

Wells Fargo Bank N.A. v Cunningham

2014 NY Slip Op 32200(U)

July 15, 2014

Sup Ct, Suffolk County

Docket Number: 16729/2012

Judge: William B. Rebolini

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.

Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Wells Fargo Bank N.A., as Trustee for Carrington
Mortgage Loan Trust, Series 2006-NC4 Asset-
Backed Pass-Through Certificates,

Plaintiff,

-against-

William Cunningham; Eva Cunningham; Asset
Acceptance LLC; Midland Funding LLC d/b/a
Midland Funding of Delaware LLC; Slomin's Inc.;
South Shore Adjustment Co., LLC as Successor
Assignee in Interest to GM/HSBC; NYS
Commissioner of Taxation and Finance; "John
Does" and "Jane Does", said names being
fictitious, parties intended being possible tenants or
occupants of premises, and corporation, other
entities or persons who claim, or may claim, a lien
against the premises,

Defendants.

Motion Sequence No.: 001; MOT.D
Motion Date: 9/3/13
Submitted:

Index No.: 16729/2012Attorney for Plaintiff:

Pitnick & Margolin, LLP
165 Eileen Way, Suite 101
Syosset, NY 11791

Defendants:

William Cunningham
Eva Cunningham
862 Larkfield Road
East Northport, N. Y. 11731

William Cunningham
Eva Cunningham
3770 Three Chimneyes Lane
Cumming, GA 30041

Clerk of the Court

Upon the following papers numbered 1 to 9 read upon this motion for summary judgment:
Notice of Motion and supporting papers, 1 - 9; it is

ORDERED that this unopposed motion by the plaintiff for, inter alia, an order awarding
summary judgment in its favor against the defendants William Cunningham and Eva Cunningham,
striking their answer, fixing the defaults of the non-answering defendants, appointing a referee and
amending the caption is determined as set forth below; and it is

Well Fargo Bank v. Cunningham, et al.

Index No.: 16729/2012

Page 2

ORDERED that the plaintiff shall submit with the proposed judgment of foreclosure, a certificate of conformity with respect to the affidavits of service upon the defendants William Cunningham and Eva Cunningham, executed outside the State of New York (*see*, CPLR 2309[c]; *U.S. Bank N.A. v Dellarmo*, 94 AD3d 746, 942 NYS2d 122 [2d Dept 2012]); 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 868 Larkfield Road, East Northport, New York 11731. On June 20, 2006, the defendant William Cunningham executed a fixed-rate balloon note in favor of New Century Mortgage Corporation (the lender) in the principal sum of \$442,500.00. To secure said note, the defendants William Cunningham and Eva Cunningham (the defendant mortgagors) gave the lender a mortgage also dated June 20, 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. Thereafter, by loan modification agreement made effective October 23, 2009, the note and the mortgage were modified by the plaintiff's servicer and attorney-in-fact to reflect, among other things, a new unpaid principal balance of approximately \$492,768.73. By way of an allonge executed on February 15, 2012, the lender allegedly transferred the note to Wells Fargo Bank, N.A., as Trustee for Carrington Mortgage Loan Trust, Series 2006-NC4 Asset-Backed Pass-Through Certificates (the plaintiff) prior to commencement, memorialized by an assignment of the mortgage executed on April 27, 2012. The assignment was subsequently duly recorded in the Suffolk County Clerk's Office on May 10, 2012.

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 December 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 May 31, 2012.

Issue was joined by the interposition of the defendant mortgagors' joint answer dated June 22, 2012. By their answer, the defendant mortgagors deny some allegations of the complaint, and admit other allegations therein. In the answer, the defendant mortgagors also assert fifteen affirmative defenses, alleging, *inter alia*, the following: the lack of personal jurisdiction; the lack of standing and legal capacity; fraud and misrepresentation in connection with the origination and the servicing of the loan; the lack of good faith with respect to a loan modification; and the plaintiff's failure to state a cause of action, mitigate damages and comply with the provisions of RPAPL § 1303 as well as Banking Law §§ 595-a and "61" (repealed L. 2006, ch 703, § 3, effective Sept. 13, 2006),

Well Fargo Bank v. Cunningham, et al.

Index No.: 16729/2012

Page 3

the last of which the Court deems to be an affirmative defense pursuant to Banking Law § 6-1. The remaining defendants have neither appeared nor answered the complaint.

In compliance with CPLR 3408, a settlement conference was scheduled to be held before this court's specialized mortgage foreclosure part on May 21, 2013. On the aforementioned date, this action was dismissed from the conference program and referred as an IAS case because the defendant mortgagors did not appear or otherwise participate. 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 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 with an endorsed allonge, 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 proof of compliance with the notice requirements of RPAPL §§ 1303 and 1304 (*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]; *cf., Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]). Moreover, the plaintiff submitted an affidavit from its representative wherein it is alleged that the plaintiff was the owner and holder of the note at the time of commencement, and that it has maintained possession of the same since that time (*see, Kondaur Capital Corp. v McCary*,

115 AD3d 649, 981 NYS2d 547 [2d Dept 2014]; *Deutsche Bank Natl. Trust Co. v Whalen*, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]; *HSBC Bank USA, N.A. v Avila*, 2013 NY Misc LEXIS 4521, 2013 WL 5606741, 2013 NY Slip Op 32412 [U] [Sup Ct, Suffolk County 2013]). 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 remaining 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, Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178, 919 NYS2d 465 [2011]; *Morales v AMS Mtge. Servs., Inc.*, 69 AD3d 691, 692, 897 NYS2d 103 [2d Dept 2010] [CPLR 3016(b) requires that the circumstances of fraud be "stated in detail," including specific dates and items]; *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] [plaintiff not obligated to accept a tender of less than full repayment as demanded]; *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]; *Connecticut Natl. Bank v Peach Lake Plaza*, 204 AD2d 909, 612 NYS2d 494 [3d Dept 1994] [defense based upon the doctrine of unclean hands lacks merit where a defendant fails to come forward with admissible evidence of showing immoral or unconscionable behavior]; *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"]; *Shufelt v Bulfamante*, 92 AD3d 936, 940 NYS2d 108 [2d 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]; *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]). Furthermore, with respect to the assertion set forth in the eighth affirmative defense that the defendant mortgagors were improperly refused a loan modification, there is ample authority emanating from the Appellate Division holding that "[n]othing in CPLR 3408 requires plaintiff to make the exact offer desired by [the] defendant[] [mortgagors], and the plaintiff's failure to make that offer cannot be interpreted as a lack of good faith" (*Bank of America, N.A. v Lucido*, 114 AD3d 714, *supra* at 715-16, quoting *Wells Fargo Bank, N.A. v Van Dyke*, 101 AD3d 638, *supra* at 638).

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 [1st 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 Does and Jane Does, 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.

Well Fargo Bank v. Cunningham, et al.

Index No.: 16729/2012

Page 6

By its moving papers, the plaintiff further established the default in answering on the part of the defendants Asset Acceptance LLC, Midland Funding LLC doing business as Midland Funding of Delaware LLC, Slomin's Inc., South Shore Adjustment Co., LLC as Successor Assignee in Interest to GM/HSBC, and New York State Commissioner of Taxation and Finance sued herein as NYS Commissioner of Taxation and Finance (*see*, RPAPL § 1321; ***HSBC Bank USA, N.A. v Roldan***, 80 AD3d 566, 914 NYS2d 647 [2d 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 mortgagors, and has established the default in answering by the remaining 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:

7/15/2014


 HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION ___ X ___ NON-FINAL DISPOSITION