

Wells Fargo Bank, NA v Assim
2015 NY Slip Op 31843(U)
October 1, 2015
Supreme Court, Queens County
Docket Number: 700592/2014
Judge: David Elliot
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

WELLS FARGO BANK, NA,
Plaintiff(s),

Index
No. 700592 2014

- against -

Motion
Date July 16, 2015

MOHAMED K. ASSIM, et al.,
Defendant(s).

Motion
Cal No. 169

Motion
Seq. No. 1

Hearing
Date September 29, 2015

The following papers read on this motion by plaintiff for an order, *inter alia*, granting it summary judgment against defendant Mohamed K. Assim a/k/a Mohamed Assim (defendant), striking his answer and affirmative defenses, and appointing a referee to compute.

	<u>Papers Numbered</u>
Notice of Motion - Affirmation - Exhibits.....	EF13-29
Answering Affirmation - Exhibits.....	EF30-31
Reply.....	EF32-33
Exhibits.....	1

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

Plaintiff commenced this action to foreclose on a consolidated mortgage against real property known as 97-16 124th Street, Richmond Hill, New York 11419. Pertinent documents submitted on the motion indicate the following: On March 10, 1989, defendant and his sister, nonparty Bibi S. Assim, executed a note and mortgage in the amount of \$185,000.00, in favor

of Green Point Savings Bank. Said mortgage and note were assigned to GFI Mortgage Bankers, Inc. (GFI) by written assignment dated April 4, 2003.

On April 9, 2003, defendant executed a new note and mortgage in the amount of \$8,166.26 in favor of GFI. On that same date, those parties entered into a Consolidation, Extension and Modification Agreement (CEMA 1), consolidating and modifying the two loans to form a single lien in the amount of \$150,000.00. A consolidated note was also executed on that date in that amount. The loan documents were assigned to Greenpoint Mortgage Funding, Inc., by written assignment dated April 9, 2003, and then further assigned to 1st Republic Mortgage Bankers, Inc. (1st Republic), by written assignment dated April 24, 2006.

On April 24, 2006, defendant and his wife, defendant Bibi Sahida Assim, executed a note and mortgage in the amount of \$354,545.76 in favor of 1st Republic. On that same date, the parties entered into a Consolidation, Extension and Modification Agreement (CEMA 2), consolidating and modifying CEMA 1 and the aforementioned loan to form a single lien in the amount of \$500,000.00. A consolidated note was also executed on that date in that amount. Plaintiff alleges that it is the holder of the note and is the mortgagee of record, the defendant-borrowers defaulted under the terms of the note and mortgage, as modified, by failing to make the monthly installment payments due on August 1, 2010, and all payments thereafter and, as a consequence, it elected to accelerate the entire mortgage debt.

The action was commenced on January 28, 2014. Defendant served an answer, asserting various affirmative defenses, including ones based upon lack of standing and failure to comply with RPAPL § 1304. As to the remaining defendants, plaintiff has established that none of the other defendants answered or otherwise appeared herein, though all were served with process. Plaintiff also determined that the unnamed defendants were not served and are not necessary parties herein.

A foreclosure settlement conference was held, but was released from the Foreclosure Conference Part on defendant's default on August 15, 2014. Thereafter, plaintiff filed the instant motion. Defendant opposed on the ground that triable issues of fact exist, warranting denial thereof. Defendant first challenged plaintiff's right to foreclose against the interest of defendant's sister, nonparty Bibi S. Assim, who he claimed was still a 50% owner notwithstanding the fact that he and his wife, defendant Bibi Sahida Assim, assumed the obligations of the first note which was signed by her sister-in-law. Defendant also argued that plaintiff failed to comply with RPAPL § 1304 as it failed to demonstrate that his sister, Bibi S. Assim, a "borrower," as defined in the statute, was served at all with the 90-day pre-foreclosure notice.

By prior order dated August 5, 2015, the matter was set down for a hearing to be held in Courtroom 5001 of this Courthouse; the subject of the hearing, per said order, was to relate to the issue of ownership of the premises. At the hearing, held on September 29, 2015, defense counsel, in effect, withdrew that portion of his client's opposition which challenged plaintiff's right to foreclose against the 50% interest of Bibi S. Assim, as it was established by way of documentary evidence that the named defendant-mortgagors herein (to wit: Mohamed K. Assim and Bibi Sahida Assim, husband and wife) are the sole co-owners of record of the subject premises. The issue of ownership and, in particular, whether the proper necessary parties were named herein, was resolved and, thus, the focus at this juncture is whether plaintiff is entitled to, *inter alia*, summary judgment.

It is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). In a residential mortgage foreclosure action, a plaintiff establishes its prima facie entitlement to judgment as a matter of law by producing the mortgage and the unpaid note, and evidence of the default (*see Midfirst Bank v Agho*, 121 AD3d 343 [2014]). Where the plaintiff is not the original lender and standing is at issue, the plaintiff seeking summary judgment must also submit evidence that it received both the mortgage and note by a proper assignment, which can be established by the production of a written assignment of the note (*see Aurora Loan Servs., LLC v Taylor*, 114 AD3d 627 [2014]; *see Homecomings Fin., LLC v Guldi*, 108 AD3d 506 [2013]), or by physical delivery to the plaintiff of the note (*see Kondaur Capital Corp. v McCary*, 115 AD3d 649 [2014]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95 [2011]). In addition, the plaintiff must make a prima facie showing of strict compliance with RPAPL § 1304, which is a condition precedent to the commencement of the foreclosure action (*see Aurora Loan Services, LLC v Weisblum*, 85 AD3d at 107). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Here, plaintiff has established that it has standing to commence the within action by virtue of production of the aforementioned notes, mortgages, and written assignments, together with the affidavit of Krysta Johnson, Vice President Loan Documentation of Wells Fargo Bank, N.A., wherein which she indicates that plaintiff was in possession of the note prior to commencement of the action, and together with the fact that the consolidated note, specially endorsed to plaintiff herein, was annexed to the filed summons and complaint herein (*see Aurora Loan Servs., LLC v Lopa*, 130 AD3d 952 [2015]; *Nationstar Mtge., LLC v Catizone*, 127 AD3d 1151 [2015]; *Aurora Loan Servs., LLC v Taylor*, 114 AD3d 627

[2014], *affd* 25 NY3d 355 [2015]). In opposition to the motion, defendant remained silent on the issue of standing and, as such, he failed to raise a triable issue of fact in that regard.

With respect to RPAPL § 1304, however, plaintiff has failed to meet its *prima facie* burden establishing “strict compliance” with the statute. Ms. Johnson, per her affidavit, merely states that she has “reviewed the 90 day pre-foreclosure notice sent to borrower(s) by certified mail and also by first-class mail to the last known address of the borrower(s), and if different, to the residence that is the subject of the mortgage and a copy of said notice(s) is attached.” Plaintiff also submits a copy of the notice, dated September 5, 2013. Ms. Johnson’s affidavit does not amount to a proper affidavit of service of the statutorily-required notice (*see Flagstar Bank, FSB v Anderson*, 129 AD3d 665 [2015], *citing Wells Fargo Bank, NA v Burke*, 125 AD3d 765 [2015] [plaintiff failed to tender sufficient evidence to eliminate triable issue since it did not submit an affidavit of service]; *U.S. Bank N.A. v Tate*, 102 AD3d 859 [2013]; *Deutsche Bank Nat. Trust Co. v Spanos*, 102 AD3d 909 [2013]; *Aurora Loan Servs., LLC*, 85 AD3d at 100).

Neither does Ms. Johnson indicate in her affidavit, for example: (1) the date that the notice was alleged to have been sent; (2) by whom the notice was alleged to have been sent; and (3) 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]). It is noted that annexing a copy of the notice does not establish proof of proper mailing (*HSBC Mtge. Corp. (USA) v Gerber*, 100 AD3d 966 [2012]).¹ Inasmuch as plaintiff has not met its burden with respect to RPAPL § 1304, it cannot conclusively meet its burden with respect to compliance with RPAPL § 1306.

1. Though the court need not look to the opposition papers with respect to the issue of compliance with RPAPL § 1304, it should be noted that defendant asserts that plaintiff has failed to demonstrate compliance with the statute with respect to defendant’s sister Bibi S. Assim. Importantly, this action was not commenced against defendant’s sister; thus, RPAPL § 1304 does not apply to her. Indeed, defendant conceded, in effect, that she need not be added as a party. In any event, as correctly pointed out by plaintiff in reply to the opposition, that defense would be personal to her and cannot be asserted on her behalf by him (*see e.g. Nash v Duroseau*, 39 AD3d 719 [2007]; *Home Sav. of Am. v Gkanios*, 233 AD2d 422 [1996]; *see also Wells Fargo Bank, N.A. v Bowie*, 89AD3d 931 [2011]; *Home Sav. of Am. v Gkanios*, 233 AD2d 422 [1996]). Moreover, CEMA 2 (which combined and restated prior notes and mortgages) defines the borrower(s) as defendant and his wife Bibi Sahida Assim.

With respect to that branch of the motion by plaintiff to strike defendant's affirmative defenses raised by defendant in his answer, plaintiff bears the burden of demonstrating that the affirmative defenses are without merit as a matter of law (*Greco v Christoffersen*, 70AD3d 769 [2010], quoting *Vita v New York Waste Servs., LLC*, 34AD3d 559 [2006]).

As to defendant's first and sixth affirmative defenses regarding predatory lending and failure to investigate defendant's ability to pay, respectively, plaintiff established that these defenses were bare, conclusory assertions without any factual basis, especially considering the fact that the loan to which he refers was entered into over 20 years ago. Defendant has failed to address, in opposition to the motion, plaintiff's *prima facie* showing.

As to defendant's second and third affirmative defenses regarding non-compliance with RPAPL §§ 1304 and 1306 – as it relates to him – plaintiff is not entitled to their dismissal, as discussed, *supra*. As to defendant's fourth affirmative defense alleging lack of standing, however, plaintiff is entitled to dismissal of same.

Regarding plaintiff's fifth affirmative defense of lack of personal jurisdiction, defendant waived that defense by failing to move on such ground within the time prescribed by statute (CPLR 3211 [e]). Furthermore, he cannot assert such a defense on behalf of other defendants herein (*see Wells Fargo Bank, N.A.*, 89AD3d at 932; *Home Sav. of Am.*, 233 AD2d at 423).

Accordingly, the branches of plaintiff's motion for an order granting it summary judgment against defendant Mohamed K. Assim, striking his answer, and appointing a referee to compute, are denied. The branch of its motion for an order striking defendant's affirmative defenses is denied only with respect to the second and third affirmative defenses alleging non-compliance with RPAPL §§ 1304 and 1306, respectively, and is otherwise granted. The branch of the motion for an order discontinuing this action against "John Doe," "Richard Roe," "Jane Doe," Cora Coe," "Dick Moe," and "Ruby Poe" is granted. The branch of the motion for an order deeming non-answering and non-appearing defendants in default is granted. The branch of the motion for costs of the motion is denied.

Dated: October 1, 2015

J.S.C.