

<b>Wells Fargo Bank, N.A. v Blaich</b>
2014 NY Slip Op 32110(U)
July 28, 2014
Sup Ct, Suffolk County
Docket Number: 13024-10
Judge: Joseph Farneti
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SUPREME COURT - STATE OF NEW YORK  
IAS PART 37 - SUFFOLK COUNTY

PRESENT: Hon. JOSEPH FARNETI  
Acting Justice Supreme Court

MOTION DATE 9-25-13  
ADJ. DATE 9-25-13  
Mot. Seq. #001-MotD

\_\_\_\_\_  
Wells Fargo Bank, N. A., as Trustee for ABCF  
2006-OPT2 Trust, ABFC Asset-Backed  
Certificates, Series 2006-OPT2,

Plaintiff,

RAS BORISKIN, LLC  
Attorneys for Plaintiff  
900 Merchants Concourse  
Westbury, N. Y. 11590

-against-

Frederick R. Blaich a/k/a Frederick Blaich,  
Agnes Blaich and "JOHN DOE #1" THROUGH  
"JOHN DOE #10", the last ten names being  
fictitious and unknown to the plaintiff, the  
persons or parties, if any, having or claiming  
an interest in or lien upon the Mortgage premises  
described in the Complaint,

FREDERICK R. BLAICH  
61 Colonial Street  
East Northport, N. Y. 11731

AGNES BLAICH  
61 Colonial Street  
East Northport, N. Y. 11731

Defendants.

\_\_\_\_\_  
X

Upon the following papers numbered 1 to 15 read on this motion for summary judgment; 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,

**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 Frederick Blaich and Agnes Blaich, 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 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 61 Colonial Street, East Northport, New York, 11731. On July 25, 2006, the defendants Frederich Blaich and Agnes Blaich (the “defendant mortgagors”) executed an adjustable-rate note in favor of Option One Mortgage Corporation (the “lender”) in the principal sum of \$377,000.00. To secure said note, the defendant mortgagors gave the lender a mortgage also dated July 25, 2006 on the property.

By way of an endorsed allonge, the note was allegedly transferred to the plaintiff, Wells Fargo Bank, N.A., as Trustee for ABFC 2006-OPT2 Trust, ABFC Asset-Backed Certificates, Series 2006-OPT2, memorialized by an assignment of the mortgage dated March 11, 2008. The assignment was subsequently duly recorded in the Suffolk County Clerk’s Office on March 20, 2008. Thereafter, by loan modification agreement effective September 1, 2008 (the “agreement”), the note and the mortgage were modified to reflect, among other things, a single lien and a new unpaid principal balance of \$400,984.89. The agreement also provided for, *inter alia*, payments of interest at a yearly rate of 5% for a period of 60 months from September 1, 2008 through to August 31, 2013.

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 August 1, 2009, 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 April 5, 2010. Parenthetically, the plaintiff re-filed the *lis pendens* on or about May 22, 2013.

Issue was joined by the interposition of the defendant mortgagors’ joint answer dated May 3, 2010. By their answer, the defendant mortgagors deny all of the material allegations contained in the complaint, and assert five affirmative defenses alleging, among other things, lack of personal jurisdiction; failure to state a cause of action; a defective complaint; payment; and breach of contract. The remaining defendants have neither answered nor appeared.

In compliance with CPLR 3408, a settlement conference was scheduled to be held before this Court’s specialized mortgage foreclosure part on June 11, 2010. On said date, this action was dismissed from the conference program and referred as an IAS case because the defendant mortgagors did not attend the conference or otherwise participate. Accordingly, no further conference is required under any statute, law or rule.

The plaintiff now moves for 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, the 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]). 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 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]; *Wells Fargo Bank, N.A. v Van Dyke*, 101 AD3d 638, 958 NYS2d 331 [1st Dept 2012]; *Long Is. Sav. Bank of Centereach, F.S.B. v Denkensohn*, 222 AD2d 659, 635 NYS2d 683 [2d Dept 1995] [dispute as to amount owed by the mortgagor is not a defense to a foreclosure action]; *Charter One Bank, FSB v Leone*, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007] [no competent evidence of an accord and satisfaction]). 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 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 [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 [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 Mentosana*, 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 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 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 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 relief described above. All future proceedings shall be captioned accordingly.

The branch of the motion for an Order fixing the defaults of all non-answering defendants is denied. The moving papers reflect that the defendant mortgagors are the only defendants in this

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action. Because the plaintiff has already been awarded summary judgment against the defendant mortgagors, and there are no other defendants in this action, it is also 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 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: July 28, 2014

  
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Hon. Joseph Farneti  
Acting Justice Supreme Court

\_\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION