## 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)