

Deutsche Bank Natl. Trust Co. v Foglia
2014 NY Slip Op 31539(U)
June 11, 2014
Supreme Court, Suffolk County
Docket Number: 18321/11
Judge: Paul J. Baisley
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

COPY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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DEUTSCHE BANK NATIONAL TRUST
COMPANY, AS TRUSTEE ON BEHALF OF THE
HOLDERS OF TERWIN MORTGAGE TRUST 2006-
17HE ASSET-BACKED CERTIFICATES, SERIES
2006-17HE,

Plaintiff,

INDEX NO.: 18321/11
MOTION DATE: 5/15/14
MOTION NO.: 002 MOT D

PLAINTIFF'S ATTORNEY:
SHAPIRO, DICARO & BARAK, LLC
250 Mile Crossing Blvd., Suite One
Rochester, N. Y. 14624

-against-

CAMILLO FOGLIA, MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., AS NOMINEE
FOR FIRST CENTRAL SAVINGS BANK, JOHN
DOE (Said name 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 mortgage premises.),

DEFENDANT'S ATTORNEY:
VINCENT J. TRIMARCO, ESQ.
1038 W. Jericho Tpke.
Smithtown, N. Y. 11787

Defendants.

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Upon the following papers numbered 1 to 10 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-10; ~~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 the unopposed motion (motion sequence no. 002) of plaintiff for, *inter alia*, an order awarding summary judgment in its favor, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption is determined as set forth below; and it is further

ORDERED that the branch of the motion wherein plaintiff requests an order awarding it the costs of this motion is denied without prejudice, with leave to renew upon proper documentation of costs at the time of submission of the judgment; and it is further

ORDERED that 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 further

ORDERED that 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 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 R. 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 real property known as 75 Centerport Road, Greenlawn, New York 11740. On July 13, 2006, the defendant Camillo Foglia (the defendant mortgagor) executed an adjustable-rate note in favor of First Central Savings Bank (the lender) in the principal sum of \$581,750.00. To secure said note, the defendant mortgagor gave the lender a mortgage also dated July 13, 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. Plaintiff alleges that by way of an allonge affixed to the note with physical delivery, the note and the mortgage were transferred to Deutsche Bank National Trust Company, as Trustee, on behalf of the holders of the Terwin Mortgage Trust 2006-17HE Asset-Backed Certificates, Series 2006-17HE (plaintiff) prior to commencement. Thereafter, the transfer of the note to plaintiff was memorialized by an assignment of the mortgage executed on January 21, 2010, and subsequently duly recorded in the Suffolk County Clerk's Office on February 25, 2011.

The defendant mortgagor allegedly defaulted on the note and mortgage by failing to make the monthly payment of interest due on or about December 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 June 3, 2011.

Issue was joined by the interposition of the defendant mortgagor's answer sworn to on October 26, 2011. By his answer, the defendant mortgagor denies some of the allegations contained in the complaint, and admits other allegations therein. In his answer, the defendant mortgagor also asserts six affirmative defenses, alleging, *inter alia*, the following: failure to state a cause of action; lack of personal jurisdiction; failure to meet all administrative, statutory and jurisdictional conditions precedent; lack of good faith efforts with respect to an anticipated loan modification; failure to mitigate damages; and lack of standing. The remaining defendants have neither answered nor appeared herein.

In compliance with CPLR §3408, settlement conferences were conducted or adjourned before this court's specialized mortgage foreclosure part on May 28 and on August 26, 2013. On the date of the last conference, this action was dismissed from the conference program because the parties were unable to reach a settlement. Accordingly, no further conference is required under any statute, law or rule.

Plaintiff now moves for, *inter alia*, an order: (1) pursuant to CPLR R. 3212 awarding summary judgment in its favor and against the defendant mortgagor, striking his answer and dismissing the affirmative defenses 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 R. 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, 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 submitted proof of compliance with the notice requirements of RPAPL §1304 as well as the notice provisions of the mortgage prior to commencement (see, *Wachovia Bank, N.A. v Carcano*, 106 AD3d 724, *supra*; cf., *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]). Moreover, the plaintiff submitted an affidavit from its representative wherein it is alleged that the note, with an allonge affixed thereto, and the mortgage were transferred to it by physical delivery prior to commencement, and that it has maintained possession of the same since that time (see, *Kondaur Capital Corp. v McCary*, 115 AD3d 649, 981 NYS2d 547 [2d Dept 2014]; *Deutsche Bank Natl. Trust Co. v Whalen*, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]; *HSBC Bank USA, N.A. v Avila*, 2013 NY Misc LEXIS 4521, 2013 WL 5606741, 2013 NY Slip Op 32412 [U] [Sup Ct, Suffolk County 2013]). Thus, the plaintiff demonstrated its *prima facie* burden as to the merits of this foreclosure action and as to its standing.

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, *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]; *Bank of N.Y. Mellon v Scura*, 102 AD3d 714, 961 NYS2d 185 [2d Dept 2013]; *Scarano v Scarano*, 63 AD3d 716, 880 NYS2d 682 [2d Dept 2009] [process server’s sworn affidavit of service is *prima facie* evidence of proper service]; *La Salle Bank N.A. v Kosarovich*, 31 AD3d 904, 820 NYS2d 144 [3d Dept 2006]; *Pilewski v Solymosy*, 266 AD2d 83, 698 NYS2d 660 [1st Dept 1999]; *CFSC Capital Corp. XXVII v Bachman Mech. Sheet Metal Co.*, 247 AD2d 502, 669 NYS2d 329 [2d Dept 1998] [an affirmative defense based upon the notion of culpable conduct is unavailable in a foreclosure action]). Furthermore, with respect to the assertion set forth in the third affirmative defense that the defendant mortgagor was improperly refused a loan

modification, “[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, 638, 958 NYS2d 331 [1st Dept 2012]).

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 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 Bellafore*, 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*). 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 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 Bellafore*, 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 and the 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 Liz Nisi and Michael Regansberg for the fictitious

defendant, John Doe, and by excising the remaining descriptive words pertaining to the fictitious defendant 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 defendant, MERS, as nominee for the lender, and on the part of the newly substituted defendants, Liz Nisi and Michael Regansberg (*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 the above-noted defendants is fixed and determined. Since the plaintiff has been awarded summary judgment against the defendant mortgagor, 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 is determined as set forth above. Proposed long form order appointing a referee to compute pursuant to RPAPL §1321, as modified by the Court, has been signed concurrently herewith.

Dated: 6/11/14

HON. PAUL J. BAISLEY, JR.

J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION