

Citimortgage, Inc. v First Franklin Fin. Corp.
2020 NY Slip Op 30833(U)
February 14, 2020
Supreme Court, Kings County
Docket Number: 510843/2018
Judge: Devin P. Cohen
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Supreme Court of the State of New York
County of Kings

Index Number 510843/2018

SEQ 4002

Part 91

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

CITIMORTGAGE, INC.

Plaintiff,

against

FIRST FRANKLIN FINANCIAL CORP., SUBSIDIARY OF NATIONAL CITY BANK OF INDIANA A/K/A FIRST FRANKLIN FINANCIAL, A DIVISION OF NATIONAL CITY BANK OF INDIANA, PNC FINANCIAL SERVICES GROUP, INC., AS SUCCESSOR TO NATIONAL CITY BANK OF PENNSYLVANIA, THE PACIFIC WEST GROUP, INC., DEBRA AZEMAR, EDWIN P. KENNEDY, CHARLOTTE NICHOLSON, AND "JOHN DOE" AND "MARY DOE", SAID NAMES BEING FICTITIOUS, THE PERSONS, PARTIES, CORPORATIONS, OR ENTITIES, IF ANY, HAVING OR CLAIMING AN INTEREST IN OR A LIEN UPON THE MORTGAGED PREMISES DESCRIBED IN THE COMPLAINT,

Defendants.

Table with 2 columns: Papers, Numbered. Rows include Notice of Motion and Affidavits Annexed (1), Order to Show Cause and Affidavits Annexed, Answering Affidavits, Replying Affidavits, Exhibits, Other.

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KINGS COUNTY CLERK
FILED

Upon review of the foregoing documents, plaintiff's unopposed motion for summary judgment and for default judgment is decided as follows:

Factual Background

Plaintiff commenced this action to extinguish certain mortgages on property located at 5407 Avenue O, Brooklyn, New York 11234, Block 7899, Lot 7 (the "property"). In its amended complaint, plaintiff alleges that defendant Debra Azemar executed two mortgages on the property in favor of defendant First Franklin Financial Corp. ("First Franklin"), dated July 9, 2004, securing indebtedness in the amount of \$390,000 on the first mortgage and \$74,250 on the second. Plaintiff provides certified copies of the mortgages. Plaintiff alleges that, by assignment dated May 7, 2005, First Franklin assigned its interest in the first mortgage to National City Bank

of Pennsylvania. Plaintiff further alleges that, by assignment, dated March 23, 2006, plaintiff assigned its interest in the second mortgage to The Pacific West Group, Inc. Plaintiff provides certified copies of the assignments.

In addition, plaintiff alleges that Ms. Azemar transferred her interest in the property to McArthur Pierre by deed, dated September 27, 2006. Plaintiff provides a certified copy of the deed. Plaintiff alleges that Mr. Pierre obtained two mortgages on the property, dated September 27, 2006, in the amounts of \$588,000 and \$147,000, from WMC Mortgage Corp. Plaintiff provides certified copies of the mortgages. Thereafter, Mr. Pierre's first mortgage was assigned to Saxon Mortgage Services by assignment, dated December 24, 2007. Plaintiff provides a certified copy of the assignment.

Plaintiff alleges that Mr. Pierre transferred title to the property to the Pierre Family Trust by deed, dated June 30, 2008, who in turn transferred title to Charlotte Nicholson and Edwin P. Kennedy, by deed, dated September 5, 2008. Plaintiff provides certified copies of both deeds. Ms. Nicholson and Mr. Kennedy took out a mortgage from Knightbridge Mortgage Bankers, LLC ("Knightbridge"), dated September 5, 2008, in the amount of \$644,880. Knightbridge assigned this mortgage to plaintiff by assignment, dated October 12, 2009. Plaintiff provides certified copies of the mortgage and assignment.

Plaintiff submits the affidavit of Elina Alsiweadi, a recovery senior analyst with plaintiff, who provides a copy of a HUD-1 Statement, dated September 5, 2008. Line 504 of the statement indicates that \$405,813.00 of accompanying mortgage loan was used to pay off the "Saxon Mtg."

Plaintiff claims that Ms. Nicholson and Mr. Kennedy defaulted on their mortgage, and so plaintiff commenced a foreclosure action, which is still pending. In conjunction with that

foreclosure action, plaintiff commenced this action to extinguish the mortgages issued to Ms. Azemar.

Analysis

Plaintiff contends that the funds from the loans related to the mortgages issued to Mr. Pierre paid off the mortgages issued to Ms. Azemar. Plaintiff further contends that the absence of any documentation memorializing the satisfaction of Ms. Azemar's mortgages is an inadvertent oversight. Thus, plaintiff asks this court to issue an order granting summary judgment on its claim to extinguish these mortgages against defendant Kennedy, who is the only defendant to have appeared in this case.

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Although plaintiff provides a sufficient evidentiary narrative for the various mortgages, assignments and title transfers for the property, plaintiff has not provided any evidence to suggest that Mr. Pierre's mortgages satisfied Ms. Azemar's mortgages. Additionally, plaintiff references no legal doctrine that entitles it to a presumption that Mr. Pierre's mortgages satisfied Ms. Azemar's mortgages. Accordingly, on this record, the court cannot grant summary judgment in favor of plaintiff.

Plaintiff also seeks default judgment against the remaining defendants. To obtain default judgment, plaintiff must show that defendants were properly served, that defendants defaulted,

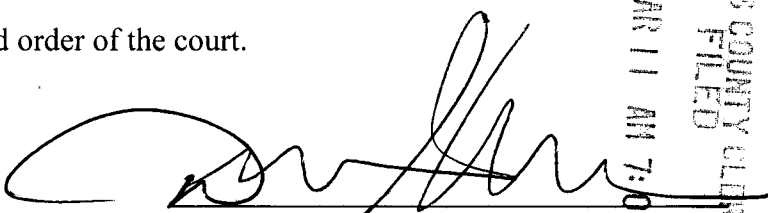
and that plaintiff establishes a viable cause of action (*Triangle Properties 2, LLC v Narang*, 73 AD3d 1030, 1032 [2d Dept 2010]). As set forth above, plaintiff has not established a viable cause of action for extinguishment of Ms. Azemar’s mortgages. Additionally, plaintiff did not establish that it mailed an additional copy of the supplemental summons to defendants First Franklin and PNC Financial pursuant to BCL § 306 (*see Schilling v Maren Enterprises, Inc.*, 302 AD2d 375, 376 [2d Dept 2003]). Plaintiff also did not establish that it served Ms. Nicholson with the supplemental summons and amended complaint.¹ Lastly, plaintiff did not establish that Ms. Azemar is not in the military or dependent on someone serving in the military (NY Military Law §§ 303[1], 306; *Bergani v Desena*, 50 AD3d 716, 717 [2d Dept 2008]).

Conclusion

For the foregoing reasons, plaintiff’s motion is denied.

This constitutes the decision and order of the court.

February 14, 2020
DATE



DEVIN P. COHEN
 Justice of the Supreme Court

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¹ Plaintiff served the original summons and complaint on Ms. Nicholson. Accordingly, this court has personal jurisdiction over her. However, when plaintiff filed its supplemental summons and amended complaint, that pleading superseded the original pleading (*Mawere v Landau*, 170 AD3d 826, 827-28 [2d Dept 2019]; *R & G Brenner Income Tax Consultants v Gilmartin*, 166 AD3d 685, 688 [2d Dept 2018]). Accordingly, Ms. Nicholson was entitled at least to service of the amended pleading in accordance with CPLR 2103.