

Chase Home Fin. LLC v Adago
2022 NY Slip Op 30883(U)
March 15, 2022
Supreme Court, New York County
Docket Number: Index No. 104723/2009
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

CHASE HOME FINANCE LLC

INDEX NO. 104723/2009

- v -

MOT. DATE

MOT. SEQ. NO. 006

JOSEPH ADAGO et al.

The following papers were read on this motion to/for sj
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
Notice of Cross-Motion/Answering Affidavits — Exhibits
Replying Affidavits

ECFS Doc. No(s). _____
ECFS Doc. No(s). _____
ECFS Doc. No(s). _____

This is a mortgage foreclosure action. Plaintiff Chase Home Finance, LLC filed a motion for summary judgment in its favor and dismissing defendant Joseph Adago's affirmative defenses and counter-claims, notice of which is dated April 8, 2019. Plaintiff further sought a default judgment against all non-appearing defendants as well as the appointment of a referee to sell the underlying premises pursuant to RPAPL § 1321. Adago opposed plaintiff's motion and cross-moved for summary judgment in his favor, as well as for reasonable attorneys fees pursuant to RPL § 282. The motion was inadvertently marked decided on January 9, 2020, although no decision was rendered.

The court received a letter from plaintiff's counsel dated November 1, 2021 which advised of the still-pending motion. Thereafter, the court calendared the motion and cross-motion for oral argument on December 14, 2021 and directed the parties to recreate the file by submitting copies of all motion papers to the court (see order dated 11/23/21). For the reasons that follow, the motion is granted and the cross-motion is denied.

Issue has been joined and note of issue has not yet been filed. Therefore, summary judgment relief is available. On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to

Dated: 3.15.22



HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
- 2. Check as appropriate: Motion is GRANTED DENIED GRANTED IN PART OTHER
- 3. Check if appropriate: SETTLE ORDER SUBMIT ORDER DO NOT POST
- FIDUCIARY APPOINTMENT REFERENCE

“issue finding,” not “issue determination” (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

The relevant facts are not in dispute. On or about October 18, 2006, Adago obtained a loan from JP Morgan Chase Bank, N.A. in the amount of \$581,750 vis-à-vis a Promissory Note (the “Note”) which was secured by a mortgage on the premises (the “Mortgage”). Plaintiff is the holder of the Note and assignee of the Mortgage. Adago is the record owner and mortgagor of the property at issue located at 548 West 162nd Street, New York, New York 10032 (the “premises”).

Thereafter, Adago defaulted under the Mortgage by failing to make required payments and a 90-Day Notice was sent to him pursuant to RPAPL § 1304 on or about September 25, 2008. Despite said notice, Adago did not cure the default. Plaintiff commenced this action on April 3 2009, alleging that the October 1, 2008 payment and subsequent payments were not made leaving an unpaid principal balance of \$571,354.80 due. As this court stated in its decision/order dated April 3, 2018, although Adago never answered the complaint, the parties appeared for at least 20 settlement conferences from July 2009 through June 2012. Thereafter, the Honorable Peter Moulton directed plaintiff to move for an order appointing a referee within 90 days from July 2, 2012.

As the court's 4/3/18 Order further states, plaintiff did not timely move for a referee. Ultimately, the matter was referred to a Special Referee for a traverse hearing. At that hearing, Special Referee Steven E. Liebman, found in a decision/order dated June 1, 2017 that Adago was not served with the summons and complaint. Therefore, Special Referee Liebman restored the cross-motion to dismiss, granted it and ordered that the complaint in this action against Adago be dismissed for lack of personal jurisdiction.

Plaintiff then moved pursuant to CPLR § 306-b to extend its time to serve Adago. This court granted that motion in the 4/3/18 Order. The 4/3/18 Order was then affirmed on appeal by the Appellate Division, First Department, in a decision/order dated April 11, 2019. Plaintiff has since served Adago (although Adago now disputes service) and Adago has answered the complaint.

On its motion, plaintiff argues that it is entitled to summary judgment and dismissal of Adago's defenses and counterclaims because it has demonstrated *prima facie* existence of the Note, the Mortgage and Adago's default. Specifically, plaintiff has provided copies of the Note and Mortgage to the court, as well as the sworn affidavit of Aneetra Harris, Foreclosure Specialist of Seterus Inc. (“Seterus”), an authorized subservicer for Federal National Mortgage Association, in which Harris affirmed that Adago defaulted on the terms of the Note and Mortgage by failing to make the payment due on October 1, 2008. In opposition and in support of his cross-motion, Adago contends that plaintiff failed to demonstrate compliance with RPAPL § 1304, that the RPAPL § 1304 Notice is defective on its face, that plaintiff failed to prove compliance with a condition precedent in the Mortgage, and plaintiff failed to comply with RPAPL § 1303.

The court agrees with plaintiff that it has demonstrated *prima facie* entitlement to judgment as a matter of law on the complaint and dismissing Adago's affirmative defenses and counterclaim. In turn, Adago has failed to raise a triable issue of fact sufficient to defeat the motion for the reasons that follow. Indeed, plaintiff has addressed each of Adago's affirmative defenses and counterclaim in its motion-in-chief and Adago has not raised any argument in opposition to their dismissal. As such, the affirmative defenses and counterclaim are dismissed without opposition as abandoned (*see generally Kuehne & Nagel v Baiden*, 36 NY2d 539 [1975]).

Turning to Adago's substantive arguments, plaintiff points out that defendant was not entitled to notice pursuant to RPAPL § 1304 because that statute required a 90-day pre-foreclosure notice on Home Loans that were subprime, high cost or nontraditional.¹ Indeed, Adago makes no argument that the un-

¹ RPAPL § 1304[5] (September 1, 2008 to January 13, 2010):

(b) “Home loan” means a home loan, including an open-end credit plan, other than a reverse mortgage transaction, in which:

derlying loan fell under any of these three categories. In any event, plaintiff has provided copies of the 90 Day Notice it served and shown through the affidavit of Amy Gauthier, who is also employed by Seterus, that the 90-day pre-foreclosure notices were mailed on September 25, 2008 to the defendants by certified and first class mail to the premises. To the extent that Adago's counsel claims that neither Harris nor Gauthier can attest to plaintiff's business practices or what plaintiff did when it mailed notices regarding Adago's default under the Note and Mortgage, the court disagrees. Both Harris and Gauthier explain that where business records for the underlying loan were created by a prior servicer, such as plaintiff:

the prior servicer's records for the loan were integrated and boarded into Seterus, Inc.'s systems, such that the prior servicer's records concerning the loan are now part of Seterus, Inc.'s business records. Seterus, Inc. maintains quality control and verification procedures as part of the boarding process to ensure the accuracy of the boarded records. It is the regular practice of Seterus, Inc., to integrate prior servicer's records into Seterus, Inc.'s business records, and to rely upon the accuracy of those boarded records in providing its loan servicing functions. These prior servicer records are integrated and relied upon by Seterus, Inc., as part of Seterus, Inc.'s business records.

Thus, the court finds that Harris and Gauthier can properly assert, based upon their personal knowledge obtained in the regular performance of their job functions in connection with Seterus' business records, that plaintiff served a RPAPL § 1304 notice upon Adago, among other claims. Adago's unsubstantiated denial of receipt of the notice is insufficient to defeat plaintiff's motion (see i.e. *Citibank NA v. Conti-Scheurer*, 172 AD3d 17 [2d Dept 2019]).

As for Adago's claim that the subject notice is not statutorily compliant, the effective version of RPAPL § 1304 (September 1, 2008 to January 13, 2010) provides in pertinent part as follows:

§ 1304. Required prior notices

1. Notwithstanding any other provision of law, with regard to a high-cost home loan, as such term is defined in section six-l of the banking law, a subprime home loan or a non-traditional home loan, at least ninety days before a lender or a mortgage loan servicer commences legal action against the borrower, including

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- (i) The principal amount of the loan at origination did not exceed the conforming loan size that was in existence at the time of origination for a comparable dwelling as established by the federal national mortgage association;
 - (ii) The borrower is a natural person;
 - (iii) The debt is incurred by the borrower primarily for personal, family, or household purposes;
 - (iv) The loan is secured by a mortgage or deed of trust on real estate upon which there is located or there is to be located a structure or structures intended principally for occupancy of from one to four families which is or will be occupied by the borrower as the borrower's principal dwelling; and
 - (v) The property is located in this state.

(c) "Subprime home loan" for the purposes of this section, means a home loan consummated between January first, two thousand three and September first, two thousand eight in which the terms of the loan exceed the threshold as defined in paragraph (d) of this subdivision. A subprime home loan excludes a transaction to finance the initial construction of a dwelling, a temporary or "bridge" loan with a term of twelve months or less, such as a loan to purchase a new dwelling where the borrower plans to sell a current dwelling within twelve months, or a home equity line of credit.

(e) "Non-traditional home loan" shall mean a payment option adjustable rate mortgage or an interest only loan consummated between January first, two thousand three and September first, two thousand eight.

mortgage foreclosure, the lender or mortgage loan servicer shall give notice to the borrower in at least fourteen-point type which shall include the following:

**“YOU COULD LOSE YOUR HOME. PLEASE READ THE FOLLOWING
NOTICE CAREFULLY”**

“As of ..., your home loan is ... days in default. Under New York State Law, we are required to send you this notice to inform you that you are at risk of losing your home. You can cure this default by making the payment of dollars by

...

2. Such notice shall be sent by the lender or mortgage loan servicer to the borrower, by registered or certified mail and also by first-class mail to the last known address of the borrower, and if different, to the residence which is the subject of the mortgage. ...

The court has reviewed the 90 Day Notice served by plaintiff and finds that it does comply with the effective version of RPAPL § 1304. Thus, on this record, plaintiff has shown that it complied with RPAPL § 1304, even if the underlying loan required it to do so. In turn, Adago has failed to raise a triable issue of fact through proof in admissible form which would show that plaintiff did not comply with RPAPL § 1304. His counsel claims that the discrepancy between the date of default alleged in the complaint, and the fact that the underlying 90 Day Notice indicated that Adago was 85 days in default, is a fatal defect. However, Adago does not claim that he made any payments within the 85-day period that plaintiff claimed he was in default. Plaintiff's decision to allege that Adago was in default on a latter date is not a fatal defect, given it inures to Adago's benefit in the computation of interest. Nor has Adago shown that he was prejudiced by the aforementioned discrepancy.

Plaintiff has also shown that it complied with the notice requirements contained in the Mortgage and Note, which only required 30 days' notice. Indeed, plaintiff does not even deny that he received the copy of plaintiff's notice which was mailed to the premises as evidenced by the Gauthier affidavit.

Finally, Adago's argument premised upon RPAPL § 1303 is equally unavailing. Specifically, Adago argues that he was entitled to notice under RPAPL § 1303 because this action relates to an owner-occupied one-to-four family dwelling. A Section 1303 notice is required to be delivered with the summons and complaint (RPAPL § 1303[2]). Adago claims that he was not served with the summons and complaint because plaintiff's affidavit of service indicates that these documents were served upon a 58-year-old white female with brown hair and this description does not match Adago. However, as plaintiff points out in opposition to the cross-motion, the premises was owned by JDA LLC, not Adago, at the time this action was commenced. Therefore, RPAPL § 1303 does not apply. Further, plaintiff correctly points out that Adago never moved to dismiss on grounds of lack of personal jurisdiction due to improper service, therefore, that defense is waived pursuant to CPLR § 3211[e]. If Adago cannot now challenge service of process, it follows that Adago cannot challenge service of the RPAPL § 1303 notice as well.

For all these reasons, plaintiff's motion for summary judgment is granted in its entirety and defendants' cross-motion is denied. In light of this result, the balance of plaintiff's motion is also granted and a separate order has been signed on even date.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated:

3.15.22
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.