

Citimortgage, Inc. v Limoncelli
2014 NY Slip Op 32037(U)
July 9, 2014
Sup Ct, Suffolk County
Docket Number: 15652-09
Judge: Joseph C. Pastoressa
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SUPREME COURT - STATE OF NEW YORK
IAS PART 34 - SUFFOLK COUNTYPRESENT: Hon. JOSEPH C. PASTORESSA
Justice of the Supreme CourtMOTION DATE 9-4-13
ADJ. DATE _____
Mot. Seq. #001-MotD_____
CITIMORTGAGE, INC.,

Plaintiff,

KNUCKLES, KOMOSINSKI
& ELLIOTT, LLP
Attorneys for Plaintiff
565 Taxter Road, Suite 590
Elmsford, N. Y. 10523

-against-

BRIDGET LIMONCELLI; NATIONAL CITY
BANK; "JOHN DOE #1" through "JOHN DOE
#10" inclusive, the names of the ten last named
Defendants being fictitious, real names unknown
to the Plaintiff, the parties intended being persons
or corporations having an interest in, or tenants or
persons in possession of, portions of the
mortgaged premises described in the Complaint),FARR & BASS
Attorneys for Defendant
Bridget Limoncelli
3100 Veterans Memorial Highway
Bohemia, N.Y. 11716

Defendants.

X

Upon the following papers numbered 1 to 23 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 17; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 18 - 23; Replying Affidavits and supporting papers 24 - 27; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is.

ORDERED that this motion by the plaintiff for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the defendant Bridget Limoncelli, 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

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 82 Cobblestone Drive, Shoreham, New York 11786. On March 9, 2007, the defendant Bridget Limoncelli (the defendant mortgagor) executed a fixed-rate note in favor of CitiMortgage, Inc. (the plaintiff) in the principal sum of \$710,400.00. To secure said note, the defendant mortgagor gave the plaintiff a mortgage also dated March 9, 2007 on the property. The mortgage indicates that Mortgage Electronic Registration Systems, Inc. (MERS) was acting solely as a nominee for the plaintiff and its successors and assigns and that, for the purposes of recording the mortgage, MERS was the mortgagee of record. By way of an assignment executed on April 17, 2009, the mortgage was transferred to the plaintiff. Thereafter, the assignment was duly recorded in the Suffolk County Clerk's office on May 4, 2009.

The defendant mortgagor allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on or about August 1, 2008, 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 April 29, 2009. Parenthetically, the plaintiff re-filed the lis pendens on or about October 12, 2012.

Issue was joined by the interposition of the defendant mortgagor's verified answer sworn to on May 16, 2009. By her answer, the defendant mortgagor generally admits some of the allegations in the complaint, and denies other allegations set forth therein. In the answer, the defendant mortgagor also asserts seven affirmative defenses, alleging, inter alia, the wrongful rejection of payments and an unaffordable loan as well as the plaintiff's failure to: properly credit all payments; send an acceleration notice; register to do business in New York; state a cause of action; comply with RPAPL §§ 1303 and 1320; and notify her of the transfer of the mortgage to it. The remaining defendants have neither answered nor appeared.

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 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. Opposition and reply papers have been filed herein.

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 the issue of standing is raised by a defendant, a 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 defense of a lack of standing is waived, however, unless it is raised in either the answer or in a pre-answer motion to dismiss the complaint (see, *Bank of N.Y. v Alderazi*, 99 AD3d 837, 951 NYS2d 900 [2d Dept 2012]; *U.S. Bank Natl. Assn. v Denaro*, 98 AD3d 964, 950 NYS2d 581 [2d Dept 2012]; *Citibank, N.A. v Swiatkowski*, 98 AD3d 555, 949 NYS2d 635 [2d Dept 2012]; *CitiMortgage, Inc. v Rosenthal*, 88 AD3d 759, *supra*).

It is also well established that once a mortgagor defaults on loan payments, a mortgagee is not required to accept less than the full repayment as demanded (see, *EMC Mtge. Corp. v Stewart*, 2 AD3d 772, 769 NYS2d 408 [2d Dept 2003]; *First Fed. Sav. v Midura*, 264 AD2d 407, 694 NYS2d 121 [2d Dept 1999]). Further, "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]).

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]). Furthermore, the plaintiff submitted proof of compliance with the notice requirements of RPAPL §§ 1303 and 1320 (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]). 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 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]; *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]; *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 [3d 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 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 [1st Dept 1999] [internal quotation marks and citations omitted]).

A review of the opposing papers shows that the same are insufficient to raise any genuine issue of fact requiring a trial on the merits of the plaintiff’s claims for foreclosure and sale, and insufficient to demonstrate any bona fide defense to such claim (*see, CPLR 3211[e]; U.S. Bank Trust N.A. Trustee v Butti*, 16 AD3d 408, 792 NYS2d 505 [2d Dept 2005]; *see also, Flagstar Bank v Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Argent Mtge. Co., LLC v Mentosana*, 79 AD3d 1079, *supra*). In opposition to the motion, the defendant mortgagor has offered no proof or arguments in support of any of her pleaded defenses, except as to her inability to afford the loan at origination. The failure by the defendant mortgagor to raise and/or assert each of her remaining pleaded defenses in opposition to the plaintiff’s motion warrants the dismissal of 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*). All of the defendant mortgagor’s

unsupported affirmative defenses are thus dismissed.

The assertions by the defendant mortgagor concerning the plaintiff's alleged lack of standing, which rest, inter alia, upon MERS' alleged inability to assign the note are without merit (*see, Chase Home Fin., LLC v Miciotta*, 101 AD3d 1307, 956 NYS2d 271 [3d Dept 2012]; *GRP Loan, LLC v Taylor*, 95 AD3d 1172, 945 NYS2d 336 [2d Dept 2012]; *see also, Suntrust Mtge., Inc. v Andriopoulos*, 39 Misc 3d 1208(A), 971 NYS2d 75 [Sup Court, Suffolk County 2013]). The plaintiff, as the originating lender, had standing to commence this action (*see, Kondaur Capital Corp. v McCary*, 115 AD3d 649, 981 NYS2d 547 [2d Dept 2014]; *Teachers Fed. Credit Union v Duryee*, 2013 NY Misc LEXIS 6137, 2013 WL 6916477, 2013 NY Slip Op 33321 [U] [Sup Ct, Suffolk County 2013]). In any event, the defendant mortgagor waived an affirmative defense based upon standing because she failed to interpose such a defense in her answer, or in a pre-answer motion to dismiss the complaint (*see, CPLR 3211[e]; U.S. Bank N.A. v Denaro*, 98 AD3d 964, *supra*; *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). The remaining contentions advanced by the defendant mortgagor are similarly without merit.

Notwithstanding the general denials in the answer, notably absent from the opposition papers are any allegations by the defendant mortgagor denying her continuous default in payment. Thus, even when viewed in the light most favorable to the defendant mortgagor, the opposition is insufficient to raise any genuine question of fact requiring a trial on the merits of the plaintiff's claims for foreclosure and sale, and insufficient to demonstrate any bona fide defenses (*see, CPLR 3211[e]; see, Emigrant Mtge. Co., Inc. v Beckerman*, 105 AD3d 895, 964 NYS2d 548 [2d Dept 2013]; *Bank of Smithtown v 219 Sagg Main, LLC*, 107 AD3d 654, 968 NYS2d 95 [2d Dept 2013]; *Valley Natl. Bank v Deutsch*, 88 AD3d 691, *supra*; *Rossrock Fund II, L.P. v Commack Inv. Group, Inc.*, 78 AD3d 920, 912 NYS2d 71 [2d Dept 2010]; *Cochran Inv. Co., Inc. v Jackson*, 38 AD3d 704, 834 NYS2d 198 [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 in their entirety.

The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by excising the fictitious named defendants, John Doe #1-10, 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 National City Bank (*see, RPAPL § 1321; HSBC Bank USA, N.A. v Roldan*, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the default of National City Bank is fixed and determined. Because the plaintiff has been awarded summary judgment against the defendant mortgagor, and has established the default in answering by the remaining defendant, the plaintiff is entitled to an order appointing a referee to compute amounts due under the subject note and mortgage

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(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 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: July 9, 2014


HON. JOSEPH C. PASTORESSA, J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION