

Banco Popular N. Am. v 33-06 31st LLC
2013 NY Slip Op 31860(U)
July 30, 2013
Sup Ct, Queens County
Docket Number: 702172/2012
Judge: Frederick D.R. Sampson
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 31

BANCO POPULAR NORTH AMERICA X

INDEX NO. 702172/2012

Plaintiff,

MOTION SEQ. NO. 16

- against -

BY: SAMPSON, J.

DATED: July 30, 2013

33-06 31st LLC, KAMEK SALEH, NEW YORK
CITY ENVIRONMENTAL CONTROL
BOARD, and "JOHN DOE #1" through
"JOHN DOE #5", the last five names being
fictitious and unknown to plaintiff, the persons
or parties intended being the tenants, occupants,
persons or corporation, if any, having or claiming
to have an interest in or lien upon the premises,

Defendants.

X

Plaintiff moves for an order granting summary judgment against defendant 33-06 31ST LLC; for a default judgment against defendants Kamel Saleh and New York City Environmental Control Board; for an order substituting Raul Chavez and Michael Ropelewski for defendants John Doe #1 through John Doe #5, and amending the caption accordingly; for a default judgment against Raul Chavez and Michael Ropelewski; for an order appointing a referee to compute the amount due plaintiff and to determine how the mortgaged property should be sold; and awarding costs, disbursements and attorneys' fees.

Plaintiff commenced this action by filing a copy of the summons and complaint, on

September 21, 2012. A notice of pendency was filed on September 24, 2012. Plaintiff seeks to foreclose on a mortgage on the subject real property known as 30-63 Steinway Street, Astoria New York given by, to secure repayment of a note evidencing a commercial loan in the original principal amount of \$1,450,000.00, plus interest, extended to 36-06 31ST LLC.

Plaintiff alleges that it is the holder of the mortgage and note, and that defendant 36-03 31ST LLC defaulted under the terms of the mortgage and note by failing to make the monthly installment payment due in November 2011, within interest due as of November 2011, and as a consequence, it elected to accelerate the entire mortgage debt.

Defendant 36-03 31ST LLC was served with a copy of the summons and complaint and served an answer dated November 14, 2012, in which it asserted as affirmative defenses the failure to state a cause of action, equitable estoppel, laches, failure to mitigate damages, and lack of personal jurisdiction.

Defendant New York City Environmental Control Board was served with process, pursuant to CPLR 311, on October 1, 2012, and is in default, as it has not appeared in this action or served an answer.

Defendant Kamel Saleh was served with process on September 26, 2012, pursuant to CPLR 308(4), and the affidavit of service was filed with the court on October 12, 2012; defendant Saleh is in default, as he has not served an answer or otherwise moved in this action, and his time to do so expired on November 21, 2012 (CPLR 320, 308[4]).

Raul Chavez, sued herein as John Doe #1, was served with process on October 1,

2012, pursuant to CPLR 308(1), and is in default as he has not served an answer or otherwise moved; the time to do so expired on October 22, 2012. Michael Ropelewski sued herein as John Doe #2, was served with process on October 1, 2012, pursuant to CPLR 308(1), and is in default as he has not served an answer or otherwise moved; the time to do so expired on October 22, 2012. Mr. Chavez and Mr. Ropelewski are alleged to be tenants or occupants of the mortgaged premises.

All of the defendants were served with a copy of the within motion by ordinary mail on March 27, 2013 and have failed to oppose the motion or cross move for any relief.

On a motion for summary judgment in a foreclosure action, a plaintiff must make a prima facie showing by producing the mortgage, the unpaid note, and evidence of default (see *Wachovia Bank, Natl. Assn. v Carcano*, 106 AD3d 724, 725 [2d Dept 2013]; *Capital One, N.A. v Knollwood Props. II, LLC*, 98 AD3d 707, 707-708 [2d Dept 2012]; *Rossrock Fund II, L.P. v Osborne* 82 AD3d 737 [2d Dept 2011]; *Wells Fargo Bank, N.A. v Webster*, 61 AD3d 856, 856 [2d Dept 2009]; *Republic Natl. Bank of N.Y. v O'Kane*, 308 AD2d 482, 482 [2d Dept 2003]). Here, plaintiff has submitted a copy of the pleadings, the note, the commercial mortgage, an affidavit of regularity of its counsel, and an affidavit from Wilfredo Fuentes, an officer of Banco Popular North America. These submissions establish plaintiff's prima facie case to summary judgment as against defendant 33-06 31ST LLC. The burden then shifts to the defendant 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 Argent Mtge. Co., LLC v Montesana*, 79 AD3d 1079, [2d Dept. 2010]; *Ames Funding Corp. v Houston*, 44 AD3d 692, [2d Dept. 2007], *supra*). Where, as here, 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 [1915]; *Argent Mtge. Co., LLC v Montesana*, 79 AD3d 1079 [2nd Dept. 2010], *supra*).

Further, to the extent that defendant 33-06 31ST LLC preserved the defenses of lack of jurisdiction in their answer, said defense has been waived, as it failed to move to dismiss the complaint on this ground within 60 days of the service of their answer (CPLR 3211[e]).

The remainder of the defenses asserted in said answer are factually unsupported by an affidavit from said defendant, therefore, are without merit (*see Neighborhood Hous. Servs. N.Y. City, Inc. v Meltzer*, 67 AD3d 872 [2d Dept 2009]). That branch of plaintiff's motion which seeks an order granting summary judgment against defendant 33-06 31ST LLC and striking its affirmative defenses, is granted.

Plaintiff has made a prima facie showing of entitlement to a default judgment against defendant Kamal Saleh, as a matter of law, by submission of a copy of the pleadings, an affidavit of service, the commercial mortgage, the note, the guaranty, proof of default, and an affidavit of regularity by its counsel (*see Baron Assoc., LLC v Garcia Group Enters., Inc.*, 96 AD3d 793 [2d Dept 2012]).

That branch of plaintiff's motion which seeks to substitute Raul Chavez for defendant

John Doe #1 and Michael Ropelewski for John Doe #2, and to delete from the caption John Doe #3 through John Doe #5, is granted. That branch of plaintiffs’ motion which seeks to delete defendants “John Doe #1 through John Doe #12 defendants, is granted. The new caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----x

BANCO POPULAR NORTH AMERICA,

Plaintiff,

-against-

INDEX NO. 702172/2012

33-06 31ST LLC, KAMEL SALEH,
NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD, RAUL CHAVEZ AND
MICHAEL ROPELEWSKI,

Defendants.

----- x

That branch of plaintiff’s motion which seeks a default judgment against defendants New York City Environmental Control Board, Raul Chavez and Michael Ropelewski, is granted.

That branch of the motion which seeks the appointment of a referee to compute the amount due on the mortgage, is granted (*see HSBC Bank USA, N.A. v Taher*, 104 AD3d 815

[2d Dept 2013]; *Bank of N.Y. v Alderazi*, 99 AD3d 837 [2d Dept 2012]; *Bank of N.Y. v Alderazi* [2d Dept 2012]; *Emigrant Mtge. Co., Inc. v Fisher*, 90 AD3d 823, 824 [2d Dept 2011]; RPAPL 1321).

That branch of the motion which seeks an award of costs, disbursements and attorney's fees is denied with leave to renew upon a motion for foreclosure and sale.

Settle order.

Dated: July 30, 2013

.....
J.S.C.