

Wells Fargo Bank N.A. v Mullings

2015 NY Slip Op 32511(U)

December 11, 2015

Supreme Court, Suffolk County

Docket Number: 15348-11

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

MOTION DATE 09-23-14
ADJ. DATE 12-11-15
MOT. SEQ # 003 MG

_____ x
**WELLS FARGO BANK, N.A., A/K/A WACHOVIA
MORTGAGE A DIVISION OF WELLS FARGO BANK,
N.A., F/K/A WACHOVIA MORTGAGE FSB, F/K/A
WORLD SAVINGS BANK, FBS,**

Plaintiff,

HOGAN LOVELLS US LLP
Attorneys for Plaintiff
875 Third Avenue
New York, New York 10022

-against-

DRUCKMAN LAW GROUP PLLC
Co-Counsel for Plaintiff
242 Drexel Avenue, Suite 2
Westbury, NY 11590

**DAUDREY MULLINGS A/K/A DAUDREY M.
MULLINGS, SLOMIN'S INC., "JOHN DOE 1 to JOHN
DOE 25", said names being fictitious, the persons or parties
intended being the persons, parties, corporations or entities, if
any, having or claiming an interest in or lien upon the mortgaged
premises described in the complaint,**

Defendants,

KENNETH C. HENRY, ESQ.
Attorney for Defendant Daudrey Mullings
900 Merchants Concourse, Suite 303
Westbury, New York 11590

_____ x

Upon the following papers numbered 1 to 27 read on this motion for summary judgment and an order of reference ; Notice of Motion/ ~~Order to Show Cause~~ and supporting papers 1-19 ; Notice of Cross Motion and supporting papers 20-23 ; ~~Answering Affidavits and supporting papers~~ ; ~~Replying Affidavits and supporting papers~~ 24-27 ; 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 Daudrey Mullings 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

ORDERED that "John Doe 1 to John Doe 25" be replaced as party defendants with "Frank Mullings," "Elena Mullings," "Daphney Mullings," and "Mitzy Mullings," and the caption be amended to reflect the replacement; and it is further

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

_____X
WELLS FARGO BANK, N.A., A/K/A WACHOVIA
MORTGAGE A DIVISION OF WELLS FARGO BANK, N.A.,
F/K/A WACHOVIA MORTGAGE FSB, F/K/A WORLD
SAVINGS BANK, FBS,

Plaintiff,

-against-

DAUDREY MULLINGS A/K/A DAUDREY M. MULLINGS,
SLOMIN'S INC., FRANK MULLINGS, ELENA MULLINGS,
DAPHNEY MULLINGS, MITZY MULLINGS,

Defendants.

INDEX NO. 11-15348

Mortgaged Premises:
22 Van Buren Street
Farmingdale, NY 11735

SBL#
122.00-01.00-009.000

_____X
This is an action to foreclose a mortgage on premises known as 22 Van Buren Street, Farmingdale, New York. On January 20, 2006, the defendant executed an adjustable rate note and mortgage in favor of World Savings Bank (World), agreeing to pay the sum of \$280,000.00 at the yearly rate of 6.690% (percent.) The mortgage was recorded in the Suffolk County Clerk's Office. On December 31, 2007, World changed its name to Wachovia Mortgage FSB (Wachovia). On November 1, 2009 Wachovia merged with Wells Fargo.

A notice of default, dated December 30, 2010, was sent to the defendant stating that he had defaulted on his mortgage loan and that the amount past due was \$31,689.00. On December 30, 2010, the plaintiff sent by certified and 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 May 10, 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 §1302.

The Court's computerized records indicate that a final foreclosure settlement conference was held on June 26, 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.

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 Michael Doland, Research and Mediation Manager for Wells Fargo, the holder and, the servicer of the plaintiffs loan; the affirmations of Heather R. Sushue, Gabrielle M. Mannuzza and David Dunn 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 twelve (12) affirmative defenses and four (4) counter-claims.

“[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 *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 three (3) grounds alleging that summary judgment is not warranted. In the defendants first claim, the defendant suggests that the summary judgment as to and against Frank Mullings, Elena Mullings, Daphney Mullings, Mitzy Mullings and Slomin's Inc should be dismissed pursuant to CPLR §3215 (c). The defendant relies upon the case of *One West Bank v Daniel Corrar*, 43 Misc.3d 1230(a) (Kings County 2014.) However, One West offers no support for the defendants position as One West dealt with a motion by a defendant arguing for dismissal pursuant to §3215 on that defendants behalf. Here, the defendant attacks the plaintiffs' papers on behalf of the non-appearing defendants. The defendant lacks standing to make any such claims. Further, the Court notes that CPLR §3215 (c) does not require dismissal of the instant claim as against Mullings and Slomin's as the plaintiff has established good cause for the delay. The record also reflects that the instant motion is this matters third motion. Further, establishing good cause for the delay is the fact the parties were involved in class action litigation with regard to the mortgage.

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In light of the totality of the record, the Court finds that dismissal of the non-appearing defendants is not warranted. The record establishes reasonable excuse for the delay as well as a meritorious against the non-appearing defendants. The record further establishes that the plaintiff did not intend to abandon the claims against the non-appearing defendants.

The defendants second area of objection, surrounds the alleged failure to provide notice with the New York State Banking Department as mandated under RPAPL §1306. Initially, it must be noted that the defendant waived this claim as it was not raised in the defendants answer. CPLR §§ 3018 (b) and 3211; *Kulh v Piatelli*. 31 AD3d 1038, 1039 (3d Dept 2006). However, as the plaintiffs' reply papers establish that the notice was in fact timely filed as required by RPAPL §1306, this branch of the defendants' motion is denied..

The third objection raised by the defendant suggests that the service on co-defendants Slomin's is effective and as such the summary judgment motion "against it must be denied". As noted above, the proper party to raise the issue of service on Slomin's is Slomin's. The defendant has no standing to object to the service on the co-defendant. CPLR §§ (8) . Further, the affidavit of service is facially sufficient

With respect to the remaining affirmative defenses and counterclaims that survived the prior motion, the defendant 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. 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, 379NYS2d 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 defendants motion against the non-answering defendants is granted. 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 John T. Powers Jr. Esq., with an office located at 375 Commack Rd Ste 202, Deer Park, NY 11729 Ph #631-667-7100, 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: 12/11/15



Hon. Glenn A. Murphy
Acting Justice Supreme Court

 FINAL DISPOSITION X NON-FINAL DISPOSITION

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Frank Mullings a/k/a John Doe #1
Non-Appearing Defendant
22 Van Buren Street
Farmingdale, NY 11735

Elena Mullings a/k/a John Doe #2
Non-Appearing Defendant
22 Van Buren Street
Farmingdale, NY 11735

Daphney Mullings a/k/a John Doe #3
Non-Appearing Defendant
22 Van Buren Street
Farmingdale, NY 11735

Mitzy Mullings a/k/a John Doe #4
Non-Appearing Defendant
22 Van Buren Street
Farmingdale, NY 11735

John Doe #5 to 25
Non-Appearing Defendant
22 Van Buren Street
Farmingdale, NY 11735

Slomin's Inc
Non-Appearing Defendant
125 Lauman Avenue
Hicksville, NY 11801