standing, pursuant to CPLR 3211 (a) (10) to dismiss for failure to join a necessary party, and for an order cancelling the notice of pendency are denied as academic.

Accordingly, the motion for summary judgment is granted in favor of plaintiff against defendants Rosemary E. Davis and Corey Davis, whose answer with counterclaims is hereby dismissed. The defendants' cross motion is dismissed. That branch of the motion seeking to fix the defaults as against the

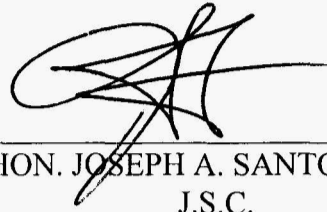
Central Mortgage Company v Davis  
Index No. 09-50074  
Page 6

remaining defendants who have not answered or appeared herein is granted. The application for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is granted (see *Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *Bank of East Asia 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.

**SEP 25 2014**

Dated: \_\_\_\_\_



\_\_\_\_\_  
HON. JOSEPH A. SANTORELLI  
J.S.C.

\_\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION

DISCOVER BANK  
199 Crossways Park Drive  
Woodbury, New York 11797

PALISADES ACQUISITION XVI, LLC  
210 Sylvan Avenue  
Englewood Cliffs, New Jersey 07632

UNITED STATES OF AMERICA (EASTERN DISTRICT)  
271 Cadman Plaza East, 7<sup>th</sup> Floor  
Brooklyn, New York 11201