

Select Portfolio Servicing, Inc. v Fowkes

2015 NY Slip Op 32249(U)

November 10, 2015

Supreme Court, Suffolk County

Docket Number: 35828-2010

Judge: Glenn A. Murphy

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COPY

**SUPREME COURT - STATE OF NEW YORK
IAS PART 25 - SUFFOLK COUNTY**

PRESENT: Hon. GLENN A. MURPHY
Acting Justice of the Supreme Court

Select Portfolio Servicing, Inc.,

Plaintiff,

-against-

William J. Fowkes, Mortgage Electronic Systems, Inc., as nominee for Continental Home Loans, Inc., People of New York, JOHN DOE (Said names being fictitious, it being the intention of Plaintiff to designate and any all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises.),

Defendants,
_____x

MOTION DATE 08-27-14
ADJ. DATE 11-10-15
MOT. SEQ #003 MG

SHELDON MAY & ASSOCIATES, P.C.
Attorneys for Plaintiff
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Rockville Centre, New York 11570

ALFRED S. WALENDOWSKI, P.C.
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532 Broadhollow Road Suite 144
Melville, New York 11747

Upon the following papers numbered 1 to 15 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; Replying Affidavits and supporting papers 15; ~~Other~~; (and after hearing counsel in support and opposed to the motion) it is,

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

ORDERED that this motion by the plaintiff Select Portfolio Servicing, Inc., (Select), pursuant to CPLR §3212 for summary judgment on its complaint, to strike the answer and counter-claim of William J. Fowkes and, for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law (RPAPL) §1321, is granted; and it is further

ORDERED that the plaintiff's application for leave to amend the caption of this action pursuant to CPLR §3025 (b), is granted; and it is further

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ORDERED that the plaintiff shall submit with the proposed judgment of foreclosure and sale the required affidavits of non-military status of the mortgagor(s) and obligor(s), and it is further

ORDERED that the caption of this action be amended by striking therefrom the remaining defendants sued herein as "John Doe", and by amended in the caption to add the following defendants instead of and in place of the "John Doe" as listed in the caption as follows: Jose Tenacata, Eugenia Bisnea, Manuel Chillogalli, Celio Chillogalli all without prejudice to the proceedings heretofore had herein; and it is further

ORDERED that the caption of this action as amended, shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF SUFFOLK

_____x
Select Portfolio Servicing, Inc.,

Plaintiff,

-against-

**William J. Fowkes, Mortgage Electronic Systems, Inc.,
 as nominee for Continental Home Loans, Inc., People
 of New York, Jose Tenacata, Eugenia Bisnea, Manuel
 Chillogalli, Celio Chillogalli,**

Defendants.
 _____x

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Foreclosure of: 14 Muir
 Boulevard, East Hampton,
 New York

Section: 122.00
 Block: 02.00
 Lot: 002.001

ORDERED that the plaintiff is directed to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court.

This is an action to foreclose a mortgage on premises known as 14 Muir Boulevard, East Hampton, New York. On December 21, 2006, the defendant executed a note in favor of Continental Home Loans Inc. (Continental), agreeing to pay the sum of \$340,750.00 at the yearly rate of 6.500% (percent). On the same date, the defendant executed a first mortgage in like sum on the subject property. The mortgage was recorded on January 12, 2007, in the Suffolk County Clerk's Office. The mortgage named Mortgage Electronic Registration Systems (MERS) as the nominee for Continental. On September 15, 2010, the mortgage was assigned by MERS as nominee for Continental to the plaintiff. The assignment of mortgage was filed with the Suffolk County Clerk's Office on October 5, 2010.

A notice of default, dated June 30, 2010, was sent to the defendant stating that he had defaulted on his mortgage loan and that the amount past due was \$11,782.66. On April 29, 2010, the plaintiff sent by regular mail a ninety (90) day notice pursuant to RPAPL §1304. As a result of the defendant's continuing default, the plaintiff commenced this foreclosure action on September 23, 2010.

In its complaint, the plaintiff alleges in pertinent part that the defendant breached his obligations under the terms of the note and mortgage by failing to make monthly payments. The summons and complaint comply with the requirement of RPAPL §1302. The defendant interposed an answer consisting of general denials.

The Court's computerized records indicate that a foreclosure settlement conference was held on July 20, 2012, at which time this matter was referred as an IAS case upon default by the defendant. Thus, there has been compliance with CPLR §3408 and no further settlement conference is required.

The plaintiff now moves for summary judgment on its complaint contending that the defendant failed to comply with the terms of the loan agreement and mortgage and, that the defendant's general denials raised no issues of fact for trial. In support of its motion, the plaintiff submits among other things: the sworn affidavits of David Recksiek, Document Control Officer for the plaintiff Select, the servicer/holder of the plaintiffs loan; the affirmations of Ted Eric May, in support of the instant motion together with his affirmation pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the pleadings; the note, mortgage, and assignment of mortgage; notice of default; notices pursuant to RPAPL §§ 1320, 1304 and 1303; affidavits of service for the summons and complaint; and, an affidavit of service for the instant summary judgment motion upon the defendant's counsel. The defendant has submitted an answer with no affirmative defense and an affirmation in opposition.

“[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 Mentessana*, 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 ASD3d 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 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]).

In opposition, the defendant, through his attorney raises standing attacking the sufficiency of the affidavit of Mr. Recksiek. The plaintiff correctly notes that the defendants' failure to file an amended answer despite given the opportunity by the Court, has waived his objection to standing, as the original answer failed to articulate that defense CPLR §3211 (c). The Court, however, finds that the affidavit of Mr. Recksiek when viewed in the totality of the plaintiffs entire submission inclusive of the supporting documents, establishes a sufficient basis for standing. *See* CPLR §3415 and *HSBC Bank U.S.A. v. Sage*, 112 AD2d 1126 (3d Dept 2013).

The defendants opposition is based solely upon defense counsels conclusory and speculative allegations. The affirmation is not based upon personal knowledge and as such is "without evidentiary value" *See Zuckerman v. City of New York*, 49 NY 2d 557(1980); *see also Weingarten v. Marcus*, 118 AD 2d 640 (2d Dept 1986); *Reuben Israelson v. Sidney Rubin*, 20 AD2d 668, 247 NYS2d 85 (2d Dept 1964) Affd 14 NY2d 887(1964); *Erin Federico v. City of Mechanicville*, 141 AD2d 1002, 531 NYS2d 42 (3rd Dept. 1988); *Cohen v. Pannia*, 7 AD2d 886, 181 NYS2d 220 (4th Dept. 1959). "Motions for summary judgment may not be defeated merely by surmise, conjecture or suspicion" *Shaw v Time-Life Records*, 38 NY2d 201, 379NYS2d 390 [1975]. Here, the 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]). Notably, the 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].

In light of the foregoing, the motion for summary judgment is granted against the defendant and the defendant's answer is stricken. The 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])

ORDERED, further that this action is hereby referred to Daniel A. Russo, Esq., with an office located at 64 C Old Riverhead Road, Westhampton Beach, New York 11978 ph #631-447-1200, who is hereby appointed Referee to ascertain and compute the total amount due plaintiff for unpaid principal, accrued interest and all (other disbursements advanced as provided for by statute) mortgage costs and expenses other than attorneys' fees secured by the note and mortgage set forth in the complaint, and to examine and report as to whether the mortgaged premises can be sold in one parcel; and it is further

ORDERED, that plaintiff shall provide the Referee all required documents to compute within sixty (60) days from the date of this Order, and the Referee shall make his/her report no later than thirty (30) days thereafter and that, except for good cause shown, the plaintiff shall move for judgment no later than thirty (30) days of the date of the Referee's Report; and it is further

ORDERED, that by accepting this appointment the Referee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to section 36.2 (c) ("Disqualifications from appointment"), and section 36.2 (d) ("Limitations on appointments based upon compensation"); and it is further

ORDERED, that upon submission of the Referee's Report, plaintiff shall pay pursuant to CPLR §8003 (a) \$250.00 to the Referee as compensation for his/her services, which sum may be recouped as a cost of litigation; and it is further

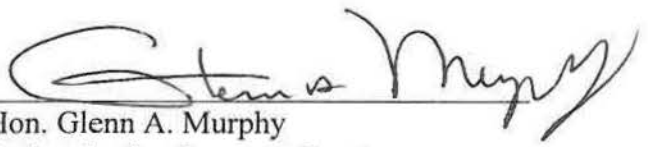
ORDERED, that the Referee is prohibited from accepting or retaining any funds for him/herself or paying funds to him/herself without compliance with Part 36 of the rules of the Chief Administrative Judge; and it is further

ORDERED, that the Referee appointed herein is subject to the requirements of Rule 36.2 (c) of the Chief Judge, and if the Referee is disqualified from receiving an appointment pursuant to the provision of that Rule, the Referee shall notify the appointing Justice forthwith; and it is further

ORDERED, plaintiff is to include in any proposed order for a judgment of foreclosure and sale language complying with the Suffolk County Local Rule for filing of the Foreclosure Action Surplus Monies form contained in Suffolk County Administrative Order #41-13; and it is further

ORDERED, that a copy of this order with Notice of Entry shall be served upon the designated Referee, the owner of the equity of redemption, any tenants named in this action and any other party entitled notice within twenty (20) days of entry and no less than thirty (30) days prior to any hearing before the Referee. The Referee shall not proceed to take evidence as provided herein without proof of such service, which must accompany any application for Final Judgment of Foreclosure and Sale.

Dated: NOV 10 2015



Hon. Glenn A. Murphy
Acting Justice Supreme Court

 FINAL DISPOSITION X NON-FINAL DISPOSITION