

New York Community Bank v Castillo

2015 NY Slip Op 31263(U)

July 10, 2015

Supreme Court, Suffolk County

Docket Number: 20063-12

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
IAS PART 37 - SUFFOLK COUNTY

PRESENT: Hon. JOSEPH FARNETI
Acting Justice of the Supreme Court

MOTION DATE: 3/30/15
ADJ. DATE: 4/16/15
MOT. SEQ. # 003 - MG

NEW YORK COMMUNITY BANK,

Plaintiff,

-against-

CARLOS CASTILLO A/K/A CARLOS E.
CASTILLO; MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC. AS NOMINEE
FOR OHIO SAVINGS BANK; CAPITAL ONE
BANK.

“JOHN DOE #1-5”, and “JANE DOE #1-5”, said
names being fictitious, it being the intention of
Plaintiff to designate any and all occupants, tenants,
persons or corporations, if any, having or claiming
an interest in or lien upon the premises being
foreclosed herein,

Defendant.

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Upon the following papers numbered 1 to 21 read on this motion to vacate the prior order of reference and for summary judgment and a new order of reference; Notice of Motion/ ~~Order to Show Cause~~ and supporting papers 1 - 15; ~~Notice of Cross Motion and supporting papers~~ _____; Answering Affidavits and supporting papers 16 - 18; Replying Affidavits and supporting papers 19 - 21; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the branch of the motion by plaintiff, New York Community Bank (“plaintiff”), for an order vacating the prior order of reference of the Court dated July 28, 2014 (Kent, J.) due to a Chapter 11 bankruptcy petition filed by defendant Carlos Castillo a/k/a Carlos E. Castillo (“defendant”) on July 7, 2014, in the United States Bankruptcy Court, Eastern District of New York, is granted; and it is further

ORDERED that the branches of the motion by plaintiff, pursuant to CPLR 3212, for summary judgment on its complaint against defendant, to amend the caption of this action pursuant to CPLR 3025 (b), and for a new 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 Leslie Argueta in place of "Jane Doe #1," substituting Rosa Romero in place of "Jane Doe #2," substituting Elmer Carillo in place of "John Doe #1," substituting Carlos Hernandez in place of "John Doe #2," substituting Angel Mayorquim in place of "John Doe #3," substituting Irma Martinez in place of "Jane Doe #3" and, substituting Luis Dehming in place of "John Doe #4" and by striking therefrom defendants "John Doe #5" and "Jane Doe #4" through "Jane Doe #5"; 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 shall hereinafter appear as follows:

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF SUFFOLK

_____x
 NEW YORK COMMUNITY BANK,

Plaintiff,

-against-

CARLOS CASTILLO A/K/A CARLOS E.
 CASTILLO; MORTGAGE ELECTRONIC
 REGISTRATION SYSTEMS, INC. AS NOMINEE
 FOR OHIO SAVINGS BANK; CAPITAL ONE
 BANK, LESLIE ARGUETA, ROSA ROMERO,
 ELMER CARILLO, CARLOS HERNANDEZ,
 ANGEL MAYORQUIM, IRMA MARTINEZ,
 LUIS DEHMING,

Defendants.
 _____x

This is an action to foreclose a mortgage on property known as 10 West 16 Street, Huntington Station, New York. On September 28, 2006, defendant executed an adjustable rate note in favor of Ohio Savings Bank agreeing to pay the sum of \$279,500.00 at the starting yearly rate of 6.875 percent. On the

same date, defendant Castillo also executed a mortgage in the principal sum of \$279,500.00 on the subject property. The mortgage indicated Ohio Savings Bank to be the lender and Mortgage Electronic Registration Systems, Inc. ("MERS") to be the nominee of Ohio Savings Bank as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on October 26, 2006 in the Suffolk County Clerk's Office. The note and mortgage were subsequently modified by a loan modification agreement dated December 21, 2007 modifying, *inter alia*, the unpaid balance to \$283,612.35. The note and mortgage were again modified by a loan modification agreement dated January 16, 2009 modifying, *inter alia*, the unpaid balance to \$294,357.86. Thereafter, by assignment dated June 14, 2011, MERS, as nominee for Ohio Savings Bank, assigned said mortgage to plaintiff, NY Community. The assignment of mortgage was recorded on July 13, 2011 with the Suffolk County Clerk's Office. The aforementioned assignment of mortgage was corrected by a corrective assignment of mortgage dated September 15, 2011 and filed with the Suffolk County Clerk's Office on September 30, 2011.

Plaintiff sent a notice of default dated February 8, 2011 to defendant stating that he had defaulted on his mortgage loan and that the amount past due was \$8,922.77. As a result of defendant's continuing default, plaintiff commenced this foreclosure action. Defendant Castillo interposed a verified answer with nine affirmative defenses and three counterclaims. The Court's computerized records indicate that a foreclosure settlement conference was held on October 10, 2012, the calendar was marked "not eligible," and this matter was referred as an IAS case. Thus, there has been compliance with CPLR 3408 and no further settlement conference is required.

Plaintiff now moves for summary judgment on its complaint contending that defendant breached his obligations under the terms of the loan agreement and mortgage by failing to tender monthly payments commencing with his January 1, 2010 payment and subsequent payments thereafter. In support of its motion, plaintiff submits, among other things: the sworn affidavit of Donna Wilson, senior vice president of New York Community Bank; the affirmation of Ronald P. Labeck, Esq. in support of the motion; the pleadings; the note, the mortgage, modification agreements and assignments of mortgage; a notice of default; notices pursuant to RPAPL 1320 and 1303; affidavits of service for the summons and complaint; and, a proposed order appointing a referee to compute. Defendant, through his attorney, opposes the summary judgment motion.

"[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 Mentasana*, 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 has established its entitlement to summary judgment against the answering defendant Castillo as such papers included a copy of the mortgage, a copy of the assignment of mortgage, the unpaid note together with due evidence of his default in payment under the terms of the loan documents (*see* CPLR

3212; RPAPL 1321; *Neighborhood Hous. Serv. of New York City v Hawkins*, 97 AD3d 554, 947 NYS2d 321 [2d Dept 2012]; *Baron Assoc., LLC v Garcia Group Enter.*, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; *Citibank, N.A. v Van Brunt Prop., LLC*, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]; *Archer Capital Fund, L.P. v GEL, LLC*, 95 AD3d 800, 944 NYS2d 179 [2d Dept 2012]; *Swedbank, AB v Hale Ave. Borrower, LLC*, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]; *Rossrock Fund II, L.P. v Osborne*, 82 AD3d 737, 918 NYS2d 514 [2d Dept 2011]).

Where, as here, standing is put into issue by the defendant, the plaintiff is required to prove it has standing in order to be entitled to the relief requested (*see Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680, 954 NYS2d 551 [2d Dept 2011]; *US Bank, NA v Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; *Wells Fargo Bank Minn., NA v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). In a mortgage foreclosure action “[a] plaintiff has standing where it is the holder or assignee of both the subject mortgage and of the underlying note at the time the action is commenced” (*HSBC Bank USA v Hernandez*, 92 AD3d 843, 939 NYS2d 120 [2d Dept 2012]; *US Bank, NA v Collymore*, 68 AD3d at 753; *Countrywide Home Loans, Inc. v Gress*, 68 AD3d 709, 888 NYS2d 914 [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, the plaintiff established that it took possession of the note, containing an indorsement in blank on its face, by physical delivery on December 4, 2009, which was 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 established, *prima facie*, its standing to prosecute this action.

It was thus incumbent upon the answering defendant 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 his answer or otherwise available to him (*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 his opposing papers, the defendant re-asserts his pleaded affirmative defense that the plaintiff lacks standing to prosecute its claims for foreclosure and sale. The defendant contends, *inter alia*, that a question of fact exists with respect to the plaintiff's standing by reason of plaintiff's failure to produce evidence that any of the individuals who endorsed the note had authority to do same. In addition, defendant asserts the defenses of champerty and failure to provide the 90 day pre-commencement notice pursuant to RPAPL 1304. Here, neither the defenses raised in his answer nor those asserted in his opposition to plaintiff's motion rebut the plaintiff's *prima facie* showing of its entitlement to summary judgment.

RPAPL1304 provides that in a residential foreclosure action, at least 90 days before the lender commences an action against the borrower, the lender must send a notice to the borrower including certain language and the notice must be in 14-point type. The notice must be sent by registered or certified mail and also by first-class mail to the last known address of the borrower, and if different, to the residence that is the subject of the mortgage (*see* RPAPL 1304). The statute further provides that the notice shall contain a list of at least five housing counseling agencies that serve the region where the borrower resides.

It is well-settled that proper service of the notice required by 1304 is a condition precedent to the commencement of a residential foreclosure action, and is the plaintiff's burden to establish (*see Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909, 961 NYS2d 200 [2d Dept 2013]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]; *First Natl. Bank of Chicago v Silver*, 73 AD3d 162, 899 NYS2d 256 [2d Dept 2010]).

As amended, effective January 14, 2010, RPAPL 1304 (1) requires that with regard to any "home loan," at least 90 days before a lender, assignee or mortgage loan servicer commences legal action against a borrower, including a mortgage foreclosure action, such lender, assignee or servicer must give notice to the borrower in at least 14-point type and with the specific content set forth in the statute. The term, "home loan," is defined in RPAPL1304 (5) (a) to mean "a loan, including an open-end credit plan, other than a reverse mortgage transaction in which: (i) the borrower is a natural person; (ii) the debt is incurred by the borrower primarily for personal, family, or household purposes; (iii) the loan is secured by a mortgage or deed of trust on real estate improved by a one to four family dwelling, or a condominium unit, in either case, used or occupied, or intended to be used or occupied wholly or partly, as the home or residence of one or more persons and which is or will be occupied by the borrower as the borrower's principal dwelling; and (iv) the property is located in this state."

Here, plaintiff maintains that defendant's property is a rental property and not owner occupied. Since defendant Castillo has failed to rebut plaintiff's assertions, the Court finds that defendant's mortgage loan does not constitute a "home loan" as defined by RPAPL 1304 (5) (a). Since plaintiff has sustained its unchallenged burden of showing that the loan subject to foreclosure does not meet the criteria set forth in RPAPL 1304 (5) (a), it has established that it is exempt from the mandated requirements under RPAPL 1304 (1).


With respect to his remaining affirmative defenses and counterclaims, defendant has 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]). Here, answering defendant has 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]). Notably, defendant does not deny that he has not made payments of interest or principal on the note (*see Citibank, N.A. v Souto Geffen Co.*, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]).

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Based on the foregoing, plaintiff's motion for summary judgment is granted against answering defendant. 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 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 as modified by the Court.

Dated: July 10, 2015



Hon. Joseph Farneti
Acting Justice of the Supreme Court

____ FINAL DISPOSITION X NON-FINAL DISPOSITION