

**Brooklyn Fed. Savs. Bank v Hempstead Realty II**

2011 NY Slip Op 33037(U)

November 15, 2011

Supreme Court, Nassau County

Docket Number: 5146/11

Judge: Denise L. Sher

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**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER  
Acting Supreme Court Justice

BROOKLYN FEDERAL SAVINGS BANK,

Plaintiff,

- against -

TRIAL/IAS PART 32  
NASSAU COUNTY

Index No.: 5164/11  
Motion Seq. No.: 01  
Motion Date: 08/17/11

HEMPSTEAD REALTY II, LLC, SAM STRULOVITCH,  
LAZAR STRULOVITCH, HEMPSTEAD ALP, LLC and  
"JOHN DOE No. 1" through "JOHN DOE No. 10," the  
names being fictitious and unknown to Plaintiff, the person  
or parties intended being certain other tenants, occupants,  
persons or entities, if any, having or claiming an interest in  
or lien upon the premises described in the complaint,

Defendants.

**The following papers have been read on this motion:**

	Papers Numbered
Notice of Motion, Affidavit, Affirmation and Exhibits and Memorandum of Law	1
Affirmation in Opposition, Affidavit and Exhibits and Memorandum of Law	2
Reply Affidavit and Memorandum of Law	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiff Brooklyn Federal Savings Bank ("Brooklyn Federal") moves, pursuant to CPLR § 3212, for an order granting it summary judgment; for an order dismissing the Affirmative Defenses interposed by defendants in their Answer; for an order excising from the caption of this

action the names "John Doe No. 1" through "John Doe No. 10" without prejudice to any of the proceedings heretofore had herein or to be had herein; for an order declaring that any remaining defendants and all persons claiming under any of them, and every other person, firm or corporation whose right, title, conveyance or encumbrance is subsequently recorded, are forever barred and foreclosed from all estate, right, title, interest, claim or lien or equity of redemption in the mortgaged property identified in the Verified Complaint; for an order referring this action to some suitable person, as referee, to ascertain and compute the amount due to plaintiff Brooklyn Federal for principal, interest, penalties and attorneys' fees due pursuant to the mortgage sales as of July 8, 2008 and related loan documents, which mortgage is being foreclosed in this action, and all other amounts due and advances made by plaintiff Brooklyn Federal, and to examine and report whether the mortgaged property, together with the buildings and improvements thereon (if any) and the chattels and intangibles therein and appertaining thereto, can be sold either as one or as several parcels according to the law; for an order providing that, upon the confirmation of the report said referee, plaintiff Brooklyn Federal have a judgment of foreclosure and sale with respect to the mortgage, in the usual form; for an order directing that from the proceeds of such sale plaintiff Brooklyn Federal be paid the amounts due, with interest thereon to the time of such payment in accordance with the mortgage and the note dated July 8, 2008, and the costs and expenses of this action, including attorneys' fees, with appropriate interest thereon, so far as the proceeds of such sale property applicable thereto will pay the same; and for an order declaring that following the sale of the mortgaged premises, defendants Sam Strulovitch, Lazar Strulovitch and Hempstead ALP, LLC will be jointly and severally liable to pay the deficiency due which may remain unsatisfied after applying all of the proceeds of such sale pursuant to the direction of

the Court. Defendants oppose the motion.

By "Mortgage and Security Agreement" dated July, 2008, plaintiff Brooklyn Federal advanced the principal sum of \$7 million to defendant-mortgagor Hempstead Realty II, LLC ("Hempstead Realty"). The debt was unconditionally guaranteed by co-defendants Stan Strulovitch, Lazar Strulovitch and Hempstead ALP, LLC. *See* Plaintiff's Affidavit in Support Exhibit A ¶¶ 1-2, 16-18, 20-21.

As extended, the note was due to mature in early February of 2011, at which time payment of principal and all accrued and/or unpaid interest was due and owing. *See* Plaintiff's Affidavit in Support Exhibit A ¶¶ 29-30, 36-37. There is no material dispute that defendant Hempstead Realty failed to make the required payments upon the note's maturity in February of 2011. *See* Plaintiff's Affidavit in Support Exhibit A ¶¶ 27-38; Plaintiff's Affidavit in Support Exhibit 9.

By notices dated February, 2, 2011 and April 1, 2011, plaintiff Brooklyn Federal notified defendant Hempstead Realty that it was in default and later separately notified defendant-guarantors Stan Strulovitch, Lazar Strulovitch and Hempstead ALP, LLC of the main borrower's default, demanding payment of the sums then owed. *See* Plaintiff's Affidavit in Support Exhibits 9 and 10. Although certain post-default payments were made, neither defendant Hempstead Realty, nor the defendants-guarantors Stan Strulovitch, Lazar Strulovitch and Hempstead ALP, LLC, remitted the full amount owed under either the underlying note or the guarantees.

Thereafter, and based upon the above-referenced facts, plaintiff Brooklyn Federal commenced the within foreclosure action, interposing four causes of action seeking, *inter alia*, a judgment of foreclosure and deficiency judgments as against defendant-borrower Hempstead

Realty and defendant-guarantors Stan Strulovitch, Lazar Strulovitch and Hempstead ALP, LLC. See Plaintiff's Affidavit in Support Exhibit A ¶¶ 47-61. Defendants have answered, denied the material allegations of the Verified Complaint and interposed a series of Affirmative Defenses. See Plaintiff's Affidavit in Support Exhibit D ¶¶ 30-51.

Plaintiff Brooklyn Federal now moves for summary judgment on its claims as against the defendants on the mortgage and guarantee.

Plaintiff Brooklyn Federal has established its *prima facie* entitlement to judgment against defendant mortgagor Hempstead Realty and individual defendants-guarantors Stan Strulovitch, Lazar Strulovitch and Hempstead ALP, LLC upon submission of the mortgage, the unpaid note and unconditional guarantees together with evidence of defendants' default. See *HSBC Bank USA, NA v. Schwartz*, \_\_\_ A.D.3d \_\_\_, 2011 WL 5085755 (2d Dept. 2011); *JPMorgan Chase Bank, N.A. v. Galt Group, Inc.*, 84 A.D.3d 1028, 923 N.Y.S.2d 643 (2d Dept. 2011); *Emigrant Mortg. Co., Inc. v. Turk*, 71 A.D.3d 721, 895 N.Y.S.2d 722 (2d Dept. 2010); *Neighborhood Housing Services of New York City, Inc. v. Meltzer*, 67 A.D.3d 872, 889 N.Y.S.2d 627 (2d Dept. 2009).

In opposition to the motion, the burden shifted to defendants to produce evidentiary proof in admissible form sufficient to require a trial of their defenses and claims. See *Jin Sheng He v. Sing Huei Chang*, 83 A.D.3d 788, 921 N.Y.S.2d 128 (2d Dept. 2011); *Washington Mut. Bank, F.A. v. O'Connor*, 63 A.D.3d 832, 880 N.Y.S.2d 696 (2d Dept. 2009); *JPMorgan Chase Bank, N.A. v. Agnello*, 62 A.D.3d 662, 878 N.Y.S.2d 397 (2d Dept. 2009). Defendants have failed to do so. See *Jin Sheng He v. Sing Huei Chang*, *supra* at 789; *Constructamax, Inc. v. CBA Associates, Inc.*, 294 A.D.2d 460, 742 N.Y.S.2d 555 (2d Dept. 2002).

Among other things, plaintiff Brooklyn Federal was not obligated to supply defendants

with a notice of default or a 10-day grace period before electing to hold them in default and/or prior to commencing the within action on the mortgage and note. *Cf.*, *Gullery v. Imburgio*, 74 A.D.3d 1022, 905 N.Y.S.2d 221 (2d Dept. 2010). *See* Plaintiff's Affidavit in Support Exhibit 1 ¶¶ 21, 22, 24; Plaintiff's Affidavit in Support Exhibit 2 ¶ 3.1 at 2. Further, a review of the record belies defendants' additional assertions that, *inter alia*, plaintiff Brooklyn Federal entered into a binding or unconditional agreement to, *inter alia*, extend the maturity date of the debt (*see* Defendants' Rosenberg Affidavit in Support Exhibit F; *JPMorgan Chase Bank, N.A. v. Galt Group, Inc.*, *supra* at 1029-1030), or that its conduct was otherwise inequitable, improper or supportive of an unclean hands defense *See generally* *Bruno v. Sant'elia*, 52 A.D.3d 556, 860 N.Y.S.2d 589 (2d Dept. 2008); *Clifton Country Rd. Assoc. v. Vinciguerra*, 195 A.D.2d 895, 600 N.Y.S.2d 982 (3d Dept. 1993).

Nor have defendants' speculative assertions raised questions of fact with respect to the issue of standing. *See Mortgage Electronic Registration Systems, Inc. v. Schuh*, 48 A.D.3d 838, 852 N.Y.S.2d 403 (3d Dept. 2008); *Flushing Sav. Bank, FSB v. New Canaan Realty Inc.*, \_\_\_ Misc.3d \_\_\_, 2011 WL 2604447 (Supreme Court, Nassau County, 2011). The Court notes that plaintiff Brooklyn Federal was the originating lender – not an assignee – and was therefore the lender to whom the defendants-borrower-guarantors originally delivered the loan documents, as the materials submitted in support of the motion establish. Under these circumstances, plaintiff Brooklyn Federal sufficiently demonstrated its current ownership of the subject loan documents in its supporting papers.

Defendants' remaining Affirmative Defenses and claims are framed in conclusory fashion and/or fail to generate triable issues of fact. *See generally* *Signature Bank v. Galit Properties, Inc.*, 80 A.D.3d 689, 915 N.Y.S.2d 138 (2d Dept. 2011); *JPMorgan Chase Bank, N.A. v. Agnello*,

*supra*; *Flushing Sav. Bank, FSB v. New Canaan Realty Inc.*, \_\_\_ Misc.3d \_\_\_, 2011 WL 2604447 (Supreme Court, Nassau County 2011). It is settled that defenses which merely plead conclusions of law without supporting facts are insufficient and should be stricken. *See Becher v. Feller*, 64 A.D.3d 672, 884 N.Y.S.2d 83 (2d Dept. 2009); *Bruno v. Sant'elia, supra*. Similarly, “[a]verments merely stating conclusions, of fact or of law, are insufficient” to “defeat summary judgment” *Banco Popular North America v. Victory Taxi Management, Inc.*, 1 N.Y.3d 381, 774 N.Y.S.2d 480 (2004), *quoting Mallad Constr. Corp. v. County Fed. Sav. & Loan Assn.*, 32 N.Y.2d 285, 344 N.Y.S.2d 925 (1973), “as is reliance upon surmise, conjecture, or speculation.” *Morgan v. New York Telephone*, 220 A.D.2d 728, 633 N.Y.S.2d 319 (2d Dept. 1995).

Additionally, on the facts and circumstances presented here, *i.e.*, where judgment has been already been granted on plaintiff Brooklyn Federal’s foreclosure cause of action (*see* Plaintiff’s Affidavit in Support Exhibit A ¶¶ 59-61), the inclusion of both foreclosure and deficiency judgment claims in the Verified Complaint does violate the election of remedies provisions set forth in RPAPL § 1301. *See e.g. Fargo Bank, NA v. Ghobrial*, \_\_\_ Misc.3d \_\_\_, 2011 WL 4838917 (Supreme Court, Westchester County, 2011) *See generally Aurora Loan Servs., LLC v. Spearman*, 68 A.D.3d 796, 890 N.Y.S.2d 124 (2d Dept. 2009). *Cf. Greystone Bank v. 15 Hoover Street, LLC*, \_\_\_ Misc.3d \_\_\_, 2010 WL 4026387 (Supreme Court, Nassau County, 2010).

Lastly, defendants have failed to demonstrate that plaintiff Brooklyn Federal’s motion for summary judgment should be denied pending further discovery. Notably, “the mere hope that further discovery would yield evidence of a triable issue of fact is not a basis for denying summary judgment.” *JPMorgan Chase Bank, N.A. v. Agnello, supra* at 663. *See also Martinez v.*

[\* 7]  
*Kreychmar*, 84 A.D.3d 1037, 923 N.Y.S.2d 648 (2d Dept. 2011); *Woodard v. Thomas*, 77 A.D.3d 738, 913 N.Y.S.2d 103 (2d Dept. 2010).

The Court has considered the defendants' remaining contentions and concludes that they are insufficient to defeat the plaintiff Brooklyn Federal's motion for summary judgment.

Accordingly, it is,

**ORDERED** that plaintiff Brooklyn Federal's motion, pursuant to CPLR § 3212, for an order granting it summary judgment and dismissing the Affirmative Defenses interposed by defendants in their Answer, is hereby **GRANTED**. And it is further

**ORDERED** that the names "John Doe No.1" through "John Doe No. 10" are hereby excised from the caption of this action without prejudice to any of the proceedings heretofore had herein or to be had herein. And it is further

**ORDERED** that any remaining defendants and all persons claiming under any of them, and every other person, firm or corporation whose right, title, conveyance or encumbrance is subsequently recorded, are forever barred and foreclosed from all estate, right, title, interest, claim or lien or equity of redemption in the mortgaged property identified in the Verified Complaint. And it is further

**ORDERED** that this action be and the same hereby is referred to Michael Cardello, III, Esq., Fiduciary No. 221577, having an office at 400 Garden City Plaza, Garden City, New York 11530, telephone number (516) 873-2000, as Referee, to ascertain and compute the amount due to plaintiff for principal, interest, penalties, except for attorney's fees, fees due pursuant to the mortgage sales as of July 8, 2008 and related loan documents, which mortgage is being foreclosed in this action, and all other amounts due and advances made by plaintiff and to examine and report whether the mortgaged property, together with the buildings and

improvements thereon (if any) and the chattels and intangibles therein and appertaining thereto, can be sold either as one or as several parcels according to the law, and to report to the Court with all convenient speed. And it is further

**ORDERED** that, pursuant to CPLR § 8003(a), in the discretion of the Court, a fee of \$350.00 shall be paid to the Referee for the computation stage and upon the filing of his report. And it is further

**ORDERED** that, by accepting this appointment, the Referee appointed herein is subject to the requirements of Rule 36.2(c) of the Chief Judge, and, if the Referee is disqualified from receiving an appointment pursuant to the provision of that Rule, the Referee shall notify the Appointing Judge forthwith. And it is further

**ORDERED** that, by accepting this appointment, the Referee certifies that he is in compliance with Part 36 Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to, Section 36.2(c) (“Disqualifications from appointment”) and Section 36.2(d) (“Limitations on appointments based upon compensation”). And it is further

**ORDERED** that the Referee is prohibited from accepting or retaining any funds for himself or paying funds to himself without compliance with Part 36 of the Rules of the Chief Judge. And it is further

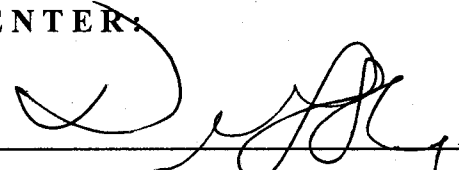
**ORDERED** that, upon the confirmation of the report said referee, plaintiff Brooklyn Federal may have a judgment of foreclosure and sale with respect to the mortgage, in the usual form. And it is further

**ORDERED** that, from the proceeds of such sale plaintiff Brooklyn Federal be paid the amounts due, with interest thereon to the time of such payment in accordance with the mortgage and the note dated July 8, 2008, and the costs and expenses of this action, including attorneys’

fees, with appropriate interest thereon, so far as the proceeds of such sale property applicable thereto will pay the same. And it is further

**ORDERED** that following the sale of the mortgaged premises, defendants Sam Strulovitch, Lazar Strulovitch and Hempstead ALP, LLC will be jointly and severally liable to pay the deficiency due which may remain unsatisfied after applying all of the proceeds of such sale pursuant to the direction of the Court.

This constitutes the Decision and Order of this Court.

ENTER:  
  
DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York  
November 15, 2011

**ENTERED**  
NOV 18 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE