

**Wells Fargo Bank, NA v Barbato**

2014 NY Slip Op 32601(U)

October 2, 2014

Supreme Court, Suffolk County

Docket Number: 33580/09

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART XXXVI SUFFOLK COUNTY

COPY

**PRESENT:**

**HON. PAUL J. BAISLEY, JR., J.S.C.**

-----X  
WELLS FARGO BANK, NA,

Plaintiff,

-against-

NICHOLAS BARBATO, JENNIFER M. BARBATO,  
AMERICAN EXPRESS CENTURION BANK,  
PEOPLE OF THE STATE OF NEW YORK, WELLS  
FARGO BANK, NA and "JOHN DOE #1" to "JOHN  
DOE #10" the last 10 names being fictitious and  
unknown to plaintiff, the persons or parties intended  
being the persons or parties, if any, having or claiming  
an interest in or lien upon the mortgaged premises  
described in the verified complaint,

Defendants.

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INDEX NO.: 33580/09  
MOTION DATE: 5/30/13  
MOTION NO.: 001 MG

**PLAINTIFF'S ATTORNEY:**  
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145 Huguenot Street, Suite 499  
New Rochelle, New York 10801

**DEFENDANT'S ATTORNEY:**  
EMOUNA & MIKHAIL, P.C.  
110 Old Country Rd., Suite 3  
Mineola, New York 11501

Upon the following papers numbered 1 to 21 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-15; ~~Notice of Cross Motion and supporting papers~~    ; Answering Affidavits and supporting papers 16-18; Replying Affidavits and supporting papers 19-21; ~~Other~~    ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that the motion (motion sequence no. 001) of plaintiff for, *inter alia*, an order awarding summary judgment in its favor against defendant Jennifer M. Barbato, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption is granted; and it is further

**ORDERED** that the answer interposed by defendant Jennifer M. Barbato is stricken from the record and is limited to a notice of appearance; and it is further

**ORDERED** that 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 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 residential property known as 43 Smith Lane, Centereach, New York. On October 3, 2005, defendant-mortgagors Nicholas Barbato and Jennifer Barbato executed a fixed-rate note in favor of plaintiff Wells Fargo Bank, N.A. in the

principal sum of \$352,000.00. To secure the note, defendant-mortgagors gave plaintiff a mortgage dated October 3, 2005 on the property.

The defendant-mortgagors allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on April 1, 2009, and each month thereafter. After the defendant-mortgagors allegedly failed to cure their default, plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on August 24, 2009. Plaintiff subsequently re-filed the lis pendens on August 24, 2012.

Issue was joined by the interposition of Jennifer M. Barbato's answer on or about September 14, 2009. Parenthetically, the answer is misdated September 14, 2008, the year prior to commencement. By her answer, Ms. Barbato admits the execution of the note and mortgage, but generally denies the remaining allegations set forth in the complaint. Ms. Barbato also asserts ten affirmative defenses, alleging, *inter alia*, lack of personal jurisdiction; fraudulent misrepresentations; failure to state a cause of action; improper property description; dispute as to amount owed; lack of capacity; offer of payment rejected; failure to name all necessary parties; and failure to comply with conditions precedent as well as sections 1303 and 1304 of the Real Property Actions and Proceedings Law. Defendant People of the State of New York ("New York State") has filed a notice of appearance and waiver, waiving all but certain notices. The remaining defendants have neither answered nor appeared herein.

According to the records maintained by the Court's computerized database, a series of settlement conference were scheduled for and/or held before this Court's specialized mortgage foreclosure part on June 15, August 18 and November 15, 2010. At the November 2010 conference, this action was dismissed from the conference program due to the failure of defendant-mortgagors to appear or participate. Thereafter, on August 21, 2012, a status conference was held in the undersigned's IAS Part 36. No further conference is required under any statute, law or rule.

Plaintiff now moves for, *inter alia*, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against Ms. Barbato, 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 opposition, Ms. Barbato submitted the affirmation of counsel dated May 28, 2013, and filed the same with the Court on May 31, 2013, the day after the return date of this motion (*see*, CPLR 2214[b]; *Foittl v G.A.F. Corp.*, 64 NY2d 911, 488 NYS2d 377 [1985]). In response, plaintiff has filed a reply.

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, plaintiff established its *prima facie* entitlement to summary judgment on the complaint (*see*, CPLR R. 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, 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, plaintiff submitted proof of compliance with the notice requirements of RPAPL §§1303 and 1304 (*cf.*, *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]). Moreover, plaintiff demonstrated that it has standing to commence this action as the originating lender and the holder of the note (*see*, *Deutsche Bank Natl. Trust Co. v Whalen*, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]). Under these circumstances, plaintiff met its *prima facie* burden as to the merits of this foreclosure action and as to its standing to maintain the same.

Plaintiff also submitted sufficient proof to establish, *prima facie*, that the affirmative defenses set forth in Ms. Barbato’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*, *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 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]; *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]; *Charter One Bank, FSB v Leone*, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007] [no competent evidence of an accord and satisfaction]; *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]; *Polish Natl. Alliance of Brooklyn v White Eagle Hall Co.*, 98 AD2d 400, 470 NYS2d 642 [2d Dept 1983] [the definition of a necessary party pursuant to RPAPL §1311 includes, *inter alia*, those having “an interest in possession” and “every person entitled to reversion, remainder, or inheritance of the real property, or any interest therein or undivided share thereof”]).

As plaintiff duly demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted to Ms. Barbato (*see*, *HSBC Bank USA v Merrill*, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]). Accordingly, it was incumbent upon Ms. Barbato 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 the plaintiff is not required to respond to alleged affirmative defenses that are based on such allegations (*see, Charter One Bank, FSB v Leone*, 45 AD3d 958, *supra*; *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 Montesana*, 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 opposing papers are insufficient to raise any genuine issue of fact requiring a trial on the merits of 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]). In opposition to the motion, Ms. Barbato has offered no proof or arguments in support of any of her pleaded defenses. The failure by Ms. Barbato to raise and/or assert each of her pleaded defenses in opposition to 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 Ms. Barbato's affirmative defenses are thus dismissed.

Rejected as unmeritorious are Ms. Barbato's challenges, by counsel, to the sufficiency of the proof upon which plaintiff relies to support its motion for summary judgment. Contrary to defendant's contentions, the affidavit of plaintiff's Vice President of Loan Documentation is legally sufficient and comports with the requirements of CPLR R. 3212 (*see, Charter One Bank, FSB v Leone*, 45 AD3d 958, *supra*; *Fleet Bank v Pine Knoll Corp.*, 290 AD2d 792, 736 NYS2d 737 [3d Dept 2002]; *see also, HSBC Bank USA, N.A. v Sage*, 2013 NY Slip Op 8327 [3d Dept, Dec. 12, 2013]; *LaSalle Bank, N.A. v Pace*, 31 Misc3d 627, 919 NYS2d 794, *affd* 100 AD3d 970, 955 NYS2d 161 [2d Dept 2012]).

Moreover, defendant has 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]).

Under these circumstances, Ms. Barbato failed to establish that the defenses asserted in her answer are sufficiently meritorious to defeat plaintiff's motion for summary judgment (*see, CPLR 3211[e]*; *U.S. Bank Trust N.A. Trustee v Butti*, 16 AD3d 408, *supra*). Thus, even when viewed in the light most favorable to Ms. Barbato, her submissions are insufficient to raise any

genuine question of fact requiring a trial on the merits of plaintiff's claims for foreclosure and sale, and insufficient to demonstrate any bona fide defenses (*see*, CPLR 3211[e]; *see*, *Bank of Smithtown v 219 Sagg Main, LLC*, 107 AD3d 654, 968 NYS2d 95 [2d Dept 2013]; *Rossrock Fund II, L.P. v Commack Inv. Group, Inc.*, 78 AD3d 920, 912 NYS2d 71 [2d Dept 2010]; *Neighborhood Hous. Servs. of N.Y. City, Inc. v Meltzer*, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]; *Cochran Inv. Co. Inc. v Jackson*, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007]). Plaintiff, therefore, is awarded summary judgment in its favor against Ms. Barbato (*see*, *Federal Home Loan Mtge. Corp. v Karastathis*, 237 AD2d 558, *supra*; *U.S. Bank Trust N.A. Trustee v Butti*, 16 AD3d 408, *supra*; *see generally*, *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Accordingly, Ms. Barbato's answer is stricken, and the affirmative defenses therein are dismissed.

The branch of the instant motion wherein plaintiff seeks an order pursuant to CPLR §1024 amending the caption by excising the fictitious named defendants John Doe #1-10 is granted (*see*, *PHH Mtge. Corp. v Davis*, 111 AD3d 1110, 975 NYS2d 480 [3d Dept 2013]; *Flagstar Bank v Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Neighborhood Hous. Servs. of N.Y. City, Inc. v Meltzer*, 67 AD3d 872, *supra*). By its submissions, plaintiff established the basis for this relief. All future proceedings shall be captioned accordingly.

By its moving papers, plaintiff further established the default in answering on the part of defendants New York, Nicholas Barbato, American Express Centurion Bank and Wells Fargo Bank, NA (as a subordinate lienholder) (*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 plaintiff has been awarded summary judgment against Ms. Barbato, and has established the default in answering by all of the non-answering defendants, 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 granted. Proposed long form order appointing a referee to compute pursuant to RPAPL §1321, as modified by the Court, signed concurrently herewith.

Dated: October 2, 2014

**HON. PAUL J. BAISLEY, JR.**

\_\_\_\_\_  
J.S.C.

\_\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION