

U.S. Bank Natl. Assn. v Bethelmie

2012 NY Slip Op 31773(U)

June 29, 2012

Supreme Court, Queens County

Docket Number: 15315/2009

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

U.S. BANK NATIONAL ASSOCIATION, AS
TRUSTEE FOR ASSET-BACKED PASS-THROUGH
CERTIFICATES, SERIES 2006-NC2
3476 Stateview Boulevard
Ft. Mill, SC 29715

Index No.: 15315/2009
Motion Date: 04/12/12
Motion No.: 29
Motion Seq.: 4

Plaintiff,

- against -

THOMAS BETHELMIE, LUCY DUENAS, NEW
CENTURY MORTGAGE CORPORATION, NEW YORK
CITY ENVIRONMENTAL CONTROL BOARD, NEW
YORK CITY TRANSIT ADJUDICATION BUREAU,
ABLAM KLOUSTE, ABLAUI KISSI, NUSHANA
RAGLAN, SHANA FABIEN,

Defendants.

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The following papers numbered 1 to 21 to were read on this cross-
motion by defendant, THOMAS BETHELMIE, for an order dismissing
the plaintiff's complaint for failure to provide the defendant
with a 90-day notice pursuant to RPAPL § 1304; dismissing the
complaint pursuant to CPLR 3211(a)(8) for lack of personal
service upon defendant; or in the alternative permitting the
defendant to file a late answer:

Papers Numbered

Notice of Motion-Affidavits-Exhibits.....	1 - 7
Defendant Bethelmie's Cross-Motion.....	8 - 12
Affirmation in Opposition to Cross-Motion.....	13 - 17
Reply Affirmation.....	18 - 21

This is an action brought to foreclose a mortgage in the
principal sum of \$454,400.00 executed by plaintiff Thomas
Bethelmie, dated July 11, 2006, pertaining to the property

located at 102-30 134th Street, Richmond Hill, N.Y., 11420. The plaintiff asserts that it is the assignee of a mortgage delivered by Bethelmie to New Century Mortgage. Based upon the record before this court, the defendant defaulted on his mortgage when he failed to make his monthly mortgage payments beginning October 1, 2007. Plaintiff subsequently accelerated the defendant's mortgage and brought an action to foreclose its mortgage by filing a lis pendens and a summons and complaint on June 10, 2009. Defendant Bethelmie was purportedly personally served with the summons and complaint on June 13, 2009. Alice A. Nicholson, Esq. filed a notice of appearance on behalf of Thomas Bethelmie dated September 11, 2009.

On November 12, 2009, a settlement conference was held before Referee Florio. Plaintiff appeared as did defendant Bethelmie and his attorney, Alice A. Nicholson. The referee filed an order stating that the defendant is in debt on two mortgages totaling in excess of \$650,000. The case was not settled at that time and the Referee ordered that the matter proceed by Order of Reference.

Defendant failed to interpose an answer in the foreclosure action. Subsequently, pursuant to RPAPL 1321, the plaintiff moved for an order of reference appointing a referee to compute the sums owed. By order dated December 23, 2009 the Court granted the plaintiff's unopposed motion for an order appointing a referee. In support of the Order of Reference, an Affidavit of Merit and Amount Due dated September 1, 2009 was executed by Xee Moua, Vice President of Loan Documentation of Wells Fargo Bank, N.A. the servicer for the plaintiff, setting forth the basis of plaintiff's claims and the amounts due and owing by the defendant.

An Order of Reference was signed by this Court on May 20, 2010 appointing David W. Graber, Esq. as Referee. On May 17, 2011, Mr. Graber executed his Oath and Report of Amount Due.

On July 14, 2011, plaintiff moved for a Judgment of Foreclosure and Sale. Plaintiff requested the court accept and substitute, nunc pro tunc, a new affidavit of merit dated April 15, 2011, executed by David M. Beitz, in place and stead of the previously filed Affidavit of Merit. Plaintiff's counsel, Douglas C. Weinert, Esq. states that the reason for the substitution was that his firm was notified by its client that there may have been irregularities with regard to the execution of the Affidavit of Merit and Amount Due and therefore certification cannot be provided. Counsel states that the client was unable to confirm or deny that the affidavits previously filed with the court in

support of the order of reference were properly reviewed or notarized. Plaintiff's counsel avers that as the prior affidavit was defective, the new Affidavits of Merit should be substituted nunc pro tunc pursuant to CPLR 2001 and CPLR 5019(a)."

Prior to the submission date of the motion for a Judgment of Foreclosure, plaintiff executed a consent to change attorneys dated December 16, 2011, substituting the law firm of Gross, Polowy & Orleans for the law firm of Steven Baum, P.C. On March 2, 2012, plaintiff's incoming attorneys filed a notice withdrawing the motion for Judgment of Foreclosure and Sale. The notice states, however, that the plaintiff will not be discontinuing the action.

On October 24, 2011, prior to the motion for Judgment of Foreclosure being withdrawn, defendant Bethelmie filed a cross-motion opposing the motion for judgment of foreclosure, and in addition, requesting an order dismissing the plaintiff's complaint based upon plaintiff's failure to provide the defendant with a 90-day pre-foreclosure notice pursuant to RPAPL § 1304; dismissing the complaint pursuant to CPLR 3211(a)(8) for lack of personal service upon defendant or in the alternative, permitting the defendant to file a late answer.

On April 12, 2012, the plaintiff's motion was marked withdrawn but the defendant's cross-motion to dismiss the complaint was fully submitted. Plaintiff states that it anticipates submitting a motion to vacate the prior order of reference and submitting a new order of reference on the ground that plaintiff cannot confirm the signatures of the affidavit of merit submitted with the Order of Reference presently on file with the Court.

The basis of the cross-motion is that the plaintiff's complaint should be dismissed for failure to comply with RPAPL §§ 1302 and 1304 which requires the plaintiff, prior to instituting a foreclosure action to give notice to the borrower 90 days prior to the commencement of the action. Citing Aurora Loan Servs., LLC v Weisblum, 85 AD3d 95 [2d Dept. 2011], which states that "proper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of a foreclosure action," defendant contends that the action must be dismissed for failure to comply with this mandatory condition precedent.

Secondly, counsel asserts that Mr. Bethelmie was not personally served in the action. The affidavit of personal service executed by process server, Alan Feldman, on June 19, 2009, states that on June 13, 2009 he personally served Mr.

Bethelmie by serving a copy of the summons and complaint to "Shana Fabien (co-occupant) a person of suitable age and discretion at defendant's dwelling place." Mr. Bethelmie submits an affidavit in opposition, dated October 20, 2011, stating that on the date of the purported service, June 13, 2009, he lived on the second floor of the residence and Ms. Fabien, a tenant, lived on the first floor. He states that he never received notice of the action until he received a notice from the Court to appear for a settlement conference. In the alternative, defendant requests that his default be vacated and that he be granted an extension of time to submit an answer.

Upon review and consideration of the defendant's cross-motion, plaintiff's affirmation in opposition, and defendant's reply thereto, this court finds that the defendant's motion to dismiss the complaint is granted.

RPAPL 1304 provides that at least ninety days before a lender begins an action against a borrower to foreclose on a mortgage, the lender must provide notice to the borrower that the loan is in default and his or her home is at risk (see Aurora Loan Services, LLC v Weisblum, 85 AD3d 95[2d Dept. 2011]). "[P]roper service of the RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of the foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition" (Aurora Loan Services, LLC v Weisblum, 85 AD3d at 107). Because satisfaction of a statutory condition precedent is an element of the claim itself which must be proved by the plaintiff, as opposed to an affirmative defense which must be pled by the defendant (see Matter of Langella v. Front Door Assoc. Inc., 34 Misc. 3d 1212A [Sup. Ct. Suffolk Co. 2012]), plaintiff's failure to show strict compliance requires dismissal (see Aurora Loan Services, LLC v Weisblum, 85 AD3d at 103).

Here, plaintiff's counsel states in her affirmation that on January 19, 2009, a 90 day notice pursuant to CPLR 1304 was sent to the defendant via first class mail and certified mail to his home address located at 102- 30 134th Street, South Richmond Hill, New York. A copy of the notice was attached to the opposition papers. However, plaintiff has failed to submit proof of service of the RPAPL 1304 notice. Counsel's affirmation is not based upon personal knowledge, and thus, does not constitute proper proof of service (see Aurora Loan Services, LLC v Weisblum, 85 AD3d 95[2d Dept. 2011][n] or did (the plaintiff) submit an affidavit of service to establish proper service .[on the borrower] by registered or certified mail and also by first-class mail' to [the borrower's] last known address (RPAPL

1304[2]; also see Wells Fargo Bank, N.A. v Barrett, 33 Misc. 3d 1207A [Sup. Ct. Qns. Co. 2011]).

Accordingly, for all of the aforesaid reasons, it is hereby,

ORDERED, that the defendant's motion to dismiss the complaint for failure to comply with RPAPL 1304 is granted, and it is further,

ORDERED, that the notice of pendency is canceled.

In view of the above, the other branches of the defendant's motion are academic.

Dated: June 29, 2012
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.