Central Mtge. Co. v Torres
2017 NY Slip Op 31083(U)
May 10, 2017
Supreme Court, Suffolk County
Docket Number: 21923/2010
Judge: Howard H. Heckman, Jr.

Short Form Order

SUPREME COURT - STATE OF NEW YORK
IAS PART 18 - SUFFOLK COUNTY

PRESENT:
HON. HOWARD H. HECKMAN, JR., J.S.C.

INDEX NO.: 21923/2010
MOTION DATE: 01/31/2017
MOTION SEQ. NO.: 004 MG

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CENTRAL MORTGAGE COMPANY,

Plaintiff,

-against-

JESUS TORRES, MARIA TORRES,

Defendants.

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PLAINTIFFS' ATTORNEY:
BERKMAN, HENOCH, PETERSON,
PEDDY & FENCHEL, P.C.
100 GARDEN CITY PLAZA
GARDEN CITY, NY 11530

DEFENDANT'S ATTORNEY:
CABANILLAS & ASSOCIATES, P.C.
120 BLOOMINGDALE RD., STE. 400
WHITE PLAINS, NY 10605

Upon the following papers numbered 1 to read on this motion 1- 20 : Notice of Motion : Notice of Cross Motion and supporting papers : Answering Affidavits and supporting papers 21-39 : Replying Affidavits and supporting papers 40-61 : Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff seeking an order pursuant to CPLR Section 2221 granting leave to renew plaintiff's prior motion and the Order (Gazzillo, J.) thereon dated October 21, 2014, denying plaintiffs summary judgment motion and for the appointment of a referee to compute the sums due and owing to the plaintiff in this mortgage foreclosure action is granted; and it is further

ORDERED that upon renewal, plaintiff's motion for an order: 1) granting summary judgment striking the answer of Jesus Torres; 2) substituting "Harvey Torres" as a named party defendant in place and stead of a defendant designated as "John Doe #1" and discontinuing this action against defendants designated as "John Doe #2" through "John Doe #12"; 3) deeming all defendants in default; 4) amending the caption; and 5) appointing a referee to compute the sums due and owing to the plaintiff in this mortgage foreclosure action is granted; and it is further

ORDERED that plaintiff is directed to serve a copy of this order amending the caption upon the Calendar Clerk of the 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 and not waived further notice pursuant to CPLR 2103(b)(1),(2) or (3) within thirty days of the date of this order and to promptly file the affidavits of service with the Clerk of the Court.

Plaintiff's action seeks to foreclose a mortgage in the original sum of $299,000 executed by defendants Jose Torres and Maria Torres on December 29, 2006 in favor of Wilmington Finance, Inc. On the same date defendant Jose Torres also executed a promissory note promising to re-pay

the entire amount of the indebtedness to the mortgage lender. On October 17, 2008 the defendants executed a loan modification agreement to form a single lien in the sum of to $309,418.60. By assignment dated October 1, 2008, the mortgage was assigned to the plaintiff. The defendants have failed to make any mortgage payments since October 1, 2009. By Order (Gazillo, J.) dated October 21, 2014 plaintiff's motion for an order granting summary judgment and appointing a referee to compute the sums due and owing to the plaintiff and defendant's cross-motion to dismiss the complaint were denied.

Plaintiff's motion seeks an order granting leave to renew its prior motion and the Order denying it, and upon renewal, granting summary judgment. Plaintiff argues that its motion to renew is based upon evidentiary facts supplementing its prior submission and that there is reasonable justification for failure to present an additional affidavit since the lender reasonably believed its prior evidentiary submissions were sufficient to prove plaintiff had the requisite standing to maintain this action. Plaintiff notes that an assignee's affidavit was previously submitted which addressed the issue of the physical delivery of the promissory note but was never cited by the court prior to rendering the determination denying its motion. The plaintiff further contends that the supplemental affidavit provides the court with the additional factual information regarding the timing of the plaintiffs acquisition of the note, thereby confirming the plaintiff's standing to commence this action. The plaintiff contends that the original note was physically delivered, surrendered and conveyed to the plaintiff on July 1, 2007 and that the plaintiff had actual physical possession of the note prior to the commencement of this action.

In opposition, the defendant submits an attorney's affirmation and claims that the plaintiff's motion must be denied since plaintiff failed to meet the statutory requirements for a motion to renew pursuant to CPLR 2221. Defendant argues that the plaintiff has failed to establish any new facts that were not offered on the prior motion that would change the prior determination of the court, and has not put forth a reasonable justification for its failure to present such facts on the prior motion. Defendant argues that even if this court were to consider the supplemental affidavit, the plaintiff has failed to provide justification as to why the information was not included in its prior affidavit. Defendant also claims that the proof submitted by the plaintiff in support of this motion fails to establish that the plaintiff has standing.

CPLR Section 2221(e) provides:

(e) A motion for leave to renew:

1. shall be identified as such

2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination;

3. shall contain reasonable justification for the failure to present such facts on the prior motion.

Generally "a motion for leave to renew is intended to bring to the court's attention new or additional facts which were in existence at the time the original motion was made, but unknown to

the movant" (*Vita v. Alstom Signaling*, 308 AD2d 582, 582, 764 NYS2d 864 (2nd Dept., 2003)). However, the requirement that a motion for leave to renew be based upon new or additional facts unknown to the movant at the time of the original motion is a flexible one and the court, in its discretion, may also grant renewal, in the interest of justice, upon facts which were known to the movant at the time the original motion was made (*CitiMortgage, Inc. v. Espinal*, 136 AD3d 857, 26 NYS3d 541 (2nd Dept., 2016); *Tishman Construction Corp. of New York v. City of New York*, 280 AD2d 374, 376, 720 NYS2d 487 (1st Dept., 2001); *Stock v. Ostrander*, 233 AD2d 816, 650 NYS2d 416 (3rd Dept., 1996); *Vayser v. Waldbaum, Inc.*, 225 AD2d 760, 640 NYS2d 179 (2nd Dept., 1996); *Sciascia v. Nevins*, 130 AD2d 649, 515 NYS2d 578 (2nd Dept., 1987)).

In this case, plaintiff has provided a reasonable excuse for its failure to submit a supplemental affidavit from the mortgage lender's vice president (now submitted in support of this renewal motion) on the basis that its reliance upon the previously submitted affidavit from the mortgage lender's assistant vice president (Swayze affidavit) dated June 24, 2013 was reasonable, since that affidavit (admissible as evidence satisfying the business records exception to the hearsay rule) provided sufficient proof of the plaintiff's standing based upon the affiant's representation in paragraph 10 stating that: "Plaintiff has physical possession of the Note, having taken physical delivery of the note from Wilmington Finance Inc. prior to the commencement of this action." The October 21, 2014 Order (Gazzillo, J.) made no mention of this affidavit in the decision denying that standing had been established. Moreover, even were this court to accept the defendant's contention that the facts contained in the supplemental affidavit were known to the plaintiff at the time the original motion was made (yet not provided in the Swayze affidavit), the interests of justice are best served by granting renewal, in view of the facts underlying this foreclosure action which are not contested by the defendant, and which show that defendant has breached the lending agreement by failing to make any mortgage payments for the past eight and one-half years.

In this case, the plaintiff has submitted sufficient documentary evidence to prove its standing to prosecute this action by offering the evidentiary facts necessary regarding the mortgage company's possession of the duly indorsed in blank promissory note prior to commencement of the foreclosure action. The evidence, in the form of an affidavit from the plaintiff's vice president, which satisfies the business records exception to the hearsay rule, together with copies of the documentary proof establishes the relevant facts that the promissory note signed by Jesus Torres, together with an allonge indorsed in blank and signed by a designated signer of the original mortgage lender, Wilmington Finance Inc., was physically delivered to the plaintiff on July 1, 2007 and was in plaintiff's continuous possession since that time and at the commencement of this action. Such evidence proves that the plaintiff has standing to maintain this action (*see Aurora Loan Services v. Taylor*, 25 NY3d 355, 12 NYS3d 612 (2015); *Wells Fargo Bank v. Ali*, 122 AD3d 726, 995 NYS2d 735 (2nd Dept., 2014); *Emigrant Bank v. Larizza*, 129 AD3d 94, 13 NYS3d 129 (2nd Dept., 2015); *Wells Fargo Bank, N.A. v. Parker*, 125 AD3d 848, 5 NYS3d 130 (2nd Dept., 2015); *U.S. Bank, N.A. v. Guy*, 125 AD3d 845, 5 NYS3d 116 (2nd Dept., 2015)) and contrary to the defendant's claim, there is no requirement that any additional factual details be provided surrounding the delivery of the note, given the unqualified testimony of the mortgage company's representative that the plaintiff possessed the endorsed in blank note continuously since July 1, 2007 which was prior to commencement of this action on June 10, 2010 (*see JPMorgan Chase Bank, N.A. v. Weinberger*, 142 AD3d 643, 37 NYS3d 286 (2nd Dept., 2016); *One West Bank, FSB v. Albanese*, 139 AD3d 831, 30 NYS3d 337 (2nd Dept., 2016); *Wells Fargo Bank, N.A. v. Gallagher*, 137 AD3d 898, 28 NYS3d 84 (2nd Dept., 2016); *Wells Fargo Bank, N.A. v. Joseph*, 137 AD3d 896, 26 NYS3d 583 (2nd Dept.,

2016); *CitiMortgage, Inc. v. Klein*, 140 AD3d 913, 33 NYS3d 432 (2nd Dept., 2016)).

Upon renewal, a review of plaintiff's motion papers reveals that summary judgment must be granted to the plaintiff. 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 eliminate any material question of fact from the case. The grant of summary judgment is appropriate only when it is clear that no material and triable issues of fact have been presented (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY3d 395 (1957)). The moving party bears the initial burden of proving entitlement to summary judgment (*Winegrad v. NYU Medical Center*, 64 NY2d 851 (1985)). Once such proof has been proffered, the burden shifts to the opposing party who, to defeat the motion, must offer evidence in admissible form, and must set forth facts sufficient to require a trial of any issue of fact (CPLR 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557 (1980)). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v. Associated Fur Manufacturers*, 46 NY2d 1065 (1979)).

Entitlement to summary judgment in favor of the foreclosing plaintiff is established, prima facie, by the plaintiff's production of the mortgage and the unpaid note, and evidence of default in payment (*see Wells Fargo Bank, N.A. v. Erobobo*, 127 AD3d 1176, 9 NYS3d 312 (2nd Dept., 2015); *Wells Fargo Bank, N.A. v. Ali, supra.*)). Where the plaintiff's standing is placed in issue by the defendant's answer, the plaintiff must also establish its standing as part of its prima facie showing (*Aurora Loan Services v. Taylor, supra.*; *Loancare v. Firshing*, 130 AD3d 787, 14 NYS3d 410 (2nd Dept., 2015); *HSBC Bank USA, N.A. v. Baptiste*, 128 AD3d 77, 10 NYS3d 255 (2nd Dept., 2015)).

The only issue raised in opposition to the plaintiff's summary judgment motion was the plaintiff's claimed lack of standing. Having determined that plaintiff has established standing, the sole remaining issue concerns whether plaintiff has submitted sufficient proof to warrant an order granting summary judgment. The evidence submitted by the mortgage lender shows, and the defendant does not dispute, that the mortgagors have defaulted under the terms of the parties agreement by failing to make timely monthly mortgage payments since October 1, 2009 and also shows that all pre-foreclosure notices required under the terms of the mortgage and pursuant to RPAPL 1304 were timely served. The mortgage company, having proven entitlement to summary judgment, it is incumbent upon the defendant to submit relevant, evidentiary proof sufficiently substantive to raise genuine issues of fact concerning why the lender is not entitled to foreclose the mortgage. Defendant has wholly failed to do so and the plaintiff's motion must therefore be granted.

Finally as the defendant has failed to raise any evidence to address any of his remaining ten affirmative defenses and one counterclaim set forth in his answer in opposition to plaintiff's motion, those affirmative defenses and counterclaim are deemed abandoned and are dismissed (*see Kronick v. L.P. Theriault Co., Inc.*, 70 AD3d 648, 892 NYS2d 85 (2nd Dept., 2010); *Citibank, N.A. v. Van Brunt Properties, LLC*, 95 AD3d 1158, 945 NYS2d 330 (2nd Dept., 2012); *Flagstar Bank v. Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 (2nd Dept., 2012); *Wells Fargo Bank Minnesota, N.A. v. Perez*, 41 AD3d 590, 837 NYS2d 877 (2nd Dept., 2007)).

Accordingly, upon renewal, plaintiff's motion for an order pursuant to CPLR 3212 is granted in its entirety. The proposed order for the appointment of a referee has been signed simultaneously with the execution of this order.

Dated: May 10, 2017

Hon. Howard H. Heckman Jr.
J.S.C.