US Bank Natl. Assoc. v Stuart
2015 NY Slip Op 30472(U)
March 30, 2015
Sup Ct, Queens County
Docket Number: 31439/2009
Judge: Robert J. McDonald

MEMORANDUM

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

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US BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR CSMC 2006-6
3476 Stateview Boulevard
Ft. Mill, SC 29715,

Plaintiff,

- against -

CRAIG STUART, LOIS STUART, CRIMINAL COURT CITY OF NEW YORK, HSBC BANK USA, NATIONAL ASSOCIATION, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE,

JOHN DOE (Said name being fictitious, it being the intention of the Plaintiff to designate 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.

Index No.: 31439/2009

Motion Date: 08/04/14

Motion No.: 128

Motion Seq.: 1

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The following papers numbered 1 to 30 were read on this motion by plaintiff, US Bank National Association as Trustee for CSMC 2006-6, for an order dismissing the answer of the defendant, Craig Stuart; granting summary judgment in favor of the plaintiff; granting a default judgment against all other non-answering defendants including Lois Stuart; for an order pursuant to RPAPL § 1321 appointing a referee to ascertain and compute the amount due to the plaintiff; for an order amending the caption to delete "John Doe" as a party defendant and deleting the address of the plaintiff from the caption; and the cross-motion of the defendant for an order pursuant to CPLR 2004 and 3025(b) granting

the defendant leave to amend and supplement his pro se answer to assert various affirmative defenses and counterclaims; for an order directing a preliminary conference to schedule discovery; and for an order dismissing the action against defendant Lois Stuart pursuant to CPLR 3215(c) for failure to take proceedings for a default judgment within one year of said defendant's failure to appear

	Papers Numbered
Notice of Motion Affidavits-Exhibits-Memo of Law	1 - 7
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In this mortgage foreclosure action, plaintiff moves for an order striking the answer of defendant Craig Stuart; granting summary judgment against said defendant on the ground that his answer contains no valid defense and no triable issue of fact exists; granting a default judgment against the remaining defendants who have not answered; appointing a referee to compute the sum due and owing to plaintiff; and amending the caption.

Defendant, Craig Stuart, opposes the motion for summary judgment and cross-moves for leave to serve an amended answer to assert various affirmative defenses and counterclaims; for an order directing a preliminary conference to schedule discovery; and for an order dismissing the action against defendant Lois Stuart pursuant to CPLR 3215(c) for failure to take proceedings for a default judgment within one year of said defendant's failure to appear.

This foreclosure action pertains to the property located at 248-03 40th Avenue, Little Neck, New York, 11363. Based upon the record before this court, the defendant, Craig Stuart, entered into a note with Southern Star Mortgage Corp. on April 13, 2006 in the original principal amount of $417,000. The indorsed note made payable in blank contains an allonge dated April 13, 2006 signed by Southern Star Mortgage Company. The note was secured by a mortgage signed by Craig Stuart and Lois Stuart. The mortgage was assigned by Southern Star Mortgage Corp to plaintiff US Bank National by assignment dated February 25, 2009. The plaintiff asserts that defendants defaulted on the mortgage when they failed to make their monthly mortgage payments beginning July 1, 2008.

The plaintiff subsequently accelerated payment of the defendants' note and mortgage and brought an action to foreclose its mortgage by filing a lis pendens and summons and complaint on November 23, 2009. The plaintiff submits affidavits of service on all of the named defendants. Pursuant to the sworn affidavits of service, defendants Craig and Lois Stuart were personally served with a copy of the summons and complaint and all necessary RPAPL notices, pursuant to CPLR 308 on November 25, 2009 and December 7, 2009 respectively. Lois Stuart was served in the State of Texas. Defendant Craig Stuart joined issue by service of a pro se answer dated December 11, 2009. The answer contains a general denial and affirmative defenses including lack of standing, improper service of the summons and complaint, and failure to serve certain required RPAPL notices. The answer asserts that plaintiff US Bank National does not own the note and mortgage. He also states in the answer that he seeks to be approved for a Hamp loan modification. Besides Craig Stuart, none of the other defendants answered the summons and complaint and are in default.

A foreclosure settlement conference was held before Referee Mark J. Kugelman, Esq. on August 3, 2010, October 12, 2010, and December 20, 2010. On January 10, 2011, the Referee found that the defendant had not sought loss mitigation and instead intended to list the property for sale. Referee Kugelman ordered that the case should proceed by motion for summary judgment and an Order of Reference.

In support of the motion for summary judgment, the plaintiff submits the affirmation of counsel, Douglas C. Weinert, Esq., the affidavit of Shae Smith, a Vice President of Loan Documentation for Wells Fargo Bank, N.A., the mortgage loan servicing agent of the plaintiff; a copy of the Mortgage and Note with allonge copies of the affidavits of service on all the defendants; a copy of the pleadings including the answer of defendant Craig Stuart; a copy of the mortgage trust agreement; a copy of the assignment of the mortgage from Southern Star Mortgage Corp. to US Bank National Association as Trustee for CSMC 2006-6 recorded on May 10, 2006; 90 day notice of intent to foreclose; copy of the RPAPL § 1304 notices sent to the defendant with the summons and complaint; and a copy of the attorney affidavit pursuant to the Administrative Order of the Chief Administrative Judge dated July 10, 2014 under AO/431/11, executed by Douglas C. Weinert, Esq.

In her affidavit, dated January 30, 2014, Shae Smith, a Vice President of Loan Documentation for Wells Fargo Bank National Association, who serviced the loan in issue for US Bank National Association, states that based upon her personal knowledge and review of Wells Fargo’s records, the plaintiff, U.S. Bank

National Association is in possession of the Promissory Note. She states that the Promissory Note contains an allonge indorsed in blank and that plaintiff was is possession of the Promissory Note prior to the commencement of the action on November 23, 2009. She states that the defendants defaulted on the terms of the promissory note by failing to make their monthly installments beginning on July 1, 2008. She states that the plaintiffs elected to call due the entire unpaid principal and sent a 30 day notice of default pursuant to the terms of the mortgage. When the default was not cured, the plaintiff sent a 90 day pre-foreclosure notice to the defendants pursuant to RPAPL § 1304 by first class mail and certified mail on April 2, 2009. Ms. Smith states that the total amount due to the plaintiff on the Note as of January 28, 2014 is $599,304.84 made up of the principal balance of $407,164.63, interest of $158,362.25, and other costs including hazard insurance disbursements and tax disbursements.

Plaintiff contends, based upon the evidence submitted, that plaintiff has made a prima facie showing that it is entitled to summary judgment against the answering defendant, an order striking the affirmative defenses and an Order of Reference. Plaintiff asserts that the defendants were all lawfully served with a summons and complaint and that the Court, therefore, has personal jurisdiction. In addition, the plaintiff asserts, contrary to the defendant's contention, that it has standing to bring the action by presenting sufficient evidence of the written assignment and physical transfer of the note and mortgage to the plaintiff prior to the commencement of the action. Plaintiff asserts that it has established, prima facie, entitlement to summary judgment based upon its submission of the Note with Allonge, the Mortgage, the Pooling and Servicing Agreement, the notice of default and the affidavit of Ms. Smith evidencing the defendants' failure to make the contractually required loan payments. Counsel also asserts that there are no triable issues of fact with respect to any of the affirmative defenses asserted by the defendant.

In this regard, the plaintiff contends that the defendant's answer, should be stricken as the defendant has failed to set forth any factual basis or factual assertions of wrongdoing on the part of the plaintiff. With respect to the defense of lack of standing plaintiff asserts that the evidence submitted proves that it was the holder of the Note as it was in possession of the Note with an allonge indorsed in blank as well as an assignment of the mortgage prior to the commencement of the action. Although defendant asserts that he did not have knowledge that the note and mortgage were assigned to the plaintiff, such lack of knowledge is not a viable defense as the plaintiff has demonstrated that it had proper standing.

With respect to the affirmative defense of improper service the plaintiff asserts that the defendant waived said defense by failing to move to dismiss the action for lack of service with 60 days of service of the answer. Moreover plaintiff contends that the affidavits of the process server demonstrates that Craig Stuart was served personally and that service was properly effectuated pursuant to CPLR 308(1). Plaintiff also assets that the affidavits of service show that the defendant was also served with RPAPL § 1303 notices with the summons and complaint and the process server's affirmation is prima facie evidence of proper service.

Lastly, counsel asserts that the failure to arrive at an agreeable loss mitigation package despite having conferenced the matter several times before a referee is not a viable defense for the defendants' default on the note. Counsel also notes that despite granting summary judgment, a short sale, loan modification, forbearance agreement, reinstatement or redemption may still take place prior to the judicial sale of the property.

On May 31, 2014, defendant's counsel, R. David Marquez, Esq. filed a notice of appearance for Craig Stuart and Lois Stuart. Defendants oppose the motion for summary judgment and cross-move for an order granting leave to serve an amended answer, for an order directing the plaintiff to respond to its notices for discovery and for an order dismissing the action against the non-answering defendant, Lois Stuart for failure to timely seek a default judgment. In that respect counsel asserts that Ms. Stuart was served on December 7, 2009 but did not take action for a default judgment until the instant motion was served on March 7, 2014.

In support of the cross-motion counsel asserts that the defendant is entitled to amend its answer at any time as of right pursuant to CPLR 2004 and CPLR 3025(b) unless the proposed amendment is palpably insufficient or patently devoid of merit and so long as the amendment does not cause the opposing party prejudice or surprise resulting from the delay.

In addition, defendants assert that the motion for summary judgment is premature as the plaintiff has not responded to the defendant's Notice to Produce, Notice for Discovery and Inspection and Notice of Deposition. These notices were served on May 30, 2014, two months after service of the plaintiff's motion for summary judgment. Counsel asserts plaintiff should produce inter alia, certified copies of the original note and mortgage, proof of intervening indorsements, and intervening assignments, all contents of the original collateral file, mortgage file, loan file, and servicing file.

In addition, in opposition to the motion for summary judgment counsel asserts that the plaintiff lacks standing by failing to demonstrate that it is the lawful owner or holder of the defendants' note and mortgage. Counsel asserts that the affidavit of Ms. Smith is insufficient to prove that the plaintiff had proper standing to commence the proceeding or that the assignment was in proper form. Mr. Stuart also submits an affidavit stating that he believes that there are issues of fact raised by counsel concerning whether the plaintiff was in physical possession of the Mortgage and Note at the time of the commencement of the action, whether plaintiff adhered to the limitations imposed by the Trust's Pooling and Servicing Agreement, and whether there has been sufficient evidence presented that the 90 day pre-foreclosure notice was properly served.

Plaintiff opposes the cross-motion to serve an amended answer on the ground that it is untimely as the original answer was served over four years ago. Plaintiff also claims that the fact that defendant is now represented by counsel is not a sufficient excuse to justify the delay. Further, plaintiff states that it has a reasonable excuse for not moving for a default judgment against Lois Stuart within one year(citing Giglio v NTIMP, Inc., 86 AD3d 301 [2d Dept. 2011]; Costello vReilly, 36 AD3d 581 [2d Dept. 2007]). Plaintiff asserts that it did not receive the file from prior counsel until February 10 2012 and plaintiff had to review all the documents in the file in order to obtain the affidavit required by the Chief Administrative Judge pursuant to AO 431/11. Further the defendant stopped all foreclosure actions due to the area being declared a Federal Disaster Area. Counsel claims it as a meritorious cause of action and has not abandoned the action against Lois Stuart.

It is well settled that a plaintiff in a mortgage foreclosure action establishes a prima facie case of entitlement to summary judgment through submission of proof of the existence of the underlying note, mortgage and default in payment after due demand (see Valley Natl. Bank v Deutsch, 88 AD3d 691 [2d Dept 2011]; Witelson v Jamaica Estates Holding Corp. I, 40 AD3d 284 [1st Dept. 2007]; Marculescu v Ouanez, 27 AD3d 701 [2d Dept. 2006]; US. Bank Trust National Assoc. v Butti, 16 AD3d 408 [2d Dept. 2005]; Layden v Boccio, 253 AD2d 540 [2d Dept. 1998]; State Mortgage Agency v Lang, 250 AD2d 595(2d Dept.1998]). Upon such a showing, the burden shifts to the defendant to produce evidence in admissible form sufficient to raise a material issue of fact requiring a trial.

This Court finds that the plaintiff's submissions are sufficient to establish its entitlement to summary judgment against defendant mortgagor, Craig Stuart. The moving papers demonstrate, prima facie, that none of the asserted defenses set forth in the answer of defendant are meritorious and plaintiff is entitled to summary judgment on its claims against Craig Stuart(see EMC Mortg. Corp. v Riverdale Assocs., 291 AD2d 370 [2d Dept. 2002]; State of New York v Lang, 250 AD2d 595 [2d Dept. 1998]). As stated above, the complaint herein sufficiently sets forth a valid cause of action for foreclosure. Plaintiff has submitted a copy of the mortgage, note and affidavit from Ms. Shae Smith establishing defendant's default in payment. The plaintiff demonstrated proper service of the summons and complaint and showed by admissible evidence that it had standing to commence the action as it had properly been in physical possession of the note indorsed in blank, the assignment of mortgage and the mortgage as of the date of the commencement of the action. In addition, the plaintiff has submitted sufficient proof to show that notices were served on the defendant in compliance with RPAPL §§ 1303 and 1304. Therefore, the moving papers demonstrated, prima facie, that none of the asserted defenses set forth in the answer of defendant or in the defendant's cross-motion are meritorious and plaintiff is therefore entitled to summary judgment on its claims against CRAIG Stuart(see State of New York v Lang, 250 AD2d 595 [2d Dept. 1998]).

A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced (see U.S. Bank N.A. v Faruque, 120 AD3d 575 [2d Dept. 2014]). Here, the plaintiff established it has standing to commence the instant action for foreclosure and sale by demonstrating that prior to the commencement of this action, it took physical possession of, and was the holder of the note indorsed in blank by Southern Star Mortgage Corp.(see Bank of N.Y. v Silverberg, supra; Kondaur Capital Corp. v Argyros, 38 Misc 3d 1230[A][Sup. Ct. Queens Co. 2013]). Since the mortgage follows as an incident of the note, when possession of the note changed, the mortgage interest automatically followed (see Deutsche Bank Natl. Trust Co. v Spanos, 102 AD3d 909 [2d Dept 2013]; U.S. Bank Natl. Assn. v Cange, 96 AD3d 8252 [2d Dept 2012]). Therefore, plaintiff's demonstration of possession of the indorsed note at the time of commencement of the action as well as by assignment of mortgage is sufficient to establish plaintiff's standing (see Wells Fargo Bank, N.A. v Parker, 2015 NY Slip Op 01445 [2d Dept. 2015]; Deutsche Bank Natl. Trust Co. v Whalen, 107 AD3d 931 [2d Dept. 2013]).

The burden then shifted to defendant to establish the existence of a triable issue of fact (see State Bank of Albany v Fioravanti, 51 NY2d 638, 647 [1980]). In opposition to the motion, the defendant failed to submit any evidence which would raise a question of fact. As stated above, plaintiff demonstrated that it had standing to commence the action. In addition, the plaintiff presented sufficient evidence that the 90 day pre-foreclosure notice was set by regular and certified mail (see Wachovia Bank, N.A. v Carcano, 106 AD3d 724[2d Dept 2013]; U.S. Bank, N.A. v Denaro, 98 AD3d 964 [2d Dept 2012]; Capital One, N.A. v Knollwood Props. II, LLC, 98 AD3d 707 [2d Dept 2012]).

The branches of the defendant's cross-motion for an order granting leave to serve an amended complaint to add additional affirmative defenses and counterclaims and for an order denying the motion for summary judgment as premature is denied. Generally, leave to amend a pleading is, in the absence of prejudice or surprise to the opposing party, freely granted (see CPLR 3025 [b]; Inwood Tower v Fireman's Fund Ins. Co., 290 AD2d 252 [2002]). However, where there has been an extended delay in moving to amend, the party seeking leave to amend must establish a reasonable excuse for the delay (see Heller v Louis Provenzano, Inc., 303 AD2d 20 [1st Dept. 2003], quoting Jablonski v County of Erie, 286 AD2d 927 [4th Dept. 2001]). Here the defendants have failed to proffer a reasonable excuse for their delay in seeking leave to amend the complaint. The defendant served his initial answer on December 11, 2009. Defendant has failed to show a reasonable excuse for waiting until May 30, 2014, more than four years later to move to amend the answer (see Oil Heat Inst. v RMTS Assocs., LLC, 4 AD3d 290 [1st Dept. 2004]). Further. even if the motion were timely, leave to amend a pleading must be denied where the proposed amendments are palpably insufficient and plainly lacking in merit. Here, the proposed amended affirmative defenses which are not contained in the original answer are conclusory in form and not supported by factual allegations and as such are palpably insufficient and devoid of merit (see Becher v Feller, 64 AD3d 672 [2d Dept. 2009] [affirmative defenses dismissed which were unsubstantiated with factual allegations and conclusory in nature]).

That branch of the cross-motion for an order denying plaintiff's motion for summary judgment as premature based upon outstanding discovery is denied. Here, the defendant failed to demonstrate that he made reasonable attempts to obtain discovery at any time after issue was joined. Defendant had a reasonable opportunity to seek discovery prior to the time plaintiff moved for summary judgment but made no attempt to serve any demands for discovery until two months after the motion for summary judgment was filed. Moreover, the defendant has not shown that further

discovery might lead to relevant evidence (see CPLR 3212 [f]; Swedbank, AB, N.Y. Branch v Hale Ave. Borrower, LLC, 89 AD3d 922, [2d Dept 2011]; JP Morgan Chase Bank v Agnello, N.A., 62 AD3d 662 [2d Dept 2009]). Mere hope and speculation that additional discovery might yield evidence sufficient to raise a triable issue of fact is not a basis for denying summary judgment (see Lee v T.F. DeMilo Corp., 29 AD3d 867 [2d Dept 2006]; Sasson v Setina Mfg. Co., Inc., 26 AD3d 487 [2d Dept 2006]).

Defendant also cross-moves on behalf of defendant Lois Stuart to dismiss the complaint pursuant to CPLR 3215(c) on the ground that Lois Stuart never answered the summons and complaint and was in default and plaintiff did not move for a default judgment or move for an order of reference since the time of the defendant's default more than four years ago. Defendant asserts that pursuant to CPLR 3215© the plaintiff's action for foreclosure must be dismissed as abandoned as plaintiff has failed to take proceedings for the entry of a judgment within one year after the defendant's default. Lois Stuart was served personally December 7, 2009 and failed to answer the summons and complaint. Defendant asserts that the plaintiff, in the more than four years between Lois Stuart's default and the time of the service of this motion in March 2014 has not taken any steps to move for a default judgment or order of reference.

Here, defendant Lois Stuart has been in default over four years. Plaintiff has not provided the court with any reason for its failure to move for a default judgment in that time other than stating that it had not yet been able to prepare an affirmation in compliance with Administrative Order 431/11 of the Chief Administrative Judge of the Courts. However, plaintiff has not provided a sufficient and substantiated reason for not being able to review its records within that time period to confirm the accuracy of its pleadings so as to comply with the administrative order (see Costello v Reilly, 36 AD3d 581 [2d Dept. 2007] [unsubstantiated excuse proffered by plaintiff's counsel not deemed reasonable]; BAC Home Loans Servicing, LP v Musa, 35 Misc. 3d 1241A [Sup. Ct., Dutchess Cty., 2012] [action dismissed where not moved into foreclosure settlement part in two and half years]; Onewest Bank, FSB v Ryes, 37 Misc. 3d 1202A [Sup. Ct. Queens Cty. 2012]; U.S. Bank N.A. v Solorin, 34 Misc. 3d 292 [Sup. Ct Queens Co. 2011]). In addition, although there was a 90 period during which foreclosures were stayed due to Superstorm Sandy that still does not explain the inordinate delay in moving for a default judgment.

Therefore, as plaintiff has failed to take proceedings for

the entry of judgment within one year after the default, the motion by defendant, Lois Stuart, to dismiss the plaintiff's complaint against her as abandoned is granted (see CPLR 3215(c); Van Hoesen v Dolen, 94 AD3d 1264 [3rd Dept. 2012]; Kohn v Tri-State Hardwoods, Ltd., 92 AD3d 642 [2d Dept. 2012]; Ryant v Bullock, 77 AD3d 811 [2d Dept. 2010]; Solano v Castro, 72 AD3d 932 [2d Dept. 2010]; Costello v Reilly, 36 AD3d 581 [2d Dept. 2007]).

That branch of the plaintiff's motion for an order striking the answer of defendant Craig Stuart and granting summary judgment in favor of the plaintiff against said defendant is granted. As stated above, the plaintiff established its prima facie entitlement to judgment as a matter of law and defendant failed to raise any triable issues of fact in his answer. The submissions further reflect that plaintiff is entitled to amend the caption to delete "John Doe" as a party defendant and to delete the address of the plaintiff from the caption. Plaintiff's further application for the appointment of a referee to compute the amounts due under the subject mortgage is also granted.

Settle Order on notice.

Dated: March 30. 2015
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.