

Deutsche Bank Natl. Trust Co. v Tumbarello
2014 NY Slip Op 30737(U)
March 18, 2014
Supreme Court, Suffolk County
Docket Number: 17881-10
Judge: Jr., Andrew G. Tarantino
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**SUPREME COURT - STATE OF NEW YORK
IAS PART 50 - SUFFOLK COUNTY**

PRESENT: Hon. ANDREW G. TARANTINO JR.
Acting Supreme Court Justice

_____ X

**DEUTSCHE BANK NATIONAL TRUST COMPANY, AS
TRUSTEE ON BEHALF OF BCAP LLC TRUST 2007-AA4**

**Motion Date: 6-4-13
Adj. Date: _____
Mot. Seq. # 001-MotD**

Plaintiff,

**McCABE, WEISBERG, & CONWAY, P.C.
Attorneys for Plaintiff
145 Huguenot Street, Suite 499
New Rochelle, New York 10801**

-against-

**ALFRED M. TUMBARELLO III A/K/A ALFRED
MICHAEL TUMBARELLO III A/K/A ALFRED
TUMBARELLO, JEANA TUMBARELLO A/K/A JEAN
TUMBARELLO, WORKERS' COMPENSATION BOARD
OF THE STATE OF NEW YORK, SUFFOLK FEDERAL
CREDIT UNION AND "JOHN DOE #1" to "JOHN DOE
#10," the last 10 names being fictitious and unknown to
plaintiff, the persons or parties intended being the persons or
parties, if any, having or claiming an interest in or lien upon
the mortgaged premises described in the verified complaint,**

**DANIEL A. RUSSO, P.C.
Attorneys for the Defendants
Alfred Tumbarello
Jeana Tumbarello
31 West Main Street
Suite 203
Patchogue, NY 11772**

Defendants.

**JAMES R. MCGINN, ESQ.
Attorney for the Defendant
New York State Workers'
Compensation Board sued herein as
Workers' Compensation Board of NYS
Att: Judgement Unit
20 Park Street, Rm 200
Albany, NY 12207**

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**RUBIN & ROTHMAN, LLC
Att: Joseph Latona, Esq.
Attorneys for Non-Party
Teachers Federal Credit Union
1787 Veterans Highway
Islandia, NY 11749**

Upon the following papers numbered 1 to 11 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 11; 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,

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ORDERED that this unopposed motion by the plaintiff for, inter alia, an order awarding summary judgment in its favor against the defendants Alfred Tumbarello and Jeana Tumbarello, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption is determined as indicated below; and it is

ORDERED that the plaintiff is directed to serve a copy of this order amending the caption upon the Calendar Clerk of this Court; 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 property known as 1620 Speonk-Riverhead Road, Speonk, New York 11960. On March 7, 2007, the defendant Alfred Tumbarello executed an interest only adjustable-rate note in favor of Countrywide Bank, N.A. (the lender) in the principal sum of \$568,000.00. To secure said note, Mr. Tumbarello and his wife, Jeana Tumbarello (the defendant mortgagors), gave the lender a mortgage also dated March 7, 2007 on the property. By way of an endorsed note and an assignment of the mortgage dated January 25, 2010, the mortgage instruments were allegedly transferred to Deutsche Bank National Trust Company, As Trustee on behalf of BCAP LLC Trust 2007-AA4 (the plaintiff) prior to commencement of this action.

Mr. Tumbarello allegedly defaulted on the note and mortgage by failing to make the monthly payment of interest due on July 1, 2009, and each month thereafter. After the defendant mortgagors allegedly failed to cure Mr. Tumbarello's default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on May 11, 2010. According to the records maintained by the Suffolk County Clerk's computerized database, the plaintiff re-filed the lis pendens on or about July 30, 2013.

Issue was joined by the interposition of the defendant mortgagors' joint verified answer dated and sworn to on June 15, 2010. By their answer, the defendant mortgagors deny all of the allegations set forth in the complaint, and assert three affirmative defenses, alleging, inter alia, failure to state a cause of action; lack of personal jurisdiction; and the statute of frauds. The defendant New York State Workers' Compensation Board sued herein as the Worker's Compensation Board of the State of New York, has filed a notice of appearance, waiving all, but certain notices. The remaining defendants have neither appeared, nor answered the complaint. Parenthetically, while a purported notice of appearance and waiver was filed in this action on behalf of Teachers Federal Credit Union (TFCU), TFCU is not a party defendant. Ostensibly, counsel for TFCU intended on filing a notice of appearance for the defendant Suffolk Federal Credit Union (SFCU), which has not appeared in this action.

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In compliance with CPLR 3408, an initial settlement conference was scheduled to be held before this Court's specialized mortgage foreclosure part on October 4, 2010, however, the defendant mortgagors failed to appear. As a result, this action was referred as an IAS case. Thereafter, an additional conference was held before Foreclosure Conference Part 5 on November 18, 2010, and subsequently rescheduled to January 6, 2011. At the January, 2011 conference, the defendant mortgagors did not appear a second time, resulting in the conference being adjourned to July 13, 2012, this time before Foreclosure Conference Part 48. On July 13, 2012, the pending conference in this action was adjourned several times, namely October 19, November 30 and February 5, 2013. At the February, 2013 conference, after initial attempts to settle this action were unsuccessful, the conference was rescheduled a final time to May 21, 2013. At the May, 2013 conference, the defendant mortgagors did not appear or otherwise participate. Accordingly, the conference requirement imposed by CPLR 3408 has been satisfied, and no further conference is required.

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 set forth therein; (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) 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, inter alia, 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]). Under these circumstances, 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, Bank of N.Y. Mellon v Scura*, 102 AD3d 714, 961 NYS2d 185 [2d Dept 2013]; *Scarano v Scarano*, 63 AD3d 716, 880 NYS2d 682 [2d Dept 2009] [process server's sworn affidavit of service is prima facie evidence of proper service]).

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, 845 NYS2d 513 [2d 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]). 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*). 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*). By their first affirmative defense, the defendant mortgagors assert that the complaint fails to state a cause of action, however, they have not cross moved to dismiss the complaint on this ground (*see, Butler v Catinella*, 58 AD3d 145, 868 NYS2d 101 [2d Dept 2008]). Also, as indicated above, the plaintiff has established its prima facie entitlement to summary judgment. 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., Inc.*, 66 AD3d 656, 886 NYS2d 480 [2d Dept 2009]; *Schmidt's Wholesale, Inc. v Miller & Lehman Constr.*, 173 AD2d 1004, 569 NYS2d 836 [3d Dept 1991]). The second affirmative defense, in which the defendant mortgagors allege that the Court lacks jurisdiction over them, was also waived as they failed to move to dismiss the complaint against them on this ground within 60 days after serving the answer

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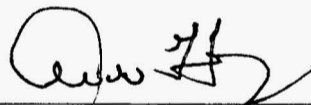
(see, CPLR 3211[e]; *Putnam County Sav. Bank v Mastrantone*, 111 AD3d 914, 975 NYS2d 684 [2d Dept 2013]; *Reyes v Albertson*, 62 AD3d 855, 878 NYS2d 623 [2d Dept 2009]; *Dimond v Verdon*, 5 AD3d 718, 773 NYS2d 603 [2d Dept 2004]). In any event, the failure by the defendant mortgagors to raise and/or assert 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 v Baiden*, 36 NY2d 539, *supra*; see also, *Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, *supra*).

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#1-10, 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]). The branch of the motion wherein the plaintiff seeks an order pursuant to CPLR 1021 substituting Deutsche Bank National Trust Company, As Trustee For Holders of the BCAP LLC Trust 2007-AA4 for the plaintiff is also granted (see, CPLR 1018; 3025[b]; *Citibank, N.A. v Van Brunt Props., LLC*, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]; see also, *IndyMac Bank F.S.B. v Thompson*, 99 AD3d 669, 952 NYS2d 86 [2d Dept 2012]; *Greenpoint Mtge. Corp. v Lamberti*, 94 AD3d 815, 941 NYS2d 864 [2d Dept 2012]; *Maspeth Fed. Sav. & Loan Assn. v Simon-Erdan*, 67 AD3d 750, 888 NYS2d 599 [2d Dept 2009]). By its submissions, the plaintiff established the basis for the above-noted 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 defendants New York and SFCU (see, RPAPL § 1321; *HSBC Bank USA, N.A. v Roldan*, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the defaults of New York and SFCU are fixed and determined. Since the plaintiff has been awarded summary judgment against the defendant mortgagors, and has established the default in answering by New York and SFCU, 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 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

Accordingly, this motion for, inter alia, summary judgment and an order of reference is determined as indicated above. 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: 3. 18. 2014



Hon. ANDREW G. TARANTINO, A.S.C.J.

 FINAL DISPOSITION X NON-FINAL DISPOSITION