

Wells Fargo Bank, N.A. v Aliaga

2014 NY Slip Op 33200(U)

November 25, 2014

Supreme Court, Suffolk County

Docket Number: 27313-11

Judge: W. Gerard Asher

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SUPREME COURT - STATE OF NEW YORK
IAS PART 32- SUFFOLK COUNTY

COPY

PRESENT: Hon. W. GERARD ASHER
Justice of the Supreme Court

_____ x
WELLS FARGO BANK, NA

Plaintiff,

-against-

JOHAN E. ALIAGA, BANK OF AMERICA, N.A.,

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.
_____ x

MOTION DATE 5-21-14
ADJ. DATE _____
Mot. Seq. # 001-MotD

GROSS POLOWY ORLANS, LLC
Attorneys for Plaintiff
25 Northpointe Parkway, Suite 25
Amherst, N. Y. 14228

JOHAN E. ALIAGA
Defendant Pro Se
1957 Joshuas Path
a/k/a Joshua's Path
Central Islip, N. Y. 10118

Upon the following papers numbered 1 to 14 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 13; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers _____; Other Letter - 14; (~~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 Johan E. Aliaga, 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 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 situate in Suffolk County. On November 16, 2004, the defendant Johan E. Aliaga (the defendant mortgagor) executed a fixed-rate note in favor of First Residential Mortgage Services Corporation (the lender) in the principal sum of \$294,673.00. To secure said note, the defendant mortgagor gave the lender a mortgage also dated November 16, 2004 on the property. By way of, inter alia, an undated endorsement, the note was transferred to the plaintiff, memorialized by an assignment of the mortgage executed on June 9, 2010. The assignment was subsequently duly recorded on June 22, 2010 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 December 1, 2009, and each month thereafter. After the defendant mortgagor allegedly failed to cure the default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on August 22, 2011.

Issue was joined by the interposition of the defendant mortgagor's answer dated September 16, 2011. By his answer, the defendant mortgagor generally denies all of the allegations set forth in the complaint and asserts nine affirmative defenses, alleging, inter alia, the following: the lack of jurisdiction; collateral estoppel; the failure of a condition precedent; predatory lending practices by the plaintiff; fraud and misrepresentation by the plaintiff's agent; culpable conduct by the plaintiff; alleged damages, if recoverable, reduced by the amount of any collateral sources or governmental subsidy or assistance; and violations of the Real Estate Settlement Procedures Act (RESPA) (12 USC § 2601, *et seq.*), sections 6-l and/or 6-m of the Banking Law and/or section 1304 of the RPAPL. While the wherefore clause of the answer includes a request for an award for attorneys fees and financial sanctions "per the counterclaim," the answer does not specifically set forth any designated counterclaims. Nevertheless, the plaintiff interposed a reply dated September 26, 2011, wherein it denies all of the allegations in the counterclaims and asserts twenty-one affirmative defenses. The remaining defendants have neither answered, nor appeared in this action.

In compliance with CPLR 3408, settlement conferences were conducted or adjourned before this Court's specialized mortgage foreclosure part on February 24 and May 30, 2012. A representative of the plaintiff attended and participated in the 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 his 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 this motion.

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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 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 (*see, U.S. Bank N.A. v Tate*, 102 AD3d 859, 958 NYS2d 722 [2d Dept 2013]; *Castle Peak 2012-I Trust v Choudhury*, 2013 NY Misc LEXIS 5510, 2013 WL 6229919, 2013 NY Slip Op 32971 [U] [Sup Ct, Queens County 2013]; *M & T Bank v Romero*, 40 Misc3d 1210 [A], 977 NYS2d 667 [Sup Ct, Suffolk County 2013]; *cf., Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]). Thus, the plaintiff demonstrated its prima facie burden as to the merits of this foreclosure action.

Furthermore, the plaintiff submitted sufficient proof to establish, prima facie, that the affirmative defenses and 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]; *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]; *Wachovia Bank, N.A. v Carcano*, 106 AD3d 724, *supra* [compliance with the pre-foreclosure notice requirement of RPAPL §1304 satisfies the "30-day notice" requirement specified in the mortgage]; *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]; *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]; *CFSC Capital Corp. XXVII v Bachman Mech. Sheet Metal Co.*, 247 AD2d 502, 669 NYS2d 329 [2d Dept 1998] [an affirmative defense based upon the notion of culpable conduct is unavailable in a foreclosure action]; *Deutsche Bank Natl. Trust Co. v Campbell*, 26 Misc3d 1206 [A], 906 NYS2d 779, 2009 NY Slip Op 526780 [U] [Sup Ct, Kings County 2009] [a disclosure violation of the Real Estate Settlement Procedures Act, 12 USC § 2601, *et seq.*, does not constitute a valid defense to a mortgage foreclosure]. Moreover, “when a mortgagor defaults on loan payments, even if only for a day, a mortgagee may accelerate the loan, require that the balance be tendered or commence foreclosure proceedings, and equity will not intervene” (*Home Sav. of Am., FSB v Isaacson*, 240 AD2d 633, 633, 659 NYS2d 94 [2d Dept 1997]).

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, Inc. 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 and counterclaims 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 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,

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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 and counterclaims 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 Alex Rios, Elsa Fernandez, Filemon Aliaga, Flavia Anariba and Joanna Aliaga for the fictitious 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 the defendant Bank of America, N.A. as well as the newly substituted defendants, Alex Rios, Elsa Fernandez, Filemon Aliaga, Flavia Anariba and Joanna Aliaga (*see*, RPAPL § 1321; **HSBC Bank USA, N.A. v Roldan**, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the defaults of all 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 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: November 25, 2014


Hon. W. GERARD ASHER, J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION