

Wells Fargo Bank, N.A. v Vinas

2014 NY Slip Op 31297(U)

May 8, 2014

Supreme Court, Suffolk County

Docket Number: 35849-10

Judge: Daniel Martin

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

PRESENT:
Hon. DANIEL MARTIN

INDEX NO.: 35849-10
Motion Date: 8-1-13
Adj. Date: _____
Mot. Seq. #: 001-MotD

WELLS FARGO BANK, N.A., AS TRUSTEE FOR
THE CERTIFICATEHOLDERS OF BANC OF
AMERICA ALTERNATIVE LOAN TRUST
2006-3, MORTGAGE PASS-THROUGH
CERTIFICATE, SERIES 2006-3

Plaintiff.

-against-

JONATHAN VINAS
and "JOHN DOE #1" to "JOHN DOE #10", the last
10 names being fictitious and unknown to plaintiff,
the person 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.

Defendants.

PLAINTIFF'S ATTY:

McCabe, Weisberg & Conway, P.C.
145 Huguenot Street, Ste. 499
New Rochelle, N. Y. 10801

DEFENDANT'S ATTY:

Law Office of Brian T.
Epstein and Tai Kim, P.C.
1305 Middle Country Road, Ste. 6
Selden, N. Y. 11784

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: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the defendant mortgagor, 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) 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 set forth below: and it is

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ORDERED that the plaintiff is directed to file proof of filing of an additional or a successive notice of pendency with the proposed judgment of foreclosure (*see*, CPLR 6513; 6516[a]; *Aames Funding Corp. v Houston*, 57 AD3d 808, 872 NYS2d 134 [2d Dept 2008]; *EMC Mtge. Corp. v Stewart*, 2 AD3d 772, 769 NYS2d 408 [2d Dept 2003]; *Horowitz v Griggs*, 2 AD3d 404, 767 NYS2d 860 [2d Dept 2003]); 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

This is an action to foreclose a mortgage on real property known as 9 Chesapeake Bay Road, Coram, New York 11727. On January 27, 2006, the defendant Jonathan Vinas (the defendant mortgagor) executed a fixed-rate note in favor of Bank of America, N.A. (the lender) in the principal sum of \$378,000.00. To secure said note, the defendant mortgagor gave the lender a mortgage also dated January 27, 2006 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 an assignment of the mortgage and note, the lender transferred its interest in the note and mortgage to Wells Fargo Bank, N.A., as Trustee for the Certificateholders of Banc of America Alternative Loan Trust 2006-3, Mortgage Pass-Through Certificates, Series 2006-3 (the plaintiff) prior to commencement. The assignment was subsequently duly recorded in the Suffolk County Clerk's Office on September 17, 2010.

The defendant mortgagor allegedly defaulted on the note and mortgage by failing to make the 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 a *lis pendens*, summons and verified complaint on September 23, 2010. Parenthetically, the court notes that the *lis pendens* has now expired.

Issue was joined by the interposition of the defendant mortgagor's answer dated February 3, 2011. By his answer, the defendant mortgagor admits the allegation of the complaint pertaining to the property address/description, and generally denies the remaining allegations therein. The defendant mortgagor also asserts nine affirmative defenses alleging, among other things, the following: the failure to state a cause of action and comply with "statutory notice requirements"; the lack of standing based upon a defective mortgage assignment; an unverified complaint; and a bar to recovery in this action based upon the doctrines of bad faith, unclean hands and laches due to the plaintiff's misrepresentations, failure to modify the defendant mortgagor's loan and otherwise deal fairly with him. The remaining defendants have neither answered nor appeared.

In compliance with CPLR 3408, the parties began a prolonged period of negotiations in an attempt to agree on a loan modification, and five settlement conferences were conducted or adjourned before the specialized foreclosure conference part beginning on November 1, 2012 and lasting until June 27, 2013. At the last conference, this case was dismissed from the conference program as the parties were unable to reach a settlement. Accordingly, the conference requirements imposed by CPLR 3408 have 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 mortgagor, 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) 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 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]). The plaintiff also submitted proof of compliance with the notice requirements of RPAPL §§ 1303, 1304 and 1320 (*see, Castle Peak 2012-I Trust v Choudhury*, 2013 NY Misc LEXIS 5510, 2013 WL 6229919, 2013 NY Slip Op 32971 [U] [Sup Ct, Queens County 2013]; *M & T Bank v Romero*, 40 Misc3d 1210 [A], 977 NYS2d 667 [Sup Ct, Suffolk County 2013]; *cf., Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]). Thus, the plaintiff demonstrated its prima facie burden as to the merits of this foreclosure action.

Where, as here, an answer served includes the defense of standing or lack of capacity to sue, the plaintiff must prove its standing in order to be entitled to relief (*see, CitiMortgage, Inc. v Rosenthal*, 88 AD3d 759, 931 NYS2d 638 [2d Dept 2011]). The plaintiff further demonstrated that, as holder of the endorsed note, and as the assignee of the mortgage and note, it has standing to commence this action (*see, Bank of N.Y. v Silverberg*, 86 AD3d 274, 926 NYS2d 532 [2d Dept 2011]; *First Trust Natl. Assn. v Meisels*, 234 AD2d 414, 651 NYS2d 121 [2d Dept 1996]). The plaintiff's submissions include, inter alia, the affidavit from the plaintiff's representative wherein it is alleged the plaintiff is the holder of the note and that it was the assignee of the mortgage prior to the commencement of this action (*see, Kondaur Capital Corp. v McCary*, ___ AD3d ___, 981 AD3d 547, [2d Dept 2014]; *Chase Home Fin., LLC v Miciotta*, 101 AD3d 1307, 956 NYS2d 271 [3d Dept 2012]; *GRP Loan, LLC v Taylor*, 95 AD3d 1172, 945 NYS2d 336 [2d Dept 2012]). Additionally, the plaintiff submitted, among other things, an assignment

dated September 17, 2010, and thereafter duly recorded in the Suffolk County Clerk's Office, which memorialized the transfer of the note and mortgage to it prior to commencement (*see, GRP Loan, LLC v Taylor*, 95 AD3d 1172, *supra*). Therefore, it appears that the plaintiff is the transferee and holder of the original note as well as the assignee of the lender by virtue of the written assignment. Thus, the plaintiff demonstrated its prima facie burden as to its standing in this foreclosure action.

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 America, N.A. v Lucido*, 114 AD3d 714, 981 NYS2d 433 [2d Dept 2014] [plaintiff's refusal to consider a reduction in principal does not establish a failure to negotiate in good faith]; *Washington Mut. Bank v Schenk*, 112 AD3d 615, 975 NYS2d 902 [2d Dept 2013]; *JP Morgan Chase Bank, N.A. v Ilardo*, 36 Misc3d 359, 940 NYS2d 829 [Sup Ct, Suffolk County 2012] [plaintiff not obligated to accept a tender of less than full repayment as demanded]; *Wells Fargo Bank, N.A. v Van Dyke*, 101 AD3d 638, 958 NYS2d 331 [1st Dept 2012]; *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]). Furthermore, with respect to the assertion set forth in the fifth affirmative defense that the defendant mortgagor was improperly refused a loan modification, there is ample authority emanating from the Appellate Division holding that "[n]othing in CPLR 3408 requires plaintiff to make the exact offer desired by [the] defendant[] [mortgagor], and the plaintiff's failure to make that offer cannot be interpreted as a lack of good faith" (*Bank of America, N.A. v Lucido*, 114 AD3d 714, *supra* at 715-16, quoting *Wells Fargo Bank, N.A. v Van Dyke*, 101 AD3d 638, *supra* at 638).

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 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]).

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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 Mentasana*, 79 AD3d 1079, *supra*). In this case, the affirmative defenses and asserted by the defendant mortgagor are factually unsupported and without apparent merit (*see, Becher v Feller*, 64 AD3d 672, *supra*). In any event, the failure by the defendant mortgagor to raise and/or assert 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 v Baiden*, 36 NY2d 539, *supra*; *see also, Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, *supra*).

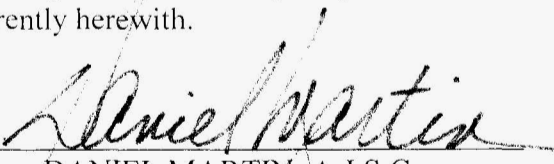
Under these circumstances, the Court finds that the defendant mortgagor failed to rebut the plaintiff's prima facie showing of its entitlement to summary judgment requested by it (*see, Flagstar Bank v Bellafiore*, 94 AD3d 1044, *supra*; *Argent Mtge. Co., LLC v Mentasana*, 79 AD3d 1079, *supra*; *Rossrock 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 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 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 substituting Dan Vinas for John Doe #1 and Mindy Vinas for John Doe #2, and excising the names of the remaining fictitious defendants, John Doe #3-10, 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.

By its moving papers, the plaintiff further established the default in answering on the part of the newly substituted defendants Dan Vinas and Mindy Vinas (the tenants/occupants) (*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 tenant/occupants are fixed and determined. Since the plaintiff has been awarded summary judgment against the defendant mortgagor, and has established the default in answering by 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 8, 2014
 Riverhead, NY


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

_____ FINAL DISPOSITION _____ X / NON-FINAL DISPOSITION