

<b>HSBC Bank USA v Avila</b>
2013 NY Slip Op 32412(U)
September 18, 2013
Supreme Court, Suffolk County
Docket Number: 5312/10
Judge: Joseph C. Pastoressa
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SUPREME COURT - STATE OF NEW YORK  
IAS PART 34 - SUFFOLK COUNTYPRESENT: Hon. JOSEPH C. PASTORESSA  
Justice of the Supreme CourtMOTION DATE 2-27-13

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

Mot. Seq. #001-MotD

\_\_\_\_\_  
HSBC BANK USA, NATIONAL ASSOCIATION,  
AS TRUSTEE FOR HOME EQUITY LOAN  
TRUST SERIES ACE 2005-HE5  
3476 Stateview Boulevard  
Ft. Mill, SC 29715

Plaintiff,

HOGAN LOVELLS US LLP  
Attorneys for Plaintiff and  
Counterclaim-Defendant  
HSBC Bank USA, National  
Association, as Trustee for Home  
Equity Loan Trust Series ACE  
2005-HE-5

-against-

JAMES AVILA, NEW YORK STATE  
DEPARTMENT OF TAXATION AND FINANCE,FRANK J. ROMANO & ASSOCIATES, P.C.  
Attorney for Defendant/Counterclaim-Plaintiff  
James Avila  
51 East Main Street  
Smithtown, N. Y. 11787JOHN DOE (Said name being fictitious, it being the  
intention of Plaintiff to designate any and all  
occupants of premises being foreclosed herein, and  
any parties, corporations or entities, if any, having  
or claiming an interest or lien upon the mortgaged  
premises.),

Defendants.

GROSS, POLOWY & ORLANS  
Co-Counsel for Plaintiff and  
Counterclaim Defendant  
25 Northpointe Parkway, Suite 25  
Amherst, N. Y. 14228\_\_\_\_\_  
Upon the following papers numbered 1 to 13 read on this motion for summary judgment; Notice of  
Motion/Order to Show Cause and supporting papers 1 - 13; 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/counterclaim-defendant for, inter alia,  
an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the  
defendant/counterclaim-plaintiff James Avila, and striking his answer, affirmative defenses and  
counterclaim; (2) pursuant to CPLR 3215 fixing the defaults of the non-answering defendants; (3)  
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; and (4) awarding the plaintiff the costs of this motion, is granted solely to the extent  
indicated below, otherwise denied; 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 promptly file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on residential real property known as 41 Brookes Road, North Babylon, New York 11703. On May 10, 2005, the defendant James Avila (the defendant mortgagor) executed an adjustable-rate note in favor of Fremont Investment & Loan (Fremont) in the principal sum of \$328,000.00. To secure said note, the defendant mortgagor gave Fremont a mortgage also dated May 10, 2005 on the property. By way of an endorsement with delivery, the note was allegedly transferred by Fremont to HSBC Bank USA, National Association, as Trustee for Home Equity Loan Trust Series ACE 2005-HE5 (the plaintiff) prior to commencement. The transfer of the note and mortgage was memorialized by an assignment of the mortgage dated January 28, 2010 and recorded on February 22, 2010 in the Suffolk County Clerk's Office.

The defendant mortgagor allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on or about October 1, 2009, and each month thereafter. After the defendant mortgagor allegedly failed to cure his default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on February 5, 2010. Issue was joined by the interposition of the defendant mortgagor's answer dated March 5, 2010.

By his answer, the defendant mortgagor generally denies all of the allegations set forth in the complaint and asserts four affirmative defenses, alleging failure to state a cause of action; lack of personal jurisdiction; payment and/or accord and satisfaction; and estoppel based upon a deferral or forbearance agreement. The answer also contains one counterclaim whereby the defendant mortgagor alleges that he is owed attorneys fees from the plaintiff by virtue of a clause in the subject mortgage. In response, the plaintiff/counterclaim-defendant has filed a reply dated March 15, 2010, which includes twenty one affirmative defenses. The remaining defendants have not answered the complaint. Parenthetically, according to the information contained in the County Clerk's records, the plaintiff filed a renewed lis pendens on January 10, 2013.

In compliance with CPLR 3408, a series of foreclosure settlement conferences were held in this court's specialized mortgage foreclosure part on December 21, 2010 (screening), February 7, April 25, June 15, July 18, August 24 and September 26, 2011. At the last conference, this case was dismissed from the conference program as the loan was not modified and as this action was not otherwise settled. Accordingly, no further conference is required.

The plaintiff/counterclaim-defendant now moves for, among other things, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the defendant mortgagor, and striking his answer, affirmative defenses and counterclaim; (2) pursuant to CPLR 3215 fixing the defaults of the non-answering defendants; (3) 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; and (4) awarding the plaintiff the costs of this motion. No opposition has been filed in response to this motion.

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], quoting *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 467, 644 NYS2d 345 [2d Dept 1997]).

By its submissions, the plaintiff established its prima facie entitlement to summary judgment on the complaint (*see, CPLR 3212; RPAPL § 1321; Wachovia Bank, Natl. Assn. v Carcano*, 106 AD3d 724, 965 NYS2d 516 [2d Dept 2013]; *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]). 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]). Further, the plaintiff 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 and mortgage since commencement of this action (*see, Deutsche Bank Natl. Trust Co. v Whelan*, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]; *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 mortgagor's answer, and the counterclaim asserted therein, 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*]; *Bank of N.Y. Mellon v Scura*, 102 AD3d 714, 961 NYS2d 185 [2d Dept 2013] [*process server's sworn affidavit of service is prima facie evidence of proper service pursuant to CPLR 308(2)*]; *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 before or after a default*]; *Shufelt v Bulfamante*, 92 AD3d 936, 940 NYS2d 108 [2d Dept 2012]; *Long Island Sav. Bank, F.S.B. v Denkensohn*, 222 AD2d 659, 635 NYS2d 683 [2d Dept 1995] [*dispute as to amount owed by the mortgagor is not a defense to a foreclosure action*]; *Charter One Bank, FSB v Leone*, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007] [*no competent evidence of an accord and satisfaction*]; *Manufacturers & Traders Trust Co. v David G. Schlosser & Assocs.*, 242 AD2d 943, 665 NYS2d 949 [4<sup>th</sup> Dept 1997] [*conclusory allegations of the conduct constituting alleged waiver are insufficient to raise a triable issue of fact*]; *FGH Realty Credit Corp. v VRD Realty Corp.*, 231 AD2d 489, 647 NYS2d 229 [2d Dept 1996]; *Prudential Home Mtge. Co. v Cermele*, 226 AD2d 357, 640 NYS2d 254 [2d Dept 1996] [*no valid defense or claim of estoppel*]).

where mortgage provision bars oral modification]; *Naugatuck Sav. Bank v Gross*, 214 AD2d 549, 625 NYS2d 572 [2d Dept 1995] [unsubstantiated allegations of facts are insufficient to raise a triable issue of fact with respect to an estoppel defense]).

With respect to the defendant mortgagor's counterclaim, the plaintiff demonstrated its prima facie entitlement to judgment as a matter of law by establishing that there is no contractual provision which requires it to pay the defendant mortgagor's attorney's fees in connection with this mortgage foreclosure action (see, *U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d 592, 789 NYS2d 470 [2004]; *Great Neck Terrace Owners Corp. v McCabe*, 101 AD3d 944, 957 NYS2d 216 [2d Dept 2012]; *Neighborhood Hous. Servs. N.Y. City, Inc. v Hawkins*, 97 AD3d 554, 947 NYS2d 321 [2d Dept 2012]). In this case, the terms of the note and mortgage do not provide for the payment of the defendant mortgagor's attorney's fees upon his own default in payment. Accordingly, there is no basis, factually or legally to support the defendant mortgagor's request for attorney's fees (see, CPLR 3211[b]). Thus, the counterclaim fails to state a cause of action upon which relief may be granted.

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 [3d Dept 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]; *Wash. Mut. Bank v Valencia*, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]).

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]). Further, the affirmative defenses and the counterclaim asserted by the defendant mortgagor are factually unsupported and without apparent merit (see, *Becher v Feller*, 64 AD3d 672, *supra*).

By his first affirmative defense, the defendant mortgagor asserts that the complaint fails to state a cause of action, however, he has not cross moved to dismiss the complaint on this ground (see, *Butler v Catinella*, 58 AD3d 145, 868 NYS2d 101 [2d Dept 2008]). Also, 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]).

The second affirmative defense, in which the defendant mortgagor alleges that the Court lacks jurisdiction over him, is stricken as he does not allege that he was not properly served with process herein (see, *Associates First Capital Corp. v Wiggins*, 75 AD3d 614, 904 NYS2d 668 [2d Dept 2010]). This defense was also waived as the defendant mortgagor failed to move to dismiss the complaint against him on this ground within 60 days after serving his answer (see, CPLR 3211[e]; *Reyes v Albertson*, 62 AD3d 855, 878 NYS2d 623 [2d Dept 2009]; *Dimond v Verdon*, 5 AD3d 718,

773 NYS2d 603 [2d Dept 2004]).

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, 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 [1<sup>st</sup> Dept 2012]; *Argent Mtge. Co., LLC v Mentasana*, 79 AD3d 1079, *supra*). The failure by the defendant mortgagor to raise and/or assert each of his pleaded defenses and his counterclaim in opposition to the plaintiff's motion warrants the dismissal of same as abandoned under the case authorities cited above (*see, Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, *supra*; *see also, Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, *supra*).

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, Flagstar Bank v Bellafore*, 94 AD3d 1044, *supra*; *Argent Mtge. Co., LLC v Mentasana*, 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, *supra*; *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 mortgagor (*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 mortgagor's answer, and the second, third and fourth affirmative defenses asserted therein, are stricken. Further, the defendant mortgagor's counterclaim against the plaintiff/counterclaim-defendant is dismissed as entirely without merit.

The branch of the instant motion wherein the plaintiff seeks an order amending the caption by excising the fictitious defendant "John Doe," is granted pursuant to CPLR 1024. By its submissions, the plaintiff established the basis for this relief (*see, Flagstar Bank v Bellafore*, 94 AD3d 1044, *supra*; *Neighborhood Hous. Servs. N.Y. City, Inc. v Meltzer*, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]). All future proceedings shall be captioned accordingly.

By its moving papers, the plaintiff further established the default in answering on the part of the remaining defendant, New York State Department of Taxation and Finance (New York) (*see, RPAPL § 1321; HSBC Bank USA, N.A. v Roldan*, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the default of New York is fixed and determined. Since the plaintiff has been awarded summary judgment against the defendant mortgagor, and has established the default in answering by the remaining defendant, New York, 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 herein and not addressed above is denied.

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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: September 18, 2013

  

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**HON. JOSEPH C. PASTORESSA, J.S.C.**

FINAL DISPOSITION     NON-FINAL DISPOSITION