

Bank of N.Y. Mellon v Reis

2015 NY Slip Op 30153(U)

January 5, 2015

Supreme Court, Suffolk County

Docket Number: 25784/2011

Judge: William B. Rebolini

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COPY

Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

The Bank of New York Mellon f/k/a
the Bank of New York as Successor to
JPMorgan Chase Bank, as Trustee for the Benefit
of the Certificateholders of Equity One Abs, Inc.
Mortgage Pass-through Certificates Series 2004-2,

Plaintiff,

-against-

Christopher Reis a/k/a Christopher Ries;
Tammy Reis; Central Suffolk Hospital;
and "John Doe" and "Mary Doe," (Said names
being fictitious, it being the intention of plaintiff
to designate any and all occupants, tenants,
persons or corporations, if any, having or
claiming an interests in or lien upon the
premises being foreclosed herein.)

Defendants.

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Motion Sequence No.: 001; MG
Motion Date: 3/22/13
Submitted: 3/22/13

Motion Sequence No.: 002; XMD
Motion Date: 3/22/13
Submitted: 3/22/13

Attorney for Plaintiff:

Leopold & Associates, PLLC
80 Business Park Drive, Suite 110
Armonk, NY 10504

Attorney for Defendant

Christopher Reis a/k/a Christopher Ries:

James F. Misiano, P.C.
510 Broadhollow Road, Suite 110
Melville, NY 11747

Clerk of the Court

Upon the following papers numbered 1 to 24 read upon this motion for summary judgment and order of reference: Notice of Motion and supporting papers, 1 - 14; Notice of Cross Motion and supporting papers, 15 - 19; Answering Affidavits and supporting papers, 20 - 22; Replying Affidavits and supporting papers, 23 - 24; it is

ORDERED that this motion (001) by plaintiff The Bank of New York Mellon f/k/a the Bank of New York as successor to JPMorgan Chase Bank, as Trustee for the Benefit of the Certificateholders of Equity One ABS, Inc. Mortgage Pass-Through Certificates Series 2004-2 (Bank

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of NY Mellon) pursuant to CPLR 3212 for summary judgment on its complaint as against defendant Christopher Reis a/k/a Christopher Ries (defendant), for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, and for leave to amend the caption of this action pursuant to CPLR 3025 (b), is granted; and it is further

ORDERED that the cross motion (002) by defendant for an order compelling plaintiff to provide responses to defendant's notice of discovery pursuant to CPLR 3124, is denied.

ORDERED that the caption is hereby amended by substituting the name of Michael Reis in place of "John Doe", by substituting Christopher Reis a/k/a Christopher Ries, as successor in interest to Tammy Reis as tenants by the entirety and by striking therefrom defendants "Mary 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

_____ X
The Bank of New York Mellon f/k/a the Bank of
New York as Successor to Jpmorgan Chase Bank,
as Trustee for the Benefit of the Certificateholders
of Equity One Abs, Inc. Mortgage Pass-Through
Certificates Series 2004-2,

Plaintiff,

- against -

Christopher Reis A/k/a Christopher Ries;
individually and as Successor in interest as tenant
by the entirety to Tammy Reis;
Central Suffolk Hospital; Michael Reis,

Defendants.

_____ X

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This is an action to foreclose a mortgage on premises known as 73 Montauk Trail, Ridge, New York. On December 18, 2003, defendant executed a fixed rate note in favor of American General Home Equity, Inc. (American General) agreeing to pay the sum of \$125,000.00 at the yearly rate of 6.990 percent. On the same date, defendant with Tammy Reis executed a mortgage in the principal sum of \$125,000.00 on the subject property. The mortgage was recorded on February 2, 2004 in the Suffolk County Clerk's Office. The mortgage was transferred by an assignment of mortgage dated December 21, 2003 from American General to Mortgage Electronic Registration Systems, Inc. (MERS). The assignment of mortgage was recorded on February 23, 2005 with the Suffolk County Clerk's Office. On July 20, 2011, the note and mortgage were transferred by an assignment of mortgage from MERS to plaintiff Bank of NY Mellon. The assignment of mortgage was recorded on August 17, 2011 with the Suffolk County Clerk's Office. In its complaint, plaintiff alleges in pertinent part that the defendant breached his obligations under the terms of the note and mortgage by failing to make monthly payments. Defendant Reis interposed an answer with affirmative defenses.

The Court's computerized records indicate that a foreclosure settlement conference was held on October 30, 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 conference is required.

Plaintiff now moves for summary judgment on its complaint. In support of its motion, plaintiff submits among other things: the sworn affidavit of Nicholas Collins, contract management coordinator of Ocwen Loan Servicing, LLC, servicer for plaintiff; the affirmations of Sarah G. Greenberg, Esq. in support of the application; the pleadings; the note, mortgage and assignments of mortgage; proof of notices pursuant to RPAPL 1320 and 1303; the affirmation of Sarah J. Greenberg, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); 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. Defendant has submitted a cross motion seeking an order compelling plaintiff to comply with his discovery demands.

“[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” (*see 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 (*see Ames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]; *Household Fin. Realty Corp. of New York v Winn*, 19 AD3d 545, 796 NYS2d 533 [2d Dept 2005]).

Here, plaintiff has established its entitlement to summary judgment against the answering defendant as such papers included a copy of the mortgage, the unpaid note together with due evidence of his default in payment under the terms of the loan documents (*see* CPLR 3212; RPAPL

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1321; *Neighborhood Hous. Serv. of New York City v Hawkins*, 97 AD3d 554, 947 NYS2d 321 [2d Dept 2012]; *Baron Assoc., LLC v Garcia Group Enter.*, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; *Citibank, N.A. v Van Brunt Prop., LLC*, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]; *Archer Capital Fund, L.P. v GEL, LLC*, 95 AD3d 800, 944 NYS2d 179 [2d Dept 2012]; *Swedbank, AB v Hale Ave. Borrower, LLC.*, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]; *Rossrock Fund II, L.P. v Osborne*, 82 AD3d 737, 918 NYS2d 514 [2d Dept 2011]). Nicholas Collins avers that defendant defaulted under the terms and conditions of the note and mortgage by failing to tender payment for the monthly installment due on July 1, 2010 and that an acceleration letter was sent to defendant.

It was thus incumbent upon the answering defendant 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 Bellafore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Grogg Assocs. v South Rd. Assocs.*, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; *Wells Fargo Bank v Karla*, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; *Washington Mut. Bank v O'Connor*, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]; *J.P. Morgan Chase Bank, N.A. v Agnello*, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; *Ames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]).

Here defendant's contention that plaintiff's summary judgment motion should be denied in order to afford defendant an opportunity to obtain discovery is unavailing. CPLR 3212(f) provides that "should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just". Appellate case authorities have long instructed that to avail oneself of the safe harbor this rule affords, the claimant must "offer an evidentiary basis to show that discovery may lead to relevant evidence and that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff" (*Martinez v Kreychmar*, 84 AD3d 1037, 923 NYS2d 648 [2d Dept 2011]; see *Garcia v Lenox Hill Florist III, Inc.*, 120 AD3d 1296, 993 NYS2d 86 [2d Dept 2104]; *Seaway Capital Corp. v 500 Sterling Realty Corp.*, 94 AD3d 856, 941 NYS2d 871 [2d Dept 2012]). In addition, the party asserting the rule must demonstrate that he or she made reasonable attempts to discover facts which would give rise to a genuine triable issue of fact on matters material to those at issue (see *Swedbank, AB v Hale Ave. Borrower, LLC*, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]). The opposing papers submitted by defendant were insufficient to satisfy the aforementioned statutory burden. Thus, defendant failed to sufficiently demonstrate that he made reasonable attempts to discover the facts which would give rise to a triable issue of fact or that further discovery might lead to relevant evidence (see CPLR 3212 [f]; *Anzel v Pisotino*, 105 AD3d 784, 962 NYS2d 700 [2d Dept 2013]; *Cortes v Whelan*, 83 AD3d 763, 922 NYS2d 419 [2d Dept 2011]; *Sasson v Setina Mfg. Co., Inc.*, 26 AD3d 487, 810 NYS2d 500 [2d Dept 2006]).

Accordingly, the motion for summary judgment is granted against the answering defendant. Plaintiff's request for an order of reference appointing a referee to compute the amount due plaintiff

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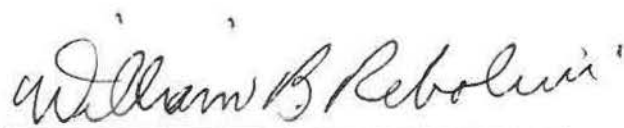
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under the note and mortgage is granted (*see Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *Bank of East Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]). The defendant's cross-motion is denied in its entirety.

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

Dated:

1/5/2015



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

_____ FINAL DISPOSITION ___ X ___ NON-FINAL DISPOSITION