

BAC Home Loans Serv., L.P. v Pacheco

2014 NY Slip Op 31528(U)

March 1, 2014

Sup Ct, Suffolk County

Docket Number: 31585-10

Judge: Ralph T. Gazzillo

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SUPREME COURT - STATE OF NEW YORK
IAS PART 6 - SUFFOLK COUNTYPRESENT: Hon. RALPH T. GAZZILLO
Acting Justice Supreme CourtMOTION DATE 6-3-13

ADJ. DATE _____

Mot. Seq. #001-MotD

BAC HOME LOANS SERVICING, L.P. F/K/A
COUNTRYWIDE HOME LOANS SERVICING,
LP

Plaintiff,

BERKMAN, HENOCH, PETERSON,
PEDDY & FENCHEL, P.C.
Attorneys for Plaintiff
100 Garden City Plaza
Garden City, N. Y. 11530

-against-

ADILSON PACHECO, MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., COLUMBIA
HOME LOANS, LLC,LONG ISLAND HOUSING
SERVICES, INC.
Attorney for Defendant
Adilson Pacheco
640 Johnson Avenue Suite 8
Bohemia, N. Y. 11716"JOHN DOE #1" THROUGH "JOHN DOE #12,
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 up
on the premises, described in the complaint,

Defendants.

X

Upon the following papers numbered 1 to 9 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 9; 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 Adilson Pacheco, 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 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

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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.

This is an action to foreclose a mortgage on residential property known as 37 Montauk Street, Selden, New York 11784. On March 19, 2007, the defendant Adilson Pacheco (the defendant mortgagor) executed a fixed-rate note in favor of Columbia Home Loans, LLC (the lender) in the principal sum of \$315,550.00. To secure said note, the defendant mortgagor gave the lender a mortgage also dated March 19, 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 an assignment of the mortgage dated August 23, 2010, the note and mortgage were transferred to the plaintiff, BAC Home Loans Servicing, L.P., formerly known as Countrywide Home Loans Servicing, L.P.

The defendant mortgagor allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on July 1, 2009. As a result of four payments made by the defendant mortgagor to the plaintiff pursuant to a trial modification, the default date was extended to November 1, 2009. After the defendant mortgagor allegedly failed to qualify for a permanent modification or cure his default, the plaintiff commenced the instant action by the filing of the summons and verified complaint on August 24, 2010, followed by the notice of pendency on August 25, 2010. According to the records maintained by the Suffolk County Clerk's computerized database, the plaintiff re-filed the lis pendens on or about July 23, 2013.

Issue was joined by the interposition of the defendant mortgagor's verified answer dated and sworn to on September 17, 2010. By his answer, the defendant mortgagor generally denies all of the allegations set forth in the complaint, but does not assert any affirmative defenses. The remaining defendants have neither appeared nor answered the complaint.

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 January 24, March 23, June 23, August 25, and November 17, 2011 as well as on January 23, March 28 and May 30, 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. Parenthetically, the defendant mortgagor did not qualify for a permanent modification because he allegedly failed to provide the plaintiff with certain requested financial documentation. Accordingly, no further conference is required under any statute, law or rule.

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(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, *supra*). 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]).

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 Mentosana*, 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.

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 # 1-12, 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]). The branch of the motion wherein the plaintiff seeks an order pursuant to CPLR 1021 substituting Bank of America, N.A. for the plaintiff is also granted (see, CPLR 1018; 3025[c]; *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 MERS and Columbia Home Loans, LLC (Columbia) (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, MERS and Columbia, 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]).

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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 mortgagor and striking his answer; (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; (4) amending the caption; and (5) awarding it 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, inter alia, 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.


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]).

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, 915 NYS2d 591 [2d Dept 2010]) 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

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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: 3/11/14



Hon. RALPH T. GAZZILLO, A.J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION