Teachers Fed. Credit Union v Giannetti
2015 NY Slip Op 30359(U)
March 6, 2015
Supreme Court, Suffolk County
Docket Number: 12-34993
Judge: Joseph Farneti
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SHORT FORM ORDER

INDEX NO. 12-34993

SUPREME COURT - STATE OF NEW YORK
IAS PART 37 - SUFFOLK COUNTY

PRESENT: Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 5-8-13 (001)
10-28-13 (002)
11-14-13 (003)
ADJ. DATE 1-9-14 (001)
Mot. Seq. #001 - MD
002 - MG
003 - XMD

---x

TEACHERS FEDERAL CREDIT UNION,

Plaintiff,

-against-

ROBERT GIANNETTI, DONNA GIANNETTI,

"JOHN DOE #1" through "JOHN DOE #12", the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interred in or lien upon the premises described in the complaint,

Defendants.

---x

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Upon the following papers numbered 1 to 102 read on these motions for an order dismissing the action and summary judgment and cross motion for summary judgment; Defendants' Notice of Motion (001) and supporting papers 1 - 13; Answering Affidavits and supporting papers 14 - 15; Replying Affidavits and supporting papers 16 - 18; Plaintiff's Notice of Motion (002) and supporting papers 19 - 41; Notice of Cross Motion and supporting papers 57 - 84; Answering Affirmation and supporting papers 85 - 97; Replying Affidavits and supporting papers 98 - 102; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (seq. #001) by defendants Robert Giannetti and Donna Gianetti ("defendants"), the motion (seq. #002) by plaintiff Teachers Federal Credit Union ("Teachers Federal") and the cross-motion (seq. #003) by defendants, are consolidated for purposes of this determination; and it is further

ORDERED that this motion (seq. #001) by defendants for an Order, pursuant to CPLR 3126 (3) striking plaintiff's complaint and dismissing the action or in the alternative, for an Order determining "de facto" admissions by plaintiff for its failure to comply with defendants' notice to admit, and for an Order, pursuant to CPLR 3124, compelling plaintiff to comply with defendants' discovery demands, is denied; and it is further

ORDERED that this motion (seq. #002) by plaintiff for an Order, pursuant to CPLR 3212, granting summary judgment on its complaint as against defendants, 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 cross-motion (seq. #003) by defendants for an Order, pursuant to CPLR 3212, granting summary judgment in their favor against plaintiff, is denied; and it is further

ORDERED that the caption is hereby amended by substituting Jessica Giannetti and Matthew Giannetti in place of defendants "John Doe #1" through "John Doe #2" and by striking therefrom defendants "John Doe #3" through "John Doe #12"; and it is further

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
____x
TEACHERS FEDERAL CREDIT UNION,

Plaintiff,

-against-

ROBERT GIANNETTI, DONNA GIANNETTI,
JESSICA GIANNETTI, MATTHEW GIANNETTI,

Defendants.
____x

This is an action to foreclose a residential mortgage on premises known as 36 Tyburn Lane, Centereach, New York. On February 6, 2004, defendants executed a fixed rate note ("Note 1") in favor of Teachers Federal agreeing to pay the sum of $205,000.00 at the yearly rate of 5.500 percent. On the same date, defendants also executed a mortgage ("Mortgage 1") in the principal sum of $205,000.00 on the subject property. The mortgage was recorded on May 12, 2004 in the Suffolk County Clerk's Office. On March 16, 2007, defendants executed a fixed rate note ("Note 2") in favor of Teachers Federal agreeing to pay the sum of $125,000.00 at the yearly rate of 7.500 percent. On the same date, defendants also executed a mortgage ("Mortgage 2") in the principal sum of $125,000.00 on the subject property. The second mortgage was recorded on November 21, 2007 in the Suffolk County Clerk's Office. Thereafter, defendants executed a consolidation, extension and modification

agreement ("CEMA") dated September 29, 2009 with Teachers Federal in which the aforementioned notes (Notes 1 and 2) and mortgages (Mortgages 1 and 2) were consolidated with a third note ("Note 3") in the sum of $40,815.55 and a third mortgage. The consolidated note in the sum of $342,000.00 and mortgages formed a consolidated lien on the subject premises. The third mortgage and CEMA were recorded on October 19, 2009 in the Suffolk County Clerk's Office.

Teachers Federal sent a notice of default dated February 2, 2012 to defendants stating that they had defaulted on their mortgage loan and that the amount past due was $33,489.59. As a result of defendants' continuing default, plaintiff commenced this foreclosure action on November 16, 2012. In its verified 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 payments. Defendants interposed an answer with affirmative defenses and counterclaims.

The Court's computerized records indicate that a foreclosure settlement conference was held on July 23, 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.

Initially addressing defendants' motion wherein they seek various forms of relief based upon plaintiff's purported failure to comply with defendants' discovery demands, Uniform Rules for Trial Courts (22 NYCRR) § 202.7 (a), mandates that any motion relating to disclosure must be accompanied by an attorney's affirmation of a good faith effort to resolve the underlying discovery dispute. Such an affirmation must indicate the time, place, and nature of the consultation, the issues discussed and any resolutions, or must show good cause why no such conferral with opposing counsel was held (*see* 22 NYCRR § 202.7 [c]; ***Mironer v City of New York***, 79 AD2d 1106, 915 NYS2d 279 [2d Dept 2010]; ***Natoli v Milazzo***, 65 AD3d 1309, 886 NYS2d 205 [2d Dept 2009]).

> The "good faith" requirement is intended to remove from the court's work load all but the most significant and unresolvable disputes over what has been the most prolific generator of pretrial motions: discovery issues. Most seasoned litigators know that, with a modicum of good sense, discovery disputes can and should be resolved by the attorneys without the necessity of judicial intervention.

(***Eaton v Chahal***, 146 Misc 2d 977, 553 NYS2d 642 [Sup Ct, Rensselaer County 1990]).

The affirmation of good faith submitted by the defendants' attorney, annexed to the defendants' motion to compel the plaintiff to comply with discovery is insufficient, thus requiring summary denial of defendants' motion. In his affirmation of good faith, defendants' counsel merely acknowledges that he sent a correspondence to plaintiff's counsel dated February 27, 2013 which indicated that "[a]s of the date of this correspondence, plaintiff has yet to respond and/or comply with the defendants' combined demands. Notwithstanding the fact that plaintiff is currently in default on the combined demands, the defendants request that plaintiff properly respond to the combined demands immediately. Please be guided accordingly." Here, defendants failed to set forth any discussions or communications between the parties that would evince a diligent effort by them to

resolve the discovery dispute raised in their motion (*see* 22 NYCRR § 202.7 [a], [c]; ***Mironer v City of New York***, 79 AD3d 1106 [2d Dept 2010]; ***Natoli v Milazzo***, 65 AD3d 1309 [2d Dept 2009]). Accordingly, the motion is denied.

Plaintiff now moves for summary judgment on its complaint. In support of its motion, plaintiff submits, among other things: the sworn affidavit of Nancy J. Orlando, senior vice president of Teachers Federal; the affirmation of Tiffany L. Henry, Esq. in support of the motion; the affirmation of Alan Waintraub, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the pleadings; the notes, mortgages and a CEMA; notices pursuant to RPAPL 1320, 1303 and 1304; affidavits of service for the summons and complaint; an affidavit of service for the instant summary judgment motion upon defendants and defendants' 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 grounds that, *inter alia*, 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 Mentesana***, 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 defendants' 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, Nancy J. Orlando avers "[p]laintiff, as the original lender, has physical possession of the notes and mortgages as consolidated, having taken physical delivery of Note 1, Note 2 and Note 3 prior to the commencement of this action. As such Note 1, Note 2, Note 3 and CEMA are now held by Plaintiff" (*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 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 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 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]; ***Aames Funding Corp. v Houston***, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]).

In their opposing papers, defendants re-asserted their pleaded affirmative defense that the plaintiff lacks standing to prosecute its claims for foreclosure and sale. The defendants contend that a question of fact exists with respect to the plaintiff's standing as plaintiff failed to establish that it was the owner and holder of the note at the outset of the action and that plaintiff did not have physical possession of the note as of the date of the commencement of this action. The court finds that none of defendants' allegations give rise to questions of fact that implicate a lack of standing on the part of the plaintiff. The uncontroverted facts establish that plaintiff, as the original lender of the notes, mortgages and CEMA, physically possessed same prior to the commencement of the action. Neither the defenses raised in their answer, nor those asserted on this motion rebut the plaintiff's *prima facie* showing of its entitlement to summary judgment.

Defendants also contend that plaintiff's "Note 4" is inadmissible as incomplete. However, plaintiff claims to have inadvertently failed to annex page 3 of 3 to Note 4 in its moving papers. In any event, the missing page to Note 4 was subsequently submitted in plaintiff's affirmation in opposition thereby rendering the subject document complete. As a result thereof, defendants' assertion is without merit.

Also unavailing is defendants' claim of forgery as to Note 4. The mere denial by way of an undetailed affidavit of defendants as to the authenticity of their initials on said instrument, without any other proof, is insufficient to establish *prima facie* that the subject note was forged (*see* ***Banco Popular N. A. v Victory Taxi Mgt.***, 1 NY3d 381, 774 NYS2d 488 [2004]). It is also noted that defendants do not deny having received the loan proceeds or having defaulted on their mortgage loan payments in their affidavit (*see* ***Citibank, N.A. v Souto Geffen Co.***, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]).

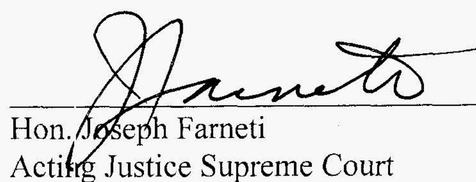
With respect to any of their remaining affirmative defenses, defendants have failed to raise any triable issues of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud,

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]). Defendants have 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]).[1]

Accordingly, the motion for summary judgment is granted against the answering defendants Giannetti. Plaintiff's request for an order of reference appointing a referee to compute the amount due plaintiff 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 defendants' 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: March 6, 2015



Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION _X_ NON-FINAL DISPOSITION

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[1] In rendering its decision, the Court, in its discretion, has considered all arguments and submissions before it, including plaintiff's allegedly untimely reply to defendants' opposition to plaintiff's motion for summary judgment and defendants' unexecuted affirmation in further support of defendants' cross motion.