

Wells Fargo Bank N.A. v Bunai
2016 NY Slip Op 31825(U)
August 11, 2016
Supreme Court, Suffolk County
Docket Number: 43763/10
Judge: Thomas F. Whelan
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COPYSUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY**PRESENT:**Hon. THOMAS F. WHELAN
Justice of the Supreme CourtMOTION DATE 07/21/16
ADJ. DATES 07/22/16
Mot. Seq. # 002 - MOTD
THIRD CAUSE OF ACTION
SEVERED -SUBMIT JUDGMENT
CDISP: NO-----X
WELLS FARGO BANK NA, successor by merger :
to Wells Fargo Home Mortgage, Inc., :

Plaintiff, :

-against- :

STEPHEN BUNAI, CHRISTINE BUNAI, :
CITIBANK, NA, CLERK OF THE SUFFOLK :
COUNTY DISTRICT COURT, DISCOVER :
BANK, NATIONAL CREDIT ADJUSTERS :
LLC, STEPHEN R. BUNAI, :Defendants. :
-----XCUDDY & FEDER, LLP
Attys. For Plaintiff
445 Hamilton Ave. 14th Floor
White Plains NY 10601KALEEM SIKANDAR, ESQ.
Atty. For Defs. Bunai
156 E. Main St. - Ste. 8
Pt. Jefferson, NY 11777

Upon the following papers numbered 1 to 5 read on this motion for default judgment on the third cause of action set forth in the plaintiff's complaint; Notice of Motion/Order to Show Cause and supporting papers 1 - 5; Notice of Cross Motion and supporting papers _____; Opposing papers: _____; Reply papers _____; Other _____. (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that those portions of this motion (#002) by the plaintiff wherein it seeks a default judgment against defendant, Christine Bunai, on the Third cause of action set forth in the complaint in which the plaintiff demands a judicial declaration that the plaintiff holds an equitable mortgage against said defendant's interest in the premises that are the subject of this action in the amount \$150,046.63 is granted to the extent that the court so declares that the plaintiff is the owner of an equitable mortgage and that the lien of such mortgage encumbers Christine Bunai's ownership interest in the premises known as 85 Rose Place, Selden New York; and it is further

ORDERED that the remaining portions of this motion wherein the plaintiff seeks relief in the form of a nunc pro tunc declaration of the existence of its equitable mortgage to the date April 23,

2003, which was the date of the execution of the written note and mortgage by defendant, Stephen Bunai, an award of contractual interest from such date and a judgment foreclosing the lien of said equitable mortgage is denied, as is plaintiff's demands for an award of summary judgment; and it is further

ORDERED that the Third cause of action set forth in the complaint for declaratory relief is hereby severed from the First cause of action and the plaintiff is hereby granted leave to submit a judgment reflecting the severance of the Third cause of action and the award of a default judgment on said Third cause of action, to the extent granted herein to the plaintiff, and the other material terms of this memo decision and order.

The plaintiff commenced this action to foreclose the lien of a \$185,000.00 mortgage executed by defendant, Stephen Bunai, on April 23, 2003 that was recorded in the office of the Suffolk County Clerk on March 16, 2005. In addition, the plaintiff sought declaratory relief in two additional separate causes of action against defendant, Christine Bunai, who is or was an owner of the subject premises but was neither an obligor nor mortgagor under the April 23, 2003 loan documents. The Second cause of action for declaratory relief in the form of a reformation of the mortgage to include the defendant, Christine Bunai, as a mortgagor was dismissed by decision and orders of this court dated June 6, 2014. Said orders also awarded the plaintiff default judgments against all defendants served with process on the plaintiff's First cause of action, in which, foreclosure of Stephen Bunai's April 23, 2003 mortgage was demanded. With respect to that First cause of action, a separate order appointing a referee to compute amounts due under the terms of that mortgage also issued on June 6, 2014.

By the instant motion (#002), the plaintiff seeks a default judgment or a summary judgment on its Third cause of action for declaratory relief against defendant, Christine Bunai, in the form of a judicial declaration that the plaintiff is the owner of an equitable mortgage against said defendant's interest in the subject premises in the amount of \$150,046.63. Underlying this pleaded claim for relief on this motion for an accelerated judgment thereon are allegations that the \$185,000.00, mortgage of April 23, 2003 was part of a larger transaction that included the refinancing of a August 15, 2001 mortgage given by both defendants, Stephen Bunai and Christine Bunai, to American Home Mortgage and thereafter assigned to Wells Fargo Home Mortgage. Of the monies loaned by Wells Fargo Home Mortgage on August 23, 2003 to Stephen Bunai, alone, \$150,046.63 was used to pay off the joint indebtedness of the Bunai defendants then existing under the terms of their August 15, 2001 mortgage.

Due to mistake, inadvertence and/or error, Christine Bunai was not a signatory to either the note or the April 23, 2003 mortgage, although it was purportedly the intention of the parties to that loan transaction that she be a mortgagor. That intention is allegedly evidenced by a joint bankruptcy filing in 2008 in which both Stephen and Christine Bunai listed the plaintiff's April 23, 2003 mortgage as a joint debt obligation for which they sought and received a discharge. The plaintiff thus claims an entitlement to an equitable mortgage equal to the amount used to pay off the August 15, 2001 mortgage, namely, the sum of \$150,046.63, and asks that court declaration impress said equitable mortgage as a lien against Christine Bunai's interest in the premises to the extent of the payoff of the 2001 mortgage from the proceeds of the April 23, 2003 mortgage executed only by defendant Stephen Bunai.

The plaintiff further seeks, on this motion, relief in the form of a nunc pro tunc declaration of the existence of the claimed equitable mortgage to the date of the execution of the written mortgage by Stephen Bunai on April 23, 2003 and an award of interest on the equitable mortgage at the contract rate. A review of the complaint filed herein reveals that none of these further demands for relief are advanced in the complaint served in this action.

For the reasons stated, the motion is granted only to the extent set forth herein.

It is well established that a party's right to recover upon a defendant's default in answering is governed by CPLR 3215 and, pursuant thereto, the moving party must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting defendant's failure to answer (*see* CPLR 3215[f]; *U.S. Bank Natl. Ass'n v Alba* 130 AD3d 715, 11 NYS2d 864 [2d Dept 2015]; *HSBC Bank USA, N.A. v Alexander*, 124 AD3d 838, 4 NYS2d 47 [2d Dept 2015]; *Todd v Green*, 122 AD3d 831, 997 NYS2d 155 [2d Dept 2014]; *Oak Hollow Nursing Ctr. v Stumbo*, 117 AD3d 698, 985 NYS2d 269 [2d Dept 2014]; *U.S. Bank, Natl. Ass'n v Razon*, 115 AD3d 739, 981 NYS2d 571 [2d Dept 2014]; *Dela Cruz v Keter Residence, LLC*, 115 AD3d 700, 981 NYS2d 607 [2d Dept. 2014]; *Kolonkowski v Daily News, L.P.*, 94 AD3d 704, 941 NYS2d 663 [2d Dept. 2012]; *Triangle Prop. #2, LLC v Narang*, 73 AD3d 1030, 903 NYS2d 424 [2d Dept 2010]). To satisfy the "facts constituting the claim" element of CLR 3215, the plaintiff must advance by affidavit or verified pleadings, facts from which, the court may discern the plaintiff's possession of one or more viable claims for relief against the defaulting defendant together with proof of the amount due, if sufficiently certain (*see* CPLR 3215[f]; *DLJ Mtge. Capital, Inc. v United Gen. Title Ins. Co.*, 128 AD3d 760, 9 NYS3d 335 [2d Dept 2015]; *Williams v North Shore LIJ Health Sys.*, 119 AD3d 937, 989 NYS2d 887 [2d Dept 2014]; *CPS Group, Inc. v Gastro Enter. Corp.*, 54 AD3d 800, 863 NYS2d 764 [2d Dept 2008]; *Resnick v Lebovitz*, 28 AD3d 533, 813 NYS2d 480 [2d Dept. 2006]; *Beaton v Transit Fac. Corp.*, 14 AD3d 637, 789 NYS2d 314 [2d Dept. 2005]).

Where these elements are established, a motion for the entry of a default judgment should be granted (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 760 NYS2d 727 [2003]; *Deutsche Bank Natl. Trust Co. v Kuldip*, 136 AD3d 969, 25 NYS3d 653 [2d Dept 2016]; *BAC Home Loans Serv., LP v Reardon*, 132 AD3d 790, 18 NYS3d 664 [2d Dept 2015]; *Green Tree Serv., LLC v Cary*, 106 AD3d 691, *supra*). Where they are not established, the motion should be denied (*see DLJ Mtge. Capital, Inc. v United Gen. Title Ins. Co.*, 128 AD3d 760, *supra*; *U.S. Bank, Natl. Ass'n v Razon*, 115 AD3d 739, *supra*; *Resnick v Lebovitz*, 28 AD3d 533, *supra*; *Beaton v Transit Fac. Corp.*, 14 AD3d 637, *supra*).

In contrast, the remedy of summary judgment is available only in cases in which issue has been joined by service of an answer by the targeted defendant and where copies of the pleading served accompany the motion (*see* CPLR 3212[a];[b]; *Lindbergh v SHLO 54, LLC*, 128 AD3d 642, 9 NYS3d 105 [2d Dept 2015]; *Shaibani v Soraya*, 71 AD3d 1121, 898 NYS2d 72 [2d Dept 2010]; *115-41 St. Albans Holding Corp. v Harrison*, 71 AD3d 653, 894 NYS2d 896 [2d Dept 2010]; *Enriquez v Home Lawn Care and Landscaping, Inc.*, 49 AD3d 496, 854 NYS2d 410 [2d Dept 2008]). Here, the plaintiff's demand for summary judgment is denied as issue has not been joined by service of an answer by any defendant served with process, including, Christine Bunai, the only defendant targeted

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by the relief demanded in the Third cause of action (*see* CPLR 3212[a]; *Lindbergh v SHLO 54, LLC.*, 128 AD3d 642, *supra*; *Shaibani v Soraya*, 71 AD3d 1121, *supra*).

The plaintiff's demands for a nunc pro tunc declaration of the existence of the claimed equitable mortgage to the date of the execution of the written mortgage by Stephen Bunai on April 23, 2003 and an award of interest on the equitable mortgage at the contract rate are denied on both procedural and substantive grounds. The granting of such relief, which was not pleaded in the complaint, is interdicted by the mandate set forth in CPLR 3215(b) which precludes the court from awarding a judgment which will "exceed in amount or differ in type from that demanded in the complaint or stated in the notice served pursuant to subdivision (b) of rule 305". In any event, the moving papers before the court on this motion failed to establish that the plaintiff possesses cognizable claims for this relief (*see Sprague v Cochran*, 144 NY 104, 113, 38 N.E. 1000 [1894] (*an equitable mortgage lien may be defeated by the claims of bona fide purchasers or encumbrancers*); CPLR 5001 (*prejudgment interest discretionary not mandatory on equitable claims*); *Presse v Morel*, 2016 WL 1426035 [N.Y.C.A. 2d Cir. 2016]).

The plaintiff's demands for a default judgment against defendant, Christine Bunai, on the Third cause of action set forth in the complaint is granted. Therein, the plaintiff demands a judicial declaration that the plaintiff holds an equitable mortgage against said defendant's interest in the premises that are the subject of this action in the amount \$150,046.63. The moving papers sufficiently demonstrated the plaintiff's entitlement to such relief including its possession of a cognizable claim for the declaration sought under equitable principles that allow for the imposition of an equitable lien where facts surrounding a transaction evidence that the parties intended that a particular piece of property is to be held or transferred to secure an obligation (*see Deutsche Bank Trust Co. of Am. v Cox.*, 110 AD3d 760, 973 NYS2d 662 [2d Dept 2013]; *1.2.3. Holding Corp. v Exeter Holding, LTD.*, 72 AD3d 1040, 900 NYS2d 356 [2d Dept 2010]). Accordingly, the court awards a default judgment in favor of the plaintiff against defendant, Christine Bunai, on the plaintiff's Third cause of action and declares that the plaintiff is the owner of an equitable mortgage in the amount of \$150,046.63 and that the lien of such mortgage encumbers Christine Bunai's ownership interest in the premises known as 85 Rose Place, Selden New York.

To facilitate the entry of a judgment on the plaintiff's Third cause of action, the court directs a severance of said Third cause of action from the First Cause of action which sounds in foreclosure of the April 23, 2003 mortgage lien arising under the written mortgage note and mortgage executed by defendant, Stephen Bunai, on that date and the sale of his interest in said premises. Accordingly, the plaintiff is hereby granted leave to submit a proposed judgment to the undersigned reflecting the severance of the Third cause of action and the award of a default judgment on said Third cause of action, to the extent granted herein to the plaintiff, and the other material terms of this memo decision and order.

To the extent that the instant motion may be considered to include a demand for foreclosure of the lien of the equitable mortgage herein declared to exist in favor of the plaintiff, such demand is denied. Neither the complaint nor the moving papers contain allegations of fact from which a cognizable claim for foreclosure of the lien of the subject equitable mortgage as herein found to exist in favor of the plaintiff is discernable.

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Submit judgment, upon a copy of this order, providing for the severance of the Third cause of action, the default judgment awarded to the plaintiff thereon and the court's declaration of the plaintiff's ownership of the equitable mortgage as found herein.

Dated: August 11, 2016



THOMAS F. WHELAN, J.S.C.