

Bank of N.Y. Mellon v Morris
2014 NY Slip Op 31941(U)
May 15, 2014
Supreme Court, Suffolk County
Docket Number: 50036-09
Judge: Jr., Andrew G. Tarantino
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SHORT FORM ORDER

**ORIGINAL
WHEN BLUE**

INDEX
NO.: 50036-09

**SUPREME COURT - STATE OF NEW YORK
IAS PART 50 - SUFFOLK COUNTY**

**PRESENT: Hon. ANDREW G. TARANTINO JR.
Acting Supreme Court Justice**

**Motion Date: 8-20-13
Adj. Date: _____
Mot. Seq. #001-MotD**

The Bank of New York Mellon F/K/A The Bank
of New York, as Trustee for the Certificate
Holders CWALT, INC., Alternative Loan Trust
2006-OC7, Mortgage Pass-Through
Certificates

**SHELDON MAY & ASSOCIATES, P.C.
Attorneys for Plaintiff
255 Merrick Road
Rockville Centre, N. Y. 11570**

Plaintiff,

**THE RANALLI LAW GROUP, PLLC
Attorney for Defendant
Cathy Morris
742 Veterans Memorial Highway
Hauppauge, N. Y. 11788**

-against-

Cathy Morris, Denise Williams and "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
being foreclosed herein,

**DENISE WILLIAMS
150 Archer Avenue
Copiague, N. Y. 11726**

Defendants.

**MAUDINE NIXON as "John Doe"
3424 Great Neck Road
Amityville, N. Y. 11701**

**CHRIS NIXON as "John Doe"
3424 Great Neck Road
Amityville, N. Y. 11701**

Upon the following papers numbered 1 to 21 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 21; 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 defendant Cathy Morris, striking her 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 determined as set forth below; and it is

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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 3424 Great Neck Road, Amityville, New York 11701. On June 30, 2006, the defendant Cathy Morris (the defendant mortgagor) executed an adjustable-rate note in favor of Decision One Mortgage Company, LLC (the lender) in the principal sum of \$240,000.00. To secure said note, the defendant mortgagor gave the lender a mortgage also dated June 30, 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. By way of a blank endorsement with physical delivery, the note was allegedly transferred to the plaintiff, The Bank of New York Mellon F/K/A The Bank of New York, as Trustee for the Certificate Holders CWALT, INC., Alternative Loan Trust 2006-OC7, Mortgage Pass-Through Certificates on August 1, 2006. The transfer of the note to the plaintiff was subsequently memorialized by an assignment of the mortgage dated July 28, 2009, and thereafter duly recorded in the Suffolk County Clerk's Office on December 28, 2009.

The defendant mortgagor allegedly defaulted on the note and mortgage by failing to make the monthly payment of interest due on or about January 1, 2009, and each month thereafter. After the defendant mortgagor allegedly failed to cure her default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on December 24, 2009. In the complaint, the plaintiff asserts two causes of action. In the first cause of action, the plaintiff demands, inter alia, a foreclosure and sale of the property. In the second cause of action, the plaintiff requests a reformation of the legal description set forth in the mortgage, which was recorded in the Suffolk County Clerk's Office on August 7, 2006, nunc pro tunc to the date of filing of the complaint. Parenthetically, the plaintiff re-filed the lis pendens on May 13, 2013.

Issue was joined by the interposition of the defendant mortgagor's verified answer sworn to on January 25, 2010. By her answer, the defendant mortgagor denies some of the allegations contained in the complaint, and admits other allegations therein. In her answer, the defendant mortgagor asserts five affirmative defenses, alleging, among other things, the following: the failure to receive an acceleration notice; the plaintiff's failure to register to do business in New York; an unaffordable loan; standing; and the plaintiff's lack of authority to collect legal fees in this action. No other defendants have appeared or answered herein.

According to the records maintained by the court's computerized database, two settlement conferences were conducted or adjourned before the specialized mortgage foreclosure part on May 10,

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2010 and June 30, 2010. On June 30, 2010, it was initially determined that the defendant mortgagor was ineligible for any further conferences of the type contemplated by CPLR 3408. Thereafter, additional conferences were conducted or adjourned before Foreclosure Conference Part 48 from July 13, 2012 continuing through to July 30, 2013. A representative of the plaintiff attended and participated in all settlement conferences. On the last date indicated, this action was marked to indicate that the parties had not reached a settlement and, thus, this case was released from any further conferences. In any event, the Court notes that the defendant mortgagor executed a 1-4 family rider (assignment of rents) dated June 30, 2006, whereby section "6" of the mortgage concerning occupancy of the property by her was deleted (*see*, RPAPL § 1304 [5] [a]). Accordingly, 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 mortgagor, striking her 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 an affidavit from its representative wherein it is alleged that the note and mortgage were transferred to the plaintiff prior to the commencement of this action, and it was the owner and holder of the note and mortgage on the date of commencement (*see*, *Kondaur Capital Corp. v McCary*, 115 AD3d 649, 981 NYS2d 547 [2d Dept 2014]; *see also*, *Deutsche Bank Natl. Trust Co. v Whalen*, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]; *Chase Home Fin., LLC v Miciotta*, 101 AD3d 1307, 956 NYS2d 271 [3d Dept 2012]; *GRP*

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Loan, LLC v Taylor, 95 AD3d 1172, 945 NYS2d 336 [2d Dept 2012]). 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, 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]; *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]; *First Wis. Trust Co. v Hakimian*, 237 AD2d 249, 654 NYS2d 808 [2d Dept 1997]; *Banque Arabe Et Internationale D'Investissement v One Times Square Assoc. Ltd. Partnership*, 193 AD2d 387, 597 NYS2d 48 [1st Dept 1993] [Banking Law § 200 authorizes foreign banks to loan money secured by mortgages on property in New York and to commence actions to enforce obligations under those mortgages]). 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]).

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 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

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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 her 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 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.

By its submissions, the plaintiff demonstrated that the incorrect property description set forth in the recorded mortgage was inadvertent, and that the substantial right of any party to this action has not been prejudiced (*see, CPLR 2001; Household Fin. Realty Corp. of N.Y. v Emanuel*, 2 AD3d 192, 769 NYS2d 511 [1st Dept 2003]; *Rennert Diana & Co. v Kin Chevrolet*, 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]). More specifically, the plaintiff has shown that the fifth course listed in the property description recited "point of place of BEGINNING," instead of "point or place of BEGINNING." Accordingly, pursuant to CPLR 2001 and 3025(c), the second cause of action is granted, and the fifth course listed in the property description is amended nunc pro tunc to December 24, 2009 to read, in relevant part, as follows:

"THENCE north 37 degrees 49 minutes 16 seconds west, 60.00 feet to the point or place of BEGINNING."

The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by substituting Maudine Nixon and Chris Nixon for the fictitious defendants, John Doe 1-2, and excising the remaining fictitious defendants, John Doe #3-12, 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 Denise Williams as well as the newly substituted defendants, Maudine Nixon and Chris Nixon (*see, RPAPL § 1321; HSBC Bank USA, N.A. v Roldan*, 80 AD3d 566, 914 NYS2d 647 [2d

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Dept 2011]). Accordingly, the defaults of all of the above-noted defendants are fixed and determined. Since the plaintiff has been awarded summary judgment against the defendant mortgagor, 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]).

Accordingly, this motion for, inter alia, summary judgment 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: 5.15.14



Hon. ANDREW G. TARANTINO, A.S.C.J.

 FINAL DISPOSITION X NON-FINAL DISPOSITION