

Bank of N.Y. Mellon v Villorente

2014 NY Slip Op 32867(U)

October 31, 2014

Supreme Court, Suffolk County

Docket Number: 10-38281

Judge: Jeffrey Arlen Spinner

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 21 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 2-13-14
ADJ. DATE
Mot. Seq. # 001 - MG

-----X
THE BANK OF NEW YORK MELLON, F/K/A
THE BANK OF NEW YORK AS SUCCESSOR
IN INTEREST TO JPMORGAN CHASE BANK
NA, AS TRUSTEE FOR STRUCTURED ASSET
MORTGAGE INVESTMENTS II INC. BEAR
STEARNS ALT-A TRUST 2005-7, MORTGAGE
PASS-THROUGH CERTIFICATES, SERIES
2005-7,

Plaintiff,

- against -

NICOLE VILLORENTE, BOARD OF
MANAGERS OF THE FAIRVIEW AT ARTIST
LAKE CONDOMINIUM II ASSN, COLUMBIA
EQUITIES, LTD., JACOBY & JACOBY ESQS.,
MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC. AS NOMINEE FOR
FAIRFIELD FINANCIAL MORTGAGE
GROUP, INC., JOHN DOE (Said name being
fictitious, it being the intention of Plaintiff to
designate any 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 mortgage premises.),

Defendant.
-----X

KOZENY MCCUBBIN & KATZ, LLP
Attorney for Plaintiff
395 North Service Road, Suite 401
Melville, New York 11747

ADAM C. GOMERMAN, ESQ.
Attorney for Defendant - Villorente
807 E. Jericho Turnpike
Huntington Station, New York 11746

COLUMBIA HOME LOANS, LLC S/H/A
COLUMBIA EQUITIES, LTD.
C/O NYS SECRETARY OF THE STATE
One Commerce Plaza
99 Washington Avenue
Albany, New York 12231

JACOBY & JACOBY ESQS.
C/O NYS Secretary of the State
One Commerce Plaza
99 Washington Avenue
Albany, New York 12231

MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.
C/O CT Corporation System
111 Eighth Avenue
New York, New York 10011

CARMINE ESPOSITO
239 Fairview Circle
Middle Island, New York 11953

Bank of New York v Villorente

Index No. 10-38281

Page 2

Upon the following papers numbered 1 to 13 read on this motion for summary judgment and an order of reference; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; ~~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 the Bank of New York Mellon, f/k/a the Bank of New York as successor in interest to JPMorgan Chase Bank NA, as Trustee for Structured Asset Mortgage Investments II Inc. Bear Stearns Alt-A Trust 2005-7, Mortgage Pass-Through Certificates, Series 2005-7 (Bank of New York) pursuant to CPLR 3212 for summary judgment on its complaint against defendant Nicole Villorente (Villorente), 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 Carmine Esposito in place of “John Doe” and “Jane Doe”; 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

THE BANK OF NEW YORK MELLON, F/K/A THE
BANK OF NEW YORK AS SUCCESSOR IN INTEREST
TO JPMORGAN CHASE BANK NA, AS TRUSTEE FOR
STRUCTURED ASSET MORTGAGE INVESTMENTS II
INC. BEAR STEARNS ALT-A TRUST 2005-7,
MORTGAGE PASS-THROUGH CERTIFICATES,
SERIES 2005-7,

Plaintiff,

- against -

NICOLE VILLORENTE, BOARD OF MANAGERS OF
THE FAIRVIEW AT ARTIST LAKE CONDOMINIUM II
ASSN, COLUMBIA EQUITIES, LTD., JACOBY &
JACOBY ESQS., MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC. AS NOMINEE
FOR FAIRFIELD FINANCIAL MORTGAGE GROUP,
INC., CARMINE ESPOSITO,

Defendants.

_____x

This is an action to foreclose a mortgage on premises known as 239 Fairview Circle, Middle Island, New York. On April 20, 2005, defendant Villorente executed an adjustable rate note in favor of Fairfield Financial Mortgage Group, Inc. (Fairfield) agreeing to pay the sum of \$188,000.00 at the starting yearly rate of 6.250 percent. On the same date, defendant Villorente executed a mortgage in the principal sum of \$188,000.00 on the subject property. The mortgage indicated Fairfield to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of Fairfield as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on May 13, 2005 in the Suffolk County Clerk's Office. Thereafter, on September 2, 2008, the mortgage was transferred by assignment of mortgage from MERS, as nominee for Fairfield, to plaintiff Bank of New York. The assignment of mortgage was recorded on September 12, 2008 with the Suffolk County Clerk's Office. Thereafter, on September 19, 2011, the mortgage was transferred by a correcting assignment of mortgage from MERS, as nominee for Fairfield to plaintiff Bank of New York. The correcting assignment of mortgage was recorded on October 3, 2011 with the Suffolk County Clerk's Office.

Plaintiff's servicer sent a notice of default dated July 4, 2010 to defendant Villorente stating that she had defaulted on her mortgage loan and that the amount past due was \$10,684.12. As a result of defendant's continuing default, plaintiff commenced this foreclosure action on October 19, 2010. In its complaint, plaintiff alleges in pertinent part that defendant Villorente breached her obligations under the terms of the note and mortgage by failing to make her monthly payments commencing with the January 1, 2010 payment. Defendant Villorente interposed an answer with five affirmative defenses.

The Court's computerized records indicate that a foreclosure settlement conference was held on August 21, 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 conferences are required.

Plaintiff now moves for summary judgment on its complaint contending that defendant Villorente breached her obligations under the terms of the note and mortgage by failing to tender payment for the monthly installment due on January 1, 2010 and subsequent payments thereafter. In support of its motion, plaintiff submits among other things: the sworn affidavit of Marcus Wolfe, vice president loan documentation of Wells Fargo; the affirmation of Douglas S. Thaler, Esq. in support of the instant motion; the affirmation of Phillip Mahony, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the pleadings; the note, mortgage and assignments of 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'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 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]).

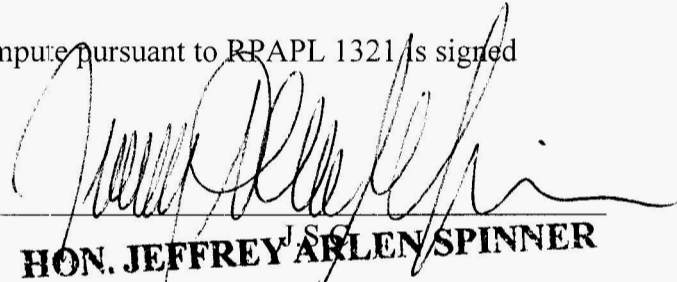
Here, plaintiff produced the note and mortgage executed by defendant Villorente, as well as evidence of defendant's nonpayment, thereby establishing a prima facie case as a matter of law (*see Wells Fargo Bank Minnesota, Natl. Assn. v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). Marcus Wolfe avers that defendant defaulted on the note and mortgage by failing to make her monthly payments commencing with the installment due on January 1, 2010 and subsequent payments thereafter; that a notice of default was mailed to the mortgagor at her last known address; that a 90 day pre-foreclosure notice was sent to borrower by certified mail and first-class mail; and, that defendant has not cured the default.

Defendant Villorente 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 Zanfini v Chandler*, 79 AD3d 1031, 912 NYS2d 911 [2d Dept 2010]).

Based upon the foregoing, the motion for summary judgment is granted against defendant Villorente. 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]).

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

Dated: OCT 31 2014



HON. JEFFREY ARLEN SPINNER
J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION