Bayview Loan Servicing, LLC v Healey
2020 NY Slip Op 35781(U)
March 4, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 608276/2017
Judge: Martha L. Luft
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Short Form Order

Index No. 608276/2017

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - COUNTY OF SUFFOLK

PRESENT:
Hon. Martha L. Luft
Acting Justice Supreme Court

DECISION AND ORDER
CASEDISP

x

BAYVIEW LOAN SERVICING, LLC,

Plaintiff,

-against-

NANCY HEALEY a/k/a NANCY MINAKAKIS a/k/a NANCY GENOVESE,CLERK OF THE SUFFOLK COUNTY FIRST DISTRICT COURT and JOHN DOE NOS. 1 through 10 being and representing persons who may possess or claim an interest in the subject property, if said above named defendants be living, and if the said defendant be dead, then any and all other persons who claims as heirs-at-law next-of-kin, devisees, distributes, legal representatives and successors in interest of said defendant, their wives or husbands, creditors, mortgagees, lienors, assigns and legal representatives of them and the successors in interest of said heir-at-law, next-of-kin, their wives, husbands, creditors, mortgagees, lienors, assignees and legal representatives of them and if any specifically named defendant or any defendants named as a class be dead, then their heirs-at-law, next-of-kin, devisees, grantees, distributes, assignees, mortgagees, lienors and successors in interest and generally all parties having or claiming to have an interest in or lien upon the premises described in the complaint or any amendment thereto by, through or under any of said specifically named defendants herein

Motions Seq. No.:	001 - Mot.D
Orig. Return Date:	11/30/2017
Mot. Submit Date:	01/29/2019
Mot. Seq. No.:	002 - MD
Orig. Return Date:	12/07/2017
Mot. Submit Date:	01/29/2019
Mot. Seq. No.:	003 - MD
Orig. Return Date:	04/17/2018
Mot. Submit Date:	01/29/2019
Mot. Seq. No.:	004 - MD
Orig. Return Date:	07/31/2018
Mot. Submit Date:	01/29/2019
Mot. Seq. No.:	005 - MD
Orig. Return Date:	08/28/2018
Mot. Submit Date:	01/29/2019
Mot. Seq. No.:	006 - MD
Orig. Return Date:	10/16/2018
Mot. Submit Date:	01/29/2019
Mot. Seq. No.:	007 - Mot.D
Orig. Return Date:	10/16/2018
Mot. Submit Date:	01/29/2019

PLAINTIFF'S ATTORNEY
Andrew M. Roth, Esq.
Sahn Ward Coschignano, PLLC
The OMNI
333 Earle Ovington Boulevard, Suite 601
Uniondale, NY 11553

or by, through or under any of the other defendants herein named specifically as a class, all of whom and whose places or residence are unknown to the plaintiff and cannot after diligent inquiry be ascertained,

Defendants.
____________________________________x

DEFENDANT PRO SE
Nancy Healey
P.O. Box 1195
Quogue, NY 11959

Upon the e-filed documents numbered 12 through 163, and the Orders to Show Cause dated July 17, 2018 and August 6, 2018, respectively, it is

ORDERED that the motions by the plaintiff Bayview Loan Servicing, LLC (#001 and #007) and the motions by the defendant Nancy Healey a/k/a Nancy Minakakis a/k/a Nancy Genovese (#002-006) are hereby consolidated for the purposes of this determination; it is further

ORDERED that the motion by the plaintiff (#001) for, *inter alia*, an order: (1) granting partial summary judgment in its favor and directing the Suffolk County Clerk to accept for recording a copy of a mortgage, *nunc pro tunc*, to the date of its execution and declaring this mortgage to be a first lien on title to real property known as 9 Lakewood Avenue, East Quogue, New York; (2) striking the defendant's sixteenth affirmative defense of lack of personal jurisdiction; and (3) granting it leave to fix the default of the non-answering defendant, the Clerk of the Suffolk County First District Court, is granted to the extent described herein, but is otherwise denied; it is further

ORDERED that the portion of the plaintiff's motion seeking an order directing the Suffolk County Clerk to accept for recording a copy of the subject mortgage, *nunc pro tunc*, to the date of its execution, and declaring this mortgage to be a first lien on title to the subject real property is granted to the extent that the Suffolk County Clerk is directed to accept for recording a copy of the subject mortgage, *nunc pro tunc*, to May 2, 2017, the Suffolk County Clerk is directed to record a copy of the subject mortgage within 20 days of the date of this order's entry, and the plaintiff is directed to pay any required fees, but is otherwise denied; it is further

ORDERED that the defendant's motion (#002) for, *inter alia*, an order granting summary judgment in her favor: (1) dismissing the complaint as asserted against her for lack of standing, violations of good faith and fair dealing, violations of the Truth In Lending Act (TILA), and/or bad faith settlement negotiations; (2) entering a judgment in her favor and against the plaintiff on her counterclaims; (3) scheduling an inquest as to the amount owed on the subject note; or, in the alternative; (4) permitting the defendant to conduct discovery, is denied; it is further

ORDERED that the defendant's motion (#003) for, *inter alia*, an order compelling compliance with certain discovery requests is denied; it is further

ORDERED that the defendant's motion (#004) for, *inter alia*, an order enjoining the plaintiff from collecting payments due under the subject mortgage loan agreement is denied; it is further

ORDERED that the defendant's motion (#005) for, *inter alia*, an order granting summary judgment in her favor dismissing the complaint as asserted against her is denied; it is further

ORDERED that the defendant's motion (#006) for, *inter alia*, an order granting summary judgment in her favor dismissing the complaint as asserted against her is denied; it is further

ORDERED that the plaintiff's cross motion (#007) for, *inter alia*, an order imposing sanctions upon the defendant for frivolous conduct and enjoining her from making further applications without leave of court is granted to the extent described herein, but is otherwise denied; and it is further

ORDERED that the defendant is directed to pay the sum of $500.00 to the Clerk of the Court for transmittal to the Commissioner of Taxation and Finance within 20 days of this order's entry.

The plaintiff commenced the instant action on April 28, 2017, for, *inter alia*, an order compelling the Suffolk County Clerk to accept a copy of a mortgage upon real property for recording. On February 7, 2008, the defendant Nancy Healey a/k/a Nancy Minakakis a/k/a Nancy Genovese executed a promissory note in favor of Capital One Home Loans, LLC ("Capital One"). To secure the note, on the same date, the defendant executed a mortgage in favor of Mortgage Electronic Registrations Systems, Inc. ("MERS"), as nominee for Capital One. The subject note is endorsed via allonge from Capital One to JPMorgan Chase Bank, N.A. ("JP Morgan"), then by JP Morgan again in blank.

By its verified complaint, the plaintiff alleges, among other things, that it is now the holder of the subject note, and that the original mortgage given to its predecessor in interest was lost by a prior loan servicer. The plaintiff seeks an order compelling the Suffolk County Clerk to accept a copy of the subject mortgage for recording, or, in the alternative, the plaintiff asserts claims for an equitable mortgage and equitable subrogation. On June 30, 2017, the defendant filed an answer to the complaint asserting numerous affirmative defenses and counterclaims, including lack of the plaintiff's standing to prosecute this action, lack of personal jurisdiction, expiration of the statute of limitations, and violations of the Truth In Lending Act (TILA). The Court notes that, in July 2017, in a foreclosure proceeding under index number 605466/2015 before Justice Joseph C. Pastoressa, the plaintiff discontinued its action against the defendant after she provided funds to reinstate the underlying mortgage loan. On July 25, 2018, the defendant signed a consent to change attorney, discharging Grausso & Foy, LLP as her attorneys, and notifying the Court and all parties that she was now represented by Charles Wallshein, Esq.

On August 6, 2018, the defendant filed a notice of intent to cease e-filing in the instant action, as she was now unrepresented by counsel. The defendant remains self-represented at this time.

The plaintiff now moves for partial summary judgment in its favor, directing the Suffolk County Clerk to record a certified copy of a mortgage, *nunc pro tunc*, and declaring this mortgage to be a first lien on title to the subject real property, arguing that it sent the original mortgage to its prior mortgage servicer for recording, but it was inadvertently lost. In addition, the plaintiff seeks an order striking the defendant's affirmative defense of lack of personal jurisdiction, arguing that she has waived same, and granting it leave to fix the default of the Clerk of the Suffolk County First District Court, as s/he has not answered the complaint and the time to do so has expired. In support, the plaintiff submits, among other things, an affirmation of its attorney, a copy of the subject note, a copy of the subject mortgage, and an affidavit of Jessica E. Fernandez, its Assistant Vice President.

The defendant opposes the motion, and she moves for various relief, including an order dismissing the complaint for lack of standing, violations of good faith and fair dealing, violations of the TILA, and/or bad faith settlement negotiations, entering a judgment in her favor and against the plaintiff on her counterclaims, scheduling an inquest as to the amount owed on the subject note, or, in the alternative, permitting the defendant to conduct discovery. In support of this motion, the defendant submits, among other things, an affirmation of her attorney, and copies of the pleadings and exhibits submitted by the plaintiff in support of its motion.

The defendant also moves for an order compelling the plaintiff to comply with her discovery demands, and she has filed three separate motions for an order granting summary judgment in her favor dismissing the complaint against her, arguing, *inter alia*, that the subject mortgage loan has been paid in full. In addition, the defendant moves for an order enjoining the plaintiff from collecting any further payments due under the subject mortgage loan. In support of her motions, the defendant submits several documents, including her own affidavits, and various mortgage statements.

At the outset, the Court finds that the instant action is not to quiet title, as it is not an action to recover ownership or possession of real property (*see* RPAPL § 1501; ***JP Morgan Chase Bank, N.A. v Mbanefo***, 123 AD3d 669, 671, 998 NYS2d 415 [2d Dept 2014]). However, the complaint adequately states a cause of action to compel the county clerk to accept a copy of the subject mortgage for recording (*see* ***JPMorgan Chase Bank, N.A. v Wright***, 174 AD3d 871, 107 NYS3d 339 [2d Dept 2019]; ***JPMorgan Chase Bank, N.A. v Roseman***, 137 AD3d 1222, 1223, 29 NYS3d 380 [2d Dept 2016]).

In addition, the plaintiff demonstrated its entitlement to an order striking the defendant's affirmative defense of lack of personal jurisdiction, as she waived same by failing to move to dismiss the complaint on this ground within 60 days of serving her answer (*see* CPLR 3211 [e]; ***Generation Mtge. Co. v Medina***, 138 AD3d 688, 27 NYS3d 881 [2d Dept 2016]; ***Putnam County Sav. Bank v Mastrantone***, 111 AD3d 914, 975 NYS2d 684 [2d Dept 2013]; ***Countrywide Home Loans Servicing, LP v Albert***, 78 AD3d 983, 984, 912 NYS2d 96 [2d Dept

2010]). Further, the plaintiff established its entitlement for leave to fix the default of the Clerk of the Suffolk County First District Court, as its affidavit of service shows that this defendant was served with the summons and complaint on June 15, 2017, pursuant to CPLR 311 (a)(3), the time for s/he to answer has expired, and the plaintiff has moved for this relief within one year of such default (*see* CPLR 3215).

Moreover, the plaintiff's submissions establish its entitlement to an order compelling the Suffolk County Clerk to accept a copy of the subject mortgage for recording (*see* ***JPMorgan Chase Bank, N.A. v Wright***, *supra*; ***JPMorgan Chase Bank, N.A. v Roseman***, *supra*). The County Clerk has a statutory duty that is ministerial in nature to record a written conveyance if it is duly acknowledged and accompanied by the proper fee (*see* Real Property Law §§ 290 [3], 291; County Law § 525 [1]; ***JPMorgan Chase Bank, N.A. v Wright***, *supra*). As such, the County Clerk does not have the authority to refuse to record a conveyance which satisfies the narrowly-drawn prerequisites set forth in the recording statute (*see* ***Matter of MERSCORP, Inc. v Romaine***, 24 AD3d 673, 674, 808 NYS2d 307 [2d Dept 2005], *affd* 8 NY3d 90, 828 NYS2d 266 [2006]). Here, the plaintiff attached a copy of the subject mortgage to its moving papers, showing it was duly acknowledged by an identified notary public; thus, the mortgage is valid on its face and subject to recording (*see* ***JPMorgan Chase Bank, N.A. v Wright***, *supra*; ***JPMorgan Chase Bank, N.A. v Roseman***, *supra*; *cf.* ***JP Morgan Chase Bank, N.A. v Mbanefo***, *supra*). As this cause of action renders the plaintiff's alternative claims for, *inter alia*, an equitable mortgage and equitable subrogation moot, these remaining causes of action are dismissed.

Notwithstanding the foregoing, the plaintiff's submissions fail to establish its entitlement to an order directing the recording of the subject mortgage, *nunc pro tunc*, to February 7, 2008, the date same was executed, and, in effect, declaring this mortgage to be a first lien on title to the subject real property. The priority of the mortgage lien is limited to those provided under the "race-notice" recording statutes (*see* RPL §§ 290, 291), and thus, the only document that currently serves as constructive notice of any rights and interests the plaintiff has in the subject property is a notice of pendency filed at the commencement of the instant action (*see* CPLR 6501; ***Wells Fargo Bank, NA v Perry***, 23 Misc 3d 827, 829, 875 NYS2d 853 [Sup Ct, Suffolk County 2009]; *see also* ***Gletzer v Harris***, 12 NY3d 468, 473, 882 NYS2d 386 [2009]; ***Matter of Sakow***, 97 NY2d 436, 741 NYS2d 175 [2002]). As such, the Court will direct the Suffolk County Clerk to record a copy of the subject mortgage, *nunc pro tunc*, to May 2, 2017, the date the notice of pendency was filed and received by the New York State Electronic Filing System.

In opposition, and in support of her many motions to dismiss the complaint, nearly all of the defendant's submissions and arguments in opposition to the plaintiff's motion and in support of her motions sound in defenses that are more properly raised in residential mortgage proceedings. As to the plaintiff's motion, none of the defendant's submissions are sufficient to raise a triable issue of fact as to the plaintiff's entitlement to an order compelling the Suffolk County Clerk to accept a copy of the subject mortgage for recording (*see* ***JPMorgan Chase Bank, N.A. v Wright***, *supra*). Further, the failure to raise pleaded affirmative defenses in opposition to a motion for summary judgment renders those defenses abandoned and thus subject to dismissal (*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]). Moreover, as this is not a residential mortgage foreclosure action, the defendant's arguments as to standing, TILA violations, and violations of good faith and fair dealing are inapplicable. However, the Court's decision on the instant motions is without prejudice to such defenses being raised in any subsequent action to foreclose the subject mortgage.

As to the plaintiff's cross motion for an order imposing sanctions on the defendant for her allegedly frivolous conduct, a court, in its discretion, may impose financial sanctions against a party or attorney who engages in frivolous conduct after affording him or her a reasonable opportunity to be heard (*see* 22 NYCRR 130-1.1[a], [d]; ***Merchant Cash & Capital, LLC v Blueshyft, Inc.***, 175 AD3d 603, 104 NYS3d 907 [2d Dept 2019]). As the plaintiff expressly requested this relief in its motion papers, and the defendant was afforded an opportunity to be heard and to oppose the motion, a hearing is not required as to whether to impose sanctions upon the defendant (see 22 NYCRR 130-1.1 [d]; ***Matter of Minister, Elders & Deacons of Refm. Prot. Dutch Church of City of N.Y. v 198 Broadway***, 76 NY2d 411, 413 n, 559 NYS2d 866 [1990]; ***Matter of Ruth S. [Sharon S.]***, 125 AD3d 978, 5 NYS3d 135 [2d Dept 2015]; ***Duncan v Popoli***, 105 AD3d 803, 963 NYS2d 315 [2d Dept 2013]).

Here, the Court finds that the defendant's conduct in filing three motions for summary judgment were undertaken primarily to delay or prolong the resolution of the litigation, and as such, this conduct was frivolous, and that sanctions are appropriate (*see* 22 NYCRR 130-1.1 [c][2]; ***Matter of Minister, Elders & Deacons of Refm. Prot. Dutch Church of City of N.Y. v 198 Broadway***, *supra*; ***Levine v Levine***, 111 AD3d 898, 975 NYS2d 686 [2d Dept 2013]). The Court has taken into consideration the fact that the defendant has proceeded *pro se*. However, it does not take any special know-how to recognize the impropriety of bringing multiple motions seeking the same relief. As a sanction for this frivolous conduct, and in light of the circumstances surrounding the instant action, the Court finds that the defendant's conduct warrants sanctions in the amount of $500.00 (*see* 22 NYCRR 130-1.3; ***ATS-1 Corp. v Rodriguez***, 156 AD3d 674, 67 NYS3d 60 [2d Dept 2017]; ***Ram v Estate of Hershowitz***, 149 AD3d 959, 52 NYS3d 437 [2d Dept 2017]; ***Duncan v Popoli***, *supra*).

Based upon the foregoing, the plaintiff's motion for summary judgment is granted, the defendant's motions are denied, and the plaintiff's cross motion for sanctions is granted in part, and denied in part.

ENTER

Martha L. Luft

HON. MARTHA L. LUFT, A.J.S.C.

Date: March 4, 2020
Riverhead, New York

__X__ FINAL DISPOSITION

____ NON-FINAL DISPOSITION