

**Chase Home Fin., LLC v Orellana**

2014 NY Slip Op 31937(U)

May 9, 2014

Supreme Court, Suffolk County

Docket Number: 25904-10

Judge: Joseph A. Santorelli

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.

SUPREME COURT - STATE OF NEW YORK  
IAS PART 30 - SUFFOLK COUNTY

COPY

PRESENT: Hon. JOSEPH A. SANTORELLI  
Justice of the Supreme Court

MOTION DATE 8-19-13  
ADJ. DATE \_\_\_\_\_  
Mot. Seq. #001-MotD

\_\_\_\_\_  
CHASE HOME FINANCE, LLC, x

Plaintiff,

ROSICKI, ROSICKI & ASSOCIATES, P.C.  
Attorneys for Plaintiff  
51 E. Bethpage Road  
Plainview, N. Y. 11803

-against-

MARCO A. ORELLANA; XIOMARA L. ORELLANA;  
JPMORGAN CHASE BANK, N.A.; "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,

\_\_\_\_\_  
x

XIOMARA L. ORELLANA  
10 Valerie Place  
East Islip, N. Y. 11730

MARCO ORELLANA  
10 Valerie Place  
East Islip, N. Y. 11730

XIOMARA L. ORELLANA  
13 Walbridge Avenue  
Bay Shore, N. Y. 11706

MARCO A. ORELLANA  
13 Walbridge Avenue  
Bay Shore, N. Y. 11706

Upon the following papers numbered 1 to 11 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 11; 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: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the defendants Marco A. Orellana and Xiomara L. Orellana, striking their 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 is granted; and it is

Chase Home Finance, LLC  
v Orellana, et. al.  
Index No.: 25904-10  
Pg. 2

**ORDERED** that the 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]; *Aames 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

**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 real property known as 13 Walbridge Avenue, Bay Shore, New York 11706. On February 23, 2007, the defendants Marco A. Orellana and Xiomara L. Orellana (the defendant mortgagors) executed a fixed-rate note in favor of JPMorgan Chase Bank, N.A. (JPMorgan) in the principal sum of \$348,000.00. To secure said note, the defendant mortgagors gave JPMorgan a mortgage also dated February 23, 2007 on the property. By way of an endorsed note, an assignment of the mortgage dated July 26, 2010 and a corporate merger, the note and mortgage were transferred to and acquired by the plaintiff, Chase Home Finance, LLC.

The defendant mortgagors allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on or about March 1, 2010, and each month thereafter. After the defendant mortgagors allegedly failed to cure their default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on August 3, 2010. Parenthetically, the lis pendens has now expired.

Issue was joined by the interposition of the defendant mortgagors' joint answer dated August 16, 2010. By their answer, the defendant mortgagors admit some of the allegations set forth in the complaint, and generally deny other allegations therein. The defendant mortgagors also assert two affirmative defenses, alleging, among other things, the following: bad faith with respect to the mortgage modification process; and a pending loan modification. The remaining defendants have neither answered nor appeared in this action.

According to the records maintained by the court's computerized database, the parties began a prolonged period of negotiations in an attempt to agree on a loan modification. Initially, three foreclosure settlement conferences were conducted or adjourned before this court's foreclosure conference part beginning on December 14, 2010 and lasting until May 10, 2011. On May 10, 2011, the parties were unable to reach a settlement; as a result, this action was dismissed from the conference program. Thereafter, four additional settlement conferences were conducted or adjourned before Foreclosure Conference Part 10 on February 22, 2013 through to September 10, 2013. At the

Chase Home Finance, LLC  
v Orellana, et. al.  
Index No.: 25904-10  
Pg. 3

last conference, this action was again marked to indicate that the parties could not reach an agreement to modify the loan or otherwise settle this action. The court also notes that a representative of the plaintiff attended and participated in all settlement conferences. Accordingly, the conference requirements imposed by CPLR 3408 have been satisfied; no further conference is required under any statute, law or rule.

The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the defendant mortgagors, striking their 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 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]). Thus, the plaintiff demonstrated its prima facie burden as to the merits of this foreclosure action.

The plaintiff also submitted sufficient proof to establish, prima facie, that the affirmative defenses set forth in the defendant mortgagors' 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]

Chase Home Finance, LLC  
v Orellana, et. al.  
Index No.: 25904-10  
Pg. 4

[plaintiff not obligated to accept a tender of less than full repayment as demanded]). Furthermore, “when a mortgagor defaults on loan payments, even if only for a day, a mortgagee may accelerate the loan, require that the balance be tendered or commence foreclosure proceedings, and equity will not intervene” (*Home Sav. Of Am., FSB v Isaacson*, 240 AD2d 633, 633, 659 NYS2d 94 [2d Dept 1997]). Moreover, “[a]ny sympathy which the [defendant] mortgagor[’s] situation might arouse cannot be permitted to undermine the stability of contractual obligations” (*Jamaica Sav. Bank v Cohan*, 36 AD2d 743, 744, 320 NYS2d 471 [2d Dept 1971]).

As the plaintiff duly demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted to the defendant mortgagors (*see, HSBC Bank USA v Merrill*, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]). Accordingly, it was incumbent upon the defendant mortgagors 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 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 [1<sup>st</sup> Dept 1999] [internal quotation marks and citations omitted]).

The defendant mortgagors’ 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, *supra*). In this case, the affirmative defenses asserted by the defendant mortgagors are factually unsupported and without apparent merit (*see, Becher v Feller*, 64 AD3d 672, *supra*). In any event, the failure by the defendant mortgagors to raise and/or assert each of their 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 mortgagors 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 Mentasana*, 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

Chase Home Finance, LLC  
 v Orellana, et. al.  
 Index No.: 25904-10  
 Pg. 5

[2d Dept 2007]). The plaintiff, therefore, is awarded summary judgment in its favor against the defendant mortgagors (*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 mortgagors' answer is stricken, and the affirmative defenses set forth therein are dismissed.

The branch of the motion wherein the plaintiff seeks an order pursuant to CPLR 1021 substituting Federal National Mortgage Association for the plaintiff is granted (*see, CPLR 1018; 3025[b]; Citibank, N.A. v Van Brunt Props., LLC*, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]). The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by substituting Rosa Lopez for the fictitious defendants, Jane Does, and excising the names of the remaining fictitious defendants, John Does, is also 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 submissions, the plaintiff demonstrated its entitlement to an amendment of the complaint and a correction of certain scrivener's errors therein, and it appearing that the substantial right of any party to this action has not been prejudiced (*see, CPLR 2001; Household Fin. Realty Corp. v Emanuel*, 2 AD3d 192, 769 NYS2d 511 [1<sup>st</sup> Dept 2003]; *Rennert Diana & Co. v Kin Chevrolet, Inc.*, 137 AD2d 589, 524 NYS2d 481 [2d Dept 1988], *see also, Serena Constr. Corp. v Valley Drywall Serv.*, 45 AD2d 896, 357 NYS2d 214 [3d Dept 1974]). Accordingly, pursuant to CPLR 2001 and 3025(c), paragraph "5" of the complaint is amended nunc pro tunc to August 3, 2010 to read:

"5. As collateral security for the payment of said indebtedness, the aforesaid defendants MARCO A. ORELLANA and XIOMARA L. ORELLANA also executed, acknowledged and delivered to JPMORGAN CHASE BANK, N.A. a mortgage dated February 23, 2007 and recorded in the County of Suffolk on April 19, 2007 in Liber/Reel 21520 of Mortgages, at page 134. The mortgage tax as duly paid. Thereafter said mortgage was assigned to Plaintiff by assignment of mortgage.

Said mortgaged premises being known as and by street address:  
 13 WALBRIDGE AVE, BAY SHORE, NY 11706 bearing tax map designation:

Dist: 0500 Section 245.00 Block 02.00 Lot(s) 014.000

which premises are more fully described in Schedule "A," annexed hereto and made a part hereof."

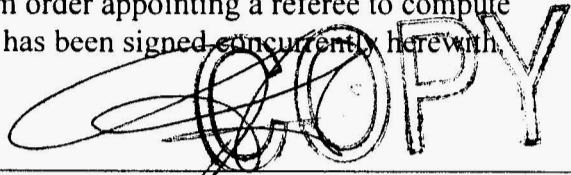
By its moving papers, the plaintiff further established the default in answering on the part of the defendants Rosa Lopez and JPMorgan (*see, RPAPL § 1321; HSBC Bank USA, N.A. v Roldan*, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the defaults of the above-noted defendants

Chase Home Finance, LLC  
v Orellana, et. al.  
Index No.: 25904-10  
Pg. 6

are fixed and determined. Since the plaintiff has been awarded summary judgment against the defendant mortgagors, and has established the default in answering by 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]).

Accordingly, this motion for, inter alia, summary judgment and an order of reference is determined as set forth 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:     MAY 09 2014    

  
\_\_\_\_\_  
Hon. JOSEPH A. SANTORELLI, J.S.C.

     FINAL DISPOSITION      X   NON-FINAL DISPOSITION