

Citimortgage, Inc. v Keith

2016 NY Slip Op 32526(U)

September 27, 2016

Supreme Court, Suffolk County

Docket Number: 066536/2014

Judge: C. Randall Hinrichs

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**SUPREME COURT OF THE STATE OF NEW YORK
I.A.S PART 49 - SUFFOLK COUNTY**

PRESENT: HON. C. RANDALL HINRICHS
Justice of the Supreme Court

Motion Date: 001: 11-13-2015 / 002: 1-6-2016
Motion Sequence 001: MG / 002: MD

Citimortgage, Inc.,

Plaintiff,

-against-

Edward J. Keith, Jr. a/k/a Edward Keith, Jr.; Marie A. Keith a/k/a Marie A. Fisher; GE Money Bank; Discover Bank; Commissioner of Taxation and Finance Civil Enforcement Region 5B; Caremax Surgical PC; Windham Recoveries Ltd., as Assignee of Bank One Delaware, NA; State of New York on Behalf of University Hospital IP; "John Doe #1-5" and "Jane Doe #1-5 said names being fictitious, it being the intention of Plaintiff to designate any and all occupants, tenants, persons or corporations, if any, having or claiming an interest in or lien upon the premises being foreclosed herein,

Defendants.

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By Richard D. Femano, Esq.
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EDWARD J. KEITH, JR. a/k/a EDWARD KEITH, JR.
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Upon the following named papers having been read on this motion: Notice of Motion for an Order of Reference and supporting papers 1 - 23 plus Exhibits; Cross-Motion 1-9; and Reply Affirmation in Opposition to Defendant's Cross-Motion 1-6 plus Affidavit of Service, it is

ORDERED that this motion (001) by plaintiff for, inter alia, an order: pursuant to CPLR 3212 awarding summary judgment in favor of Plaintiff CitiMortgage and against the answering defendants, striking the Keiths' answer and dismissing the affirmative defenses and counterclaims set forth therein; pursuant to CPLR 3215 fixing the defaults of the non-answering defendants; deeming the legal description contained in the vesting deed and foreclosing mortgage is hereby reformed; pursuant to RPAPL § 1321 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 amending the caption is granted; and it is further

ORDERED that the defendants' cross-motion is dismissed in its entirety; and it is further

ORDERED that plaintiff shall submit with the proposed judgment of foreclosure, proof of filing a successive notice of pendency with the Suffolk County Clerk, pursuant to CPLR 6516, and it is further

ORDERED that plaintiff is directed to serve a copy of this order amending the caption upon the Calendar Clerk of this Court; and it is further

ORDERED that plaintiff is directed to serve a copy of this order with notice of entry upon all parties who have appeared herein and not waived further notice pursuant to CPLR 2103(b)(1), (2) or (3) within thirty (30) days of the date herein, and to promptly file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on real property situate in Suffolk County, New York. On June 24, 2004, defendant-mortgagor Edward J. Keith, Jr. A/K/A Edward Keith, Jr. And Marie A. Keith A/K/A Marie A. Fisher executed a note to Ameriquest Mortgage Company to secure the principal sum of \$228,500.00, which was recorded in the Suffolk County Clerk's Office on August 5, 2004, in Liber 20816 of Mortgages, at Page 998. Said mortgage was assigned by Ameriquest Mortgage Company to Citifinancial Mortgage Company, Inc. by Assignment executed September 21, 2005 and recorded in the Suffolk County Clerk's Office on November 17, 2005, in Liber 21173 of Mortgages, at Page 712. Citifinancial Mortgage Company, Inc. merged with and into CitiMortgage, Inc., by virtue of Certificate of Merger. Accordingly, with physical delivery, the note was transferred to plaintiff prior to commencement of the action. Defendant-mortgagor allegedly defaulted on the note and mortgage by failing to make a monthly payment of principal and interest which had come due. After the defendant-mortgagor allegedly failed to cure the default in payment, plaintiff commenced the instant action by the filing a lis pendens, summons and complaint on August 14, 2014. Issue was joined by the interposition of an answer dated September 17, 2014.

The Court held two foreclosure settlement conferences pursuant to CPLR 3408 on March 17, 2015 and May 27, 2015, at which time Defendants appeared and advised the Court Attorney Referee that they did not wish to file a loan modification application or pursue other loss mitigation. The case was discharged from the residential foreclosure conference part and referred to the IAS Part. Plaintiff now moves for summary judgment and an order of reference.

By their answer, defendants generally deny the material allegations set forth in the complaint, and assert two affirmative defenses and two counterclaims. In its reply, plaintiff denies all of the allegations contained in the counterclaims, and asserts two affirmative defenses. On August 26, 2014, Defendant Discover Bank, through attorneys Forester & Garbus, LLP, served a Notice of Appearance and Waiver in Foreclosure. The remaining defendants have neither appeared nor answered herein. Defendant-mortgagor's opposition to the present motion is limited to their allegation of "fraud" by Plaintiff claiming that they entered into a "2003" Note and Mortgage with Plaintiff's predecessor Ameriquest Mortgage Company, but deny executing the June 24, 2004 Note and Mortgage to Ameriquest Mortgage Company. In addition, Defendants "cross-move" alleging that they have been distressed and humiliated by Plaintiff, seeking damages in the amount of \$593,000,000.00 and further demand from Plaintiff prepaid credit cards in the amount of \$10,000.00 per month, to be renewed monthly for the next fifty years.

By its submissions, the plaintiff established its prima facie entitlement to summary judgment on the complaint (*see*, CPLR 3212; RPAPL § 1321; *U.S. Bank, N.A. v Denaro*, 98 AD3d 964, 950 NYS2d 581 [2d Dept 2012]; *Capital One, N.A. v Knollwood Props. II, LLC*, 98 AD3d 707, 950 NYS2d 482 [2d Dept 2012]). Plaintiff produced, inter alia, the indorsed note, the mortgage, and evidence of nonpayment (*see, Federal Home Loan Mtge. Corp. v Karastathis*, 237 AD2d 558, 655 NYS2d 631 [2d Dept 1997]; *First Trust Natl. Assn. v Meisels*, 234 AD2d 414, 651 NYS2d 121 [2d Dept 1996]). Furthermore, plaintiff submitted an affidavit from its representative, attesting that the note was delivered to it on September 30, 2004, a date prior to commencement of the action, and that it has continued to remain the owner and holder of the note continuously since that date (*see, Kondaur Capital Corp. v McCary*, 115 AD3d 649, 981 NYS2d 547 [2d Dept 2014]; *Deutsche Bank Natl. Trust Co. v Whalen*, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]). The documentary evidence submitted also includes, among other things, a copy of the note transferred via an indorsement in blank

(*cf.*, *Slutsky v Blooming Grove Inn, Inc.*, 147 AD2d 208, 542 NYS2d 721 [2d Dept 1989]). The mortgage passed to plaintiff with the note as an inseparable incident (*see*, *U.S. Bank, N.A. v. Collymore* [2d Dept 2009]). Since standing was established by physical delivery, the Court need not address the validity of the subsequently executed assignment of the mortgage (*see*, *Deutsche Bank Natl. Trust Co. v Whalen*, *supra.*). Therefore, it appears that the plaintiff is the owner and the holder of the note and mortgage by virtue of physical delivery.

It was thus incumbent upon the answering defendant 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 the answer (*see*, *Grogg v South Rd. Assoc.*, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; *Washington Mut. Bank, F.A. v O'Connor*, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]; *JP Morgan Chase Bank, N.A. v Agnello*, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]). Even when considered in the light most favorable to the answering defendant, the opposing papers are insufficient to raise any genuine question of fact requiring a trial on the merits of the plaintiff's claims for foreclosure and sale (*see*, *Bank of Smithtown v 219 Sagg Main, LLC*, 107 AD3d 654, 968 NYS2d 95 [2d Dept 2013]; *Emigrant Mtge. Co., Inc. v Beckerman*, 105 AD3d 895, 964 NYS2d 548 [2d Dept 2013]). With regard to defendant's request for discovery, defendant has not made a satisfactory showing of the evidence sought which would create an issue of fact. Mere hope and speculation that additional discovery might yield evidence sufficient to raise a triable issue of fact is not a basis for denying summary judgment (*Lee v T.F. DeMilo Corp.*, 29 AD3d 867, 868, 815 NYS2d 700 [2d Dept 2006]; *Sasson v Setina Mfg. Co., Inc.*, 26 AD3d 487, 488, 810 NYS2d 500 [2d Dept 2006]).

The Defendants' allegations are without merit and unsupported by competent evidence. Defendants provide no evidence of either a 2003 Note and Mortgage, nor any evidence that the signatures on the June 24, 2004 Mortgage are forgeries. This Court further notes that Defendants made payments for over eight years on an allegedly fraudulent mortgage before defaulting. Plaintiff submitted sufficient proof to establish, prima facie, that the remaining affirmative defenses and counterclaims set forth in the defendant-mortgagor's answer are subject to dismissal due to their unmeritorious nature (*see*, *Becher v Feller*, 64 AD3d 672, 884 NYS2d 83 [2d Dept 2009]).


By its submissions, plaintiff also established that the counterclaims, sounding in, inter alia, fraud and misrepresentation lack merit and fail as a matter of law because answering defendant failed to allege that plaintiff or its predecessor owed him a fiduciary duty with respect to his future ability to afford the mortgage (*see generally*, *Schwatka v Super Millwork, Inc.*, 106 AD3d 897, 965 NYS2d 547 [2d Dept 2013]; *Levin v Kitsis*, 82 AD3d 1051, 920 NYS2d 131 [2d Dept 2011]; *see also*, *Aurora Loan Servs., LLC v Enaw*, 126 AD3d 830, 7 NYS3d 146 [2d Dept 2015]; *PHH Mtge. Corp. v Davis*, 111 AD3d 1110, 975 NYS2d 480 [3d Dept 2013]). Additionally, answering defendant's general factual assertions do not satisfy the pleading requirements of fraud (*see*, *Abdourahamane v Public Stor. Institutional Fund*, 113 AD3d 644, 978 NYS2d 685 [2d Dept 2014]; *Goel v Ramachandran*, 111 AD3d 783, 975 NYS2d 428 [2d Dept 2013]; *Jones v OTN Enter., Inc.*, 84 AD3d 1027, 922 NYS2d 810 [2d Dept 2011]; *see also*, *High Tides, LLC v DeMichele*, 88 AD3d 954, 931 NYS2d 377 [2d Dept 2011]). Furthermore, to the extent that the remaining counterclaims sound in a purported cause of action for wrongful foreclosure, because of plaintiff's enforcement of the available remedies in this action, they are not cognizable (*see*, *Ladino v Bank of Am.*, 52 AD3d 571, 861 NYS2d 683 [2d Dept 2008]; *see also*, *see also*, *Gottlieb v City of New York*, 2013 NY Misc. LEXIS 4407, 2013 WL 552202, 2013 NY Slip Op 32340 [U] [Sup Ct, Queens County 2013], *aff'd* 129 AD3d 724, 10 NYS3d 542 [2d Dept 2015]; *Dickman v Verizon Commc'ns, Inc.*, 876 FSupp2d 166 [US Dist Ct, ED NY 2012]). The plaintiff further demonstrated that the counterclaims asserted in the answer of the defendants, wherein they seek sanctions or monetary damages due to the purported illegal actions in enforcing the remedies available to the plaintiff in this action, are without merit (*see*, *Ladino v Bank of Am.*, 52 AD3d 571, 861 NYS2d 683 [2d Dept 2008]). Additionally,

the general factual assertions in the counterclaims do not satisfy the pleading requirements of fraud (*see, Goel v Ramachandran*, 111 AD3d 783, 975 NYS2d 428 [2d Dept 2013]). Accordingly, all of defendant's counterclaims are dismissed in their entirety.

The plaintiff, therefore, is awarded summary judgment in its favor against the answering defendant (*see, Federal Home Loan Mtge. Corp. v Karastathis*, 237 AD2d 558, 655 NYS2d 631 [2d Dept 1997]). Accordingly, the answer is stricken, and the affirmative defenses set forth therein are dismissed.

The proposed order appointing a referee to compute, as modified by the court, has been signed concurrently herewith.

Dated: September 27, 2016



HON. C. RANDALL HINRICHS, JSC

 FINAL DISPOSITION X NON-FINAL DISPOSITION

substitute the names of the occupants served with process in place of fictitiously named Defendants and striking the remaining fictitiously named Defendants, and upon the summons and verified complaint herein, and due proof that all Defendants have been duly served with said process or have voluntarily appeared in this action,

AND upon the affidavit of SUSAN KNOEPFLER, sworn to on September 15, 2015 on behalf of Plaintiff in support thereof and the affirmation dated October 7, 2015 of RICHARD D. FEMANO, ESQ. of FEIN, SUCH & CRANE, LLP, attorneys for the Plaintiff setting forth the prior proceedings and the various procedural facts which entitle the Plaintiff to the requested relief, and upon proof of due service thereof;

NOW, ON MOTION, of FEIN, SUCH & CRANE, LLP, attorneys for Plaintiff, it is

to the extent requested herein. The plaintiff
ORDERED, that Plaintiff's motion is granted and the Answer of Defendant(s) EDWARD J. KEITH, JR. and MARIE A. KEITH, be and the same hereby is stricken, and Plaintiff is entitled to judgment by default against the remaining Defendants: GE MONEY BANK; COMMISSIONER OF TAXATION AND FINANCE CIVIL ENFORCEMENT REGION 5B; CAREMAX SURGICAL PC; WINDHAM RECOVERIES LTD, AS ASSIGNEE OF BANK ONE DELAWARE, NA; STATE OF NEW YORK ON BEHALF OF UNIVERSITY HOSPITAL I/P, *are hereby deemed in default,* and it is further

*RLH
JSL*

ORDERED the legal description contained in the vesting deed and foreclosing mortgage is hereby deemed reformed.

ORDERED that *Joan M. Grenchi*, Esq. of *P.O. Box 210 Port Jefferson Station, NY 11774* New York, is hereby appointed Referee to, with *631-942-8055*

convenient speed, ascertain and compute the amount due upon the bond(s)/note(s) and mortgage(s) being foreclosed in this action, except attorneys' fees, and to examine and report whether the mortgaged premises can be sold in parcels; and it is further

*RLH
JSL*

and the matter shall be maintained under the same index number; and it is further