Wells Fargo Bank, N.A. v Carpenter
2016 NY Slip Op 30299(U)
February 1, 2016
Supreme Court, Suffolk County
Docket Number: 13243-12
Judge: William G. Ford
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SHORT FORM ORDER

INDEX
NO.: 13243-12

SUPREME COURT - STATE OF NEW YORK
IAS PART 38 - SUFFOLK COUNTY

COPY

PRESENT: Hon. WILLIAM G. FORD
Justice of the Supreme Court

Wells Fargo Bank, N.A.,

Plaintiff,

-against-

Robert Carpenter, Teachers Federal Credit Union, People of the State of New York, KMT Group LLC LVNV Funding LLC APO Sears, and "JOHN DOE #1" through "JOHN DOE #10", the last ten names being fictitious and unknown to the plaintiff, the person or parties, if any, having or claiming an interest in or lien upon the Mortgage premises described in the Complaint,

Defendants.

MOTION DATE 10-16-14
ADJ. DATE 11-13-14
Mot. Seq. # 001-MD

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Upon the following papers numbered 1 to 26 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 16; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 17 - 21; Replying Affidavits and supporting papers 22 - 25; Other Stipulation 26; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by the plaintiff for, inter alia, an order awarding summary judgment in its favor and against the defendant Robert Carpenter, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption is denied in its entirety; and it is further

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon all parties who have appeared herein and not waived further notice within thirty (30) days of the date herein, and shall promptly file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on real property known as 113 Madison Street, Mastic New York 11950. On June 23, 2003, the defendant Robert Carpenter ("the defendant mortgagor") executed a fixed-rate note in favor of Alliance Mortgage Banking Corp. ("the lender") in the principal sum of $213,099.00. To secure said note, the defendant mortgagor gave the lender a

mortgage also dated June 23, 2003 on the property. By way of two undated endorsements and two assignments, the note and mortgage were allegedly transferred from the lender to Wells Fargo Bank, N.A. ("the plaintiff") prior to commencement. The assignments of the note and mortgage were duly recorded in the Suffolk County Clerk's Office on March 27, 2006 and March 31, 2011.

The defendant mortgagor allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on or about October 1, 2006, and each month thereafter. In response, the plaintiff allegedly sent a default notice dated July 13, 2010 and a 90-day notice dated July 22, 2011 to the defendant mortgagor. Parenthetically, the 30-day default notice and the 90-day notice each list Wells Fargo Home Mortgage (Wells Fargo) as the sender at the top heading. After the defendant mortgagor allegedly failed to cure the aforesaid default in payment, the plaintiff commenced the instant action by the filing of the lis pendens, summons and complaint on April 27, 2012.

In response to the complaint, defendant mortgagor interposed a verified answer sworn to on June 5, 2012. By his answer, the defendant mortgagor admits some and denies other allegations in the complaint. In the answer, the defendant mortgagor also asserts sixteen affirmative defenses, alleging, inter alia, that plaintiff failed to comply with the provisions of RPAPL § 1304. The defendant KMT Group, LLC ("KMT") appeared herein and waived all, but certain, notices; however, KMT never answered, and, thus, is in default. The remaining defendants have neither answered nor appeared herein, and are also in default.

By way of background, the parties began a prolonged period of negotiations in an attempt to agree on a loan modification, and foreclosure settlement conferences were conducted or adjourned beginning on November 27, 2012 and lasting until April 23, 2013. A representative of the plaintiff attended and participated in all settlement conferences. On the last date, this case was dismissed from the conference program as the parties were unable to modify the loan or otherwise reach a settlement. Accordingly, there has been compliance with CPLR 3408; no further conference is required under any statute, law or rule.

The plaintiff now moves for, inter alia, an order: (1) awarding summary judgment in its favor and against the defendant mortgagor, striking his answer and dismissing the affirmative defenses set forth therein; (2) fixing the defaults of the non-answering defendants; (3) appointing a referee to (a) compute amounts due under the subject mortgage; and (b) examine and report whether the subject premises should be sold in one parcel or multiple parcels; and (4) amending the caption. In opposition to the motion, the defendant mortgagor has filed, inter alia, an affirmation from his counsel and his own affidavit. In response, the plaintiff has a filed a reply.

A plaintiff in a mortgage foreclosure action establishes a prima facie case for summary judgment by submission of the mortgage, the note, bond or obligation, and evidence of default (*see*, ***Valley Natl. Bank v Deutsch***, 88 AD3d 691, 930 NYS2d 477 [2d Dept 2011]; ***Wells Fargo Bank v Das Karla***, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; ***Washington Mut. Bank, F.A. v O'Connor***, 63 AD3d 832, 880 NYS2d 696 [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"

(***Capstone Bus. Credit, LLC v Imperia Family Realty, LLC***, 70 AD3d 882, 883, 895 NYS2d 199 [2d Dept 2010], quoting ***Mahopac Natl. Bank v Baisley***, 244 AD2d 466, 467, 644 NYS2d 345 [2d Dept 1997]).

It is well settled that the proponent of a summary judgment motion bears the initial burden of making a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Norwest Bank Minn. v Sabloff***, 297 AD2d 722, 723, 747 NYS2d 559 [2d Dept 2002]). Failure to make such a prima facie showing requires denial of the motion regardless of the sufficiency of the opposition papers (***De Santis v Romeo***, 177 AD2d 616, 616, 576 NYS2d 323 [2d Dept 1991]).

When moving to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is "without merit as a matter of law" (*see*, CPLR 3211 [b]; ***Vita v New York Waste Servs., LLC***, 34 AD3d 559, 559, 824 NYS2d 177 [2d Dept 2006]). In reviewing a motion to dismiss an affirmative defense, this court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference (*see*, ***Fireman's Fund Ins. Co. v Farrell***, 57 AD3d 721, 869 NYS2d 597 [2d Dept 2008]). Moreover, if there is any doubt as to the availability of a defense, it should not be dismissed (*see, id.*).

In its present form, RPAPL § 1304 provides that in a legal action, including a residential mortgage 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). Such notice shall be sent by the lender, assignee or mortgage loan servicer in a separate envelope from any other mailing or notice (*id.*). 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.*). RPAPL § 1304 provides that the notice must be sent to the "borrower," a term not defined in the statute (***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 105, 923 NYS2d 609 [2d Dept 2011]).

Proper service of the RPAPL § 1304 notice containing the statutorily-mandated content on the "borrower" or "borrowers" is a condition precedent to the commencement of a foreclosure action, and the plaintiff's failure to show strict compliance requires dismissal (***Hudson City Sav. Bank v DePasquale***, 113 AD3d 595, 596, 977 NYS2d 895 [2d Dept 2014]; ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, 910, 961 NYS2d 200 [2d Dept 2013]; ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, *supra* at 103; *see also*, ***Pritchard v Curtis***, 101 AD3d 1502, 1504, 957 NYS2d 440 [3d Dept 2012]). Since this action was commenced on April 27, 2012, the 90-day notice requirement set forth in the statute is applicable. Thus, in support of its motion for summary judgment on the complaint, the plaintiff was required to prove its allegations by tendering sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL 1304, and failure to make this showing requires denial of the motion, regardless of the opposing papers (***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d at 106 [citation omitted]).

In meeting this burden, the plaintiff benefits from the long-standing doctrine of presumption of regularity: generally, a letter or notice that is properly stamped, addressed, and mailed is presumed to be delivered by that addressee (***Trusts & Guar. Co. v Barnhardt***, 270 NY 350, 352 [1936]; ***News Syndicate Co. v Gatti Paper Stock Corp.***, 256 NY 211, 214-216 [1931]; ***Connolly v Allstate Ins. Co.***, 213 AD2d 787, 787, 623 NYS2d 373 [3d Dept 1995]; ***Kearney v Kearney***, 42 Misc3d 360, 369, 979 NYS2d 226 [Sup Ct, Monroe County 2013]). The presumption of receipt by the addressee "may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed" (***Residential Holding Corp. v Scottsdale Ins. Co.***, 286 AD2d 679, 680, 729 NYS2d 776 [2d Dept 2001]). CPLR 2103 (f) (1) defines mailing as "the deposit of a paper enclosed in a first class postpaid wrapper, addressed to the address designated by a person for that purpose or, if none is designated, at that person's last known address, in a post office or official depository under the exclusive care and custody of the United States Postal Service within the state" (*see*, ***Lindsay v Pasternack Tilker Ziegler Walsh Stanton & Romano LLP***, 129 AD3d 790, 12 NYS3d 124 [2d Dept 2015]). "If that proof is established, the burden shifts to the borrower," and "the final legal truism prevails: once the presumption of proper service has been established, mere denial of receipt is insufficient to rebut the presumption" (***Kearney v Kearney***, 42 Misc3d 360, *supra* at 370; *see*, ***Matter of ATM One v Landaverde***, 2 NY3d 472, 478, 779 NYS2d 808 [2004]).

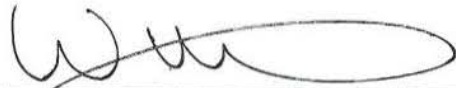
The plaintiff failed to establish its prima facie entitlement to judgment as a matter of law because it failed to supply adequate evidentiary proof of compliance with RPAPL § 1304 (*see*, ***Bank of N.Y. Mellon v Aquino***, 131 AD3d 1186, 16 NYS3d 770 [2d Dept 2015]; ***Wells Fargo Bank, NA v Burke***, 125 AD3d 765, 5 NYS3d 107 [2d Dept 2015]; ***Hudson City Sav. Bank v DePasquale***, 113 AD3d 595, 977 NYS2d 895 [2d Dept 2014]). The plaintiff submitted neither an affidavit of service of the 90-day notice upon the defendant mortgagor, nor an affidavit from one with personal knowledge of the mailing, along with copies of the certified mailing receipts stamped by the United States Post Office on the date of the alleged mailing (*see*, ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, *supra*). Under the facts presented, the conclusory statements set forth in the affidavit of Fausto Ceballos, a Vice President of Loan Documentation from the plaintiff that, inter alia, "[he] reviewed the 90 day pre-foreclosure notice sent to the 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 [m]ortgage," even when combined with copies of certain submitted documentation, are insufficient to meet the requirements of the statute (*see*, ***Hudson City Sav. Bank v DePasquale***, 113 AD3d 595, *supra*; ***US Bank N.A. v Lampley***, 46 Misc3d 630, 996 NYS2d 499 [Sup Ct, Kings County 2014]). The affiant did not allege sufficient facts as to how or when compliance was accomplished. He also does not state that he served the notice; nor does he identify the individual who allegedly did so.

Further, it is noted that Mr. Ceballos's affidavit does not constitute proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed by certified mail and by first class mail (*see*, ***Nocella v Fort Dearborn Life Ins. Co. of N.Y.***, 99 AD3d 877, 955 NYS2d 70 [2d Dept 2012]; *cf.*, ***Preferred Mut. Ins. Co. v Donnelly***, 111 AD3d 1242, 974 NYS2d 682 [4th Dept 2013]; ***Residential Holding Corp. v Scottsdale Ins. Co.***, 286 AD2d 679, *supra*). Moreover, the affiant did not assert that he has personal knowledge of the defendant mortgagor's payment history since the time of the default (*see*, ***JP Morgan Chase Bank, N.A. v RADS Group, Inc.***, 88 AD3d 766,

930 NYS2d 899 [2d Dept 2011]). To the extent that the statements made by the affiant are based on documents that were in the possession of the lender or Wells Fargo prior to the alleged transfer of the note and the mortgage to the plaintiff, these records constituted hearsay (*see generally*, ***People v Goldstein***, 6 NY3d 119, 810 NYS2d 100 [2005]). The mere filing of papers received from other entities, "even if they are retained in the regular course of business, is insufficient to qualify the documents as business records, because such papers simply are not made in the regular course of the recipient, who is in no position to provide the necessary foundation testimony" (***Lodato v Greyhawk N. Am., LLC***, 39 AD3d 494, 495, 834 NYS2d 239 [2d Dept 2007] [internal quotation marks omitted]).

Thus, the plaintiff failed to establish its prima facie entitlement to judgment as a matter of law with respect to the defendant mortgagor. The plaintiff's failure to make 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, 487 NYS2d 316 [1985]).

In view of the open question of whether the plaintiff strictly complied with the 90-day notice requirement of RPAPL §1304, the remaining branches of the plaintiff's motion are denied at this juncture. In view of the foregoing, the proposed order submitted by the plaintiff has been marked "not signed."



Dated: February 1, 2016

Hon. WILLIAM G. FORD, J.S.C.

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION