

HSBC Mtge. Corp. (USA) v Kahan

2024 NY Slip Op 32195(U)

June 27, 2024

Supreme Court, Kings County

Docket Number: Index No. 25207/2007

Judge: Derefim B. Neckles

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part FRP-2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, 11201 on the 27th day of June, 2024.

P R E S E N T:

HON. DEREKIM B. NECKLES,
Acting Justice.

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HSBC MORTGAGE CORPORATION (USA),

Plaintiff,

- against -

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FAIGA KAHAN; KED; BROOKLYN UNION
GAS/KEYSPAN ENERGY; CITY OF NEW YORK
ENVIRONMENTAL CONTROL BOARD;
DEPARTMENT OF HOUSING, PRESERVATION
AND DEVELOPMENT OF THE CITY OF NEW
YORK; BERNARD GANZ;

Defendants.

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Upon review of the submitted papers in this proceeding for an order granting summary judgment, plaintiff HSBC Mortgage Corporation (USA) moves (in mot. seq. 8) for an order: (1) granting summary judgment in favor of plaintiff and against defendant Faiga Kahan; (2) granting a default judgment against all the non-appearing defendants; (3) substituting U.S. Bank as the named plaintiff and amending the caption to reflect said amendment; and (4) appointing a referee to compute the amount of the mortgage debt owed to plaintiff pursuant to RPAPL § 1321. Defendant cross-moves (in mot. seq 9) for an order (1) granting summary judgment in defendant's favor and dismissing this action and denying plaintiff's motion; and (2) for such other relief as the court deems just and proper.

Background

On July 25, 2001, defendant Faiga Kahan (defendant), executed a note in favor of HSBC Mortgage Corporation (USA) (plaintiff), in the principal amount of \$412,500.00. As security for the note, defendant executed a mortgage in favor of plaintiff, securing the property known as 279 Rutledge Street, Brooklyn, New York 11211. The subject mortgage provides in Section 22 several contractual conditions precedent for the lender to foreclose. Specifically, the lender is required to send a notice concerning default at least 30-days prior to the commencement of a foreclosure action.

On July 10, 2007, plaintiff commenced a foreclosure action against defendant. Thereafter, plaintiff filed for an order of reference and default judgment against defendant, and by order dated January 18, 2008, the court granted plaintiff's motion. Defendant filed an order to show cause seeking to vacate the default judgment, and on September 25, 2009, the court granted defendant's order to show cause and allowed for defendant to file a late answer. In an answer with counterclaims filed on or about October 23, 2009, defendant raised several affirmative defenses, including the failure to comply with conditions precedent before commencing this action.

Subsequently, on June 21, 2010, plaintiff filed its first summary judgment motion, but withdrew that motion on or about September 26, 2011. Then, on January 20, 2015, plaintiff filed its second attempt for a motion for summary judgment. However, by an order dated December 8, 2016, the court denied plaintiff's motion. In opposition to plaintiff's second motion for summary judgment, defendant submitted an affidavit attesting to the

fact that she never received the 30-Day Default Notice as required under the subject mortgage. Thereafter, on May 22, 2019, plaintiff filed its third attempt for a motion for summary judgment. On February 24, 2020, the court denied plaintiff's motion because the "plaintiff failed to prove that it complied with the default notice requirements of the mortgage." Plaintiff now files the instant motion as their fourth attempt for summary judgment.

Discussion

The proponent of a summary judgment motion 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 (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 501 N.E.2d 572, 574 (1986)). The plaintiff has establish its prima facie entitlement to foreclosure as a matter of law by submitting evidence of the execution of the note and mortgage and defendant's failure to make payment in accordance with its terms (*FGH Realty Credit Corp. v. VRD Realty Corp.*, 647 N.Y.S.2d 229 (1996)). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v. City of New York*, 427 N.Y.S.2d 595).

Here, plaintiff makes its fourth attempt for summary judgment. While plaintiff contends that they have established a prima facie entitlement to foreclosure by submitting evidence of the note and mortgage and the defendant's default, there still remains the issue

of whether the plaintiff complied with the default notice requirements of the mortgage. Plaintiff submits an affidavit from Ann M. Kennedy, the assistant vice president of HSBC, stating that she has access to and is familiar with the business records as well as personal knowledge of the manner in which these business records are created and maintained. Kennedy refers to HSBC's electronic notes with respect to the servicing of loans, stating that the entry dated April 19, 2007, indicates that the default letter was mailed to the defendant. Like the plaintiff in *HSBC Mtge Corp. v. Gerber*, the unsubstantiated and conclusory statements in the servicer's affidavit that the required notice of default was sent in accordance with the terms of the mortgage, combined with the copy of the notice of default, failed to establish that the required notice was mailed to the defendant (100 A.D.3d 966, 967 (2012)). Additionally, the log submitted was insufficient to establish that the notice was mailed.

Additionally, successive motions for summary judgment are disfavored and should only be entertained when they are substantively valid and the granting of the motion will further the end of justice and eliminate unnecessary burden on the resources of the courts (*Graham v. City of New York*, 24 N.Y.S.3d 754).

Here, plaintiff is making its fourth attempt at summary judgment, and still fails to establish that it complied with default notice requirements of the mortgage. Plaintiff fails to prove that this motion is substantively valid.

Accordingly, it is

ORDERED that plaintiff's motion is granted to the extent that U.S Bank is the named plaintiff and the caption is amended to reflect that, however the remainder of the motion is denied.

ORDERED that defendant's cross-motion is denied in its entirety.

This constitutes the decision and order of the court.

E N T E R,



HON. DEREKIM B. NECKLES
A. J. S. C.
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A.J.S.C.