

Wells Fargo Bank NA v Kaine
2019 NY Slip Op 31562(U)
May 31, 2019
Supreme Court, Suffolk County
Docket Number: 17899/13
Judge: Thomas F. Whelan
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COPY

SUPREME COURT - STATE OF NEW YORK
IAS PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 3/19/19
SUBMIT DATE 5/10/19
Mot. Seq. # 001 - MG
Mot. Seq. # 002 - XMD
CDISP Y ___ N x

-----X		
WELLS FARGO BANK NA,	:	GROSS POLOWY, LLC
	:	Attys. For Plaintiff
Plaintiff,	:	1775 Wehrle Dr. - Ste. 100
	:	Williamsville, NY 14221
-against-	:	
	:	PHIL W. FELICE, ESQ.
THOMAS KAINE a/k/a THOMAS B. KAINE,	:	Atty. For Defendant Thomas Kaine
NANCY FIGUEROA a/k/a NANCY L.	:	333 Sunrise Hwy.
FIGUEROA a/k/a NANCY KAINE a/k/a NANCY	:	W. Islip, NY 11795
L. KAINE, SLOMIN'S INC. and "JOHN DOE	:	
#1" to "JOHN DOE #10", the last 10 names being	:	
fictitious and unknown to plaintiff, the person 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.	:	
-----X		

Upon the following papers numbered 1 to 10 read on this motion to appoint a referee to compute among other things and cross motion to dismiss; Notice of Motion/Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers: 5-7; Opposing papers: 8-9; Reply papers _____; Other 10 (memorandum); (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (#001) by plaintiff for, among other things, summary judgment, amendment of the caption and the appointment of a referee to compute, is granted in its entirety; and it is further

ORDERED that the cross motion (#002) by defendant, Thomas Kaine, for summary judgment dismissing the action is denied; and it is further

ORDERED that the proposed Order submitted by plaintiff, as modified by the court, is signed simultaneously herewith; and it is further

ORDERED that plaintiff is directed to file a notice of entry within five days of receipt of this Order pursuant to 22 NYCRR § 202.5-b(h)(2).

This is an action for foreclosure on property situate in North Amityville. In essence, on June 2, 1997, defendants Thomas Kaine and Nancy Figueroa borrowed \$99,000.00 from the plaintiff's predecessor-in-interest and executed a promissory note and a mortgage. Since September 1, 2010, the defendants have failed to pay the monthly installments due and owing. This action was commenced by filing on July 10, 2013. On August 13, 2013, defendant Thomas Kaine, through counsel, submitted an unverified answer to the complaint, alleging twelve affirmative defenses. Thereafter, plaintiff filed the instant motion (#001) for summary judgment, default judgments against the non-answering defendants, and the appointment of a referee to compute. Defendant, Thomas Kaine, opposes the motion and has cross moved (#002) for summary judgment dismissing the complaint.

In the moving papers on this summary judgment motion, the plaintiff addresses its burden of proof and refutes the affirmative defenses and counterclaims in the answer. Therefore, plaintiff has satisfied its prima facie burden on this summary judgment motion (*see HSBC Bank USA, Natl. Assn. v Espinal*, 137 AD3d 1079, 28 NYS3d 107 [2d Dept 2016]; *U.S. Bank Natl. Assn. v Cox*, 148 AD3d 692, 49 NYS3d 527 [2d Dept 2017]).

The burden then shifts to the defendants (*see Bank of America, N.A. v DeNardo*, 151 AD3d 1008, 58 NYS3d 469 [2d Dept 2017]) and it was incumbent upon the answering defendants to submit proof sufficient to raise a genuine question of fact rebutting plaintiff's prima facie showing or in support of the affirmative defenses asserted in the 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]; *J.P. Morgan Chase Bank, NA v Agnello*, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; *Ames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]).

Notably, affirmative defenses predicated upon legal conclusions that are not substantiated with allegations of fact are subject to dismissal (*see CPLR 3013, 3018[b]*; *Katz v Miller*, 120 AD3d 768, 991 NYS2d 346 [2d Dept 2014]; *Becher v Feller*, 64 AD3d 672, 677, 884 NYS2d 83 [2d Dept 2009]; *Cohen Fashion Opt., Inc. v V & M Opt., Inc.*, 51 AD3d 619, 858 NYS2d 260 [2d Dept 2008]). Where a defendant fails to oppose some or all matters advanced on a motion for summary judgment, the facts as alleged in the movant's papers may be deemed admitted as there is, in effect, a concession that no question of fact exists (*see Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 369 NYS2d 667 [1975]; *see also Madeline D'Anthony Enter., Inc. v Sokolowsky*, 101 AD3d 606, 957

NYS2d 88 [1st Dept 2012]; *Argent Mtge. Co., LLC v Mentasana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). In addition, the failure to raise pleaded affirmative defenses in opposition to a motion for summary judgment renders those defenses abandoned and thus without any efficacy (see *New York Commercial Bank v J. Realty F Rockaway, Ltd.*, 108 AD3d 756, 969 NYS2d 796 [2d Dept 2013]; *Starkman v City of Long Beach*, 106 AD3d 1076, 965 NYS2d 609 [2d Dept 2013]).

The defendant's submission, which consists of an affirmation of counsel and an affidavit from defendant, alleges that because plaintiff's 90-day notice was not in fourteen point font as required by pursuant to RPAPL §1304, the complaint must be dismissed. The Court will address this claim herein, however, in accordance with the above, all other affirmative defenses and claims raised in the answer and not addressed in the opposition are dismissed as abandoned (see *JPMorgan Chase Bank, Natl. Assn. v Cao*, 160 AD3d 821, 76 NYS3d 82 [2d Dept 2018]).

The Court first considers the cross motion (#002) by the defendant, Thomas Kaine, as determination thereof may render determination of the plaintiff's motion, academic.

Initially, the Court notes that defendant's assertions in his opposition contradict those of his answer. In the opposition, he acknowledges receipt of the 90 Day Notice, but alleges the font size utilized in the notice was not at least fourteen-point type. In the answer, however, defendant averred that plaintiff "fail[ed] to provide [the] 90 day pre-foreclosure notice" altogether. Indeed, the Court takes issue with the defendant's assertions as a whole. Nevertheless, as the defendant now concedes compliance with the mailing requirement, and in accordance with the above, the affirmative defense raised in the answer has been abandoned and is otherwise without any merit (see *New York Commercial Bank v J. Realty F Rockaway, Ltd.*, 108 AD3d at 756, *supra*; *Starkman v City of Long Beach*, 106 AD3d at 1076, *supra*).

The Court recognizes the claim of non-compliance with RPAPL § 1304 as a "defense," which is the manner in which it is characterized in RPAPL § 1302 (see *Pritchard v Curtis*, 101 AD3d 1502, 957 NYS2d 440 [3d Dept 2011]), and that such defense is not one that is jurisdictional in nature (see *Flagstar Bank, FSB v Jambelli*, 140 AD3d 829, 32 NYS3d 625 [2d Dept 2016]; *U.S. Bank N.A. v Carey*, 137 AD3d 894, 896, 28 NYS3d 68 [2d Dept 2016]; *Citimortgage v Espinal*, 134 AD3d 876, 23 NYS3d 251 [2d Dept 2016]; *cf.*, *Wells Fargo Bank, N.A. v Muricy*, 135 AD3d 725, 24 NYS3d 137 [2d Dept 2016]). It may be raised at any time during the action and, unlike the affirmative defenses of the type set forth in CPLR 3016, 3018 and 3211(a), is not subject to waiver if not raised in a timely served pre-answer motion to dismiss or in an answer timely served (see *Flagstar Bank, FSB v Jambelli*, 140 AD3d 829, *supra*; *U.S. Bank N.A. v Carey*, 137 AD3d 894, *supra*; *Citimortgage v Espinal*, 134 AD3d 876, *supra*; *cf.*, *Bank of New York Trust Co., N.A. v Chiejina*, 142 AD3d 570, 36 NYS3d 512 [2d Dept 2016]; *Deutsche Bank Trust Co. Americas v Cox*, 110 D3d 760, 973 NYS2d 662 [2d Dept 2013]).

By way of background, the "strict compliance" component of RPAPL § 1304 originated with the appellate court's decision in *Aurora Loan Services, LLC v Weisblum*, where it was held that the plaintiff must demonstrate strict compliance with the statute or face dismissal (*Aurora Loan Services, LLC v Weisblum*, 85 AD3d 95, 103, 923 NYS2d 609 [2d Dept 2011]). The Court noted that the legislative intent behind the Home Equity Theft Prevention Act (Real Property Law § 265-a,

or “HETPA”), through which RPAPL § 1304 was enacted, was to provide greater protections to borrowers facing foreclosure (*see First Natl. Bank of Chicago v Silver*, 73 AD3d 162, 165 [2d Dept 2010], *citing* Senate Introductory Mem. in Support, Bill Jacket, L. 2006, ch. 308, at 7–9). RPAPL § 1304 was thereafter enacted “to aid the homeowner in an attempt to avoid litigation, and to facilitate communication between distressed homeowners and lenders and/or servicers” (*HSBC Bank USA, Nat. Assn. v Ozcan*, 154 AD3d 822, 825, 64 NYS3d 38 [2d Dept 2017], *citing* Senate Introductory Mem. in Support, Bill Jacket L. 2008, ch. 472, § 2; *Aurora Loan Services, LLC v Weisblum*, 85 AD3d 95, *supra*). Specifically, “[t]he bill sponsored sought ‘to bridge that communication gap in order to facilitate a resolution that avoids foreclosure’ by providing a pre-foreclosure notice advising the borrower of ‘housing counseling services available in the borrower’s area’ and an ‘additional period of time ... to work on a resolution’” (*Aurora Loan Services, LLC v Weisblum*, 85 AD3d at 107–08, *supra*, *citing* Senate Introductory Mem. in Support, Bill Jacket, L. 2008, ch. 472, at 10).

To achieve this end, the statute requires that the lender/servicer mail a notice containing specific, mandatory language to the borrower at least 90 days prior to commencement of an anticipated foreclosure filing (RPAPL § 1304[1]). The content requirements of the notice support the “underlying purpose of HETPA to afford greater protections to homeowners confronted with foreclosure” (*Aurora Loan Services, LLC v Weisblum*, 85 AD3d 95, 103, *supra*, *citing First Natl. Bank of Chicago v Silver*, 73 AD3d 162, 165, 899 NYS2d 256 [2d Dept 2010]), and must be “in at least fourteen-point type” (RPAPL § 1304[1]). The statute further provides that the mailing should take place “in a separate envelope from any other mailing or notice” (RPAPL § 1304[2]).

The defendant challenges whether the font size utilized in plaintiff’s notice is in strict compliance with RPAPL § 1304. In support, he submits an affidavit from Ms. Rebeka Rodriguez, a secretary, who is “fully familiar with the Microsoft Word program.” In her affidavit, Ms. Rodriguez avers that defendant’s Exhibit 6, which is a document containing the verbiage required by RPAPL § 1304, was typed by her using fourteen point size and in Times New Roman font. A comparison of the notice in plaintiff’s papers and Ms. Rodriguez’s document, the defendant surmises, makes clear that the plaintiff’s notice was not typed in at least 14 point font and, therefore, plaintiff failed to strictly comply with RPAPL § 1304.

The Court finds the defendant’s contention to be unavailing. In two sworn affidavits submitted in support of the plaintiff’s motion, the plaintiff attested that notices “in compliance with RPAPL § 1304” were mailed to the defendants, thus demonstrating that the font size was “at least 14 point.” Additionally, the plaintiff’s response submission notes that the letter submitted with the initial motion was a copy of the actual notice. Nevertheless, the purpose of and intent behind RPAPL § 1304 was to facilitate communication between the plaintiff and the defendant. Here, the intent remains “to provide a homeowner with information necessary ... to preserve and protect home equity” (Real Property Law § 265–a[1][d]) by providing borrowers with additional contact options available to obtain information in connection with home retention options, regardless of the font size used.

Defendant’s claim raises an additional issue that courts have often faced in such statutory interpretation cases. For instance, in *People ex rel. Baez v Superintendent, Queensboro Corr. Facility*, 127 AD3d 110, 119, 5 NYS3d 216 (2d Dept 2015), the Second Department proclaimed, in examining the Drug Law Reform Act, “[t]his Court will not permit the petitioner to convert a

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shield into a sword.” The same court, in interpreting General Municipal Law §50-e, in *Se Dae Yang v New York City Health & Hosps. Corp.*, 140 AD3d 1051,1052, 35 NYS3d 350 (2d Dept 2016), held that the statute “was not meant as a sword to cut down honest claims, but merely as a shield to protect municipalities against spurious ones.” Finally, as the Court of Appeals stated in *Benjamin v Koepfel*, 85 NY2d 549, 553, 626 NYS2d 982 (1995), “the courts are especially skeptical of efforts by clients or customers to use public policy ‘as a sword for personal gain rather than a shield for public good,’” quoting *Charlebois v Weller Assn.*, 72 NY2d 587, 595, 535 NYS2d 356 (1988).

In light of the above, plaintiff has satisfied its prima facie burden on this summary judgment motion (see *HSBC Bank USA v Ozcan*, 154 AD2d 822, 64 NYS3d 38 [2d Dept 2017]; *HSBC Bank USA, Natl. Assn. v Espinal*, 137 AD3d 1079, 28 NYS3d 107 [2d Dept 2016]), and the defendant has failed to raise any issue of fact. The Court thus grants plaintiff’s motion (#001) for an order appointing a referee to compute, granting it default judgments as against all non-appearing defendants, and to amend the caption (see CPLR 3212, 3215, 1003 and RPAPL §1321; *Wells Fargo Bank, N.A. v Ali*, 122 AD3d 726, 995 NYS2d 735 [2d Dept 2014]; *Central Mtge. Co. v McClelland*, 119 AD3d 885, 991 NYS2d 87 [2d Dept 2014]; *Peak Fin. Partners, Inc. v Brook*, 119 AD3d 916, 987 NYS2d 916 [2d Dept 2014]; *Plaza Equities, LLC v Lamberti*, 118 AD3d 688, 986 NYS2d 843 [2d Dept 2014]).

Accordingly, plaintiff’s motion (#001) is granted and defendant’s cross motion (#002) is denied. The proposed order of reference, as modified by the court, has been signed simultaneously with this memorandum decision and order.

DATED: 5/31/18


THOMAS F. WHELAN, J.S.C.