| **Maloney v Joseph** |
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| 2016 NY Slip Op 31332(U) |
| July 14, 2016 |
| Supreme Court, Kings County |
| Docket Number: 506535/2015 |
| Judge: Noach Dear |
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At an IAS Term, Part FRP-1, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 22th day of June 2016.

P R E S E N T:

HON. NOACH DEAR,
J.S.C.

Index No.:506535/2015

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MARILYN G. MALONEY AND MARILYN J. MALONEY,

Plaintiff, DECISION AND ORDER

-against-

HANCY P. JOSEPH, et al,

Defendant,

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Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion:

| Papers | Numbered |
|---|---|
| Moving Papers and Affidavits Annexed | 1 |
| Opposition | 2 |
| Reply | 3 |

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Pursuant to CPLR 3212 Plaintiff moves for the entry of summary judgment in favor of Plaintiff against Defendant on the ground that there is no defense to the cause of action alleged in the Complaint, to consequently strike the answer and dismiss the affirmative defenses and counterclaims of the Defendant, for the appointment of a Referee to compute the amount due to Plaintiff, and to amend the caption, substituting Clelie Durandisse in the place and stead of John Doe #1, while striking John Doe #2 through #12 from the caption. Defendant opposes.

CPLR3212 provides that "[a] party moving for summary judgment must demonstrate that

'the cause of action is established sufficiently to warrant the court as a matter of law in directing judgment' in the moving parties favor" *(Jacobsen v. New York City Health and Hospitals Corporation*, 22 NY 3d 824, 833 [2014]). Thus, "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]). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" *(William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013] [internal quotation marks omitted]). If the moving party meets this burden, the burden then shifts to the non-moving party to "establish the existence of material issues of fact which require a trial of the action" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

This action was commenced to foreclose a mortgage Defendant Hancy P. Joseph entered into as mortgagor with the Plaintiffs, Marilyn G. Maloney and Marilyn J. Maloney, as mortgagees. In moving for summary judgment in an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law by submitting 1) the underlying note, 2) the relevant mortgage, and 3) evidence of default *(Swedbank, AB v. Hale Ave. Borrower, LLC.*, 89 AD3d 922, 923 [2d Dept 2011]). We will address each in turn.

1) The unpaid note

While Plaintiff admits that they are no longer in possession of the original note, said note having been apparently lost during Hurricane Sandy, CPLR 3012-b provides that in such instances, "the plaintiff shall attach . . . supplemental affidavits . . . attesting that such documents be lost whether by destruction, theft, or otherwise." (See also NY UCC 3-804). Plaintiff does supply a Lost Note Affidavit, stating that the note was never sold or otherwise transferred, and was lost and/or destroyed during Super Storm Sandy, and could not be located in its aftermath. Furthermore, Plaintiff continues to possess a copy of the original Note, and has produced said copy. Defendant's claim that a copy of the note is not valid is invalid as a matter of law.

2) The mortgage and 3) Evidence of default

Plaintiff also provides the mortgage, and an affidavit from Marilyn J. Maloney, stating

that she, as one of the mortgagees in this action, maintained contemporaneous records as to payments of the note and mortgage. Based on her review of these records, she states that Defendant has failed to make payments since September 1, 2012, and is thus in default as per the terms of the mortgage.

While it is true that Defendant supplies proof of three separate payments made between February and May 2014 to Plaintiff, in the amount of $4,000 total, this in itself would not cure the mortgage deficiency. At best, Defendant's payments challenge only the amount of the mortgage debt, and if proved, might offset some of the amount due and owing to the plaintiff (*Johnson v. Gaughan*, 128 AD2d 756, 757 [2d Dept 1987]). Defendant admits that they "stopped making payments." Defendant's reasoning for doing so is that, according to Defendant, he was told by a Mr. Peter Maloney, a relative of named Plaintiffs who had served in some legal capacity for Plaintiffs in the real estate sale, and who allegedly was receiving the payments on behalf of Plaintiffs, that "the property is worth more now, and that he wants it back." Even if this allegation were true, there is no legal basis to stop making mortgage payments based on a peculiar hearsay statement made by a non-party to the mortgage. Even if the mortgagees themselves had made this odd statement, that would not be a legal basis to cease making mortgage payments.

Defendant, despite stating he made payments in 2013 and 2014, while also providing proof of some of the 2014 payments, by admitting he "stopped making payments," and not contesting the general allegation that his mortgage has defaulted, he is, in effect, only challenging the amount of the mortgage debt. Defendant erroneously claims that, as Plaintiff did not prove the exact amount due by Defendant, that Plaintiff thus failed to make a prima facie showing. The proper procedure in such a case is an order of reference, to determine the "amount due and owing to the plaintiff" (*1855 E. Tremont Corp. v. Collado Holdings LLC*, 102 AD3d 567, 568 [1st Dept 2013]). The mortgage instrument itself states the grounds for default, including that "[m]ortgagor fails to make any payment required by the Bond or Note or Mortgage within 15 days of the date it is due," an action Defendant essentially concedes in stating that he "stopped making payments."

Prima Facie showing

Plaintiff, by providing 1) the unpaid note, 2) the mortgage, and 3) evidence of default,

without Defendant providing any evidentiary facts rebutting those elements, has thus established a prima facie case in their favor. Having done so, the burden now shifts to Defendant to come forth with evidentiary facts to supports any other defenses or counterclaims they raise in their answer, in order to demonstrate that a genuine question of fact exists that can rebut the prima facie showing (see *Union State Bank v. Blankfort*, 222 AD2d 430, 431 [2d Dept 1995].

Alleged defenses and counterclaims

Defendant fails to come forth with evidentiary facts to support any of its alleged defenses or counterclaims. The premises which are the subject of this action were sold by the Plaintiffs to Defendant. Plaintiffs delivered a deed to Defendants, and Defendant took possession of the premises after the closing. As part of the purchase price, the Defendant delivered a Note to the Plaintiffs, and also executed and delivered a Mortgage to Plaintiffs. The essence of these facts are not in dispute, though Defendant speculates about the existence of the original Note that was allegedly lost.

What Defendant does claim, however, is that the sale of the premises had a number of issues, such as "conflict of interests" and "fraud." Though a bit unclear in their arguments, Defendants seem to be essentially claiming fraudulent activity in the sale of the home. Even if we assume Defendant's claim to be true, and that the home sale involved fraudulent activity, "fraud is not a defense in an action to foreclose a mortgage" (*Dyke v. Peck*, 279 AD2d 841, 844 [3d Dept 2001]). Thus, at best, Defendant would have a claim in fraud against Plaintiff, but this would not serve as a defense against the foreclosure.

Defendants fails, however, to even provide evidentiary facts to suggest any fraud on the part of Plaintiffs. In order to sustain a cause of action to recover damages for fraud, a party must prove: (1) that the defendant made a representation, (2) as to a material fact, (3) which is false, (4) and known to be false by the defendant, (5) that the representation was made for the purpose of inducing the other party to rely upon it, (6) that the other party rightfully did so rely, (7) in ignorance of its falsity, (8) to his injury (*Mechanical Plastics Corp. v. Rawlplug Co.*, 119 AD2d 641 [2d Dept 1986], *Lanzi v. Brooks*, 54 AD2d 1057 [1976]). Defendant makes this assertion based on the alleged defects that Defendant noticed over time after purchasing the home, and a 2016 visual inspection of the home by a Home Inspections Services company that suggest the

home may have some structural defects. Even assuming Defendant's observations and the inspectors' 2016 report is accurate, and the home currently does have structural defects, it is pure conjecture to suppose that these defects were present when the home was sold in 2012, that Plaintiff, previous owner of the home, materially knew of these defects, and then, purposely omitted to mention them to Defendant, intending to thus materially misrepresent to Defendant the quality of the property with the intent that Defendant rely on this alleged omission, and apparently did so, in ignorance of the actual defect.

Furthermore, even assuming this conjecture to be true, in contract for sale of real property, unless facts are matters peculiarly within one party's knowledge, the other party must make use of means available to him to ascertain, by exercise of ordinary intelligence, truth of such representations, or that party will not be heard to complain that he was induced to enter transactions. *Casey v. Masullo Bros. Builders*, 218 AD2d 907, 907-908 [3d Dept 1995], see also *Dyke v. Peck*, 279 AD2d 841, 843-844 [3d Dept 2001]. In the instant action, the alleged defects complained of were noticed based on visual observation by Defendant and the Home Inspection Services company, belying any suggestion that they were of the sort that are peculiarly within the knowledge of the seller. Remainder of Defendant's pleaded defenses are similarly based only on conjecture, without any evidentiary basis, or else are in error. Defendant pleads a defense of "conflict of interest" for example, but does not supply any evidentiary or legal basis for the defense. Defendant also claims that Plaintiff did not provide any communication letter before the foreclosure acceleration, when in fact, in Plaintiff's papers, a 90-day notice with proof of mailing, a NYS Banking Department proof of filing, and a copy of the Notice of Default are all attached.

Based on the foregoing, Plaintiff's motion is granted in its entirety.

ENTER:

Hon. Noach Dear, J.S.C.

HON. NOACH DEAR