

Wells Fargo Bank NA v Schullerman

2014 NY Slip Op 32852(U)

October 23, 2014

Sup Ct, Suffolk County

Docket Number: 49713-09

Judge: Joseph 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 2-13-14
ADJ. DATE _____
Mot. Seq. #002-MotD

WELLS FARGO BANK NA, x

Plaintiff,

-against-

**JESSICA SCHULLERMAN, DANTE MOORE,
BOARD OF DIRECTORS OF MASTIC BEACH
PROPERTY OWNER'S ASSOCIATION, INC.
COMMERCE BANK, N.A., TEMPEST RECOVERY
SERVICES, INC., UNIFUND CCR PARTNERS A/A/O
PROVIDIAN NATIONAL BANK, JOHN DOE (Said
name being fictitious, it being the intention of
Plaintiff to designate any and all occupants or
premises being foreclosed herein, and any parties,
corporations or entities, if any, having or claiming
an interest or lien upon the mortgaged premises)**

Defendants.

x

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DANTE MOORE
Defendant Pro Se
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Mastic Beach, N. Y. 11951

Jane Doe #1
67 Moriches Drive
Mastic Beach, N. Y. 11951

Upon the following papers numbered 1 to 6 read on this motion for summary judgment; Notice of Motion/
Order to Show Cause and supporting papers 1 - 6 ; 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 defendant Dante Moore, fixing the defaults of the non-
answering defendants, appointing a referee and amending the caption is determined as set forth below;
and it is

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ORDERED that the branch of the motion wherein the plaintiff requests an Order awarding it the costs of this motion is denied without prejudice, leave to renew upon proper documentation for costs at the time of submission of the judgment; 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 the guardian ad litem, Michael Gajdos, Esq., and 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 67 Moriches Drive, Mastic Beach, New York 11951. On October 24, 2006, the defendants Jessica Schullerman and Dante Moore (the “defendant mortgagors”) executed a fixed-rate note in favor of Continental Mortgage Bankers, Inc. doing business as Financial Equities (the “lender”) in the principal sum of \$259,332.00, secured by a mortgage on the property. The mortgage indicates that Mortgage Electronic Registration Systems, Inc. (“MERS”) was acting solely as a nominee for the lender and its successors and assigns and that, for the purposes of recording the mortgage, MERS was the mortgagee of record. By way of an undated endorsement, the note was transferred to the plaintiff, Wells Fargo Bank, N.A., memorialized by an assignment of the mortgage executed on December 14, 2009. Thereafter, the assignment of the mortgage was duly recorded in the Suffolk County Clerk’s Office on January 25, 2010.

The defendant mortgagors allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on or about June 1, 2009, 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 lis pendens, summons and complaint on December 22, 2009. Parenthetically, the plaintiff re-filed the lis pendens on March 19, 2013. Issue was joined by the interposition of the defendant Dante Moore’s sworn to on January 15, 2010. By his answer, Moore generally denies all of the allegations contained in the complaint, and asserts one affirmative defense that he has sought a loan modification with the plaintiff’s loss mitigation department. The remaining defendants have neither answered, nor appeared herein.

By way of further background, the plaintiff was allegedly unable to locate and serve the defendant Jessica Schullerman (“Schullerman”), and moved for an order allowing service upon Schullerman by publication in this action. By Order of this Court dated November 9, 2010, the plaintiff was directed to serve Schullerman by publication in two newspapers, Newsday and South Shore Press, once a week for four consecutive weeks. Within that Order, the Court also appointed Mr. Michael Gajdos, Esq., as guardian ad litem and military attorney (the “GAL”) on behalf of: (1) any defendant who may be an infant, absentee or incompetent, or unknown successor in interest of the

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defendant who may no longer be in existence, and to protect and defend the interests of said defendant in this action; and (2) Schullerman, should she be in default and be in the military service of the United States of America, for the purpose of representing her and protecting her interests in this action, pursuant to the Service Members Relief Act of 2003. The GAL has appeared herein and waived all, but certain, notices. The GAL also filed an oath dated December 29, 2010.

According to the records maintained by the court's database, a series of settlement conferences were conducted or adjourned before this court's specialized mortgage foreclosure part on October 1, 2010. A representative of the plaintiff attended and participated in the conference. On the aforementioned date, this action was dismissed from the conference program because the parties were unable to modify the loan or otherwise settle this action. 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 Moore, and striking his 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.

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 publication of the summons with notice, together with a notice and brief statement of the object of the action, and a brief description of the property once a

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week for four weeks in Newsday and South Shore Press. Thus, the plaintiff demonstrated its *prima facie* burden as to the merits of this foreclosure action.

The plaintiff also submitted sufficient proof to establish, *prima facie*, that the affirmative defense set forth in Moore's answer is 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 Bank of America, N.A. v Lucido*, 114 AD3d 714, 981 NYS2d 433 [2d Dept 2014] [plaintiff's refusal to consider a reduction in principal does not establish a failure to negotiate in good faith]; *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]).

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

Moore'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 Moore is factually unsupported and without apparent merit (*see Becher v Feller*, 64 AD3d 672, *supra*). In any event, the failure by Moore to raise and/or assert his pleaded defense by way of admissible proof in opposition to the plaintiff's motion warrants the dismissal of the same as abandoned under the case

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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 Moore 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 Moore (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, Moore's answer is stricken and the affirmative defense set forth therein is dismissed.

The branch of the instant motion wherein the plaintiff seeks an Order, pursuant to CPLR 1024, amending the caption by substituting the defendant "Jane Doe #1," for the fictitious named defendant, John Doe, 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 Schullerman and the newly substituted defendant, "Jane Doe # 1" (see 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 Moore, and has established the default in answering by the non-answering defendants, 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]).

By its submissions, the plaintiff demonstrated that the incorrect property description set forth in the mortgage was inadvertent, and that the substantial right of any party to this action has not been prejudiced (see CPLR 2001; *Household Fin. Realty Corp. of N.Y. v Emanuel*, 2 AD3d 192, 769 NYS2d 511 [1st Dept 2003]; *Rennert Diana & Co. v Kin Chevrolet*, 137 AD2d 589, 524 NYS2d 481 [2d Dept 1988], see also, *Serena Constr. Corp. v Valley Drywall Serv.*, 45 AD2d 896, 357 NYS2d 214 [3d Dept 1974]). In this regard, the court notes that the property description set forth in the mortgage, which was recorded in the Suffolk County Clerk's Office on November 9, 2006 in Liber 21415 at page 398, was inaccurate insofar as the preamble recites "known and designated as Lots 2021 and 2025, inclusive," instead of "known and designated as Lots 2021 through 2025, inclusive." Accordingly, pursuant to CPLR 2001 and 3025 (c), the second cause of action is granted, and the

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preamble of the description set forth in the mortgage is amended *nunc pro tunc* to December 22, 2009 to read, in relevant part, as follows:

“ALL that certain plot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying and being in the Town of Brookhaven, County of Suffolk, State of New York, known and designated as Lots 2021 through 2025 inclusive on a certain map entitled, “Fifth Map of Mastic Beach” Suffolk County, New York, and filed in the Suffolk County Clerk’s Office on September 2, 1930 as File No. 1005 and being bounded and described as follows:”

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: October 23, 2014



Hon. Joseph Farneti
Acting Justice Supreme Court

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION