

Bank of Am., N.A. v Madsen

2023 NY Slip Op 32875(U)

April 10, 2023

Supreme Court, Warren County

Docket Number: Index No. EF2018-65304

Judge: Felix J. Catena

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**SUPREME COURT
COUNTY OF WARREN**

STATE OF NEW YORK

**BANK OF AMERICA, N.A., SUCCESSORS BY MERGER
TO FLEET NATIONAL BANK**

Plaintiff,

- against -

**DECISION AND ORDER
Index No.: EF2018-65304**

**JAMES MADSEN; JAMES E. MADSEN; SOMER
HILL CAMP, LLC, and "John Doe" and/or "Jane Doe" #1-10
inclusive, the last ten names being fictitious and unknown to
plaintiff, the persons or parties intended being the tenants,
occupants, persons, corporations or heirs at law, if any,
having or claiming an interest in or lien upon the premises
described in the complaint,**

Defendants.

SUPREME COURT:

APPEARANCES:

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CATENA, J.

Motion #3 by plaintiff for, *inter alia*, summary judgment against the defendants James Madsen, Somer Hill Camp, et al., and cross motion #4 by defendants for dismissal due to plaintiff's failure to state a claim and non-compliance with RPAPL §1304.

This is an action to foreclose on a mortgage on real property known as 1018 High Street,

Athol, NY 12810. On June 13, 2005, the defendant James E. Madsen executed a Home Equity Line of Credit Agreement in favor of Fleet National Bank, a Bank of America Company, with a credit limit of \$150,000.00. To secure payment of all sums under the Home Equity Line of Credit Agreement, defendant executed a mortgage on the real property signed on June 13, 2005.

The plaintiff commenced this foreclosure action against defendants on May 1, 2018 in Warren County Supreme Court. The plaintiff mortgagee alleges defendants' default on November 25, 2017 by failure to make monthly payments per the terms of the Note and Mortgage. The issue was joined on August 16, 2018 when defendant filed a Verified Answer to the plaintiff's Complaint generally denying all of the allegations set forth in the complaint, and asserted ten affirmative defenses. Thereafter the plaintiff moved for summary judgment in November 2018. In December 2018, defendants filed their cross motion. In October 2019, the Court marked the plaintiff's motion and defendant's cross-motion off the calendar as there was no substantive activity on the case. The Court requested an update on March 24, 2022, and an update that the case was still open was received on April 4, 2022 from Elliot S. Small, attorney for defendants. Plaintiff then filed a new notice of pendency on October 20, 2022 and a notice of motion for summary judgment on December 7, 2022, whereby the defendants submitted a Cross Motion on January 27, 2023 and referenced only two of the affirmative defenses previously raised. Lastly, plaintiffs submitted their reply to the cross motion on March 2, 2023.

A. Motion for summary judgment

On a motion for summary judgment, the movant bears the initial burden of setting forth evidentiary facts sufficient to entitle that party to judgment as a matter of law (*Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). In foreclosure matters, a "plaintiff establish[es] its prima

facie entitlement to judgment as a matter of law by producing a mortgage, an unpaid note, . . . evidence of default, and by demonstrating that [any] affirmative defenses [are] without merit.” (*Fairmont Capital, LLC v. Laniado*, 116 A.D.3d 998 [2nd Dept. 2014] (internal citations omitted); see also *JP Morgan Chase Bank, N.A. v. Venture*, 148 A.D.3d 1269, 1270 [3rd Dept. 2017]). If the moving party meets this burden, then the burden shifts to the opposing party who must then produce “evidentiary proof in admissible form” to show that a question of fact exists requiring a determination by a trier of fact (*Zuckerman*, 49 NY2d at 562; see also *PIII Mtge. Corp. v. Davis*, 111 A.D.3d 1110, 1111 [3rd Dept. 2013], *contra*, see *Bank of New York Mellon v. Cronin*, 151 A.D.3d 1504 [3rd Dept. 2017] “defendants did not offer any affidavits attesting to the existence of admissible evidence that would raise a triable issue of fact as to plaintiff’s entitlement to summary judgment as a matter of law.” *Cronin* 151 A.D.3d at 1507). When considering a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party (*Vega v. Restani*, 18 NY3d 499, 503 [2012]).

In support of its motion for summary judgment, the plaintiff has submitted a mortgage, a home equity line of credit [hereinafter HELOC] agreement, which would take the place of a note, as well as affidavits and affirmations in their motion papers stating there has been a default. Plaintiff alleges the date of default as November 25, 2017 through their attorney affirmation dated December 7, 2022 and their business affidavit in support of motion for summary judgment completed by Nichole Renee Williams, Assistant Vice President of Bank of America dated September 25, 2018. Plaintiff has established its prima facie entitlement to summary judgment by evidence of the above documentation. This Court declines to examine defendant’s affirmative defenses that were not preserved through their cross motion opposition to plaintiff’s motion for summary judgment. The validity of the affirmative defenses predicated on the defendant’s motion to dismiss are analyzed

below in section (B), subsections (a) and (b) of this order.

Additionally, even though the Court finds plaintiff's evidence sufficient to sustain its burden of proof on a motion for summary judgment, the Court nevertheless finds that the defendant has raised a triable issue of fact as to whether the funds were ever disbursed and distributed to the defendant pursuant to the HELOC agreement and then therefore owed by the defendant to the plaintiff mortgagee. Counsel for defendant submitted an affidavit completed by the defendant Mr. James Madsen dated January 27, 2023, attesting that "a closing did occur, but it only opened a line of credit which did not disburse any funds at the closing." The specific terms of the HELOC agreement executed on June 13, 2005 reads, "My credit *limit* is \$150,000[,] "I promise to pay you *all the amounts I borrow. . .*[,] and "I may obtain loan advances on my Account in the following manner . . .", which appears consistent with defendant's contention that this may not have been a traditional note/loan that immediately disburses money to the defendant (emphasis added). Rather, the agreement reads as a line of credit that the defendant could draw from and thereafter owe such sums to plaintiff mortgagee. A question of fact surely exists. It is also worth noting that defendant has argued defects exist in the plaintiff's pleadings including that the loan as referenced by plaintiff and through their business affidavits continuously refer to the loan as a "Note". Looking within the four corners of the HELOC agreement, the loan in question is clearly a "Home Equity Line of Credit Agreement [HELOC]".

Reviewing the evidence in the light most favorable to the opposing party, the Court finds that the plaintiff established its prima facie entitlement to a judgment as a matter of law, however, the defendant subsequently raised sufficient triable issues of fact, therefore summary judgment must be denied.

B. Motion to dismiss

a. *Failure to state a claim*

CPLR §3211 states in part that “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that: [...] the pleading fails to state a cause of action” (CPLR §3211 (a)(7)). When a court is tasked with deciding a motion to dismiss pursuant to CPLR §3211 (a)(7) for failure to state a cause of action, it must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 571 [2005]). The Court’s sole criteria is whether the pleadings state a cause of action, and if from the four corners factual allegations are discernable which taken together manifest any cause of action cognizable at law, a motion to dismiss will fail (*Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001], quoting *Guggenheimer v Gizburg*, 43 NY2d 268, 275 [1977]). “However imperfectly, informally or even illogically the facts may be stated, a complaint, attacked for insufficiency, is deemed to allege whatever can be implied from its statements by fair and reasonable intendment” (*Foley v D’Agostino*, 21 AD2d 60, 65 [1st Dept. 1964], quoting *Kain v Larkin*, 141 NY 144, 151 [1894]) (internal quotations omitted).

The Court finds that in looking to the substance of the plaintiff’s pleadings, and affording plaintiff the benefit of every possible inference, a cause of action can be easily discerned. Therefore, defendant’s motion to dismiss for failure to state a cause of action under CPLR §3211 (a)(7) must be denied.

b. *Compliance with RPAPL §1304*

Plaintiff included the following additional text in their RPAPL §1304 mailing, namely:

“IMPORTANT DISCLOSURES. Bank of America, N.A. is required by law to inform you that this communication is from a debt collector. If you are currently in a bankruptcy proceeding or have previously obtained a discharge of this debt under bankruptcy law, this notice is for information purposes only and is not an attempt to collect a debt, a demand for payment or an attempt to impose personal liability for a discharged debt.”

Defendant contends in their motion to dismiss that the above text violates that statute as various courts have held the inclusion of any additional mailing or notice in the same envelope with the statutorily required notice is a violation of said statute and can serve as a ground for dismissal of the entire foreclosure action (*see Bank of America, N.A. v. Kessler*, 202 A.D.3d 10, 16, [2nd Dept. 2021] *reversed* 2023 WL 1972994; *USBank N.A. v. Haliotis*, 185 A.D.3d 756, 758–59 (denying motion for summary judgment because “the records did not show that the RPAPI. 1304 notice was ‘served in an envelope that was separate from any other mailing or notice.’”). However, the Court of Appeals has since reversed the lower court findings in *Bank of America v. Kessler* and those that came before it as Plaintiff correctly contends in their reply papers (*Bank of America, N.A. v. Kessler*, No. 4, 2023 WL 1972994 [2023] (finding that “accurate statements that further the underlying statutory purpose of providing information to borrowers that is or may become relevant to avoiding foreclosure do not constitute an ‘other notice’” *Id.* at *4).

The Court has reviewed Defendant’s argument that the inclusion of the above “Important Disclosures” paragraph warrants dismissal, but the Court finds it unavailing due to the reversal and reinterpretation of *Bank of America v. Kessler*, as well as the contents of such paragraph relating directly to the foreclosure and providing additional helpful information to the homeowner. As such, Defendant’s motion to dismiss on this ground must be denied.

It is therefore,

ORDERED that the Plaintiff’s motion for summary judgment and request for an Order of

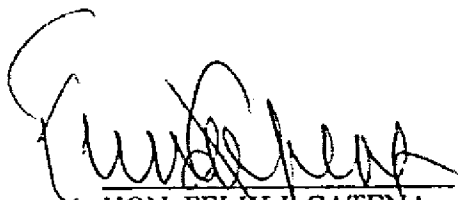
Reference is denied without prejudice; and it is further

ORDERED that the Defendant's motion to dismiss the Plaintiff's action for failure to state a claim and failure to comply with RPAPL 1304 is denied without prejudice.

Dated:

April 10, 2023

04/12/2023


HON. FELIX J. CATENA
Acting Supreme Court Justice

Samela J. Vogel