

Deutsche Bank Natl. Trust Co. v Cruz-Rivera
2014 NY Slip Op 31462(U)
February 25, 2014
Supreme Court, Suffolk County
Docket Number: 2772-11
Judge: Arthur G. Pitts
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SUPREME COURT - STATE OF NEW YORK
IAS PART 43 - SUFFOLK COUNTY

PRESENT: Hon. ARTHUR G. PITTS
Justice of the Supreme Court

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS
TRUSTEE OF THE HOME EQUITY MORTGAGE LOAN
ASSET-BACKED TRUST SERIES INABS 2005-D HOME
EQUITY MORTGAGE LOAN ASSET-BACKED
CERTIFICATES, SERIES INABS 20005-A UNDER THE
POOLING AND SERVICING AGREEMENT DATED DEC
1, 2005,

Plaintiff,

-against-

MARIA D. CRUZ-RIVERA AKA MARIA D. CRUZ
RIVERA AKA MARIA CRUZ-RIVERA AKA
MARIA CRUZ RIVERA and "JOHN DOE #1" to
"JOHN DOE #10", the last 10 names being fictitious
and unknown to plaintiff, the persons 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.

MOTION DATE: 6-6-13
ADJ. DATE: _____
Mot. Seq. # 001-MotD

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AND CONWAY, P.C.
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X

Upon the following papers numbered 1 to 12 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 12; 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 against the defendant Maria D. Cruz-Rivera, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption is determined as indicated below; 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

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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 3112 Gull Avenue, Medford, New York 11763. On November 1, 2005, the defendant Maria Cruz-Rivera (the defendant mortgagor) executed a fixed/adjustable-rate note in favor of IndyMac, F.S.B. (the lender) in the principal sum of \$351,000.00. To secure said note, the defendant mortgagor gave the lender a mortgage also dated November 1, 2005 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 dated January 18, 2011, the mortgage instruments were allegedly transferred to Deutsche Bank National Trust Company, As Trustee of the Home Equity Mortgage Loan Asset-Backed Trust Series INABS 2005-D Home Equity Mortgage Loan Asset-Backed Certificates, Series INABS 2005-A Under the Pooling and Servicing Agreement dated Dec 1, 2005 (the plaintiff) prior to commencement of this action.

The defendant mortgagor allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on March 1, 2010. After the defendant mortgagor allegedly failed cure her default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on January 24, 2011.

Issue was joined by the interposition of the defendant mortgagor's undated answer, which is mislabeled a motion to dismiss. By her answer, the defendant mortgagor denies some of allegations set forth in the complaint, and admits other allegations therein. In her answer, the defendant mortgagor also asserts a first affirmative defense, alleging, inter alia, that the plaintiff lacks standing. The remaining defendants have neither answered the complaint nor appeared herein.

In compliance with CPLR 3408, a series of settlement conferences were scheduled for and/or held before this Court's specialized mortgage foreclosure part on March 22, April 11, May 16, August 4, September 13, and November 29, 2011 as well as on January 24, March 14 and May 31, 2012. On the last scheduled date, 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 defendant mortgagor, striking her answer and dismissing the affirmative defense 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*

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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]).

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 standing of a plaintiff in a mortgage foreclosure action is measured by its ownership, holder status or possession of the note and mortgage at the time of the commencement of the action (see, *Bank of N.Y. v Silverberg*, 86 AD3d 274, 926 NYS2d 532 [2d Dept 2011]; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]). A mortgage "is merely security for a debt or other obligation, and cannot exist independently of the debt or obligation" (*Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909, 911, 961 NYS2d 200 [2d Dept 2013] [internal quotation marks and citations omitted]). Holder status is established where the plaintiff is the special indorsee of the note or takes possession of a mortgage note that contains an endorsement in blank on its face or attached thereto, as the mortgage follows an incident thereto (see, *Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674, 838 NYS2d 622 [2d Dept 2007]; *First Trust Natl. Assn. v Meisels*, 234 AD2d 414, 651 NYS2d 121 [2d Dept 1996]). "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident" (*U.S. Bank, N.A. v Collymore*, 68 AD3d 752, *supra* at 754 [internal quotation marks and citations omitted]). Further, "[n]o special form or language is necessary to effect an assignment as long as the language shows the intention of the owner of a right to transfer it" (*Suraleb, Inc. v International Trade Club, Inc.*, 13 AD3d 612, 612, 788 NYS2d 403 [2d Dept 2004] [internal quotation marks and citations omitted]). Moreover, "a good assignment is made by delivery only" (*Fryer v Rockefeller*, 63 NY 268, 276 [1875]; *U.S. Bank Natl. Assn. v Lanzetta*, 2013 NY Misc LEXIS 1509, 2013 WL 1699251, 2013 NY Slip Op 30755 [U] [Sup Ct, Suffolk County 2013, slip op, at 17]; *Deutsche Bank Natl. Trust Co. v Bills*, 37 Misc3d 1209 [A], ___ NYS2d ___, 2012 NY Misc LEXIS 4842, 2012 WL 4868108, 2012 NY Slip Op 51943 [U] [Sup Ct, Essex County 2012, slip op, at 5]). Furthermore, UCC § 9-203(g) explicitly provides that the assignment of an interest of the seller or grantor of a security interest in the note automatically transfers a corresponding interest in the mortgage to the assignee.

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 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 demonstrated that, as holder of the endorsed note, and as the assignee of the mortgage, it has standing to commence this action (*see, Bank of N.Y. v Silverberg*, 86 AD3d 274, *supra*; *First Trust Natl. Assn. v Meisels*, 234 AD2d 414, *supra*). The plaintiff also submitted, inter alia, the affidavit of its officer, wherein it is alleged that the plaintiff is the holder and is in possession of, or is otherwise entitled to enforce the note (*see, Deutsche Bank Natl. Trust Co. v Whalen*, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]; *see also, Chase Home Fin., LLC v Miciotta*, 101 AD3d 1307, 956 NYS2d 271 [3d Dept 2012]; *U.S. Bank N.A. v Cange*, 96 AD3d 825, 947 NYS2d 522 [2d 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 January 18, 2011, 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 also the transferee and holder of the original note as well as the assignee of the lender by virtue of the written assignment.

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 Montesana*, 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 Bellafigiore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Argent Mtge. Co., LLC v Montesana*, 79 AD3d 1079, *supra*). In this case, the affirmative defense asserted by the defendant mortgagor is 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 her 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 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 Bellafigiore*, 94 AD3d 1044, *supra*; *Argent Mtge. Co., LLC v Montesana*, 79 AD3d 1079, *supra*; *Rossrock Fund II, L.P. v*

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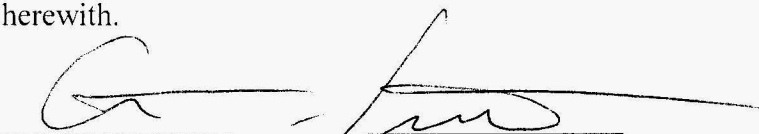
Commack Inv. Group, Inc., 78 AD3d 920, 912 NYS2d 71 [2d Dept 2010]; *see generally*, *Hermitage Ins. Co. v Trance Nite Club, Inc.*, 40 AD3d 1032, 834 NYS2d 870 [2d Dept 2007]). The plaintiff, therefore, is awarded summary judgment in its favor against the defendant mortgagor (*see*, *Federal Home Loan 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 the affirmative defense set forth therein is dismissed.

The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by substituting Evarardo Cruz, Jose Reyes, Eden Cruz and Maria Cruz for the fictitious defendants John Doe#1-4, and excising the remaining fictitious defendants John Doe #5-10 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 moving papers, the plaintiff further established the default in answering on the part of the newly substituted defendants, Evarardo Cruz, Jose Reyes, Eden Cruz and Maria Cruz (*see*, RPAPL § 1321; *HSBC Bank USA, N.A. v Roldan*, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the defaults of all of the above-noted defendants are fixed and determined. Since the plaintiff has been awarded summary judgment against the defendant mortgagor, 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 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: February 25, 2014


 J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION