

Aurora Loan Servs., LLC v Mercado

2014 NY Slip Op 33177(U)

November 6, 2014

Supreme Court, Suffolk County

Docket Number: 44409-09

Judge: Joseph C. Pastoressa

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SUPREME COURT - STATE OF NEW YORK
IAS PART 34 - SUFFOLK COUNTY

COPY

PRESENT: Hon. JOSEPH C. PASTORESSA
Justice of the Supreme CourtMOTION DATE 4-9-14
ADJ. DATE _____
Mot. Seq. #001-MotD_____
AURORA LOAN SERVICES, LLC,

Plaintiff,

-against-

INGRIS A. MERCADO, MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS INC., AS NOMINEE
FOR WILMINGTON FINANCE, INC.,JOHN DOE (Said name being fictitious, it being the
intention of Plaintiff to designate any and all
occupants of premises being foreclosed herein, and
any parties, corporations or entities, if any, having
or claiming an interest or lien upon the mortgaged
premises.),Defendants.
_____ XKNUCKLES, KOMOSINSKI
& ELLIOTT, LLP
Attorneys for Plaintiff
565 Taxter Road, Suite 590
Elmsford, N. Y. 10523FUSTER LAW, P.C.
Attorneys for Defendant
Ingris A. Mercado
31-10 37th Avenue
Long Island City, N. Y. 11101

Upon the following papers numbered 1 to 16 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 16; 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 Ingris A. Mercado, 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 cross-claims asserted by the defendant Ingris A. Mercado against the defendant Mortgage Electronic Registration Systems, Inc. are dismissed; and it is

ORDERED that the plaintiff is directed to file proof of filing of an additional or a successive notice of pendency with the proposed judgment of foreclosure (*see*, CPLR 6513; 6516[a]; *Aames Funding Corp. v Houston*, 57 AD3d 808, 872 NYS2d 134 [2d Dept 2008]; *EMC Mtge. Corp. v Stewart*, 2 AD3d 772, 769 NYS2d 408 [2d Dept 2003]; *Horowitz v Griggs*, 2 AD3d 404, 767 NYS2d 860 [2d Dept 2003]); and it is

Aurora Loan Services, LLC
v Mercado, et. al.
Index No.: 44409-09
Pg. 2

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 mortgage on real property known as 200 Jefferson Avenue, Amityville, New York 11701. On July 24, 2006, the defendant Ingris A. Mercado (the defendant mortgagor) executed an adjustable-rate note in favor of Wilmington Finance, Inc (the lender) in the principal sum of \$300,000.00. On July 24, 2006, the defendant mortgagor also executed an interest-only addendum which provides, among other things, for a 5-year interest only period. To secure said note, the defendant mortgagor gave the lender a mortgage also dated July 24, 2006 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 a series of endorsements and/or allonges, the note was allegedly transferred to the plaintiff, Aurora Loan Services, LLC, memorialized by a series of assignments of the mortgage.

The defendant mortgagor allegedly defaulted on the note and mortgage by failing to make the monthly installment of interest due on or about February 1, 2007, and each month thereafter. After the defendant mortgagor allegedly failed to cure her default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on November 12, 2009.

Issue was joined by service of the defendant mortgagor's verified answer sworn to on January 5, 2010. By her answer, the defendant mortgagor admits some of the allegations contained in the complaint, but denies the remaining allegations set forth therein. By her answer, the defendant mortgagor also asserts five affirmative defenses and four counterclaims/cross-claims, alleging the following: the plaintiff's lack of legal capacity and standing; an unconscionable loan; and violations of General Business Law § 349 (deceptive trade practices), the federal Equal Credit Opportunity Act (ECOA) (15 USC § 1691), and the federal Fair Housing Act (FFHA) (42 USC § 3604) ("reverse redlining"). By her counterclaims/cross-claims, the defendant mortgage demands, among other things, actual, compensatory, and punitive damages as well as costs and disbursements.

In response to the counterclaims, the plaintiff interposed a reply dated January 11, 2010. In its reply, the plaintiff denies all of the material allegations contained in the counterclaims, and asserts nineteen affirmative defenses, alleging, inter alia, claims barred by the doctrines of voluntary payment; laches, unclean hands, waiver and/or estoppel; documentary evidence; subrogation; the parol evidence rule; ratification; the lack of actual damages; the statute of frauds; the terms of the governing loan documents; res judicata and/or collateral estoppel; the lack of subject matter jurisdiction; a non-justifiable case; State and Federal statutes and/or regulations; and the failure to mitigate damages, state

Aurora Loan Services, LLC
v Mercado, et. al.
Index No.: 44409-09
Pg. 3

a cause of action, and join all necessary parties. The remaining defendants have not appeared or answered the complaint (*see*, CPLR 3018[a]; 3019[d]), and it is noted that the cross-claims do not require an answer (*see*, CPLR 3011).

According to the court's records, a series of settlement conferences were scheduled/and or held beginning on October 12, 2010 and lasting until March 8, 2011. A representative of the plaintiff attended and participated in all settlement conferences. At the last conference, this action was marked to indicate that the parties could not reach an agreement to modify the loan or otherwise settle this action. Accordingly, 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 her answer and dismissing the affirmative defenses and counterclaims 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 the 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 with an affixed allonges, 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]). The plaintiff also submitted an affidavit from its representative wherein it is alleged that the note was in the possession of the plaintiff or its designated custodian at the time of commencement of this action (*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]). Additionally, the documentary evidence submitted includes, among other things, the note transferred via an endorsement and affixed allonges (*cf.*, **Slutsky v Blooming Grove Inn, Inc.**, 147 AD2d 208, 542 NYS2d 721 [2d Dept 1989]). Moreover,

Aurora Loan Services, LLC
 v Mercado, et. al.
 Index No.: 44409-09
 Pg. 4

the documentary evidence includes an assignments of the mortgage, whereby the transfer of the note to the plaintiff was memorialized, all of which were subsequently duly recorded (*see, GRP Loan, LLC v Taylor*, 95 AD3d 1172, 945 NYS2d 336 [2d Dept 2012]). Therefore, it appears that the plaintiff is the transferee and 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 remaining affirmative defenses and the counterclaims 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, 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]; *Gillman v Chase Manhattan Bank, N.A.*, 73 NY2d 1, 537 NYS2d 787 [1988] [unconscionability generally not a defense]; *Patterson v Somerset Invs. Corp.*, 96 AD3d 817, 817, 946 NYS2d 217 [2d Dept 2012] ["a party who signs a document without any valid excuse for having failed to read it is 'conclusively bound' by its terms"]; *Emigrant Mtge. Co, Inc. v Fitzpatrick*, 95 AD3d 1169, 945 NYS2d 697 [2d Dept 2012] [an affirmative defense asserting violations of General Business Law § 349 and/or engagement in deceptive business practices lacks merit where, inter alia, clearly written loan documents describe the terms of the loan]; *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]; *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]). Further, for the deceptive practices claim under New York General Business Law Section 349(h), the statute of limitations is ordinarily three years, which begins to run when the injury occurs (*Gaidon v Guardian Life Ins. Co. of Am.*, 96 NY2d 201, 727 NYS2d 30 [2001]; CPLR 214[2]). The discrimination claims made under the ECOA and FFHA are subject to a two-year statute of limitations period (15 USC § 1691e[f]; 42 USC § 3613[a][1][A]; *M&T Mortg. Corp. v White*, 736 F Supp 2d 538, 555 [EDNY 2010]). The ECOA starts the clock on the "date of the occurrence of the violation," while the FHA period begins to run on the "occurrence or the termination of an alleged discriminatory housing practice[.]" (*M&T Mortg. Corp. v White*, 736 F Supp 2d 538. *supra* at 555 [EDNY 2010])

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

Aurora Loan Services, LLC
v Mercado, et. al.
Index No.: 44409-09
Pg. 5

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 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*). In any event, the failure by the defendant mortgagor to raise and/or assert each of his pleaded defenses and counterclaims 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*; *Rosrock 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; the affirmative defenses and the counterclaims set forth therein are dismissed in their entirety. Upon searching the record, the cross-claims against MERS, which are based upon the same allegations as the counterclaims, are dismissed as without merit (*see, CPLR 3212[b]; Dunham v Hilco Constr. Co.*, 89 NY2d 425, 654 NYS2d 335 [1996]).

The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by excising the fictitious named defendant, John Doe, is granted (*see, 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]). The branch of the motion wherein the plaintiff seeks an order pursuant to CPLR 1021 substituting DLJ Mortgage Capital, Inc. (DLJ) for the plaintiff is also

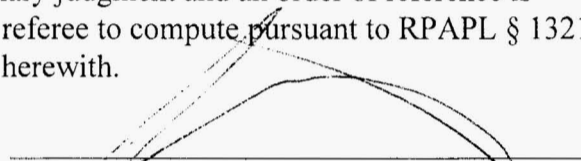
Aurora Loan Services, LLC
v Mercado, et. al.
Index No.: 44409-09
Pg. 6

granted (*see*, CPLR 1018; 3025[b]; *W & H Equities, LLC v Odums*, 113 AD3d 840, 978 NYS2d 910 [2d Dept 2014]; *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. The plaintiff's submissions include documentary evidence that the mortgage and the note were assigned to DLJ after the commencement of this action. 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 MERS (*see*, RPAPL § 1321; *HSBC Bank USA, N.A. v Roldan*, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the default of the above-noted defendant is fixed and determined. Since the plaintiff has been awarded summary judgment against the defendant mortgagor, 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]; *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. 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: November 6, 2014



HON. JOSEPH C. PASTORESSA, J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION