

Wells Fargo Bank, N.A. v Dineen

2015 NY Slip Op 32344(U)

November 17, 2015

Supreme Court, Suffolk County

Docket Number: 15587/2011

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 Supreme Court

MOTION DATE 05-29-14
ADJ. DATE 10-29-15
Mot. Seq. #001 MG-AMENDED

**WELLS FARGO BANK, N.A., TRUSTEE POOLING AND
SERVICING AGREEMENT DATED AS OF NOVEMBER
1, 2004 ASSET-BACKED PASS-THROUGH
CERTIFICATES SERIES 2004-WHQ2,**

Plaintiff,

-against-

**MICHAEL DINEEN, MARGARET DINEEN, SUFFOLK
COUNTY DEPARTMENT OF SOCIAL SERVICES O/B/O
JENNIFER L. MYERS, WELLS FARGO BANK, CLERK
OF THE SUFFOLK COUNTY DISTRICT COURT,
COMMISSIONER OF TAXATION & FINANCE, "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.

LEOPOLD & ASSOCIATES, PLLC
Marcelo E. Martinez, Esq.
Attorneys for Plaintiff
80 Business Park Drive, Suite 110
Armonk, New York 10504

RODNEY DRAKE, ESQ.
Attorney for Defendants
600 Johnson Avenue, Suite A-8
Bohemia, New York 11716

MICHAEL AND MARGARET DINEEN
Attorneys pro-se
7 Fifth Street
Ronkonkoma, New York 11779

MICHAEL AND MARGARET DINEEN
Attorneys pro-se
11 Magnet Street
Stony Brook, New York 11790

Upon the following papers numbered 1 to 30 read on this motion for summary judgment and an order of reference; Notice of Motion/ ~~Order to Show Cause~~ and supporting papers 1 - 20; ~~Notice of Cross Motion~~ and supporting papers _____; Answering Affidavits and supporting papers 21-26 ; Replying Affidavits and supporting papers 27-30; ~~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 Wells Fargo Bank, N.A., (Wells Fargo), pursuant to CPLR §3212 for summary judgment on its complaint, to strike the answer and counter-claim of Michael Dineen and Margaret Dineen 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 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 caption be amended to substitute the name of the plaintiff to the name of the current owner and holder of the note and mortgage Wells Fargo Bank, N.A., as Trustee for the Pooling and Servicing Agreement dated, November 1, 2004, Park Place Securities, Inc., Asset-Backed Pass-Through Certificates Series 2004-WHQ2 in place and stead of plaintiff, that the caption be amended to substitute the name of Janet DeStefano in place and stead of "JOHN DOE #1", that the caption be amended to strike the names "JOHN DOE #2" through "JOHN DOE #12", same not having been served with copies of the summons and complaint, said defendants not being necessary parties defendants, without prejudice to any of the proceedings heretofore had herein; and it is further,

ORDERED that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF SUFFOLK

 WELLS FARGO BANK, N.A., TRUSTEE POOLING AND
 SERVICING AGREEMENT DATED AS OF NOVEMBER 1,
 2004, PARK PLACE SECURITIES, INC., ASSET-BACKED
 PASS-THROUGH CERTIFICATES
 SERIES 2004-WHQ2,

INDEX NO.: 15587-2011

Plaintiff,

-against-

MICHAEL DINEEN, MARGARET DINEEN, SUFFOLK
 COUNTY DEPARTMENT OF SOCIAL SERVICES O/B/O
 JENNIFER L. MYERS, WELLS FARGO BANK, CLERK
 OF THE SUFFOLK COUNTY DISTRICT COURT,
 COMMISSIONER OF TAXATION & FINANCE, JANET
 DESTEFANO,

Defendants.

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 7 Fifth Street, Ronkonkoma, New York. On October 20, 2004, the defendant executed a note in favor of Argent Mortgage Company, LLC., (Argent) agreeing to pay the sum of \$292,500.00 at the yearly rate of 7.35 percent. On the same date, the defendants executed a first mortgage in like sum on the subject property. The mortgage was recorded on November 11, 2004 in the Suffolk County Clerk's Office naming Argent as the mortgage holder. On October, 26, 2004, Argent transferred its interest in the mortgage to Ameriquest Mortgage Company. On that same date Ameriquest Mortgage Company assigned the mortgage to the plaintiff. These assignments were filed simultaneously on April 21, 2010. During the pendency of this matter the plaintiff transferred the mortgage to Wells Fargo, as trustee for the PSA, dated as of November 1, 2004, Park Place Securities, Inc., Asset-Backed Pass-Through certificates series 2004-WHQ2.

A notice of default, dated October 2, 2010, was sent to the defendants stating that they had defaulted on their mortgage loan and that the amount past due was \$32,463.90. On October 1, 2010 the plaintiff sent by certified and/or registered letter and regular mail a ninety (90) day notice pursuant to RPAPL §1304. As a result of the defendants continuing default, the plaintiff commenced this foreclosure action on May 12, 2011. In its complaint, the plaintiff alleges in pertinent part that the defendants breached their 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 §1303. The defendants interposed an answer consisting of general denials and four (4) affirmative defenses.

The Court's computerized records indicate that a foreclosure settlement conference was held on May 29, 2014, 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.

The plaintiff now moves for summary judgment on its complaint contending that the defendants 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 affidavit of Morgan Rattle Ames, Vice President by Ocwen Loan Servicing, LLC (Ocwen), servicer for Wells Fargo, as trustee for the Pooling Servicing Agreement, dated as of November 1, 2004 Park Place, Asset-Backed Pass-Through Certificates Series 2004-WHQ2 as assignee of Wells Fargo Trustee Pooling Servicing Agreement dated as of November 1, 2004, Asset-Backed Pass-Through Certificates Series 2004-WHQ2.; the affirmation of Marcelo E. Martines 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 four (4) affirmative defense.

“[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 Montesana*, 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 *Ames 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 raises several claims attacking plaintiffs standing and sufficiency of proof proffered by the plaintiff with regard to the mortgage assignments included in the plaintiffs motion. Initially, the court notes that the note involved herewith and their assignments have not been attacked by the defendant. The note itself contains a specific endorsement to the plaintiff which the defendant does not contest. Recently, the Court of Appeals in *Aurora v Taylor*, 25 NY3d 355 (2015) has given clarity to the question of standing where, as here, the plaintiff lawfully possesses the note in a foreclosure action.

Specifically, the Court noted:

[I]t is not necessary to have possession of the mortgage at the time the action is commenced. This conclusion follows from the fact that the note, and not the mortgage, is the dispositive instrument that conveys standing to foreclose under New York law. In the current case, the note was transferred to *Aurora* before the commencement of the foreclosure action—that is what matters. A transfer in full of the obligation automatically transfers the mortgage as well unless the parties agree that the transferor is to retain the mortgage.... Once a note is transferred, however, “the mortgage passes as an incident to the note” (*Bank of NY v Silverberg*, 86 AD3d 274, 280, 926 NYS2d 532 [2d Dept 2011]). *Aurora* at 361.

The *Aurora* Court went on to cite 14A Carmody-Wait 2d § 92:79 [2012]. “[A]ny disparity between the holder of the note and the mortgagee of record does not stand as a bar to a foreclosure action because the mortgage is not the dispositive document of title as to the mortgage loan; the holder of the note is deemed the owner of the underlying mortgage loan with standing to foreclose” *id* at 361-362

This Court must be guided by the analysis of the *Aurora* decision and as such finds, as the note was lawfully held by the plaintiff, standing has been established.

In light of the *Aurora* guidance, the defendants claims alleging fraud with regard to the mortgage assignments are of no moment. Further, the defendants conclusionary allegations attacking the mortgage assignments contained in counsels affirmation are not based upon personal knowledge, and as such, are “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]

The remaining substantive issue raised by the defendants opposition surrounds the affidavit of Morgan Ames. The defendant suggests as the affidavit is not based on personal knowledge it is insufficient. However, when the affidavit is viewed in its totality together with the supporting documentation provided in plaintiffs motion, it is clear that the affidavit is sufficient. See CPLR §3415 and *HSBC Bank USA v Sage*, 112 AD3d 1126 (3d Dept 2013)

With respect to his remaining affirmative defenses and counterclaims, the 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.*

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v Jackson, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007] quoting *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 664 NYS2d 345 [2nd Dept 1997]. Here, answering the 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]). Notably, the defendant does not deny that they have failed to make 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 defendants 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 Donna England, Esq., with an office located at 2556 Middle Country Rd Centereach, NY 11720 Ph # 631-588-0250, 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

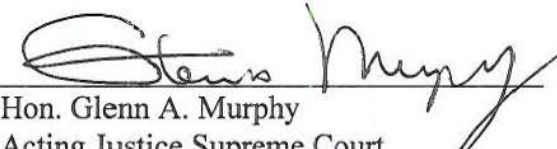
ORDERED, that the Referee is prohibited from accepting or retaining any funds for him/herself or paying funds to him/herself without compliance with Part 36 of the rules of the Chief Administrative Judge; and it is further

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: 11/17/15


Hon. Glenn A. Murphy
Acting Justice Supreme Court

 FINAL DISPOSITION X NON-FINAL DISPOSITION

JOHN E. HOLOWNIA, ESQ.

Attorneys for Defendant Suffolk County Department of Social Service o/b/o Jennifer L. Myers
Suffolk County Attorneys Office Family Court/Social Services Bureau
John P. Cohalan Court Complex-5th Floor
400 Carleton Avenue
Central Islip, New York 11722

WELLS FARGO BANK

Non-Appearing Defendant
601 Portion Road
Ronkonkoma, New York 1177

CLERK OF THE SUFFOLK COUNTY DISTRICT COURT

Non-Appearing Defendant
400 Carleton Avenue
Central Islip, New York 11722

COMMISSIONER OF TAXATION AND FINANCE

Non-Appearing Defendant
250 Veterans Memorial Highway
Hauppauge, New York 11788