

**Emigrant Savs. Bank v Philip Sia, Citibank N.A.**

2012 NY Slip Op 31854(U)

July 11, 2012

Supreme Court, Suffolk County

Docket Number: 18021-10

Judge: Daniel Martin

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SUPREME COURT OF THE STATE OF NEW YORK  
I.A.S PART 9 SUFFOLK COUNTY

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PRESENT:  
HON. DANIEL MARTIN

\_\_\_\_\_  
EMIGRANT SAVINGS BANK,

Plaintiff,

-against-

PHILIP SIA, CITIBANK N.A.,

"John Doe 1-10", said names being fictitious and unknown to plaintiff the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in, or lien upon the premises described in the complaint,

Defendants.

PLAINTIFF'S ATTY:

STAGG, TERENCE, CONFUSIONE & WABNIK, LLP  
Attorneys for Plaintiff  
401 Franklin Avenue  
Suite 300  
Garden City, NY 11530

DEFENDANT'S ATTY:

HOWARD B. ARBER, ESQ.  
Attorney for Defendant  
Philip Sia  
64 Hilton Avenue  
Hempstead, N. Y. 11550

\_\_\_\_\_ X

The following named papers have been read on this motion:

Order to Show Cause/Notice of Motion	X
Cross-Motion	
Answering Affidavits	X
Replying Affidavits	

ORDERED that this motion (002) by the plaintiff for, inter alia, an order pursuant to CPLR 3212 awarding partial summary judgment in its favor against the defendant, Philip Sia, and striking his answer and affirmative defenses; appointing a referee to compute amounts due; and amending the caption is granted; and it is further

ORDERED that DAVID T. REILLY with an office at 170 Old Country Rd.  
TE 308, Mineola N.Y. is appointed Referee to ascertain and compute the amount due upon the note and mortgage documents which this action was brought to foreclose, and to examine and report whether the mortgaged property can be sold in parcels; and it is further

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**ORDERED** that pursuant to CPLR 8003 (a) the Referee be paid the sum of \$250.00 for the computation of the amount due the plaintiff; and it is further

**ORDERED** that by accepting this appointment the Referee certifies that he/she is in compliance with Part 36 of the 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 caption of this action hereinafter appear as follows:

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF SUFFOLK

EMIGRANT SAVINGS BANK, Plaintiff, -against- PHILIP SIA, CITIBANK, N.A., NICK WOODHEAD, JAMIE TOWNSON, DEBORAH SIA, Defendants; and it is further

**ORDERED** that the plaintiff shall serve a copy of this order with notice of entry upon counsel for the defendants within forty-five (45) days of the date of this order and thereafter file the affidavit(s) of service with the Clerk of the Court; and it if further

**ORDERED** that the plaintiff shall submit with the proposed judgment of foreclosure, an affidavit or affirmation of non-military status of the defendant, Philip Sia, pursuant to 50 USCS 521 et. seq. along with a supporting printout from the Department of Defense Manpower Data Center (*see, Deutsche Bank Trust Co. Ams. v Day*, 2011 NY Misc LEXIS 6227, 2011 WL 7014817, 2011 NY Slip Op 33455U [Sup Ct, Suffolk County, Dec. 15, 2011, Pitts, J.]; *Central Mtge. Co. v Acevedo*, 34 Misc3d 213, 934 NYS2d 285 [Sup Ct, Kings County 2011]).

The plaintiff commenced this residential foreclosure action by the filing of a summons and complaint on May 13, 2010 alleging that Philip Sia (hereinafter the defendant mortgagor) defaulted in repaying a note in the principal sum of \$495,000.00. The note dated March 9, 2005 provides for the repayment of principal and interest to Emigrant Mortgage Company, Inc. (Emigrant Mortgage) in initial monthly installments in the approximate sum of \$3,376.78 for thirty years commencing on May 1, 2005. As security for the loan, the defendant mortgagor gave Emigrant Mortgage a mortgage also dated March 9, 2005 against the real property known as 143 Dickinson Avenue, East Northport, NY 11731. Subsequent to the mortgage transaction, Emigrant Mortgage allegedly transferred the subject mortgage together with the note to the plaintiff by assignment dated March 9, 2005 and recorded on March 25, 2005.

In the complaint, the plaintiff alleges, inter alia, that the defendant mortgagors allegedly defaulted under the terms of the note and mortgage by failing to make monthly payments on June 1, 2009 despite due demand; and that, as a result, the plaintiff has elected to declare due and owing the entire unpaid balance of principal, together with applicable interest. Issue was joined by the defendant mortgagor's answer dated May 26, 2010. In his answer, the defendant mortgagor admits some of the allegations in the complaint, denies other allegations and asserts four affirmative defenses: lack of personal jurisdiction; lack of standing;

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failure to comply with provisions of the contract between the parties which form a condition precedent; and failure to comply with the procedures required by statute prior to commencement. The remaining defendants have not appeared or answered the complaint.

By Order dated December 17, 2010 (Costello, J.), the plaintiff's prior motion for an order of reference was denied, without prejudice to resubmit, due to the plaintiff's failure to provide an affirmation in compliance with Administrative Order dated October 20, 2010. The plaintiff now moves for, inter alia, an order pursuant to CPLR 3212 awarding partial summary judgment in its favor against the defendant mortgagor and striking his answer and affirmative defenses; appointing a referee to compute amounts due; and amending the caption. In response, the defendant mortgagor has filed opposition papers.

A plaintiff in a mortgage foreclosure action establishes a prima facie case for summary judgment by submission of the mortgage, the mortgage note, bond or obligation, and evidence of default (*see, Valley Natl. Bank v Deutsche*, 88 AD3d 691, 930 NYS2d 477 [2d Dept 2011]; *Wells Fargo Bank v Karla*, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; *Wash. Mut. Bank, F.A. v O'Connor*, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]). The burden then shifts to the defendant to demonstrate "the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff" (*Capstone Bus. Credit, LLC v Imperia Family Realty, LLC*, 70 AD3d 882, 883, 895 NYS2d 199, 201 [2d Dept 2010]). In the instant case, the plaintiff produced the note, the mortgage, the assignment, evidence of nonpayment, the notice of default and the 90-day notice pursuant to RPAPL § 1304 (*see, Fed. Home Loan Mtge. Corp. v Karastathis*, 237 AD2d 558, 655 NYS2d 631 [2d Dept 1997]; *First Trust Natl. Assn. v Meisels*, 234 AD2d 414, 651 NYS2d 121 [2d Dept 1996]). The plaintiff also submitted, inter alia, an affidavit from an officer of the plaintiff whereby it is alleged that the mortgage and note were assigned to plaintiff prior to commencement of this action (*see, U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]). As the plaintiff duly demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted to the defendant mortgagor (*see, HSBC Bank USA v Merrill*, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]). Accordingly, it was incumbent upon the defendant mortgagor to produce evidentiary proof in admissible form sufficient to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action (*see, Argent Mtge. Co., LLC v Mentesana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]; *Aames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]).

In opposition to the motion, the defendant mortgagor has offered no arguments in support of any of his pleaded defenses, except the third and fourth affirmative defenses (*see, Argent Mtge. Co., LLC v Mentesana*, 79 AD3d 1079, *supra*; *Citibank, N.A. v Souto Geffen Co.*, 231 AD2d 466, 647 NYS2d 467 [1<sup>st</sup> Dept 1996]; *see generally, Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]). In instances where a defendant fails to oppose a motion for summary judgment, the facts, as alleged in the moving papers, may be deemed admitted and there is, in effect, a concession that no question of fact exists (*see generally, Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 369 NYS2d 667 [1975]; *Argent Mtge. Co., LLC v Mentesana*, 79 AD3d 1079, *supra*; *Madison Park Invs., LLC v Atlantic Lofts Corp.*, 33 Misc 3d 1215A, 941 NYS2d 538 [Sup Ct. Kings County 2011]). Further, the affirmative defenses set forth in the answer, which are factually unsupported by an affidavit from the defendant mortgagor, are without apparent merit (*see, Neighborhood Hous. Servs. N.Y. City, Inc. v Meltzer*, 67 AD3d 872, *supra*). Moreover, the affirmation of the defendant mortgagor's attorney, who has no personal knowledge of the operative facts,

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is without probative value and insufficient to defeat the motion (*e.g.*, *Zuckerman v City of New York*, 49 NY2d 557, 563, 427 NYS2d 595 [1980]; *2 N. St. Corp. v Getty Saugerties Corp.*, 68 AD3d 1392, 1395, 892 NYS2d 217 [3d Dept 2009]).

With respect to the first affirmative defense based upon lack of personal jurisdiction, the defendant mortgagor failed to move to dismiss the complaint upon such ground within 60 days of service of a copy of his answer. As a consequence, the defense is deemed waived (*see*, CPLR 3211 [e]; *Reyes v Albertson*, 62 AD3d 855, 878 NYS2d 623 [2d Dept 2009]; *Dimond v Verdon*, 5 AD3d 718, 773 NYS2d 603 [2d Dept 2004]).

The defendant mortgagor's second affirmative defense alleging that the plaintiff does not have standing is without merit (*see*, *LaSalle Bank, N.A. v Pace*, 31 Misc3d 627, 919 NYS2d 794 [Sup Ct, Suffolk County 2011]; *Deutsche Bank Natl. Trust Co. v Garvin*, 29 Misc3d 1215A, 918 NYS2d 397 [Sup Ct, Queens County 2010]; *cf.*, *U.S. Bank Natl. Assn. v Madero*, 80 AD3d 751, 915 NYS2d 612 [2d Dept 2011]). The plaintiff has refuted this defense and demonstrated by proof in admissible form, that it is the owner of the note and mortgage under an assignment of both, executed prior to the commencement of this action. The standing of the plaintiff was thus fixed at the time of commencement of this action.

The third affirmative defense, which the Court deems to be a defense based upon the plaintiff's alleged failure to provide the defendant mortgagor with a 30-days notice of default under the mortgage, lacks merit (*see*, *J & A Vending, Inc. v J.A.M. Vending Inc.*, 303 AD2d 370, 757 NYS2d 52 [2d Dept 2003]; *Eastern Sav. Bank v Aguirre*, 30 Misc3d 1230A, 924 NYS2d 308 [Sup Ct, Queens County 2011]; *Eastern Sav. Bank v Bottone*, 2008 NY Misc LEXIS 7793, 2008 WL 542717, 2008 NY Slip Op 30456U [Sup Ct, Suffolk County, Feb. 13, 2008, Cohalan, J.]). In her affidavit, Tara Cardoza, an assistant vice president of the plaintiff alleges that the notice of default was sent to the defendant mortgagor, and the plaintiff has submitted a copy of same with this motion. The notice reflects that it was addressed to the defendant mortgagor and sent by certified and regular mail to the defendant mortgagor at the address provided by him for notice, the subject property. The notice sent to the defendant mortgagor advised him that the plaintiff may require immediate payment in full, and was in accordance with the mortgage terms relative to the contents of the notice (*see*, the plaintiff's Exhibit "B," mortgage at paragraph 22[b][4]). In any event, the complaint clearly alleges that the plaintiff accelerated the mortgage debt by "declar[ing] the entire amount due" (*see*, *Albertina Realty Co. v Rosbro Realty Co.*, 258 NY 472, 180 NE 176 [1932]; *Logue v Young*, 94 AD2d 827, 463 NYS2d 120 [3d Dept 1983]; *Citimortgage, Inc. v Aorta*, 28 Misc3d 1220A, 2010 NY Slip Op 51401U [Sup Ct, Queens County, Aug. 4, 2010, Markey, J.]).

The fourth affirmative defense, which the Court deems to be a defense based upon the plaintiff's alleged failure to provide the defendant mortgagor with a 90-day notice in accordance with RPAPL § 1304, is without merit (*cf.*, *Aurora Loan Services, LLC v Weisblum*, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]; *Wells Fargo Bank, N.A. v Barrett*, 33 Misc3d 1207A, 938 NYS2d 230 [Sup Ct, Queens County 2011]). In this case, the complaint and the affidavit of merit contain allegations of compliance with Section 1304 of the RPAPL, and, in the affirmation of regularity, counsel avers that the 90-day notice, which is on law firm letterhead, was sent to the defendant mortgagor as required by RPAPL § 1304. The plaintiff also submitted a copy of the 90-day notice dated January 27, 2010 which was allegedly sent to the defendant mortgagor at the subject property by regular and certified mail. Additionally, the plaintiff submitted a copy

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of the certified mailing of the 90-day notice which was returned to the plaintiff as “unclaimed” and “unable to forward.” Under the facts presented here, the bare and unsubstantiated denial of receipt of the 90-day notice made by counsel for the defendant mortgagor is insufficient to rebut the presumption of proper service by made the plaintiff (*cf.* ***Aurora Loan Services, LLC v Weisblum***, 85 AD3d 95, *supra*; ***HSBC Bank USA, N.A. v Abass***, 32 Misc3d 1207A, 923 NYS2d 760 [Sup Ct, Queens County 2011]).

In any event, the defendant mortgagor failed to submit an affidavit by himself in opposition to this motion stating that the debt was incurred primarily for personal, family or household purposes, or that he intended to occupy the subject property as his principal dwelling (*see*, RPAPL § 1304 [3]; *see generally*, ***New York Community Bank v Holland***, 2012 NY Misc LEXIS 789, 2012 WL 756599, 2012 NY Slip Op 30411U [Sup Ct, Suffolk County, Feb. 15, 2012, Martin, J.]; ***Meyerson Capital X LLC v Kats***, 33 Misc3d 1017, 935 NYS2d 257 [Sup Ct, Kings County 2011]). Pursuant to RPAPL § 1304(3), the 90-day period specified in RPAPL § 1304(1) does not apply “if the borrower has filed an application for the adjustment of debts of the borrower or an order for relief from the payment of debts, or if the borrower no longer occupies the residence as the borrower’s principal dwelling” (***Butler Capital Corp. v Cannistra***, 26 Misc3d 598, 607, 891 NYS2d 238, 245 [Sup Ct, Suffolk County, 2009]). Along with the mortgage and note, the defendant mortgagor gave Emigrant Mortgage a 1-4 Family Rider (Assignment of Rents) dated March 9, 2005 whereby section “6” of the mortgage concerning occupancy of the property by the defendant mortgagor is deleted (*see generally*, ***Eastern Sav. Bank v Aguirre***, 30 Misc3d 1230A, *supra*). Further, when the defendant mortgagor was served with process pursuant to CPLR 308 (2), his father, Andrew Sia, represented to the plaintiff’s process server that the defendant mortgagor’s dwelling was 372 Carnation Avenue, Floral Park, New York 11001 (*cf.*, ***Countrywide Home Loan Servicing, L.P. v Willacy***, 29 Misc3d 1233A, 920 NYS2d 240 [Sup Ct, Queens County 2010]; ***IndyMac v Black***, 22 Misc3d 1115A, 880 NYS2d 224 [Sup Ct, Rensselaer County 2009]).

To the extent that the defendant mortgagor asserts that the plaintiff failed to comply with the conference provisions of CPLR 3408 (L 2009, c 507, § 25. subd e), after the filing of this motion, this case was assigned to the Specialized Foreclosure Settlement Conference Part and foreclosure settlement conferences were held on January 17 and March 2, 2012. At the last conference, this matter was marked to indicate that a final conference was held and that this case was dismissed from the conference program. Accordingly, there has been compliance with CPLR 3408, if required, and no further settlement conference is required.

Even when viewed in the light most favorable to defendant mortgagor, his submissions are insufficient to raise a triable issue of fact as to the affirmative defenses (*see*, ***Neighborhood Hous. Servs. N.Y. City, Inc. v Meltzer***, 67 AD3d 872, *supra*; ***Cochran Inv. Co. Inc. v Jackson***, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007]). Under these circumstances, the Court finds that the defendant mortgagor failed to rebut the prima facie showing made by the plaintiff of its entitlement to summary judgment (*see*, ***Valley Natl. Bank v Deutsche***, 88 AD3d 691, *supra*; ***Rossrock Fund II, L.P. v Commack Inv. Group, Inc.***, 78 AD3d 920, 912 NYS2d 71 [2d Dept 2010]). The plaintiff, therefore, is awarded summary judgment in its favor and against the defendant mortgagor (*see*, ***Argent Mtge. Co., LLC v Mentasana***, 79 AD3d 1079, *supra*; ***Fed. Home Loan Mtge. Corp. v Karastathis***, 237 AD2d 558, *supra*). Accordingly, the defendant mortgagor’s answer and the affirmative defenses contained therein are stricken in their entirety.

The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by substituting Nick Woodhead for John Doe # 1, Jamie Townson for John Doe # 2 and Deborah Sia for John Doe #3, and by excising the fictitious named defendants, John Doe 4-10, is granted (*see, Neighborhood Hous. Servs. N.Y. City, Inc. v Meltzer*, 67 AD3d 872, *supra*). By its submissions, the plaintiff established the basis for this relief. All future proceedings shall be captioned accordingly.

By its moving papers, the plaintiff further established the default in answering on the part of the newly substituted defendants, Nick Woodhead, Jamie Townson and Deborah Sia, as well as the defendant Citibank, N.A., since these defendants never interposed answers to the complaint (*see*, RPAPL § 1321; *HSBC Bank USA, N.A. v Roldan*, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]; *Financial Freedom Acquisition LLC v Malloy*, 2012 NY Misc LEXIS 2037, 2012 WL 1576472, 2012 NY Slip Op 31160U [Sup Ct, Suffolk County, Apr 25, 2012, Pastoressa, J.]; *Dunhill Asset Servs. III LLC v 175 Dixon Ave. Realty, Inc.*, 2012 NY Misc. LEXIS 899, 2012 WL 889632, 2012 NY Slip Op 30478U [Sup Ct, Suffolk County, Feb. 24, 2012, Whelan, J.]). Accordingly, the defaults of all such defendants are fixed and determined. Since the plaintiff has been awarded summary judgment against the defendant mortgagor and has established a default in answering by the remaining defendants, the plaintiff is entitled to an order appointing a referee to compute amounts due under the subject note and mortgage (*see*, RPAPL § 1321; *Ocwen Fed Bank FSB v Miller*, 18 AD3d 527, 794 NYS2d 650 [2d Dept 2005]; *Vt. Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *Bank of E. Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

Accordingly, the motion is granted. The proposed order appointing a referee to compute, as modified by the Court, has been signed simultaneously herewith.

Dated: JULY 11, 2012  
Riverhead, NY

  
HON. DANIEL MARTIN, A.J.S.C.

           FINAL DISPOSITION   x   NON-FINAL DISPOSITION