OneWest Bank, FSB v Donovan
2014 NY Slip Op 32855(U)
November 7, 2014
Supreme Court, Suffolk County
Docket Number: 9273-12
Judge: John Iliou

[* 1]

SHORT FORM ORDER

INDEX
NO.: 9273-12

SUPREME COURT - STATE OF NEW YORK
IAS PART 14 - SUFFOLK COUNTY

PRESENT: HON. JOHN ILIOU
Acting Supreme Court Justice

OneWest Bank, FSB,

Plaintiff,

-against-

Thomas Donovan, European American Bank, Victoria Ahmes, New York State Department of Taxation and Finance, Winchester Global Trust Company Limited Tru Factored Receivables Trust, Private Capital Group LLC., Ficus Investments Inc., Victoria Leigh Ahmes, Capital One Bank USA NA, Secretary of Housing and Urban Development,

"JOHN DOE", "RICHARD ROE", "JANE DOE", "CORA COE", "DICK MOE", AND "RUBY POE", the six defendants last named in quotation marks being intended to designate tenants or occupants in possession of the herein described premises or portions thereof, if any there be, said names being fictitiious, their true name being unknown to plaintiff,

Defendants.

MOTION DATE: 5-23-14
ADJ. DATE: _____
Mot. Seq. # 001-MotD

STEIN, WIENER & ROTH, L.L.P.
Attorney for Plaintiff
One Old Country Road
Suite 113
Carle Place, N. Y. 11514

THOMAS DONOVAN
Defendant Pro Se
146 Pine Street
Lindenhurst, N. Y. 11757

Upon the following papers numbered 1 to 9 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 9; 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 and against the defendant Thomas Donovan, 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.

This is an action to foreclose a reverse mortgage on the property known as 146 Pine Street, Lindenhurst, New York 11757. On June 17, 2002, the defendant Thomas Donovan (the defendant mortgagor) executed a loan agreement and note (the note) in favor of Financial Freedom Senior Funding Corporation (the lender) in the maximum principal sum of $360,000.00. To secure said note, the defendant mortgagor gave the lender a reverse mortgage (the mortgage) also dated June 17, 2002 on the property. The note required the lender to advance the sums secured by the mortgage to the defendant mortgagor in certain intervals set forth in the note. The mortgage and note also provide, inter alia, that the loan is due and payable upon the defendant mortgagor's death, or upon the defendant mortgagor ceasing to use the property as his primary residence, and/or the defendant mortgagor's failure to maintain hazard insurance on the property. By way of an undated, blank endorsement with delivery, the note was allegedly transferred to OneWest Bank, FSB (the plaintiff), memorialized by two assignments of the mortgage.

The defendant mortgagor allegedly defaulted on the note and mortgage by failing to maintain hazard insurance on the property beginning on or November 2, 2006, and each year thereafter. After the defendant mortgagor allegedly failed to cure said default, the plaintiff commenced the instant action by the filing of the summons and verified complaint on April 2, 2012, followed by the filing of a lis pendens on April 4, 2012. Issue was joined by the interposition of the defendant mortgagor's answer dated April 23, 2012.

By his answer, the defendant mortgagor admits some of the allegations in the complaint, and denies the remaining allegations set forth therein. In the answer, the defendant mortgagor asserts eight affirmative defenses, alleging, among other things, the following: the failure to state a cause of action; the failure to comply with the notice mandates of section 1304 of the Real Property Actions and Proceedings Law; the statute of limitations; documentary evidence; the lack of subject matter jurisdiction; and the lack of standing (alleged as first, second, third, fourth, fifth and sixth affirmative defenses). The defendant Secretary of Housing and Urban Development (HUD) has appeared herein and waived notice of all, but certain notices. The remaining defendants have neither answered nor appeared herein.

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 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 note, the mortgage, 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]). Furthermore, the plaintiff submitted an affidavit from an officer of its successor-in-interest, wherein it is alleged that the plaintiff was in possession of the note on July 14, 2011, a date being prior to 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]). 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]). With respect to the fourth affirmative defense, the general, original jurisdiction of the Supreme Court of the State of New York encompasses all actions at law and equity, except those expressly proscribed by the State and Federal Constitutions or other acts entitled to supremacy (*see*, N.Y. Const. Art. VI § 7 [a]; ***Thrasher v United States Liab. Ins. Co.***, 19 NY2d 159, 278 NYS2d 793 [1967]). Further, the instant action foreclosure action, which was commenced as a result of the alleged breach of the various mortgage loan documents, is clearly a justiciable controversy (*see*, RPAPL § 1301, *et seq.*). That an action to foreclose a mortgage is within the subject matter jurisdiction of this Court is clear. Appellate authorities have repeatedly held that "[a] plaintiff in an action to foreclose a mortgage establishes its case as a matter of law through production of the mortgage, the unpaid note and evidence of a default" (***Wells Fargo Bank v Cohen***, 80 AD3d 753, 755, 915 NYS2d 56 [2d Dept 2011]). Thus, this Court has exclusive jurisdiction to determine, according to governing statutes, the issues raised by the pleadings or by motion, including those for accelerated judgments, which are viewed as trial equivalents, and those raised at the trial of the action, including adjudication of the sufficiency of proof and the reception of evidence (*see, Balogh v H.R.B. Caterers*, 88 AD2d 136, 452 NYS2d 220 [2d Dept 1982]). Moreover, the notice requirements of section 1304 of the Real Property Actions and Proceedings Law are inapplicable to reverse mortgage loans (*see*, RPAPL 1304[5]).

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 Mentesana***, 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 motion (*see*, ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***Argent Mtge. Co., LLC v Mentesana***, 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*). 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 Mentesana***, 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 in their entirety.

The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by excising the fictitious defendants, Richard Roe, Jane Doe, Cora Coe, Dick Moe and Ruby Poe, 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. These submissions include affidavits from the plaintiff's agent showing that the defendant mortgagor is the sole occupant of the property. All future proceedings shall be captioned accordingly.

By its moving papers, the plaintiff further established the default in answering on the part of the defendants European American Bank, Victoria Ahmes, New York State Department, of Taxation and Finance, Winchester Global Trust Company Limited Tru Factored Receivables Trust, Private Capital Group, Inc., Ficus

Investments, Inc., Victoria Leigh Ahmes, Capital One Bank USA, N.A., and HUD (*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 the defendant mortgagor, and has established the default in answering by all of the remaining defendants, 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]; ***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 determined as indicated 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: 11-7-14
Central Islip, NY

Hon. JOHN ILIOU, A.S.C.J.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**