

Wells Fargo Bank, N.A. v Tellock
2019 NY Slip Op 31642(U)
June 3, 2019
Supreme Court, New York County
Docket Number: 850387/2014
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT:	<u>HON. ARLENE P. BLUTH</u>	PART	IAS MOTION 32
	<i>Justice</i>		
-----X		INDEX NO.	<u>850387/2014</u>
WELLS FARGO BANK, N.A.,		MOTION DATE	<u>N/A</u>
Plaintiff,		MOTION SEQ. NO.	<u>002</u>

- v -

DON TELLOCK, VERONICA LEDOVSKY, BOARD OF MANAGERS OF THE 10 WEST END AVENUE CONDOMINIUM, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, PEOPLE OF THE STATE OF NEW YORK, WELLS FARGO BANK, N.A.,

Defendant.

DECISION AND ORDER OF REFERENCE

-----X
The following e-filed documents, listed by NYSCEF document number (Motion 002) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 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, 94

were read on this motion to/for JUDGMENT - SUMMARY

The motion by plaintiff for an extension of time to move for summary judgment, for summary judgment and to appoint a referee to compute is granted. The cross-motion by defendant Tellock ("Defendant") for a fairness hearing and to cancel the notice of pendency is denied.

Background

This foreclosure action arises out of a property located at 10 West End Avenue, Apt. 5H in Manhattan. In July 2007, defendants Tellock and Ledovsky obtained a loan from plaintiff for \$1 million secured by a mortgage on the property. Plaintiff alleges that Defendant stopped making the monthly payments in May 1, 2014.

In opposition and in support of his cross-motion, Defendant, an attorney, asks the Court to hold a fairness hearing because plaintiff has not negotiated in good faith. Defendant claims

that while negotiating a settlement, plaintiff sent a letter stating that he made too much money for a loan modification and sent another letter claiming he made too little. Defendant points out that plaintiff failed to comply with the deadline to file the motion for summary judgment stated in the order releasing the case from the foreclosure settlement part. Defendant also argues that the notice of pendency should be cancelled because there was no motion made to renew it (plaintiff simply filed another one) and there was a lack of proper service of the notice of pendency.

In reply, plaintiff details the efforts made to reach a settlement and why one was not ultimately reached. Plaintiff claims it attended twelve settlement conferences and constantly reviewed Defendant for loan modification plans. Plaintiff claims that Defendant is simply upset that he was not approved for loss mitigation. Plaintiff points out that it sent a letter to the Court (to the judge previously-assigned) requesting an extension of time to file the instant motion.

Plaintiff also sets forth its efforts to serve Defendant. Plaintiff claims the first attempt to serve Defendant at 10 West End Avenue was unsuccessful because the process server was told the apartment was vacant. After efforts to serve Defendant at various places in Louisiana and upstate New York, plaintiff's process server allegedly served Defendant at the 10 West End Avenue address after receiving confirmation that Defendant lived there (NYSCEF Doc. Nos. 55, 67).

Discussion

As an initial matter, the Court grants plaintiff summary judgment as Defendant failed to raise an issue of fact in opposition. The Court also grants the branch of plaintiff's motion to deem any late service valid, *nunc pro tunc*. The fact is that there is no prejudice to the Defendant, who answered the complaint on May 6, 2016 (NYSCEF Doc. No. 45) and Defendant did not

move to dismiss the complaint for improper service within 60 days of service of his answer. The fact that the motion was made after the Court-imposed deadline is of no moment because plaintiff asked the Court for an extension prior to the deadline. The purpose of the deadline is to keep the case moving and plaintiff asked for an extension prior to the deadline. And Defendant did not respond to that request; he waited until his cross-motion to complain about this missed deadline.

Fairness Hearing

A review of the record on this motion does not require a fairness hearing. Plaintiff clearly evaluated Defendant for loan modifications and did not find an agreement it was willing to enter into (*see e.g.*, NYSCEF Doc. Nos. 83, 84). With respect to Defendant's claim that plaintiff engaged in bad faith by first finding he made too little money in November 2016 (NYSCEF Doc. No. 84) and then made too much money in April 2017 (NYSCEF Doc. No. 87), the fact is that these letters were five months apart. And they were based on information provided by Defendant to plaintiff.

Clearly, Defendant's financial position changed over the years. Defendant's financial information submitted in December 2016, *after* the November 2016 denial, shows that he had \$500,000 in the bank and brought in \$63,166.66 in *monthly* income (NYSCEF Doc. No. 86). Defendant's letter included in this financial information packet states he did not earn any money in 2013 or 2014 and did not file tax returns for those years (*id.*). He claims that he started making money again in 2015 (*id.*). The financial packet also shows that he *spent tens of thousands* of dollars on sporting events within a three month period, including tickets for the Knicks, the NBA D-League All-Star Game, the Nets and the Pelicans (*id.* [*see Chase statements in November 2016 through January 2017*]).

This Court is unable to find that plaintiff failed to negotiate in good faith. A hearing is not necessary just because the plaintiff will not accept a defendant's offer. Here, Defendant had \$500,000 in the bank and had enough liquidity to spend a considerable amount of money on sporting events; it was defendant who should have made reaching a settlement a priority. But there is no evidence he did so. The Court will not force plaintiff to take less than it is owed simply because Defendant thinks that is a fair agreement. There is no basis to find that plaintiff acted in bad faith here, or to even question it. That an agreement was not reached does not mean that plaintiff violated CPLR 3408.

Rather, the obvious impression from this record is that Defendant's financials kept changing—that does not bode well for reaching a settlement. Obviously, a lender desires stability when considering whether to enter into another agreement with a borrower who has already defaulted. And, here, when that borrower was riding high, he failed to make settling the case a priority, preferring instead to spend money in many ways except to pay the mortgage. The fact is that according to plaintiff, the subject property is worth \$2.1 million and this Court will not force plaintiff to settle on Defendant's terms.

Notice of Pendency

The Court finds that plaintiff properly filed a successive notice of pendency pursuant to CPLR 6516(a) and there are no grounds for dismissal on this issue. The Court has already found that any late service has been deemed timely given the diligent efforts conducted by plaintiff's process server, the lack of prejudice to Defendant, and the fact that Defendant did not move on this ground within 60 days of his answer.

In any event, because a foreclosure action is rooted in equity, the Court would decline to dismiss this action even if plaintiff failed to comply with CPLR 6512 (mandating service of the

notice of pendency on the defendant). Plaintiff and Defendant engaged in settlement discussions for years—to dismiss at this point would send the message that a borrower could simply drag out settlement negotiations for years in the hope that they could secure a dismissal after the statute of limitations has passed. This case is nearly five years old. Moreover, the Court observes that Defendant did not submit an affidavit claiming he was not served with the notice of pendency.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment is granted and the answer and any affirmative defenses of defendant Don Tellock are severed and dismissed; and it is further

ORDERED that the cross-motion by defendant Don Tellock for a fairness hearing and to cancel the notice of pendency is denied in its entirety; and it is further

ORDERED that plaintiff is entitled to a default judgment against the non-answering defendants; and it is further

ORDERED that Elaine Shay 800 Third Avenue, Suite 2800, New York, NY 10022, 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 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 counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk’s Office (60 Centre

Street, Room 119), who are directed to mark the court's records to reflect the parties being added and removed; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address (ww.nycourts.gov/supctmanh)); and it is 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 the Receiver.

Next Conference: November 12, 2019 at 2:15 p.m. If plaintiff has moved for a judgment of foreclosure and sale before the conference, then plaintiff can seek an adjournment. Please consult the part's rules for information about how to obtain an adjournment. An appearance is required if a motion for a JFS has not been made; counsel appearing for plaintiff must come prepared to explain the delay or interest may be tolled.

6/3/19

DATE

ARLENE P. BLUTH, J.S.C.

HON. ARLENE P. BLUTH

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE