

Citimortgage, Inc. v Randell

2014 NY Slip Op 30724(U)

January 16, 2014

Sup Ct, Suffolk County

Docket Number: 4333-11

Judge: Joseph C. Pastoressa

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
IAS PART 34 - SUFFOLK COUNTYPRESENT: Hon. JOSEPH C. PASTORESSA
Justice of the Supreme CourtMOTION DATE 5-23-13

ADJ. DATE _____

Mot. Seq. # 001-MG

CITIMORTGAGE, INC. x

Plaintiff,

DAVIDSON FINK LLP

Attorneys for Plaintiff

28 East Main Street

Suite 1700

Rochester, N. Y. 14614-1990

-against-

JEFFREY R. RANDELL, STACY RANDELL; and
"JOHN DOE" and "MARY DOE,"
(Said names being fictitious, it being the intention of
Plaintiff to designate any all occupants, tenants,
persons or corporations, if any, having or claiming
an interest in or lien upon the premises being
foreclosed herein.)

FRANK J. ROMANO

& ASSOCIATES, P.C.

Attorneys for Defendants

Jeffrey R. Randell

Stacy Randell

51 East Main Street

Smithtown, N. Y. 11787

Defendants.
_____ x

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 for, inter alia, an order awarding summary judgment in its favor against the defendants Jeffrey R. Randell and Stacy Randell, appointing a referee and amending the caption is granted; and it is

ORDERED that the appearance by the defendants Jeffrey R. Randell and Stacy Randell is limited to a notice of appearance and waiver of service of all papers and of notices of all proceedings in this action, except a copy of the notice of sale, notice of discontinuance and notice of proceedings to obtain surplus monies; 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 19 Milleridge Drive, Deer Park, New York 11729. On April 22, 2008, the defendants Jeffrey R. Randell and Stacy Randell (the defendant mortgagors) executed a fixed-rate note in favor of Premium Capital Funding, LLC doing business as Topdot Mortgage (the lender) in the principal sum of \$515,924.00. To secure said note, the defendant mortgagors gave the lender a mortgage also dated April 22, 2008 on the property. By way of an endorsed allonge affixed to the note, and by way of an assignment dated January 26, 2011, the note and the mortgage were transferred to the plaintiff, CitiMortgage, Inc.

The defendant mortgagors allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on or about April 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 February 9, 2011.

Issue was joined by the interposition of the defendant mortgagors' joint answer dated February 15, 2011. By their answer, the defendant mortgagors admit some of the allegations set forth in the complaint, and generally deny other allegations therein. The defendant mortgagors also assert ten affirmative defenses, alleging, among other things, the following: entitlement to a mandatory conference; predatory lending; unfair and deceptive business practices by "the [p]laintiff and/or its agents;" and failure to: state a cause of action; credit all payments; provide disclosures prior to origination as well as commencement; and negotiate in good faith with respect to a loan modification. The remaining defendants have neither answered nor appeared in this action.

In compliance with CPLR 3408, a series of foreclosure settlement conferences were scheduled for and/or held in this Court's specialized mortgage foreclosure part on June 10, August 2, September 13, October 6, and December 20, 2011 as well as on February 8, February 15, March 22, April 17, May 30 and August 15, 2012. At the last conference, this case was dismissed from the conference program as the parties could not reach an agreement to modify the loan or otherwise settle this action. Accordingly, no further conference is required pursuant to any rule, statute or law.

The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the defendant mortgagors, striking their answer and dismissing the affirmative defenses therein; (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. 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]; *Washington 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, 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 note, the mortgage and evidence of nonpayment (see, *Federal 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]). Thus, the plaintiff demonstrated its prima facie burden as to the merits of this foreclosure action.

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., 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]; *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]; *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]; *Charter One Bank, FSB v Leone*, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007] [no competent evidence of an accord and satisfaction]; *HSBC Bank USA v Picarelli*, 36 Misc3d 1218 [A], 959 NYS2d 89 [Sup Ct, Queens County 2012] [TILA requirements satisfied where the lender provided the required information and forms to the obligor at the closing]; *Deutsche Bank Natl. Trust Co. v Campbell*, 26 Misc3d 1206 [A], 906 NYS2d 779, 2009 NY Slip Op 526780 [U] [Sup Ct, Kings County 2009] [a disclosure violation of the Real Estate Settlement Procedures Act, 12 USC § 2601. *et seq.*, does not constitute a valid defense to a mortgage foreclosure]).

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

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, *supra*; *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 Mentosana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). 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 Mentosana*, 79 AD3d 1079, *supra*). Additionally, in this case, the affirmative defenses 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 in opposition to the plaintiff's motion warrants the dismissal of the 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, Bank of Smithtown v 219 Sagg Main, LLC*, 107 AD3d 654, 968 NYS2d 95 [2d Dept 2013]; *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]; *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 in its favor against the defendant mortgagors (*see, Federal 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 affirmative defenses set forth therein are dismissed in their entirety.

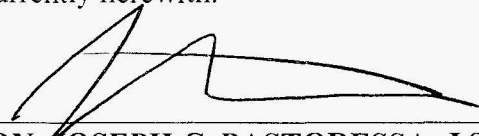
The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by excising the names of the fictitious defendants, John Doe and Mary Roe, is granted (*see, Flagstar Bank v Bellafiore*, 94 AD3d 1044, *supra*; *Neighborhood Hous. Servs. of N.Y. City, Inc.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

Since the plaintiff has been awarded summary judgment against the defendant mortgagors, and it has established that there are no other named defendants herein, 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]; *Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *Bank of E. Asia v Smith*, 201

CitiMortgage, Inc. v Randell
Index No.: 4333-11
Pg. 5

AD2d 522, 607 NYS2d 431 [2d Dept 1994]). Accordingly, this motion for, inter alia, summary judgment and an order of reference is granted. The proposed long form order appointing a referee to compute pursuant to RPAPL § 1321 has been signed concurrently herewith.

Dated: January 16, 2014



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

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION