

First Tennessee Bank Natl. Assn. v Kellam
2014 NY Slip Op 32530(U)
September 16, 2014
Supreme Court, Suffolk County
Docket Number: 28751-12
Judge: 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 10-7-13
ADJ. DATE 7-17-14
Mot. Seq. #001-MotD

FIRST TENNESSEE BANK NATIONAL
ASSOCIATION SUCCESSOR THROUGH MERGER
WITH FIRST HORIZON HOME LOAN
CORPORATION,

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Plaintiff,

BERNADETTE KELLAM
Defendant Pro Se
10 Tahoe Court
Coram, N. Y. 11727

-against-

DEXTER S. KELLAM; BERNADETTE
RAMNARINE KELLAM; "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, a lien against the premises,

Defendants.

X

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: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the defendant Bernadette Ramnarine Kellam, striking her 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

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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 10 Tahoe Court, Coram, New York 11727. On May 11, 2007, the defendants Dexter S. Kellam and Bernadette Ramnarine Kellam (“the defendant mortgagors”) executed a fixed-rate balloon note in favor of First Horizon Home Loan Corporation (“the lender”) in the principal sum of \$60,000.00. To secure said note, the defendant mortgagors gave the lender a mortgage also dated May 11, 2007 on the property. Effective May 31, 2007, the lender merged with and into the plaintiff, “First Tennessee Bank National Association successor by merger with First Horizon Home Loan Corporation.”

The defendant mortgagors allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on February 1, 2012, 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 summons and verified complaint on September 17, 2012. The following day, the plaintiff filed the notice of pendency.

Issue was joined by the interposition of Mrs. Kellam’s verified answer sworn to on October 27, 2012. By her answer, the defendant mortgagor generally denies all of the allegations set forth in the complaint, asserts three affirmative defenses (only two of which are specifically delineated as such), alleging, *inter alia*, the following: the plaintiff’s lack of standing; the failure to receive a 90-day notice; and her own financial difficulties. The remaining defendants have neither appeared nor answered herein.

In compliance with CPLR 3408, a settlement conference was conducted or adjourned before this court’s specialized mortgage foreclosure part on May 20, 2013. An additional conference was scheduled to be held on July 30, 2013; however, on that date this action was dismissed from the conference program and referred as an IAS case because the defendant mortgagors did not attend 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. Kellam, 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. 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, 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 proof of compliance with the notice requirements of RPAPL 1304 (*see, Wachovia Bank, N.A. v Carcano*, 106 AD3d 724, *supra*; *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 holder of the note and the mortgage at the time of commencement by virtue of 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]). 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 Mrs. Kellam'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, 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]; *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, "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]). Moreover, "[a]ny sympathy which the mortgagors' situation might arouse cannot be permitted to undermine the stability of contractual obligations" (*Jamaica Sav. Bank v Cohan*, 36 AD2d 743, 744, 320 NYS2d 471 [2d Dept

1971]).

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

Mrs. Kellam'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 Mentasana*, 79 AD3d 1079, *supra*). In this case, the affirmative defenses asserted by Mrs. Kellam are factually unsupported and without apparent merit (*see, Becher v Feller*, 64 AD3d 672, *supra*; *U. S. Bank N. A. v Slavinski*, 78 AD3d 1167, 912 NYS2d 285 [2d Dept 2010]). In any event, the failure by Mrs. Kellam to raise and/or assert each of her 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 Mrs. Kellam 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 Mrs. Kellam (*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. Kellam's answer is stricken, and the affirmative defenses set forth therein are dismissed.


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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.

By its moving papers, the plaintiff further established the default in answering on the part of the defendant Dexter S. Kellam (*see, RPAPL 1321; HSBC Bank USA, N.A. v Roldan*, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the default of Mr. Kellam is fixed and determined. Since the plaintiff has been awarded summary judgment against Mrs. Kellam, and has established the default in answering by Mr. Kellam, 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: September 16, 2014



 Hon. Joseph Farneti
 Acting Justice Supreme Court

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION