

Wells Fargo Bank, N.A. v Gaitan

2014 NY Slip Op 33110(U)

March 10, 2014

Supreme Court, Queens County

Docket Number: 8438/2012

Judge: Augustus C. Agate

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.

Plaintiff commenced this action on April 20, 2012 to foreclose the mortgage encumbering the real property known as 132-30 87th Street, East Elmhurst, New York given by defendant Armando Gaitan as security for the payment of a note, evidencing an obligation in the principal amount of \$476,000.00 plus interest. The mortgage named Argent Mortgage Company, LLC as the lender. Plaintiff alleged in its complaint that it is the holder of the note and subject mortgage, and that defendant Gaitan defaulted under the terms of the mortgage and note, and as a consequence, it elected to accelerate the entire mortgage debt.

Defendant Gaitan served a combined answer, asserting various affirmative defenses, including lack of standing, and interposing counterclaims. It is unclear whether plaintiff served a reply to the counterclaims. Plaintiff caused Environmental Control Board, Parking Violations Bureau, Mortgage Electronic Registration Systems, Inc., as nominee for N.Y. Financial Mortgage Lending, JPMorgan Chase Bank, N.A. to be served with process, and Jack Sajordo to be served with process as defendant “John Doe #1.” Plaintiff did not cause defendants “John Doe 2” through “John Doe #12” to be served with process because it determined that they are unnecessary party defendants.

That branch of the motion by plaintiff for leave to amend the caption as proposed is granted.

It is ORDERED that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY

-----X
Wells Fargo Bank, N.A., as Trustee for the Pooling
and Servicing Agreement dated as of February 1, 2005
Park Place Securities, Inc. Asset-Backed Pass-Through
Certificates Series 2005-WHQ1,

Plaintiff

Index No. 8438/2012

-against-

Armando Gaitan, Environmental Control Board,
Parking Violations Bureau, Mortgage Electronic
Registration Systems, Inc., as nominee for N.Y.
Financial Mortgage Lending, JPMorgan Chase Bank, N.A.,
and Jack Sajordo,

Defendants

-----X.

It is well established that the proponent of a summary judgment motion “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Plaintiff has failed to establish its prima facie entitlement to judgment as a matter of law. “CPLR 3212 (b) provides that a summary judgment motion ‘shall be supported by affidavit’ of a person ‘having knowledge of the facts’ as well as other admissible evidence (*see GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965, 967 [1985])” (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384 [2005]). The purported affidavit dated July 23, 2013 of Timeka J. Motlow, a contract management coordinator of Ocwen Loan Servicing, LLC (Ocwen), as attorney-in-fact for Wells Fargo Bank, N.A., as Trustee for the Pooling and Servicing Agreement dated as of February 1, 2005 Park Place Securities, Inc. Asset-Backed Pass-Through Certificates Series 2005-WHQ1 as assignee of Wells Fargo Bank, N.A., as Trustee for the Pooling and Servicing Agreement dated as of February 1, 2005 Asset-Backed Pass-Through Certificates Series 2005-WHQ1, lacks any jurat or other indication that Ms. Motlow had been duly sworn by a notary or commissioner of deeds before signing it. Thus, notwithstanding the statement contains an acknowledgment and certificate of conformity, it is without evidentiary value. In addition, the complaint is unverified, and thus does not constitute competent evidence to stand in the place of a proper affidavit of merit (*see Alvarez v Prospect Hosp.*, 68 NY2d at 327 [1986]). The affirmation of plaintiff’s counsel likewise is insufficient because it is not based upon personal knowledge of the facts (*see Citibank, N.A. v Joffe*, 265 AD2d 291 [2d Dept 1999]). That branch of the motion by plaintiff for summary judgment against defendant Gaitan is denied.

With respect to that branch of the motion by plaintiff to strike the answer and affirmative defenses asserted by defendant Gaitan, plaintiff bears the burden of demonstrating that the defenses are without merit as a matter of law (*see Butler v Catinella*, 58 AD3d 145, 157-148 [2d Dept 2008]; *Vita v New York Waste Servs., LLC*, 34 AD3d 559, 559 [2d Dept 2006]).

Defendant Gaitan asserts in the first, eighth, sixteenth and seventeenth affirmative defenses that plaintiff lacks standing. Plaintiff has failed to establish that the defense of lack of standing is without merit as a matter of law (*see Butler v Catinella*, 58 AD3d 145, 157-148 [2d Dept 2008]; *Vita v New York Waste Servs., LLC*, 34 AD3d 559, 559 [2d Dept 2006]; *see also Citimortgage, Inc. v Stosel*, 89 AD3d 887, 888 [2d Dept 2011]; *Bank of N.Y. v Silverberg*, 86 AD3d 274, 279 [2d Dept 2011]; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 753 [2d Dept 2009]). Nevertheless, the eighth, sixteenth and seventeenth affirmative defenses are duplicative of the first affirmative defense. Under such circumstances, that

branch of the motion by plaintiff to dismiss the first, eighth, sixteenth and seventeenth affirmative defenses is granted only to the extent of dismissing the eighth, sixteenth and seventeenth affirmative defenses.

That branch of the motion by plaintiff to dismiss the second affirmative defense asserted by defendant Gaitan in his answer based upon failure to properly credit payments is granted. Defendant Gaitan has not alleged he is not in default in payment or has paid the mortgage in full. Any dispute as to the exact amount owed by the mortgagor to the mortgagee may be resolved after a reference pursuant to RPAPL 1321 (*see Crest/Good Mfg. Co., Inc. v Baumann*, 160 AD2d 831 [2d Dept 1990]).

That branch of the motion by plaintiff to dismiss the third affirmative defense asserted by defendant Gaitan based upon violation of Banking Law § 595-a is granted. Banking Law § 595-a authorizes the superintendent of financial services to promulgate regulations (Banking Law § 595-a[1], [2], [3]). It also restricts a mortgage banker, mortgage broker or exempt organization, as a condition for the approval of a mortgage loan, from requiring the use of a particular title insurance company or agent or for any other type of insurance from requiring the use of a particular insurer, agent or broker (Banking Law § 595-a[4]), and prohibits a licensee or registrant engaging in activities constituting the business of a distressed property consultant (*see Real Property Law § 265-b*), from charging for or accepting payment for real property consulting services before the full completion of such services (Banking Law § 595-a[5]). Defendant Gaitan has failed to allege any facts in support of his claim of a violation of Banking Law § 595-a (*see Moran Enterprises, Inc. v Hurst*, 96 AD3d 914 [2d Dept 2012]; *Glenesk v Guidance Realty Corp.*, 36 AD2d 852 [1971], *abrogated on other grounds by Butler v Catinella*, 58 AD3d 145; *MacIver v George Braziller, Inc.*, 32 Misc 2d 477 [Sup Ct NY Co. 1961]; CPLR 3016, 3018[b]).

That branch of the motion by plaintiff to dismiss the fourth affirmative defense asserted by defendant Gaitan based upon violation of Banking Law § 6-1 is granted. The version of Banking Law § 6-1 which was in effect (L 2002, ch 626, § 4, eff. April 1, 2003) at the time of defendant Gaitan's entry into the mortgage loan (December 21, 2004), did not apply to all loans. Rather, it applied to those loans for which application was made on or after the statute's effective date (*see L 2002, ch 626, § 4*) and required the loan to be a "home loan" and, once within that category, the statute applied if the loan met the threshold of being considered a "high cost home loan"¹ (*see Bergman, B., Predatory Lending for All*, 77-Sep NY State BJ 46 [2005]; *see generally* Keefe, K. and Hasper, E., *New State Law Addresses*

¹

A "high cost home loan" was defined as "a *home loan* in which the terms of the loan exceed one or more of the thresholds as defined in paragraph g of [subdivision 1]" (former Banking Law § 6-1[1][d]) (L 2002, c 626) (emphasis supplied).

Mortgage Foreclosure Crisis and Subprime Lending Abuses, Legal Services J, August 2008, at n 4; *Ng v HSBC Mortg. Corp.*, 2010 WL 889256, 2010 US Dist LEXIS 40109 [ED NY March 10, 2010]). To have been a “home loan” within the meaning of that version of the statute, the principal could not exceed the lesser of the Fannie Mae conforming loan amount or \$300,000.00 (see former Banking Law § 6-l(1)(e)(I) [B] [L 2002, ch 626, § 1]; *Wells Fargo Bank, Nat. Assn v Rolon*, 24 Misc 3d 1216(A) [Sup Ct Queens Co. 2009]; *Fremont Inv. & Loan v Laroc*, 21 Misc 3d 1124[A] [Sup Ct Queens Co. 2008]; *Sutherland v Remax 2000*, 20 Misc 3d 1131[A] [Sup Ct Nassau Co. 2008]; *Alliance Mtge. Banking Corp. v Dobkin*, 19 Misc 3d 1121[A] [Sup Ct Nassau Co. 2008]; *DLJ Mortgage Capital, Inc. v Smith*, 2007 Slip Op. 32745(U), 2007 NY Misc LEXIS 8988, 2007 WL 2814513 [Sup Ct Queens Co. 2007]; see also Bergman, B., *Predatory Lending for All*, 77-Sep NYSBJ 46 [2005], *supra*).

The original version of Banking Law § 6-1 (L 2002, c 626) was specifically made applicable only to loans for which application was made on or after the law’s effective date (October 3, 2002) (L 2002, ch 626, § 4). The subsequent amendment to Banking Law § 6-l(1)(e)(I) (L 2007, ch 552, § 1) defined a “home loan,” as one that the principal amount of the loan “does not exceed the conforming loan size limit for a comparable dwelling as established from time to time by the federal national mortgage association.” Such amendment, in effect, dropped consideration of whether the principal amount of the loan exceeded \$300,000.00. Although it may be argued that such amendment was for the purpose of expanding the coverage of Banking Law § 6-1, the Legislature specifically limited the amendment’s reach to those loans for which application had been made on or after the amendment’s effective date (October 14, 2007) (see L 2007, ch 552, § 2). Banking Law § 6-l(1)(e)(I) thereafter was further amended to define a “home loan” as one that the “principal amount of the loan at origination does not exceed the conforming loan size limit (including any applicable special limit for jumbo mortgages) for a comparable dwelling as established from time to time by the federal national mortgage association” (L 2009, c 507, § 12) (emphasis supplied) (the “jumbo mortgages” amendment). The Legislature did not specifically state the “jumbo mortgages” amendment was not made applicable to loans prior to the 2009 amendment’s effective date (L 2009, ch 507, § 25 [December 15, 2009]). Nevertheless, it also did not make any explicit provision for retroactivity of that amendment. Based upon this legislative history where the amendments to Banking Law § 6-l(1)(e)(I) were substantive, and enacted in increments over time, the court holds that the Legislature intended that the respective statutory amendments to Banking Law § 6-1 applied to loans based upon whichever amendment was in effect at the time of the loan application, and not retroactively. As a consequence, the affirmative defense of defendant Gaitan based upon violation of Banking Law § 6-1 is without merit insofar as that statute was inapplicable to the subject mortgage loan at the time of the loan origination.

That branch of the motion by plaintiff to strike the fourth affirmative defense asserted by defendant Gaitan based upon violation of Banking Law § 6-m is granted. The subject

loan, issued on December 21, 2004, does not fall under the purview of Banking Law § 6-m, which applies only to subprime and high-cost loans issued on or after September 1, 2008 (*see* Banking Law § 6-m, as added by L 2008, ch 472; *Emigrant Mortg. Co., Inc. v Fitzpatrick*, 95 AD3d 1169 [2d Dept 2012]).

That branch of the motion by plaintiff to dismiss the fifth affirmative defense asserted by defendant Gaitan based upon plaintiff's alleged violation of Federal Truth in Lending Act (15 USC § 1601 *et seq.* [TILA]) is granted. Defendant Gaitan does not allege the manner in which plaintiff violated the statute, and plaintiff offers a copy of the disclosure statement executed by him. Defendant Gaitan makes no claim he was not provided with the statement, or that it was inaccurate (*see Moran Enterprises, Inc. v Hurst*, 96 AD3d 914 [2d Dept 2012]; *Glenesk v Guidance Realty Corp.*, 36 AD2d 852 [2d Dept 1971], *abrogated on other grounds by Butler v Catinella*, 58 AD3d 145; *MacIver v George Braziller, Inc.*, 32 Misc 2d 477; CPLR 3016, 3018[b]).

That branch of the motion by plaintiff to dismiss the sixth affirmative defense asserted by defendant Gaitan based upon plaintiff's alleged violation of the Real Estate Settlement Procedures Act (RESPA), (12 USC § 2601 *et seq.*) is granted. Defendant Gaitan does not allege the manner in which plaintiff violated the statute, and plaintiff offers a copy of the settlement statement also known as the "HUD-1" statement executed by defendant. Defendant Gaitan makes no claim he was not provided with the statement, or that it was inaccurate (*see Moran Enterprises, Inc. v Hurst*, 96 AD3d 914 [2d Dept 2012]; *Glenesk v Guidance Realty Corp.*, 36 AD2d 852, *abrogated on other grounds by Butler v Catinella*, 58 AD3d 145; *MacIver v George Braziller, Inc.*, 32 Misc 2d 477; CPLR 3016, 3018[b]).

That branch of the motion by plaintiff to dismiss the seventh affirmative defense asserted by defendant Gaitan based upon plaintiff's alleged violation of the Federal Fair Debt Collection Practices Act (FDCPA) (*see* 15 USC § 1692 *et seq.*) is granted. The FDCPA does not generally apply to a creditor seeking to enforce a contract, such as a mortgage or note (*see United Cos. Lending v Candela*, 292 AD2d 800, 801–802 [4th Dept 2002], *citing* 15 USC § 1692a [6][F][iii]; *see also Maguire v Citicorp Retail Servs.*, 147 F3d 232, 235 [2d Cir 1998]; *Wadlington v Credit Acceptance*, 76 F3d 103, 106 [6th Cir 1996]). Defendant Gaitan makes no allegation that plaintiff is "in the process of collecting [its] own debts, used any name other than [its] own which would indicate that a third person [wa]s collecting or attempting to collect such debts" (15 USC § 1692a [6]).

Defendant Gaitan asserts in his answer a ninth,² tenth, eleventh and twelfth affirmative defense based upon failure to state a cause of action. The assertion of a defense based upon

²

Defendant Gaitan did not denominate the affirmative defenses in his answer with reference to ordinal numbers. The court nevertheless will refer to them by use of ordinal numbers.

failure to state a cause of action in an answer may not be subject to motion to strike or provide a basis to test sufficiency of the complaint (*see Butler v Catinella*, 58 AD3d at 150; *Riland v Frederick S. Todman & Co.*, 56 AD2d 350 [1st Dept 1977]). Nevertheless, because the tenth, eleventh and twelfth affirmative defenses are duplicative of the ninth affirmative defense, that branch of the motion by plaintiff to dismiss the ninth, tenth, eleventh and twelfth affirmative defenses asserted by defendant Gaitan in his answer is granted only to the extent of dismissing the tenth, eleventh and twelfth affirmative defenses.

That branch of the motion by plaintiff to dismiss the thirteen affirmative defense the doctrine of unclean hands asserted by defendant Gaitan in his answer based upon is granted. Defendant Gaitan has failed to allege any facts supporting this conclusion of law (*see Moran Enterprises, Inc. v Hurst*, 96 AD3d 914).

Defendant Gaitan asserts a fourteenth affirmative defense in his answer based upon his claim that plaintiff “accepted [Gaitan]’s non payment of the loan for a length of time significant enough that the [p]laintiff accepted [Gaitan]’s nonperformance.” To the extent such defense constitutes a claim of waiver or laches, he has failed to allege or prove any facts supporting such defense (*see Glenesk v Guidance Realty Corp.*, 36 AD2d 852, *abrogated on other grounds by Butler v Catinella*, 58 AD3d 145). That branch of the motion by plaintiff to dismiss the fourteenth affirmative defense in defendant Gaitan’s answer based upon laches and waiver is granted.

That branch of the motion by plaintiff to dismiss the fifteenth affirmative defense in the answer of defendant Gaitan based upon failure to comply with RPAPL 1304 and 1306 is denied. Plaintiff has failed to establish this defense is without merit as a matter of law (*see Butler v Catinella*, 58 AD3d 145, 157-148 [2d Dept 2008]; *Vita v New York Waste Servs., LLC*, 34 AD3d 559, 559 [2d Dept 2006]; *see also Hudson City Sav. Bank v DePasquale*, 113 AD3d 595 [2d Dept 2014; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 105–106 [2d Dept 2011]).

That branch of the motion by plaintiff for leave to appoint a referee is denied at this juncture.

Dated: March 10, 2014

AUGUSTUS C. AGATE, J.S.C.