

<b>GMAC Mtge., LLC v Schneider</b>
2013 NY Slip Op 30599(U)
March 20, 2013
Supreme Court, Suffolk County
Docket Number: 28588-11
Judge: Thomas F. Whelan
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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 33 - SUFFOLK COUNTY

**COPY**

**PRESENT:**

Hon. THOMAS F. WHELAN  
Justice of the Supreme Court

MOTION DATE 2/13/13  
ADJ. DATES 3/15/13  
Mot. Seq. # 001- MG;  
Submit Order

-----X		
GMAC MORTGAGE, LLC,	:	ZEICHNER, ELLMAN & KRAUSS
	:	Attys. For Plaintiff
Plaintiff,	:	575 Lexington Ave.
	:	New York, NY 10022
-against-	:	
	:	THE RANALLI LAW GROUP, PLLC
WINFRED SCHNEIDER, MORTGAGE	:	Attys. For Defendant Schneider
ELECTRONIC REGISTRATION SYSTEMS,	:	742 Veterans Memorial Hwy.
INC., et als,	:	Hauppauge, NY 11788
	:	
Defendants.	:	
-----X		

Upon the following papers numbered 1 to 6 read on this motion for summary and default judgments, deletion of parties and the appointment of a referee to compute; Notice of Motion/Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers \_\_\_\_\_; Reply papers \_\_\_\_\_; Other 5-6 (Memorandum of Law in support of motion); (and after hearing counsel in support and opposed to the motion, it is

**ORDERED** that this motion (#001) by the plaintiff for accelerated judgments against the defendants, the appointment of a referee to compute and other incidental relief is considered under CPLR 3212, 3215 and RPAPL 1321 and is granted; and it is further

**ORDERED** that the plaintiff shall forthwith submit, *upon a copy of this order*, an order providing in blank for the appointment of a referee to compute and the other matters normally included in such orders.

The plaintiff commenced this action on September 8, 2011 to foreclose a December 2, 2005 mortgage that encumbers residential real property in Ronkonkoma, New York which was given by defendant Schneider to secure a mortgage note of the same date in the principal amount of \$315,000.00. Issue was joined by the service of an answer by defendant Schneider dated October 8, 2011. The answer includes fourteen affirmative defenses, including predatory lending, lack of standing, failure to modify

loan, lack of credit for amounts paid and champerty, and counterclaims for money damages sounding in General Business Law § 349, misrepresentation, unconscionability, the unaffordability of the loan and *plaintiff's* lack of due diligence in assessing the defendant's financial circumstances and inability to pay.

The plaintiff now moves for an order awarding the following relief: (1) summary judgment against the answering defendant together with dismissal of her affirmative defenses and counterclaims; (2) fixing the defaults in answering of the non-answering defendants; (3) deleting as party defendants certain named defendants together with an amendment of the caption to reflect same; and (4) appointing a referee to compute amounts due under the subject mortgage. The motion is considered under CPLR 3215, 3212 and RPAPL § 1321 and is granted for the reasons stated below.

“Entitlement to a judgment of foreclosure may be established, as a matter of law, where a mortgagee produces both the mortgage and unpaid note, together with evidence of the mortgagor's default, thereby shifting the burden to the mortgagor to demonstrate, through both competent and admissible evidence, any defense which could raise a question of fact” (*Zanfini v Chandler*, 79 AD3d 1031, 912 NYS2d 911 [2d Dept 2010], quoting *HSBC Bank USA v Merrill*, 37 AD3d 899, 900, 830 NYS2d 598 [2d Dept 2010]; see *Bank Natl. Ass'n v Denaro*, 98 AD3d 964, 950 NYS2d 581 [2d Dept 2012]; *Citibank, N.A. v Van Brunt Prop., LLC*, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]; *HSBC Bank v Shwartz*, 88 AD3d 961, 931 NYS2d 528 [2d Dept 2011]; *US Bank N.A. v Eaddy*, 79 AD3d 1022, 1022, 914 NYS2d 901 [2010]). Where, as here, an answer served includes the defense of standing or lack of capacity to sue, the plaintiff must further establish its standing to succeed on a motion for summary judgment (see *US Bank, N.A. v Adrian Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]).

The standing of a plaintiff in a mortgage foreclosure action is measured by its ownership, holder status or possession of the note and mortgage at the time of the commencement of the action (see *US Bank of NY v Silverberg*, 86 AD3d 274, 279, 926 NYS2d 532 [2d Dept 2011]; *US Bank, N.A. v Adrian Collymore*, 68 AD3d 752, *supra*; *Wells Fargo Bank, N.A. v Marchione*, 69 AD3d 204, 887 NYS2d 615 [2d Dept 2009]). Because “a mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation”, a mortgage passes as an incident of the note upon its physical delivery to the plaintiff (*Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909, 2013 WL 361084 [2d Dept 2013, internal citations omitted]; *US Bank Natl. Ass'n v Cange*, 96 AD3d 825, 947 NYS2d 522 [2d Dept 2012]). Holder status is established where the plaintiff is the special indorsee of the note or takes possession of a mortgage note that contains an indorsement in blank on the face thereof or attached thereto, as the mortgage follows as incident thereto (see UCC §3-202; §3-204; §9-203[g]; see *Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674, 838 NYS2d 622 [2d Dept. 2007]; *First Trust Natl. Ass'n v Meisels*, 234 AD2d 414, 651 NYS2d 121 [2d Dept 1996]; *Deutsche Bank Natl. Trust Co. v Pietranico*, 33 Misc3d 528, 928 NYS2d 818 [Sup. Ct. Suffolk County 2011], *aff'd*, 102 AD3d 724, 957 NYS2d 868 [2d Dept 2013]; see also *GRP Loan, LLC v Taylor*, 95 AD3d 1172, 945 NYS2d 336 [2d Dept 2012]).

Here, the plaintiff established that it took possession of the note by physical delivery to its custodial agent on July 30, 2009, some two years prior to the commencement of the action and thus was the holder thereof as such note contained an indorsement in blank on the face thereof (*see Policy Funding Corp. v Kings County Lafayette Trust Co.*, 33 NY2d 776, 350 NYS2d 414 [1973]; *see also Tonelli v Chase Manhattan Bank, N.A.*, 41 NY2d 667, 394 NYS2d 858 [1977]; *Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674, *supra*; *First Trust Natl. Ass'n v Meisels*, 234 AD2d 414, *supra*). The July 30, 2009 physical delivery of the note also effected an assignment by delivery which conferred assignee status of the note and the mortgage upon the plaintiff (*see OneWest Bank FSB v Carey*, \_\_\_ AD3d \_\_\_, 2013 WL 828014 [1st Dept 2013]; *US Bank Natl. Ass'n v Cange*, 96 AD3d 825, *supra*; *Bank of New York Mellon Trust Co. N.A. v Sachar*, 95 AD3d 695, 943 NYS2d 893 [1st Dept 2012]).

There is also evidence that in November of 2010, a nominee of the original lender assigned the mortgage and the mortgage indebtedness to the plaintiff by a written assignment recorded in the office of the County Clerk on December 6, 2010 (*see Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674, *supra*; *Deutsche Bank Natl. Trust Co. v Pietranico*, 33 Misc3d 528, *supra*; *US Bank, N.A. v Reed*, 38 Misc3d 1206(A), Slip Copy, 2013 WL 49817 [Sup. Ct. Suffolk County 2013]; *US Bank v Flynn*, 27 Misc.3d 802, 897 NYS2d 855 [Sup. Ct. Suffolk County 2010]). Appellate case authorities have recently held that an assignment of the mortgage indebtedness contained in the written assignment of the mortgage is sufficient to assign the subject note which was expressly identified in such assignment (*see Chase Home Fin., LLC v Miciotta*, 101 AD3d 1307, 956 NYS2d 271 [3d Dept 2012]). It thus appears that the plaintiff is the assignee of the original lender by virtue of this written assignment (*see Bank of New York Mellon Trust Co. N.A. v Sachar*, 95 AD3d 695, *supra*).

Upon its review of the moving papers, the court finds that plaintiff established a prima facie entitlement to summary judgment in its favor on its complaint against the answering defendant as such papers included copies of the mortgage, the unpaid note executed on December 5, 2006, together with due evidence of a default under the terms thereof secured by the mortgage (*see CPLR 3212; RPAPL § 1321; US Bank Natl. Ass'n v Denaro*, 98 AD3d 964, 950 NYS2d 581 [2d Dept 2012]; *Neighborhood Hous. Serv. of New York City v Hawkins*, 97 AD3d 554, 947 NYS2d 321 [2d Dept 2012]; *Baron Assoc., LLC v Garcia Group Enter.*, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; *Washington Mut. Bank v Valencia*, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]). The moving papers further established, prima facie, that the plaintiff has standing to prosecute its pleaded claims for foreclosure and sale by, among other things, its possession of the mortgage note bearing an indorsement in blank by the original mortgagee at the time of the commencement of this action.

The moving papers also included sufficient proof to establish, prima facie, that the remaining affirmative defenses set forth in the answer of the mortgagor defendant and the counterclaims asserted therein are subject to dismissal due to their unmeritorious nature (*see Patterson v Somerset Inv. Corp.*, 96 AD3d 817, 946 NYS2d 217 [2d Dept 2012]; *Emigrant Mtge. Co. v Fitzpatrick*, 95 AD3d 1169, 945 NYS2d 697 [2d Dept 2012, *claimed violations of General Business Law § 349 and/or engagement in*

*deceptive business practices do not generally give rise to claims against lender*]; **Wells Fargo Bank, N.A. v Van Dyke**, 101 AD3d 638, 958 NYS2d 331 [1<sup>st</sup> Dept 2012, *foreclosing plaintiff has no obligation to modify loan*]; **Long Is. Sav. Bank v Denkensohn**, 222 AD2d 659, 635 NYS2d 683 [2d Dept 1995], *quoting Crest/Good Mfg. Co. v Baumann*, 160 AD2d 831, 832, 554 NYS2d 264 [2d Dept 1990; “A dispute as to the exact amount owed by the mortgagor to the mortgagee may be resolved after a reference pursuant to RPAPL 1321, and the existence of such a dispute does not preclude the issuance of summary judgment directing the sale of the mortgaged property”]; **G.G.F. Dev. Corp. v Andreadis**, 251 AD2d 624, 676 NYS2d 488 [2d Dept 1998; *champerty not a defense*]; *see also Limpar Realty Corp. v Uswiss Realty Holding, Inc.*, 112 AD2d 834, 492 NYS2d 754 [1st Dept 1985]; **Baron Assoc., LLC v Garcia Group Enter.**, 96 AD3d 793, *supra*; [*unconscionability not a defense*]; *see also Emigrant Mtge. Co., Inc. v Fitzpatrick*, 95AD3d 1169, *supra*; **Patterson v Somerset Inv. Corp.**, 96 AD3d 817, *supra*; **Argent Mtge. Co., LLC v Mentessana**, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010; *unaffordability of loan will not support damages claim against lender and is not a defense to foreclosure action*]; *see also Patterson v Somerset Inv. Corp.*, 96 AD3d 817, *supra*).

It was thus incumbent upon the answering defendant to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff’s prima facie showing or in support of the affirmative defenses asserted in their answer, if any or otherwise possessed by them (*see Flagstar Bank v Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; **Grogg Assocs. v South Rd. Assocs.**, 74 AD3d 1021 907 NYS2d 22 [2d Dept 2010]; **Wells Fargo Bank v Karla**, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; **Washington Mut. Bank v O’Connor**, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]; **Ames Funding Corp. v Houston**, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]).

Where a defendant fails to oppose some or all matters advanced on a motion for summary judgment, the facts as alleged in the movant’s papers may be deemed admitted as there is, in effect, a concession that no question of fact exists (*see Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 369 NYS2d 667 [1975]; *see also Madeline D’Anthony Enter., Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; **Argent Mtge. Co., LLC v Mentessana**, 79 AD3d 1079, *supra*). Such is the case here, as the court is without opposing papers from the mortgagor defendant. The failure to oppose this motion, coupled with the plaintiff’s prima facie showing of a lack of merit in the affirmative defenses and counterclaims set forth in the answer of defendant Schneider, warrants the dismissal of such defenses and counterclaims pursuant to CPLR 3212.

The court thus finds that the plaintiff is entitled to summary judgment on its complaint and dismissal of the affirmative defenses and counterclaims set forth in the answer of the mortgagor defendant Schneider. Those portions of this motion wherein the plaintiff seeks such relief are thus granted.

Those portions of the instant motion wherein the plaintiff seeks an order dropping as party defendants the unknown defendants listed in the caption and an amendment of the caption to reflect same are granted.

The moving papers further established the defaults in answering on the part of the remaining defendants, none of whom served answers to the plaintiff's complaint. Accordingly, the defaults of all such defendants are hereby fixed and determined. Since the plaintiff has been awarded summary judgment against the sole answering defendant and has established the defaults 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; *Bank of East Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]; *Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *LaSalle Bank, N.A. v Pace*, 31 Misc3d 627, 919 NYS2d 794 [Sup. Ct. Suffolk County 2011], *aff'd*, 100 AD3d 970, 955 NYS2d 161 [2d Dept 2012]). Those portions of the instant motion wherein plaintiff demands such relief are thus granted.

The moving papers established that a conference of the type mandated by the Laws of Laws of 2008, Ch. 472 § 3-a as amended by the Laws of 2009 Ch. 507 § 10 or by CPLR 3408 was previously conducted on April 16, 2012 by the specialized mortgage part. Also submitted was due proof that the affirmation required by Administrative Orders 548-10 and 4311-11 has been filed and is fully compliant therewith.

The plaintiff shall forthwith submit, *upon a copy of this memo decision and order*, a separate order providing for the appointment of a referee to compute and the other matters normally included in such orders, as no proposed order appointing a referee to compute was submitted with the moving papers.

Dated: March 20, 2013

  
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THOMAS F. WHELAN, J.S.C.