

U.S. Bank N.A. v Liang
2015 NY Slip Op 31096(U)
June 22, 2015
Supreme Court, Queens County
Docket Number: 2452 2014
Judge: David Elliot
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

U.S. BANK NATIONAL ASSOCIATION, etc.,
Plaintiff(s),

Index
No. 2452 2014

- against -

Motion
Date May 18, 2015

JOSEPH H. LIANG, et al.,
Defendant(s).

Motion
Cal. No. 138

Motion
Seq. No. 1

The following papers numbered 1 to 19 read on this motion by plaintiff for an order granting them summary judgment against defendants Joseph H. Liang and Chung Ting Chen (defendants), striking their answer and dismissing their affirmative defenses and treating same as a limited Notice of Appearance, amending the caption, granting judgment by default against the remaining non-appearing and non-answering defendants, and appointing a referee to compute; and on this cross motion by defendants for an order granting them summary judgment dismissing the complaint or, in the alternative, permitting discovery.

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

Plaintiff commenced this action to foreclose a consolidated mortgage against real property known as 67-19 198th Street, Fresh Meadows, New York. Defendants executed a note and mortgage in the amount of \$354,400.00, in favor of Wells Fargo Bank, N.A. (Wells Fargo), on March 16, 2005. Defendant Liang then executed a new note, with corresponding mortgage executed by both defendants, for \$67,055.96, on August 26, 2005. On that same date, defendants entered into a Consolidation, Extension and Modification Agreement (CEMA), consolidating and modifying the two loans to form a single lien in the amount of \$420,000.00. A corresponding consolidated note and mortgage were also executed. Thereafter, the terms of the loan documents were further modified as of May 1, 2010. Pursuant to its complaint, plaintiff alleges it is the owner and holder of the subject note and mortgage or has been delegated the authority to institute this mortgage foreclosure action by the holder of the subject note and mortgage, that defendant Liang defaulted under the terms thereunder by failing to pay the monthly installment which became due and owing on September 1, 2010, and all subsequent payments and, as a result, it elected to accelerate the debt by virtue of the filing of the summons and complaint and *lis pendens* on February 18, 2014.

Plaintiff has demonstrated that all defendants were served with process and have defaulted in answering or appearing herein, with the exception of defendant Discover Bank, who filed a Notice of Appearance and Waiver in Foreclosure, and the cross-moving defendants, who interposed an answer with affirmative defenses, including defenses based upon noncompliance with RPAPL §§ 1303 and 1304, failure to comply with notice provisions in certain mortgages requiring notices of default, lack of standing, and plaintiff's failure to be licensed as a debt collector.

In support of their cross motion, defendants aver that they are entitled to summary judgment dismissing the complaint against them based on, *inter alia*, plaintiff's failure to comply with Section 22 of the mortgages at issue in this action by failing to demonstrate that a proper notice of default was served on them. Initially, to the extent defendants make any arguments with respect to Section 22 of the March 16, 2005 and August 26, 2005 mortgages, same are without merit inasmuch as Article IV of the CEMA – a document which defendants admit, in their answer, to having executed – specifically states that the terms of the prior mortgages “are changed and restated to be the terms of the ‘Consolidated Mortgage.’ ” As such, the only applicable notice provisions are those which are found in the consolidated mortgage.

Section 22 of the consolidated mortgage, dated August 26, 2005, requires that, prior to commencing the within action, the lender was required to send defendants a written notice of the default. The lender may require immediate payment in full:

“only if all of the following conditions are met:

(a) I fail to keep any promise or agreement made in this Security Instrument or the Note, Including, but not limited to, the promises to pay the Sums Secured when due, or if another default occurs under this Security Instrument;

(b) Lender sends me, in the manner described in Section 15 of this Security Instrument, a notice that states:

(1) The promise or agreement that I failed to keep or the default that has occurred;

(2) The action that I must take to correct that default;

(3) A date by which I must correct the default. That date will be at least 30 days from the date on which the notice is given;

(4) That if I do not correct the default by the date stated in the notice, Lender may require Immediate Payment in Full, and Lender or another Person may acquire the Property by means of Foreclosure and Sale;

(5) That if I meet the conditions stated in Section 19 of this Security Instrument, I will have the right to have Lender’s enforcement of this Security Instrument stopped and to have the Note and this Security Instrument remain fully effective as if Immediate Payment in Full had never been required; and

(6) That I have the right in any lawsuit for Foreclosure and Sale to argue that I did keep my promises and agreements under the Note and under this Security Instrument, and to present any other defenses I may have; and

(c) I do not correct the default stated in the notice from Lender by the date stated in that notice.”

Section 15 of the consolidated mortgage states, in pertinent part, that:

“Any notice to me in connection with this Security Instrument is considered given to me when mailed by first class mail or when actually delivered to my notice address if sent by other means. Notice to any one borrower will be notice to all Borrowers unless applicable law expressly requires otherwise. The notice address is the address of the Property unless I give notice to Lender of a different address.”

Defendants advance three separate arguments in support of this branch of their cross motion: (1) the notice of default impermissibly shortens the 30-day cure period by requiring payment of an amount due in the future; (2) the notice of default does not provide an explicit sum to cure; and (3) the notice was not served in the manner required by Section 15 of the consolidated mortgage.

On these papers, the court finds that defendants are entitled to dismissal of the complaint against them for plaintiff's failure to comply with a condition precedent. Defendants established, *prima facie*, that plaintiff failed to provide notice of their default as required by the terms of the consolidated mortgage. Ms. Horton's declaration that, "[i]n accordance with the provisions of the Mortgage, a notice of default was mailed to the mortgagor(s) at the last known address provided by the mortgagor(s) to this institution" is "unsubstantiated and conclusory," even when also considering the copy of the notice of default which was proffered to the court as an Exhibit to both the motion and the cross motion (*see GMAC Mtge., LLC v Bell*, 128 AD3d 772 [2015][cross motion for dismissal granted on these grounds]; *Wells Fargo Bank, N.A. v Eisler*, 118 AD3d 982 [2014][same]; *see also Nationstar Mtge., LLC v Dimura*, 127 AD3d 1152 [2015]; *HSBC Mtge. Corp. (USA) v Gerber*, 100 AD3d 966 [2012]). Ms. Horton failed to, among other things: (1) provide the date that the notice was alleged to have been sent; (2) indicate in what manner the notice was sent, *i.e.*, by first class mail or by some other means; (3) state by whom the notice was alleged to have been sent; and (4) give any indication that she is familiar with the standard mailing practices or procedures of the entity alleged to have sent the notice, and that those practices or procedures were followed in this instance (*see e.g. HSBC Mtge. Corp. (USA) v Erneste*, 22 Misc 3d 1115 [A][Sup Ct Kings County 2009], *citing St. Vincent's Hosp. of Richmond v Government Empls. Ins. Co.*, 50 AD3d 1123 [2008]). Further, defendants submit personal affidavits in which they indicate that they did not receive the notice as required by the terms of the consolidated mortgage (*see Wells Fargo Bank, N.A.*, 118 AD3d at 983; *see also Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95 [2011]).

In opposition to the cross motion and in support of its motion, plaintiff relies upon the same affidavit of its employee and, as such, it failed to meet its own burden and failed to create a triable issue of fact as to defendants' cross motion, thereby warranting the denial of the motion and the granting of the cross motion (*see GMAC Mtge., LLC*, 128 AD3d at 772; *Wells Fargo Bank, N.A.*, 118 AD3d at 983). Contrary to plaintiff's contention that defendants' "mere denial of receipt is insufficient to rebut the presumption of delivery," plaintiff has not submitted sufficient proof, *in the first instance*, so as to create a rebuttable presumption of proper delivery of the default notice (*cf. Countrywide Home Loans v Brown*, 305 AD2d 626 [2003]).

In light of the above, this court need not consider, as academic, defendants' remaining arguments in support of their cross motion. Moreover, to the extent plaintiff seeks summary judgment and related relief against defendants, same is denied.

Accordingly, defendants' cross motion for an order granting them summary judgment dismissing the complaint insofar as asserted against them on the ground that plaintiff failed to comply with a condition precedent to the commencement of this action is granted. The

remaining branches of the motion are denied as academic. Plaintiff's motion is granted only to the extent that the non-appearing and non-answering defendants are in default herein, and the caption is amended by substituting "Yung Chang" in the place and stead of "John Doe." The motion is otherwise denied.

Dated: June 22, 2015

J.S.C.