

Bac Home Loans Servicing, L.P. v Zakaria
2014 NY Slip Op 31257(U)
February 10, 2014
Supreme Court, Suffolk County
Docket Number: 50182/09
Judge: Daniel Martin
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COPY

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

INDEX NO.: 50182-09

PRESENT:

Hon. DANIEL MARTIN

PLAINTIFF'S ATTY:

BERKMAN, HENOCH,
PETERSON, PEDDY FENCHEL, PC
100 Garden City Plaza
Garden City, N.Y. 11530

DEFENDANT:

PARVIN AKTHER ZAKARIA
54 Madia Avenue
Deer Park, N. Y. 11729

BAC HOME LOANS SERVICING, L.P.
f/ka COUNTRYWIDE HOME LOANS
SERVICING, LP,

Plaintiff,

-against-

PARVIN AKTHER ZAKARIA, et al.,

"JOHN DOE #1"through "JOHN DOE #12", the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises, described in the complaint,

Defendants.

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 the branch of this unopposed motion by the plaintiff for an order awarding summary judgment in its favor and against the defendant Parvin Akther Zakaria, striking his answer and dismissing the affirmative defenses set forth therein is granted; and it is

ORDERED that the branches of the motion wherein the plaintiff requests an order amending the caption, fixing the defaults of the non-answering defendants and appointing a referee are denied, for the reasons stated below, without prejudice to renewal within One Hundred and Twenty (120) Days of the date of this Order; and it is

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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 any motion resubmitted pursuant to this Order shall include a proposed long form order appointing a referee; 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 54 Maida Avenue, Deer Park, New York 11729. On March 8, 2007, the defendant Parvin Akther Zakaria (the defendant mortgagor) executed a fixed-rate note in favor of America's Wholesale Lender (the lender) in the principal sum of \$351,500.00. To secure said note, the defendant mortgagor gave the lender a mortgage also dated March 8, 2007 on the property. The mortgage indicates that Mortgage Electronic Registration Systems, Inc. (MERS) was acting solely as a nominee for the lender and its successors and assigns and that, for the purposes of recording the mortgage, MERS was the mortgagee of record. By way of an endorsed note and by way of an assignment dated November 16, 2009, the note and mortgage were allegedly transferred to BAC Home Loans Servicing, LP, formerly known as Countrywide Home Loans Servicing, LP (the plaintiff).

The defendant mortgagor allegedly defaulted on the note and mortgage by failing to make his monthly payment of principal and interest due on or about September 1, 2008, and each month thereafter. After the defendant mortgagor allegedly failed to cure his default, the plaintiff commenced the instant action by the filing of the notice of pendency, summons and verified complaint on December 28, 2009. According to the records maintained by the Office of the Suffolk County Clerk, the plaintiff re-filed the notice of pendency on December 5, 2012.

Issue was joined by service of the defendant mortgagor's answer dated January 11, 2010. By his answer, the defendant mortgagor generally denies all of the material allegations in the complaint and asserts fourteen affirmative defenses alleging, inter alia, the lack of personal jurisdiction and standing; unclean hands; and the failure to provide notice of the plaintiff's merger, modify the loan in good-faith, mitigate damages, serve a 30-day notice, timely serve the summons and complaint, and comply with Banking Law § 6-m. RPAPL §§ 1302, 1303, 1304 and 1320. The remaining defendants have neither answered nor appeared herein.

A review of the records maintained by the Court's computerized database shows that a settlement conferences were scheduled for and/or held in this Court's specialized mortgage foreclosure part on October 28, 2010 and January 20, 2011. 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.

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The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the defendant Parvin Akther Zakaria, striking his answer and dismissing the affirmative defenses set forth therein; (2) pursuant to CPLR 3215 fixing the defaults of the non-answering defendants; (3) amending the caption; (4) 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 (5) awarding the plaintiff the costs of this motion. 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 endorsed note, the mortgage, the assignment 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]). Furthermore, the plaintiff 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]). Moreover, the plaintiff demonstrated that, as the holder of the note and assignee of the mortgage, it has standing to commence this action (*see, Deutsche Bank Natl. Trust Co. v Whalen*, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]). Under these circumstances, the plaintiff demonstrated its prima facie burden as to the merits of this foreclosure action and as to its standing to maintain the same.

The plaintiff also submitted sufficient proof to establish, prima facie, that the affirmative defenses set forth in the defendant mortgagor's 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)*]; *Wells Fargo Bank, N.A. v Van Dyke*, 101 AD3d 638, 958 NYS2d 331

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[1st Dept 2012]; **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*]; **Scarano v Scarano**, 63 AD3d 716, 716, 880 NYS2d 682 [2d Dept 2009] [*a process server's affidavit of service constitutes prima facie evidence of proper service*]; **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*]; **FGH Realty Credit Corp. v VRD Realty Corp.**, 231 AD2d 489, 647 NYS2d 229 [2d Dept 1996] [*no valid defense or claim of estoppel where mortgage provision bars oral modification*]; **Naugatuck Sav. Bank v Gross**, 214 AD2d 549, 625 NYS2d 572 [2d Dept 1995] [*unsubstantiated allegations of facts are insufficient to raise a triable issue of fact with respect to an estoppel defense*]; **Connecticut Natl. Bank v Peach Lake Plaza**, 204 AD2d 909, 612 NYS2d 494 [3d Dept 1994] [*defense based upon the doctrine of unclean hands lacks merit where a defendant fails to come forward with admissible evidence of showing immoral or unconscionable behavior*]; **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 mortgagor (*see, HSBC Bank USA v Merrill*, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]). Accordingly, it was incumbent upon the defendant mortgagor 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 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 mortgagor's 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*). In this case, the affirmative defenses asserted by the defendant mortgagor are factually unsupported and without apparent merit (*see, Becher v Feller*, 64 AD3d 672, *supra*). The second affirmative defense, in which the defendant mortgagor alleges that the Court lacks jurisdiction over him, is stricken as he does not allege that he was not properly served with process herein (*see, Associates First Capital Corp. v Wiggins*, 75 AD3d 614, 904 NYS2d 668 [2d Dept 2010]). This defense was also waived as the defendant mortgagor failed to move to dismiss the complaint against him on this ground within 60 days after serving the answer (*see, CPLR 3211[e]; Reyes*

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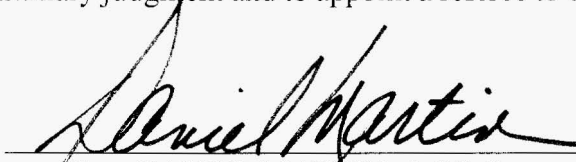
v *Albertson*, 62 AD3d 855, 878 NYS2d 623 [2d Dept 2009]; *Dimond v Verdon*, 5 AD3d 718, 773 NYS2d 603 [2d Dept 2004]). In any event, the failure by the defendant mortgagor to raise and/or assert each of his pleaded defenses in opposition to the plaintiff's motion warrants the dismissal of the same as 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 mortgagor 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 Montesana*, 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 in its favor against the defendant mortgagor (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 mortgagor's answer is stricken, and the affirmative defenses set forth therein are dismissed.

The branches of the motion for an order amending the caption, fixing the defaults of the non-answering defendants and appointing a referee are denied, without prejudice to renewal, as the plaintiff failed to demonstrate its prima facie burden with respect to the same (see generally, CPLR 3215 [a]; RPAPL § 1321; *Joosten v Gale*, 129 AD2d 531, 514 NYS2d 729 [1st Dept 1987]; cf., *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 plaintiff's request to deem all non-answering defendants in default and to also discontinue this action as to all of the fictitious defendants is inconsistent and has left the Court in the untenable position of having to guess whether a default is sought as to "Mrs. Zackaria," the defendant mortgagor's alleged co-occupant and mother. More specifically, the plaintiff has not sufficiently set forth whether Mrs. Zakaria is to be substituted in place of the fictitious defendant "John Doe #1," and whether her default in answering is to be fixed and determined. Additionally, the plaintiff's moving papers do not include a proposed long form order appointing a referee and awarding the incidental relief sought (see generally, RPAPL 1321).

Accordingly, this motion for, inter alia, summary judgment and to appoint a referee to compute is determined as indicated above.

Dated: FEBRUARY 10, 2014.
Riverhead, NY



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

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION