

ARCPE I LLC v Mason-Mascall

2025 NY Slip Op 31942(U)

May 30, 2025

Supreme Court, Kings County

Docket Number: Index No. 503600/18

Judge: Cenceria P. Edwards

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At an IAS Term, Part FRP-1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 30th day of May, 2025.

P R E S E N T:

HON. CENCERIA EDWARDS,

Justice.

-----X
ARCPE I LLC,

Plaintiff,

- against -

Index No. 503600/18

LAURA MASON-MASCALL AKA LAURA MASON,
GIDEON MASCALL, NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD, AMERICAN EXPRESS BANK FSB,
NEW YORK CITY PARKING VIOLATIONS BUREAU,
JOHN DOE (Those unknown tenants, occupants,
Persons or corporations or their heirs, distributes,
Executors, administrators, trustees, guardians,
Assignees, creditors or successors claiming an
Interest inn the mortgaged premises),

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and

Affidavits (Affirmations) _____

30-31, 33-48

Opposing Affidavits (Affirmations) _____

54-58

Reply Affidavits (Affirmations) _____

59-61

Upon the foregoing papers in this action to foreclose a second mortgage encumbering the residential property at 9307 Flatlands Avenue in Brooklyn (Block 8181, Lot 7) (Property), plaintiff ARCPE I LLC (ARCPE or Plaintiff) moves (in motion sequence [mot. seq.] one) for an order: (1) granting it summary judgment, pursuant to CPLR 3212; (2) dismissing defenses asserted in defendant Laura Mason-Mascall’s answer, pursuant to

CPLR 3211 (b), and granting it leave to treat her answer as a limited notice of appearance; (3) appointing a referee to determine the amount due and to ascertain whether the Property may be sold in parcels; and (4) granting a default judgment against all non-appearing and non-answering defendants, pursuant to CPLR 3215 (NYSCEF Doc No. 30).

Background

On February 21, 2018, ARCPE commenced this foreclosure action by filing a summons, an unverified complaint and a notice of pendency against the Property (NYSCEF Doc Nos. 1-3). The complaint alleges that on or about June 14, 2007, Defendants Laura Mason-Mascall (Laura Mason) and Gideon Mascall executed and delivered a \$50,000.00 promissory note in favor of Flagstar Bank, FSB (Flagstar), which was secured by a mortgage encumbering their Property (a home equity line of credit [HELOC]) (NYSCEF Doc No. 1 at ¶¶ 2-3). The complaint further alleges that “Laura Mason-Mascall AKA Laura Mason failed to comply with the conditions of the note and mortgage by not making the payment that was due on April 1, 2012 and subsequent payments” (*id.* at ¶ 5). Notably, annexed to the complaint is a copy of the HELOC note with a blank endorsement from Flagstar evidencing ARCPE’s standing (*id.* at 7-10).

On May 10, 2018, Laura Mason answered the complaint, denied the material allegations therein and asserted affirmative defenses, including lack of standing, the statute of limitations, failure to comply with RPAPL § 1304 and fraud in the inducement (NYSCEF Doc No. 25).

The remaining defendants failed to answer or otherwise respond to the complaint.

ARCPE's Summary Judgment Motion

On June 27, 2019, ARCPE moved for summary judgment, an order of reference and a default judgment against the non-answering defendants (NYSCEF Doc No. 30). ARCPE submits an affidavit from David Gordon (Gordon), its “authorized representative” and “managing member” who generally states that “[i]n preparation of this Affidavit, I reviewed business records related to the Subject Loan . . .” and he “regularly access[es]” such business records (NYSCEF Doc No. 35 at ¶¶ 3-4). Without referencing or annexing any particular business records, Gordon attests that “[b]ased upon my review of the computerized business records for this loan, the loan is currently in default and due for the April 1, 2012 payment and all subsequent payments” (*id.* at ¶ 10). Regarding ARCPE’s standing to foreclose, Gordon attests that “[b]ased upon my review of the business records, the original Note dated June 14, 2007, was in ARCPE I LLC’s possession prior to and on February 21, 2018, the date the Complaint was filed” (*id.* at ¶ 12).

Laura Mason's Opposition

On January 7, 2021, Laura Mason submitted an affidavit in opposition to ARCPE’s summary judgment motion asserting that she was the victim of fraud:

“Plaintiff engaged in fraud in the inducement in that misleading representations were made to me regarding the terms of the mortgage and I would not have signed the mortgage papers if the terms had been truthfully disclosed.

“The mortgage broker who put this deal together came to my door.

“I was not looking to refinance nor cash out any monies nor pay any bills.

“I was told that this was a refinance and that I would have only 1 payment.

“I did not expect to incur a second loan and especially a payment” (NYSCEF Doc No. 54 at ¶¶ 7-11).

Laura Mason further attests that she and her defense counsel have requested copies of the checks from the closing of the HELOC from ARCPE and its counsel to no avail (*id.* at ¶¶ 19-21). Laura Mason also asserts that “there are additional issues of fact as to (a) whether Plaintiff has established that it served the 90-day pre-foreclosure notice; (b) whether plaintiff actually was assigned the Note; [and] (c) whether Plaintiff has standing to bring this action” (*id.* at ¶ 22). Notably, Laura Mason does not deny receiving the RPAPL § 1304 90-day notice in her affidavit.

Defense counsel submits an affirmation asserting that:

“[t]he affidavit of the defendant Laura Mason annexed hereto shows that she was defrauded, that the plaintiff does not come to the Court with clean hands and raises triable issues of fact. The defendant has asserted affirmative defenses which require a finding of fact and therefore, would make an order of summary judgment improper in this case. She has been requesting copies of the checks that were cut at the closing [of the HELOC]; upon information and belief, those checks cannot be located by the plaintiff nor its predecessor” (NYSCEF Doc No. 55 at ¶ 3).

Defense counsel also argues that there is a question of fact as to whether ARCPE sent Laura Mason a 90-day pre-foreclosure notice, pursuant to RPAPL § 1304, because “Plaintiff has not demonstrated strict compliance with RPAPL 1304” (*id.* at ¶ 11). Defense

counsel also asserts that “[t]here is a genuine issue of fact as to who owned the Note at the time of the commencement of the foreclosure action” because “[t]he evidence submitted by the plaintiff in support of its motion did not demonstrate that the note was physically delivered or assigned to it prior to commencement of the action” (*id.* at ¶¶ 13-14).

ARCPE’s Reply

ARCPE, in reply, submits an attorney affirmation asserting that “Ms. Kinga Kowalewska executed an **Affidavit of Mailing** on July 19, 2017 at the time she mailed the RPAPL §1304 notices[,]” copies of which were submitted as part of ARCPE’s moving papers with certified mail receipts (NYSCEF Doc No. 59 at ¶ 8 and NYSCEF Doc No. 40). Counsel contends that “[t]his evidence established, prima facie, Plaintiff’s compliance with RPAPL § 1304 and created a rebuttable presumption that the intended recipient received the statutory condition precedent notice” (NYSCEF Doc No. 59 at ¶ 9). Counsel asserts that “**there is no statement in the Defendant’s Affidavit submitted in opposition to the instant motion denying receipt of the RPAPL §1304 notice**” and “[t]herefore, any challenge to the Plaintiff’s compliance with RPAPL §1304 must fail” (*id.* at ¶ 11).

ARCPE also argues that Laura Mason failed to allege any of the elements of fraud necessary to raise an issue of fact to preclude the grant of summary judgment (*id.* at ¶ 23). ARCPE argues that it could not have induced Laura Mason into executing the loan since “Plaintiff was not the originating lender and is a successor in interest to the lender Flagstar Bank” (*id.* at ¶ 21).

ARCPE's counsel asserts that Defendant Laura Mason's claim that she never received copies of the checks from the closing of the HELOC does not preclude summary judgment because the defense never served a document request upon ARCPE (*id.* at ¶ 39). Counsel explains that "[t]he Plaintiff attempted to locate copies of the requested checks as a c[o]urtesy to the Defendant, but its search was not successful" (*id.* at ¶ 39).

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "The proponent of a motion for summary judgment 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" (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]).

Generally, to establish prima facie entitlement to judgment as a matter of law in an action to foreclose a mortgage, a plaintiff must produce the mortgage, the unpaid note, and *admissible evidence* of the borrower's payment default (*see Deutsche Bank Natl. Trust Co. v Karibandi*, 188 AD3d 650, 651 [2d Dept 2020]; *Christiana Trust v Moneta*, 186 AD3d 1604, 1605 [2d Dept 2020]; *Deutsche Bank Trust Co. Ams. v Garrison*, 147 AD3d 725, 726 [2d Dept 2017]). Where a plaintiff establishes prima facie entitlement to judgment, the burden then shifts to the defendant to raise a triable issue of fact as to a bona fide defense to the action (*CitiMortgage, Inc. v Guillermo*, 143 AD3d 852, 853 [2d Dept 2016]; *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 467 [2d Dept 1997]).

Here, although ARCPE submitted copies of the HELOC note and the mortgage, it has not established its prima facie entitlement to summary judgment, an order of reference and a default judgment because it failed to submit admissible proof of the borrowers' payment default. The Second Department has held that affidavit testimony regarding a borrower's default based on a review of business records is inadmissible hearsay and lacks probative value if the business records themselves are not produced (*see Deutsche Bank National Trust Company v Elshiekh*, 179 AD3d 1017, 1021 [2d Dept 2020]; *Bank of New York Mellon v Gordon*, 171 AD3d 197, 208-209 [2d Dept 2019]; *JPMorgan Chase Bank National Assoc. v Grennan*, 175 AD3d 1513, 1516-1517 [2d Dept 2019]). Gordon's affidavit testimony regarding the borrowers' payment default based on his review of unidentified business records is inadmissible because ARCPE failed to produce the business records upon which Gordon's knowledge is based. Consequently, ARCPE's

motion for summary judgment, an order of reference and a default judgment are denied with leave to renew based on papers that provide a proper foundation. Since ARCPE has not established its prima facie right to summary judgment, the burden did not shift to Laura Mason to raise triable issue of fact to preclude summary judgment. Accordingly, it is hereby

ORDERED that ARCPE's motion (mot. seq. one) is denied without prejudice and with leave to renew.

This constitutes the decision and order of the court.

E N T E R,



J. S. C. Hon. Cenceria P. Edwards, CPA