

Aurora Loan Servs. LLC v Tamargo
2014 NY Slip Op 33442(U)
December 29, 2014
Supreme Court, Suffolk County
Docket Number: 33729/2009
Judge: William B. Rebolini
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Short Form Order

SUPREME COURT - STATE OF NEW YORK**I.A.S. PART 7 - SUFFOLK COUNTY****PRESENT:****WILLIAM B. REBOLINI**
Justice

Aurora Loan Services LLC,

Plaintiff,

-against-

Jeanette Merola Tamargo, Donald Tamargo,
JPMorgan Chase Bank, N.A., 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 mortgaged premises.)

Defendants.

Motion Sequence No.: 001; MGMotion Date: 11/8/13Submitted:Index No.: 33729/2009Attorney for Plaintiff:Sandelands Eyet LLP
1545 U.S. Highway 206, Suite 304
Bedminster, NJ 07921Attorney for DefendantsJeanette Merola Tamargo
and Donald Tamargo:Christopher Thompson, Esq.
33 Davison Lane East
West Islip, NY 11795Clerk of the Court

Upon the following papers numbered 1 to 28 read upon this motion for summary judgment: Notice of Motion and supporting papers, 1 - 20; Answering Affidavits and supporting papers, 21 - 24; Replying Affidavits and supporting papers, 25 - 28; it is

ORDERED that that the plaintiff's motion (001) pursuant to CPLR 3212 for summary judgment on its complaint against defendants Donald Tamargo and Jeanette M. Tamargo, fixing the defaults as to the non-appearing, non-answering 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

Aurora Loan Services v. Tamargo

Index No.: 33729/2009

Page 2

ORDERED that the caption is hereby amended by substituting Nationstar Mortgage, LLC in the place and stead of Aurora Loan Services, LLC; and it is further

ORDERED that the 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 shall hereinafter appear as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

Nationstar Mortgage, LLC, X

Plaintiff,

-against-

Jeanette Merola Tamargo, Donald Tamargo,
JPMorgan Chase Bank, N.A., 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 mortgaged premises.)

Defendants,

X

This is an action to foreclose a mortgage on property known as 3 Farrell Street, Manorville, New York. On March 24, 2006, defendants Jeanette M. Tamargo and Donald Tamargo (“defendants”) executed a note in favor of First Magnus Finance Corporation (“First Magnus”) agreeing to pay the sum of \$506,760. On said date, defendants also executed a mortgage in the principal sum of \$506,760 on the subject property. The mortgage indicated First Magnus to be the lender and Mortgage Electronic Registration Systems, Inc. (“MERS”) to be the nominee of First Magnus as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on April 11, 2006 with the Suffolk County Clerk’s Office. By assignment dated July 14, 2009, MERS, as nominee for First Magnus, assigned said mortgage to Aurora Loan Services, LLC (Aurora”). The assignment was recorded on September 4, 2009 with the Suffolk County Clerk’s office. A second assignment occurred on July 5, 2012, when Aurora assigned the mortgage to Nationstar Mortgage, LLC. The second assignment was recorded on September 12, 2012 with the Suffolk County Clerk’s Office.

Aurora Loan Services v. Tamargo

Index No.: 33729/2009

Page 3

A notice of default was sent by plaintiff Aurora on April 3, 2009 to the defendants stating that they had defaulted on their mortgage loan and that the amount past due was \$10,852.91. As a result of defendants' continuing default, plaintiff commenced this foreclosure action on September 1, 2009. In its complaint plaintiff alleges in pertinent part that the defendants breached their obligations under the terms of the note and mortgage by failing to make their monthly installment due on February 1, 2009 and subsequent payments thereafter. The defendants interposed a verified answer on September 14, 2009 containing thirteen affirmative defenses and two counterclaims.

The court's computerized records indicate that foreclosure settlement conferences were held on June 22, 2010 and March 29, 2011. Several conferences were adjourned. A final settlement conference was held on May 24, 2011 and was referred to an IAS Part on the ground that no settlement occurred. Thus, there has been compliance with CPLR 3408 and no further settlement conferences are required.

Plaintiff now moves for summary judgment on its complaint. In support of its motion, plaintiff submits, among other things, the sworn affidavits of A. J. Loll; the pleadings, the note, mortgage and assignments of mortgage; notices pursuant to RPAPL 1320, 1303 and 1304; and affidavits of service for the summons and complaint.

"[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]; *Village Bank v Wild Oaks Holding*, 196 AD2d 812, 601 NYS2d 940 [2d Dept 1993]). Once a plaintiff has made this showing, the burden then shifts to defendant to produce evidentiary proof in admissible form sufficient to require a trial on their defenses (*Aames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]; *Household Fin. Realty Corp. v Winn*, 19 AD3d 545, 796 NYS2d 533 [2d Dept 2005]).

It is well settled that proper service of the notices 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]). There is no requirement that plaintiff submit an affidavit of service for such notice (see RPAPL 1304 [2]). In addition, any alleged failure of plaintiff to satisfy the RPAPL 1304 notice requirements, even if true, merely constitutes a defense to the action and does not deprive the court of subject matter jurisdiction to render an order of reference (see *Deutsche Bank Trust Co. Ams. v Shields*, 116 AD3d 653, 983 NYS2d 286 [2d Dept 2014]; *Signature Bank v Epstein*, 95 AD3d 1199, 945 NYS2d 347 [2d Dept 2012]). The former statute, effective August 5, 2008, provided that a 90-day notice was required only for subprime, high cost and non-traditional loans (RPAPL 1304, 2008 N.Y. ALS 472, § 28, sub g). The amended statute, effective January 14, 2010, provides that the notice is mandatory for all home loans (RPAPL 1304, 2009 NY ALS 507, § 25, sub a).

Aurora Loan Services v. Tamargo

Index No.: 33729/2009

Page 4

Here, the plaintiff has established its entitlement to summary judgment against the answering defendants as such papers included a copy of the mortgage, the unpaid note together with due evidence of their default in payment under the terms of the loan documents (see CPLR 3212; RPAPL 1321; *Neighborhood Hous. Servs. of N.Y. City, Inc. v Hawkins*, 97 AD3d 554, 947 NYS2d 321 [2d Dept 2012]; *Baron Assoc., LLC v Garcia Group Enters., Inc.*, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]). A.J. Loll avers in his affidavit that he is employed as a vice president by Nationstar Mortgage LLC, the successor in interest to the interests of Aurora Loan Services, LLC. He states that a review of Aurora Loan Services' business records reveals that the 30-day letter was mailed to defendants on April 3, 2009. A 90-day notice was mailed to defendants on April 2, 2009, which was mailed in separate envelopes by regular and certified mail and were accompanied by a list of housing counseling agencies as required by statute. Despite the notices sent to defendants, the default was never cured. This action was commenced due to defendants' failure to tender the mortgage payment due January 1, 2009 and each subsequent payment.

It was thus incumbent upon the answering defendants 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 their answer or otherwise available to them (see *Flagstar Bank v Bellafigliore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]). In their opposing papers, defendants re-assert their pleaded affirmative defense that they were not properly served with the RPAPL 1304 notice and that such notice is defective, in that the amount in default differed from the amount stated in the 30-day notice sent the day before.

In reply, plaintiff contends that the RPAPL 1304 notice was mailed to the defendants, as stated in the affidavit of A. J. Loll. In any event, it was not a statutory requirement at the time of commencement, August 25, 2009, inasmuch as the statute at that time applied only to high cost, subprime, and non-traditional home loans. Plaintiff's counsel affirms that the statute was not amended to include all home loans until January 14, 2010, after the commencement of this action. Plaintiff also demonstrated that the subject home loan is a traditional fixed rate home loan, does not fall into the other categories stated above. Therefore, the defendants have failed to raise a triable issue of fact regarding the RPAPL 1304 notice.

As to their remaining assertions, defendant has failed to demonstrate, through the production of competent and admissible evidence, a viable defense which could raise a triable issue of fact (see *Deutsche Bank Natl. Trust Co. v Posner*, 89 AD3d 674, 933 NYS2s 52 [2d Dept 2011]). Notably, the defendants did not deny having received the loan proceeds and having defaulted on their loan payments in their opposition papers (*Citibank, N.A. v Souto Geffen Co.*, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]).

Accordingly, the plaintiff's motion for summary judgment is granted against the answering defendants, and their answer is dismissed. The branch of the motion seeking to fix the defaults as against the remaining defendants who have not answered or appeared herein is granted. The 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.

Aurora Loan Services v. Tamargo

Index No.: 33729/2009

Page 5

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

Dated: 12/29/2014

William B. Rebolini
HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION