

<b>JPMorgan Chase Bank, N.A. v Ben Rose Props., LLC</b>
2013 NY Slip Op 31767(U)
July 22, 2013
Supreme Court, Suffolk County
Docket Number: 23588-12
Judge: Thomas F. Whelan
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SUPREME COURT - STATE OF NEW YORK  
I.A.S. COMMERCIAL PART 45 - SUFFOLK COUNTY

**COPY**

**PRESENT:**

Hon. THOMAS F. WHELAN  
Justice of the Supreme Court

MOTION DATE 6/28/13  
ADJ. DATES \_\_\_\_\_  
Mot. Seq. # 001 - MD \_\_\_\_\_  
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JPMORGAN CHASE BANK, N.A. :

Plaintiff, :

-against- :

BEN ROSE PROPERTIES, LLC, SUFFOLK COUNTY, :

J & A LUMBER COMPANY, INC., ALAN A. :

ROSENBERG, LORI R. ROSENBERG, SELIG :

ROSENBERG and HARRIET B. ROSENBERG, and :

“JOHN DOE 1” through “JOHN DOE V” said defendants :

being intended to designate tenants or occupants :

in possession of the herein described premises or portions :

thereof, if any there be, said names being fictitious, their :

true names being unknown to the plaintiff, :

Defendants. :

-----X

BUONAMICI & LARAUS, LLP  
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Upon the following papers numbered 1 to 5 read on this motion by the plaintiff for summary judgment on its complaint; Notice of Motion/Order to Show Cause and supporting papers 1 - 5; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers \_\_\_\_\_; Reply papers \_\_\_\_\_; Other \_\_\_\_\_; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion (#001) by the plaintiff for summary judgment against all defendants and an order appointing a referee is considered under CPLR 3212, CPLR 3001, RPAPL 1321 and Real Property Tax Law § 1110, *et. seq.*, and is denied.

The plaintiff is the owner of a mortgage note and mortgage by assignment from the originator of the 1999 mortgage loan that is the subject of this action. Therein, the plaintiff seeks a judicial declaration that the mortgagor, Ben Rose Properties, LLC, [hereinafter “BRP”] is the “legal owner of the [mortgaged] property” and for foreclosure of the subject mortgage. The plaintiff further seeks

*no*

deficiency judgments against the mortgagor defendant, BRP, and against J&A Lumber Company and the four Rosenberg defendants, each of whom, executed personal written guarantees of BRP's obligations under the loan documents. Only defendants Alan and Lori Rosenberg appeared by answer in response to the plaintiff's service of the summons and complaint.

The instant action is the second instituted by the plaintiff against the defendants. The first was an action upon the mortgage note and the written guarantees which the plaintiff brought in Westchester County in 2009. That action was concluded by a default judgment in favor of the plaintiff against defendant BRP in the amount of \$364,400.51 and against its five guarantors in the amount of \$409,551.76 on November 10, 2011. Although the judgement was entered by the Clerk upon default, it appears that some or all of the defendants appeared and that a forbearance agreement was entered into and that a default thereunder occurred which allowed the plaintiff to enter a default judgment on November 10, 2011. A November 14, 2011 execution addressed to, among others, the Sheriff of Suffolk County targeting only the mortgagor defendant, BRP, was returned unsatisfied on April 2, 2012.

While the impetus for the Westchester County suit on the note and guarantees is not advanced in the moving papers, it may have been the result of a tax lien foreclosure sale of the mortgaged premises to the County of Suffolk in December of 2008. Following the expiration of the time within which the property could be redeemed, a conveyance of said premises to the County of Suffolk was issued under a deed dated November 23, 2010 that was recorded on November 30, 2010. As of that date, the County of Suffolk was vested with title to the mortgaged premises and the lien of the 1999 mortgage which is the subject of this action was presumptively extinguished and rendered unenforceable (*see* Real Property Tax Law § 1136).

During the pendency of the Westchester County action on the note, the plaintiff paid the County of Suffolk the sum of \$260,749.01 on February 6 2011, which was allegedly "applied to the past due and then existing real estate taxes owed by BRP and to redeemed [sic] the property and to revert title from Suffolk County to the defaulted owner Ben Rose Properties, LLC" (*see* ¶ 22 of the complaint). The Suffolk Legislature allegedly accepted the plaintiff's payment and authorized the issuance of a deed to BRP by resolution dated March 27, 2012, which deed issued on April 12, 2012. While the plaintiff characterizes such resolution as one authorizing the redemption of the property by BRP, the resolution itself recites that it is one authorizing a *sale* of the subject premises *upon application of BRP and its payment of the \$260,749.01* owing in back and current taxes (*see* Resolution attached as Exhibit N attached to the complaint).

Notwithstanding the language of the resolution, the plaintiff alleges that the February payment of \$260,749.01 to the County was not made by BRP but instead, was made by the plaintiff (*see* ¶¶ 22-24 of the complaint). The plaintiff further alleges that the April 12, 2012 deed issued from Suffolk, although "served upon BRP" has not been recorded (*see* ¶¶ 25 -26 of the complaint). In August of 2012, the plaintiff commenced this action for a judgment declaring that BRP is the legal owner of the premises. It further seeks a judgment foreclosing its mortgage lien as well as an award of deficiency judgments against BRP and its five guarantors, notwithstanding that a judgment on the note and guarantees has already been awarded to the plaintiff in the Westchester County action.

By the instant motion, the plaintiff demands an order directing “summary judgment in favor of the plaintiffs against the defendants and appointing a referee to compute, and for the relief requested in the Complaint upon the grounds that Plaintiff is entitled to judgment as a matter of law”. Although the motion is unopposed, it is denied.

Accelerated judgments are provided for in Article 32 of the CPLR. The remedy of summary judgment is available only after the joinder of issue (*see* CPLR 3212[a]). It is thus not available against parties in default and the court is powerless to grant such a motion against such a party (*see Gaskin v Harris*, 98 AD3d 941, 950 NYS2d 751 [2d Dept 2012]; *Shaibani v Soraya*, 71 AD3d 1121, 898 NYS2d 72 [2d Dept 2010]). Because of its drastic nature, the remedy of summary judgment should issue only where the movant demonstrates his or her entitlement to judgment as a matter of law by the tender of proof in admissible form sufficient to eliminate all questions of fact from the case (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Dina v Olsen*, 106 AD3d 903, 965 NYS2d 352 [2d Dept 2013]). A failure to do so warrants a denial of the motion without regard to the sufficiency of opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Carlucci v Village of Scarsdale*, 104 AD3d 797, 961 NYS2d 318 [2d Dept 2013]). In contrast, accelerated judgments against parties in default are governed by CPLR 3215 and are available where the movant submits proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing (*see* CPLR 3225(f); *Green Tree Serv., LLC v Cary*, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]; *Dupps v Betancourt*, 99 AD3d 855, 855, 952 NYS2d 585 [2d Dept 2013]).

Here, only two defendants, Alan and Lori Rosenberg, appeared by answer in response to the process served upon them. The plaintiff's demands for summary judgment are thus denied as to the remaining defendants. The court will however, measure the plaintiff's demands for relief against the defendants in default under CPLR 3215, in light of the absence of opposition. In this regard, the court notes that the plaintiff's moving papers duly established service of the summons and complaint upon the defaulting defendants, and a failure on their part to answer or otherwise appear in response thereto.

The granting of declaratory relief is a matter left to the court's discretion, as it may decline to hear the matter if other adequate remedies are available (*see Morgenthau v Erlbaum*, 59 NY2d 143, 464 NYS2d 392 [1983]; *Woollard v Shaffer Stores Co.*, 272 NY 304 [1936]). Specific pleading requirements are imposed upon those seeking this discretionary remedy by the provisions of CPLR 3017(b). Pursuant thereto, the pleader must specify the rights and other legal relations on which the declaration is requested and state what further or consequential relief is or could be claimed and the nature and extent of any relief which is claimed. The discretionary nature of the remedy afforded in declaratory judgments is further reflected in the provisions of its governing statute. CPLR 3001 thus provides that “[t]he supreme court *may* render a declaratory judgment ... as to the rights and other legal relations of the parties to a justiciable controversy” (emphasis added). A cause of action for a declaratory judgment is thus “unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract” (*BGW Dev. Corp. v Mount Kisco Lodge No.*, 247 AD2d 565, 669 NYS2d 56 [2d Dept 1998]; *see also Alizio v Feldman*, 82 AD3d 804, 918 NYS2d 218 [2d Dept 2011]; *Main Evaluations, Inc. v State*, 296 AD2d 852, 745 NYS2d 355

[4th Dept 2002]; *Apple Records v Capitol Records*, 137 AD2d 50, 54, 529 NYS2d 279 [1st Dept 1998]).

The term “justiciable controversy” as employed in CPLR 3001 has been defined by appellate case authorities as one which involves “a real dispute between adverse parties, involving substantial legal interests for which a declaration of rights will have some practical effect” (*Chanos v MADAD, LLC*, 74 AD3d 1007, 903 NYS2d 503 [2d Dept 2010]). A controversy is said to exist where the plaintiff asserts rights which are actually challenged by the defendant (*see Chanos v MADAD, LLC*, 74 AD3d 1007, *supra*). A concrete, actual controversy must be presented to the court for adjudication as an abstract, hypothetical issue is insufficient (*see Fragaso v Romano*, 268 AD2d 457, 702 NYS2d 333 [2d Dept 2000]). Because the remedy afforded by a declaratory judgment provides only a judicial declaration of rights between parties that is aimed at forestalling further litigation, such remedy does not entail coercive relief (*see Morgenthau v Erlbaum*, 59 NY2d 143, *supra*). Consequently, the declaration set forth in the judgment itself cannot be executed upon so as to compel a party to perform an act or to surrender property (*id.*, at 59 NY2d 148).

Upon application of the foregoing legal maxims to the facts presented on the instant application, the court finds that the plaintiff failed to establish an entitlement to an award of summary judgment against the answering defendants or an award of a default judgment against the defendants who failed to answer on the plaintiff’s first cause of action for declaratory relief. The complaint served and filed herein does not meet the specific pleading requirement imposed upon the plaintiff under CPLR 3017(b) and a justiciable controversy of the type defined above is not presented by the complaint nor the moving papers. Even if it were otherwise, the plaintiff failed to establish a substantive entitlement to the declaratory relief requested as no legal basis for a declaration that defendant BRP is the owner of the property as advanced in the moving papers. Finally, the remedy of declaratory relief appears to be unnecessary and inappropriate since the plaintiff has been awarded an adequate remedy at law under the terms of the money judgment entered against all defendants herein in the Westchester County action on the note and the guarantees.

The moving papers also failed to establish the plaintiff’s entitlement to accelerated judgments on its claims for foreclosure and sale and for deficiency judgments and awards of counsel fees against the defendants. The failure of the plaintiff to address the apparent extinguishment of the plaintiff’s mortgage following the County’s purchase of the property in 2008 and the 2010 conveyance to the County following the expiration of applicable periods of redemption leaves the record replete with questions of fact as to the viability of the plaintiff’s claims for foreclosure (*see Anderson v Pease*, 284 AD3d 871, 727 NYS2d 717 [3d Dept 2001]; *First Natl. Bank of Downsville v Atkin*, 279 AD2d 779, 718 NYS2d 499 [3d Dept 2001]; *see also Weinberg v Drewke*, 2002 WL 34678151 [Sup.Ct. Orange County 2002]). The subsequent machinations of the plaintiff in securing the March 27, 2013 resolution of the Suffolk County legislature, by which, a “sale” of the premises back to BRP upon the plaintiff’s payment of then outstanding taxes on the premises together with a conveyance of the mortgaged premises from the County back to BRP under the deed dated April 12, 2012, do not remove those questions of fact from the case (*see Anderson v Pease*, 284 AD3d 871, *supra*, at 873-874; *First Natl. Bank of Downsville v Atkin*, 279 AD2d 779, *supra*). In addition, the demands for deficiency judgments

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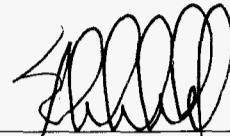
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against BRP and its guarantors and additional amounts attributable to counsel fees incurred by the plaintiff appear to be redundant in light of the existing judgment against them in the Westchester County action on the note .

In view of the foregoing, the instant motion (#001) by the plaintiff is denied, without prejudice to the interposition of new motion for the same and other similar relief upon proper papers. The proposed order appointing a referee to compute has thus been marked "not signed".

Dated: July 22 2013



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THOMAS F. WHELAN, J.S.C.