

Deutsche Bank Natl. Trust Co. v Eren

2014 NY Slip Op 31765(U)

June 30, 2014

Supreme Court, Suffolk County

Docket Number: 37854-10

Judge: Daniel Martin

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

COPY

**SUPREME COURT OF THE STATE OF NEW YORK
I.A.S PART 9 - SUFFOLK COUNTY**

INDEX NO.: 37854-10

PRESENT:

Hon. DANIEL MARTIN

Deutsche Bank National Trust Company, as
Indenture Trustee for American Home Summons
Investment Trust 2007-2

Plaintiff,

-against-

Bayram Eren, Mortgage Electronic Registration
Systems, Inc. as nominee for American Home
Mortgage, its successors and assigns, New York
State Commissioner of Taxation and Finance,
and "JOHN DOE #1" through "JOHN DOE #10",
the last ten names being fictitious and unknown to
the plaintiff, the person or parties, if any, having
or claiming an interest in or lien upon the Mortgage
premises described in the Complaint,

Defendants.

PLAINTIFF'S ATTY:

FRENKEL, LAMBERT, WEISS,
WEISMAN & GORDON, LLP
53 Gibson Street
Bay Shore, N. Y. 11706

DEFENDANT PRO SE:

BAYRAM EREN
1625 Belmont Avenue
New Hyde Park, N. Y. 11040

The following named papers have been read on this motion:

- Notice of Motion for an Order of Reference _____ X
- Cross-Motion _____
- Answering Affidavits _____
- Replying Affidavits _____

ORDERED that this unopposed motion by the plaintiff for, inter alia, an order awarding summary judgment in its favor against the defendant Bayram Eren, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption is granted solely to the extent set forth below, otherwise denied; and it is

ORDERED that any future motion resubmitted pursuant to this Order shall include a proposed long form order in the correct form appointing a referee; and it is further

Deutsche Bank Natl. Trust Company, et. al.

v Eren, et. al.

Index No.: 37854-10

Pg. 2

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 294 Fir Grove Road, Ronkonkoma, New York 11779. On December 15, 2006, the defendant Bayram Eren (the defendant mortgagor) executed a fixed-rate note in favor of American Home Mortgage (the lender) in the principal sum of \$304,880.00. To secure said note, the defendant mortgagor gave the lender a mortgage also dated December 15, 2006 on the property. By way of an endorsed note and an assignment of the mortgage, the loan instruments were allegedly transferred to the plaintiff.

On May 1, 2009, the defendant mortgagor executed and delivered to American Home Mortgage Servicing, Inc., as servicer for the lender, a loan modification agreement (the agreement), whereby the note and the mortgage were modified to reflect, among other things, a new unpaid principal balance of \$322,592.46 as of the date of the date of the agreement. By said agreement, the defendant mortgagor waived all set-offs, counterclaims and defenses (*see*, Agreement ¶ 4 [d]). Further, the agreement provides that the provisions of same are binding upon all assignees and successors-in-interest (*see*, Agreement 5 ¶ [c]).

The defendant mortgagor allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on April 1, 2010, 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 October 13, 2010. The complaint contains two causes of action. In the first cause of action, the plaintiff seeks foreclosure and sale, and in the second cause of action, the plaintiff requests counsel fees relating to the prosecution of this action. Parenthetically, the plaintiff filed an additional lis pendens on September 18, 2013.

Issue was joined by the interposition of the defendant mortgagor's answer dated November 17, 2010. By his answer, the defendant mortgagor admits that he "executed various documents," but generally denies all of the remaining allegations set forth in the complaint. In the answer, the defendant mortgagor also asserts fifteen affirmative defenses whereby he alleges, inter alia, the following: the lack of personal jurisdiction; the failure to provide notice prior to commencing this action; charging an excessive interest rate beyond that allowed in the note and beyond that allowed by law; the failure to state a cause of action; violations of Banking Law § 6-1; extending a mortgage loan in excess of the value of the property and beyond his ability to pay; knowingly extending an unaffordable loan to the defendant; a violation of a fiduciary duty by falsely inflating the value of the property and the defendant mortgagor's ability to pay; standing (asserted in three affirmative defenses); the failure to act in good faith pursuant to applicable Federal Home Affordable Modification Program (HAMP) guidelines (*see*, 12 USC § 5219a); and breach of contract.

Deutsche Bank Natl. Trust Company, et. al.
v Eren, et. al.
Index No.: 37854-10
Pg. 3

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 September 28, November 2 and November 30, 2011 as well as on January 11, 2012. On the last 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.

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 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 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.*

Deutsche Bank Natl. Trust Company, et. al.
v Eren, et. al.
Index No.: 37854-10
Pg. 4

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 note with an affixed allonge, 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*). The plaintiff also 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]). Thus, the plaintiff demonstrated its prima facie burden as to the merits of this foreclosure action.

The plaintiff further 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's submissions include, inter alia, the affidavit from an officer of its representative, 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 October 7, 2010, and duly recorded in the Suffolk County Clerk's Office on November 10, 2010, 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 the transferee and holder of the original note as well as the assignee of the lender by virtue of the written assignment.

The plaintiff also submitted sufficient proof to establish, prima facie, that the remaining 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 v Lucido*, 2014 NY App Div LEXIS 942, 2014 WL 552996, 2014 NY Slip Op 00956 [2d Dept, Feb. 13, 2014] [plaintiff's refusal to consider a reduction in principal does not establish a failure to negotiate in good faith]; *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178, 919 NYS2d 465 [2011]; *Morales*

Deutsche Bank Natl. Trust Company, et. al.
 v Eren, et. al.
 Index No.: 37854-10
 Pg. 5

v *AMS Mtge. Servs., Inc.*, 69 AD3d 691, 692, 897 NYS2d 103 [2d Dept 2010] [CPLR 3016(b) requires that the circumstances of fraud be “stated in detail,” including specific dates and items]; *Washington Mut. Bank v Schenk*, 112 AD3d 615, 975 NYS2d 902 [2d Dept 2013]; *EMC Mtge. Corp. v Stewart*, 2 AD3d 772, 769 NYS2d 408 [2d Dept 2003]; *United Cos. Lending Corp. v Hingos*, 283 AD2d 764, 724 NYS2d 134 [3d Dept 2001]; *First Fed. Sav. Bank v Midura*, 264 AD2d 407, 694 NYS2d 121 [2d Dept 1999]; *JP Morgan Chase Bank, N.A. v Ilardo*, 36 Misc 3d 359, 940 NYS2d 829 [Sup Ct, Suffolk County 2012] [plaintiff not obligated to modify a loan or 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]; *Patterson v Somerset Invs. Corp.*, 96 AD3d 817, 817, 946 NYS2d 217 [2d Dept 2012]; [“a party who signs a document without any valid excuse for having failed to read it is ‘conclusively bound’ by its terms”]; *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]).

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 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 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 Mentasana*, 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*). The second affirmative defense, in which the defendant mortgagor alleges that the Court lacks jurisdiction over him, was waived as he failed to move to dismiss the complaint against him 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 defendant mortgagor to raise and/or assert his pleaded defenses in opposition to the plaintiff’s motion warrants the dismissal of the same as abandoned under the case authorities cited

Deutsche Bank Natl. Trust Company, et. al.
 v Eren, et. al.
 Index No.: 37854-10
 Pg. 6

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 Bellafiore*, 94 AD3d 1044, *supra*; *Argent Mtge. Co., LLC v Montesana*, 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 all of the enumerated affirmative defenses set forth in the complaint are dismissed.

The branches of the motion for an order amending the caption, fixing the defaults of the non-answering defendants and appointing a referee are denied without prejudice to renewal, as the plaintiff failed to demonstrate its prima facie burden with respect to the same (see generally, CPLR 3215 [a]; RPAPL § 1321; *Joosten v Gale*, 129 AD2d 531, 514 NYS2d 729 [1st Dept 1987]; cf., *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 plaintiff's request to deem all non-answering defendants in default, and to also excise the names of the fictitious "John Doe" defendants is inconsistent and has left the Court in the untenable position of having to guess whether a default is sought against Mike Zimmerman, Cindy Reich, Yilmaz Yazicioglu and Mustafa Yazicioglu (the tenants/occupants), or whether they are no longer necessary parties. Any relief to discontinue this action as to the tenants/occupants must be specifically requested by way of an affirmation or affidavit from one with personal knowledge, and the grounds for same must be set forth in the notice of motion (see, CPLR 2214[a]; 3217). Further, any future motion resubmitted pursuant to this Order shall include a proposed long form order in the correct form and shall address all requested substitutions/deletions.

Accordingly, this motion for, inter alia, summary judgment and to appoint a referee to compute is determined as indicated above. In view of the foregoing, the proposed order submitted by the plaintiff has been marked "not signed."

Dated: JUNE 30, 2014.
 Riverhead, NY


 Hon. DANIEL MARTIN, A.J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION