DOCKET NO. DBD-CV-196031453-S

GEMINI SOLUTIONS, LLC

V.

DANIEL MANZI, ET AL.

SUPERIOR COURT

J. D. OF DANBURY

AT DANBURY

APRIL 25, 2024

OFFICE OF THE CLERK
2024 APR 25 A 11:41

MEMORANDUM OF DECISION

I

PROCEDURAL HISTORY

This mortgage foreclosure action was commenced on May 21, 2019 by the plaintiff, Gemini Solutions, LLC, against the defendants, Daniel Manzi, Vincent Manzi, Florence Manzi, Joan Katherine Manzi aka Joni Manzi, Cuda & Associates, LLC, Danbury Hospital, Danbury Office of Physician Services, P.C., and Donaldson, Kershaw and Norris, LLC, relative to the property known as 46 West Whisconier Road, Brookfield, Connecticut, (the "property"). The defendants were defaulted for their failure to appear either before trial or at the time of trial.[1]

The defendant Daniel Manzi[2] filed an answer and three special defenses. More specifically as to the special defenses, the defendant alleged that 1) he was not provided with proper notice of the default and thereby the plaintiff failed to meet a condition precedent for the pursuit of the action, 2) the action is barred by the statute of limitations under General Statutes § 52-577, and 3) the action is barred by the doctrine of laches. Docket Entry #116. The remaining appearing defendants filed an answer. Docket Entry #117. Thereafter, the plaintiff filed an affidavit as to compliance with the Emergency Mortgage Assistance Program notice. Docket Entry #127. The

[1] During the course of this matter, counsel for the appearing Manzi defendants advised the court that the defendant Joan Katherine Manzi had died prior to the commencement of the action. However, no notice of her death or of the interest of her estate or her heirs with respect to the property was ever made part of the pleadings.

[2] In that Daniel Manzi was the sole party to the note and mortgage, he will hereafter be referred to as the defendant.

matter proceeded to trial on February 8, 2024 at which time the plaintiff and the defendant appeared, testified and presented evidence on the plaintiff's complaint seeking a judgment of foreclosure and other relief. With the consent of the court, the matter was then continued for the purpose of the parties providing evidence of the appraised value of the property which was done by stipulation on March 7, 2024. Docket Entry #132 and #135.

II

FACTS

On or about January 24, 2005, Daniel Manzi executed and delivered a promissory note (the "note") in favor of National City Bank in the original principal amount of $200,000. Plaintiff's exhibit 1. To secure the note, the defendant executed on the same date a mortgage deed (the "mortgage") as to the property in favor of National City Bank. Plaintiff's exhibit 2. The property was solely owned by him. Following the execution of the mortgage, PNC Bank National Association, became the successor by merger with National City Bank.[3] Plaintiff's exhibit 3. PNC then assigned the mortgage to Gemini Solutions, LLC on August 15, 2013. Id.

The parties have stipulated to the admission of plaintiff's appraisal as a full exhibit. Based on the appraisal, the fair market value of the property has been established as $1,210,000 without any breakdown given as to the value between the land and the improvements.

The plaintiff presented the testimony of Cathy Cray who is the managing member of Gemini Solutions, LLC. She credibly testified that the plaintiff was the holder of the note as it had been purchased by the plaintiff in a pool of notes of which this note was a part of. The note was

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[3] As of the time of the commencement of the action, the plaintiff's mortgage had been subordinated to a mortgage that had been assigned from Washington Mutual Bank, FA to Deutsche Bank National Trust Company as Trustee for WAMU 2005-AR16. That mortgage was dated October 12, 2005. See plaintiff's complaint paragraphs 3 and 10 (c), and defendant's answer to the complaint admitting those allegations.

obtained and kept in the ordinary course of business of the plaintiff. There were no allonges with the note as of the time of the acquisition.

The last payment made by the defendant toward the loan was May 22, 2011. As a result of the default in his payment obligations, the plaintiff issued a demand letter dated July 8, 2013 seeking payment of the balance due under the loan. A follow up letter was sent on November 13, 2013 which gave notice of the default, acceleration of the debt and made a demand for payment.[4] Plaintiff's exhibit 5. A copy of the note and mortgage along with the calculation of the debt was included. There was no response from the defendant to either correspondence. Thereafter, the plaintiff initiated a foreclosure action entitled, *Gemini Solutions, LLC* v. *Daniel Manzi, et al.*, Superior Court, judicial district of Danbury, Docket No. CV-14-6014585-S.

On September 28, 2018, the plaintiff, through its counsel, again mailed by registered mail to the defendant a letter that he was in default of the loan and advised him how and by when he could cure the default. Plaintiff's exhibit 6. The letter also contained a separate notice as to the availability of the Emergency Mortgage Assistance Program (EMAP). Id. The defendant acknowledged his receipt of this letter. Because the original foreclose action had not included all necessary notices or the EMAP notice, the plaintiff withdrew that action on May 9, 2019 and then filed the present action. The court finds that the notices and information provided through the September 28, 2018 letter were in compliance with the plaintiff's obligations under paragraph 8 of the mortgage deed and note for purposes of the present action. Paragraph 9 of the mortgage deed also allowed the recovery of advances, attorney's fees and other collection costs due to non-

[4] The face page of the letter showed a date of November 19, 2012, while the second page showed a date of November 19, 2013. Cathy Cray credibly testified that the date on the face page was a typographical error and that the correct date was November 19, 2013.

payment.[5] The plaintiff has also filed an affidavit as part of the present action as to its compliance with the EMAP notice. Docket Entry #127.

Cathy Cray presented evidence of the calculation of the debt claimed due through January 31, 2024 in the amount of $427,054.07.[6] Plaintiff's exhibit 8. Based on the testimony of the parties and the other evidence presented at trial, the court finds that of this amount, certain charges are not allocable to this action. Reviewing the breakdown of the amount claimed as testified to and as submitted in writing, the court finds that several of the appraisal fee expenses were for appraisals prior to the institution of this action. Therefore, of the $1,525 claimed, only $375 shall be allowed for the January 4, 2021 appraisal and $375 for the February 9, 2024 appraisal. Plaintiff's exhibit 7. Further, the attorney's fee of $9,704.43 is disallowed. As noted by the defendant, the billing statement of the plaintiff's counsel submitted into evidence by the plaintiff, states that it was opened November 19, 2013 and was last active on November 15, 2022 which covers a period of time over which both foreclosure matters were pending. The payment history

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[5] "8. REMEDIES ON DEFAULT. In addition to any other remedy available under the terms of this Security Instrument, Lender may accelerate the Secured Debt and foreclose this Security Instrument in a manner provided by law if Mortgagor is in default. In some instances, federal and state law will require Lender to provide Mortgagor with notice of the right to cure, or other notices and may establish time schedules for foreclosure actions.

At the option of the Lender, all or any part of the agreed fees and charges, accrued interest and principal shall become immediately due and payable, after giving notice if required by law, upon the occurrence of a default or anytime thereafter. . . . By not exercising any remedy on Mortgagor's default, Lender does not waive Lender's right to later consider the event a default if it happens again.

9. EXPENSES; ADVANCES ON COVENANTS; ATTORNEYS' FEES; COLLECTION COSTS. If Mortgagor breaches any covenant in this Security Instrument, Mortgagor agrees to pay all expenses Lender incurs in performing such covenants or protecting its security interest in the Property. Such expenses include, but are not limited to, fees incurred for inspecting, preserving, or otherwise protecting the Property and Lender's security interest. These expenses are payable on demand and will bear interest from the date of payment until paid in full at the highest rate of interest in effect as provided in the terms of the Secured Debt. Mortgagor agrees to pay all costs and expenses incurred by Lender in collecting, enforcing or protecting Lender's rights and remedies under this Security Instrument. This amount may include, but is not limited to, attorneys' fees, court costs, and other legal expenses. . . ."

[6] Plaintiff's exhibit 8 shows a debt due of $427,054.07 broken down as follows. The principal balance is $196,290.87, arrears and past due interest of $183,741.33, late charges of $24,376.24, advances of $12,941.20. As to the advances, they were broken down further as follows: mailing costs, $11.20, appraisals $1,525, in-house boarding fees of $695, in-house servicing $10,710, attorney's fees of $9,704.43.

does not distinguish which charges were for which foreclosure action. Further, the copy of the billing statement provided, while showing the month and date of service, only shows the digit "1" with respect to the year in which the service was provided making it impossible to determine which entry applies to which action. Id. Cathy Cray herself testified that the last payment made to plaintiff's counsel for his representation of the plaintiff was on November 14, 2018 which was more than six months prior to the commencement of this action (and while the last action was still pending). Lastly, in closing argument, plaintiff's counsel conceded that he has not issued a billing statement to the plaintiff since the commencement of the present action but argued that the court could set a reasonable fee for counsel's representation of the plaintiff. While the court recognizes that counsel did work on behalf of the plaintiff in this matter, it declines to set a fee. Without any evidence of a fee agreement or an amount paid to plaintiff's counsel the court would only be able to speculate as to the amount of time expended by counsel, the hourly rate (or other fee arrangement) quoted to the client and other expenses incurred by counsel during his course of the representation of the plaintiff in this matter. The court is unable to assess and apply most of the applicable factors for an award of attorney's fees as set forth in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974) as adopted in *Francini* v. *Riggione*, 193 Conn. App 321, 219 A.3d 452 (2019).

In disallowing the claim for attorney's fees and a portion of the appraisal fees, the court finds the debt to be $416,574.64.

III

STATEMENT OF LAW

The plaintiff bears the burden of proof of its claim by a preponderance of the evidence. Should the plaintiff meet its burden, where there is sufficient equity in the property, a foreclosure

by sale is appropriate. *Caliber Home Loans* v. *Zeller*, 205 Conn. App. 642, 259 A.3d 1 (2021); General Statutes 49-24.

IV

ANALYSIS

The court finds the testimony of the plaintiff's witness to be credible along with the exhibits submitted for the court's consideration. The plaintiff has established by a preponderance of the evidence that the proper party has sued and been sued, and that it was the mortgagee by assignment as well as the current holder and possessor of the note at the time of the institution of this action. It also established that all notices necessary prior to suit had been issued to the defendant. The fair market value of the property has been established by stipulation and the debt of the property has been found as cited above. All non-appearing parties are defaulted for their failure to appear. The appearing parties, other than Daniel Manzi, are defaulted for their failure appear for trial. Therefore, all necessary defaults have entered in the case.

In his defense, the defendant presented testimony contesting the fact that the plaintiff was a proper holder of the note. He raised an issue as to whether there was a proper allonge of the note. "[A] holder of a note is presumed to be the owner of the debt . . . ." (Internal quotation marks omitted.) *Equity One, Inc.* v. *Shivers*, 310 Conn. 119, 135, 74 A.3d 1225 (2013). However, "[a] defending party does not carry its burden by merely identifying some documentary lacuna in the chain of title that *might* give rise to the possibility that a party other than the foreclosing party owns the debt." (Emphasis in the original; internal quotation marks omitted.) *JP Morgan Chase Bank, N.A.* v. *Simoulidis*, 161 Conn. App. 133, 146, 126 A.3d 1098 (2015), cert. denied, 320 Conn. 913, 130 A.3d 266 (2016). While that case dealt with the burden on a party's defense of a summary judgment motion, the reasoning with respect to his defense is the same. By producing the note,

the court was able to presume that the foreclosing party is the rightful owner or holder of the note and had standing to bring its action. While the defendant can rebut such a presumption, he has the burden to prove that the holder is not the owner of the debt. Id. The court considers the defendant's testimony on this issue to be unavailing as the plaintiff has established through the credible testimony of Cathy Cray along with the documentary evidence provided, that it was the owner, holder and possessor of the note at the time it instituted the present action.

Also, the defendant testified claiming that he had made payments to the plaintiff which belied its claim of a debt due. However, no physical evidence of payments such as copies of checks, bank statements, mailings, were presented to support the testimony. Additionally, through the claim of having been made to the plaintiff, the court can reasonably infer that the defendant acknowledged he owed a debt to it through the existence of a note.

The defendant did raise three special defenses to the plaintiff's claim which the court must address. The first alleges that he was not provided proper notice of default and acceleration pursuant to the terms of the note and mortgage and therefore the plaintiff did not comply with a condition precedent for the commencement of this action. The court finds otherwise. The September 28, 2019 letter and notice to the defendant was in compliance with those obligations set forth in the note and specifically paragraphs 8 and 14 of the mortgage.[7] Also, the defendant has failed to identify or present evidence of any specific provision of the mortgage, note, or any regulation or statute that the plaintiff failed to comply with.

His second special defense contends that the action is barred by the statute of limitations under General Statutes § 52-577 which states: "No action founded upon a tort shall be brought

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[7] Paragraph 14 of the mortgage states: "Unless otherwise required by law, any notice shall be given by delivering it or by mailing it by first class mail to the appropriate party's address on page 1 of this Security Instrument, or to any other address designated in writing. Notice to one mortgagor will be deemed to be notice to all mortgagors."

but within three years from the date of the act or omission complained of." The court finds the defendant has not established this defense for two reasons. First, the action brought by the defendant is not a tort action and therefore the statute does not apply. Second, the action was timely commenced as there was an ongoing default by the defendant and the plaintiff had not waived any rights to bring an action for non-payment.

As to the third defense, that the action is barred by laches, the defendant has not met his burden to establish this defense. To establish a defense of laches a party must first prove that there was a delay that was inexcusable, and second, that the delay prejudiced the defendant. The burden is on the party alleging laches to establish such a defense. *Wells Fargo Bank, N.A.* v. *Fitzpatrick*, 190 Conn. App. 231, 244, 210 A.3d 88, cert. denied, 332 Conn. 912, 209 A.3d 1232 (2019). Like the other special defenses, the defendant has failed to establish this defense by a preponderance of the evidence. Also, paragraph 8 of the mortgage states in part that "[b]y not exercising any remedy on Mortgagor's default, [plaintiff] does not waive [plaintiff's] right to later consider the event a default if it happens again." In effect the plaintiff has reserved the right to bring an action at any point in time the defendant was in default even if the default has been longstanding.

V

CONCLUSION

The court finds that the plaintiff has met its burden of proof, all necessary defaults have been entered, the proper party has sued and been sued, and the plaintiff is the current holder of the note and mortgage. The debt and fair market value of the property have been found as previously referenced. While the plaintiff has sought a judgment of strict foreclosure, the defendant seeks a foreclosure by sale. A judgment of foreclosure by sale is entered given the substantial amount of equity in the property between the fair market value and the amount of the debt found. Though a

prior mortgage in right was referenced in the complaint, there was no evidence presented as to any other outstanding debt secured by the property. A total appraisal fee of $750 for two appraisals is awarded. No title search fee has been claimed. No attorney's fee is awarded for the reasons set forth earlier.

The sale date is August 17, 2024 at 12:00 p.m. on the premises with an inspection of the premises beginning at 10:00 a.m. The defendant shall cooperate with the committee appointed hereafter to provide access to the interior of the property during the inspection period to provide potential bidders an opportunity to view the property.

A $121,000 deposit in cash, bank check, or certified check is required to bid, however the deposit shall be waived if the plaintiff is the successful bidder. The plaintiff may email or fax in its bid prior to the sale.

Advertisement shall be in the Danbury News Times on August 9, 2024 and, August 11, 2024. Advertisement of the sale shall also be posted on the Judicial website.

A sign shall be posted on the premises no earlier than, July 18, 2024 and no later than July 28, 2024 at a cost not to exceed $350.

Atty. Stephanie Nickse, 83 Wooster Heights Rd., Suite 204, Danbury, Connecticut 06810 is appointed as committee. No committee fees or expenses are to be incurred more than 45 days prior to the date of sale.

Guy Rocco, Atlas Appraisal, 100 Canoe Brook Rd., Trumbull, Connecticut 06611 is appointed as appraiser with a return of appraisal due on or before August 7, 2024.

So ordered.

Shaban, J.