

JPMorgan Chase Bank v Kapoor

2014 NY Slip Op 32473(U)

September 15, 2014

Supreme Court, Suffolk County

Docket Number: 33121-12

Judge: Denise F. Molia

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COPY

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

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

JPMORGAN CHASE BANK, NATIONAL
ASSOCIATION, x

Plaintiff,

-against-

**MANISH KAPOOR; AMERICAN EXPRESS TRAVEL
RELATED SERVICES CO, INC.; BANK OF
AMERICA N.A.; CAPITAL ONE BANK (USA), N.A.;
CITIBANK SOUTH DAKOTA NA; COACTIV
CAPITAL PARTNERS INC; DISCOVER BANK;
FORD MOTOR CREDIT COMPANY LLC; HANN
FINANCIAL SERVICE CORP; PRIYA KAPOOR;
MIDLAND FUNDING LLC DBA IN NEW YORK
AS MIDLAND FUNDING OF DELAWARE LLC;
THE BANK OF NEW YORK; "JOHN DOES" and
"JANE DOES", said names being fictitious, parties
intended being possible tenants or occupants of
premises, and corporations, other entities or persons
who claim, or may claim, aa lien against the
premises,**

Defendants.

x

MOTION DATE: 11-14-13
ADJ. DATE: _____
Mot. Seq. #: 001-MotD

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& ASSOCIATES, P.C.**
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MANISH KAPOOR
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529 Nolting Ave.
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Upon the following papers numbered 1 to 8 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 8; 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 defendant, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption is determined as indicated 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

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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 529 Nolting Avenue, North Babylon, New York 11703. On June 17, 2003, the defendant Manish Kapoor (the defendant mortgagor) executed a fixed-rate note in favor of BNY Mortgage Company, LLC (the lender) in the principal sum of \$268,000.00. To secure said note, the defendant mortgagor gave the lender a mortgage also dated June 17, 2003 on the property. By way of an endorsement to the note and an assignment of the mortgage, the note and the mortgage were allegedly transferred to the plaintiff, JPMorgan Chase Bank, National Association. By way of further background, the defendant Priya Kapoor (Mrs. Kapoor) was allegedly given an interest in the property by deed dated February 25, 2004 (not submitted herein).

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 September 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 summons and verified complaint on October 24, 2012, followed by the filing of the lis pendens the following day.

Issue was joined by the interposition of Mrs. Kapoor's verified answer sworn to on December 10, 2012. By her answer, Mrs. Kapoor generally denies all of the allegations contained in the complaint, however, she does not assert any affirmative defenses. The defendants Discover Bank (Discover), Hann Financial Service Corp. (Hann) and Midland Funding LLC doing business as in New York as Midland Funding of Delaware LLC (Midland) have appeared herein and waived all, but certain notices. The remaining defendants have neither appeared nor answered herein. Parenthetically, Portfolio Recovery Associates, L.L.C. (Portfolio), a non-party to this action, has attempted to appear in this action by filing a purported notice of appearance and waiver.

In compliance with CPLR 3408, a settlement conference was held before this Court's specialized mortgage foreclosure part on April 25, 2012, and continued to July 9, 2013. On the last date, this case was dismissed from the conference program because the defendant mortgagor failed to 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 Mrs. Kapoor and striking her answer; (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.

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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]). Thus, the plaintiff demonstrated its prima facie burden as to the merits of this foreclosure action.

As the plaintiff duly demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted to Mrs. Kapoor (*see, HSBC Bank USA v Merrill*, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]). Accordingly, it was incumbent upon Mrs. Kapoor 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]).

Mrs. Kapoor's 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, 915 NYS2d 591 [2d Dept 2010]). 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, Inc. 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, *supra*). 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]).

Under these circumstances, the Court finds that Mrs. Kapoor 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];

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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 Mrs. Kapoor (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, Mrs. Kapoor's answer is stricken.

The branch of the motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by substituting Rohan Kapoor and Jason Lasky for the fictitious defendants, "John Does," and by excising the remaining fictitious defendants, "Jane Does," is granted (see, *PHH Mtge. Corp. v Davis*, 111 AD3d 1110, 975 NYS2d 480 [3d Dept 2013]; *Flagstar Bank v Bellafigliore*, 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.

The branch of the motion seeking to amend the caption by substituting Portfolio, which was never named as a defendant in this action or served with process, for one of the fictitious Doe defendants, is denied (see, CPLR 1003; 3025 [b]). With respect to joinder, CPLR 1003 provides in pertinent part that "parties may be added at any stage of the action *by leave of court or by stipulation of all parties who have appeared*" (emphasis added). Pursuant to CPLR 3025(b), "[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time *by leave of court or by stipulation of all parties* (emphasis added) (see, *Sackett v Konigsberg*, 74 AD3d 777, 901 NYS2d 549 [2d Dept 2010]; *Nikolic v Fedn. Empl. and Guidance Serv., Inc.*, 18 AD3d 522, 795 NYS2d 303 [2d Dept 2005]; *Peterkin v City of New York*, 293 AD2d 244, 745 NYS2d 178 [2d Dept 2002]; see also, *Crook v E. I. du Pont de Nemours & Co.*, 181 AD2d 1039, 582 NYS2d 581 [4th Dept 1992]; *Yonker v Amol Motorcycles*, 161 AD2d 638, 555 NYS2d 416 [2d Dept 1990]). Absent the proper joinder of Portfolio herein by way of, inter alia, stipulation of all appearing parties, intervention or an amendment of the complaint by leave of court, the purported notice of appearance filed herein by Portfolio is a nullity and Portfolio's rights, if any, are unaffected by the judgment (see generally, *Polish Natl. Alliance of Brooklyn v White Eagle Hall Co.*, 98 AD2d 400, 470 NYS2d 642 [2d Dept 1983]).

Furthermore, the plaintiff has failed to set forth the nature of Portfolio's interest, if any, in this action. In the absence of any allegations to the contrary, it would appear from the moving papers that Portfolio is merely a post-judgment collection agency for Discover and Midland. It is also apparent that Portfolio inexplicably filed a notice of appearance in this action even though it was neither named as a defendant nor served herein. In any event, the plaintiff may not resort to the provisions of CPLR 1024 for a substitution of Portfolio for an unknown defendant because Portfolio, which was never even served with process, would not fit within the categories of an unknown defendant in any capacity (see, *Wendover Fin. Servs. v Ridgeway*, 93 AD3d 1156, 940 NYS2d 391 [4th Dept 2012]; *Everhome Mtge. Co. v Sirignano*, 40 Misc3d 1223 [A], 975 NYS2d 708 [Sup Ct, Suffolk County 2013]).

By its moving papers, the plaintiff further established the default in answering on the part of the defendant mortgagor and the newly substituted defendants, Rohan Kapoor and Jason Lasky (see,

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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 Mrs. Kapoor, and has established the default in answering by all of 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; **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 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: 9-15-14



Hon. DENISE F. MOLIA, AJSC

____ FINAL DISPOSITION X NON-FINAL DISPOSITION