

OneWest Bank, FSB v Makarow

2013 NY Slip Op 33544(U)

November 26, 2013

Supreme Court, Suffolk County

Docket Number: 35840-10

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

OneWest Bank, FSB

Plaintiff,

-against-

Ivan Makarow, Natalie Makarow

“JOHN DOE”, “RICHARD ROE”, “JANE DOE”,
“CORA COE”, “DICK MOE” and “RUBY POE”,
the six defendants last named in quotation marks
being intended to designate tenants or occupants
in possession of the herein described premises or
portions thereof, if any there be, said names being
fictitious, their true name being unknown to
plaintiff,

Defendants.

MOTION DATE 10-23-12

ADJ. DATE _____

Mot. Seq. # 003-MotD

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Upon the following papers numbered 1 to 9 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 9; 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 (003) by the plaintiff for, inter alia, an order: awarding summary judgment in its favor and against the defendants Ivan Makarow and Natalie Makarow, striking their joint answer and dismissing their affirmative defenses and counterclaim; appointing a referee to compute and ascertain; amending the caption; and awarding the plaintiff the costs and disbursements, including attorney's fees, for this motion is granted solely to the extent indicated below, otherwise denied; 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

ORDERED that the plaintiff shall submit with the proposed judgment of foreclosure, proof of filing of a new or successive notice of pendency (*see*, CPLR 6513; 6516[a]; *Aames Funding Corp. v Houston*, 57 AD3d 808, 872 NYS2d 134 [2d Dept 2008]; *EMC Mtge. Corp. v Stewart*, 2 AD3d 772, 769 NYS2d 408 [2d Dept 2003]; *Horowitz v Griggs*, 2 AD3d 404, 767 NYS2d 860 [2d Dept 2003]); and it is

ORDERED that the plaintiff shall submit with the proposed judgment of foreclosure, a certificate of conformity with respect to the affidavit from an officer of the plaintiff executed outside the state of New York (*see*, CPLR 2309[c]; *U.S. Bank N.A. v Dellarmo*, 94 AD3d 746, 942 NYS2d 122 [2d Dept 2012]); 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 224 Bellmore Avenue, East Islip, New York 11730. On October 4, 2002, the defendants Ivan Makarow and Natalie Makarow (collectively the defendant mortgagors) executed a fixed-rate note in favor of IndyMac Bank, FSB (IndyMac) in the principal sum of \$184,000.00. To secure said note, the defendant mortgagors gave IndyMac a mortgage also dated October 4, 2002 on the property. By undated endorsement, the Federal Deposit Insurance Corporation (FDIC), as receiver for IndyMac Federal Bank, FSB successor to IndyMac, allegedly transferred the note to OneWest Bank, FSB (the plaintiff). The transfer of the note and mortgage by the FDIC to the plaintiff was subsequently memorialized by an assignment dated January 25, 2010.

The defendant mortgagors allegedly defaulted on the note and mortgage by failing to make their monthly payment of principal and interest due on or about February 1, 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 September 24, 2010.

By way of background, the plaintiff previously moved pursuant to RPAPL §1320 and CPLR 3215(f) for an order fixing the defaults of the defendant mortgagors and appointing referee. Thereafter, the defendant mortgagors moved for an Order dismissing the complaint on the grounds of lack of personal jurisdiction or, in the alternative, vacating the defendant mortgagors' default in answering and directing the plaintiff to accept their late answer. The plaintiff's motion and the defendant mortgagors' motion to dismiss were subsequently withdrawn by written stipulation dated February 22, 2012 (the stipulation). The stipulation provided, *inter alia*, for the withdrawal, without prejudice, of the plaintiff's motion for an order of reference. In return, the defendant mortgagors admitted service of process of the summons and complaint and waived any defenses relating to the lack of personal jurisdiction. The stipulation further provided, among other things, that the defendant mortgagors' answer dated December 19, 2011 was deemed served and accepted by the plaintiff.

By their answer, the defendant mortgagors admit some of the allegations in the complaint, generally deny other allegations and assert five affirmative defenses, alleging the following: lack of proper standing; the statute of frauds; lack of personal jurisdiction (subsequently waived by the stipulation as noted above); failure to comply with RPAPL § 1303; and fraud/misrepresentation. The answer also contains one counterclaim by which the defendant mortgagors seek a reformation of the note and mortgage and damages, including attorneys' fees. In the counterclaim, the defendant mortgagors allege that representatives of IndyMac committed a fraud upon them by making false representations with respect to their procurement of, and subsequent ability to repay, the mortgage loan.

In response to the counterclaim, the plaintiff, as a defendant on the counterclaim, filed a reply. In its reply, the plaintiff denies the material allegations in the counterclaim and asserts six affirmative defenses, alleging the following: failure to state a cause of action; the statute of limitations; unclean hands; compliance by the plaintiff of all required disclosures; lack of legal authority to modify the subject mortgage loan; and holder status of the note and the mortgage at the time of commencement.

By Order dated July 3, 2012 (Asher, J.), certain prior short form and long form Orders dated March 15, 2012 appointing a referee, and an Order dated June 12, 2012 (Asher, J.) denying the defendant mortgagors' motion for an order extending their time to answer were, sua sponte, vacated pursuant to the stipulation. Parenthetically, the moving papers show that the stipulation had been improperly sent by the plaintiff directly to Part 28, instead of to the attention of the Special Term of the Chief Clerk's Office. Subsequently, by Order dated December 17, 2012 (Asher, J.), a motion (004) by former counsel for the defendant mortgagors, for, inter alia, leave to withdraw as attorney of record was granted and all proceedings were stayed until February 19, 2013. The instant motion was further held in abeyance until March 27, 2013, by virtue of the stay imposed by Uniform Rules of Trial Courts (22 NYCRR) § 202.12-A (c)(7) while status/settlement conferences were pending.

In compliance with CPLR 3408, a series of foreclosure settlement conferences were calendared and/or held in this Court's specialized mortgage foreclosure conference part on January 24, April 11, June 13, September 8 and November 15, 2011. On November 15, 2011, this action was dismissed from the conference program and referred as an IAS case as a loan modification or other settlement had not been achieved. Status/settlement conferences were then held before Foreclosure Conference Part 32 on November 14, 2012, January 16 and March 27, 2013. Accordingly, 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 defendants Ivan Makarow and Natalie Makarow, striking their joint answer and dismissing their affirmative defenses and counterclaim; (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 and disbursements, including attorney's fees. 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.

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, *supra*). Additionally, the plaintiff's submissions and the record before the Court includes, inter alia, affidavits of service from the plaintiff's agent whereby it is alleged that notices in compliance with RPAPL § 1303 were served upon each of the defendant mortgagors.

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 of the original note and the mortgage and has been in possession of the same since March 19, 2009, and continuing. Additionally, 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]). Thus, the plaintiff established that it took possession of the endorsed note prior to the commencement of the action. The plaintiff also submitted, inter alia, an assignment dated prior to commencement and duly recorded on April 23, 2010, which memorialized the transfer of the note and mortgage to it prior to commencement (*see, GRP Loan, LLC v Taylor*, 95 AD3d 1172, 945 NYS2d 336 [2d Dept 2012]). Therefore, it appears that the plaintiff is also the assignee of the mortgage by virtue of the written assignment. Under these circumstances, the plaintiff demonstrated a prima facie case of standing.

Further, the plaintiff submitted sufficient proof to establish, prima facie, that the affirmative defenses and the counterclaim set forth in the defendant mortgagors' joint 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., 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] [*unsupported affirmative defenses are lacking in merit*]; *see also, Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178, 919 NYS2d 465 [2011]; *Morales v AMS Mtge. Servs., Inc.*, 69 AD3d 691, 692, 897 NYS2d 103 [2d Dept 2010] [*CPLR 3016(b) requires that the circumstances of fraud be "stated in detail," including specific dates and items*]; *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)*]; *Patterson v Somerset Invs. Corp.*, 96 AD3d 817, 817, 946 NYS2d 217 [2d Dept 2012] [*"a party who signs a document without any valid excuse for having failed to read it is 'conclusively bound' by its terms"*]; *Emigrant Mtge. Co, Inc. v Fitzpatrick*, 95 AD3d 1169, 945 NYS2d 697 [2d Dept 2012] [*claimed violations of General Business Law § 349 and/or engagement in deceptive business practices do not generally give rise to claims against a lender*]; *Argent Mtge. Co., LLC v Montesana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010] [*unaffordability of loan will not support damages claim against lender and is not a defense to a foreclosure action*]; *Grogg v South Rd. Assoc., L.P.*, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010] [*the mere denial of receipt of the notice of default is insufficient to rebut the presumption of delivery*]).

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. Assoc., L.P.*, 74 AD3d 1021, *supra*).

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, *supra*). Additionally, "uncontradicted facts are deemed admitted" (*Tortorello v Carlin*, 260 AD2d 201, 206, 688 NYS2d 64 [1st Dept 1999] [internal quotation marks and citations omitted]).

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 Mentasana*, 79 AD3d 1079, *supra*). Further, the affirmative defenses and the counterclaim asserted by the defendant mortgagors are factually unsupported and without apparent merit (*see, Becher v Feller*, 64 AD3d 672, *supra*). In any event, the failure by the defendant mortgagors to raise and/or assert each of their pleaded defenses and the 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 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 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 mortgagors striking their answer (*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 affirmative defenses and the counterclaim asserted in the answer are dismissed.

The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by excising the fictitious named defendants, John Doe, Richard Roe, Jane Doe, Cora Coe, Dick Moe and Ruby Poe is granted (*see, Flagstar Bank v Bellafiore*, 94 AD3d 1044, *supra*; *Neighborhood Hous. Servs. of N.Y. City, Inc. v Meltzer*, 67 AD3d 872, 889 NYS2d 627 [2d

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Dept 2009]). By its submissions, the plaintiff established the basis for this relief. All future proceedings shall be captioned accordingly.

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: November 26, 2013

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

 FINAL DISPOSITION X NON-FINAL DISPOSITION