

JPMorgan Chase Bank v Altheim

2014 NY Slip Op 31298(U)

February 18, 2014

Supreme Court, Suffolk County

Docket Number: 50620/09

Judge: Joseph A. Santorelli

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SUPREME COURT - STATE OF NEW YORK
IAS PART 10 - SUFFOLK COUNTYPRESENT: Hon. JOSEPH A. SANTORELLI
Justice of the Supreme CourtMOTION DATE 5-29-13

ADJ. DATE _____

Mot. Seq. #002-MG

x
JPMORGAN CHASE BANK, NATIONAL
ASSOCIATION, AS PURCHASER OF THE LOANS
AND OTHER ASSETS OF WASHINGTON MUTUAL
BANK, FORMERLY KNOWN AS THE WASHINGTON
MUTUAL BANK, FA (THE "SAVINGS BANK") FROM
THE FEDERAL DEPOSIT INSURANCE
CORPORATION ACTING AS RECEIVER FOR THE
SAVINGS BANK AND PURSUANT TO ITS AUTHORITY
UNDER THE FEDERAL DEPOSIT INSURANCE ACT,
12 U.S.C. 1821(D)

Plaintiff,

-against-

JENNIFER ALTHEIM, CAPITAL ONE BANK USA,
CLERK OF THE SUFFOLK COUNTY DISTRICT
COURT, DR. SHAFER H. ZYSMAN, HAL MEVORAH,
PEOPLE OF THE STATE OF NEW YORK

JOHN DOE (Said names being fictitious, it being the
intention of plaintiff to designate any and all occupants
of premises being foreclosed herein, and any parties,
corporations or entities, if any, having or claiming
an interest or lien upon the mortgaged premises.)

Defendants.

x

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 1 - 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,

ORDERED that this unopposed motion by the plaintiff for, inter alia, an order awarding
summary judgment in its favor and against the defendants Dr. Shafer H. Zysman and Hal Mevorah,
fixing the defaults of the non-answering defendants, appointing a referee, and amending the caption is
granted; and it is

ORDERED that the cross-claims asserted by Dr. Shafer H. Zysman and Hal Mevorah against the defendant Jennifer Altheim are severed and continued; and it is

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]; *Ames 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 with notice of entry upon all parties who have appeared herein pursuant to CPLR 2103(b)(1), (2) or (3) within thirty (30) days of the date herein and to file the affidavits of service with the Clerk of the Court; and it is further

ORDERED that the plaintiff is directed to serve a copy of this order with notice of its entry upon the Calendar Clerk of this Court.

This is an action to foreclose a mortgage on residential real property known as 7 Glenrich Drive, Saint James, New York 11780. On February 27, 2001, the defendant Jennifer Altheim (Altheim) executed an adjustable-rate note in favor of Washington Mutual Bank, FA (WAMU) in the principal sum of \$306,000.00. To secure said note, Altheim gave WAMU a mortgage also dated February 27, 2001 on the property. By way of a Purchase and Assumption Agreement between the Federal Deposit Insurance Corporation (FDIC) as Receiver for WAMU and JPMorgan Chase Bank, National Association (the plaintiff), dated September 25, 2008, the plaintiff acquired, among other things, the subject loan from WAMU.

Altheim allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on September 1, 2009, and each month thereafter. After Altheim allegedly failed to cure her default, the plaintiff commenced the instant action by the filing of a *lis pendens*, summons and verified complaint on December 31, 2009.

Issue was joined by the interposition of the defendants Dr. Shafer H. Zysman's and Hal Mevorah's joint verified answer sworn to on February 2, 2010. By their answer, Dr. Shafer H. Zysman and Hal Mevorah (collectively the Zysman defendants) generally deny all of the allegations set forth in the complaint and assert one affirmative defense, alleging the lack of personal jurisdiction. By their answer, the Zysman defendants also assert three cross-claims against Altheim seeking money damages, attorneys' fees and additional interest in the highest amount permitted by law on the balance of the loan due them. In their answer, the Zysman defendants allege, *inter alia*, that Altheim executed a note and mortgage in their favor on February 22, 2008 in the principal sum of \$50,000.00 (the secondary mortgage), obligating her to repay the sum borrowed, plus interest at 13.5% per annum. The Zysman defendants also allege that Altheim has failed to pay sums owed them pursuant to the secondary mortgage since on or about November, 2009. The remaining defendants have not appeared or answered the complaint (*see*, CPLR 3018 [a]; 3019 [d]), and it is noted that the cross-claims do not demand an answer (*see*, CPLR 3011).

According to the records maintained by the Court's computerized database, a settlement conference was held before this Court's specialized mortgage foreclosure part on May 17, 2013. On that date, this case dismissed from the conference program as the parties could not reach an agreement with respect to a loan modification. Accordingly, no further conference is required under any statute, law or rule.

By way of further background, a prior motion by the plaintiff for, among other things, an order of reference was withdrawn by the plaintiff. The plaintiff now moves again for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the Zysman defendants, striking their answer and dismissing the affirmative defense 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 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 defense set forth in the Zysman defendants' answer is subject to dismissal due to its 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]; *Bank of N.Y. Mellon v Scura*, 102 AD3d 714, 961 NYS2d 185 [2d Dept 2013]; *Scarano v Scarano*, 63 AD3d 716, 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 Zysman defendants (*see, HSBC Bank USA v Merrill*, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]). Accordingly, it was incumbent upon the Zysman defendants 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 Zysman defendants' 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 defense asserted by the Zysman defendants is factually unsupported and without apparent merit (*see, Becher v Feller*, 64 AD3d 672, *supra*). The first affirmative defense, in which the Zysman defendants allege that the Court lacks jurisdiction over them, was also waived as the Zysman defendants failed to move to dismiss the complaint against them on this ground within 60 days after serving the answer (*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 Zysman defendants to raise and/or assert their pleaded defense 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 Zysman defendants 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 Zysman defendants (*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 Zysman defendants' answer is stricken, and the affirmative defense set forth therein is dismissed. The cross-claims asserted by Dr. Shafer H. Zysman and Hal Mevorah against Alheim, however, are

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severed and continued (*see*, CPLR 3212 [e],[1]; *see also*, **Robert Stigwood Org. v Devon Co.**, 44 NY2d 922, 408 NYS2d 5 [1978]; **Neighborhood Hous. Servs. of N.Y. City, Inc. v Meltzer**, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]; **First Union Mtge. Corp. v Fern**, 298 AD2d 490, 749 NYS2d 42 [2d Dept 2002]);

The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by substituting John Doe (name refused) for the fictitious named defendant, John Doe, is granted (*see*, **Flagstar Bank v Bellafiore**, 94 AD3d 1044, *supra*; **Neighborhood Hous. Servs. of N.Y. City, Inc. v Meltzer**, 67 AD3d 872, *supra*). The branch of the motion wherein the plaintiff seeks an order pursuant to CPLR 1021 substituting JPMorgan Chase Bank, National Association 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 Altheim, Capital One Bank USA, Clerk of the Suffolk County District Court, and People of the State of New York as well as the newly substituted defendant, John Doe (name refused) (*see*, RPAPL § 1321; **HSBC Bank USA, N.A. v Roldan**, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the default in answering of all of the above-noted defendants is fixed and determined. Since the plaintiff has been awarded summary judgment against the Zysman defendants, and has established the default in answering by the remaining 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 for an order of reference is granted 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: FEB 18 2014



Hon. JOSEPH A. SANTORELLI, J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION