

**Bank of N.Y. Mellon v Greenberg**

2014 NY Slip Op 33225(U)

November 10, 2014

Supreme Court, Suffolk County

Docket Number: 10-1584

Judge: Denise F. Molia

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**COPY**

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 39 - SUFFOLK COUNTY

**PRESENT:**

Hon. DENISE F. MOLIA  
Acting Justice of the Supreme Court

MOTION DATE 2-13-14  
ADJ. DATE \_\_\_\_\_  
Mot. Seq. # 001 - MG

-----X

THE BANK OF NEW YORK MELLON F/K/A  
THE BANK OF NEW YORK AS SUCCESSOR  
IN INTEREST TO JP MORGAN CHASE  
BANK NA AS TRUSTEE FOR STRUCTURED  
ASSET MORTGAGE INVESTMENTS II INC.  
BEAR STEARNS ALT-A TRUST 2005-7,  
MORTGAGE PASS-THROUGH  
CERTIFICATES SERIES 2005-7

Plaintiff,

- against -

MARC GREENBERG, BURNER KING, INC.,  
CLERK OF THE SUFFOLK COUNTY  
DISTRICT COURT, GE MONEY BANK,  
GIALY CORP. D/B/A ANDERSON  
CATERING, JPMORGAN CHASE BANK,  
N.A., STATE FARM INSURANCE COMPANY  
A/S/O LAURIE F. KOHLWEISS, 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 mortgage  
premises.),

Defendants.

-----X

KOZENY, MCCUBBIN & KATZ, LLP  
Attorney for Plaintiff  
395 North Service Road, Suite 401  
Melville, New York 11747

HARVEY M. GOLDSTEIN, ESQ.  
Attorney for Defendant Marc Greenburg  
1719 North Ocean Avenue, Suite A  
Medford, New York 11763

Upon the following papers numbered 1 to 14 read on this motion for summary judgment and an order of reference;  
Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; ~~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;

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UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

**ORDERED** that this unopposed motion by plaintiff The Bank of New York Mellon f/k/a the Bank of New York as Successor in Interest to JP Morgan Chase Bank Na as Trustee for Structured Asset Mortgage Investments II Inc. Bear Stearns Alt-A Trust 2005-7, Mortgage Pass-Through Certificates Series 2005-7 (Bank of NY Mellon) pursuant to CPLR 3212 for summary judgment on its complaint against defendant Marc Greenberg (Greenberg), to amend the caption of this action pursuant to CPLR 3025 (b), for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is granted; and it is further

**ORDERED** that the caption is hereby amended by substituting Christine Greenberg in place of defendants "John Doe" and "Jane Doe"; and it is further

**ORDERED** that plaintiff is directed to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court; and it is further

**ORDERED** that the caption of this action hereinafter appear as follows:

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF SUFFOLK

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THE BANK OF NEW YORK MELLON F/K/A THE  
 BANK OF NEW YORK AS SUCCESSOR IN INTEREST  
 TO JP MORGAN CHASE BANK NA AS TRUSTEE FOR  
 STRUCTURED ASSET MORTGAGE INVESTMENTS II  
 INC. BEAR STEARNS ALT-A TRUST 2005-7, MORTGAGE  
 PASS-THROUGH CERTIFICATES SERIES 2005-7

Plaintiff,

- against -

MARC GREENBERG, BURNER KING, INC., CLERK OF  
 THE SUFFOLK COUNTY DISTRICT COURT, GE MONEY  
 BANK, GIALY CORP. D/B/A ANDERSON CATERING,  
 JPMORGAN CHASE BANK, N.A., STATE FARM INSURANCE  
 COMPANY A/S/O LAURIE F. KOHLWEISS, CHRISTINE  
 GREENBERG,

Defendants.

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This is an action to foreclose a mortgage on premises known as 4 Bailey Lane, Manorville, New York. On October 6, 2004, defendant Greenberg executed an adjustable rate note in favor of GreenPoint Mortgage Funding, Inc. (GreenPoint) agreeing to pay the sum of \$472,000.00 at the starting yearly rate of 5.250 percent. On the same date, defendant Greenberg executed a mortgage in the principal sum of \$472,000.00 on the subject property. The mortgage indicated GreenPoint to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of GreenPoint as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on November 3, 2004 in the Suffolk County Clerk's Office. Thereafter, on January 6, 2010, the mortgage was transferred by assignment of mortgage from MERS, as nominee for GreenPoint to plaintiff Bank of NY Mellon. The assignment of mortgage was recorded on February 11, 2010 with the Suffolk County Clerk's Office.

America's Servicing Company sent a notice of default dated November 1, 2009 to defendant Greenberg stating that he had defaulted on his note and mortgage and that the amount past due was \$6,869.92. As a result of defendant's continuing default, plaintiff commenced this foreclosure action on January 8, 2010. In its complaint, plaintiff alleges in pertinent part that defendant breached his obligations under the terms of the note and mortgage by failing to make his monthly payments commencing with the September 1, 2009 installment. Defendant Greenberg interposed an answer.

The Court's computerized records indicate that a foreclosure settlement conference was held on June 22, 2010 at which time this matter was referred as an IAS case since a resolution or settlement had not been achieved. Thus, there has been compliance with CPLR 3408 and no further settlement conferences are required.

Plaintiff now moves for summary judgment on its complaint contending that defendant Greenberg breached his obligations under the terms of the note and mortgage by failing to tender payments commencing with the installment due on the September 1, 2009 and subsequent payments thereafter. In support of its motion, plaintiff submits among other things: the sworn affidavit of Armenia L. Harrell, vice president loan documentation of Wells Fargo Bank, N.A. dba America's Servicing Company, the servicer of the subject loan; the affirmation of David Wildermuth, Esq. in support of the instant motion; the affirmation of David Wildermuth, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the pleadings; the note, mortgage and an assignment of mortgage; notices pursuant to RPAPL 1320, 1304 and 1303; affidavits of service for the summons and complaint; an affidavit of service for the instant summary judgment motion upon defendant's attorney; and a proposed order appointing a referee to compute.

“[I]n an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default” (*Republic Natl. Bank of N.Y. v O’Kane*, 308 AD2d 482, 482, 764 NYS2d 635 [2d Dept 2003]; see *Argent Mtge. Co., LLC v Montesana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Once a plaintiff has made this showing, the burden then shifts to defendant to establish by admissible evidence the existence of a triable issue of fact as to a defense (see *Washington Mut. Bank v Valencia*, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]).

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Here, plaintiff produced the note and mortgage executed by defendant Greenberg, as well as evidence of defendant's nonpayment, thereby establishing a prima facie case as a matter of law (*see Wells Fargo Bank Minnesota, Natl. Assn. v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). Armenia L. Harrell avers that defendant defaulted under the terms and conditions of the note and mortgage by failing to tender payment for the monthly installment due for September 1, 2009 and subsequent payments thereafter; that a notice of default was mailed to defendant; that a 90 day pre-foreclosure notice was sent to defendant Greenberg; and, that the default has not been cured.

Defendant Greenberg has not submitted opposition to the motion. Defendant's answer is insufficient, as a matter of law, to defeat plaintiff's unopposed motion (*see Argent Mtge. Co., LLC v Mentosana*, 79 AD3d 1079, 915 NYS2d 591; *Citibank, N.A. v Souto Geffen Co.*, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]; *Greater N.Y. Sav. Bank v 2120 Realty Inc.*, 202 AD2d 248, 608 NYS2d 463 [1st Dept 1994]). Since no opposition to the instant motion was filed by defendant, no triable issue of fact was raised in response to plaintiff's prima facie showing (*see Flagstar Bank v Bellafigliore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Wells Fargo Bank Minnesota v Perez*, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]; *see also Zanfini v Chandler*, 79 AD3d 1031, 912 NYS2d 911 [2d Dept 2010]).

Based upon the foregoing, the motion for summary judgment is granted against defendant Greenberg. Plaintiff's request for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is also granted (*see Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *Bank of East Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

The proposed order appointing a referee to compute pursuant to RPAPL 1321 is signed simultaneously herewith as modified by the court.

Dated: November 10, 2014

  
 Hon. Denise F. Moja  
 A.J.S.C.

FINAL DISPOSITION  NON-FINAL DISPOSITION

TO:

JP MORGAN CHASE BANK, N.A.  
 c/o CT CORPORATION SYSTEM  
 111 Eighth Avenue  
 New York, New York 10011

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STATE FARN INSURANCE COMPANY  
1305 Walt Whitman Road  
Melville, New York 11747

CHRISTINE GREENBERG AS JOHN DOE #1  
4 Bailey Lane  
Manorville, New York 11949