

<b>U.S. Bank N.A. v Stehlin</b>
2014 NY Slip Op 31764(U)
June 18, 2014
Supreme Court, Suffolk County
Docket Number: 12194-12
Judge: W. Gerard Asher
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SUPREME COURT - STATE OF NEW YORK  
IAS PART 28 - SUFFOLK COUNTY

PRESENT: Hon. W. GERARD ASHER  
Justice of the Supreme Court

\_\_\_\_\_  
U.S. BANK NATIONAL ASSOCIATION, AS  
TRUSTEE FOR THE REGISTERED HOLDERS OF  
AEGIS ASSET BACKED SECURITIES TRUST,  
MORTGAGE PASS-THROUGH CERTIFICATES  
SERIES 2005-5

Plaintiff,

-against-

ROGER STEHLIN, JNL FUNDING CORP., NEW  
YOUR STATE DEPARTMENT OF TAXATION AND  
FINANCE, UNITED STATES OF AMERICA,

“JOHN DOE #1 through “JOHN DOE #12,” the  
last 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 upon the  
premises, described in the complaint,

Defendants.

\_\_\_\_\_ x

MOTION DATE 6-14-13  
ADJ. DATE \_\_\_\_\_  
Mot. Seq. #001-MG

LEOPOLD & ASSOCIATES, PLLC  
Attorneys for Plaintiff  
80 Business Park Drive, Suite 110  
Armonk, N. Y. 10504

ROGER STEHLIN  
Defendant Pro Se  
5 Landview Drive  
Huntington Station, N. Y. 11746

Upon the following papers numbered 1 to 8 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 8; 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, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption is granted; 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 real property known as 5 Landview Drive, Huntington Station, New York 11746. On September 9, 2005, the defendant Roger Stehlin (the defendant mortgagor) executed an adjustable-rate note in favor of Aegis Funding Corporation (the lender) in the principal sum of \$499,000.00. To secure said note, the defendant mortgagor gave the lender a mortgage also dated September 9, 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 a blank endorsement, the note was allegedly transferred to U.S. Bank National Association, as Trustee for the Registered Holders of Aegis Asset Backed Securities Trust, Mortgage Pass-Through Certificates, Series 2005-5 (the plaintiff) prior to commencement. Thereafter, the transfer of the note to the plaintiff was memorialized by a corrective assignment of the mortgage executed on November 1, 2011, and subsequently duly recorded in the Suffolk County Clerk's Office on April 12, 2012.

The defendant mortgagor allegedly defaulted on the note and mortgage by failing to make the monthly payment of interest due on or about February 1, 2011, 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 April 17, 2012.

Issue was joined by the interposition of the defendant mortgagor's answer sworn to on May 2, 2012. By his answer, the defendant mortgagor denies all of the material allegations contained in the complaint, and asserts ten affirmative defenses, alleging, *inter alia*, the failure to comply with section 1301, 1302, 1303 and 1304 of the Real Property Actions and Proceedings Law; the lack of jurisdiction; the failure to state a cause of action; the lack of standing; a defective notice of pendency; the failure to comply with the notice provisions of the mortgage; and another action pending. The defendant JNL Funding Corp. (JNL) has appeared herein. The defendants New York State Department of Taxation and Finance (New York) and United States of America (USA) have appeared herein and waived all, but certain, notices. Parenthetically, the notice of appearance served by New York, which is noted in the court's computerized database, was not filed until after the return date of this motion. 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 June 5 and on August 26, 2013. On the last date noted, 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.

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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, 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 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, 651 NYS2d 121 [2d Dept 1996]). Furthermore, the plaintiff submitted proof of compliance with the notice requirements of RPAPL §§ 1303 and 1304 (*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]). Moreover, the plaintiff submitted an affidavit from its representative wherein it is alleged that the plaintiff was the holder of the note and mortgage at the time of 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*,

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5 AD3d 718, 773 NYS2d 604 [2d Dept 2004] [unsupported affirmative defenses are lacking in merit]; *see also*, ***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]; ***Wachovia Bank, N.A. v Carcano***, 106 AD3d 724, *supra* [compliance with the pre-foreclosure notice requirement of RPAPL §1304 satisfies the "30-day notice" requirement specified in the mortgage]; ***Emigrant Mtge. Co, Inc. v Fitzpatrick***, 95 AD3d 1169, 945 NYS2d 697 [2d Dept 2012] [an affirmative defense asserting violations of General Business Law § 349 and/or engagement in deceptive business practices lacks merit where, inter alia, clearly written loan documents describe the terms of the loan]; ***Grogg v South Rd. Assoc., L.P.***, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010] [the mere denial of receipt of the notice of default is insufficient to rebut the presumption of delivery]). Furthermore, the notice of pendency, submitted by the plaintiff in support of its motion, accurately identifies the mortgage, the sum secured thereby, the recording information for the mortgage, and the defendant mortgagor.

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 [1<sup>st</sup> 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 [1<sup>st</sup> 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 Bellafiore***, 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*).

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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 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 excising fictitious defendants, John Doe #1-12, along with the remaining descriptive words pertaining thereto 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 defendants JNL, New York and USA (*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 granted. 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: June 18, 2014

  
 Hon. W. GERARD ASHER, J.S.C.

       FINAL DISPOSITION      X   NON-FINAL DISPOSITION