Deutsche Bank Natl. Trust Co. v Rogers

2014 NY Slip Op 31197(U)

May 5, 2014

Supreme Court, Suffolk County

Docket Number: 30807-09

Judge: Daniel Martin

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This opinion is uncorrected and not selected for official publication.

[* 1]

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
I.A.S PART 9 - SUFFOLK COUNTY

INDEX NO.: 30807-09
Motion Date: 7-11-13
Adj. Date: ________
Mot. Seq. #002-MotD

PRESENT:
Hon. DANIEL MARTIN

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Deutsche Bank National Trust Company, as Trustee for the Certificateholders of Soundview Home Loan Trust 2005-OPT1, Asset-Backed Certificates, Series 2005-OPT1,

Plaintiff,

-against-

Roslyn Rogers; Elliot Rogers; Town of Babylon Industrial Development Agency; New York State Department of Taxation and Finance; Fleet National Bank, and "JOHN DOE #1" through "JOHN DOE #10", the last ten names being fictitious and unknown to the Plaintiff, the person or parties intended being the person or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the complaint,

Defendants.

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PLAINTIFF'S ATTY:

McCABE, WEISBERG & CONWAY, P.C.
145 Huguenot Street, Suite 499
New Rochelle, N. Y. 10801

DEFENDANT'S ATTY:

Adam C. Gomerman, Esq.
807 E. Jericho Turnpike
Huntington Station, N. Y. 11746

The following named papers have been read on this motion:	
Notice of Motion for an Order of Reference	X
Cross-Motion	
Answering Affidavits	
Replying Affidavits	

ORDERED that this unopposed motion by the plaintiff for, inter alia, an order: awarding summary judgment in its favor and against the defendants Roslyn Rogers and Elliott Rogers, striking their answer and dismissing the affirmative defenses therein; fixing the defaults of the non-answering defendants; appointing a referee; and amending the caption is determined as set forth below; and it is

ORDERED that the branch of the motion wherein the plaintiff requests an order awarding it 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 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.

The plaintiff, Deutsche Bank National Trust Company, as Trustee for the Certificateholders of Soundview Home Loan Trust 2005-OPT1, Asset-Backed Certificates, Series 2005-OPT1, commenced this action foreclose a modified mortgage on residential real property known as 40 Greenway Terrace, Babylon, New York 11702. On February 3, 2005, the defendant Roslyn Rogers executed an adjustable-rate note (the note) in favor of Option One Mortgage Corporation (the lender) in the principal sum of $500,000.00. To secure said note, Mrs. Rogers and her husband Elliott Rogers (the defendant mortgagors) gave the lender a mortgage also dated February 3, 2005 (the mortgage) on the property.

On February 22, 2008, the defendant mortgagors subsequently executed a loan modification agreement (the agreement) which amended and supplemented the note and the mortgage to form a single lien in the consolidated amount of $543,480.42, with interest. The agreement provides for a fixed-rate of interest for the first three years, and changing amounts of interest and principal due beginning on February 1, 2008. The agreement further provides, inter alia, for the full payments of all amounts due under the agreement on the maturity date, March 1, 2035. The lender allegedly transferred the modified note and mortgage to the plaintiff prior to commencement, memorialized by an endorsement to the note and an assignment of the note and mortgage dated July 10, 2006. Thereafter, the assignment was duly recorded in the Suffolk County Clerk's Office on January 31, 2007.

The defendant mortgagors allegedly defaulted on the note by failing to make the monthly payment of principal and interest due on or about August 1, 2008, 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 August 7, 2009. The plaintiff re-filed lis pendens on October 25, 2012.

Issue was joined by the interposition of the defendant mortgagors' joint answer dated September 21, 2009. By their answer, the defendant mortgagors deny some of the allegations set forth in the complaint and admit other allegations set forth therein. In their answer, the defendant mortgagors also assert six affirmative defenses as follows: lack of personal jurisdiction; failure to state a cause of action; a fatally defective complaint; payment; breach of contract; lack of privity of contract. The remaining defendants have neither appeared nor answered the complaint.

According to the records maintained by the court's computerized database, a settlement conference was held before the specialized foreclosure conference part on October 19, 2009. On that date, this case was dismissed from the conference program as the defendant mortgagors did not appear or participate. Thereafter, by Order dated June 8, 2010 (Costello, J.), a prior motion by the plaintiff for summary judgment and an order of reference was referred to a conference. Pursuant to that Order, additional settlement conferences were then conducted or adjourned before Foreclosure Conference Part 27 on August 12, October 28, and November 18, 2010. Upon Justice Costello's retirement, further conferences were conducted or adjourned before Foreclosure Conference Part 9 on February 24, April 14, June 23 and June 28, 2011. At the last conference, this action was marked to indicate that the parties could not reach an agreement to modify the loan or otherwise settle this action. Accordingly, the conference requirements imposed by CPLR 3408 have been satisfied; no further conference is required under any statute, law or rule.

The plaintiff now moves again 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 endorsed note, the mortgage, the assignment, the modification agreement 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, *supra*). 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*, ***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]; ***Wells Fargo Bank, N.A. v Van Dyke***, 101 AD3d 638, 958 NYS2d 331 [1st 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]; ***Charter One Bank, FSB v Leone***, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007] [no competent evidence of an accord and satisfaction]). Furthermore, in this case, the plaintiff was free to transfer the note and mortgage, absent any language which expressly prohibited the assignment (*see*, ***Matter of Stralem***, 303 AD2d 120, 758 NYS2d 345 [2d Dept 2003]).

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 Mentesana***, 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 Mentesana***, 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*). 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*).

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 Mentesana***, 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.

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*, ***PHH Mtge. Corp. v Davis***, 111 AD3d 1110, 975 NYS2d 480 [3d Dept 2013]; ***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 the above-noted relief. All future proceedings shall be captioned accordingly.

The plaintiff's request to record a copy of the agreement in the Office of the Suffolk County Clerk upon the payment of all applicable fees and taxes, in lieu of the original thereof, is granted (*see*, UCC 3-804; *see also*, ***Kraft v Commer***, 54 AD22d 598, 387 NYS2d 318 [4th Dept 1976]; *cf.*, ***Brown Bark II, L.P. v Weiss & Mahoney, Inc.***, 90 AD3d 963, 935 NYS2d 637 [2d Dept 2011]; ***Marrazzo v Piccolo***, 163 AD2d 369, 558 NYS2d 103 [2d Dept 1990]). By its submissions, the plaintiff established the basis for the above-noted relief.

By its moving papers, the plaintiff further established the default in answering on the part of the defendants Town of Babylon Industrial Development Agency, New York State Department of Taxation and Finance (*see*, RPAPL § 1321; ***HSBC Bank USA, N.A. v Roldan***, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the defaults of the above-noted defendants are fixed and determined. Since the plaintiff has been awarded summary judgment against the defendant mortgagors, and has established the default in answering by all of the non-answering 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]; ***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 set forth 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: May 5, 2014
Riverhead, NY

Hon. DANIEL MARTIN, A.J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**