

JPMorgan Chase Bank, N.A. v Jones

2019 NY Slip Op 30971(U)

April 3, 2019

Supreme Court, New York County

Docket Number: 850023/2013

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

-----X
JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, INDEX NO. 850023/2013
Plaintiff, MOTION DATE N/A, N/A
MOTION SEQ. NO. 002 004

- v -

CHARLES JONES, GENA LOVETT, COMMISSIONER OF SOCIAL SERVICES OF NEW YORK CITY, CRIMINAL COURT OF THE CITY OF NEW YORK, CBS OUTDOOR, INC., HIGH RISE DEVELOPMENT ENTERPRISES, INC., MIDLAND FUNDING, LLC, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK SUPREME COURT, UNITED STATES OF AMERICA - INTERNAL REVENUE SERVICE, JOHN DOES AND JANE DOES,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 95, 96, 97, 98, 102, 142, 143, 150

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 004) 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 144, 145, 146, 147

were read on this motion to/for ORDER/JUDGMENT NUNC PRO TUNC

Motion Sequence Numbers 002 and 004 are consolidated for disposition. The motion (mot seq 002) by plaintiff for an order of reference is granted¹ and the motion (mot seq 004) by defendant Gena Lovett for summary judgment dismissing this action based on *inter alia* plaintiff's alleged bad faith during the settlement process is denied.

¹ Plaintiff appears to ask this Court to grant some sort of relief against defendant the Internal Revenue Service ("IRS"). However, plaintiff's motion does not say exactly what type of relief it seeks against the IRS; plaintiff only states "The Court should also grant Plaintiff the relief sought in the complaint against defendant [IRS]" (NYSCEF Doc. No. 66, ¶ 42). But it is not obvious in the complaint what relief is sought against the IRS and the Court declines to guess.

Background

This foreclosure action relates to a property located at 2084 Fifth Avenue in Manhattan. In 2008, defendant Jones (Lovett's ex-husband) obtained a note for \$1,625,000 secured by a mortgage signed by *both* Lovett and Jones. Only Jones is on the note. The defendants defaulted on the terms of the note and mortgage by failing to make a payment in April 2011. Plaintiff claims that it has standing to pursue this action because it acquired the note prior to commencing this action. Plaintiff insists that it properly served defendants and also that Lovett waived her personal jurisdiction defense by not raising it within 60 days after service of her answer. Plaintiff contends that it did not need to serve the notice of default to both Jones and Lovett because the terms of the note and mortgage permitted plaintiff to give notice to either Jones *or* Lovett. Plaintiff also argues that it complied with the notice requirements in RPAPL 1304 and 1303.

In her order to show cause, defendant Lovett observes that she fell into financial hardship after she divorced Jones in May 2012. Lovett alleges that she sought to obtain a loan modification from plaintiff between 2012 and 2014 and insists that plaintiff denied her attempts to refinance without giving an explanation. Lovett further insists that she never got the required notices about the default and questions why plaintiff failed to give her a loan modification offer.

Discussion

"A plaintiff may establish standing in a foreclosure action either by showing assignment of the mortgage note or physical delivery of the note prior to the commencement of the foreclosure action. However, a plaintiff may not do so by means of conclusory boiler plate statements. Nevertheless, if the note is affixed to the summons and complaint at the time the action is commenced, it is unnecessary to give factual details of the delivery to establish that possession was obtained prior to a particular date" (*Bank of New York Mellon v Knowles*, 151

AD3d 596, 596-97, 57 NYS3d 473 [1st Dept 2017] [internal quotations and citations omitted]).

“[I]t is the note, and not the mortgage, that is the dispositive instrument that conveys standing to foreclose” (*Wells Fargo Bank, N.A. v Lawson Ho-Shing*, 168 AD3d 126, 131, 92 NYS3d 194 [1st Dept 2019]).

Here, plaintiff has established standing by demonstrating it possessed the note prior to commencing the instant action. Plaintiff also met its prima facie burden for summary judgment by showing it sent the required RPAPL notices and alleging that the loan was in default.

Lovett failed to raise an issue of fact in opposition nor did she sufficiently support her order to show cause for summary judgment. As an initial matter, the Court observes that this matter had **fourteen** settlement conferences during two different time periods. In fact, the case was referred back to the foreclosure settlement part in November 2016 after it was previously released (and had already had seven prior settlement conferences). There is no basis to find that plaintiff failed to negotiate in good faith; instead, the record shows that plaintiff engaged in years of settlement conferences. Simply because an agreement was not reached does not mean that plaintiff acted in bad faith. The Court cannot force plaintiff to settle—that is a business decision to be made by plaintiff.

Lovett also waived her personal jurisdiction claims by not making a motion on this ground within sixty days of filing her answer (CPLR 3211[e]). Her answer was filed in 2013 and this motion was filed in 2018. Lovett was not entitled to notice of the default because the terms of the note and mortgage allowed plaintiff to send the default notice to either Jones or Lovett. And the Court observes that the default notice was sent in October 2011, prior to when Lovett claims she obtained a divorce from Jones. To the extent that Lovett argues that plaintiff violated the Truth in Lending Act, Lovett failed to establish an issue of fact because she offered only

conclusory allegations. And plaintiff attaches a truth in lending disclosure statement it allegedly sent to Jones in 2008 (NYSCEF Doc. No. 125).

Although Lovett is understandably upset with the fact that this case has not settled given the numerous settlement conferences, that is not a reason to deny plaintiff's motion or grant her motion. The fact is that according to plaintiff, the total amount due to pay off the loan was \$2,071,968.63 as of January 31, 2016 (NYSCEF Doc. No. 85) and Lovett makes no claim that she can offer anything approaching this amount.

Accordingly, it is hereby

ORDERED that the motion (Motion Sequence 002) for summary judgment by plaintiff against defendant Lovett, for a default judgment as to the remaining defendants except for the IRS is granted and the affirmative defenses asserted in defendant Lovett's answer are severed and dismissed; and Lovett's motion (Motion Sequence 004) for summary judgment dismissing this case is denied; and it is further

ORDERED that Elaine Shay with an address of 800 Third Avenue, Suite 2800, New York, NY 10022 (212) 520-2690, is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff for principal, interest and other disbursements advanced as provided for in the note and mortgage upon which this action is brought, and to examine whether the mortgaged property can be sold in parcels; and it is further

ORDERED that the mortgage shall be reformed to include the correct legal description attached as Schedule A and the City Register, County of New York is directed to record the mortgage as a first mortgage on the premises; and it is further

ORDERED that the Referee may take testimony pursuant to RPAPL § 1321; and it is further

ORDERED that by accepting this appointment the Referee certifies that she/he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2 (c) (“Disqualifications from appointment”), and §36.2 (d) (“Limitations on appointments based upon compensation”), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

ORDERED that, pursuant to CPLR 8003(a), and in the discretion of the court, a fee of \$350 shall be paid to the Referee for the computation of the amount due and upon the filing of her/his report and the Referee shall not request or accept additional compensation for the computation unless it has been fixed by the court in accordance with CPLR 8003(b); and it is further;

ORDERED that the Referee is prohibited from accepting or retaining any funds for herself/himself or paying funds to him/herself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that plaintiff shall forward all necessary documents to the Referee within 30 days of the date of this order and shall *promptly* respond to every inquiry made by the referee (promptly means within two business days); and it is further

ORDERED that plaintiff must bring a motion for a judgment of foreclosure and sale within 30 days of receipt of the referee’s report; and it is further

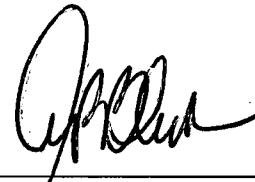
ORDERED that if plaintiff fails to meet these deadlines, then the Court may *sua sponte* vacate this order and direct plaintiff to move again for an order of reference and the Court may *sua sponte* toll interest depending on whether the delays are due to plaintiff’s failure to move this litigation forward; and it further

ORDERED that Plaintiff shall serve a copy of this Order with notice of entry on all parties and persons entitled to notice, including the Referee appointed herein; and it

Next Conference: July 23, 2019 at 10 a.m. If a motion for a judgment of foreclosure and sale has been made prior to the conference, then an adjournment may be obtained; consult the foreclosure rules of this Part in order to obtain an adjournment. If a conference is necessary, come prepared to explain the reasons for the delay.

4.3.19

DATE



ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

HON. ARLENE P. BLUTH