

Residential Funding Co., LLC v Lehman
2015 NY Slip Op 31068(U)
June 23, 2015
Supreme Court, Tioga County
Docket Number: 41296
Judge: Eugene D. Faughnan
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At a Special Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tioga County Courthouse, Owego, New York, on the 27th day of April, 2015.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : TIOGA COUNTY

Residential Funding Company, LLC,

Plaintiff,

-vs-

Christopher K. Lehman aka Chrisopher K. Lehman, Citifinancial Services, Inc., United States of America Acting through the IRS, John Doe (said name 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.

APPEARANCES:

PLAINTIFF'S COUNSEL,

McCabe, Weisberg & Conway, P.C.
Suite 210
145 Huguenot Street
New Rochelle, NY 10801

DEFENDANT'S COUNSEL,

Guttman & Reiter
411 North Tioga Street
Ithaca, NY 14850

EUGENE D. FAUGHNAN, J.S.C.

This matter comes before the court on the motion of Residential Funding Company, LLC (hereinafter Plaintiff), dated January 23, 2015 seeking summary judgment and the appointment of a Referee in this foreclosure action. One of the defendants, Christopher K. Lehman¹, through his attorney, filed an affidavit in opposition to the motion.

Factual Background

The current action was commenced on September 23, 2011 by the filing of a summons and complaint. Plaintiff's complaint contends that Defendant executed a Mortgage and Note on September 15, 2006, and that he has defaulted in payments on the loan. Defendant served an Answer on 10/14/11 and an Amended Answer on 10/28/11, raising affirmative defenses of Plaintiff's unclean hands, and Plaintiff's failure to comply with Real Property Actions and Proceedings Law ("RPAPL") §1304. Defendant's Answer requested dismissal of Plaintiff's Complaint.

A foreclosure settlement conference was held, and Plaintiff did not appear. Therefore, a second foreclosure settlement conference was held and at the conclusion, Plaintiff was allowed to proceed in its action.

In January, 2015, Plaintiff filed this motion. In support thereof, Plaintiff submitted an Attorney Affirmation of Shan P. Massand dated January 23, 2015, regarding CPLR 3408 Settlement Conferences, a Certificate of Merit of Natalie Giraldo, Esq., dated January 23, 2015 and an Attorney Affirmation in Support from Shan P. Massand dated January 23, 2015 with attached Exhibits. Plaintiff also included an Affidavit of Indebtedness from Thomas F. Kennedy, dated July 17, 2013.

Defendant submitted an Affidavit of Charles Guttman, Esq., dated March 4, 2015, with Exhibits, in opposition to the motion. Included in the opposing papers were a consent to

¹Although there are multiple defendants, Christopher Lehman will be referred to as "Defendant".

discontinue a prior foreclosure action on this property².

The matter was scheduled for oral argument on the motion on April 27, 2015. Plaintiff did not appear, but Defendant was represented by Attorney Guttman. Following that argument, the Court Reserved Decision on the motion

Discussion and Findings

Plaintiff's moving papers allege that Defendant has breached the terms of the Note and Mortgage by failing to make required monthly payments from November, 2008 to the present. In support of the motion, Plaintiff also submitted evidence that it had provided a 90 day notice to Defendant, as required under RPAPL §1304. That notice was dated February 23, 2010. However, Defendant argues that the February 23, 2010 notice was applicable to the earlier action, which was ultimately discontinued, and that Plaintiff has not provided a new 90 days notice prior to the commencement of the instant action on September 23, 2011.

RPAPL §1304 provides:

Notwithstanding any other provision of law, with regard to a home loan, at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower, including mortgage foreclosure, such lender, assignee 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

RPAPL §1304(1).

Defendant contends that the earlier 90 day notice became ineffective when that case

²The prior action had Index Number 40679, and the Consent to Discontinue the action was dated May 16, 2011.

was discontinued, and that a new notice was required. Defendant did not provide any citations on this exact question, and the Court's independent research did not reveal any New York cases dealing directly with the issue. However, the Court finds the case of *Wells Fargo Bank, N.A. v. Spivak*, 2014 PA Super 250, 104 A.3d 7 (Sup. Ct. 2014) to be instructive. At issue in that case was a provision in Pennsylvania law regarding pre-foreclosure notice requirements, and whether a separate notice was required in a second action. The Court in *Spivak* concluded that a new notice was required. The Pennsylvania law requires that the lender provide notice and state what sum of money must be tendered to cure the default and the time within which the debtor must cure the default. This language is nearly identical to the New York language quoted above, and requires that the notice must state how much is required to be paid and by when. As noted by the Court in *Spivak*, a second notice would be required if a second action is commenced, so that the debtor could potentially cure the default. Here, the notice upon which Plaintiff relies is dated February 23, 2010 and advises the borrower that he "can cure this default by making the payment of 18058.24 by 05/24/2010." That was sufficient notice to permit the Plaintiff to file the earlier action. But once that action was discontinued, the Defendant would have to be entitled, once again, to a 90 day notice. That notice would inform him of the amount needed, and time permitted to cure the default. Clearly, by the time the second action was commenced, the amount owed would have changed, and Defendant could not cure the default by 05/24/10 as that date had passed. A new notice would be required to provide him with the correct information that could cure his default.

The notice requirement under RPAPL §1304 is a condition precedent to bringing a foreclosure action, and the party seeking the foreclosure has the burden to show compliance with the notice requirement. *Pritchard v. Curtis*, 101 AD3d 1502 (3rd Dept. 2012); see *Aurora Loan Services, LLC v. Weisblum*, 85 AD3d 95 (2nd Dept. 2011); see *TD Bank, N.A. v Leroy*, 121 AD3d 1256 (3rd Dept. 2014). The Plaintiff claims that it has complied with RPAPL §1304. "Thus, in support of its motion for summary judgment on the complaint, [the lender] was required to prove its allegations by tendering sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL 1304, and failure to make this showing requires denial of the motion, regardless of the opposing papers" *Aurora Loan Servs., LLC*, 85 AD3d at 106 [citation

omitted]; *TD Bank, N.A., supra*. The Defendant's papers and evidence submitted in opposition to Plaintiff's motion have at least raised material issues as to whether Plaintiff has complied with RPAPL §1304.

Conclusion

Based upon the foregoing discussion, the Court finds that the Plaintiff has failed to establish an entitlement to summary judgment on this record. Therefore, Plaintiff's motion is **DENIED**.

This constitutes the Decision and Order of the Court.

Dated: June 23, 2015
Owego, New York



HON. EUGENE D. FAUGHNAN
Supreme Court Justice