

JPMorgan Chase Bank, N.A. v Nola
2015 NY Slip Op 31373(U)
July 6, 2015
Supreme Court, Suffolk County
Docket Number: 29797/2012
Judge: William B. Rebolini
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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

JPMorgan Chase Bank, National Association,

Index No.: 29797/2012

Plaintiff,

Motion Sequence No.: 005; MD ✓

Motion Date: 3/8/13

Submitted: 5/20/15

- against -

Gregory J. Nola, Nancy S. Nola,
Clerk of the Suffolk County District Court;
Cori J. Nola, "John Does" and "Jane Does", said
names being fictitious, parties intended being
possible tenants or occupants of premises, and
corporations, other entities or persons who claim,
or may claim, a lien against the premises,

Motion Sequence No.: 006; XMD ✓

Motion Date: 3/27/13

Submitted: 5/20/15

Motion Sequence No.: 007; MOT.D ✓

Motion Date: 7/10/14

Submitted: 5/20/15

Defendants.

Motion Sequence No.: 008; XMOT.D ✓

Motion Date: 9/8/14

Submitted: 5/20/15

Attorney for Defendants:

Young Law Group, PLLC
80 Orville Drive, Suite 100
Bohemia, New York 11716

Attorney for Plaintiff:

Stagg, Terenzi, Confusione & Wabnik
401 Franklin Avenue, Suite 300
Garden City, New York 11530

Clerk of the Court

Upon the following papers numbered 1 to 84 read upon these motions for a protective order, to strike the complaint, summary judgment and order of reference, summary judgment dismissing complaint: Notice of Motion and supporting papers, 1 - 10; 43 - 58; Notice of Cross Motion and supporting papers, 25 - 34; 61 - 78; Answering Affidavits and supporting papers, 11 - 13; 35 - 40; 59 - 60; Replying Affidavits and supporting papers, 41 - 42; 79 - 82; 83 - 84; it is

ph

ORDERED that the motions (005, 007) by plaintiff for a protective order and summary judgment, respectively, are consolidated for the purpose of this determination and decided together with the cross motions (006, 008) by defendant Nancy S. Nola to strike the complaint and for summary judgment, respectively; and it is further

ORDERED that the plaintiff's motion (005) seeking a protective order is denied; and it is further

ORDERED that the cross-motion (006) by defendant Nancy Nola seeking an order striking the complaint pursuant to CPLR 3126 is denied; and it is further

ORDERED that the plaintiff's motion (007) for summary judgment on its complaint against defendants Gregory J. Nola, Cori J. Nola, and Nancy S. Nola, dismissing the counterclaims of Nancy S. Nola, fixing the defaults as against the non-appearing, non-answering defendants, appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is determined as set forth herein; and it is further

ORDERED that the cross-motion (008) by defendant Nancy Nola for summary judgment dismissing the complaint as asserted against her, a judgment declaring that the underlying mortgage transaction, mortgage and promissory note dated July 25, 2008 is void and for related relief is determined as set forth herein.

This is an action to foreclose a residential mortgage on property known as 7 Stonington Circle, Wheatley Heights, New York ("the premises"). On July 25, 2008, defendant Gregory J. Nola, individually, and as power of attorney for his mother, defendant Nancy S. Nola, executed a note in favor of plaintiff, agreeing to pay the sum of \$381,500. On said date, defendants Gregory J. Nola and his wife Cori J. Nola, executed a mortgage in the principal sum of \$381,500 on the subject property, in favor of plaintiff. The mortgage was recorded on September 23, 2008 with the Suffolk County Clerk's Office.

A notice of default was sent by plaintiff on October 6, 2011 to the defendants stating that they had defaulted on their mortgage loan and that the amount past due was \$58,191.72 which could be cured by payment within thirty days. The notice further stated that if payment was not made within 90 days legal action may be commenced. As a result of defendants' continuing default, plaintiff commenced this foreclosure action on September 25, 2012. In its complaint plaintiff alleges in pertinent part that the defendants breached their obligations under the terms of the note and mortgage by failing to make their monthly installment due on April 1, 2010 and subsequent payments thereafter. The defendants Gregory J. Nola and Cori J. Nola asserted a verified answer on or about November 8, 2012 containing general denials and nine affirmative defenses. Defendant Nancy S. Nola asserted a verified answer on or about November 9, 2012 containing general denials, six affirmative defenses and four counterclaims, three of which allege violation of banking laws and General Business Law § 349, seeking damages. The fourth counterclaim alleges that the power of attorney was not valid and seeks damages.

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The court's computerized records indicate that foreclosure settlement conferences were held on March 19, 2013 and June 20, 2013. After no settlement was reached, the matter was referred to an IAS Part on the ground that no settlement occurred. Thus, there has been compliance with CPLR 3408 and no further settlement conferences are required.

Plaintiff now moves for summary judgment on its complaint, for an order striking the answer by Gregory and Cori Nola, striking the answer of Nancy Nola and dismissing the counterclaims, granting a default judgment against the non-answering defendants, appointing a referee to compute the sums due and for costs on the motion. Defendant Nancy S. Nola cross-moves for summary judgment dismissing the complaint as asserted against her. In addition, plaintiff moves for a protective order regulating defendant Nancy Nola's notice to admit, and defendant Nancy Nola cross-moves for an order striking the complaint pursuant to CPLR 3126.

“[I]n an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default” (see *Republic Nat'l. Bank of N.Y. v O'Kane*, 308 AD2d 482, 482, 764 NYS2d 635 [2d Dept 2003]; *Village Bank v Wild Oaks Holding*, 196 AD2d 812, 601 NYS2d 940 [2d Dept 1993]). Once a plaintiff has made this showing, the burden then shifts to defendant to produce evidentiary proof in admissible form sufficient to require a trial on their defenses (see *Aames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]; *Household Fin. Realty Corp. v Winn*, 19 AD3d 545, 796 NYS2d 533 [2d Dept 2005]). Real Property Actions and Proceedings Law (“RPAPL”) § 1304 provides, in part, that a 90-day notice shall not apply if the borrower no longer occupies the residence as the borrower's principal dwelling.

Here, plaintiff has established its entitlement to summary judgment against the answering defendants as such papers included copies of the note and mortgage, a copy of the defendant Nancy Nola's durable power of attorney, the unpaid note together with due evidence of defendants' default in payment under the terms of the loan documents, and personal affidavits of plaintiff's employees (see CPLR 3212; RPAPL §1321; *Neighborhood Hous. Servs. of N.Y. City, Inc. v Hawkins*, 97 AD3d 554, 947 NYS2d 321 [2d Dept 2012]; *Baron Assoc., LLC v Garcia Group Enters., Inc.*, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]). The durable power of attorney reveals that defendant Nancy Nola appointed defendant Gregory Nola as her power of attorney with authority to enter into real estate transactions. The statutory short form also states “this power is limited to the executing of any and all documents in connection with the loan from JP Morgan Chase Bank NA, Loan # 113522840 for property address 7 Stonington Circle, Wheatly [*sic*] Heights, NY 11798.” The affidavits of Ms. Brooks, Ms. Buckalew, and Ms. Denney, employees of plaintiff, validate the original note and mortgage, that the plaintiff was in possession of the note and mortgage at all times prior to the commencement of the action as the original lender, that the defendants defaulted on their obligation to pay the loan, were served with notice of default, and have failed to cure the default.

It was thus incumbent upon the answering defendants to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's *prima facie* showing or in support of the affirmative defenses asserted in their answer or otherwise available to them (see *Flagstar Bank v Bellafiore*,

94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Grogg v South Road. Assocs., L.P.*, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]). Defendants Gregory Nola and Cori Nola have failed to raise a triable issue of fact. Their counsel's affirmation opposition is rejected as not probative in a motion for summary judgment since he has no personal knowledge of the facts (see *Zuckerman v New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Defendants Gregory Nola's and Cori Nola's answer is insufficient, as a matter of law, to defeat plaintiff's motion (see *Citibank, N.A. v Souto Geffen Co.*, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]). Notably, these defendants do not deny that they defaulted on the mortgage payments. Accordingly, the plaintiff's summary judgment motion is granted as against defendants Gregory Nola and Cori Nola.

In support of her cross-motion for summary judgment dismissing the complaint as asserted against her, defendant Nancy Nola has demonstrated her entitlement to judgment as a matter of law (see *Zuckerman v New York, supra*). Ms. Nola states in her personal affidavit, among other things, that she was advised by her attorney that subdivisions (A) and (R) were not initialized on the durable power of attorney form as required by the statute in effect at the time it was executed. The form explicitly required her to place her initials in designated spaces on the form to indicate her "choices" with respect to the specific powers granted to her agents. Inasmuch as the subdivisions were marked with an "x" Ms. Nola avers that the durable power of attorney was not valid. In addition, defendant Nancy Nola contends that she was not aware that she was the co-borrower on the loan, and was not served with the 90-day notice pursuant to RPAPL 1304.

In opposition to the cross-motion, the plaintiff submits the personal affidavit of Tisha Denney, Assistant Secretary for plaintiff, and several loan applications. Ms. Denney avers that multiple loan modification applications were submitted bearing the signatures of Gregory Nola and Nancy Nola. These applications were dated August 26, 2009/September 8, 2009; November 17, 2009/November 22, 2009; January 18, 2011; February 11, 2011; March 1, 2011 and March 31, 2011, and annexes copies of the applications. In addition, plaintiff states that Nancy Nola's allegations that she was unaware of the loan transaction are belied by her continued involvement with the loan when she signed several applications to modify the loan. In addition, Nancy Nola admitted that she submitted her financial information to the plaintiff to help her son through the loan modification process. The power of attorney specifically gave power to apply and close on the contemplated loan as by its explicit language. Moreover, plaintiff contends that it was not required to serve the 90-day notice upon Nancy Nola inasmuch as the premises was not her primary residence. The Court agrees.

However, with regard to the validity of the power of attorney, "if the designated spaces are not initialed, no authority is granted" (*Matter of Marriott*, 86 AD3d 943, 927 NYS2d 269 [4th Dept 2011]). Therefore, regardless of whether Nancy Nola executed the loan applications, since she did not effectively authorize Gregory Nola to execute the note as her power of attorney, the power of attorney is fatally defective and Nancy Nola cannot be held liable for payment on the note. Accordingly, defendant Nancy Nola's cross-motion for summary judgment dismissing the complaint as asserted against her is granted, and the plaintiff's motion for summary judgment as against defendant Nancy Nola is denied.

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In sum, plaintiff's motion for summary judgment on its complaint is granted only against defendants Gregory Nola and Cori Nola. Defendant Nancy Nola's cross-motion is granted solely to the extent that the complaint is dismissed as asserted against her, and all other requested relief is denied. The remaining motion by plaintiff for a protective order and defendant Nancy Nola's cross-motion to strike the complaint are denied as academic.

Based upon the foregoing, the plaintiff's motion for summary judgment is granted solely against the defendants Gregory Nola and Cori Nola, whose answer is dismissed. That branch of the motion seeking to fix the defaults as against the remaining defendants who have not answered or appeared herein is granted. Plaintiff's request for an order of reference appointing a referee to compute the amount due to plaintiff under the note and mortgage is also granted (*Green Tree Servicing LLC v Cary*, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]). Defendant Nancy Nola's cross-motion for summary judgment is granted only to the extent that the complaint is dismissed as asserted against her, the action is severed and shall otherwise continue against the remaining defendants. In addition, the Court finds that further discovery is not necessary at this juncture and denies the plaintiff's motion for a protective order and the defendants' cross-motion to strike the complaint as academic.

The proposed order appointing a referee to compute pursuant to RPAPL 3121, as modified by the Court, is signed simultaneously herewith.

Dated:

7/6/2015


 HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION