

Chase Home Fin., LLC v Gelmin

2014 NY Slip Op 31846(U)

July 16, 2014

Supreme Court, Suffolk County

Docket Number: 7550/10

Judge: Jerry Garguilo

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This opinion is uncorrected and not selected for official publication.

COPYINDEX
NO.: 7550/10**SUPREME COURT - STATE OF NEW YORK**
IAS PART 21 - SUFFOLK COUNTY**PRESENT: Hon. JERRY GARGUILO**
Justice of the Supreme Court_____
CHASE HOME FINANCE, LLC,

Plaintiff,

-against-

**JEFFREY GELMIN JR.; DISCOVER BANK;
FIRST NIAGARA BANK; GLORIA A. GELMIN;
JPMORGAN CHASE BANK N.A.; NEW YORK
STATE DEPARTMENT OF TAXATION AND
FINANCE; JP MORGAN CHASE BANK; NABB
ASSOCIATES, LLC; "JOHN DOES" and "JANE
DOES", said names being fictitious, parties
intended being possible tenants or occupants of
premises, and corporations, other entities or
persons who claim, or may claim, a lien against the premises,**Defendants.

_____ XMOTION DATE: 7-11-13
ADJ. DATE:
Mot. Seq. # 002-MG**ROSICKI, ROSICKI & ASSOCIATES, P.C.**
Attorneys for Plaintiff
26 Harvester Avenue
Batavia, N. Y. 14020**JAMES M. O'SHEA, ESQ.**
Attorney for Defendants
Jeffrey Gelmin Jr.
Gloria A. Gelmin
250 North Sea Road
Southampton, N. Y. 11968

Upon the following papers numbered 1 to 15 read on this motion for summary judgment and an order of reference; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15; ~~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;

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is hereby

ORDERED that this unopposed motion by plaintiff Chase Home Finance, LLC (Chase), pursuant to CPLR 3212 for summary judgment on its verified complaint, to strike the combined answer of Jeffrey Gelmin, Jr. and Gloria A. Gelmin (collectively Gelmin), fixing the defaults as to non-answering, non-appearing defendants and, for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is granted; and it is further

ORDERED that plaintiff's application for leave to amend the caption of this action pursuant to CPLR

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3025 (b), is granted; and it is further

ORDERED that the caption is hereby amended by substituting JPMorgan Chase Bank, NA for plaintiff Chase Home Finance, LLC, by striking one of the two defendants named JP Morgan Chase Bank as duplicative and, by striking therefrom the names of defendants “John Does” and “Jane Does”; and it is further

ORDERED that plaintiff is directed to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court; and it is further

ORDERED that the caption of this action hereinafter appear as follows:

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF SUFFOLK

_____x
 JPMORGAN CHASE BANK NA,

Plaintiff,

-against-

JEFFREY GELMIN JR.; DISCOVER BANK;
 FIRST NIAGARA BANK; GLORIA A. GELMIN;
 JPMORGAN; CHASE BANK N.A.; NEW YORK
 STATE DEPARTMENT OF TAXATION AND
 FINANCE; NABB ASSOCIATES, LLC;

Defendants.

_____x

This is an action to foreclose a mortgage on premises known as 3 Olmstead Lane, E. Northport, New York. On January 16, 2003, defendant Jeffrey Gelmin, Jr. executed a fixed rate note in favor of JP Morgan Chase Bank agreeing to pay the sum of \$362,690.00. On the same date, defendant Jeffrey Gelmin, Jr. and Gloria A. Gelmin through her attorney in fact executed a first mortgage in the principal sum of \$362,690.00 on the subject property. Thereafter, the note and mortgage were transferred from JP Morgan Chase Bank to plaintiff Chase by assignment of mortgage dated February 12, 2010 with an effective date of May 1, 2003. The assignment of mortgage was recorded with the Suffolk County Clerk’s Office on April 8, 2010.

Notices of default dated July 18, 2009 were sent to defendant Jeffrey Gelmin, Jr. stating that he had defaulted on his mortgage loan and that the amount past due was \$20,906.46. As a result of defendants’ continuing default, plaintiff commenced this foreclosure action on March 1, 2010. In its complaint, plaintiff alleges in pertinent part that defendants breached their obligations under the terms of the note and mortgage by failing to make monthly payments commencing with their February 1, 2009 payment and subsequent payments thereafter. Defendants Gelmin interposed an answer with six affirmative defenses.

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The Court's computerized records indicate that a foreclosure settlement conference was held on November 23, 2010 at which time this matter was referred as an IAS case since a resolution or settlement had not been achieved. Thus, there has been compliance with CPLR 3408 and no further settlement conference is required.

Plaintiff now moves for summary judgment on its complaint contending that defendants failed to comply with the terms of the loan agreement and mortgage and, that defendants' general denials and unsupported affirmative defenses raised no issues of fact for trial. In support of its motion, plaintiff submits among other things: the sworn affidavit of Grant Stephenson, vice president of JPMorgan Chase Bank; the affirmation of Richard Fay, Esq. in support of the instant motion; the affirmation of Richard Fay, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the pleadings; the note, mortgage, and assignment of mortgage; notices of default; notices pursuant to RPAPL §§ 1320, 1304 and 1303; affidavits of service for the summons and complaint; and, an affidavit of service for the instant summary judgment motion upon defendants. No opposition to the summary judgment motion has been filed.

“[I]n an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default” (*Republic Natl. Bank of N.Y. v O’Kane*, 308 AD2d 482, 482, 764 NYS2d 635 [2d Dept 2003]; see *Argent Mtge. Co., LLC v Mentasana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Once a plaintiff has made this showing, the burden then shifts to defendant to establish by admissible evidence the existence of a triable issue of fact as to a defense (see *Washington Mut. Bank v Valencia*, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]).

Here, plaintiff produced the note executed by Jeffrey Gelmin, Jr. and the mortgage executed by defendants Gelmin, as well as evidence of defendants' nonpayment, thereby establishing a prima facie case as a matter of law (see *Wells Fargo Bank Minnesota, Natl. Assn. v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). Grant Stephenson, vice president of JPMorgan Chase Bank, avers that defendants failed to comply with the terms of the note and mortgage by failing to make monthly payments; that a notice of default was sent to borrower on July 18, 2009 to borrower's last known address; that 90 day pre-foreclosure notices were sent to defendant Jeffrey Gelmin, Jr. on July 15, 2009 to the address of the subject property and to borrower's last known address; and, that defendants have not cured the default.

Defendants' combined answer is insufficient, as a matter of law, to defeat plaintiff's unopposed motion (see *Argent Mtge. Co., LLC v Mentasana*, 79 AD3d 1079, 915 NYS2d 591; *Citibank, N.A. v Souto Geffen Co.*, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]; *Greater N.Y. Sav. Bank v 2120 Realty Inc.*, 202 AD2d 248, 608 NYS2d 463 [1st Dept 1994]). Since no opposition to the instant motion was filed by defendants, no triable issue of fact was raised in response to plaintiff's prima facie showing (see *Flagstar Bank v Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Wells Fargo Bank Minnesota v Perez*, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]; see also *Zanfini v Chandler*, 79 AD3d 1031, 912 NYS2d 911 [2d Dept 2010]).

Based upon the foregoing, the motion for summary judgment is granted against defendants Gelmin and the defendants' answer is stricken. That branch of the motion seeking to fix the defaults as against the remaining defendants who have not answered or appeared herein is granted. Plaintiff's request for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is also granted (see *Green*

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Tree Serv. v Cary, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]; *Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *Bank of East Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

The proposed order appointing a referee to compute pursuant to RPAPL §1321 is signed simultaneously herewith as modified by the court.

Dated: 7/16/14



Hon. JERRY GARGUILO, J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION

COPY

At an IAS Term, Part 47, of the Supreme Court of the State of New York, held in and for the County of Suffolk, at the Courthouse located at ~~210 Center Dr.~~ one Cou street, Riverhead, NY 11901 on the 16th day of July, 2014.

PRESENT:

Hon. Jerry Garguilo
Justice
HON. JERRY GARGUILO

-----X
CHASE HOME FINANCE, LLC,

Index No. 7550/10

Plaintiff,

-against-

JEFFREY GELMIN JR; DISCOVER BANK; FIRST NIAGARA BANK; GLORIA A GELMIN; JPMORGAN CHASE BANK N.A.; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; JP MORGAN CHASE BANK; NABB ASSOCIATES, LLC; "JOHN DOES" and "JANE DOES"; said names being fictitious, parties intended being possible tenants or occupants of premises, and corporations, other entities or persons who claim, or may claim, a lien against the premises,

ORDER GRANTING SUMMARY JUDGMENT, APPOINTING A REFEREE TO COMPUTE AND AMENDING CAPTION

Defendants.
-----X

Upon reading and filing of the Notice of Motion dated June 12, 2013, the Affirmation of Richard Fay, Esq., of Rosicki, Rosicki & Associates, P.C., dated June 12, 2013, the affidavit of Grant Stephenson, sworn to on April 17, 2013, with exhibits annexed including the Summons and Complaint, and Notice of Pendency, duly filed in the Office of the Clerk of the County of Suffolk, on March 1, 2010; the Order of Publication, signed on May 28, 2010 by a Justice of this Court; and on the affidavits of service thereon upon the several defendants herein, all duly filed; and it appearing to the satisfaction of this Court from the aforesaid documents that this action was brought to foreclose a mortgage on real property situate in the County in which this Court is located; that the entire unpaid balance secured thereby is due and owing; and that the Summons and Complaint was duly served upon all defendants and that the time prescribed by law to answer has expired, the same not

being extended, and that all of the defendants herein have defaulted in pleading, or have appeared and waived notice of this application except defendant(s) JEFFREY GELMIN JR; GLORIA A GELMIN; who appeared herein by their attorney(s) and interposed an answer with affirmative defenses to the complaint; and that all parties herein have received notice of the application herein pursuant to CPLR §3215; and it appearing that none of the defendants is an infant, incompetent or absentee; and that the notice of pendency of this action was filed more than 20 days prior hereto; and that since the filing of said notice; the Summons and Complaint herein have not been amended by adding new parties to this action, or so as to extend the claim of the Plaintiff against the mortgaged premises; and on all the pleadings and papers heretofore filed herein; and the proceedings heretofore had herein; and no one appearing in opposition hereto; and after due deliberation,

NOW, on motion of ROSICKI, ROSICKI & ASSOCIATES, P.C., attorneys for Plaintiff, it is

ORDERED, that the motion for summary judgment is granted and the answer of JEFFREY GELMIN JR; GLORIA A GELMIN; is stricken; and it is further

ORDERED, that this action be and the same hereby is referred to

Charles Russo Esq., having an office at 400 Townline Road, Hauppauge, NY 11788 telephone number 265-7200 **except attorney's fe.** as Referee to ascertain and compute the amount due to Plaintiff herein, for

principal, interest, and other disbursements advanced as provided for by statute and in the note and mortgage upon which this action was brought, to examine and report whether or not the mortgaged premises should be sold in parcels, and that the Referee make his/her report no later than 60 days from the date of this Order and that except for good cause shown, the plaintiff shall move for judgment no later than 60 days of the date of the Referee's report; and it is further

~~**ORDERED**, that upon submission of the Referee's Report, Plaintiff shall pay \$250 to the Referee as compensation for his/her services, which may be recouped as a cost of litigation, and it is further~~

ORDERED, that the Referee appointed herein is subject to the requirements of Rule 36.2 (c) of

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the Chief Judge, and if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall notify the appointing Judge forthwith; and it is further

ORDERED, that by accepting this appointment the Referee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCCR Part 36) including, but not limited to Section 36.2(c) ("Disqualification from Appointment") and Section 36.2(d) ("Limitations on Appointments Based on Compensation"), and it is further

ORDERED, that the answer interposed by defendant(s) JEFFREY GELMIN JR; GLORIA A GELMIN; be and hereby is deemed the usual appearance and waiver in foreclosure, requiring service of only Notice of Sale, Notice of Proceedings for Surplus Monies, and Notice of Discontinuance of Action upon said defendant(s); and it is further

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ORDERED, that Plaintiff is awarded summary judgment against JEFFREY GELMIN JR; GLORIA A GELMIN; and ~~default judgment~~ *the defaults are hereby fixed as* against all remaining, non-answering and non-appearing defendants; and it is further

ORDERED, that the court has complied with the requirements of CPLR §3408; plaintiff may proceed with the action herein; and it is further

ORDERED, that the caption be amended by striking therefrom the names of 'JOHN DOES' and 'JANE DOES,' such names being fictitious; and all papers and proceedings heretofore filed herein shall be deemed amended accordingly; and it is further

ORDERED, that plaintiff JPMORGAN CHASE BANK NA be substituted for CHASE HOME FINANCE, LLC as said mortgage was assigned.

ORDERED, that the caption of the summons be amended by striking "JP MORGAN CHASE BANK" as the repetition of such name was a mere scrivener's error; and all papers and proceedings heretofore filed herein shall be deemed amended accordingly; and it is further

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ORDERED, that pursuant to CPLR 8003 (a) ~~(the statutory fee of \$50.00)~~ (in discretion of the court a fee of \$500.00), shall be paid to the Referee for the computation stage and upon the filing of his/her report, and it is further

ORDERED, plaintiff is to include in any proposed order for a judgment of foreclosure and sale language complying with the Suffolk County Local Rule for filing of the Foreclosure Action Surplus Monies form contained in Suffolk County Administrative Order # 41-13.

ORDERED, that the caption as amended shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X
JPMORGAN CHASE BANK NA,

Index No. 7550/10

Plaintiff,

-against-

JEFFREY GELMIN JR; DISCOVER BANK; FIRST
NIAGARA BANK; GLORIA A GELMIN; JPMORGAN
CHASE BANK N.A.; NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE;
NABB ASSOCIATES, LLC;

Defendants.
-----X

and it is further

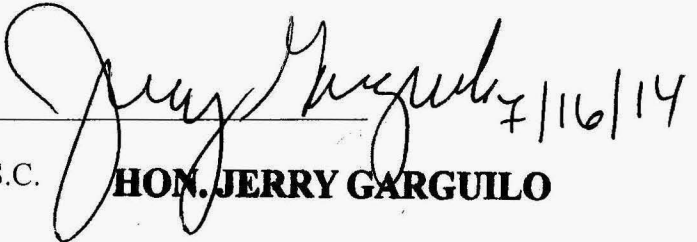
ORDERED, that a copy of this Order with Notice of Entry shall be served upon the owner of the equity redemption, any tenants named in this action and any other party entitled to notice.

ENTER

GRANTED

JUL 16 2014

Judith A. Pascale
CLERK OF SUFFOLK COUNTY



J.S.C. **HON. JERRY GARGUILO** 7/16/14