

JP Morgan Chase Bank, N.A. v Clervoix

2013 NY Slip Op 32173(U)

September 4, 2013

Sup Ct, Suffolk County

Docket Number: 11-18916

Judge: Jerry Garguilo

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX No. 11-18916

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

P R E S E N T :

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 3-5-13
ADJ. DATE _____
Mot. Seq. # 001 - MG
002 - XMD

-----X

JP MORGAN CHASE BANK, N.A.,
Plaintiff,

- against -

SONY CLERVOIX; FRANTZIE JOSEPH
CLERVOIX A/K/A FRANTZIE JOSEPH-
CLERVOIX; JP MORGAN CHASE BANK,
N.A.; "JOHN DOE #1-5" and "JANE DOE #1-5"
said names being fictitious, it being the intention
of Plaintiff to designate any and all occupants,
tenants, persons or corporations, if any, having or
claiming an interest in or lien upon the premises
being foreclosed herein,
Defendants.

-----X

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THE RANALLI LAW GROUP PLLC.
Attorney for Defendant
Sony Clervoix
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FRANTZIE JOSEPH CLÉRVOIX
Defendant Pro Se
72 Giant Oak Road
Ridge, New York 11961

Upon the following papers numbered 1 to 30 read on this motion for an order of reference; Notice of Motion/ Order to Show Cause and supporting papers 1-11; Notice of Cross Motion and supporting papers 12-28; ~~Answering Affidavits and supporting papers _____~~; Replying Affidavits and supporting papers 29-30; ~~Other _____~~; (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 hereby

ORDERED that this motion (#001) by plaintiff JP Morgan Chase Bank, N.A. (Chase), for leave to amend the caption of this action pursuant to CPLR 3025 (b) 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 that the caption is hereby amended by striking therefrom the names of "John Doe #1" through "John Doe #5" and "Jane Doe #1 through "Jane Doe #5"; and it is further

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ORDERED that Plaintiff is directed to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court; 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**

JP MORGAN CHASE BANK, N.A.,

Plaintiff,

- against -

SONY CLERVOIX; FRANTZIE JOSEPH CLERVOIX
 A/K/A FRANTZIE JOSEPH-CLERVOIX; JP MORGAN
 CHASE BANK

Defendants.

ORDERED that defendants' cross motion (#002) seeking leave to submit a late answer and for an order dismissing the complaint on the grounds that plaintiff does not have the standing to bring the action and fraud is denied.

This is an action to foreclose a mortgage on premises known as 72 Giant Oak Road, Ridge, New York. On October 31, 2003, defendants Sony Clervoix and Frantzie Joseph Clervoix, a/k/a Frantzie Joseph-Clervoix (collectively Clervoix) executed a fixed rate note in favor of Cross Island Capital Corp. (Cross Island), agreeing to pay the sum of \$315,000.00 at the yearly rate of 5.87 percent. On October 31, 2003, defendants Clervoix executed a first mortgage in the principal sum of \$315,000.00 on the subject property. The mortgage was recorded on November 19, 2003 in the Suffolk County Clerk's Office. Thereafter, the mortgage was transferred by assignment of mortgage dated April 5, 2005 from Cross Island to JP Morgan Chase Bank, N.A. The assignment of mortgage was recorded on May 16, 2005 with the Suffolk County Clerk's Office. An allonge to the note, dated October 31, 2003, contains the indorsement of Guy Reeps, president of Cross Island transferring the note to Chase Manhattan Mortgage Corporation. Effective January 1, 2005, Chase Manhattan Mortgage Corporation merged with and into Chase Home Finance LLC. Effective May 1, 2011, Chase Home Finance LLC then merged with and into JP Morgan Chase Bank, National Association, the plaintiff herein.

Chase Home Finance, LLC sent a notice of default September 15, 2010 to defendants Clervoix stating that they had defaulted on their mortgage loan and that the amount past due was \$31,565.79. As a result of defendants' continuing default, plaintiff commenced this foreclosure action on June 9, 2011. In its complaint plaintiff alleges, in pertinent part, that defendants breached their obligations under the

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terms and conditions of the note and mortgage by failing to make their monthly payments commencing with the November 1, 2009 payment. Defendant Franzie Joseph Clervoix a/k/a Frantzie Joseph-Clervoix has not answered or appeared in this action. Defendant Sony Clervoix, who appeared by way of her attorney, served an untimely answer which was rejected by plaintiff.

The Court's computerized records indicate that a foreclosure settlement conference was held on January 24, 2013 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 an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321. In support of its motion, plaintiff submits among other things: the sworn affidavit of Cimeone Starling, vice president of Chase; the affirmation of Victor Spinelli, Esq.; the pleadings; the note, mortgage, assignment and merger documents; a notice of default; notices pursuant to RPAPL §§ 1320, 1303 and 1304; the affirmation of Victor Spinelli, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); affidavits of service for the summons and complaint; an affidavit of service for the instant summary judgment motion; and a proposed order appointing a referee to compute.

Defendants Clervoix cross-move (#002) seeking leave to submit a late answer and to dismiss the complaint on the grounds that plaintiff lacks standing to bring the action and fraud. Plaintiff has submitted a reply affirmation.

It is well settled that “[a] defendant who has failed to timely appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action when ... moving to extend the time to answer or to compel the acceptance of an untimely answer” (*see Maspeth Fed. Sav. & Loan Assn. v McGown*, 77 AD3d 890, 909 NYS2d 642 [2d Dept 2010], quoting *Lipp v Port Auth. of N.Y. & N.J.*, 34 AD3d 649, 649, 824 NYS2d 671 [2d Dept 2006]; *see also Karalis v New Dimensions HR, Inc.*, 105 AD3d 707, 962 NYS2d 647 [2d Dept 2013]; *Midfirst Bank v Al-Rahman*, 81 AD3d 797, 917 NYS2d 871 [2d Dept 2011]; *Swedbank, AB v Hale Ave. Borrower, LLC*, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]; *Community Preservation Corp. v Bridgewater Condominiums, LLC*, 89 AD3d 784, 932 NYS2d 378 [2d Dept 2011]; *Deutsche Bank Natl. Trust Co. v Rudman*, 80 AD3d 651, 914 NYS2d 672 [2d Dept 2010]). The determination as to what constitutes a reasonable excuse lies within the sound discretion of the trial court (*see Segovia v Delcon Constr. Corp.*, 43 AD3d 1143, 842 NYS2d 536 [2d Dept 2007]; *Matter of Gambardella v Ortov Light*, 278 AD2d 494, 717 NYS2d 923 [2d Dept 2000]).

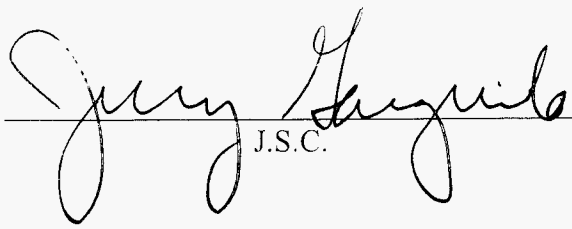
Here, defendants have failed to present any reasonable excuse for their default and as such, it is unnecessary to address whether they have a meritorious defenses (*see Deutsche Bank Natl. Trust Co. v Pietranico*, 102 AD3d 724, 957 NYS2d 868 [2d Dept 2013], citing *U.S. Bank N.A. v Stewart*, 97 AD3d 740, 948 NYS2d 411 [2d Dept 2012]; *Reich v Redley*, 96 AD3d 1038, 947 NYS2d 564 [2d Dept 2012]). Furthermore, defendants' failure to raise lack of standing as an affirmative defense in an answer constitutes a waiver of that defense (*see CPLR 3211[e]*; *see also Citibank v Swiatkowski*, 98 AD3d 555, 949 NYS2d 635 [2d Dept 2012]; *US Bank, Natl. Assoc. v Sharif*, 89 AD3d 723, 933 NYS2d 293 [2d

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Dept 2011]). The remaining requests for relief raised by the defendants are denied as moot given the foregoing determination. Notably, defendants do not deny in their opposition papers having received the loan proceeds and having defaulted on their loan payments.

Plaintiff's application for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is granted. The proposed order appointing a referee to compute pursuant to RPAPL §1321 is signed simultaneously herewith as modified by the court.

Dated: 9/4/13



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION