

JPMorgan Chase Bank, N.A. v Donovan

2016 NY Slip Op 30125(U)

January 13, 2016

Supreme Court, Suffolk County

Docket Number: 34118-10

Judge: Glenn A. Murphy

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

COPY

**SUPREME COURT - STATE OF NEW YORK
IAS PART 25 - SUFFOLK COUNTY**

PRESENT: Hon. GLENN A. MURPHY
Acting Justice of the Supreme Court

MOTION DATE 08-07-14/09-10-14
ADJ. DATE 01-13-16
MOT. SEQ #001 MG
#002 XMD

_____^x
JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,
AS PURCHASER OF THE LOANS AND OTHER ASSETS
OF WASHINGTON MUTUAL BANK, FORMERLY
KNOWN AS WASHINGTON MUTUAL BANK, FA
SUCCESSOR BY MERGER TO HOME SAVINGS OF
AMERICA, FSB (THE "SAVINGS BANK") FROM THE
FEDERAL DEPOSIT INSURANCE CORPORATION,
ACTING AS RECEIVER FOR THE SAVINGS BANK AND
PURSUANT TO ITS AUTHORITY UNDER THE
FEDERAL DEPOSIT INSURANCE ACT, 12 U.S.C. § (D)
3415 Vision Drive
Columbus, OH 43219

SHAPIRO, DICARO & BARAK, LLC
Robert S. Markel, Esq.
Attorneys for Plaintiff
175 Mile Crossing Boulevard
Rochester, New York 14624

Plaintiff,

FRED M. SCHWARTZ, ESQ.
Attorney for Defendant Kevin Donovan
317 Middle Country Road Suite 5
Smithtown, New York 11787

-against-

**KEVIN DONOVAN; BOARD OF DIRECTORS OF THE
MASTIC BEACH PROPERTY HOMEOWNERS ASSN;
NEW YORK STATE DEPARTMENT OF TAXATION AND
FINANCE; WASHINGTON MUTUAL BANK F/K/A
WASHINGTON MUTUAL BANK, FA
JOHN DOE** (Said names being fictitious it being the intention
of Plaintiff to designate any and all occupants of premises being
foreclosed, herein, and any parties, corporations or entities, if
any, having or claiming an interest or lien upon the mortgaged
premises.)

Defendants,

_____^x

Upon the following papers numbered 1 to 22 read on this motion for summary judgment and an order of reference; Notice of Motion/~~Order to Show Cause~~ and supporting papers 1-14; Notice of Cross Motion and supporting papers 15-18; ~~Answering Affidavits and supporting papers~~; Replying Affidavits and supporting papers 19-22; ~~Other~~; (and after hearing counsel in support and opposed to the motion) it is,

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers,
the motion is decided as follows: it is hereby

JP Morgan Chase v. Donovan, Kevin
 Index No. 34118-10
 Page No. 2

ORDERED that this motion by the plaintiff JP Morgan Chase Bank, N.A.,(Chase), pursuant to CPLR §3212 for summary judgment on its complaint, to strike the answer and counter-claim of Kevin Donovan and, for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law (RPAPL) §1321, is granted; and it is further

ORDERED that the defendant's cross-motion seeking dismissal and a finding of bad faith is denied and it is further

ORDERED that the plaintiff's application for leave to amend the caption of this action pursuant to CPLR §3025 (b), is granted; and it is further

ORDERED that the caption be amended by changing the name of the plaintiff to read as JP Morgan Chase Bank, N.A. in place and instead of JPMorgan Chase Bank, National Association, as Purchaser of the loans and other assets of Washington Mutual Bank, formerly known as Washington Mutual Bank, FA successor by merger to Home Savings of America, FSB (the "Savings Bank") from the Federal Deposit Insurance Corporation, acting as receiver for the Savings Bank and pursuant to its authority under the Federal Deposit Insurance Act, 12 U.S.C. §(D); and it is further

ORDERED that the caption be amended by dropping the Defendants heretofore mentioned in the Summons and Complaint as "John Doe", all without prejudice to the proceedings therefore had herein; and it is further

ORDERED that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF SUFFOLK

_____^x
JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,

Plaintiff,

INDEX NO. 34118-10

-against-

**KEVIN DONOVAN; BOARD OF DIRECTORS OF THE
 MASTIC BEACH PROPERTY HOMEOWNERS ASSN;
 NEW YORK STATE DEPARTMENT OF TAXATION
 AND FINANCE; WASHINGTON MUTUAL BANK F/K/A
 WASHINGTON MUTUAL BANK, FA**

Defendants.

_____^x

ORDERED that the plaintiff is directed to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court.

This is an action to foreclose a mortgage on premises known as 262 West Forest Road, Mastic Beach, New York. On May 5, 1995, the defendant executed a note and mortgage in favor of Home Savings of America (Home Savings), agreeing to pay the sum of \$72,800.00 at the yearly rate of 6.20 % (percent). The mortgage was recorded on May 19, 1995 in the Suffolk County Clerk's Office. On or about October 3, 1998, as per the office of Thrift Supervision notification, Home Savings merged with Washington Mutual Bank. On or about September 25, 2008 the Washington Mutual Bank assets were acquired by the plaintiff.

A notice of default, dated May 11, 2010, was sent to the defendant stating that he had defaulted on his mortgage loan and that the amount past due was \$ 2646.12. On May 10, 2010, the plaintiff sent by certified and regular mail a ninety (90) day notice pursuant to RPAPL §1304. As a result of the defendant's continuing default, the plaintiff commenced this foreclosure action on September 16, 2010. In its complaint, the plaintiff alleges in pertinent part that the defendants breached their obligations under the terms of the note and mortgage by failing to make monthly payments. The summons and complaint comply with the requirement of RPAPL §1302. The defendants interposed an answer consisting of general denials and twelve (12) affirmative defenses.

The Court's computerized records indicate that a final foreclosure settlement conference was held on June 4, 2014, at which time this matter was referred as an IAS case since it was determined that the defendant was not eligible for CPLR §3408 protections. Thus, there has been compliance with CPLR §3408 and no further settlement conference is required.

The plaintiff now moves for summary judgment on its complaint contending that the defendants failed to comply with the terms of the loan agreement and mortgage and, that the defendant's general denials raised no issues of fact for trial. In support of its motion, the plaintiff submits among other things: the sworn affidavit of Earlena Aunouvet; Vice president of JP Morgan Chase Bank, the holder of the note since May 1, 2011; the affirmations of Robert S. Markel in support of the instant motion together with his affirmation pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the pleadings; the note, mortgage, and assignment of mortgage; notice of default; notices pursuant to RPAPL §§ 1320, 1304 and 1303; affidavits of service for the summons and complaint; and, an affidavit of service for the instant summary judgment motion upon the defendant's counsel.

In opposition, the defendant raises two (2) substantive arguments seeking dismissal of the matter together with general objections to the granting of the plaintiff's motion for summary judgment. The defendant first argument suggests that the plaintiff failed to state a cause of action and that the plaintiff's lack of standing to prosecute the action. Specifically the defendant raised a RPAPL §1304 objection noting that the defendant denied receipt of the notice and that the search of the US Postal Service showed that the proof of the notices transmission was "not found."

It is well settled that proper service of the notice required by RPAPL §1304 is a condition precedent to the commencement of a residential foreclosure action, and is the plaintiff's burden to establish *see Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909, 961 NYS2d 200 [2d Dept 2013]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]; *First*

Natl. Bank of Chicago v Silver, 73 AD3d 162, 899 NYS2d 256 [2d Dept 2010]). Here, the plaintiff satisfied its burden that service of the RPAPL §1304 notice was properly made. The defendants bare and unsubstantiated denial of receipt of the RPAPL §1304 notice was insufficient to rebut the presumption of proper service created by the affidavit of service (*see id.*; *Deutsche Bank Natl. Trust Co. v Hussain*, 78 AD3d 989, 912 NYS2d 595 [2d Dept 2010]). In addition, annexed to the plaintiff's motion is a copy of the RPAPL §1304 notice, the affidavit of Earlena Aunouvet which is based upon her personal knowledge and the plaintiff's records, together with documents submitted in support thereof, established that the RPAPL §1304 notice was properly sent by certified and regular mail. Thus, the defendants mere denial of receipt is insufficient to rebut the Earlena Aunouvet affidavit establishing a proper mailing. (*see Kihl v Pfeffer*, 94 NY2d 118, 700 NYS2d 87 [1999]). The Court notes further that the requirements of RPAPL §1304 are not mandated in this matter as the property involved was investment property and not the defendants primary residence.

The second area of objection surrounds a suggestion that the plaintiff failed to act in good faith while the parties were involved in the CPLR §3408 conference. However, as the address involved with the instant foreclosure was an investment property for the defendant and not his primary residence, the protections of CPLR §3408 do not apply. The defendant does not deny that the property to be foreclosed upon was in fact an investment property, and as such defendant's attempt to obtain the protections of CPLR §3408 are therefore misplaced.

With respect to the remaining affirmative defenses, the defendant has failed to raise any triable issues of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff (*see Cochran. Inv. Co., Inc. v Jackson*, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007] *quoting Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 664 NYS2d 345 [2nd Dept 1997]). Here, answering the defendant has failed to demonstrate, through the production of competent and admissible evidence, a viable defense which could raise a triable issue of fact (*see Deutsche Bank Natl. Trust Co. V Posner*, 89 AD3d 674, 933 NYS2d 52 [2d Dept 2011]). "Motions for summary judgment may not be defeated merely by surmise, conjecture or suspicion" (*Shaw v Time-Life Records*, 38 NY2d 201, 379NYS2d 390 [1975]). Notably, the defendant does not deny that he has not made payments of interest or principal on the note (*see Citibank, N.A. v Souto Geffen Co.*, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]).

In light of the foregoing, the motion for summary judgment is granted against the defendant and the defendant's answer is stricken. The plaintiff's request for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is also granted (*see Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *Bank of East Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

ORDERED, further that this action is hereby referred to Arthur C. Purcell, Esq., with an office located at PO Box 712, Stony Brook, NY 11790 Ph # 631-751-5757, who is hereby appointed Referee to ascertain and compute the total amount due plaintiff for unpaid principal, accrued interest and all (other disbursements advanced as provided for by statute) mortgage costs and expenses other than attorneys' fees secured by the note and mortgage set forth in the complaint, and to examine and report as to whether the mortgage premises can be sold in one parcel; and it is further

JP Morgan Chase v. Donovan, Kevin
Index No. 34118-10
Page No. 5

ORDERED, that plaintiff shall provide the Referee all required documents to compute within sixty (60) days from the date of this Order, and the Referee shall make his/her report no later than thirty (30) days thereafter and that, except for good cause shown, the plaintiff shall move for judgment no later than thirty (30) days of the date of the Referee's Report; and it is further

ORDERED, that by accepting this appointment the Referee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to section 36.2 (c) ("Disqualifications from appointment"), and section 36.2 (d) ("Limitations on appointments based upon compensation"); and it is further

ORDERED, that upon submission of the Referee's Report, plaintiff shall pay pursuant to CPLR §8003 (a) \$250.00 to the Referee as compensation for his/her services, which sum may be recouped as a cost of litigation; and it is further

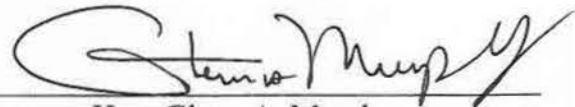
ORDERED, that the Referee is prohibited from accepting or retaining any funds for him/herself or paying funds to him/herself without compliance with Part 36 of the rules of the Chief Administrative Judge; and it is further

ORDERED, that the Referee appointed herein is subject to the requirements of Rule 36.2 (c) of the Chief Judge, and if the Referee is disqualified from receiving an appointment pursuant to the provision of that Rule, the Referee shall notify the appointing Justice forthwith; and it is further

ORDERED, plaintiff is to include in any proposed order for a judgment of foreclosure and sale language complying with the Suffolk County Local Rule for filing of the Foreclosure Action Surplus Monies form contained in Suffolk County Administrative Order #41-13; and it is further

ORDERED, that a copy of this order with Notice of Entry shall be served upon the designated Referee, the owner of the equity of redemption, any tenants named in this action and any other party entitled notice within twenty (20) days of entry and no less than thirty (30) days prior to any hearing before the Referee. The Referee shall not proceed to take evidence as provided herein without proof of such service, which must accompany any application for Final Judgment of Foreclosure and Sale.

Dated: January 13, 2016



Hon. Glenn A. Murphy
Acting Justice Supreme Court

 FINAL DISPOSITION X NON-FINAL DISPOSITION