

Citimortgage, Inc. v Edwards

2014 NY Slip Op 32439(U)

September 6, 2014

Sup Ct, Suffolk County

Docket Number: 44519-10

Judge: Ralph T. Gazzillo

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
IAS PART 6 - SUFFOLK COUNTYPRESENT: Hon. RALPH T. GAZZILLO
Justice of the Supreme CourtMOTION DATE: 4-30-13 (001)
7-25-13 (002)CITIMORTGAGE, INC., SUCCESSOR BY MERGER
TO ABN AMRO MORTGAGE GROUP, INC.,^xADJ. DATE: _____
Mot. Seq. #:001-MotD
#:002-MotD

Plaintiff,

DAVIDSON FINK LLP
Attorneys for Plaintiff
28 East Main Street, Suite 1700
Rochester, N. Y. 14614

-against-

NICOLE EDWARDS, BETHPAGE FEDERAL CREDIT
UNION, CWA LONG ISLAND FEDERAL CREDIT
UNION; NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCEYOUNG LAW GROUP, PLLC
Attorneys for Defendant
Nicole Edwards
80 Orville Drive, Suite 100
Bohemia, N. Y. 11716"JOHN DOE" and "MARY DOE," (Said names being
fictitious, it being the intention of plaintiff to designate
any and all occupants, tenants, persons or corporations,
if any, having or claiming an interest in or lien upon the
premises being foreclosed herein),BERKMAN, HENOCH, PETERSON
PEDDY & FENCHEL, P.C.
Attorneys for Defendant
Bethpage Federal Credit Union
100 Garden City Plaza
Garden City, New York 11530

Defendants.

^x

Upon the following papers numbered 1 to 22 read on this motion for summary judgment and motion for leave to file late opposition papers; Notice of Motion/Order to Show Cause and supporting papers 1 - 11; 12 - 16; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 17 - 19; Replying Affidavits and supporting papers 20 - 22; Other _____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motions (001, 002) are consolidated for the purposes of this determination and are decided herewith; and it is

ORDERED that this motion (001) by the plaintiff for, inter alia, an order: (1) awarding summary judgment in its favor and against the defendant Nicole Edwards, striking her answer and dismissing the affirmative defenses set forth therein; (2) fixing the defaults of the non-answering defendants; (3) 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

CitiMortgage, Inc. v Edwards, et. al.

Index No.: 44519-10

Pg. 2

ORDERED that this motion (002) by the defendant Nicole Edwards for, inter alia, an order granting her leave to interpose untimely opposition in response to the plaintiff's summary judgment motion is granted solely to the extent that the opposition papers have been considered herein, otherwise denied; 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 1621 Hecksher Avenue, Bay Shore, New York 11706. On November 21, 2006, the defendant Nicole Edwards (the defendant mortgagor) executed a fixed-rate note in favor of ABN AMRO Mortgage Group, Inc. (the lender) in the principal sum of \$285,000.00. To secure said note, the defendant mortgagor gave the lender a mortgage also dated November 21, 2006 on the property. Effective September 1, 2007, the lender merged with and into the plaintiff, CitiMortgage, Inc. successor by merger to ABN AMRO Mortgage Group, Inc.

The defendant mortgagor allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on July 1, 2010, and each month thereafter. After the defendant mortgagor allegedly failed to cure his default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on December 9, 2010. Parenthetically, the plaintiff re-filed the notice of pendency on November 15, 2013.

By her answer, the defendant mortgagor generally denies all of the allegations set forth in the complaint, and asserts six affirmative defenses, alleging, among other things: the lack of proof that the plaintiff is licensed to conduct business in New York; the lack of standing (alleged as second and third affirmative defenses); and the failure to: render a loan modification determination in compliance with the applicable Federal Home Affordable Modification Program (HAMP) guidelines (*see*, 12 USC § 5219a); demonstrate that it is entitled to legal fees in this action; and comply with the requirements of the Truth In Lending Act (TILA) (15 USC § 1601, *et seq.*) as well as Federal Reserve Board Regulation Z (Regulation Z) (12 CFR part 226). The defendant Bethpage Federal Credit Union (BFCU) appeared herein and waived notice of all, but certain, notices. The remaining defendants have neither answered the complaint, nor appeared herein.

In compliance with CPLR 3408, a series of settlement conferences were conducted or adjourned before the specialized mortgage foreclosure part beginning on July 25, 2011 and continuing through to December 11, 2012. A representative of the plaintiff attended and participated in all settlement conferences. On the last date, this action was dismissed from the conference program and referred as an IAS case because the parties were unable to modify the loan or otherwise reach a settlement. 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.

In response to the plaintiff's motion, the defendant mortgagor moves by Order to Show Cause dated July 9, 2013 (Asher, J.), for, among other things, an order pursuant to CPLR 2004 granting her leave to interpose untimely opposition in response to the plaintiff's summary judgment motion. In light of the plaintiff's submission of opposition to the defendant mortgagor's motion, and the absence of showing any prejudice, the court considers the defendant's opposition papers in their entirety (*compare, Rodriguez v Tiwari*, 265 AD2d 247, 697 NYS2d 24 [1st Dept 1999], with *Romeo v Ben-Soph Food Corp.*, 146 AD2d 688, 537 NYS2d 52 [2d Dept 1989]). The court next turns to the plaintiff's motion for summary judgment and an order of reference.

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, 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 an affidavit from its representative wherein it is alleged that the plaintiff was the holder of the note at the time of commencement by virtue of a bank merger with the lender (*see, Banking Law § 602; Ladino v Bank of Am.*, 52 AD3d 571, 861 NYS2d 683 [2d Dept 2008]; *see also, Kondaur Capital Corp. v McCary*, 115 AD3d 649, 981 NYS2d 547 [2d Dept 2014]; *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 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, 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]; *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”]; *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]; *HSBC Bank USA v Picarelli*, 36 Misc3d 1218 [A], 959 NYS2d 89 [Sup Ct, Queens County 2012] [TILA requirements satisfied where the lender provided the required information and forms to the obligor at the closing]). 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 the plaintiff's alleged lack of standing. 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.

Rejected as unmeritorious are the defendant mortgagor's challenges to the sufficiency of the proof upon which the plaintiff relies to support its motion for summary judgment. Contrary to the defendant mortgagor's contentions, the affidavit of the plaintiff's representative contains sufficient allegations as to the possession of the note to it prior to commencement and comports with the requirements of CPLR 3212 (*see, Kondaur Capital Corp. v McCary*, 115 AD3d 649, *supra*; *see also, Charter One Bank, FSB v Leone*, 45 AD3d 958, *supra*).

The assertions by the defendant mortgagor as to the plaintiff's alleged lack of standing, which rest, inter alia, upon the lack of an endorsement on the note or the lack of allegations by the plaintiff's representative concerning a physical delivery of the note are misplaced and without merit (*see, Banking Law § 602; Capital One, N.A. v Brooklyn Flatiron, LLC*, 85 AD3d 837, 925 NYS2d 350 [2d Dept 2011]; *Ladino v Bank of Am.*, 52 AD3d 571, *supra*). The plaintiff merged with the lender in 2007, more than two years before the commencement of this action. Banking Law § 602, which governs the effect of a merger, provides that the receiving bank "shall be considered the same business and corporate entity" as the bank that merged into it and that all of the property, rights, and powers of the merged bank shall vest in the receiving bank. Thus, no formal assignment is required to effect a transfer of the assets of the merged bank, and the plaintiff is not required to submit proof that the subject loan was assigned in order to establish its entitlement to summary judgment (*Ladino v Bank of Am.*, 52 AD3d 571, *supra* at 572-573). Moreover, at least two courts have recognized that the plaintiff is the successor by merger to the lender's loans with standing to prosecute foreclosure actions (*see, Citimortgage, Inc. v Vatash*, 41 Misc. 3d 1236 [A], 983 NYS2d 202 [Sup Ct, Suffolk County 2013]; *Citimortgage, Inc. v Aorta*, 28 Misc3d 1220 [A], 957 NYS2d 634 [Sup Ct, Queens County 2010]). The defendant mortgagor, therefore, failed to establish the merit of her defenses based upon the plaintiff's alleged lack of standing.

The defendant mortgagor's request for an order directing a preliminary conference pursuant to Uniform Rules of Trials Courts (22 NYCRR) § 202.12, which was not set forth in the notice of motion, is denied as procedurally and substantively deficient (*see, CPLR 2214 [a]*). In any event, the defendant mortgagor failed to demonstrate that she made reasonable attempts to discover the facts which would give rise to a triable issue of fact or that further discovery might lead to relevant evidence (*see, CPLR 3212 [f]; Swedbank, AB, N.Y. Branch v Hale Ave. Borrower, LLC*, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]; *JP Morgan Chase Bank v Agnello, N.A.*, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]). Mere hope and speculation that additional discovery might yield evidence sufficient to raise a triable issue of fact is not a basis for denying summary judgment (*Lee v T.F. DeMilo Corp.*, 29 AD3d 867, 868, 815 NYS2d 700 [2d Dept 2006]; *Sasson v Setina Mfg. Co., Inc.*, 26 AD3d 487, 488, 810 NYS2d 500 [2d Dept 2006]). The remaining contentions advanced by the

CitiMortgage, Inc. v Edwards, et. al.

Index No.: 44519-10

Pg. 6

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 (*see generally, Fleet Bank v Pine Knoll Corp.*, 290 AD2d 792, 736 NYS2d 737 [3d Dept 2002]). 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]; *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 substituting Jack Edwards and Matt Edwards for the fictitious defendants "John Doe" and "Mary Doe," and by excising the defendant CWA Long Island Federal Credit Union from the caption is also granted (*see, PHH Mtge. Corp. v Davis*, 111 AD3d 1110, 975 NYS2d 480 [3d Dept 2013]; *Flagstar Bank v Bellafigiore*, 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 defendants BFCU and New York State Department of Taxation and Finance as well as the newly substituted defendants, Jack Edwards and Matt Edwards (*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 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 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 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: 9/16/11


Hon. RALPH T. GAZZILLO, A.J. S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION