

Wells Fargo Bank, N.A. v Wint

2013 NY Slip Op 31179(U)

May 29, 2013

Sup Ct, Suffolk County

Docket Number: 27292/10

Judge: Hector D. LaSalle

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ORDERED that the plaintiff shall submit with the proposed judgment of foreclosure, a certificate of conformity with respect to the affidavit of the plaintiff's officer, executed outside the State of New York (*see*, CPLR 2309[c]; *U.S. Bank Natl. Assn. v Dellarmo*, 94 AD3d 746, 942 NYS2d 122 [2d Dept 2012]); and it is further

ORDERED that the plaintiff is directed to serve a copy of this Order with notice of entry upon all parties who have appeared herein and not waived further notice pursuant to CPLR 2103(b)(1), (2) or (3) within thirty (30) days of the date herein, and to file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on residential real property known and described as 55 Monroe Street, New York 11735 (the property). The defendant Lecia Wint (the defendant mortgagor) executed a fixed-rate note dated February 20, 2008 (the note) in favor of Lend America (the lender) in the principal sum of \$368,231.00. To secure said note, the defendant mortgagor gave the lender a mortgage also dated February 20, 2008 (the mortgage) on the property. The mortgage indicates that Mortgage Electronic Registration Systems, Inc. (MERS) was acting solely as a nominee for the lender and its successors and assigns and that, for the purposes of recording the mortgage, MERS was the mortgagee of record. The note contains, inter alia, an undated endorsement without recourse by the lender to Wells Fargo Bank, N.A. (the plaintiff). By assignment dated April 9, 2009 and recorded on May 8, 2009, MERS as nominee for the lender transferred its interest in the mortgage to Wells Fargo Bank, N.A. (the plaintiff). Thereafter, the note was subsequently modified by agreement dated October 2, 2009, whereby, inter alia, the original principal balance due to the plaintiff by the defendant mortgagor was increased from \$368,231.00 to \$390,260.19. The agreement also provided that the defendant mortgagor pay to the plaintiff monthly installments in the approximate amounts of \$2,124.92 commencing on December 1, 2009 through to November 1, 2039, the maturity date.

The defendant mortgagor allegedly defaulted on her monthly payment of interest due on February 1, 2010, and each month thereafter. After the defendant mortgagor allegedly failed to cure her default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on July 23, 2010. By Order dated November 16, 2010 (Cohen, J.), a prior motion (001) by the plaintiff for an order of reference in this action was granted, and Susan Saltz, Esq., was appointed as a referee to compute and ascertain. The prior motion, however, was subsequently later marked "withdrawn" by the Court (Cohen, J.) on December 2, 2010.

Issue was joined by the service of the defendant mortgagor's verified answer dated December 10, 2010. By her answer, the defendant mortgagor admits the execution of the mortgage as well as the allegation that there are no other actions pending to collect or enforce the note and mortgage, but denies the remaining allegations therein. In the answer, the defendant mortgagor also asserts, four affirmative defenses that she will apply for a mortgage modification, sell the property, evict the tenant residing at the property and subsequently occupy the property herself. Also, in the answer, the defendant mortgagor requests a foreclosure settlement conference. The remaining defendants have neither answered nor appeared in this action and are in default.

The plaintiff now moves for, inter alia, an order recalling and vacating the prior Order dated

November 16, 2010 (Cohen, J.), and upon renewal awarding partial summary judgment in its favor against the defendant mortgagor, and striking her answer and affirmative defenses, deeming the stricken answer a limited notice of appearance, appointing a referee to compute amounts due, and amending the caption. No opposition has been filed in response to this motion.

Initially, the branch of the motion for an Order vacating and recalling the prior Order dated November 16, 2010 is granted (*see*, CPLR 2221[a][2], [e]; *see also*, ***Patron v Mutual of Omaha Ins. Co.***, 129 AD2d 572, 514 NYS2d 70 [2d Dept 1987]). The plaintiff has shown that an answer was interposed by the defendant mortgagor shortly after the prior application had been determined. Additionally, as noted above, the record shows that the prior motion for an order of reference on default had initially been granted, but that the same was subsequently marked “withdrawn”. Accordingly, renewal is granted. The Court now turns to the merits of this motion for summary judgment.

A plaintiff in a mortgage foreclosure action establishes a prima facie case for summary judgment by submission of the mortgage, the 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 [2d Dept 2010]). In the instant case, the plaintiff produced the endorsed note, the mortgage and loan modification agreement executed by the defendant mortgagor, the assignment, as well as evidence of nonpayment (*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 a representative of the plaintiff, whereby it is alleged, inter alia, that the plaintiff is the holder and is in possession of the note (*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 [2007], *lv dismissed* 8 NY3d 967, 836 NYS2d 540 [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*, ***Baron Assoc., LLC v Garcia Group Enters., Inc.***, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; ***Ames Funding Corp. v Houston***, 44 AD3d 692, 843 NYS2d 660 [2007], *lv denied* 10 NY3d 704, 857 NYS2d 37 [2008]). The defendant mortgagor’s answer is insufficient, as a matter of law, to defeat the plaintiff’s unopposed motion (*see*, ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***Argent Mtge. Co., LLC v Mentasana***, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Moreover, the defendant mortgagor’s affirmative defenses are factually unsupported and without apparent merit (*see*, ***Neighborhood Hous. Servs. N.Y. City, Inc. v Meltzer***, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]; ***EMC Mtge. Corp. v Stewart***, 2 AD3d 772, 769 NYS2d 408 [2d Dept 2003]; *see also*, ***Wells Fargo Bank, N.A. v Van Dyke***, 101 AD3d 638, 958 NYS2d 331 [1st Dept 2012] [*foreclosing plaintiff has no obligation to modify loan before or after a default*]). In any event, 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]; *see also*, *Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; *Argent Mtge. Co., LLC v Mentasana*, 79 AD3d 1079, *supra*; *Madison Park Invs., LLC v Atlantic Lofts Corp.*, 33 Misc3d 1215A, 941 NYS2d 538 [Sup Ct, Kings County 2011]).

Under these circumstances, the Court finds that the defendant mortgagor failed to rebut the plaintiff's prima facie showing of its entitlement to summary judgment requested by it (*see*, *Rossrock Fund II, L.P. v Commack Inv. Group, Inc.*, 78 AD3d 920, 912 NYS2d 71 [2d Dept 2010]; *see generally*, *Hermitage Ins. Co. Trance Nite Club, Inc.*, 40 AD3d 1032, 834 NYS2d 870 [2d Dept 2007]). The plaintiff, therefore, is awarded summary judgment 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*; *see generally*, *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Accordingly, the defendant mortgagor's answer, and the affirmative defenses contained therein, are stricken.

The branch of the instant motion wherein the plaintiff seeks an order amending the caption by substituting Patrice "Doe" as a party defendant for the fictitious "John Doe" defendant, is granted pursuant to CPLR 1024. By its submissions, the plaintiff established the basis for this relief (*see*, *Flagstar Bank v Bellafiore*, 94 AD3d 1044, *supra*; *Neighborhood Hous. Servs. N.Y. City, Inc. v Meltzer*, 67 AD3d 872, *supra*). 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, Patrice "Doe" and Capital One Bank USA, NA (Capital One), as these defendants never interposed answers (*see*, RPAPL § 1321; *HSBC Bank USA, N.A. v Roldan*, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the defaults of all such defaulting defendants are fixed and determined. Since the plaintiff has been awarded summary judgment against the defendant mortgagor, and has established the default in answering by Patrice "Doe" and Capital One, 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 [2005], *appeal dismissed* 5 NY3d 824, 804 NYS2d 37 [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]).

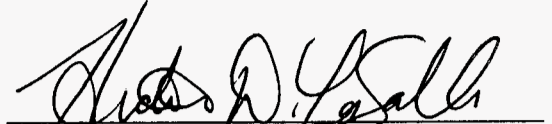
The defendant mortgagor's request for a mandatory settlement conference of the type contemplated by CPLR 3408, which was improperly asserted in her answer and served without the benefit of a cross motion, is denied as substantively and procedurally deficient (*see*, CPLR 2215; *see also*, *Thomas v The Drifters, Inc.*, 219 AD2d 639, 631 NYS2d 419 [2d Dept 1995]; *Citimortgage Inc. v Lepore*, 2012 NY Misc LEXIS 4282, 2012 WL 3947031, 2012 NY Slip Op 32290[U] [Sup Ct, Suffolk County 2012]).

Accordingly, this motion by the plaintiff for an order pursuant to CPLR 3212 is granted. The proposed order appointing a referee to compute pursuant to RPAPL § 1321 has been signed herewith.

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The foregoing constitutes the Order of this Court.

Dated: May 29, 2013
Riverhead, NY



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

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION