

First Mtge. Strategies Group, Inc. v Martinez

2017 NY Slip Op 32236(U)

October 20, 2017

Supreme Court, Suffolk County

Docket Number: 32753-2012

Judge: Robert F. Quinlan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT F. QUINLAN
Justice of the Supreme Court

MOTION DATE:12/08/16(#003)
11/17/16(#004)
SUBMIT DATE: 12/22/2016
Mot. Seq.: # 003- MotD
Mot. Seq.: # 004- MotD

FIRST MORTGAGE STRATEGIES GROUP,
INC.

Plaintiff,

- against -

NELSON MARTINEZ; CITIBANK, N.A.; LUIS
HILAIRE; ELSIE HILAIRE; LONG ISLAND
REAL PROPERTY HOLDINGS, LTD.

Defendant(s).

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Upon the following papers read on this motion: plaintiff's submissions in support of its motion consisting of affirmations of counsel, attached exhibits; defendant's counsel's affirmation in support of its motion, and attached exhibits; plaintiff's counsel's affirmation in opposition and attached exhibits; defendant's counsel's affirmation in reply, as well as in opposition to plaintiff's motion; and plaintiff's counsel's affirmation in reply, it is,

ORDERED that the portion of defendant Long Island Real Property Holdings, Ltd's motion (Mot. Seq. #004) seeking to reargue its cross-motion (Mot. Seq. #002) is granted, and upon reargument and reconsideration, the court modifies its prior decision and order of July 7, 2016 as it applies to defendant's cross-motion, to the extent set forth below, but in all other respects defendant's cross-motion is denied; and it is further

ORDERED that the portion of defendant Long Island Real Property Holdings, Ltd's motion (Mot. Seq. #004) seeking to renew to its cross-motion (Mot. Seq. #002) is denied; and it is further

ORDERED that plaintiff First Mortgage Strategies Group, Inc.'s application for a judgment of foreclosure and sale (Mot. Seq. # 003) is granted upon the terms set forth below and plaintiff's proposed order, as modified by the court, is signed contemporaneously with this order; and it is further

ORDERED that pursuant to RPAPL § 1351 (1) the mortgaged premises is to be sold under the direction of the referee within ninety (90) days of the date of this order; and it is further

ORDERED that the referee complete and file the Suffolk County Foreclosure Action Surplus Monies form with the Supreme Court Calendar Clerk and the Suffolk County Clerk within thirty (30) days of the foreclosure sale; and it is further

ORDERED that the referee submit proof of deposit of any surplus monies with the County Comptroller, with the Supreme Court Calendar Clerk and the Suffolk County Clerk within thirty (30) days of the closing of title.

First Mortgage Strategies Group, Inc. ("plaintiff") moves for an order granting it judgment of foreclosure and sale (Mot. Seq. #003) based upon the order of this court dated July 7, 2016 granting it summary judgment dismissing and striking defendant Long Island Real Property Holdings, Ltd.'s ("defendant") answer and fixing the defaults of the non-appearing, non-answering defendants, including defendant-mortgagor Nelson Martinez ("Martinez") (Mot. Seq. # 001) and denying defendant's cross-motion to dismiss (Mot. Seq. #002).

Defendant moves (Mot. Seq. #004) to reargue and renew the denial of its cross-motion (Mot. Seq. #002), and upon reargument and/or renewal, for an order granting its motion to dismiss. Defendant initially filed no opposition to plaintiff's motion, but by letter dated December 7, 2016, the parties agreed to a schedule for submissions which included defendant filing both its reply to plaintiff's opposition and its own opposition to plaintiff's motion by December 14, 2016, and plaintiff to file its response thereto by December 21, 2016 (changed to December 22, 2017 by the court in approving the agreement). Defendant filed both its reply and opposition in one submission.

In determining the motions, the court has considered plaintiff's submissions in support of its motion consisting of affirmations of counsel, attached exhibits, including the oath and report of the referee, a copy of the court's "long form order" of July 7, 2016, a copy of counsel's affirmation in support of Mot. Seq. #001 and exhibits attached thereto; in support of its motion defendant submitted its counsel's affirmation, an affidavit of defendant's president and attached exhibits, including the submissions of the parties on Mot. Seq. #001 and #002, as well as a transcript of the court's decision made on the record on July 7, 2016; plaintiff's counsel's affirmation in opposition to defendant's motion and attached exhibits; defendant's counsel's affirmation in reply, as well as in opposition to plaintiff's motion; and plaintiff's counsel's affirmation in reply.

Although defendant's motion was not denominated a cross-motion, for purposes of simplicity and clarity the court consolidates both motions for this decision.

REARGUMENT GRANTED

The court first addresses defendant's motion to reargue. The court grant's reargument, as such motions are addressed to the sound discretion of the court (*see HSBC Bank USA v Halls*, 98 Ad3d 718 [2d

Dept 2012]; *Deutsche Bank National Trust Co. v Ramirez*, 117 AD3d 674 [2d Dept 2014]) and, upon reconsideration, modifies its decision and order as to Mot. Seq. #002 to the extent set forth below, but reaffirms denial of defendant's cross-motion.

MODIFY PRIOR DECISION

The court modifies its decision by deleting its *sua sponte* reference to the possibility, not argued by plaintiff, that RPAPL § 1304 may not apply to this obvious rental property because Martinez no longer lived there at the time the action was commenced. The court misspoke. It was referring to the fact that the requirement that plaintiff may not commence a foreclosure action on a "home loan" until ninety days had passed from the mailing of the notices required by RPAPL § 1304 did not apply under these circumstances, as Martinez clearly no longer lived at the subject property when the action was commenced (RPAPL § 1304 [3]). In all other regards, the court adheres to its original decision of July 7, 2016.

CROSS-MOTION (MOT. SEQ #002) DENIED

On reargument, defendant's arguments are otherwise the same as originally made and defendant provides no support for the court to conclude that it either overlooked or misapprehended matters of fact or law (CPLR 2221 [d] [2]).

DEFENDANT MISSTATES AND MISINTERPRETS RPAPL § 1302 (2)

Defendant's counsel's claim that because RPAPL § 1302 (2) states "it is a defense to an action to foreclose a mortgage" any co-defendant in a foreclosure action, whether tenant, a subordinate mortgagee, inferior judgment creditor, or as here, an investor/co-owner, has the right to raise a defense based upon an alleged failure of plaintiff to establish compliance with the mailing requirements of RPAPL § 1304 to a defaulting defendant-mortgagor is without merit.

First, even assuming arguendo that there is some merit to defendant's argument that it can "piggy-back" on to a personal defense of Martinez, as defendant bases its argument on the applicability of RPAPL § 1302 (2) to enable it to raise this defense, defendant would have to show by evidentiary proof in admissible form that the conditions required by RPAPL § 1302 (2) concerning the type of loan involved have been met. Defendant fails to quote the entire section it relies upon for what it claims is mandated strict compliance with a provision of RPAPL Article 13 giving any defendant rights to this defense. RPAPL § 1302 (2) states:

"2. It shall be a defense to an action to foreclose a mortgage for a high-cost home loan or subprime home loan that the terms of the home loan or the actions of the lender violate any provision of section six-l or six-m of the banking law or section thirteen hundred four of this article." (emphasis added)

Therefore, if defendant's claim of the ability of any defendant to raise RPAPL § 1304 rests on strict compliance with RPAPL § 1302 (2), it must show that the subject loan was a "high cost home loan or subprime home loan." There is no proof of this offered by defendant, and there is no proof of it even if the court searches the record.

In the complaint, submitted by the parties in all four motions, paragraph "Eighteenth" only states "If the subject note and mortgage fall within the prescribed definition of a subprime home loan or a high cost home loan..." (emphasis added) This is not an admission by plaintiff that the loan meets either

category.

In plaintiff's counsel's affirmation in support of Mot. Seq. #001, counsel only states that RPAPL § 1304 notices "were sent as required." This is no admission or proof that the loans were high cost home loans or subprime home loans. The first version of RPAPL § 1302 was effective in 2003 and the legislation passed at that time dealt only with high cost home loans; the addition of subprime home loans came in 2008 with the passage of the legislation to protect home owners during the "mortgage crisis." At first, the legislation involving the notice requirements of RPAPL § 1304 only applied to high cost home loans and subprime home loans or non-traditional home loans, as indicated by the addition of subprime home loans to RPAPL § 1302. Subsequently, the legislature broadened the application of a number of the statutes, including RPAPL § 1304, by amending the language in RPAPL § 1304 (5) to make RPAPL § 1304 applicable to all "home loans" as defined therein, but for whatever reason, it never amended the 2008 language of RPAPL § 1302. Therefore, if defendant wishes to base its claim that any defendant may raise the failure of a plaintiff to establish mailing to a co-defendant-mortgagor of the notices required by RPAPL § 1304 as its own defense to a foreclosure action based upon the language of RPAPL § 1302 (2), it must show the loan was a high cost or subprime home loan. Defendant fails to do so by admissible proof in evidentiary form; this alone is enough to deny its cross-motion, even if defendant has standing to raise this defense, which it does not. The court reaffirms its prior holding that defendant lacks standing to raise a defense personal to Martinez.

RPAPL § 1304 IS PERSONAL TO DEFENDANT-MORTGAGOR

Defendant provides no fact or principle of law overlooked by the court when it held that this defendant lacked standing to raise as a defense that plaintiff had failed to prove compliance with RPAPL § 1304 as to the mailings to defendant Martinez. This was a defense that was personal to Martinez as mortgagor and borrower of this "home loan," and as with other personal defenses, such as service, cannot be raised by a co-defendant (*see Home Savings of America, F.A. v Gkianos*, 233 AD2d 422 [2d Dept 1996]; *NYCTL 1996-1 Trust v King*, 13 AD3d 429 [2d Dept 2004]; *Wells Fargo Bank v Bowie*, 89 AD3d 931 [2d Dept 2011]; *IMC Mgte Co v Vetere*, 142 AD3d 954 [2d Dept 2016]; *Wells Fargo Bank, NA v Bachmann*, 145 AD3d 712 [2d Dept 2016]). As Martinez failed to file an answer contesting the complaint, he waived the issue of compliance with RPAPL § 1304 (*see U.S. Bank, N.A. v Carey*, 137 AD3d 894 [2d Dept 2016]; *Flagstar Bank, FSB v Jambelli*, 140 AD3d 829 [2d Dept 2016]). The attempt by defendant to claim that the combination of RPAPL §§ 1302 and 1304 are some sort of powerful "super defense" that overcomes all basic principles of law is belied by the holding in *HSBC Bank, N.A. v Clayton*, 146 AD3d 942 (2d Dept 2017). Defendant wants to treat this "super defense" as if it was jurisdictional, which it is not. If it was such, then Clayton would not have had to first prove an ability to vacate his default to raise it. The general principles of law do still apply as to when and who can raise RPAPL § 1304 as a defense, especially when a defendant such as Martinez has waived it by failing to answer; which is more fully discussed below in dealing with the application for renewal (*see JPMorgan Chase Bank, N.A. v Kutch*, 142 AD3d 536 [2d Dept 2016]). Defendant has not provided the court with any case law or statutory authority to support its theory that it, as a co-owner/investor who obtained that status after the action was commenced, can raise this personal defense.

Although the cases cited above deal with the personal defense of a claim of improper service, the principle is applicable to any other personal defense. RPAPL Article 13 makes the defense personal to a party situated as is Martinez, a mortgagor, "borrower" and home owner. The purpose and benefits of the

2008 enactments of RPAPL Article 13, as well as the subsequent amendments, were intended by the legislature to aid defendant-mortgagor-home owners in distress because of the financial crisis. They were not intended to benefit subsequent investors who purchased an interest in the property after a foreclosure action was commenced, nor judgment creditors or holders of subordinate mortgages, all of whom, under defendant's theory, would be "defendants" who could raise a co-defendant's personal defense. All of these "defendants" would thereby be able to prevent plaintiff's final adjudication of its rights to foreclose and attempt to obtain a financial concession from plaintiff.

Even if defendant had standing to raise the issue, defendant's argument that plaintiff could not have complied with the mailings required by RPAPL § 1304 to Martinez because it "knew" Martinez no longer lived there and only mailed them to him at the property address, is both without proof and without merit. It appears to be based upon conjecture in a letter to another justice of this court in a prior case where plaintiff's counsel may have made a statement that he knew Martinez no longer lived at the subject property. There is no proof offered that plaintiff knew of another address for Martinez, other than the subject property, even if they knew he was no longer at the property. If Martinez had provided plaintiff with a substitute address upon moving, as required by the standard language of the mortgage, or if plaintiff knew of another address for him before mailing the notices, it is logical that plaintiff would have served him with the complaint, filed October 22, 2013, months before serving him on January 31, 2013, in Georgia. Defendant provides no proof of its conjecture.

Considering neither Martinez, nor anyone on his behalf, has made any payment on the mortgage debt for over ten years, and it is clear that others have been living in the subject property as tenants, that defendant took its share of title to the property on the same day Martinez was served (see deed filed with Suffolk County Clerk dated January 31, 2013), for defendant to now claim "That it would be a travesty of justice to allow Plaintiff to obtain summary judgment when they willingly failed to comply with RPAPL § 1304." (see paragraph 16 of defendant's opposition and reply), is politely suggested to be, in the least harsh term that could be used, inappropriate. On reargument, except as mentioned above, defendant's cross-motion is denied.

RENEWAL DENIED

Defendant's motion to renew is considered by the court, and is denied. Defendant provides no new facts nor is there a change in the law that inures to the benefit of defendant as claimed. The decision of the Second Department in *JPMorgan Chase Bank, N.A. v Kutch*, 142 AD3d 536 (2d Dept 2016) does not affect this case in any positive way for defendant, as defendant misapplies its holding and combines it with its failed theory that it can raise Martinez' personal defense. Defendant fails to recognize that unlike Martinez, Ms. Kutch answered the complaint, denying the allegations of plaintiff's compliance with RPAPL § 1304. Although Ms. Kutch never opposed the motion, the court applied the principle that as she had answered denying compliance with RPAPL § 1304, and as with other conditions precedent once raised, plaintiff was required to establish compliance with RPAPL § 1304 as part of its *prima facie* submission on its motion for summary judgment. Defendant attempts to stretch the holding in *Kutch, supra*, to mean that because as a co-defendant it raised lack of compliance with RPAPL § 1304, it can share in Martinez's ability to raise it as if he had answered denying compliance. The argument overlooks the basic difference in the cases; the fact that Martinez never answered and denied the plaintiff's claim of compliance with RPAPL § 1304 as did Ms. Kutch. The court agrees that if Martinez had answered and contested compliance, plaintiff would have been required to establish its compliance as part of its *prima facie* case, even if Martinez, or defendant, never opposed the motion. But as Martinez did not answer, the holding in *Kutch, supra* is inapplicable to this case. As there is no proof of a change in the law authorizing renewal, defendant's application to renew is denied.

JUDGMENT OF FORECLOSURE GRANTED

The court considers plaintiff's motion for a judgment of foreclosure and sale, and upon consideration of the submissions in support, opposition and reply and the court's own computations thereon, grants plaintiff's application to the extent set forth herein and in plaintiff's proposed judgment as modified, by the court and signed contemporaneously herewith.

First, as there is no objection raised by defendant to the determination of the referee that it is best to sell the parcel as one, the court accepts that finding and recommendation.

Despite plaintiff's arguments to the contrary, defendant has raised a valid objection to granting judgment based solely upon the referee's report, as the referee never noticed a hearing as to his computations pursuant to CPLR 4313, nor was defendant sent the proof upon which such a computation was to be made before such hearing.

Plaintiff is incorrect in its argument that because the court did not order the referee to notice the hearing he was not required to do so. Although a party who had defaulted, such as Martinez, may not be entitled to notice of a hearing before the referee to contest the submissions and computations, this answering defendant, a co-owner of the subject property, was entitled to notice, even after its answer was stricken (CPLR 4313; *see Aurora Loan Services, LLC v Taylor*, 25 NY3d 355 [2015]; *243 West 98th Condominium*, 12 AD3d 591 [2d Dept 2004]; *Citimortgage v Kidd*, 148 AD3d 767 [2d Dept 2017]).

Pursuant to CPLR 4313, the court's order could have provided that no hearing was necessary, but it did not.

Plaintiff's argument that defendant waived any right to contest the computations by failing to submit objections to the referee is without merit, as there is no proof that either a notice of the hearing or the proof to be submitted to the referee for the computation was sent to defendant. Without such, what was defendant to contest? Yet now, having received the report and computations of the referee, defendant has made no specific objections to those submissions in its opposition to plaintiff's motion. As defendant has had an opportunity not only to review all of plaintiff's submissions on this motion, including those documents again submitted from Mot. Seq. #001, and an opportunity to review the specific submissions made by plaintiff to the referee as basis for his computations, as well as the report of the referee, it had an opportunity in its opposition to make specific objections to these amounts and claims. Defendant fails to do this, and makes no more than a protest it never received the notice of the hearing, apparently hoping that this will cause further delay of a foreclosure sale while the property remains in its possession and use as a rental property.

Plaintiff is correct that the referee's report is only advisory, that the ultimate arbiter of all issues involved in this reference is the court, and that the court could, on its own, review the submissions made to the referee and perform the computations itself (*see Shultis v Woodstock Land Development Associates*, 195 AD2d 677 [3rd Dept 1993]; *Stein v American Mortgage Banking, Ltd.*, 216 AD2d 458 [2d Dept 1995]; *Adelman v Fremd*, 234 AD2d 488 [2d Dept 1996]; *Federal Deposit Insurance Co. v 65 Lennox Road Owners Corporation*, 270 AD2d 303 [2d Dept 2000]; *NYCTL1996-1 Trust v Westmoreland Assoc.*, 33 AD3d 900 [2d Dept 2006]; *Deutsche Bank National Trust Company v Zlotoff*, 77 AD3d [2d Dept 2010]; *Aurora Loan Services, LLC v Taylor*, 114 AD3d 627 [2d Dept 2014]; *aff'd* 25 NY3d 355 [2015]).

Unlike the supreme court in the Second Department's decision in *Aurora Loan Services, LLC v Taylor*, *supra*, this court rejects the report of the referee for failure to give notice of the hearing to compute, and will, as the ultimate arbiter, consider plaintiff's evidence, defendant's failure to present any specific objection, although having the ability and opportunity to do so, and make a finding upon the evidence

presented.

The proof presented is encompassed in the submissions with the referee's report and consists of a copy of the note and mortgage (Schedule A), a copy of the amounts due for principal and interest and the period for which the computation was requested (Schedule B), and an affidavit of plaintiff's president which claims to contain the information regarding the amounts due plaintiff (Schedule C). The court notes Schedule A is clear and is the same as presented as evidence to the court when it decided Mot. Seq. #001, and as such, it was relied upon and was part of the record upon which the court granted plaintiff's motion by the decision of July 7, 2016. The amount of principal outstanding and the interest rate at the time of default were thereby fixed and set. The affidavit of the president of plaintiff establishes his ability to testify to plaintiff's business records pursuant to CPLR 4518 (a), and confirms these figures.

The court is experienced in doing the calculations without a referee's report, as the court was responsible for the Suffolk County Vacant and Abandoned Properties Part (pre RPAPL § 1309) where "combined motions" were submitted and the court performed the calculations. The court calculates that the unpaid principal of \$387,858.68 at a yearly interest rate of 6.625% results in yearly interest of \$25,695.64 and a per diem rate of \$70.40. Using the date of default, which was determined to be with the November 1, 2006 payment, this calculation was performed by the court on October 19, 2017 instead of the submission date of August 31, 2016. Defendant is in default for ten years and 353 days, for a total amount of interest due of \$281,807.60. The court acknowledges that even if calculated at the August 31, 2016 date used by the referee and plaintiff, the interest there would still be dramatically more than the \$146,970.58 calculated by the referee. The court notes neither the referee or plaintiff offer any explanation for this reduced rate, but their math is inaccurate. The court's computations entitle plaintiff to a total of \$669,666.28 for outstanding principal and interest.

The court finds that the other amounts claimed by plaintiff are not explained and are unsupported by proof. The only possible "proof" are the conclusory statements by plaintiff's president in his affidavit. There is no explanation in that affidavit as to how the late charges were calculated by, although the referee's report makes a reference to the fact that the note provides for a "Late charge of 2% of P&I." The claim for taxes, hazard insurance, inspections and maintenance ("advances") are unsupported by any proof other than the conclusory statements of plaintiff's president's affidavit. Although the court agrees he can testify to plaintiff's business records, there is no reference in his affidavit to the fact that plaintiff's business records show that these amounts of the "advances" were made on behalf of the subject property. The last paragraph of his affidavit, paragraph 7, merely states: "The instant loan is due for the December 1, 2006 installment and all subsequent installment, and by reason thereof, the Note and Mortgage are in default. The amount due upon the Note and Mortgage as of August 31, 2016, is as follows:..." It then goes on the list the principal due, the interest due, the late charges and the advances claimed. The reference is "The amount due upon said Note and Mortgage..." with no attempt at establishing the basis for the "advances." The court, therefore, must disallow these claims for "advances."

The court also notes, that amounts claimed for "advances" here are presented differently and significantly more than in the affidavit of plaintiff's servicer submitted in support of summary judgment in Mot. Seq. #001. The reason for the increase of over \$47,000.00 in approximately thirty-one months is not apparent or explained. Among other things, "Property Inspections," claimed after Martinez was in default for eight years were only \$296, then increases by almost \$1,200.00 over the next thirty-one months, without explanation.

Therefore, the court only authorizes "Total Claimed" of the proven \$669,666.28, and plaintiff is awarded judgment in that amount with a per diem of \$70.40 from the date of this order, until the final entry

of the judgment, at which point the statutory rate of interest will apply.

Plaintiff's proposed order, as modified by the court is signed contemporaneously wit this order.

This constitutes the Order and decision of the Court.

Dated: October 20, 2017



Hon. Robert F. Quinlan, J.S.C

FINAL DISPOSITION NON-FINAL DISPOSITION