

Wells Fargo Bank, N.A. v Goans

2014 NY Slip Op 33712(U)

March 13, 2014

Supreme Court, Kings County

Docket Number: 26997/09

Judge: Bernard J. Graham

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: 36**

WELLS FARGO BANK, N.A.,

Plaintiff(s),

-against-

KYLE GOANS,

Defendant(s).

Index No.: 26997/09
Motion Calendar No.
Motion Sequence No.

DECISION / ORDER

Present:
Hon. Judge Bernard J. Graham
Supreme Court Justice

Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion to dismiss plaintiff's complaint and for summary judgment.

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	_____ 1-2 _____
Order to Show cause and Affidavits Annexed.....	_____
Answering Affidavits	_____ 3,4 _____
Replying Affidavits.....	_____
Exhibits.....	_____
Other:.....Memo of law.....	_____ 5 _____

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Defendant, Kyle Goans, ("Mr. Goans") has moved pursuant to CPLR § 3211(a)(1), § 3211(a)(2), § 3211(a)(3), § 3211(a)(7), § 3013 and Business Corporation Law (BCL) § 1312, for an order dismissing the within action upon the grounds that the Court lacks subject matter jurisdiction due to plaintiff's lack of standing to institute this action; the underlying action cannot be instituted as a consumer debt, but rather should be commenced as a foreclosure proceeding; plaintiff has no legal capacity to sue in this state and plaintiff has failed to state a proper cause of action upon which relief can be granted. In opposition to the motion, the plaintiff, Wells Fargo Bank, N.A. ("Wells Fargo") maintains that they have standing upon which to bring this

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proceeding, jurisdiction is proper, the complaint is well plead, and the plaintiff is within its statutory right to maintain an action to collect on a consumer debt based upon defendant's default in the payment of the underlying home equity loan.

Background:

The defendant, Kyle Goans ("Mr. Goans") had obtained a first mortgage and a home equity mortgage from Wells Fargo, which were secured by his home located at 10 East 57th Street, Brooklyn, New York. Mr. Goans states that he became unemployed in April 2009 and contacted Wells Fargo for the purpose of modifying his loan payments.

It appears from the record that Mr. Goans was successful in modifying the first mortgage with Wells Fargo. As to the home equity loan, negotiations were being conducted between Mr. Goans and counsel for Wells Fargo between August 28, 2009 and September 27, 2009, but it did not result in a modification. As a result, Wells Fargo initiated an action on October 26, 2009, based upon non-payment of a consumer debt. Due to the failure of Mr. Goans to appear or enter a responsive pleading to the complaint, a default judgment was awarded to Wells Fargo and against Mr. Goans on January 4, 2010, in the amount of \$82,040.80.

The plaintiff then proceeded to execute upon the judgment. After becoming aware of a Notice of Garnishment which Mr. Goans received from the office of a New York City marshal, Mr. Goans moved by order to show cause on March 23, 2010 to vacate the default. The Court in ruling upon the merits of the order to show cause, ordered that a traverse hearing be conducted. A traverse hearing was held on February 28, 2011, in which the Court determined that process, which was effectuated by substituted service, was done properly. Thereafter, a second order to show cause seeking the same relief was brought by Mr. Goans, which was denied by the Court on May 6, 2011. In each order to show cause, the defendant appeared *pro se*.

Defendant then moved a third time by order to show cause, this time by counsel, seeking to vacate the default judgment. This Court in considering the third application, held that the traverse hearing only determined the issue of service of process and is not determinative of whether there is a reasonable excuse or a meritorious defense sufficient to set aside the default judgment based upon other considerations.

In rendering a decision dated January 17, 2012, this Court had scrutinized the correspondence submitted which was related to the negotiations regarding the modification of the home equity loan. It appeared to this Court that Mr. Goans was given an unreasonably short period of time to respond to the request of Jason Verhagen, Esq., counsel for Wells Fargo. Mr. Verhagen stated that his office contacted Mr. Goans on or about August 29, 2009, to advise him that the outstanding debt on the home equity loan was assigned to his office for collection. Mr. Verhagen then stated that Mr. Goans contacted his office on September 19, 2009. Thereafter, on September 27, 2009, Mr. Goans was asked to produce proof of his financial hardship. Mr. Verhagen stated that when such information was not provided by Mr. Goans, a decision was made on October 19, 2009 to pursue an action against Mr. Goans.

This Court upon a review of the submission of the parties notes that the summons initiated by Mr. Verhagen's office is dated August 31, 2009, (well prior to the October 19, 2009 date) and which was approximately the same time that Mr. Verhagen's office and Mr. Goans had their initial contact. Additionally, the information requested by Mr. Verhagen's office had already been received by Wells Fargo in connection with the review of the first mortgage modification. As a result, this Court concluded that those facts raised a question as to whether the negotiations between Wells Fargo and Mr. Goans had been conducted in good faith.

This Court further considered the issue of the appropriateness of bringing an action for monetary damages by Wells Fargo, which issue is germane to the within Motion to Dismiss. The home equity loan is a secured interest in the residence of Mr. Goans and its terms are contained in the "Smartfit Home Equity Account Agreement and Disclosure Statement" (Home Equity Agreement). The home equity agreement contains a default section (section 17) which provides the options available to the lender in the event of a default. These options include (a) closing the account immediately; (b) returning unpaid any outstanding advance request checks drawn on the account and refusing to honor any other advance request made on the account; (c) require immediate payment of the entire balance of the account.

This Court determined that there was no provision in the Home Equity Agreement for bringing a lawsuit for monetary damages (as opposed to a mortgage foreclosure) by the lender. By bringing this suit as a monetary claim, Wells Fargo has avoided the mortgage foreclosure rules

which might be available to a home owner. This Court determined that Wells Fargo had effectively avoided the requirements of CPLR Rule 3408, which requires foreclosure actions to have mandatory conferences with the Court and other protections available to home owners subject to foreclosure in New York State including the mandatory settlement conference (see Uniform Civil Rules of the Supreme Court, Rule 202.12-a "Residential Mortgage Foreclosure Actions; Settlement Conference").

This Court further determined that the actions of Wells Fargo point to a prima facie case of possible bad faith conduct, which has been ruled to be a ground for vacatur of a judgment. This Court ruled that the default judgment obtained by Wells Fargo against Mr. Goans be vacated and any and all collection efforts were to be terminated.

Thereafter, Mr. Goans, through counsel, served an answer with counterclaims, on or about March 7, 2012. Plaintiff rejected the answer, on or about March 12, 2012, because the answer did not contain a verification. Thereafter, an amended verified answer, with counterclaims was served on or about March 20, 2012. Wells Fargo served a reply to the amended answer on or about April 16, 2012.

Defendant's contention:

Defendant has moved to dismiss plaintiff's complaint, pursuant to CPLR § 3211(a)(2), upon the grounds that the Court lacks subject matter jurisdiction to hear the matter due to plaintiff's lack of standing to institute this action. Defendant maintains that this action should have been instituted as a foreclosure proceeding, where the plaintiff would be subject to certain proof, including having to establish that they are in possession of the original debt instrument.

The defendant has also moved to dismiss plaintiff's complaint, pursuant to CPLR § 3211(a)(1), on the grounds that the action cannot be instituted as a consumer debt and must therefore be brought as a foreclosure proceeding. By bringing this suit as a monetary claim, the plaintiff has avoided being subject to the mortgage foreclosure rules and laws which might be available to a home owner. The plaintiff has avoided being subject to the requirements of CPLR § 3408, which statute provides that foreclosure actions have mandatory conferences with the Court. The enactment of RPAPL § 1320 is evidence of the legislature's desire to aid homeowners, not to

create a means to deny a mortgagor the opportunity to litigate.

The defendant has further moved to dismiss, pursuant to CPLR § 3211(a)(3) and Business Corporation Law § 1312, on the grounds that the plaintiff has no legal capacity to sue in this state. The defendant contends that Wells Fargo is not registered or licensed to conduct business in the State of New York. Business corporations require statutory authority to sue and be sued (see BCL § 202(a)(2) and § 1312).

Additionally, the defendant seeks to dismiss this action pursuant to CPLR § 3013 and CPLR § 3211(a)(7) on the grounds that plaintiff has failed to state a proper cause of action. Defendant further contends that to the extent that plaintiff's causes of action seeks to recover monies for breach of contract, this claim cannot be maintained because it is barred by the doctrine of merger (see Ka Foon Lo v. Curis, 29 AD3d 525 (2006); Fabozzi v. Coppa, 5 AD3d 722 (2004); Rothstein v. Equity Ventures, 299 AD2d 472 (2002)).

Plaintiff's contentions:

In addressing the defendant's argument that the complaint does not properly state a cause of action, plaintiff maintains that defendant's contention that the claim is barred by the doctrine of merger is misplaced because the doctrine of merger is inapplicable to the facts in this matter. The doctrine of merger provides that the provisions of the contract for the sale of real property are merged in the deed and, as a result, are extinguished upon the closing of title (see Simone v. Real Estate Servs., Inc., 42 AD3d 518, 840 NYS2d 398 (2nd Dept. 2007)). The cases cited by defendant, which include Ka Foon Lo v. Curis, Fabozzi v. Coppa, and Rothstein v. Equity Ventures, to support defendant's argument as to applicability of the doctrine of merger are distinguishable as neither of these cases dealt with issues of a note and/or mortgage, but rather focused on a contract of sale, a subsequent closing of title and a deed transfer between the parties to the sale and claims that a party had arising from an alleged breach of that transaction.

As to the issue of standing, plaintiff maintains that Wells Fargo was the original lender in this transaction and remains so to this date. It is plaintiff's position that the lender has no obligation to submit the original note, to tender it or attach it to a complaint or a debt instrument. Wells Fargo further contends that it has sufficiently alleged its standing to survive a motion to

dismiss. Plaintiff states in the complaint that defendant executed a contract with plaintiff, defendant agreed to pay plaintiff for any indebtedness incurred by advancing monies, plaintiff advanced money to defendant and defendant defaulted on his repayment obligations.

As to the issue of Wells Fargo's legal capacity to maintain an action in this state, as a national banking association it is organized and existing under and pursuant to Chapter 2 of Title 12 of the United States Code and operates pursuant to federal authority. As a national bank, Wells Fargo is not required to obtain authority from the State of New York to do business in New York (see FIA Card Servs., N.A. v. Di Lorenzo, 22 Misc.3d 1127(A) (Dist. Ct. Nassau County 2009)). National banks may commence and maintain an action in the courts of this state without obtaining authority to do business in New York (see U.S. Bank Trust Nat'l Ass'n Tr. v. Butti, 16 AD3d 408, 792 NYS2d 505 (2nd Dept. 2005)). Accordingly, that portion of defendant's motion to dismiss the action, due to Wells Fargo not having been authorized to conduct business in New York, should be denied.

Plaintiff further contends that Wells Fargo properly elected its remedy at law. A mortgagee may elect its remedies when a mortgagor has defaulted on the loan obligation, either at law to recover on the obligation under the promissory note, or in equity to foreclose its lien on the property (see RPAPL §1301(1); Copp v. Sands Point Marina, Inc., 17 NY2d 291,293; 270 NYS2d 599, 600 (1966)).

Discussion

This Court has reviewed the submissions of counsel for the respective parties and considered the arguments presented herein, as well as the applicable law in making its determination with respect to the underlying motion to dismiss this action which seeks monetary damages based upon a delinquent home equity loan.

At issue, before this Court, is whether the plaintiff should be permitted to proceed in this action for monetary damages as a result of a delinquent home equity loan or should the plaintiff be limited to proceeding as a foreclosure matter.

This Court in its decision dated January 17, 2012, in determining whether a default should be vacated, addressed this very issue. The Court noted that this home equity loan is a secured

interest in the residence of Mr. Goans and that the terms of the loan were expressly contained in the Home Equity Agreement. The agreement contained a default section (section 17) which provided that the lender had three options; close the account, return unpaid any outstanding advance request checks that were drawn on the account and refuse to honor any other advance checks or require the immediate payment of the entire balance due and owing on said account. This Court determined that there was no provision in the Home Equity Agreement for commencing an action for monetary damages, as opposed to a mortgage foreclosure by the lender. This Court was of the opinion that Wells Fargo by bringing only a claim for money damages, has avoided the mortgage foreclosure rules which might be available to a home owner. As such, Wells Fargo has effectively avoided the requirements of CPLR § 3408, which requires foreclosure actions to have mandatory conferences with the Court and other protections available to home owners subject to foreclosure in New York State including the mandatory settlement conference (see Uniform Civil Rules of the Supreme Court, Rule 202.12-a "Residential Mortgage Foreclosure Actions; Settlement Conference"). Pursuant to CPLR § 3408, the purpose of the settlement conference is to hold settlement discussions, especially to see whether the parties can reach a mutually agreeable resolution, including a loan modification, to help the defendant avoid losing his or her home. The goal is for the parties to work out a payment schedule that will keep the defendant (Mr. Goans) in his residence.

This Court was also concerned that the actions of Wells Fargo, in limiting the time in which a resolution of this matter and a possible modification of the loan could be accomplished, could possibly point to a prima facie case of bad faith conduct. The plaintiff was allegedly awaiting documentation from Mr. Goans, although such information may have been previously provided by the defendant while successfully modifying a first mortgage with Wells Fargo. While plaintiff contends that they have the option to select their remedy, either at law to recover on the obligation under the promissory note, or in equity to foreclose its lien on the property (see RPAPL §1301(1)), the default provisions of this home equity loan do not provide that the plaintiff may commence an action for monetary damages.

This Court finds that this matter should proceed as a foreclosure proceeding and not as a claim for monetary damages for the default on the home equity loan.


In addressing the other issues presented, this Court finds that Wells Fargo has legal capacity to commence and maintain an action before the courts of this state without obtaining authority to do business in New York. As to the claim by defendant that plaintiff's claim is barred by the doctrine of merger, this Court finds that the doctrine of merger is inapplicable here as the dispute involves an interpretation of the loan documents and not an issue of merger.

Decision

The motion by defendant to dismiss the complaint is granted as the proper remedy to enforce the home equity loan is a foreclosure action. The plaintiff may proceed against the defendant in a foreclosure proceeding.

This shall constitute the decision and order of the Court.

Dated: March 13, 2014
Brooklyn, New York

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Hon. Bernard J. Graham, Justice
Supreme Court, Kings County

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