

Citimortgage Inc. v Medina

2015 NY Slip Op 30276(U)

February 19, 2015

Supreme Court, Suffolk County

Docket Number: 2411-12

Judge: W. Gerard Asher

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
IAS PART 32 - SUFFOLK COUNTY

PRESENT: Hon. W. GERARD ASHER
Justice of the Supreme Court

CITIMORTGAGE INC.,

Plaintiff,

-against-

NELSON MEDINA, CITIBANK, N.A. PEOPLE OF THE STATE OF NEW YORK; DANIELLE MEDINA; COMMISSIONER OF TAXATION AND FINANCE; LA BONNIE VIE ASSOCIATES; "JOHN DOE #1" through "JOHN DOE #10" inclusive, the names of ten last name defendants being fictitious, real names unknown to plaintiff the parties intended being persons or corporations having an interest in, or tenants or persons in possession of, portions of the mortgaged premises described in the Complaint,

Defendant.

MOTION DATE: 1-6-14

ADJ. DATE:

MOT. SEQ. # 001 - MG

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_____ X

Upon the following papers numbered 1 to 16, read on this motion for summary judgment and an order of reference; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12 (memorandum of law); ~~Notice of Cross Motion and supporting papers~~; Answering Affidavits and supporting papers 13 - 14; Replying Affidavits and supporting papers 15 - 16; ~~Other~~; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by plaintiff, CitiMortgage, Inc., for an order pursuant to CPLR 3212 granting summary judgment in its favor against defendant Nelson Medina (defendant), fixing the defaults as against the non-appearing, non-answering defendants, for leave 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 Sandra Medina in place of "John Doe #1" and by striking therefrom defendants "John Doe #2" through "John Doe #10"; and it is further


2-19-14

ORDERED that plaintiff is directed to serve a copy of this order 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

CITIMORTGAGE INC.,

Plaintiff,

-against-

NELSON MEDINA, CITIBANK, N.A. PEOPLE
OF THE STATE OF NEW YORK; DANIELLE
MEDINA; COMMISSIONER OF TAXATION
AND FINANCE; LA BONNIE VIE ASSOCIATES;
SANDRA MEDINA,

Defendants.

X

This is an action to foreclose a mortgage on property known as 17 Nadworny Lane, Stony Brook, New York. On May 2, 2005, defendant executed a fixed rate note in favor of CitiMortgage, Inc. agreeing to pay the sum of \$500,000.00 at the yearly interest rate of 6.500 percent. On said date, defendant also executed a mortgage in the principal sum of \$500,000.00 on the subject property. The mortgage was recorded on June 3, 2005 in the Suffolk County Clerk's Office.

CitiMortgage, Inc. sent a notice of default on August 2, 2010 to defendant stating that he had defaulted on his note and mortgage and that the amount past due was \$17,578.89. As a result of his continuing default, plaintiff commenced this foreclosure action on January 19, 2012. In its complaint, plaintiff alleges in pertinent part that defendant breached his obligations under the terms of the note and mortgage by failing to pay the monthly installment due on June 1, 2010 and subsequent payments thereafter. Defendant interposed an answer with affirmative defenses.

The Court's computerized records indicate that a foreclosure settlement conference was held on August 28, 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 conference is required.

Plaintiff now moves for summary judgment on its complaint. In support of its motion, plaintiff submits among other things, the affirmation of Kenneth J. Flickinger, Esq. in support of the motion; the affirmation of Richard F. Komosinski, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the affidavit of Debbie Caudill, vice president - document control by CitiMortgage, Inc.; the pleadings; the note and mortgage; proof of notices pursuant to RPAPL 1320, 1303

CitiMortgage v Medina

Index No. 12-02411

Page 3

and 1304; affidavits of service of the summons and complaint; an affidavit of service of the instant summary judgment motion upon the defendant's counsel; and, a proposed order appointing a referee to compute. Defendants have submitted a cross motion opposing plaintiff's motion and seeking an order dismissing the complaint on the ground that plaintiff does not have standing.

“[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, 764 NYS2d 635 [2d Dept 2003]; see *Argent Mtge. Co., LLC v Mentasana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]; *Wells Fargo Bank, N.A. v Webster*, 61 AD3d 856, 877 NYS2d 200 [2d Dept 2009]). “The burden then shifts to the defendant to demonstrate ‘the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff’ ” (*U.S. Bank Natl. Assn. TR U/S 6/01/98 [Home Equity Loan Trust 1998–2] v Alvarez*, 49 AD3d 711, 711, 854 NYS2d 171 [2d Dept 2008], quoting *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 664 NYS2d 345 [2d Dept 1997], *lv to appeal dismissed* 91 NY2d 1003, 676 NYS2d 129 [1998]; see also *Emigrant Mtge. Co., Inc. v Beckerman*, 105 AD3d 895, 895, 964 NYS2d 548 [2d Dept 2013]).

Here, plaintiff has established its *prima facie* entitlement to summary judgment against the answering defendant as such papers included a copy of the mortgage and the unpaid note together with due evidence of defendant's default in payment under the terms of the loan documents (see *Jessabell Realty Corp. v Gonzales*, 117 AD3d 908, 985 NYS2d 897 [2d Dept 2014]; *Bank of New York Mellon Trust Co. v McCall*, 116 AD3d 993, 985 NYS2d 255 [2d Dept 2014]; *North Bright Capital, LLC v 705 Flatbush Realty, LLC*, 66 AD3d 977, 889 NYS2d 596 [2d Dept 2009]; *Countrywide Home Loans, Inc. v Delphonse*, 64 AD3d 624, 883 NYS2d 135 [2d Dept 2009]).

The standing of a plaintiff in a mortgage foreclosure action is measured by its ownership, holder status or possession of the note and mortgage at the time of the commencement of the action (see *U.S. Bank of N.Y. v Silverberg*, 86 AD3d 274, 279, 926 NYS2d 532 [2d Dept 2011]; *U.S. Bank, N.A. v Adrian Collymore*, 68 AD3d 752; *Wells Fargo Bank, N.A. v Marchione*, 69 AD3d 204, 887 NYS2d 615 [2d Dept 2009]). Because “a mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation” (*Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909, 961 NYS2d 200 [2d Dept 2013] [internal citations omitted]), a mortgage passes as an incident of the note upon its physical delivery to the plaintiff. Holder status is established where the plaintiff is the special indorsee of the note or takes possession of a mortgage note that contains an indorsement in blank on the face thereof as the mortgage follows as incident thereto (see UCC § 3–202; § 3–204; § 9–203[g]). Here, Debbie Caudill avers that at the commencement of the action and at all times thereafter, CitiMortgage Inc. was and is in possession of the original note (see *Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674, 838 NYS2d 622 [2d Dept 2007]). The plaintiff thus has established, *prima facie*, it has standing to prosecute this action.

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 his answer or otherwise available to him (see *Flagstar Bank v Bellafiore*, 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*

CitiMortgage v Medina

Index No. 12-02411

Page 4

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]).

In his opposing papers, defendant re-asserts his pleaded affirmative defense that the plaintiff lacks standing to prosecute its claims for foreclosure and sale. The defendant contends that a question of fact exists with respect to the plaintiff's standing as the complaint and affidavit of Debbie Caudill fail to allege that CitiMortgage Inc. is the owner of the mortgage and note.

The court finds that none of defendant's allegations give rise to a question of fact that implicate a lack of standing on the part of the plaintiff. Here, the uncontroverted facts establish that plaintiff, was the original lender in connection with the subject note and mortgage which remained in its physical possession prior to the commencement of the action.

Likewise unavailing is the defendant's assertion that the Court lacks personal jurisdiction over the defendant due to an alleged defect in service. Here, the law is well settled that a jurisdictional defense not asserted in the first responsive pleading, whether in an answer or pre-answer dismissal motion pursuant to CPLR 3211, is waived (*see* CPLR 3211[e]; *Addesso v Shemtob*, 70 NY2d 689, 518 NYS2d 793 [1987]). By appearing in the action and electing to answer the complaint without an objection to jurisdiction, defendant conferred jurisdiction upon the court and waived such defense (*see Urena v NYNEX Inc.*, 223 AD2d 442, 637 NYS2d 49 [1st Dept 1996]; *Wiesener v Avis Rent-A-Car Inc.*, 182 AD2d 372, 582 NYS2d 122 [1st Dept 1992]).

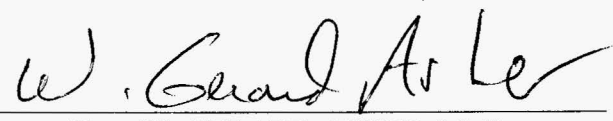
With respect to his remaining affirmative defenses, defendant has failed to raise any triable issues of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff (*see Cochran Inv. Co., Inc. v Jackson*, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007] *quoting Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 664 NYS2d 345 [2d Dept 1997]). Here, answering 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 NYS2d 52 [2d Dept 2011]). "Motions for summary judgment may not be defeated merely by surmise, conjecture or suspicion" (*Shaw v Time-Life Records*, 38 NY2d 201, 379 NYS2d 390 [1975]). Neither the defenses raised in his answer nor those asserted on this motion rebut the plaintiff's *prima facie* showing of its entitlement to summary judgment.

Based on the foregoing, plaintiff's motion for summary judgment is granted as against defendant Medina. That branch of the motion seeking to fix the defaults as against the remaining defendants who have not answered or appeared herein is granted. 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 Green Tree Serv. v Cary*, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]; *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]).

CitiMortgage v Medina
Index No. 12-02411
Page 5

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

Dated: Feb. 19, 2015



Hon. W. GERARD ASHER J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION