CitiMortgage, Inc. v Slater
2015 NY Slip Op 31705(U)
May 19, 2015
Supreme Court, Suffolk County
Docket Number: 10-18975
Judge: Daniel Martin
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SHORT FORM ORDER

INDEX No. 10-18975

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN
Justice of the Supreme Court

MOTION DATE 3-11-14
ADJ. DATE ______
Mot. Seq. # 002 - MG

CITIMORTGAGE, INC. SUCCESSOR BY MERGER TO ABN AMRO MORTGAGE GROUP, INC.

Plaintiff,

- against -

ROBERT E. SLATER;

"JOHN DOE" and "Mary Doe" (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 mortgaged premises being foreclosed herein.)

Defendants.

DAVIDSON FINK LLP
Attorney for Plaintiff
28 East Main Street, Suite 1700
Rochester, New York 14614-1990

NEIL E. COLMENARES, P.C.
Attorney for Defendant
ROBERT E. SLATER
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Las Vegas, Nevada 89118

Upon the following papers numbered 1 to 23 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 - 21; Replying Affidavits and supporting papers 22 - 23; ~~Other ___; (and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion by plaintiff CitiMortgage, Inc. successor by merger to ABN Amro Mortgage Group, Inc. (CitiMortgage) pursuant to CPLR 3212 for summary judgment on its complaint as

against defendant Robert E. Slater (defendant), 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 "John Doe #1", "John Doe #2", "Jane Doe #1", "Jane Doe #2', and "Rose Doe" in place of "John Doe" and Mary Doe"; 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

CITIMORTGAGE, INC. SUCCESSOR BY MERGER TO
ABN AMRO MORTGAGE GROUP, INC.

Plaintiff,

- against -

ROBERT E. SLATER; JOHN DOE #1; JOHN DOE #2;
JANE DOE #1; JANE DOE #2; ROSE DOE

Defendants.

---x

This is an action to foreclose a residential mortgage on premises known as 157 Vernon Valley Road, East Northport, New York. On March 14, 2006, defendant executed a fixed rate note in favor of ABN Amro Mortgage Group, Inc. (ABN AMRO) agreeing to pay the sum of $440,000.00 at the yearly rate of 6.000 percent. On the same date, defendant also executed a mortgage in the principal sum of $440,000.00 on the subject property. The mortgage was recorded on April 10, 2006 in the Suffolk County Clerk's Office. CitiMortgage, Inc. is the successor by merger to the original lender, ABN AMRO.

CitiMortgage sent a notice of default dated January 29, 2010 to defendant stating that he had defaulted on his mortgage loan and that the amount past due was $8,100.32. As a result of defendant's continuing default, plaintiff commenced this foreclosure action on May 21, 2010. In its complaint, plaintiff alleges in pertinent part that the defendant breached his obligations under the terms of the note

and mortgage by failing to make his monthly installment due on December 1, 2009. Defendant interposed an answer with affirmative defenses.

The Court's computerized records indicate that a foreclosure settlement conference was held on July 17, 2012 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 William A. Santmyer, Esq. in support of the motion; the affirmation of Alissa L. Wilson, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the affidavit of Wendelyn Burgin, vice president-document control of CitiMortgage; the pleadings; the note and mortgage; a certificate of merger; 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 defendant's counsel; and, a proposed order appointing a referee to compute. Defendant has submitted opposition to the 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, 764 NYS2d 635 [2d Dept 2003]; *see* ***Argent Mtge. Co., LLC v Mentesana***, 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 defendant as such papers included a copy of the mortgage and the unpaid note together with due evidence of defendant's 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]). 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]).

In his opposing papers, defendant asserts that plaintiff's summary judgment motion should be denied in order to afford defendant an opportunity to obtain discovery. CPLR 3212(f) provides that "should it appear from affidavits submitted in opposition to the motion that facts essential to justify

opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just". Appellate case authorities have long instructed that to avail oneself of the safe harbor this rule affords, the claimant must "offer an evidentiary basis to show that discovery may lead to relevant evidence and that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff" (***Martinez v Kreychmar***, 84 AD3d 1037, 923 NYS2d 648 [2d Dept 2011]; *see* ***Garcia v Lenox Hill Florist III, Inc.***, 120 AD3d 1296, 993 NYS2d 86 [2d Dept 2104]; ***Seaway Capital Corp. v 500 Sterling Realty Corp.***, 94 AD3d 856, 941 NYS2d 871 [2d Dept 2012]). In addition, the party asserting the rule must demonstrate that he or she made reasonable attempts to discover facts which would give rise to a genuine triable issue of fact on matters material to those at issue (*see* ***Swedbank, AB v Hale Ave. Borrower, LLC***, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]). Defendant's opposition papers fail to sufficiently demonstrate that he made reasonable attempts to discover the facts which would give rise to a triable issue of fact or that further discovery might lead to relevant evidence (*see* CPLR 3212 [f]; ***Anzel v Pisotino***, 105 AD3d 784, 962 NYS2d 700 [2d Dept 2013]; ***Cortes v Whelan***, 83 AD3d 763, 922 NYS2d 419 [2d Dept 2011]; ***Sasson v Setina Mfg. Co., Inc.***, 26 AD3d 487, 810 NYS2d 500 [2d Dept 2006]). Defendant's claim is thus rejected as unmeritorious.

As to defendant's assertion that plaintiff did not properly comply with the RPAPL 1304 notice requirements, same is also rejected by the Court as being without merit. RPAPL 1304 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 (id.).

It is well settled that proper service of the notices required by RPAPL 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]). Here, plaintiff established, through the affidavit of Wendelyn Burgin, that the 90 day pre-foreclosure notice was sent to defendant at 157 Vernon Valley Road, East Northport, New York on January 5, 2010 by registered or certified and first class mail and that such notice was typed in at least 14 point type. Contrary to defendant's contention, there is no requirement that plaintiff submit an affidavit of service for such notice (see RPAPL 1304 [2]). Moreover, any alleged failure of plaintiff to satisfy the RPAPL 1304 notice requirements, even if true, merely constitutes a defense to the action and did 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]).

As to his remaining assertions, 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, the defendant did not deny having received the loan proceeds and did not deny having defaulted on his loan payments (*see* ***Citibank, N.A. v Souto Geffen Co.***, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]). Accordingly, the remaining contentions of defendant are rejected by the court.

Based upon the foregoing, the 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 simultaneously herewith as modified by the court.

Dated: MAY 19, 2015

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**