

| |
|--|
| Bank United v Durham |
| 2014 NY Slip Op 32727(U) |
| September 22, 2014 |
| Supreme Court, Suffolk County |
| Docket Number: 31255-11 |
| Judge: Joseph Farneti |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office. |
| This opinion is uncorrected and not selected for official publication. |

SUPREME COURT - STATE OF NEW YORK
IAS PART 37 - SUFFOLK COUNTY

PRESENT: Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 11-14-13
ADJ. DATE 9-18-14
Mot. Seq. #001-MotD

_____ x
BankUnited

Plaintiff,

SHELDON MAY & ASSOCIATES, P.C.
Attorneys for Plaintiff
255 Merrick Road
Rockville Centre, N. Y. 11570

-against-

CHRISTOPHER THOMPSON, ESQ.
Attorney for Defendant
Sean Durham
33 Davidson Lane
West Islip, N.Y.

Sean Durham, T.C. Music Co., Inc. d/b/a Cornet Music; United States of America-Internal Revenue Service' "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 19 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers _____; Other Letters 20 - 21; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by the plaintiff for, *inter alia*, an Order awarding summary judgment in its favor against the defendant Sean Durham, 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 branch of the motion wherein the plaintiff seeks an Order substituting Castle Peak 2012-1 Loan Trust Mortgage Backed Notes, Series 2012-1, by U.S. Bank National Association, as Indenture Trustee for the plaintiff is granted; 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 branches of the motion wherein the plaintiff requests an Order amending the caption by excising and/or substituting certain fictitious defendants, fixing the defaults of the non-answering defendants and appointing a referee are denied, for the reasons stated below, without prejudice to renewal within one hundred and twenty (120) days of the date of this Order; and it is

ORDERED that any motion resubmitted pursuant to this Order shall include a corrected proposed long form order appointing a referee consistent with the relief sought in the plaintiff's notice of motion and attorney affirmation; 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 154 6th Street, St. James, New York 11780. On April 5, 2006, the defendant Sean Durham ("the defendant mortgagor") executed an adjustable-rate note in favor of BankUnited, FSB ("the lender") in the principal sum of \$512,800.00. To secure said note, the defendant mortgagor gave the lender a mortgage also dated April 5, 2006 on the property. By way of, *inter alia*, an undated allonge, the note was transferred to the plaintiff, memorialized by an assignment of the mortgage. The assignment was subsequently duly recorded in the Suffolk County Clerk's Office.

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 January 1, 2011, 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 28, 2011, followed by the filing of a *lis pendens* on October 31, 2011.

Issue was joined by the interposition of the defendant mortgagor's answer dated March 2, 2012. By his answer, the defendant mortgagor admits that he is a resident of New York State, but denies all of the other allegations contained therein. In the answer, the defendant mortgagor also asserts nine affirmative defenses, alleging, *inter alia*, the following: the lack of standing; unclean hands; an unconscionable loan; the statute of limitations; foreclosure on unsecured property; failure to comply with a condition precedent; failure to comply with the specialized request for judicial intervention as required by Uniform Rules of Court (22 NYCRR) § 202.12-a; failure to comply with the mandates of AO 431/11; and the failure to allege compliance with Banking Law § 595-a. The defendant United States of America-Internal Revenue Service ("IRS") appeared herein and waived all, but certain, notices. The remaining defendants have neither answered, nor appeared in this action.

In compliance with CPLR 3408, a series of settlement conferences were held before the specialized foreclosure conference part on June 5, 2012 and continuing through to March 12, 2013. A representative of the plaintiff attended and participated in all settlement conferences. On the last date, this action was referred as an IAS case because the parties were unable to modify the subject loan or

otherwise reach a settlement. Accordingly, there has been compliance with CPLR 3408, and 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 his 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.

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 with an endorsed allonge affixed thereto, 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]). Further, the plaintiff submitted an affidavit from its representative wherein it is alleged that it was the holder of the note on the date of commencement, having been negotiated the note on May 21, 2009 (*see Kondaur 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, Suntrust Mtge., Inc. v Andriopoulos*, 39 Misc 3d 1208(A), 971 NYS2d 75 [Sup Court, Suffolk County 2013]). 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, an examination of the assignment to the plaintiff shows that it includes a reference to the mortgage note (*see, Chase Home Finance, LLC v Miciotta*, 101 AD3d 1307, 956 NYS2d 271 [3d Dept 2012]). Therefore, it appears that the plaintiff is the owner and the 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 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, 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 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 [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]).

The defendant mortgagor'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 the defendant mortgagor 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 the defendant mortgagor to raise and/or assert each of his 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 mortgagor 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

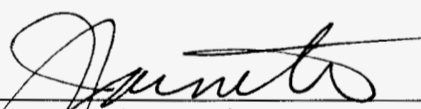
2010]; *see generally*, **Hermitage Ins. Co. v Trance Nite Club, Inc.**, 40 AD3d 1032, 834 NYS2d 870 [2d Dept 2007]). The plaintiff, therefore, is awarded summary judgment in its favor against the defendant mortgagor (*see*, **Federal Home Loan Mtge. Corp. v Karastathis**, 237 AD2d 558, *supra*; *see 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.

The branch of the motion wherein the plaintiff seeks an Order substituting Castle Peak 2012-1 Loan Trust Mortgage Backed Notes, Series 2012-1, by U.S. Bank National Association, as Indenture Trustee for the plaintiff is granted (*see* CPLR 1018; 3025[c]; **Citibank, N.A. v Van Brunt Props., LLC**, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]; *see also* **IndyMac Bank F.S.B. v Thompson**, 99 AD3d 669, 952 NYS2d 86 [2d Dept 2012]; **Greenpoint Mtge. Corp. v Lamberti**, 94 AD3d 815, 941 NYS2d 864 [2d Dept 2012]; **Maspeth Fed. Sav. & Loan Assn. v Simon-Erdan**, 67 AD3d 750, 888 NYS2d 599 [2d Dept 2009]). By its submissions, the plaintiff established the basis for the above-noted relief. All future proceedings shall be captioned accordingly.

The branches of the motion for an Order amending the caption by excising and/or substituting certain fictitious defendants, fixing the defaults of the non-answering defendants and appointing a referee are denied, without prejudice to renewal, as the plaintiff failed to demonstrate its *prima facie* burden with respect to the same (*see generally* CPLR 3215 [a]; RPAPL 1321; **Joosten v Gale**, 129 AD2d 531, 514 NYS2d 729 [1st Dept 1987]; *cf.* **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]). More specifically, the branch of the motion wherein the plaintiff requests that certain fictitious defendants be excised and/or substituted is inconsistently worded, such that the Court is left in the untenable position of having to guess the exact the relief sought herein. Additionally, the affidavit of service upon the alleged occupants, who have been sued herein as John Does and Jane Does, does not reflect the name of the person, if any, served, and the description does not match that of "John Durham (first name refused), co-tenant" (as set forth in the affidavit of service upon the defendant mortgagor). Furthermore, even if the plaintiff had submitted a separate affidavit for the alleged service upon said defendant John Durham (first name refused), co-tenant," the plaintiff has neither requested that John Durham be substituted in the caption, nor alleged whether there are any other occupants. Under these circumstances, the Court may not grant an order of reference at this juncture.

Accordingly, this motion for, *inter alia*, summary judgment and to appoint a referee to compute is determined as indicated above.

Dated: September 22, 2014



Hon. Joseph Farneti
Acting Justice Supreme Court

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION