

JPMorgan Chase Bank, N.A. v Calemmo

2013 NY Slip Op 33525(U)

November 27, 2013

Supreme Court, Suffolk County

Docket Number: 21108/2011

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

JPMorgan Chase Bank, National Association,
Successor in Interest by Purchase from the Federal
Deposit Insurance Corporation as Receiver for
Washington Mutual Bank,

Plaintiff,

-against-

Joseph Calemno, "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,

Motion Sequence No.: 001; MG

Motion Date: 3/15/13

Submitted:

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Attorney for Plaintiff:

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Attorney for Defendant

Joseph Calemno:

Lawrence & Lawrence
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Clerk of the Court

Upon the following papers numbered 1 to 10 read upon this motion for summary judgment:
Notice of Motion and supporting papers, 1 - 10; it is

ORDERED that this unopposed motion (001) by the plaintiff for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the defendant Joseph Calemno, striking his answer and dismissing his affirmative defense; (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; and (3) amending the caption, is granted; and it is

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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 254 Oakwood Road, Huntington Station, New York 11746. On September 25, 2007, the defendant Joseph Calemno (the defendant mortgagor) executed a fixed-rate note in favor of Washington Mutual Bank, F.A. (WAMU) in the principal sum of \$353,950.00. To secure said note, the defendant mortgagor gave WAMU a mortgage also dated September 25, 2007 on the property. The note contains an undated, blank endorsement without recourse.

By way of background, in September of 2008 WAMU failed and its assets were seized and placed into the hand of a receiver by the Federal Deposit Insurance Corporation (FDIC). Pursuant to a Purchase and Assumption Agreement dated October 2, 2008 (the Purchase Agreement) between FDIC as receiver of WAMU and JPMorgan Chase Bank, National Association, successor-in-interest by purchase from the FDIC as receiver for WAMU (the plaintiff), the plaintiff acquired certain assets, including all loans and loan commitments of WAMU. As a result, on September 25, 2008, the plaintiff became the owner of the loans and loan commitments of WAMU by operation of law.

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 March 1, 2010, 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 July 5, 2011. Issue was joined by service of the defendant mortgagor's answer dated August 2, 2011. The remaining defendants have neither appeared nor answered the complaint.

By his answer, the defendant mortgagor generally denies the allegations in the complaint, except admits that the named defendants herein reside or conduct business at the property. The defendant mortgagor also asserts one affirmative defense, alleging that the plaintiff is not the proper party and does not have the legal authority to commence and maintain this action.

In compliance with CPLR 3408, foreclosure settlement conferences were held in this Court's specialized mortgage foreclosure conference part on May 10 and August 2, 2012. On the last date, this action was dismissed from the conference program and referred to IAS as a loan modification or other settlement had not been achieved. Accordingly, the conference requirement imposed upon the Court by CPLR 3408 and/or the Laws of 2008, Ch. 472 § 3-a as amended by Laws of 2009 Ch. 507 § 10 has been satisfied. No further conference is required under any statute, law or rule.

The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the defendant mortgagor, striking his answer and dismissing his affirmative defense; (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

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premises should be sold in one parcel or multiple parcels; and (3) amending the caption. 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 Deutsch*, 88 AD3d 691, 930 NYS2d 477 [2d Dept 2011]; *Wells Fargo Bank v Das 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]).

Where, as here, an answer served includes the defense of standing or lack of capacity to sue, the plaintiff must prove its standing in order to be entitled to relief (*see, CitiMortgage, Inc. v Rosenthal*, 88 AD3d 759, 931 NYS2d 638 [2d Dept 2011]). The standing of a plaintiff in a mortgage foreclosure action is measured by its ownership, holder status or possession of the note and mortgage at the time of the commencement of the action (*see, Bank of N.Y. v Silverberg*, 86 AD3d 274, 926 NYS2d 532 [2d Dept 2011]; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]). A mortgage "is merely security for a debt or other obligation, and cannot exist independently of the debt or obligation" (*Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909, 911, 961 NYS2d 200 [2d Dept 2013] [internal quotation marks and citations omitted]). Holder status is established where the plaintiff is the special indorsee of the note or takes possession of a mortgage note that contains an endorsement in blank on its face or attached thereto, as the mortgage follows an incident thereto (*see, Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674, 838 NYS2d 622 [2d Dept 2007]; *First Trust Natl. Assn. v Meisels*, 234 AD2d 414, 651 NYS2d 121 [2d Dept 1996]). "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident" (*U.S. Bank, N.A. v Collymore*, 68 AD3d 752, *supra* at 754 [internal quotation marks and citations omitted]). Further, "[n]o special form or language is necessary to effect an assignment as long as the language shows the intention of the owner of a right to transfer it" (*Suraleb, Inc. v International Trade Club, Inc.*, 13 AD3d 612, 612, 788 NYS2d 403 [2d Dept 2004] [internal quotation marks and citations omitted]).

The effect of an endorsement is to make the note "payable to bearer" pursuant to UCC § 1-201(5) (*see, UCC 3-104; Franzese v Fidelity N.Y., FSB*, 214 AD2d 646, 625 NYS2d 275 [2d Dept 1995]). When an instrument is indorsed in blank (and thus payable to bearer), it may be negotiated by transfer of possession alone (*see, UCC § 3-202; § 3-204; § 9-203[g]; Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674, *supra*; *First Trust Natl. Assn. v Meisels*, 234 AD2d 414, *supra*; *Franzese v Fidelity N.Y. FSB*, 214 AD2d 646, *supra*). Furthermore, UCC § 9-203(g) explicitly provides that the assignment of an interest of the seller or grantor of a security interest in the note automatically transfers a corresponding interest in the mortgage to the assignee.

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By its submissions, the plaintiff established its prima facie entitlement to summary judgment on the complaint (*see*, CPLR 3212; RPAPL § 1321; *Wachovia Bank, N.A. v Carcano*, 106 AD3d 724, 965 NYS2d 516 [2d Dept 2013]; *U.S. Bank, N.A. 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 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 demonstrated that, as holder of the endorsed note, it has standing to commence this action (*see*, *Deutsche Bank Natl. Trust Co. v Whalen*, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]; *U.S. Bank N.A. v Cange*, 96 AD3d 825, 947 NYS2d 522 [2d Dept 2012]; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, *supra*; *c.f.*, *Homecomings Fin., LLC v Guldi*, 108 AD3d 506, 969 NYS2d 470 [2d Dept 2013]). In support of the motion, the plaintiff submitted, inter alia, an affidavit from the plaintiff's representative, whereby it is alleged, inter alia, that the plaintiff is the holder and in possession of the original note. The documentary evidence submitted also includes, among other things, the note transferred via an endorsement in blank (*see*, *Slutsky v Blooming Grove Inn, Inc.*, 147 AD2d 208, 542 NYS2d 721 [2d Dept 1989]). Additionally, the plaintiff submitted a recorded copy of the Purchase Agreement, which has been found to confer upon the purchaser the right to foreclose on a defaulting borrower (*see*, *JP Morgan Chase Bank, N.A. v Shapiro*, 104 AD3d 411, 959 NYS2d 918 [1st Dept 2013]; *JP Morgan Chase Bank, N.A. v Miodownik*, 91 AD3d 546, 937 NYS2d 192 [1st Dept 2012]; *see generally*, *OneWest Bank, FSB v Davies*, 38 Misc3d 1230 [A], 967 NYS2d 868 [Sup Ct, Suffolk County, Feb. 22, 2013, Whelan, J.]). Under these circumstances, the plaintiff demonstrated a prima facie case of standing.

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]; *Grogg v South Rd. Assoc., L.P.*, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]).

Self-serving and conclusory allegations do not raise issues of fact, and do not require the plaintiff to respond to alleged affirmative defenses which are based on such allegations (*see*, *Charter One Bank, FSB v Leone*, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007]; *Rosen Auto Leasing, Inc. v Jacobs*, 9 AD3d 798, 780 NYS2d 438 [3d Dept 2004]). 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 [1st Dept 2012]; *Argent Mtge. Co., LLC v Mentasana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]).

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The defendant mortgagor's answer is insufficient, as a matter of law, to defeat the plaintiff's unopposed motion (see, *Flagstar Bank v Bellafigliore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Argent Mtge. Co., LLC v Montesana*, 79 AD3d 1079, *supra*). Further, the affirmative defenses asserted by the defendant mortgagor are factually unsupported and without apparent merit (see, *Becher v Feller*, 64 AD3d 672, 884 NYS2d 83 [2d Dept 2009]; *Wells Fargo Bank Minn., N.A. v Perez*, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]; *Coppa v Fabozzi*, 5 AD3d 718, 773 NYS2d 604 [2d Dept 2004]). In any event, the failure by the defendant mortgagor to raise and/or assert his first affirmative defense 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 Bellafigliore*, 94 AD3d 1044, *supra*; *Argent Mtge. Co., LLC v Montesana*, 79 AD3d 1079, *supra*; *Rosrock 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 is stricken and the affirmative defense asserted therein is dismissed.

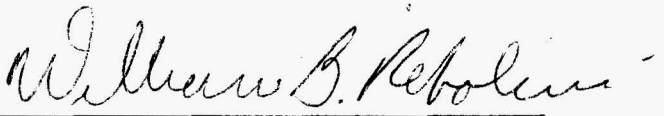
The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by substituting Mr. Calemno for John Doe #1 and Coreen Dickovitch for Jane Doe #1, and by excising the remaining fictitious named defendants John Doe #2 through #10 and Jane Doe #2 through #10 is granted (see, *Flagstar Bank v Bellafigliore*, 94 AD3d 1044, *supra*; *Neighborhood Hous. Servs. of N.Y. City, Inc. v Meltzer*, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]). By its submissions, the plaintiff established the basis for this relief. All future proceedings shall be captioned accordingly.

By its moving papers, the plaintiff further established the default in answering on the part of the newly substituted defendants (see, RPAPL § 1321; *HSBC Bank USA, N.A. v Roldan*, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the defaults of the remaining defendants are 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 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 v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

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Accordingly, this motion for, inter alia, summary judgment and to appoint a referee to compute is granted. 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: 11/27/2013


HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION