

Countywide Home Loans, Inc. v Moore

2015 NY Slip Op 31020(U)

May 27, 2015

Supreme Court, Suffolk County

Docket Number: 41425/08

Judge: Paul J. Baisley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

COPY

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

-----X
COUNTRYWIDE HOME LOANS, INC.,

Plaintiff,

-against-

JACKIE MOORE, JEFFREY R. MOORE,
MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC. AS NOMINEE FOR CAPITAL
HOME HOME LOANS, LLC, JOHN T. MATHER
MEMORIAL HOSPITAL, "JOHN DOE#1 through
JOHN DOE #12," the last twelve names being
fictitious and unknown to plaintiff, the persons or
parties intended being possible tenants, occupants,
persons or corporations, if any, having or claiming an
interest in or lien upon the premises described in the
complaint,

Defendants.

-----X

INDEX NO.: 414²⁵2/08
MOTION DATE: 2/11/15
MOTION NO.: 002 MG

PLAINTIFF'S ATTORNEY:
BERKMAN, HENOCH, PETERSON,
PEDDY & FENCHEL, P.C.
100 Garden City Plaza
Garden City, New York 11530

DEFENDANTS PRO SE:
JACKIE MOORE
JEFFREY R. MOORE
35 Scotchpine Drive
Islandia, New York 11749

Upon the following papers numbered 1 to 29 read on this motion for summary judgment and an order of reference :
Notice of Motion/ Order to Show Cause and supporting papers 1-13 ; ~~Notice of Cross Motion and supporting papers~~ ;
Answering Affidavits and supporting papers 14-18 ; Replying Affidavits and supporting papers 19-29 ; ~~Other~~ ; ~~(and after~~
~~hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion (motion sequence no. 002) of plaintiff Countrywide Home Loans, Inc. ("Countrywide") pursuant to CPLR R. 3212 for summary judgment on its complaint as against defendants Jackie Moore and Jeffrey R. Moore ("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 caption is hereby amended by substituting Bank of America, N.A. in place of plaintiff Countrywide and by striking therefrom defendants "John Doe #1" through "John Doe #12"; 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
BANK OF AMERICA, N.A.,

Plaintiff,

- against -

JACKIE MOORE, JEFFREY R. MOORE, MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, INC. AS
NOMINEE FOR CAPITAL ONE HOME LOANS, LLC,
JOHN T. MATHER MEMORIAL HOSPITAL,

Defendants.
_____X

This is an action to foreclose a mortgage on premises known as 35 Scotch Pine Drive, Islandia, New York. On November 9, 2006, defendants executed a fixed rate note in favor of Capital One Home Loans, LLC (“Capital One”) agreeing to pay the sum of \$320,000.00 at the yearly rate of 7.3750 percent. On the same date, defendants also executed a mortgage in the principal sum of \$320,000.00 on their home. The mortgage indicated Capital One to be the lender and Mortgage Electronic Registration Systems, Inc. (“MERS”) to be the nominee of Capital One as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on December 7, 2006 with the Suffolk County Clerk’s Office. Thereafter, on November 14, 2008, the note and mortgage were transferred by assignment of mortgage from MERS, as nominee for Capital One, to plaintiff Countrywide. The assignment of mortgage was recorded on September 10, 2010 with the Suffolk County Clerk’s Office.

Countrywide sent a notice of default dated August 18, 2008 to defendants stating that they had defaulted on their mortgage loan and that the amount past due was \$6,060.87. As a result of defendants’ continuing default, plaintiff commenced this foreclosure action on November 17, 2008. In its complaint, plaintiff alleges in pertinent part that defendants breached their obligations under the terms of the note and mortgage by failing to make their monthly payments commencing with the installment due on July 1, 2008 and subsequent payments thereafter. Defendants interposed answers with affirmative defenses.

The Court’s computerized records indicate that a foreclosure settlement conference was held on March 28, 2013 at which time 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 Michael D. Heath, assistant vice president of Bank of America, N.A., the proposed substituted plaintiff; the affirmation of Kaitlyn

Costello, Esq. in support of the instant motion; the affirmation of Kaitlyn Costello, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the pleadings; the note, mortgage and an assignment of mortgage; notices pursuant to RPAPL §1320 and §1303; affidavits of service of the summons and complaint; an affidavit of service of the instant summary judgment motion upon defendants; and a proposed order appointing a referee to compute. Defendants oppose the application.

“[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, 482, 764 NYS2d 635 [2d Dept 2003]; see *Argent Mtge. Co., LLC v Mentosana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). 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 of their defenses (see *Aames 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]; see also *Washington Mut. Bank v Valencia*, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]).

Here, plaintiff produced the unpaid note and mortgage executed by the defendants, an assignment of mortgage, as well as evidence of nonpayment, thereby establishing a *prima facie* case as a matter of law (see *Wells Fargo Bank Minnesota, Natl. Assn. v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). The affidavit of Michael D. Heath avers that defendants defaulted on their payments commencing with the installment due on July 1, 2008 and subsequent payments thereafter; that a notice of default dated August 18, 2008 was mailed to defendants; that plaintiff was not required to send a 90 day pre-foreclosure notice to defendants; and that defendants have not cured their default.

Once plaintiff has made a *prima facie* showing, it is incumbent on 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” (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]).

Addressing defendants’ opposition which raises an allegation of lack of standing, it is well established that “where a defendant does not challenge a plaintiff’s standing, the plaintiff may be relieved of its obligation to prove that it is the proper party to seek the requested relief.” (*Wells Fargo Bank Minnesota Natl. Assn. v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). The court further held that “an argument that a plaintiff lacks standing, if not asserted in the defendant’s answer or in a pre-answer motion to dismiss the complaint, is waived pursuant to CPLR 3211(e)” [citations omitted] (see *Wells Fargo Bank Minn., NA v Mastropaolo*, 42 AD3d 239; see also *Deutsche Bank Natl. Trust Co. v Hussain*, 78 AD3d 989, 912 NYS2d 595 [2d Dept. 2010]; *Countrywide Home Loans Serv., LP v Albert*, 78 AD3d 983, 912 NYS2d 96 [2d Dept 2010]; *Aames Funding Corp. v Houston*, 57 AD3d 808, 872 NYS2d 134 [2d Dept 2008]). Based upon the foregoing, defendants’ assertion of a standing defense is unavailing since the defendants waived such defense by failing to assert it in a timely pre-answer motion to dismiss or as an affirmative defense in their answers (see *Deutsche Bank Natl. Trust Co. v Young*, 66 AD3d 819).

Also unavailing is defendants’ contention that plaintiff failed to comply with the notice requirements pursuant to RPAPL §1304, conditions precedent to the commencement of this foreclosure action. Here, the evidence before the court establishes that at the time the action was

commenced on November 17, 2008, the controlling statute at that time, which was effective September 1, 2008 to January 13, 2010, provided that a 90-day notice was required only for subprime, high cost and non-traditional loans (RPAPL §1304, L. 2008, c. 472, §2)¹. In this regard, plaintiff asserts that it was not required to send defendants a 90 day pre-foreclosure notice as the subject loan was neither a subprime, a nontraditional nor a high-cost home loan. Even if plaintiff failed to satisfy a condition precedent by failing to satisfy the RPAPL §1304 notice requirements, such merely constitutes a defense to the action and does not deprive the Court of subject matter jurisdiction to render an order of reference (see *Deutsche Bank Trust Co. Americas v Shields*, 116 AD3d 653, 983 NYS2d 286 [2d Dept 2014]; *Pritchard v Curtis*, 101 AD3d 1502, 957 NYS2d 440 [3d Dept 2012]; *Signature Bank v Epstein*, 95 AD3d 1199, 945 NYS2d 347 [2d Dept 2012]).

The defendants further assert that plaintiff failed to act in good faith in reviewing defendants' loan modification. CPLR §3408(a) requires a mandatory settlement conference in every residential foreclosure action during which the plaintiff, through its servicer, and the defendant are required to negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible (see CPLR §3408[a], [f]). While the goal of CPLR §3408 negotiations is that the parties reach a mutually agreeable resolution to help the defendant avoid losing his or her home (see CPLR §3408[a]), the statute requires only that the parties enter into and conduct negotiations in good faith (see CPLR §3408 [f]; *Wells Fargo Bank, N.A. v Van Dyke*, 101 AD3d 638, 958 NYS2d 331 [1st Dept 2012]). In *Van Dyke*, the court noted that "there are situations in which the statutory goal is simply not financially feasible for either party" and that "the mere fact that plaintiff refused to consider a reduction in principal or interest rate does not establish that it was not negotiating in good faith. Nothing in CPLR 3408 requires plaintiff to make the exact offer desired by [the] defendant[] [mortgagors], and the plaintiff's failure to make that offer cannot be interpreted as a lack of good faith" (*Wells Fargo Bank, N.A. v Van Dyke*, 101 AD3d 638; see also *Wells Fargo Bank, N.A. v Meyers*, 108 AD3d 9, 20, 966 NYS2d 108 [2d Dept 2013] ["it is obvious that the parties cannot be forced to reach an agreement, CPLR §3408 does not purport to require them to, and the courts may not endeavor to force an agreement upon the parties"]).

To conclude that a party failed to negotiate in good faith pursuant to CPLR §3408(f), a court must determine that "the totality of the circumstances demonstrates that the party's conduct did not constitute a meaningful effort at reaching a resolution" (*US Bank N.A. v Sarmiento*, 121 AD3d 187, 203, 991 NYS2d 68 [2d Dept 2014]). Guided by the foregoing principles, the Court finds that the totality of the circumstances do not support a finding that plaintiff failed to negotiate in good faith. Here, plaintiff contends that defendants failed to submit any financial information along with their loan modification application and have failed to follow up with plaintiff's counsel regarding same over the past ten months. Furthermore, defendants did not request a "bad faith" hearing in this matter and in fact, failed to appear before this Court on March 28, 2013 for a scheduled settlement conference. Thus, plaintiff has established that, under the totality of the circumstances, it engaged in a meaningful effort at reaching a solution during the settlement conferences.

¹ The amended statute, effective January 14, 2010, provides that the RPAPL §1304 notice is mandatory for all home loans (RPAPL §1304, L. 2009, c. 507, § 25, subd. a).

As to their remaining assertions, 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]). Defendants' asserted defense that plaintiff's affidavit of merit is insufficient is refuted by the record before the court. "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]). Notably, the defendants did not deny having received the loan proceeds and having defaulted on their loan payments in their opposition papers (*see Citibank, N.A. v Souto Geffen Co.*, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]). The remaining contentions of defendants are rejected by the Court as being without merit.

Based upon the foregoing, the motion for summary judgment is granted against answering defendants. 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]).

Proposed order appointing a referee to compute pursuant to RPAPL §1321, as modified by the Court, signed simultaneously herewith.

Dated: May 27, 2015

PAUL J. BAISLEY, JR.

J.S.C.

At 11AS Term Part 3 of the Supreme Court of
the State of New York held in and for the
County of SUFFOLK at the Courthouse thereof
on the day of 2016

PRESENT:

Honorable **PAUL J. BASLEY, JR.**
Justice

----- X

COUNTRYWIDE HOME LOANS, INC.,

Plaintiff,

INDEX NO.
41425/08

ORDER

-against-

JACKIE MOORE, JEFFREY R. MOORE, MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE
FOR CAPITAL ONE HOME LOANS, LLC, JOHN T. MATHER
MEMORIAL HOSPITAL,

"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 interest in or lien upon the premises, described in
the complaint,

Defendants.

----- X

UPON the summons, ~~verified~~ complaint and notice of pendency of action, heretofore
filed herein; due proof that all the defendants have been duly served with said summons or have
voluntarily appeared in this action; the affidavits of service and the notice(s) of appearance
heretofore filed herein; the answers interposed by defendants Jackie Moore and Jeffrey R. Moore
(the "Defendants") and upon all of the pleadings and proceedings heretofore had herein; Upon
reading and filing the affidavit of Michael D. Heath, Assistant Vice President of Bank of
America, N.A., intended substituted plaintiff in place and instead of Countrywide Home Loans,

Inc. ("Plaintiff"), sworn to on August 20, 2013; on Notice of Motion, and the Affirmation of Kaitlyn Costello, Esq., an associate of Berkman, Henoch, Peterson, Peddy & Fenchel, P.C., attorneys for Plaintiff, both dated January 14, 2014, together with the exhibits annexed thereto, from which it appears that this action was brought to foreclose a certain mortgage on real property situated in the County of Suffolk, State of New York, at 35 Scotch Pine Drive, Islandia, New York 11749 (Block 1.00, Lot 100) by reason of certain defaults as alleged in the Complaint;

AND it appearing that this motion regularly came before the undersigned justice on **February 11, 2014**, and due deliberation having been had thereon, it is

ORDERED, that plaintiff's motion is granted ~~in its entirety~~ ^{to the extent reflected herein}; and it is further,

ORDERED, that summary judgment is granted in favor of Plaintiff in that there is no justiciable issue of fact; and it is further,

~~**ORDERED**, that the Defendants' Answers with affirmative defenses are hereby stricken; and it is further,~~

ORDERED, that this action be, and the same is hereby referred to

William F. Andes Jr. Esq. of 224 Griffing Ave New York, 11901
RIVERHEAD
phone number 631-727-5780, to take proof of the facts and circumstances

stated in the ~~Verified~~ Complaint, to examine plaintiff or its agent as to any payments which have **except attorney's fees** been made, and to ascertain and compute the amount due to plaintiff on the Mortgage, and for the taxes, advances, assessments, water rates, sewer charges, and all other advances, and to examine and report whether or not the mortgaged Premises can be sold in parcels, and to report to this Court with all convenient speed; and it is further

ORDERED, that if required, said Referee may take testimony pursuant to RPAPL 1321;

and it is further

ORDERED, that pursuant to CPLR 8003 (a) ~~(the statutory fee of \$50.00)~~ (in direction of the court a fee of \$250.00), shall be paid to the Referee for the computation stage and upon the filing of his/her report, and it is further

JSC

JSC

JSC

ORDERED, that the referee appointed herein is subject to the requirements of Rule 36.2 (c) of the Chief Judge, and if the referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the referee shall notify the Appointing Judge forthwith, and it is further

ORDERED, that by accepting this appointment the Referee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to, section 36.2^(c)~~(e)~~("Disqualifications from appointment") and section 36.2 (d) ("Limitations on appointments based upon compensation"); and it is further

ORDERED, that all non-answering, non-appearing defendants are hereby deemed in default; and it is further

ORDERED, that the remaining defendants, sued herein as "JOHN DOE #1" through "JOHN DOE #12," be and are hereby deleted from the caption, all without prejudice to the proceedings heretofore had herein; and it is further

Handwritten initials and a bracket:
JSC {

~~**ORDERED**, that Plaintiff is awarded the costs of this motion; and it is further~~

ORDERED, that Bank of America, N.A. is hereby substituted as plaintiff; and it is further

ORDERED, that the caption be amended to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X
BANK OF AMERICA, N.A.,

Plaintiff,

INDEX NO.
41425/08

-against-

JACKIE MOORE, JEFFREY R. MOORE, MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE
FOR CAPITAL ONE HOME LOANS, LLC, JOHN T. MATHER
MEMORIAL HOSPITAL,

Defendants.

-----X;
and it is further,

ORDERED, that a copy of this Order with Notice of Entry shall be served on the owner

of the equity of redemption named in this action and any other party entitled to notice, *and it is further*
ORDERED, plaintiff is to include in any proposed order for a judgment
of foreclosure and sale language complying with the Suffolk County Local
Rule for filing of the Foreclosure Action Surplus Monies form contained in
Suffolk County Administrative Order # 41-13.

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ENTER:

Francis...

J.S.C. 5/27/15 *JA*