JPMorgan Chase Bank v Kang
2015 NY Slip Op 30955(U)
June 5, 2015
Supreme Court, Queens County
Docket Number: 32071 2010
Judge: David Elliot

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

JPMORGAN CHASE BANK, etc.,
Plaintiff(s),

- against -

CHOUNG KOO KANG, et al.,
Defendant(s).

Index
No. 32071 2010

Motion
Date March 18, 2015

Motion
Cal. No. 90

Motion
Seq. No. 3

The following papers numbered 1 to 15 read on this motion by plaintiff for an order for summary judgment: (1) striking the answer and affirmative defenses of defendants Choung Koo Kang (Kang) and Honor Management, Inc. (Honor); (2) striking the answer and affirmative defenses of defendant-intervenors Jun Hee Kim and Sang Ok Kim (Kims); (3) granting plaintiff the relief requested in its complaint; (4) appointing a referee to compute; and (5) amending the caption.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	1-8
Answering Affirmation - Exhibits.....	9-11
Reply.....	12-15

Upon the foregoing papers it is ordered that the motion is determined as follows:

By prior order dated April 1, 2015, the court set this matter down for conference, as the motion was submitted without opposition in the Centralized Motion Part on March 18, 2015, and there were issues with respect to service of same. In lieu of appearing, counsel for plaintiff and defendants Kang and Honor executed a stipulation, dated May 8, 2015 in which they, in effect, agreed that the motion was not to be submitted without opposition, as the parties prepared and served opposition and reply, respectively, thereto. As such, the court shall consider the motion as having been fully submitted.

Plaintiff commenced this action on December 30, 2010 to foreclose a mortgage on the real property known as 171-62 46th Avenue, Flushing, New York, given by Honor, as security for the payment of a note executed by Kang and Honor in favor of Washington Mutual Bank, FA (WaMu), both dated October 22, 2002, evidencing an indebtedness in the principal amount of $ 378,000.00 plus interest. In the complaint, plaintiff alleges that it is the owner and holder of the note and mortgage. It also alleges that the "mortgagors, their successors, assigns and/or transferees" defaulted under the "instrument[s]" by failing to cure their default by failing to pay pursuant thereto commencing with the March 1, 2010 payment. It further alleges that as a consequence, it elected to accelerate the mortgage debt.

Defendants Kang and Honor served a joint answer, asserting various affirmative defenses, including ones based upon lack of standing, failure to provide these defendants with a notice of default of the note/mortgage, and failure to comply with RPAPL §§ 1303 and 1304.

Further, on or about January 26, 2011, the Kims moved, *inter alia*, to intervene in this action based upon their allegation that they each own a one-third interest in the subject premises and Kang owns the remaining one-third interest. By order dated June 23, 2011, the Kims' motion was granted to the extent that they were permitted to intervene for the purpose of defending their property interests and the action to foreclose on the mortgage. Thereafter, the Kims interposed their answer which included various affirmative defenses, including ones based upon plaintiff's failure to follow appropriate Banking Laws, plaintiff's own culpable conduct, waiver, estoppel, and failure to mitigate damages.

Plaintiff has demonstrated that all other defendants, including those sought to be substituted for the respective John and Jane Does, have been served with process and have either defaulted in answering/appearing, or have appeared by Notice of Appearance and Waiver.

Kang and Honor oppose the motion on the ground that several triable issues of fact exist, citing: (1) plaintiff's failure to "**plead in its Complaint any alleged breach and default by the Defendant under the terms of the Modification Agreement**" (emphasis in

original); (2) plaintiff's failure in its complaint to supply the correct monthly loan installment obligations as of March 1, 2010, the date of the alleged default; and (3) plaintiff's failure to provide proof of a demand for payment and/or plaintiff having sent a defective demand.

It is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). In mortgage foreclosure action, a plaintiff establishes its prima facie entitlement to judgment as a matter of law by producing the mortgage and the unpaid note, and evidence of the default (*see Midfirst Bank v Agho*, 121 AD3d 343 [2014]). Where the plaintiff is not the original lender and standing is at issue, the plaintiff seeking summary judgment must also submit evidence that it received both the mortgage and note by a proper assignment, which can be established by the production of a written assignment of the note (*see Aurora Loan Servs., LLC v Taylor*, 114 AD3d 627 [2014]; *see Homecomings Fin., LLC v Guldi*, 108 AD3d 506 [2013]), or by physical delivery to the plaintiff of the note (*see Kondaur Capital Corp. v McCary*, 115 AD3d 649 [2014]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 108 [2011]). Furthermore, a party seeking to dismiss or strike affirmative defenses must establish that same are without merit as a matter of law (*see Jessabell Realty Corp. v Gonzales*, 117 AD3d 908 [2014]; *Mazzei v Kyriacou*, 98 AD3d 1088 [2012]).

With respect to the Kims, plaintiff has met its burden of establishing its entitlement to summary judgment and the striking of the Kims' affirmative defenses since, *inter alia*, the Kims are not in privity with plaintiff (or its predecessor) and, thus, have no standing to assert said defenses. In any event, the defenses are either wholly conclusory or without merit. It is further noted that, though the Kims alleged – in support of their motion to intervene – that they have an equitable interest in the premises, the answer filed with the court after the issuance of this court's order permitting them to intervene for the purpose of defending their property interests (CPLR 1012 [a] [3]) does not allege any such property interest, nor does it attempt to allege that plaintiff, i.e., at the time it entered into the loan transaction with Kang and Honor, had any knowledge of same, or that their interest arose prior to the subject loan transaction.

Turning to the remaining branches of the motion as they relate to Kang and Honor, it is initially noted that plaintiff has established that it has standing herein by its submission of: (1) the subject note, which has been endorsed in blank, coupled with the affidavit of Jennifer Childress, Legal Specialist III for plaintiff, and Victoria J. Greenwood, Vice President of plaintiff, wherein which they indicate that plaintiff was in possession of the note at commencement of the action; and (2) a fully executed copy of a Purchase and Assumption

Agreement, evidencing that, as of September 25, 2008, plaintiff became the owner and holder of the subject loan through the Federal Deposit Insurance Corporation as Receiver for WaMu (*see JP Morgan Chase Bank, N.A. v Shapiro*, 104 AD3d 411 [2013]). By failing to rebut plaintiff's showing in opposition to the motion, Kang and Honor have failed to raise a triable issue of fact with respect to plaintiff's standing, and plaintiff is entitled to the dismissal of the third and sixth affirmative defenses sounding in same.

Plaintiff is also entitled to dismissal of the first affirmative defense of failure to state a cause of action for breach of contract, inasmuch as the instant action is an action in equity to foreclose a mortgage. As to the second defense for failure to state a cause of action for foreclosure, it appears from the face of the complaint that same properly states a cause of action to foreclose the mortgage. However, to the extent plaintiff seeks dismissal of that defense, same is denied (*see Butler v Catinella*, 58 AD3d 145 [2008]; *BAC Home Loans Servicing, LP FKA v Mostafa*, 2013 NY Slip Op 33199 [U] [Sup Ct Queens County 2013]).

As to the fifth affirmative defense regarding plaintiff's alleged failure to comply with RPAPL § 1303 in that "said notice was not printed on paper in a different color from that of the paper on which the summons and compliant were printed," plaintiff has met its prima facie burden of establishing it complied with same, as the relevant affidavits of service demonstrate that service of said notice was made on blue paper colored different than that of the summons and complaint (see *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95 [2011]). Defendants Kang and Honor have offered nothing to rebut or dispute the veracity or contents of the affidavits of service (*see e.g. Manhattan Sav. Bank v Kohen*, 231 AD2d 499 [1996]). As such, plaintiff is entitled to the dismissal of this defense.

As to the seventh affirmative defense regarding failure to comply with RPAPL § 1304, Ms. Childress' affidavit is insufficient to demonstrate "strict compliance" with the statutory mandates (*see Wells Fargo Bank, NA v Burke*, 125 AD3d 765 [2015]; *Aurora Loan Servs., LLC v Weisblum*, *supra*). Though Ms. Childress indicates that copies of the notices which were sent to Kang by certified and regular mail were attached to the motion as Exhibits H and I, respectively, those notices which she references do not contain a list of at least five housing counseling agencies that serve the region where Kang resides.[1] However, to the extent plaintiff seeks dismissal of that portion of the seventh affirmative defense sounding in a violation of the Home Ownership and Equity Protection Act, same is granted as, *inter alia*, the alleged violation is vague, conclusory, and time-barred (15 USCA § 1639;

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1. Though the notices indicate that same contain enclosures, including "Housing Counseling Agencies-New York," there are no such enclosures provided. Though annexed to the summons and complaint is said notice which includes the proper enclosures as required by statute, Ms. Childress did not indicate that copies of *that* notice were sent to Kang.

see generally U.S. Bank Nat. Assn. v Slavinski, 78 AD3d 1167 [2010]; *Fremont Inv. and Loan v Haley*, 23 Misc 3d 1138[A] [Sup Ct Queens County 2009]).

Turning to the fourth affirmative defense – that plaintiff failed to provide a notice of default and opportunity to cure – plaintiff has established, prima facie, that it provided defendants with a notice of default, dated May 11, 2010, by mailing same to both the property address and Kang's last known address, on May 13, 2010, by first class mail, which provided, among other things, the date of default, the amount necessary to cure the default, and the date by which the default must be cured, same being at least 30 days from the date the notice was given, all in accordance with the mortgage document. Furthermore, Ms. Childress' affidavit sufficiently details proof of mailing of said notice, by indicating that she has knowledge of and has reviewed business records, which are maintained in the course of plaintiff's regularly conducted business activities, and that said records include proof of mailing documentation obtained from the United States Post Office at or near the time the mailing is made, same having been supplied in support of the motion (*see e.g. Deutsche Bank Nat. Trust Co. v MacPherson*, 122 AD3d 896 [2014]; *Indymac Bank, F.S.B. v Kamen*, 68 AD3d 931 [2009]; *Countrywide Home Loans, Inc. v Brown*, 305 AD2d 626 [2003]; *cf. GMAC Mortg., LLC v Bell*, __AD3d__, 2015 NY Slip Op 04095).

Though it is noted that plaintiff did not submit proof that Honor was provided with a notice of default, section 15 of the mortgage does not require it ("Notice to any one Borrower will be notice to all Borrowers unless Applicable Law expressly requires otherwise"). Furthermore, though Kang did not execute the mortgage document and was not listed as a "borrower" thereon, he did execute a modification agreement effective December 1, 2007, which modified, amended, and supplemented the mortgage which, *inter alia*, ratified the security instrument, thereby rendering him a "borrower."

In opposition to this showing, defendants fail to raise a triable issue of fact. Defendants do not, by affidavit or otherwise, rebut proof of mailing. Rather, defendants appear to argue that plaintiff improperly pleaded in its complaint that it sent a default notice for amounts due from March 1, 2010 through December 2010, the latter being the month the complaint was drafted and filed. However, it would appear that defendants misinterpret plaintiff's allegation, as plaintiff was not required to sent a default notice demanding the amount alleged to be due as of the filing of the complaint. Same is not a requirement under the loan documents, nor is a condition precedent to commencing a foreclosure action.

Defendants otherwise fail to raise a triable issue of fact as to the alleged impropriety of the default notice. Initially, it is noted that defendants only raised the affirmative defense that the default notice was never sent. Yet, defendants argue in opposition that the substance of the notice is flawed to the extent that the amount demanded is incorrect. To that end, any

arguments raised in opposition as to the impropriety of the demand have been waived (CPLR § 3018 [b]). In any event, plaintiff in reply – by virtue of Ms. Childress' reply affidavit and exhibits referred to therein, has adequately explained that the amounts demanded per the default notice and the complaint, have been accurately computed. It is noted that any dispute as to the amount due is not a proper basis for creating a triable issue of fact (*see* Real Property Actions and Proceedings Law § 1321 [a]; *Crest/Good Mfs. Co. v Baumann*, 160 AD2d 831 [1990]).

It is otherwise noted that, to the extent defendants argue in opposition that the complaint is deficient in that plaintiff failed to plead a breach under the terms of the modification agreement, this argument was never raised as an affirmative defense in their answer and, as such, it has been waived (CPLR § 3018 [b]). In any event, as plaintiff points out in reply, the modification agreement modified the interest rate of the loan but did not define default thereunder; as such, alleging a breach under the modification agreement does not apply herein. Further, it is noted that defendant has not demonstrated, by defense in the answer or otherwise in opposition to the motion, that plaintiff is obligated to affirmatively plead the modification agreement (*see Lentschner v Klein*, 227 AD 669 [1929]; 78 NY Jur 2d Mortgages §§ 589, 592).

It must further be noted that there are issues that appear to preclude any judgment against Honor. "Under general contract rules, an obligation may not be altered without the consent of the party who assumed the obligation" (*Bier Pension Plan Trust v Estate of Schneierson*, 74 NY2d 312 [1989]; 22A NY Jur 2d Contracts § 483). That principal would appear to apply to the subject loan transaction (*see e.g.* 78 NY Jur 2d Mortgages § 261).

Here, despite the fact that Honor executed the note and mortgage, plaintiff agreed to permit a modification of the loan without obtaining Honor's signature. Plaintiff is entirely silent as to that fact. As such, plaintiff has not established its right to foreclose Honor's interest, as demanded in the complaint, acknowledging, in fact, that Honor's interest in the premises was transferred to Kang subsequent to the execution of the note and mortgage *(see Federal Nat. Mortg. Assn. v Connelly*, 84 AD3d 805 [1981]). Nor has plaintiff established its right to seek a deficiency judgment – if applicable – against Honor, as demanded in the complaint, for plaintiff's failure to address Honor not having executed the modification agreement.

Accordingly, that branch of plaintiff's motion for summary judgment against defendant-intervenors Jun Hee Kim and Sang Ok Kim is granted. Their answer is stricken and deemed a Notice of Appearance. That branch of the motion seeking summary judgment against Choung Koo Kang and Honor Management Inc., is denied. As to their affirmative defenses, same is granted only to the extent that the first, third, fourth, fifth, sixth, and the

portion of the seventh, which alleges a violation of HOEPA, affirmative defenses are dismissed. That branch of the motion seeking amendment of the caption is granted. The caption is hereby amended by adding the defendant-intervenors and by substituting "Albert Guzman," "Escort Security, Inc.," "John Friedman," "Lisa Panetta," and "Mariea Guzman" in the place and stead of the respective "Does" and by deleting the remaining "Does" therefrom. The motion is otherwise denied.

Dated: June 5, 2015

J.S.C.