Wells Fargo Bank, N.A. v Panas
2016 NY Slip Op 31899(U)
October 12, 2016
Supreme Court, Suffolk County
Docket Number: 12-29345
Judge: Arthur G. Pitts
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SHORT FORM ORDER

INDEX No. 12-29345

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 2-19-15
ADJ. DATE
Mot. Seq. # 001 - MG
Mot. Seq. # 002 - XMD

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WELLS FARGO BANK, N.A.

Plaintiff,

- against -

THERESA PANAS
MICHAEL PANAS
NORTH FOLK BANK
"JOHN DOE #1" to "JOHN DOE #10," the last 10 names being fictitious and unknown to plaintiff, the persons or parties intended being the persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the verified complaint,

Defendants.

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Attorney for Defendants
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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/ ~~Order to Show Cause~~ by the plaintiff, dated January 9, 2015, and supporting papers (including Memorandum of Law dated January 9, 2015); (2) Notice of Cross Motion by the defendant, dated February 12, 2015, supporting papers; ~~(3) Reply Affirmation by the , dated , and supporting papers (including Memorandum of Law dated); (4) Reply Affirmation by the, dated , and supporting papers; (5) Other (and after hearing counsels' oral arguments in support of and opposed to the motion~~); it is

ORDERED that the motion (001) by plaintiff, Wells Fargo Bank, N.A., for an order pursuant to CPLR 3212 granting summary judgment in its favor against defendants Theresa Panas and Michael Panas, fixing the defaults as against the non-appearing, non-answering defendants, for leave to amend the caption of this action pursuant to CPLR 3025 (b) 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 cross motion (002) by defendants Panas for, *inter alia*, an order declaring plaintiff in violation CPLR 3408(f) for its failure to negotiate in good faith; denying plaintiff's application for summary judgment; and granting counsel fees, is denied; and it is further

ORDERED that plaintiff is directed to forthwith serve an executed copy of the order of reference amending the caption of this action upon the Calendar Clerk of this Court; and it is further

ORDERED that plaintiff shall promptly serve a copy of this order with notice of entry upon all parties who have appeared in this action, if any.

This is an action to foreclose a mortgage on property known as 4 Jenna Court, Kings Park, New York. On November 26, 2004, defendant Michael Panas executed a fixed rate note in favor of American Brokers Conduit agreeing to pay the sum of $330,000.00 at the yearly interest rate of 4.875 percent. On the same date, defendants Michael Panas and Theresa Panas (defendants) executed a mortgage in the principal sum of $330,000.00 on the subject property. The mortgage indicated American Brokers Conduit to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of American Brokers Conduit as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on January 25, 2005 in the Suffolk County Clerk's Office. Thereafter, on August 10, 2010, the mortgage was transferred by assignment of mortgage from MERS, as nominee for American Brokers Conduit, to plaintiff Wells Fargo Bank, N.A. The assignment of mortgage was recorded on August 25, 2010 in the Suffolk County Clerk's Office.

Wells Fargo Home Mortgage sent a notice of default dated November 9, 2011 to defendants stating that they had defaulted on their note and mortgage and that the amount past due was $105,813.72. As a result of their continuing default, plaintiff commenced this foreclosure action on September 21, 2102. In its verified complaint, plaintiff alleges in pertinent part that defendants breached their obligations under the terms of the note and mortgage by failing to pay the installment due on September 1, 2009. Defendants interposed an verified answer with affirmative defenses and a counterclaim.

The Court's computerized records indicate that a foreclosure settlement conference was held on November 21, 2013 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.

Plaintiff now moves for summary judgment on its complaint. In support of its motion, plaintiff submits among other things, the affirmation of Megan S. Smith, Esq. in support of the motion; the affidavit of Alisha Mulder, vice president of loan documentation for Wells Fargo Bank, N.A., successor by merger to Wells Fargo Home Mortgage, Inc.; the pleadings; the note, mortgage and an assignment of mortgage; proof of notices pursuant to RPAPL 1320, 1303 and 1304; affidavits of service of the summons and complaint; an affidavit of service of the instant summary judgment motion upon the defendants' counsel; a memorandum of law; and, a proposed order appointing a referee to compute. Defendant has submitted a cross motion opposing plaintiff's motion and seeking, among other things, an order declaring plaintiff in violation CPLR 3408(f) for its failure to negotiate in good faith.

"[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, 764 NYS2d 635 [2d Dept 2003]; *see* ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]; ***Wells Fargo Bank, N.A. v Webster***, 61 AD3d 856, 877 NYS2d 200 [2d Dept 2009]). Once a plaintiff has made this showing, the burden then shifts to the defendant to produce evidentiary proof in admissible form sufficient to require a trial of their defenses (*see* ***Aames Funding Corp. v Houston***, 44 AD3d 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 *prima facie* entitlement to summary judgment against the answering defendants as such papers included a copy of the mortgage and the unpaid note together with due evidence of defendants' default in payment under the terms of the loan documents (*see* CPLR 3212; RPAPL §1321; ***Bayview Loan Servicing LLC v 254 Church St.,*** LLC, 129 AD3d 650, 9 NYS3d 589 [2d Dept 2015]; ***Wells Fargo Bank v DeSouza***, 126 AD3d 965, 3 NYS3d 629; ***Jessabell Realty Corp. v Gonzales***, 117 AD3d 908, 985 NYS2d 897 [2d Dept 2014]).

Where, as here, standing is put into issue by a defendant, the plaintiff is required to prove it has standing in order to be entitled to the relief requested (*see* ***Nationstar Mtge., LLC v Catizone***, 127 AD3d 1151, 9 NYS3d 315 [2d Dept 2015]; *citing* ***Deutsche Bank Natl. Trust Co. v Haller***, 100 AD3d 680, 954 NYS2d 551 [2d Dept 2011]; *see also* ***US Bank, NA v Collymore***, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]). In a mortgage foreclosure action "[a] plaintiff has standing if it is the holder or assignee of both the subject mortgage and of the underlying note when the action is commenced" (***Emigrant Sav. Bank-Brooklyn v Doliscar***, 124 AD3d 831, 2 NYS3d 539 [2d Dept 2015]; *citing* ***Aurora Loan Servs., LLC v Taylor***, 114 AD3d 627, 980 NYS2d 475 [2d Dept 2014]; ***HSBC Bank USA v Hernandez***, 92 AD3d 843, 939 NYS2d 120 [2d Dept 2012]). Because "a mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation" (***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, 961 NYS2d 200 [2d Dept 2013] [internal citations omitted]), a mortgage passes as an incident of the note upon its physical delivery to the plaintiff. Holder status is established where the plaintiff is the special indorsee of the note or takes possession of a mortgage note that contains an indorsement in blank on the face thereof as the mortgage follows as incident thereto (*see* UCC § 3–202; § 3–204; § 9–203[g]). Here, the plaintiff established that it took possession of the note containing a special indorsement on its face prior to the commencement of the action (*see* ***US Bank N.A. v Dellarmo***, 94 AD3d 746, 942 NYS3d 122 [2d Dept 2012]; *citing* ***Mortgage Elec. Registration Sys., Inc. v Coakley***, 41 AD3d 674, 838 NYS2d 622 [2d Dept 2007]). The plaintiff thus established, *prima facie*, its has standing to prosecute this action.

It was thus incumbent upon the answering defendants to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's *prima facie* showing or in support of the affirmative defenses asserted in their answer or otherwise available to them (*see* ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***Grogg Assocs. v South Rd. Assocs.***, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; ***Wells Fargo Bank v Karla***, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; ***Washington Mut. Bank v O'Connor***, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]).

In their opposing papers, defendants re-asserted their pleaded affirmative defense that the plaintiff lacks standing to prosecute its claims for foreclosure and sale. The defendants contend, in pertinent part, that a question of fact exists with respect to the plaintiff's standing as plaintiff failed to submit details as to the manner in which it came into possession of the note.

The court finds that none of defendants' allegations give rise to questions of fact that implicate a lack of standing on the part of the plaintiff. Here, plaintiff has demonstrated that it was in possession of the note at the time of commencement of the action based upon the affidavit of Alisha Mulder and, as evidenced by the attachment of a copy of the indorsed note to the summons and complaint at the time the action was commenced (*see* ***Nationstar Mtge., LLC v Catizone***, 127 AD3d 1151, 9 NYS3d 315 [2d Dept 2015]; ***Bank***

of N.Y. Mellon Trust Co. NA v Sachar, 95 AD3d 695, 943 NYS2d 893 [2d Dept 2012]; *cf.*, ***Deutsche Bank Natl. Trust Co. v Haller***, 100 AD3d 680, 954 NYS2d 551 [2d Dept 2012]).

Likewise, the moving defendants' claim of bad faith on the part of the plaintiff is unavailing. CPLR 3408(f) provides that "[b]oth the plaintiff and defendant shall negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible" (*see* ***U.S. Bank N.A. v. Sarmiento***, 121 AD3d 187, 991 NYS2d 68 [2d Dept 2014]). There is, however, no requirement that a foreclosing plaintiff modify its mortgage loan prior to or after a default in payment (*see* ***Wells Fargo Bank, NA v Meyers***, 108 AD3d 9, 966 NYS2d 108 [2d Dept 2013]; ***Wells Fargo Bank, NA v Van Dyke***, 101 AD3d 638, 958 NYS2d 331 [1st Dept 2012]; ***Key Intern. Mfg. Inc. v Stillman***, 103 AD2d 475, 480 NYS2d 528 [2d Dept 1984]). While the goal of CPLR 3408 negotiations is that the parties reach a mutually agreeable resolution to help the defendant avoid losing his or her home (*see* CPLR 3408[a]), the statute requires only that the parties enter into and conduct negotiations in good faith (*see* CPLR 3408 [f]; ***Wells Fargo Bank, N.A. v Van Dyke***, 101 AD3d 638, 958 NYS2d 331 [1st Dept 2012]). In ***Van Dyke***, the court noted that "there are situations in which the statutory goal is simply not financially feasible for either party" and that "the mere fact that plaintiff refused to consider a reduction in principal or interest rate does not establish that it was not negotiating in good faith. Nothing in CPLR 3408 requires plaintiff to make the exact offer desired by [the] defendant[ ] [mortgagors], and the plaintiff's failure to make that offer cannot be interpreted as a lack of good faith" (***Wells Fargo Bank, N.A. v Van Dyke***, 101 AD3d 638; *see also* ***Wells Fargo Bank, N.A. v Meyers***, 108 AD3d 9, 966 NYS2d 108 [2d Dept 2013] ["it is obvious that the parties cannot be forced to reach an agreement, CPLR 3408 does not purport to require them to, and the courts may not endeavor to force an agreement upon the parties"]). As such, the absence of agreement does not itself establish the lack of good faith (*see* ***Brookfield Indus. v. Goldman***, 87 AD2d 752, 448 NYS2d 694 [1st Dept 1982]).

To conclude that a party failed to negotiate in good faith pursuant to CPLR 3408(f), a court must determine that "the totality of the circumstances demonstrates that the party's conduct did not constitute a meaningful effort at reaching a resolution" (***US Bank N.A. v. Sarmiento***, 121 AD3d 187, 991 NYS2d 68 [2d Dept 2014]). Guided by the foregoing principles, the Court finds that the circumstances do not support a finding that plaintiff failed to negotiate in good faith. The record before this Court does not support the defendants' contention that the plaintiff failed to make a good faith determination on defendants' loan modification application. The uncontroverted facts establish that the instant matter appeared in the foreclosure settlement conference part on at least five occasions over a nine month period; that defendants were ultimately found ineligible for a loan modification; and, that there was no finding of bad faith by the referee supervising the discussions. As such, plaintiff satisfied its obligation pursuant to CPLR 3408(f).

Likewise unavailing is defendants' contention that plaintiff's summary judgment motion should be denied in order to afford defendant an opportunity to obtain discovery. CPLR 3212(f) provides that "should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just." Appellate case authorities have long instructed that to avail oneself of the safe harbor this rule affords, the claimant must "offer an evidentiary basis to show that discovery may lead to relevant evidence and that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff" (***Martinez v Kreychmar***, 84 AD3d 1037, 923 NYS2d 648 [2d Dept 2011]; *see* ***Garcia v Lenox***

Hill Florist III, Inc., 120 AD3d 1296, 993 NYS2d 86 [2d Dept 2104]; ***Seaway Capital Corp. v 500 Sterling Realty Corp.***, 94 AD3d 856, 941 NYS2d 871 [2d Dept 2012]). In addition, the party asserting the rule must demonstrate that he or she made reasonable attempts to discover facts which would give rise to a genuine triable issue of fact on matters material to those at issue (*see* ***Swedbank, AB v Hale Ave. Borrower, LLC***, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]). The opposing papers submitted by defendants were insufficient to satisfy the aforementioned statutory burden. Thus, defendants failed to sufficiently demonstrate that he made reasonable attempts to discover the facts which would give rise to a triable issue of fact or that further discovery might lead to relevant evidence (*see* CPLR 3212 [f]; ***Anzel v Pisotino***, 105 AD3d 784, 962 NYS2d 700 [2d Dept 2013]; ***Cortes v Whelan***, 83 AD3d 763, 922 NYS2d 419 [2d Dept 2011]; ***Sasson v Setina Mfg. Co., Inc.***, 26 AD3d 487, 810 NYS2d 500 [2d Dept 2006]). Defendants' claim is thus rejected as unmeritorious.

The remaining contentions raised in defendants cross motion, having been considered by the Court, are rejected as being without merit. With respect any of his remaining affirmative defenses, 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. v Jackson***, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007] *quoting* ***Mahopac Natl. Bank v Baisley***, 244 AD2d 466, 664 NYS2d 345 [2d Dept 1997]). Here, answering 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, defendants do not deny that they have not made 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]). Neither the defenses raised in their answer, nor those asserted on this motion rebut the plaintiff's *prima facie* showing of its entitlement to summary judgment.

Accordingly, the motion for summary judgment is granted against the answering defendants. Accordingly, their answer is stricken, and the affirmative defenses and counterclaim set forth therein are dismissed. Plaintiff's request for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is granted (*see* ***Green Tree Serv. v Cary***, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]; ***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]). The defendants' cross-motion is denied in its entirety

The proposed order appointing a referee to compute pursuant to RPAPL 1321 is signed simultaneously herewith as modified by the court.

Dated: Riverhead, New York
October 12, 2016

ARTHUR G. PITTS, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION