

Continental Home Loans, Inc. v Benitez

2014 NY Slip Op 31020(U)

April 11, 2014

Sup Ct, Suffolk County

Docket Number: 00199-12

Judge: Ralph T. Gazzillo

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SUPREME COURT - STATE OF NEW YORK
IAS PART 6 - SUFFOLK COUNTY

COPY

PRESENT: Hon. RALPH T. GAZZILLO
Acting Justice Supreme CourtMOTION DATE 3-28-13

ADJ. DATE _____

Mot. Seq. #001-MotD

CONTINENTAL HOME LOANS, INC., x

Plaintiff,

ROSICKI, ROSICKI & ASSOCIATES, P.C.
Attorneys for Plaintiff
26 Harvester Avenue
Batavia, N. Y. 14020

-against-

PAOLA BENITEZ; LUIS CONSTANTE; "JOHN
DOES" and "JANE DOES", said names being
fictitious, parties intended being possible tenants
or occupants of premises, and corporations, other
entities or persons who claim, or may claim, a lien
against the premises,PAOLA BENITEZ
10 A Evergreen Avenue
Brentwood, N. Y. 11717LUIS CONSTANTE
10 A Evergreen Avenue
Brentwood, N. Y. 11717

Defendants.

x

Upon the following papers numbered 1 to 18 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 10 - 14; Replying Affidavits and supporting papers 15 - 18;
Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (001) by the plaintiff for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the defendants Paola Benitez and Luis Constante, striking their joint answer and dismissing their affirmative defenses; (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 is determined as indicated below; and it is

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 10 Evergreen Avenue, Brentwood, New York 11717. On November 17, 2009, the defendants Paola Benitez and Luis Constante (the defendant mortgagors) executed a fixed-rate note in favor of Continental Home Loans, Inc. (the plaintiff) in the principal sum of \$338,200.00. To secure said note, the defendant mortgagors gave the plaintiff a mortgage also dated November 17, 2009 on the property. The mortgage indicates that Mortgage Electronic Registration Systems, Inc. (MERS) was acting solely as a nominee for the plaintiff and its successors and assigns and that, for the purposes of recording the mortgage, MERS was the mortgagee of record. By assignment dated November 23, 2011 and recorded on February 11, 2012, the mortgage was transferred from MERS to the plaintiff.

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 July 1, 2011, 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 summons and verified complaint on January 6, 2012. The plaintiff subsequently re-filed the notice of pendency on January 9, 2012.

Issue was joined by the interposition of the defendant mortgagors' joint answer. By their answer, the defendant mortgagors generally deny the allegations in the complaint pertaining to the execution and delivery of the note to the plaintiff, but admit the remaining allegations, including their default in payment and the amount claimed to be due by the plaintiff. In their answer, the defendant mortgagors also assert two affirmative defenses, alleging, inter alia, partials payments/attempts by them to secure a loan modification; and attempts by them to mitigate the effects of their alleged income reduction and to cure their arrears.

In compliance with CPLR 3408, settlement conferences were held in this Court's mortgage foreclosure conference part on August 16 and November 8, 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 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 Paola Benitez and Luis Constante, striking their joint answer and dismissing their affirmative defenses; (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.

In support of the motion, the plaintiff submits, inter alia, the note and mortgage; the assignment; the pleadings; an affidavit of Richard G. Fike, a Vice President from the plaintiff; a default notice dated September 13, 2011; a 90-day pre-foreclosure notice dated July 8, 2011; and an affirmation from counsel. In the complaint, the plaintiff alleges, among other things, compliance with the 90-day notice requirement in RPAPL § 1304. In his affidavit, Fike alleges, inter alia, that on September 13, 2011 the plaintiff sent the defendant mortgagors a demand letter in response to their failure to tender the installment due on July 1, 2011, as well as subsequent installments. The plaintiff

also sent the defendant mortgagor a 90-day pre-foreclosure notice by certified and first-class mail. Fike further alleges that his knowledge herein is based upon his review of the plaintiff's business records, and his review of the complaint, which he asserts is factually true. In his affirmation, counsel asserts that there is no dispute as to the defendant mortgagors' default in payment, and that the plaintiff was entitled to reject the attempted tender of a single monthly payment since substantially more was past due.

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]). The plaintiff also demonstrated compliance with the notice requirements of RPAPL §§ 1303 and 1304 (*cf., Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]). 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' 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*]; *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] [*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 Is. Sav. Bank of Centereach, 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*]; *Jamaica Sav. Bank v Cohan*, 36 AD2d 743, 744, 320 NYS2d 471 [2d Dept 1971] [*"A]ny sympathy which the mortgagors' situation might arouse cannot be permitted to undermine the stability of contractual obligations"*]).

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]; *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]). 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]).

In opposition, the defendant mortgagors filed an affidavit sworn to on March 29, 2013 by the defendant Paola Constante with the Court on March 29, 2013, the day after the return date of this motion (*see, CPLR 2214[b]; Foitl v G.A.F. Corp.*, 64 NY2d 911, 488 NYS2d 377 [1985]). Although untimely, the opposition has been considered since the delay was minimal and, despite the plaintiff's objection thereto, no prejudice has been shown by the late filing as the plaintiff has responded to the same (*compare, Rodriguez v Tiwari*, 265 AD2d 247, 697 NYS2d 24 [1st Dept 1999], *with Romeo v Ben-Soph Food Corp.*, 146 AD2d 688, 537 NYS2d 52 [2d Dept 1989]). In her affidavit, Constante alleges, among other things, that the defendant mortgagors have offered partial payments to the plaintiff without success. She also alleges that the defendant mortgagors have been actively working with the plaintiff to resolve this matter. Constante requests that the plaintiff extend a forbearance to the defendant mortgagors by lowering their monthly payments until their employment and overall financial situation improves.

In reply, the plaintiff has filed an affirmation from counsel. In his affirmation, counsel asserts, inter alia, that this action was dismissed from the conference program on November 8, 2012, after his office advised the Court that the defendant mortgagors were denied a loan modification. He also asserts that the alleged pursuit of a loan modification is not a defense to a foreclosure action, and that the defendant mortgagors may continue to seek a modification, outside of court intervention, up until the actual foreclosure sale.

A review of the opposing papers shows that the defendant mortgagors' opposing papers are insufficient to raise any genuine issue of fact requiring a trial on the merits of the plaintiff's claims for foreclosure and sale, and insufficient to demonstrate any bona fide defense to such claim (*see, CPLR*

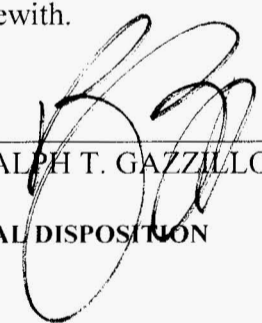
3211[e]; *Flagstar Bank v Bellafore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Argent Mtge. Co., LLC v Mentasana*, 79 AD3d 1079, *supra*). Notwithstanding the general denials by the defendant mortgagors as to the execution and delivery of the note and mortgage, notably absent from their opposition papers or their answer are any allegations by them denying their continuous default in payment. Thus, even when viewed in the light most favorable to the defendant mortgagors, their opposition is insufficient to raise any genuine question of fact requiring a trial on the merits of the plaintiff's claims for foreclosure and sale, and insufficient to demonstrate any bona fide defenses (*see*, CPLR 3211[e]; *see*, *Valley Natl. Bank v Deutsch*, 88 AD3d 691, *supra*; *Rosstock Fund II, L.P. v Commack Inv. Group, Inc.*, 78 AD3d 920, 912 NYS2d 71 [2d Dept 2010]; *Cochran Inv. Co. Inc. v Jackson*, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007]). The plaintiff, therefore, is awarded summary judgment in its favor against the defendant mortgagors (*see*, *Fed. Home Loan Mtge. Corp. v Karastathis*, 237 AD2d 558, *supra*; *see generally*, *Zuckerman v City of New York*, 49 NY2d 557, *supra*). Accordingly, the defendant mortgagors' answer is stricken, and the two affirmative defenses set forth therein 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 Does and Jane Does, is granted (*see*, *Flagstar Bank v Bellafore*, 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.

The branch of the plaintiff's motion pursuant to CPLR 3215 for an order fixing the defaults of the non-answering defendants is denied. In the affirmation of regularity, the plaintiff's counsel avers that the defendant mortgagors are the only named defendants herein. Therefore, the plaintiff failed to establish its request for this relief.

Since the plaintiff has been awarded summary judgment against the defendant mortgagors, it 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, an order awarding it summary judgment and appointing a referee to compute 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: 4/11/14



Hon. RALPH T. GAZZILLO, A.J.S.C.

____ FINAL DISPOSITION NON-FINAL DISPOSITION