

Berkshire Bank v Fawer
2019 NY Slip Op 32189(U)
July 22, 2019
Supreme Court, New York County
Docket Number: 850250/2017
Judge: Arlene P. Bluth
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should deny plaintiff's motion "in the interest of equity" because the Fawers seek a loan modification as their financial situation has improved. The Fawers admit that they fell behind on their mortgage payments when Ms. Fawer was diagnosed with cancer in February 2017.

In reply, plaintiff points out that the Fawers have continuously borrowed against the apartments since 2002 and incurred significant debt by taking out second and third mortgage loans on these properties. Plaintiff contends it properly established that it sent the RPAPL 1304 notice.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec*,

Ltee, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Standing

Plaintiff attached the note to the complaint (*see* NYSCEF Doc. No. 4). Therefore, plaintiff has established standing to prosecute this case (*Bank of New York Mellon v Knowles*, 151 AD3d 596, 596-97, 57 NYS3d 473 [1st Dept 2017]).

RPAPL 1304

As an initial matter, the Omolino affidavit (NYSCEF Doc. No. 47) establishes plaintiff's prima facie burden to show the 90-day notice was sent. Omolino, a VP for Berkshire Bank, contends that the RPAL 1304 notice was sent by regular first-class mail and by certified mail, return receipt requested on May 31, 2017 (*id.* ¶ 4). He attaches a certified mail bar code and a print out purporting to show it was sent to the Fawers' address (*id.* exh 1).

The Court observes that the Fawers do not specifically state that they did not receive the RPAPL 1304 notice in their affidavits (*see* NYSCEF Doc. Nos. 59, 60). Rather, the Fawers complain plaintiff has not met its burden to demonstrate the admissibility of the records. But including an affidavit from an employee of plaintiff stating the 90-day notice was sent and attaching records supporting that contention is sufficient.

Moreover, once the Fawers complained about the 90-day notice, plaintiff included more details about sending the 90-day notice (*see* NYSCEF Doc. Nos. 71, 77). Plaintiff was entitled to provide more detail once the Fawers complained about this issue.

Equity

The Court recognizes the difficult physical and financial challenges faced by the Fawers. But this Court cannot force plaintiff to settle this case nor can it deny the instant motion because

the Fawers' financial situation has changed. Moreover, the Fawers entered into a forbearance agreement on April 24, 2017 which required them to make payments starting on May 14, 2017 (NYSCEF Doc. No. 49). According to plaintiff, the Fawers did not even make the first payment (NYSCEF Doc. No. 71, ¶ 15). These circumstances do not compel the Court to deny plaintiff's motion based on equity.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for a default judgment against non-appearing defendants and for summary judgment against defendants Melissa Fawer and Mark Fawer is granted without opposition and the answer and affirmative defenses (*see* NYSCEF Doc. No. 19) are severed and dismissed, and it is further

ORDERED that Craig J. Albert, Esq. with an address of 733 Third Ave 15th floor NY NY 10017-3293 (646) 790-5840 is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff and to examine whether the tax parcel 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 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 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 himself or paying funds to himself 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 "John Doe" be removed as party defendants in this action and AMK Capital Corp and MRK Sales Corp. be added as party defendants; and it is further

ORDERED that the caption shall read as follows:

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

-----X
BERKSHIRE BANK, SUCCESSOR BY
MERGER TO FIRST CHOICE BANK,

Plaintiff,

v.

MELISSA FAWER, MARK FAWER,
SANTERDER BANK, N.A., KEY GROWTH
INVEST LP, NEW YORK STATE
DEPARTMENT OF TAXATION AND
FINANCE, UNITED STATES OF AMERICA
- INTERNAL REVENUE SERVICE, BOARD
OF MANAGERS OF 52 EAST END
AVENUE CONDOMINIUM, AMK
CAPITAL CORP. MRK SALES CORP.,

Defendant(s).
-----X

and it is 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 removed and added pursuant hereto; 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 (www.nycourts.gov/supctmanh)).

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.

Next Conference: January 7, 2020 @ 2:15 p.m. If a motion for judgment of foreclosure and sale has been filed, plaintiff may seek an adjournment of the conference. Please consult this part's rules for information on how to obtain an adjournment. If a motion has been made, then a conference is required to explore the reasons for the delay.

1/22/19

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 type="checkbox"/>	OTHER
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE