SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

Wachovia Bank, National Ass'n v. Carcano

106 A.D.3d 724, 965 N.Y.S.2d 516 (N.Y. App. Div. 2d Dep't 2013) · Decided May 1, 2013

SUMMARY

The Appellate Division affirmed an order granting summary judgment to Wachovia Bank in a mortgage foreclosure action and appointing a referee to compute the amount due. The court held that the bank established the mortgage, unpaid note, and default, and that the defendants failed to raise a triable issue of fact; it also rejected their challenges to the mortgage default notices.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Department
WRITING FOR THE COURT	Skelos, J.E.; Balkin, J.; Cohen, J.; Miller, J.
JURISDICTION	New York
DECIDED	May 1, 2013
DISPOSITION	affirmed
PROCEDURAL POSTURE	Defendants appealed, as limited by their brief, from an order granting the plaintiff summary judgment on the mortgage-foreclosure complaint against them and appointing a referee to compute the amount due.
STANDARD OF REVIEW	De novo review of summary judgment; the movant must demonstrate prima facie entitlement to judgment as a matter of law, after which the opposing party must raise a triable issue of fact.
PRECEDENTIAL VALUE	Published appellate decision
PARTIES	Patricia Ann Carcano, also known as Patricia M. Carcano, Felix M. Carcano v. Wachovia Bank, National Ass'n

TOPICS

foreclosure · mortgages · summary judgment · appellate procedure · remedies

PRACTICE AREAS

real estate · mortgage foreclosure · civil procedure · appellate procedure

QUESTIONS PRESENTED

1. Whether the plaintiff established prima facie entitlement to summary judgment in a mortgage-foreclosure action by producing the mortgage, unpaid note, and evidence of default.
2. Whether the appellants raised a triable issue of fact concerning a bona fide defense to foreclosure.
3. Whether the notices of default complied with the mortgage provisions requiring notice of the right to present defenses in a foreclosure action.
4. Whether a notice providing at least ninety days to cure could satisfy the mortgage's requirement that the cure date be at least thirty days after the notice, and whether the later May 2009 notice independently satisfied the mortgage.

HOLDINGS

1. A mortgage plaintiff establishes prima facie entitlement to summary judgment by producing the mortgage, the unpaid note, and evidence of default. Wachovia made that showing.
2. The appellants failed to raise a triable issue of fact as to a bona fide defense to the foreclosure action.
3. The notices of default satisfied the mortgage provision requiring notice that the borrowers had the right to present defenses in a foreclosure action.
4. The appellants' challenge to the November 2008 notice lacked merit because the mortgage required only that the cure date be at least thirty days from the date of notice; in any event, the May 2009 notice satisfied the mortgage's requirements.

KEY QUOTATIONS

> *"The plaintiff demonstrated its prima facie entitlement to judgment as a matter of law on that branch of its motion which was for summary judgment on the complaint insofar as asserted against the defendants Patricia Ann Carcano, also known as Patricia M. Carcano, and Felix M. Carcano (hereinafter together the appellants), by producing a " 'mortgage, the unpaid note, and evidence of default' ""* (725)

> *"In opposition, the appellants failed to raise a triable issue of fact as to a bona fide defense to the action"* (725)

FACTUAL BACKGROUND

The action concerned foreclosure of a mortgage securing an unpaid note. Wachovia Bank submitted the mortgage, unpaid note, and evidence of default, including notices of default sent to the appellants. The appellants argued that the notices did not satisfy the mortgage's notice provisions, including the required notice of defenses and the specified thirty-day cure period, but the court concluded that the notices complied.

PROCEDURAL HISTORY

Wachovia Bank brought an action to foreclose a mortgage. The Supreme Court, Westchester County, granted the bank's motion for summary judgment against Patricia Ann Carcano and Felix M. Carcano and appointed a referee to compute the amount due. The defendants appealed from those portions of the order, and the Appellate Division affirmed.

DISPOSITION

affirmed

CASES CITED

- Wells Fargo Bank, N.A. v. Webster, 61 A.D.3d 856, 856 (2009)
- Republic Natl. Bank of N.Y. v. O'Kane, 308 A.D.2d 482, 482 (2003)
- Capital One, N.A. v. Knollwood Props. II, LLC, 98 A.D.3d 707, 707-708 (2012)
- Swedbank, AB, N.Y. Branch v. Hale Ave. Borrower, LLC, 89 A.D.3d 922, 923 (2011)
- HSBC Bank USA, NA v. Schwartz, 88 A.D.3d 961, 961 (2011)
- Rossrock Fund II, L.P. v. Osborne, 82 A.D.3d 737, 737 (2011)
- Citibank, N.A. v. Van Brunt Props., LLC, 95 A.D.3d 1158, 1159 (2012)
- Cochran Inv. Co., Inc. v. Jackson, 38 A.D.3d 704, 705 (2007)
- Mahopac Natl. Bank v. Baisley, 244 A.D.2d 466, 467 (1997)
- Indymac Bank, F.S.B. v. Kamen, 68 A.D.3d 931, 931 (2009)
- First Trust Natl. Assn. v. Meisels, 234 A.D.2d 414 (1996)
- Fortune Limousine Serv., Inc. v. Nextel Communications, 35 A.D.3d 350, 353 (2006)
- Moet II v. McCarthy, 229 A.D.2d 876 (1996)

OPINION

PER CURIAM.

In an action to foreclose a mortgage, the defendants Patricia Ann Carcano, also known as Patricia M. Carcano, and Felix M. Carcano appeal, as limited by their brief, from so much of an order of the Supreme Court, Westchester County (Giacomo, J.), *725entered November 17, 2011, as granted those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against them and to appoint a referee to compute the amount due to it.

Ordered that the order is affirmed insofar as appealed from, with costs. The plaintiff demonstrated its prima facie entitlement to judgment as a matter of law on that branch of its motion which was for summary judgment on the complaint insofar as asserted against the defendants Patricia Ann Carcano, also known as Patricia M. Carcano, and Felix M. Carcano (hereinafter together the appellants), by producing a " 'mortgage, the unpaid note, and evidence of default' " (Wells Fargo Bank, N.A. v Webster, 61 AD3d 856, 856 [2009], quoting Republic Natl.

Bank of N.Y. v O'Kane, 308 AD2d 482, 482 [2003] [internal quotation marks omitted]; see Capital One, N.A. v Knollwood Props. II, LLC, 98 AD3d 707, 707-708 [2012]; Swedbank, AB, N.Y. Branch v Hale Ave. Borrower, LLC, 89 AD3d 922, 923 [2011]; HSBC Bank USA, NA v Schwartz, 88 AD3d 961, 961 [2011]; Rossrock Fund II, L.P. v Osborne, 82 AD3d 737, 737 [2011]).

In opposition, the appellants failed to raise a triable issue of fact as to a bona fide defense to the action (see Citibank, N.A. v Van Brunt Props., LLC, 95 AD3d 1158, 1159 [2012]; Cochran Inv. Co., Inc. v Jackson, 38 AD3d 704, 705 [2007]; Mahopac Natl. Bank v Baisley, 244 AD2d 466, 467 [1997]). Contrary to the appellants' contention, the notices of default provided to them by the plaintiff satisfied the provision in the subject mortgage requiring that such notice inform the appellants that they "have the right in any lawsuit for Foreclosure and Sale to... present any... defenses that [they] may have" (see Indymac Bank, F.S.B. v Kamen, 68 AD3d 931, 931 [2009]; First Trust Natl.

Assn. v Meisels, 234 AD2d 414 [1996]; see also Fortune Limousine Serv., Inc. v Nextel Communications, 35 AD3d 350, 353 [2006]; cf. Moet II v McCarthy, 229 AD2d 876 [1996]). The appellants further contend that the plaintiff cannot rely on a notice of default sent in November 2008 to satisfy the requirements of the subject mortgage since it constitutes a "90-day notice," which is not a substitute for compliance with the "30-day notice" specified in the subject mortgage.

This contention lacks merit inasmuch as the subject mortgage requires that the notice must provide that the date by which the default must be corrected "will be at least 30 days from the date on which the notice is given" (emphasis added).

In any event, the provisions of the subject mortgage were satisfied by a notice of default sent to the appellants in May 2009. *726Accordingly, the Supreme Court properly granted those branches of the plaintiffs motion which were for summary judgment on the complaint insofar as asserted against the appellants and to appoint a referee to compute the amount due to it.

Skelos, J.E, Balkin, Cohen and Miller, JJ., concur.