

**Wells Fargo Bank N.A. v Thomas Peradze Warner's  
Oil Heat Inc.**

2014 NY Slip Op 33411(U)

November 24, 2014

Supreme Court, Suffolk County

Docket Number: 2021-12

Judge: Daniel Martin

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**SUPREME COURT OF THE STATE OF NEW YORK  
I.A.S PART 9 - SUFFOLK COUNTY**

**INDEX NO.: 2021-12**

**PRESENT:**

**Hon. DANIEL MARTIN**

**PLAINTIFF'S ATTY:**

**PETER T. ROACH AND  
ASSOCIATES, P.C.  
125 Michael Drive  
Suite 105  
Syosset, N. Y. 11791**

\_\_\_\_\_  
WELLS FARGO BANK N.A., AS TRUSTEE, FOR  
CARRINGTON MORTGAGE LOAN TRUST,  
SERIES 2006-NC3 ASSET-BACKED PASS-  
THROUGH CERTIFICATES

**Plaintiff,**

**DEFENDANT PRO SE:**

**THOMAS PERADZE  
9 Dry Saw Mill Road  
Manorville, N. Y. 11949**

**-against-**

THOMAS PERADZE  
WARNER'S OIL HEAT INC.  
MICHAEL SCHADLER  
SUFFOLK FEDERAL CREDIT UNION  
NEW YORK STATE DEPARTMENT OF TAXATION  
AND FINANCE  
UNITED STATES OF AMERICA - INTERNAL  
REVENUE SERVICE

"JOHN DOE #1" through "JOHN DOE #12", the last  
twelve names being fictitious and unknown to plaintiff,  
the persons or parties intended being the tenants,  
occupants, persons or corporations, if any, having or  
claiming an interest in or lien upon the premises,  
described in the complaint,

**Defendants.**

\_\_\_\_\_x

The following named papers have been read on this motion:

Notice of Motion for an Order of Reference \_\_\_\_\_ X

Cross-Motion \_\_\_\_\_

Answering Affidavits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

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**ORDERED** that this unopposed motion by the plaintiff for, inter alia, an order awarding summary judgment in its favor against the answering defendant, 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 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 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 9 Dry Saw Mill Road, Manorville, New York 11949. On June 9, 2006, the defendant Thomas Peradze (the defendant mortgagor) executed an adjustable-rate note in favor of New Century Mortgage Corporation (the lender) in the principal sum of \$423,000.00. To secure said note, the defendant mortgagor gave the lender a mortgage also dated June 9, 2006 on the property. Thereafter, by loan modification agreement executed on or about November 19, 2010, the note and the mortgage were modified to reflect, among other things, a new unpaid principal balance of \$417,060.20 as of December 1, 2010. By way of an endorsement to the note and an assignment of the mortgage, the note and the mortgage were allegedly transferred to the plaintiff, Wells Fargo Bank, N.A., as Trustee for Carrington Mortgage Loan Trust, Series 2006-NC3 Asset-Backed Pass-Through Certificates.

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 April 1, 2011, and each month thereafter. After the defendant mortgagor allegedly failed to cure his default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on January 17, 2012.

Issue was joined by the interposition of the defendant mortgagor's verified answer sworn to on February 3, 2012. By his answer, the defendant mortgagor admits some of the allegations set forth in the complaint, and denies other allegations therein. The defendant mortgagor also asserts five affirmative defenses, alleging, among other things, the lack of personal jurisdiction and standing; fraud in connection with the origination, servicing and closing of the loan; and the plaintiff's failure to comply with the provisions of RPAPL § 1303 as well as Banking Law §§ 595-a and "61" (repealed L. 2006, ch 703, § 3, effective Sept. 13, 2006), the last of which the Court deems to be an affirmative defense pursuant to Banking Law § 6-1. The defendants Warner's Oil Heat, Inc. (Warner's), Michael Schadler (Schadler) and Suffolk Federal Credit Union (SFCU) have appeared herein. The remaining defendants have neither appeared nor answered the complaint.

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In compliance with CPLR 3408, a settlement conference was held before this Court's specialized mortgage foreclosure part October 9, 2012, and continued to January 16, 2013. On the last date, this case was dismissed from the conference program because the defendant mortgagor failed to appear or otherwise participate. 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 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 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 RPAPL § 1303 (*see, U.S. Bank N.A. v Tate*, 102 AD3d 859, 958 NYS2d 722 [2d Dept 2013]; *Wachovia Bank, N.A. v Carcano*, 106 AD3d 724, *supra*; *see also, Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]). Further, the plaintiff submitted an affidavit from its representative wherein it is alleged that the plaintiff has been in continuous possession of the endorsed note by physical delivery since prior to commencement, and that it continues to remain in possession of the same (*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]; *HSBC Bank USA, N.A. v Avila*, 2013 NY Misc LEXIS 4521, 2013 WL 5606741, 2013 NY Slip Op 32412 [U] [Sup Ct, Suffolk County 2013]). The documentary evidence submitted also includes, among other things, the note transferred via an endorsement in blank (*cf., Slutsky v Blooming Grove Inn, Inc.*, 147 AD2d 208, 542 NYS2d 721 [2d Dept 1989]). Moreover, an examination of the assignment to the plaintiff shows that it includes a reference to the mortgage note (*see, Chase Home Finance, LLC v Miciotta*, 101 AD3d 1307, 956 NYS2d 271 [3d Dept 2012]). Therefore,

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it appears that the plaintiff is the owner and the 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 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]; *Wells Fargo Bank, N.A. v Van Dyke*, 101 AD3d 638, 958 NYS2d 331 [1st Dept 2012]; *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]; *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"]; *Shufelt v Bulfamante*, 92 AD3d 936, 940 NYS2d 108 [2d Dept 2012]). Furthermore, "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 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]).

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The defendant mortgagor's answer is insufficient, as a matter of law, to defeat the plaintiff's unopposed motion (*see, Flagstar Bank v Bellafore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Argent Mtge. Co., LLC v Mentosana*, 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*; *U.S. Bank N.A. v Slavinski*, 78 AD3d 1167, 912 NYS2d 285 [2d Dept 2010]). 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 Bellafore*, 94 AD3d 1044, *supra*; *Argent Mtge. Co., LLC v Mentosana*, 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.


The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by substituting John Bruno and Barbara Perdaze for the fictitious defendants, John Doe #1-2, and excising the remaining fictitious defendants, John Doe #3-12, is granted (*see, PHH Mtge. Corp. v Davis*, 111 AD3d 1110, 975 NYS2d 480 [3d Dept 2013]; *Flagstar Bank v Bellafore*, 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 defendants Warner's, Schadler, SFCU, New York State Department of Taxation and Finance, United States of America-Internal Revenue Service as well as the newly substituted defendants, John Bruno and Barbara Perdaze (*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]).

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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: November 24, 2014  
Riverhead, NY

  
\_\_\_\_\_  
Hon. DANIEL MARTIN, A.J.S.C.

\_\_\_\_\_ FINAL DISPOSITION  NON-FINAL DISPOSITION