

Wells Fargo Bank, N.A. v Schoenbrot

2014 NY Slip Op 32828(U)

October 29, 2014

Supreme Court, Suffolk County

Docket Number: 11-28239

Judge: Jerry Garguilo

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 10-24-13
ADJ. DATE 10-29-14
Mot. Seq. # 001 - MG

-----X
WELLS FARGO BANK, N.A.,
3476 Stateview Boulevard
Ft. Mill, SC 29715

Plaintiff,

- against -

STEPHEN SCHOENBROT;
JOHN DOE (Said name being fictitious, it being
the intention of Plaintiff to designate and all
occupants of premises being foreclosed herein,
and any parties, corporations or entities, if any,
having or claiming an interest or lien upon the
mortgaged premises.),

Defendant.
-----X

ROSICKI, ROSICKI & ASSOCIATES, P.C.
Attorney for Plaintiff
26 Harvester Avenue
Batavia, New York 14020

MICHAEL C. DeLISA
Attorney for Defendant - Schoenbrot
475 Montauk Highway
West Islip, New York 11795

Upon the following papers numbered 1 to 12 read on this motion for summary judgment and an order of reference;
Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; ~~Notice of Cross Motion and supporting papers~~ _____;
~~Answering Affidavits and supporting papers~~ _____; ~~Replying Affidavits and supporting papers~~ _____; ~~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

ORDERED that this unopposed motion by plaintiff Wells Fargo Bank, N.A. (Wells Fargo)
pursuant to CPLR 3212 for summary judgment on its complaint against defendant Stephen Schoenbrot
(Schoenbrot), for a default judgment 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 Kayla Shiggs in place of "John
Doe" and by striking therefrom the remaining "John Doe"; and it is further

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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
 WELLS FARGO BANK, N.A.,
 3476 Stateview Boulevard
 Ft. Mill, SC 29715

Plaintiff,

- against -

STEPHEN SCHOENBROT; KAYLA SHIGGS,

Defendants.
 _____X

This is an action to foreclose a mortgage on premises known as 191 Lexington Road, Shirley, New York. On October 26, 2007, defendant Schoenbrot executed a fixed rate note in favor of Wells Fargo agreeing to pay the sum of \$240,000.00 at the yearly rate of 6.625 percent. On the same date, defendant Schoenbrot executed a mortgage in the principal sum of \$240,000.00 on the subject property. The mortgage was recorded on November 15, 2007 in the Suffolk County Clerk's Office.

Plaintiff sent a notice of default dated September 12, 2010 to defendant Schoenbrot stating that he had defaulted on his mortgage loan and that the amount past due was \$3,104.24. As a result of defendant's continuing default, plaintiff commenced this foreclosure action on September 1, 2011. In its complaint, plaintiff alleges in pertinent part that Schoenbrot breached his obligations under the terms of the note and mortgage by failing to make his monthly payments commencing with the February 1, 2011 payment. Defendant Schoenbrot interposed an answer.

The Court's computerized records indicate that a foreclosure settlement conference was held on April 2, 2013 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 Schoenbrot breached his obligations under the terms of the note and mortgage by failing to tender payment for the monthly installment due on February 1, 2011 and subsequent payments thereafter. In support of its motion, plaintiff submits among other things: the sworn affidavit of Maureen Barbee, vice president loan documentation of Wells Fargo; the affirmation of Richard Fay, Esq. in support of the instant motion; the pleadings; the note and mortgage; notices pursuant to RPAPL 1320, 1304 and 1303; affidavits of service for the summons and complaint; an affidavit of service for the instant summary

judgment motion upon defendant Schoenbrot's counsel; and a proposed order appointing a referee to compute.

"[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 Mentosana*, 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]).

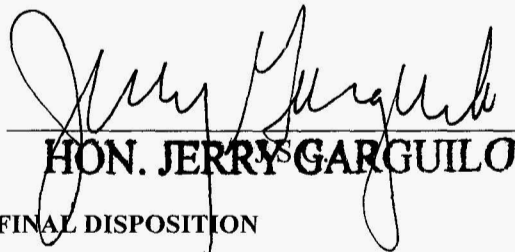
Here, plaintiff produced the note and mortgage executed by defendant Schenbrot, as well as evidence of defendant's nonpayment, thereby establishing a prima facie case as a matter of law (see *Wells Fargo Bank Minnesota, Natl. Assn. v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). Maureen Barbee avers that defendant Schoenbrot defaulted on his note and mortgage by failing to make his monthly payments commencing with the installment due on February 1, 2011 and subsequent payments thereafter; that a notice of default was sent to defendant at his last known address; that a 90 day pre-foreclosure notice was mailed to borrower by certified mail and also by first-class mail to his last known address; and, that defendant has not cured the default.

Defendant Schoenbrot has not submitted opposition to the motion. Defendant's answer is insufficient, as a matter of law, to defeat plaintiff's unopposed motion (see *Argent Mtge. Co., LLC v Mentosana*, 79 AD3d 1079, 915 NYS2d 591; *Citibank, N.A. v Souto Geffen Co.*, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]; *Greater N.Y. Sav. Bank v 2120 Realty Inc.*, 202 AD2d 248, 608 NYS2d 463 [1st Dept 1994]). Since no opposition to the instant motion was filed by defendant, no triable issue of fact was raised in response to plaintiff's prima facie showing (see *Flagstar Bank v Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Wells Fargo Bank Minnesota v Perez*, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]; see also *Zanfina v Chandler*, 79 AD3d 1031, 912 NYS2d 911 [2d Dept 2010]).

Based upon the foregoing, the motion for summary judgment is granted against defendant Schoenbrot. That branch of the motion seeking to fix the defaults as against the remaining defendants who have not answered or appeared herein is granted. 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 *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.

Dated: 10/29/14


 HON. JERRY GARGUILO

 FINAL DISPOSITION X NON-FINAL DISPOSITION