

Bethpage Fed. Credit Union v Caserta

2015 NY Slip Op 31190(U)

March 23, 2015

Supreme Court, Suffolk County

Docket Number: 13-4801

Judge: Peter H. Mayer

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SUPREME COURT - STATE OF NEW YORK
IAS PART 17 - SUFFOLK COUNTY

COPY

PRESENT: Hon. Peter H. Mayer
Justice of the Supreme Court

Motion Date: 1-17-14 (001)
2-11-14 (002)

_____ x
BETHPAGE FEDERAL CREDIT UNION,

Adj. Date: _____
Mot. Seq. 001 MG
002 XMD

Plaintiff,

**BERKMAN, HENOCH, PETERSON,
PEDDY & FENCHEL, P.C.**
Attorneys for Plaintiff
100 Garden City Plaza
Garden City, N. Y. 11530

-against-

**RALPH LEONARD CASERTA, JANET CASERTA,
BETHPAGE FEDERAL CREDIT UNION,**

YOUNG LAW GROUP, PLLC
Attorneys for Defendants
Ralph Leonard Caserta
Janet Caserta
80 Orville Drive, Suite 100
Bohemia, N. Y. 11716

“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 reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the plaintiff, dated December 17, 2013, and supporting papers (including Memorandum of Law dated _____); (2) Notice of Cross Motion by the defendant, dated January 27, 2014, and supporting papers (including a Memorandum of Law dated January 27, 2014; (3) Affirmation in Opposition by the plaintiff, dated February 10, 2014, and supporting papers; (4) Reply Affirmation by the _____, dated _____, and supporting papers; (5) Other _____ (and after hearing counsels' oral arguments in support of and opposed to the motion); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that this motion (001) by plaintiff Bethpage Federal Credit Union (Bethpage) pursuant to CPLR 3212 for summary judgment on its complaint as against defendants Ralph Leonard Caserta and Janet Caserta (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

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ORDERED that the cross motion (002) by defendants for an order pursuant to CPLR 3212 granting summary judgment in their favor against plaintiff, for an order pursuant to CPLR 3212(e) granting defendants partial summary judgment on their second counterclaim for damages from FDCPA violations, for an order compelling plaintiff to comply with and/or respond to discovery demands, is denied; and it is further

ORDERED that the caption is hereby amended 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 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

 BETHPAGE FEDERAL CREDIT UNION,

Plaintiff,

-against-

RALPH LEONARD CASERTA, JANET CASERTA,
 BETHPAGE FEDERAL CREDIT UNION,

Defendants.
 _____x

This is an action to foreclose a residential mortgage on premises known as 490 Easton Street, Ronkonkoma, New York. On February 16, 2006, defendants executed a fixed rate note (note 1) in favor of Bethpage agreeing to pay the sum of \$235,000.00 at the yearly rate of 6.1250 percent. On the same date, defendants also executed a mortgage (mortgage 1) in the principal sum of \$235,000.00 on the subject property. The mortgage was recorded on March 8, 2006 in the Suffolk County Clerk's Office. On March 20, 2007, defendants executed a fixed rate note (note 2) in favor of Bethpage agreeing to pay the sum of \$51,185.16 at the yearly rate of 6.1250 percent. On the same date, defendants also executed a mortgage (mortgage 2) in the principal sum of \$51,185.16 on the subject property. Defendants executed a consolidation, extension and modification agreement (CEMA) dated March 20, 2007 with Bethpage 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 \$280,000.00 and a third mortgage. The consolidated note in the sum of \$280,000.00 and mortgages formed a consolidated lien

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on the subject premises. The third mortgage and CEMA were recorded on April 11, 2007 in the Suffolk County Clerk's Office.

Bethpage sent a notice of default dated June 1, 2012 to defendants stating that they had defaulted on their mortgage loan and that the amount past due was \$13,768.89. As a result of defendants' continuing default, plaintiff commenced this foreclosure action on February 14, 2013. In its amended 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 installment due on January 1, 2012 and subsequent payments thereafter. Defendants interposed an answer with affirmative defenses and counterclaims.

The Court's computerized records indicate that a foreclosure settlement conference was held on October 24, 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.

Plaintiff now moves for summary judgment on its complaint. In support of its motion, plaintiff submits among other things, the affirmation of Alan Waintraub, 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 affidavit of Keith Weinkauf, assistant vice president of loan servicing and administration of Bethpage; the pleadings; the notes, mortgages and CEMA; proof of notices pursuant to RPAPL 1320, 1303 and 1304; affidavits of service of the summons and complaint; an affidavit of service of the instant summary judgment motion upon the 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 ground that 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 Montesana*, 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 defendants 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, Keith Weinkauff avers that plaintiff, as the original lender, has physical possession of the consolidated note and CEMA and had taken physical delivery prior to the commencement of the action (see *Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674, 838 NYS2d 622 [2d Dept 2007]). The plaintiff thus has established, *prima facie*, its 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 was not the holder of the note at the commencement of the action and that plaintiff was not in physical possession of the consolidated note at the time the action was commenced.

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. Here, the facts establish that plaintiff, as the original lender, has physical possession of the consolidated note and CEMA and had taken physical delivery prior to the commencement of the action. Here, 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 cross-move 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, an order

pursuant to CPLR 3124 compelling plaintiff to comply with defendants' discovery demands. The 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 June 5, 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."¹ 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). Accordingly, that branch of defendants' motion is denied.

Also rejected is defendants' claim for partial summary judgment on their counterclaim alleging plaintiff violated the Federal Debt Collection Practices Act (FDCPA). Here, the provisions under FDCPA do not relate to the uncontroverted facts before the Court. A "debt collector" under the statute is defined as anyone who collects "debts owed ... another" and excludes collecting a debt to the extent the collection "concerns a debt which *was not in default* at the time it was obtained by such person." Here, the evidence clearly establishes that Bethpage, as plaintiff, is attempting to collect a debt on its own behalf. Furthermore, plaintiff's verified complaint does not allege that the loans of the named defendants were in default at the time plaintiff obtained them. As a result of the foregoing, Bethpage does not meet the definition of "debt collector" under the statute (*see* 15 USCA §1692a [6][F]; *see Thomas v JPMorgan Chase & Co.*, 811 FSupp2d 781 [SDNY 2011]; *Diaz v Residential Credit*

¹ It is noted that the correspondence dated June 5, 2013 is not annexed to defendants' affirmation of good faith.

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Solutions, Inc., 297 FRD 42 [EDNY 2014]).

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]). Answering 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]).

Accordingly, the motion for summary judgment is granted against the answering defendants Caserta. 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]).

The proposed order appointing a referee to compute pursuant to RPAPL 1321 is signed simultaneously herewith as modified by the court.

Dated: 3-23-15



 J.S.C.

____ FINAL DISPOSITION NON-FINAL DISPOSITION