

Wells Fargo Bank, NA v O'Gorman

2014 NY Slip Op 32728(U)

October 20, 2014

Supreme Court, Suffolk County

Docket Number: 17495-12

Judge: Jr., Andrew G. Tarantino

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INDEX
NO.: 17495-12

**SUPREME COURT - STATE OF NEW YORK
IAS PART 50 - SUFFOLK COUNTY**

**PRESENT: Hon. ANDREW G. TARANTINO JR.
Acting Supreme Court Justice**

**Motion Date: 2-26-14
Adj. Date: 9-30-2014
Mot. Seq. #001-MotD**

**WELLS FARGO BANK, NA SUCCESSOR BY
MERGER TO WELLS HOME MORTGAGE INC. AS
SUCCESSOR BY MERGER TO NORWEST
MORTGAGE, INC.**

**McCABE, WEISBERG
& CONWAY, P.C.
Attorneys for Plaintiff
145 Huguenot Street, Suite 210
New Rochelle, N. Y. 10801**

Plaintiff,

-against-

**LAW OFFICE OF
DONALD NEIDHARDT
Attorneys for Defendants
Virginia O’Gorman
Gerry O’Gorman
3579 Bayview Street
Seaford, N. Y. 11783**

**VIRGINIA O’GORMAN,
GERRY O’GORMAN A/K/A GERALD O’GORMAN,
“JOHN DOE #1” to “JOHN DOE #10,” the last 10
names being fictitious and unknown to plaintiff, the
persons or parties intended being the person or parties,
if any, having or claiming an interest in or lien upon
the mortgaged premises described in the verified
complaint,**

Defendants.

x

Upon the following papers numbered 1 to 13 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 13; 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, fixing the defaults of the non-answering defendants, appointing a referee and 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

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.

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This is an action to foreclose a mortgage on real property known as 72 Pilcher Street, Babylon, New York 11702. On May 3, 1996, the defendants Gerry O'Gorman and Virginia O'Gorman (the defendant mortgagors) executed a fixed-rate note in favor of First West Mortgage Bankers, Ltd. (First West) in the principal sum of \$112,000.00, secured by a mortgage of the same date. Thereafter, on April 8, 2003, Gerry O'Gorman executed a note in favor of Wells Fargo Home Mortgage, Inc. (WFHM) in the principal sum of \$2,153.61 secured by a mortgage of the same date. On April 8, 2003, Gerry O'Gorman also executed an amended and restated note in favor of WFHM in the principal sum of \$100,000.00, and concurrently therewith, the defendant mortgagors executed a consolidation, extension and modification agreement (the CEMA) in favor of WFHM, consolidating the aforementioned mortgages and notes to form a single lien in the sum of \$100,000.00. To secure said consolidated note, the defendant mortgagors gave WFHM a consolidated mortgage also dated April 8, 2003 on the property. By a series of endorsements and corporate mergers, the notes were acquired by and/or transferred to the plaintiff, memorialized by a series of assignments of the mortgage.

The defendant mortgagors allegedly defaulted on the note and mortgage by failing to make the monthly payment of interest and principal due on or about June 1, 2011, and each month thereafter. After the defendant mortgagors allegedly failed to cure said default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and complaint on June 8, 2012.

Issue was joined by the interposition of the defendant mortgagors' answer dated June 27, 2012. By their answer, the defendant mortgagors generally deny all of the material allegations contained in the complaint and assert twelve affirmative defenses, alleging, inter alia, the following: the lack of personal jurisdiction over the defendant mortgagors; the failure of consideration; an improper computation of the sums claimed as owed; an accord and satisfaction; the doctrine of unclean hands; the failure to join all necessary parties; an improper reformation request; fraud in the inducement; the lack of standing; lack of an ownership interest in the note by virtue of sale of the note and by virtue of securitization of the loan instruments. The remaining defendant has neither appeared, nor answered herein.

According to the records maintained by the court's computerized database, a settlement conference was scheduled for and/or held in this Court's specialized mortgage foreclosure part on September 11, 2012. On said date, this case was marked to indicate that the defendant mortgagors did not appear or otherwise participate, and, as a result, this action was dismissed from the conference program. Accordingly, no further conference is required.

The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the defendant mortgagors, striking their 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. 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 endorsed notes, the mortgages, the CEM, the assignments 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 an affidavit from its officer wherein it is alleged that the plaintiff has been in continuous possession of the endorsed promissory note(s) since the date of commencement (*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]). 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, or to the plaintiff's beneficial interest thereunder (*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(s) 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 mortgagors' 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]; *Wells Fargo Bank, N.A. v Van Dyke*, 101 AD3d 638, 958 NYS2d 331 [1st 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]; *Charter One Bank, FSB v Leone*, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007] [no competent evidence of an accord and satisfaction]; *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 mortgagors (*see, HSBC Bank USA v Merrill*, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]). Accordingly, it was incumbent upon the defendant mortgagors 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, *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 Mentessana*, 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 mortgagors’ 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 Mentessana*, 79 AD3d 1079, *supra*). In this case, the affirmative defenses asserted by the defendant mortgagors are factually unsupported and without apparent merit (*see, Becher v Feller*, 64 AD3d 672, *supra*). In any event, the failure by the defendant mortgagors to raise and/or assert each of their 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 mortgagors 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 Mentessana*, 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

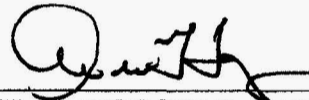
2007)). The plaintiff, therefore, is awarded summary judgment in its favor against the defendant mortgagors (*see, Federal Home Loan Mtge. Corp. v Karastathis*, 237 AD2d 558, *supra*; *see generally, Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Accordingly, the defendant mortgagors' answer is stricken, and the affirmative defenses set forth therein are dismissed.

The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by substituting John Doe for "John Doe #1" and by excising the names of the remaining fictitious defendants, "John Doe #2-10," is granted (*see, PHH Mtge. Corp. v Davis*, 111 AD3d 1110, 975 NYS2d 480 [3d Dept 2013]; *Flagstar Bank v Bellafiore*, 94 AD3d 1044, *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 John Doe, an alleged occupant of the property (*see, RPAPL § 1321; HSBC Bank USA, N.A. v Roldan*, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the default of the defendant, John Doe, is fixed and determined. Since the plaintiff has been awarded summary judgment against the defendant mortgagors, and has established the default in answering by the remaining defendant, 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]).

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: OCT 20 2014



Hon. ANDREW G. TARANTINO, Jr. A.J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION