

<b>HSBC Bank USA v Kaya</b>
2013 NY Slip Op 32239(U)
August 27, 2013
Sup Ct, Suffolk County
Docket Number: 28200-10
Judge: W. Gerard Asher
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SUPREME COURT - STATE OF NEW YORK  
IAS PART 28 - SUFFOLK COUNTYPRESENT: Hon. W. GERARD ASHER  
Justice of the Supreme Court

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HSBC BANK USA, NATIONAL ASSOCIATION  
AS TRUSTEE FOR DEUTSCHE ALT-B  
SECURITIES MORTGAGE LOAN TRUST SERIES  
2006-AB4 MORTGAGE PASS-THROUGH  
CERTIFICATES,

Plaintiff,

-against-

THERESA KAYA, ENDER KAYA, NEW YORK  
STATE COMMISSIONER OF TAXATION and  
FINANCE and John Doe "1 through "12" said  
persons or parties having or claimed to have a  
right, title, or interest in the Mortgaged premises  
herein their respective names are presently unknown  
to the plaintiff,Defendants.  

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MOTION DATE 2-25-13

ADJ. DATE \_\_\_\_\_

Mot. Seq. #001-MotD

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Upon the following papers numbered 1 to 7 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 7; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers \_\_\_\_\_; Replying Affidavits and supporting papers \_\_\_\_\_; Other \_\_\_\_\_; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that this unopposed motion by the plaintiff for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor against the defendants Theresa Kaya and Ender Kaya, and striking their joint answer and affirmative defenses; (2) pursuant to RPAPL § 1321 appointing a referee to (a) compute amounts due under the subject mortgage; and (b) examine and report whether the subject premises should be sold in one parcel or multiple parcels; (3) amending the caption; and (4) awarding the plaintiff the costs of this motion, is determined to the extent indicated below; and it is



**ORDERED** that the plaintiff's request for the costs of this motion is denied without prejudice, leave to renew upon proper documentation for costs at the time of submission of the judgment; 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 real property known as 32 Lincoln Road, Medford, New York 11763. On June 2, 2006, the defendants Theresa Kaya executed a fixed-rate note in favor of American Brokers Conduit (American) in the principal sum of \$232,000.00. To secure said note, Theresa Kaya and Ender Kaya (the defendant mortgagors) gave American a mortgage also dated June 2, 2006 on the property. The mortgage indicates that Mortgage Electronic Registration Systems, Inc. (MERS) was acting solely as a nominee for American and its successors and assigns and that, for the purposes of recording the mortgage, MERS was the mortgagee of record. By way of an undated, blank endorsement without recourse, the note was allegedly transferred to the plaintiff, and the same was memorialized by an assignment of the mortgage dated June 18, 2010 and recorded on July 6, 2010.

The defendant mortgagors allegedly defaulted on the note and mortgage by failing to make their monthly payment of principal and interest due on February 2, 2010, and each month thereafter. After the defendant mortgagors allegedly failed to cure their default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on August 2, 2010. Issue was joined by the interposition of the defendant mortgagors' answer on or about dated May 6, 2011. By their answer, the defendant mortgagors generally deny some of the allegations in the complaint, and admit other allegations, including, inter alia, the execution of the note by the Theresa Kaya. In their answer, the defendant mortgagors also assert four affirmative defenses, alleging, inter alia, the plaintiff's failure to modify their mortgage loan pursuant to the applicable Federal Home Affordable Modification Program (HAMP) guidelines (*see*, 12 USC § 5219a); the commencement of this action in violation of HAMP; standing; and the failure to state a cause of action. The remaining defendants have neither appeared nor answered.

In compliance with CPLR 3408, foreclosure settlement conferences were held on June 22 and September 13, 2012. On the last date, this case was dismissed from the conference program and referred as an IAS case as the loan was not modified and the case not otherwise settled. Accordingly, there has been compliance with CPLR 3408 and no further settlement conference is required. In any event, it appears that the subject property is not owner-occupied, and that the defendant mortgagors reside elsewhere.

The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor against the defendant mortgagors, and striking their joint answer and affirmative defenses; (2) pursuant to RPAPL § 1321 appointing a referee to (a) compute amounts due

under the subject mortgage; and (b) examine and report whether the subject premises should be sold in one parcel or multiple parcels; (3) amending the caption; and (4) awarding the plaintiff the costs of this motion. No opposition papers have been filed herein.

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]).

By its submissions, the plaintiff established its prima facie entitlement to summary judgment on the complaint (*see, CPLR 3212; RPAPL § 1321; U.S. Bank Natl. Assn. v Denaro*, 98 AD3d 964, 950 NYS2d 581 [2d Dept 2012]; *Capital One, N.A. v Knollwood Props. II, LLC*, 98 AD3d 707, 950 NYS2d 482 [2d Dept 2012]; *HSBC Bank USA, N.A. v Schwartz*, 88 AD3d 961, 931 NYS2d 528 [2d Dept 2011]). In the instant case, the plaintiff produced the endorsed note, the mortgage and 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 the owner of the note and mortgage (*see, U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]).

The plaintiff also submitted sufficient proof to establish, prima facie, that the affirmative defenses set forth in the defendant mortgagors' answer are subject to dismissal due to their unmeritorious nature (*see, Becher v Feller*, 64 AD3d 672, 884 NYS2d 83 [2d Dept 2009]; *Wells Fargo Bank Minn., Natl. Assn. v Perez*, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]; *Coppa v Fabozzi*, 5 AD3d 718, 773 NYS2d 604 [2d Dept 2004] [*unsupported affirmative defenses are lacking in merit*]; *see also, Wells Fargo Bank, N.A. v Van Dyke*, 101 AD3d 638, 958 NYS2d 331 [1st Dept 2012]; *EMC Mtge. Corp. v Stewart*, 2 AD3d 772, 769 NYS2d 408 [2d Dept 2003]; *United Cos. Lending Corp. v Hingos*, 283 AD2d 764, 724 NYS2d 134 [3d Dept 2001]; *First Fed. Sav. Bank v Midura*, 264 AD2d 407, 694 NYS2d 121 [2d Dept 1999] [*foreclosing plaintiff has no obligation to modify loan*]).

As the plaintiff duly demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted to the defendant mortgagors (*see, HSBC Bank USA v Merrill*, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]). Accordingly, it was incumbent upon the defendant mortgagors 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]; *Wash. Mut. Bank v Valencia*, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]; *Grogg v South Rd. Assocs., LP*, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]).

The defendant mortgagors' 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 Mentosana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Further, the 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]; *see generally, Wells Fargo Bank, N.A. v Van Dyke*, 101 AD3d 638, *supra*; *JP Morgan Chase Bank, N.A. v Ilardo*, 36 Misc 3d 359, 940 NYS2d 829 [Sup Ct, Suffolk County 2012]).

By their first affirmative defense, the defendant mortgagors assert that the complaint fails to state a cause of action, however, the defendant mortgagors have not cross moved to dismiss the complaint on this ground (*see, Butler v Catinella*, 58 AD3d 145, 868 NYS2d 101 [2d Dept 2008]), and, in any event, the plaintiff has established its prima facie entitlement to summary judgment as indicated above. Therefore, the first affirmative defense is surplusage, and the branch of the motion to strike such defense is denied as moot (*see, Old Williamsburg Candle Corp. v Seneca Ins. Co.*, 66 AD3d 656, 886 NYS2d 480 [2d Dept 2009]; *Schmidt's Wholesale, Inc. v Miller & Lehman Const., Inc.*, 173 AD2d 1004, 569 NYS2d 836 [3d Dept 1991]).

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]). Additionally, "uncontradicted facts are deemed admitted" (*Tortorello v Larry M. Carlin*, 260 AD2d 201, 206, 688 NYS2d 64 [1<sup>st</sup> Dept 1999]). Under these circumstances, the Court finds that the defendant mortgagors failed to rebut the plaintiff's prima facie showing of its entitlement to summary judgment requested by it (*see, Flagstar Bank v Bellafiore*, 94 AD3d 1044, *supra*; *Argent Mtge. Co., LLC v Mentosana*, 79 AD3d 1079, *supra*; *Rossrock Fund II, L.P. v Commack Inv. Group, Inc.*, 78 AD3d 920, 912 NYS2d 71 [2d Dept 2010]; *Wells Fargo Bank Minn., N.A. v Perez*, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]; *see generally, Hermitage Ins. Co. v Trance Nite Club, Inc.*, 40 AD3d 1032, 834 NYS2d 870 [2d Dept 2007]). The plaintiff, therefore, is awarded summary judgment against the defendant mortgagors (*see, 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 mortgagors' answer is stricken, and the first, second and third affirmative defenses therein are dismissed.

The branch of the instant motion wherein the plaintiff seeks an order amending the caption by substituting Ian Horner and Cari Horne as defendants for the fictitious defendants John Doe #1-2, and by excising the remaining fictitious defendants, John Doe #2-10, 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 New York State Commissioner of Taxation and Finance (the Commissioner) and the newly substituted, Ian Horner and Cari Horner (the Horner defendants), none of which answered the complaint (*see, RPAPL § 1321; HSBC Bank USA, N.A. v Roldan*, 80 AD3d 566, 914 NYS2d 647

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[2d Dept 2011]). Accordingly, the defaults of the Commissioner and the Horner defendants are fixed and determined. Since the plaintiff has been awarded summary judgment against the defendant mortgagors, and has established the defaults in answering by the Commissioner and the Horner defendants, 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 [2d Dept 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]).

Accordingly, this motion for, inter alia, summary judgment and to appoint a referee to compute is determined as indicated above. All other relief requested in the motion and not specifically addressed herein is denied. The proposed long form order appointing a referee to compute pursuant to RPAPL § 1321, as modified by the Court, has been signed concurrently herewith.

Dated: August 27, 2013

  
Hon. W. GERARD ASHER, J.S.C.

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION