

**BAC Home Loans Servicing, L.P. v Revis**

2013 NY Slip Op 30942(U)

April 16, 2013

Supreme Court, Suffolk County

Docket Number: 12949/10

Judge: Hector D. LaSalle

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SUPREME COURT - STATE OF NEW YORK  
IAS PART 48 - SUFFOLK COUNTYPRESENT: Hon. HECTOR D. LASALLE  
Justice of the Supreme Court

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BAC Home Loans Servicing, LP fka  
Countrywide Home Loans Servicing, LP,

Plaintiff,

-against-

Howard Revis, Jr., Capital One Bank, Midland  
Funding LLC DBA in New York as Midland  
Funding of Delaware LLC, and "JOHN DOE #1"  
through "JOHN DOE #10", the last ten names  
being fictitious and unknown to the plaintiff, the  
person or parties intended being the persons or  
parties, if any, having or claiming an interest in  
or lien upon the Mortgage premises described  
in the Complaint,Defendants.  

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Motion Date: 5-22-12  
Adj. Date: \_\_\_\_\_  
Mot. Seq. #001 MGBRYAN CAVE LLP  
Attorneys for Plaintiff  
1290 Avenue of Americas  
New York, N. Y. 10104CITAK & CITAK, ESQS.  
Attorneys for Defendant  
(of Record)  
Howard Revis, Jr.  
270 Madison Avenue, Suite 1203  
New York, N. Y. 10016CAMPOS, LAZAR & MARTIN, PLLC  
475 Montauk Highway  
West Islip, N. Y. 11795

Upon the following papers numbered 1 to 35 read on this motion for summary judgment and an order of reference; Notice of Motion/ Order to Show Cause and supporting papers 1 - 23; ~~Notice of Cross Motion and supporting papers \_\_\_\_\_~~; Affirmation in Opposition and supporting papers 24 - 27; Replying Affirmation and supporting papers 28 - 30; Defendant's Sur Reply 31 - 32; Plaintiff's Memorandums of Law 33 - 35; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

**ORDERED** that this motion by plaintiff BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing, LP (BAC) pursuant to CPLR 3212 for summary judgment on its verified complaint against defendant Howard Revis, Jr. (Revis), to strike the answer of the defendant Revis, for leave to amend the caption of this action pursuant to CPLR 3025 (b) by substituting the name Urszula Bauman for "John Doe #1" and striking the names of defendants "John Doe #2 through John Doe #10", granting a default judgment against those non-appearing defendants and for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is hereby determined as follows; and it is hereby

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**ORDERED** that the branch of the motion by plaintiff BAC pursuant to CPLR 3212 for summary judgment on its verified complaint against defendant Revis, to strike his answer and, for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is granted; and it is further

**ORDERED** plaintiff's application for a default judgment as to the remaining non-appearing defendants is granted; and it is further

**ORDERED** that plaintiff's application for leave to amend the caption of this action pursuant to CPLR 3025 (b), is granted; and it is further

**ORDERED** that the caption is hereby amended by substituting the name Urszula Bauman for "John Doe #1" and striking the names of defendants "John Doe #2 through John Doe #10"; 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**

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Bank of America, N.A., successor by merger to  
 BAC Home Loans Servicing, LP,

Plaintiff,

-against-

Howard Revis, Jr., Capital One Bank, Midland  
 Funding LLC DBA in New York as Midland  
 Funding of Delaware LLC, and Urszula Bauman,

Defendants.

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This is an action to foreclose a mortgage on premises known as 70 Otis Road, East Patchogue, New York. On August 17, 2007, defendant Revis executed a note in favor of Homebridge Mortgage Bankers Corp. d/b/a Refinance.Com, a New York Corporation (Homebridge) agreeing to pay \$306,530.00 at the rate of 7.250 percent per year. On August 17, 2007, defendant Revis also executed a mortgage in the principal sum of \$306,530.00 on his home, the subject property. The mortgage indicated Homebridge to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of Homebridge. The mortgage was recorded on September 7, 2007 in the Suffolk County Clerk's Office. Thereafter, MERS

assigned the note and mortgage to plaintiff BAC by assignment of mortgage dated February 22, 2010. Plaintiff BAC asserts that it is the holder of the subject note, which is indorsed as follows: Homebridge in favor of Countrywide Bank, FSB; Countrywide Bank, FSB in favor of Countrywide Home Loans, Inc.; Countrywide Home Loans, Inc. in favor of Countrywide Home Loans Servicing LP, and; by Countrywide Home Loan Servicing LP in favor of Countrywide Bank, FSB. Prior to the commencement of the instant action, the note was indorsed in blank by Bank of America, NA, successor by merger to Countrywide Bank, FSB.

Countrywide Home Loans sent a notice of default dated November 5, 2008 to defendant Revis stating that he had defaulted on his mortgage loan and that the amount past due was \$8,904.11. As a result of defendant Revis' continuing default, plaintiff commenced this foreclosure action on April 2, 2010. In its complaint, plaintiff alleges in pertinent part that defendant breached his obligations under the terms of the note and mortgage by failing to make the monthly payments commencing with the August 1, 2008 payment. Defendant Revis interposed an answer by entering a general denial with eight affirmative defenses and three counterclaims.

The Court's computerized records indicate that a foreclosure settlement conference was held on December 20, 2010 at which time this matter was referred as an IAS case since a resolution or settlement had not been achieved. Thus, there has been compliance with CPLR 3408 and no further settlement conference is required.

Plaintiff now moves for summary judgment on its complaint contending that defendant Revis failed to comply with the terms of the note and mortgage; that defendant Revis was provided with notices alerting him to his default; that Revis did not cure the default; and, that defendant's affirmative defenses and counterclaims are without merit. In support of its motion, plaintiff submits among other things: the sworn affidavit of Todd Falasco, Esq., an attorney at Frenkel, Lambert, Weiss, Weisman & Gordon, LLP attorneys for plaintiff; affidavit of Judy K. Johnson, AVP, Sr. Operations Manager at Bank of America, NA, successor by merger to BAC; the affidavit in support for summary judgment of Suzanne M. Berger, Esq.; the affirmation of Courtney J. Peterson, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the summons and complaint; the defendant's answer; the note with allonge, mortgage and assignment; a corporate resolution; a notice of default; notices pursuant to RPAPL §§ 1320, 1303 and 1304; affidavits of service for the summons and complaint; an affidavit of service of the instant summary judgment motion upon the attorneys for defendant Revis; and a proposed order appointing a referee to compute.

Defendant, through his attorneys, has submitted an affirmation in opposition<sup>1</sup> to the instant summary judgment motion asserting, *inter alia*, that plaintiff does not have standing to commence this action and that the affirmation filed pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11) is defective.

Plaintiff in reply opposes defendant's assertion that it does not have standing and maintains that the

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<sup>1</sup> While defense counsel makes several references in his affirmation in opposition concerning a defendant's cross motion in this matter, no such cross motion has been filed with this court.

affirmation filed pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11) is in proper form.

“[I]n 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” (see *Republic Natl. Bank of N.Y. v O’Kane*, 308 AD2d 482, 482, 764 NYS2d 635 [2d Dept 2003]; *Village Bank v Wild Oaks Holding*, 196 AD2d 812, 601 NYS2d 940 [2d Dept 1993]). Once a plaintiff has made this showing, the burden then shifts to defendant to produce evidentiary proof in admissible form sufficient to require a trial of their defenses (see *Aames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]; *Household Fin. Realty Corp. of New York v Winn*, 19 AD3d 545, 796 NYS2d 533 [2d Dept 2005]).

Where, as here, standing is put into issue by the defendant, the plaintiff is required to prove it has standing in order to be entitled to the relief requested (see *Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680, 954 NYS2d 551 [2d Dept 2011]; *US Bank, NA v Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; *Wells Fargo Bank Minn., NA v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). In a mortgage foreclosure action “[a] plaintiff has standing where it is the holder or assignee of both the subject mortgage and of the underlying note at the time the action is commenced” (*HSBC Bank USA v Hernandez*, 92 AD3d 843, 939 NYS2d 120 [2d Dept 2012]; *US Bank, NA v Collymore*, 68 AD3d at 753; *Countrywide Home Loans, Inc. v Gress*, 68 AD3d 709, 888 NYS2d 914 [2d Dept 2009]). “Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation” (*HSBC Bank USA v Hernandez*, 92 AD3d 843).

Here, plaintiff produced the note and mortgage, as well as evidence of defendant’s nonpayment. Judy K. Johnson AVP, Sr. Operations Manager at Bank of America, NA avers that defendant borrowed funds in the amount of \$306,530.00 from Homebridge, the original lender; that plaintiff is now the holder of the note as a result of a transfer of the note and assignment of mortgage; that on November 5, 2008, plaintiff sent defendant a breach letter alerting him that he was in default and how to cure the default; and, that defendant did not cure the default. In addition, plaintiff has submitted documentary proof that it is the current holder in due course of a valid note and mortgage executed by defendant Revis. Defendant neither denies the existence of a valid note and mortgage nor that he is in default.

Once plaintiff has made a prima facie showing, it is incumbent on 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” (see *Cochran Inv. Co., Inc. v Jackson*, 38 AD3d 704, 834 NYS2d 198, 199 [2d Dept 2007] quoting *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 467, 664 NYS2d 345 [2d Dept 1997]). Here, defendant has failed to demonstrate, through the production of competent and admissible evidence, a viable defense which could raise a triable issue of fact (*US Bank, Natl. Assoc. v Sharif*, 89 AD3d 723, 933 NYS2d 293 [2d Dept 2011]). “Motions for summary judgment may not be defeated merely by surmise, conjecture or suspicion” (see *Shaw v Time-Life Records*, 38 NY2d 201, 379 NYS2d 390 [1975]). Most significantly, defendant has failed to submit an affidavit in support of his pleadings, affirmative defenses and counterclaims or in opposition to the instant motion for summary judgment. While defendant submits an excerpt of a transcript purporting to be a deposition taken of Michele Sjolander, such transcript is neither complete, nor signed, nor certified by the official court stenographer and as such is not admissible as evidence (see CPLR 3116; *Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; *McDonald v Mauss*, 38 AD3d 727, 832

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NYS2d 291 [2d Dept 2007]; *Cox v Jeffers*, 222 AD2d 395, 634 NYS2d 519 [2d Dept 1995]). Based upon the foregoing, defendant's assertions do not establish a defense as a matter of law and are thereby rejected by the court.

Accordingly, the motion for summary judgment is granted against defendant Revis and the defendant's answer, defenses and counterclaims are stricken.

In addition, plaintiff's request for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is granted (*see Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *Bank of East Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

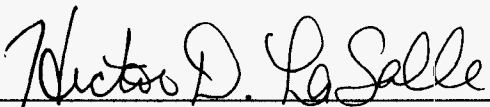
The proposed order appointing a referee to compute pursuant to RPAPL §1321 is signed as modified by the court.

To the extent that either plaintiff or defendant have requested other forms of relief but have not supported such noticed forms of relief with any allegations of law or fact, the court denies such applications.

Plaintiff is directed to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court.

The foregoing constitutes the Order of this Court.

Dated: April 16, 2013  
Riverhead, NY

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

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