

**Bank of America, N.A. v Chaudhry**

2012 NY Slip Op 32641(U)

October 11, 2012

Sup Ct, Suffolk County

Docket Number: 5990-10

Judge: Hector D. LaSalle

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**SUPREME COURT - STATE OF NEW YORK  
IAS PART 48 - SUFFOLK COUNTY**

**PRESENT: Hon. HECTOR D. LASALLE  
Justice of the Supreme Court**

\_\_\_\_\_  
**BANK OF AMERICA, NATIONAL ASSOCIATION**  
3476 Stateview Boulevard Ft. Mill, SC 29715

**Motion Date: 5-22-12  
Adj. Date: \_\_\_\_\_  
Mot. Seq. #001 MG**

**Plaintiff,**

**-against-**

**FARRUKH A. CHAUDHRY, ASTHMA B. CHAUDHRY,  
CAPITAL ONE BANK, JPMORGAN CHASE BANK, NA,  
MARLENE YOUNG, NEW YORK STATE  
DEPARTMENT OF TAXATION AND FINANCE,**

**HOGAN LOVELLS US LLP  
Attorneys for Plaintiff  
875 Third Avenue  
New York, N.Y. 10022**

**JOHN DOE (Said name being fictitious, it being the intention  
of Plaintiff to designate any and all occupants of premises being  
foreclosed herein, and any parties, corporations or entities, if  
any, having or claiming an interest or lien upon the mortgaged  
premises.)**

**STEVEN J. BAUM P.C.  
220 Northpointe Parkway, Suite G  
Amherst, New York 14228  
Co-Counsel for Plaintiff**

**Defendants.**

\_\_\_\_\_x

**DARREN ARONOW, ESQ.  
Attorney for Defendants  
8B Commercial Street  
Hicksville, N.Y. 11801**

**CAPITAL ONE BANK  
532 Old Town Road  
Port Jefferson, N.Y. 11776  
Non Appearing Defendant**

**JP Morgan Chase Bank, NA  
c/o CT Corporation System  
111 Eighth Ave.  
New York, N.Y. 10011  
Non-Appearing Defendant**

**MARLENE YOUNG  
193 Dakota Avenue  
Bay Shore, N.Y. 11706  
Non-Appearing Defendant**

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NEW YORK STATE DEPARTMENT OF TAXATION  
AND FINANCE  
OFFICE OF COUNSEL, DAVID DEMETER  
WA HARRIMAN STATE CAMPUS, BLDNG. 9, RM. 100  
Albany, N.Y. 12227  
Non-Appearing Defendant

MEHREEN RIZWAN, as John Doe Occupant  
658 Larkfield Road  
East Northport, N.Y. 11731  
Non-Appearing Defendant

"JOHN DOE #1" as John Doe Occupant  
659 Larkfield Road  
East Northport, N.Y. 11731  
Non-Appearing Defendant

Upon the following papers numbered 1 to 22 read on this motion for summary judgment and an order of reference; Notice of Motion and supporting papers 1-22 including Exhibits; Notice of Cross Motion and supporting papers 0; Answering Affidavits and supporting papers 0; Replying Affidavits and supporting papers 0; Other Memorandum of Law; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this unopposed motion by the plaintiff for (1) an order pursuant to CPLR 3212 [1] dismissing the Verified Answer of the defendants Farrukh A. Chaudhry and Asthma B. Chaudhry with prejudice; (2) granting plaintiff's motion for summary judgment; (3) granting an Order of Reference in favor of plaintiff; (4) granting plaintiff permission to treat the answer as a limited Notice of Appearance entitling defendants, counsel to receive without prior notice, a copy of the Notice of Sale, Notice of Discontinuance, and Notice of Surplus Monies, if any; (5) replacing "JOHN DOE" with "Mehreen Rizwan" and "JOHN DOE # 1" as party defendants and amending the caption to so reflect; (6) appointing a Referee to determine the amount due Plaintiff, and to determine whether the premises being foreclosed can be sold in parcels; (7) for an order that all non-appearing and non-answering defendants be deemed in default, and said defaults be fixed and determined; and (8) declaring the prior adverse lien of defendant Marlene Young to be invalid and extinguished is determined as follows; and it is further

**ORDERED** that the plaintiff's application on the motion for an order pursuant to CPLR 3212 [1] dismissing the Verified Answer of the defendants Farrukh A. Chaudhry and Asma B. Chaudhry with prejudice is denied; and is it further

**ORDERED** that the plaintiff's application on the motion for an order declaring the prior adverse lien of defendant Marlene Young to be invalid and extinguished is denied; and it is further

**ORDERED** that the plaintiff's application on the motion for summary judgment; granting an Order of Reference in favor of plaintiff; granting plaintiff permission to treat the answer as a limited Notice of Appearance entitling defendants counsel to receive without prior notice, a copy of the Notice of Sale, Notice of Discontinuance, and Notice of Surplus Monies, if any; replacing "JOHN DOE" with "Mehreen Rizwam" and "JOHN DOE #1" as party defendants and amending the caption to reflect the changes; appointing a Referee to determine the amount due plaintiff, and to determine if whether the premises being foreclosed can be sold in parcels; for an order that all non-appearing and non-answering defendants be deemed in default, and that said defaults be fixed and determined is granted; and it is further

**ORDERED** that plaintiff shall serve a copy of this Order with Notice of Entry within sixty (60) days of the date this Order is signed by the Court upon counsel for the defendant pursuant to CPLR 2103 (b), (1), (2) or (3) and upon any defendant who may have served a notice of appearance by first class mail and thereafter file the affidavit of service with the Clerk of the Court.

The present action involves the foreclosure on a note and mortgage pertaining to and alleging that the defendants Farrukh A Chaudhry and Asthma B. Chaudhry (hereinafter "Chaudhry") defaulted in repaying a note and mortgage secured by a mortgage on real property located at 658 Larkfield Road, East Northport, NY 11731.

Issue was joined by the service of an answer by Chaudhry's counsel on or about March 9, 2010 consisting of general denials and denials upon information and belief with ten affirmative defenses and three affirmative defenses also denominated as the first, second and third counterclaims. Plaintiff served a reply to the counterclaims consisting of general denials and twenty-one affirmative defenses on or about March 19, 2010.

Plaintiff now moves for summary judgment (*see* CPLR 3212 [a]; *Myung Chun v North Am. Mortg. Co.*, 285 AD2d 42, 729 NYS2d 716 [1<sup>st</sup> Dept 2001]), to dismiss Castillo's answer and for the issuance of an order of reference. In an action to foreclose a mortgage, "a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default" (*Republic Nat. Bank of N.Y. v O'Kane*, 308 AD2d 482, 764 NYS2d 635 (2d Dept 2003)); *see also*, *Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753, 915 NYS2d 569 [2d Dept 2011]).

Plaintiff submits the affidavit testimony of Kyle N. Campbell, a Vice President of plaintiff servicer and the affirmation of plaintiff's counsel along with copies of the pleadings and the relevant mortgage documents, such as the note, and mortgage signed by Chaudhry on May 5, 2005 in addition to documentary evidence of Chaudhry's default since September 1, 2009 and that to the date of this motion said default remains uncured (*see Emigrant Mortg. Co., Inc. v Fisher*, 90 AD3d 823, 935 NYS2d 313 [2d Dept 2011]; *Argent Mtge. Co., LLC v Mentosana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]; *Chiarelli v Kotsifos*, 5 AD3d 345, 772 NYS2d 531 [2d Dept 2004]; *Republic Natl. Bank of N.Y., v O'Kane*, 308 AD2d 482, *supra*). It is well settled that on a motion for summary judgment in foreclosure, a plaintiff establishes its prima facie entitlement to judgment as against a defendant mortgagor by

submitting copies of the subject signed mortgage and note (*see JPMorgan Chase Bank, N.A. v Agnello*, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; *Cochran Inv. Co., Inc. v Jackson*, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007]; *Household Fin. Realty Corp. of New York v Winn*, 19 AD3d 545, 796 NYS2d 533 [2d Dept 2005]; *Marine Midland Bank, N.A. v Freedom Road Realty Associates*, 203 AD2d 538, 611 NYS2d 34 [2d Dept 1994]). With this established, the burden shifted to Chaudhry to lay bare his proof and demonstrate, by admissible evidence, the existence of a material issue of fact requiring a trial (*see Ames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]; *lv app den* 10 NY3d 704, 857 NYS2d 37 [2008]; *reargument denied* 10 NY3d 916, 862 NYS2d 322 [2008]; *Charter One Bank v Houston*, 300 AD2d 429, 751 NYS2d 573 [2d Dept 2002]; *lv app dismissed* 99 NY2d 651, 760 NYS2d 104 [2003]). “The denials in defendants answer are insufficient to defeat the motion for summary judgment” (*New York Higher Education Services v Ortiz*, 104 AD2d 684, 685, 479 NYS2d 910 [3<sup>rd</sup> Dept 1984]).

The motion which was served upon Chaudhry is unopposed (*see Flagstar Bank v Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]) and considered by the Court to be on default. Lack of opposition is tantamount to consent (*see Hermitage Ins. Co. v Trance Nite Club, Inc.*, 40 AD3d 1032, 834 NYS2d 870 [2d Dept 2007]; CPLR 3215; *Zino v Job Taxi, Inc.*, 20 AD3d 521, 799 NYS2d 124 [2d Dept 2005]; *Woodson v Menden Leasing Corp.*, 100 NY2d 62, 760 NYS2d 727 [2003]; *see also Neuman v Zurich N. Am.*, 36 AD3d 601, 828 NYS2d 169 [2d Dept 2007]). Additionally, “uncontradicted facts are deemed admitted” (*Tortorello v Larry M. Carlin*, 260 AD2d 201, 688 NYS2d 64 [1<sup>st</sup> Dept 1999]). Therefore, plaintiff motion is granted and the defendant’s answer, affirmative defenses and counterclaims are dismissed.

The Court finds that the plaintiff established its standing to bring and maintain the foreclosure action by the physical delivery of the endorsed note prior to the commencement of the action (*see UCC 3-104 [a][1]*; *Wells Fargo Bank N.A. v Marchione*, 69 AD3d 204, 887 NYS2d 615 [2d Dept 2009]; *U.S. Bank, N. A v Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; *Countrywide Home Loans, Inc. v Gress*, 68 AD3d 709, 888 NYS2d 914 [2d Dept 2009]; *Mortgage Elec. Registration Sys, Inc. v Coakley*, 41 AD3d 674, 838 NYS2d 622 [2d Dept 2007]).

Here, the moving papers established the plaintiff’s possession of cognizable claims for a judgment of foreclosure and sale against the mortgagor defendants. However, the moving papers failed to address, let alone establish, the plaintiff’s possession of cognizable claims for declaratory relief pursuant to RPAPL Article §1501 (*see CPLR 3215[f]*; RPAPL §§ 1515 and 1519). Nor is it apparent that the plaintiff acquired jurisdiction over all persons whose interests might be affected by the granting of such relief (*see RPAPL §1511*).

In addition, the court finds that the plaintiff abandoned its second cause of action for declaratory relief by its interposition of this motion. It is axiomatic that the appointment of a referee to compute pursuant to RPAPL §1321 is not appropriate unless all pleaded claims of the parties have been adjudicated by the court and the only issues left for determination are those concerning the long account (*see Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]).

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In mortgage foreclosure actions, the issues of the long account are limited to the amounts due the plaintiff by reason of the obligor's default under the terms of the note, mortgage and/or guaranty sued upon and the other matters specified in RPAPL §1321 (*see New York State Mtg. Loan Enforcement and Admin. Corp. v New Colony Camp Houses., Inc.*, 187 AD2d 955, 590 NYS2d 635 [4th Dept 1992]). By moving for the appointment of a referee without establishing its entitlement to a default judgment on its claims for declaratory relief, the plaintiff effectively abandoned those claims. Further the continuation of the second cause of action in this action is contrary to the narrow purposes and specific confines of an order of reference under RPAPL §1321. Therefore, in the exercise of the type of discretion that the Court otherwise possesses under CPLR 603 (*see e.g. Naylor v Knoll Farms of Suffolk County Inc.*, 31 AD3d 726, 818 NYS2d 460 [2d Dept 2006]), the second cause of action is severed and dismissed without prejudice.

Accordingly, the unopposed motion for summary judgment and for the appointment of a referee to compute is granted. The Order of Reference as modified by this short form order is being concurrently signed with this short form order.

This constitutes the Order and decision of the Court.

**Dated: October 11, 2012**  
**Central Islip, NY**

  
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**HON. HECTOR D. LASALLE, J.S.C.**

\_\_\_\_ FINAL DISPOSITION     NON-FINAL DISPOSITION