

Bank of Am., N.A. v Lennan

2014 NY Slip Op 32381(U)

September 8, 2014

Supreme Court, Suffolk County

Docket Number: 16966/12

Judge: Denise F. Molia

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**SUPREME COURT - STATE OF NEW YORK
IAS PART 39 - SUFFOLK COUNTY**

PRESENT: Hon. DENISE F. MOLIA
Acting Supreme Court Justice

BANK OF AMERICA, NATIONAL ASSOCIATION
3476 Stateview Boulevard
Ft. Mill, SC 29715

Plaintiff,

-against-

**DOUGLAS LENNAN, MELISSA LENNAN,
PEOPLE OF THE STATE OF NEW YORK,**

**JOHN DOE (Said name being fictitious, it being
the intention of Plaintiff to designate any and
all occupants of premises being foreclosed herein,
and any parties, corporations or entities, if any,
having or claiming an interest or lien upon the
mortgaged premises.)**

Defendants.

MOTION DATE: 10-20-13
ADJ. DATE: _____
Mot. Seq. #: 001-MotD

GROSS POLOWY ORLANS, LLC
Attorneys for Plaintiff
25 Northpointe Parkway, Suite 25
Amherst, N. Y. 14228

**O'SHEA, MARCINCUK
& BRUYN, LLP**
Attorneys for Defendants
Douglas Lennan
Melissa Lennan
250 North Sea Road
Southampton, N. Y. 11968

_____ x

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 awarding
summary judgment in its favor against the answering defendants, appointing a referee and
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.

RST

This is an action to foreclose a mortgage on real property known as 10 Ledgewood Drive, Cold Spring Harbor, New York 11724. On December 8, 2005, the defendants Douglas Lennan Melissa Lennan (the defendant mortgagors) executed a fixed-rate note in favor of Wells Fargo Bank, N.A. (the lender) in the principal sum of \$663,750.00. To secure said note, the defendant mortgagors gave the lender a mortgage also dated December 8, 2005 on the property. By way of a blank endorsement and an assignment, the note and the mortgage were allegedly transferred to the plaintiff, Bank of America, National Association, prior to commencement. The assignment was subsequently duly recorded in the Office of the Suffolk County Clerk.

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 June 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 June 4, 2012.

Issue was joined by the interposition of the defendant mortgagors' joint answer sworn to on July 6, 2012. By their answer, the defendant mortgagors deny all of the material allegations contained in the complaint, and assert eight affirmative defenses alleging, among other things, the following: the lack of capacity to sue; the statute of frauds; the doctrine of unclean hands; damages caused in whole or in part by the plaintiff's own wrongful conduct; documentary evidence; the lack of standing; non-compliance with section 1303 of the Real Property Actions and Proceedings Law; and a reservation of rights with respect to non-specified violations of federal legislation related to lending practices, types of mortgages and foreclosures. The defendant People of the State of New York (New York), has appeared herein and waived all, but certain notices.

In compliance with CPLR 3408, settlement conferences were held before the specialized foreclosure conference part on September 27, 2012 and December 13, 2012. A representative of the plaintiff attended and participated in these settlement conferences. At the last conference, this action was marked to indicate that the parties could not reach an agreement to modify the loan or otherwise settle this action. 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 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]). The plaintiff also submitted proof of compliance with the notice requirements of sections 1303 and 1304 of the Real Property Actions and Proceedings Law as well as the notice provisions of the mortgage prior to commencement (*see*, *U.S. Bank N.A. v Tate*, 102 AD3d 859, 958 NYS2d 722 [2d Dept 2013]; *Wachovia Bank, N.A. v Carcano*, 106 AD3d 724, *supra*; *see also*, *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]).

Concerning standing, the plaintiff submitted an affidavit from its representative wherein it is alleged that the endorsed note was negotiated to it prior to commencement, and that it has maintained possession of the same since that time (*see*, *Kondaaur 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]; *see also*, *Chase Home Fin., LLC v Miciotta*, 101 AD3d 1307, 956 NYS2d 271 [3d Dept 2012]; *US Bank N.A. v Cange*, 96 AD3d 825, 947 NYS2d 522 [2d Dept 2012]; *GRP Loan, LLC v Taylor*, 95 AD3d 1172, 945 NYS2d 336 [2d Dept 2012]). The documentary evidence submitted also includes, among other things, the note transferred via an endorsement in blank (*cf.*, *Slutsky v Blooming Grove Inn, Inc.*, 147 AD2d 208, 542 NYS2d 721 [2d Dept 1989]). Moreover, the plaintiff submitted the assignment of the mortgage dated September 29, 2011, and subsequently duly recorded on October 24, 2011 (*see*, *GRP Loan, LLC v Taylor*, 95 AD3d 1172, 945 NYS2d 336 [2d Dept 2012]). An examination of the assignment shows that it includes a reference to the mortgage note (*see*, *Chase Home Finance, LLC v Miciotta*, 101 AD3d 1307, *supra*). Therefore, it appears that the plaintiff is also the transferee and holder of the original note and the assignee of the mortgage by virtue of the written assignment. 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 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*, *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]; *La Salle Bank N.A. v Kosarovich*, 31 AD3d 904, 820 NYS2d 144 [3d Dept 2006] [an affirmative defense based upon the notion of culpable conduct is unavailable in a foreclosure action]; *FGH Realty Credit Corp. v VRD Realty Corp.*, 231 AD2d 489, 647 NYS2d 229 [2d Dept 1996] [no valid defense or claim of estoppel where mortgage provision bars oral modification]; *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]]. Moreover, in this case, the plaintiff was free to transfer the note and mortgage, absent any language which expressly prohibited the assignment (*see, Matter of Stralem*, 303 AD2d 120, 758 NYS2d 345 [2d Dept 2003]).

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 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 [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 excising the plaintiff's address from the caption is granted (*see, CPLR 1001; 3025[c]; Household Fin. Realty Corp. v Emanuel*, 2 AD3d 192, 769 NYS2d 511 [1st Dept 2003]; *Rennert Diana & Co. v Kin Chevrolet, Inc.*, 137 AD2d 589, 524 NYS2d 481 [2d Dept 1988]). The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by excising the fictitious named defendant, John Doe, 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 moving papers, the plaintiff further established the default in answering on the part of the defendant New York (*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 defendant is 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 defendant, the plaintiff is entitled to an order appointing a referee to compute amounts due under the subject note and mortgage (*see, RPAPL § 1321; Green Tree Servicing, LLC v Cary*, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]; *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: 9-8-14


Hon. DENISE F. MOLIA, A.J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION