

**Wells Fargo Bank, N.A. v Rodriguez**

2014 NY Slip Op 33412(U)

November 24, 2014

Supreme Court, Suffolk County

Docket Number: 07456/2010

Judge: William B. Rebolini

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK****I.A.S. PART 7 - SUFFOLK COUNTY****PRESENT:****WILLIAM B. REBOLINI**  
**Justice**

Wells Fargo Bank, N.A.,

Plaintiff,

-against-

Jose Rodriguez, Andrea Rodriguez, American Express Centurion Bank, Arrow Financial Services LLC, Arrow Financial Services LLC as assignee of Fleet Services Corp., Astoria Federal Savings & Loan Association, Bethpage Federal Credit Union, Capital One Bank, Capital One Bank USA, NA, Carmen Rodriguez, Catherine Ortega, Central Suffolk Hospital, Charles Reed, Citibank South Dakota N.A., Clerk of the Suffolk County District Court, Colorado Capital Investments Inc., Continental Capital Corp., County of Suffolk, Elizabeth Maclachlan, Emanuel Portelos, Empire Portfolios Inc., Erik Skaalerud, FIA Card Services N.A., f/k/a Bank of America N.A., Good Samaritan Hospital Medical Center, Great Seneca Financial Corporation a/o Providian National Bank, Hung Ching d/b/a New China Restaurant, Huntington Hospital, Jeanette Reed, Jessica Rodriguez, Rosa Ruiz Slomins Inc., South Bay Anesthesia Assoc., Southside Hospital State Farm Insurance Company a/s/o Carmella Donrino, (CONTINUED)

Motion Sequence No.: 001; MOT.DMotion Date: 4/14/14Submitted:Index No.: 07456/2010Attorney for Plaintiff:

Frenkel, Lambert, Weiss,  
Weisman & Gordon, LLP  
One Whitehall Street, 20<sup>th</sup> Floor  
New York, NY 10004

Defendants Pro Se:

Jose Rodriguez  
253 Thrift Street  
Ronkonkoma, NY 11779

Andrea Rodriguez  
253 Thrift Street  
Ronkonkoma, NY 11779

Clerk of the Court

Statewide Finance Inc., Sterling National Bank & Trust Company of New York, Stevens Kremens, Stony Brook University Hospital, Suffolk County Child Support Enforcement Bureau o/b/o Emily Phillips, Suffolk County Department of Social Services, Suffolk Federal Credit Union, TBF Financial LLC as assignee of General Electric Capital Corporation, The Commissioners of the State Insurance Fund, Tomnasa Maramonte, Town Supervisor, Town of Islip, United States of America acting through the IRS, Windham Recoveries LTD, as assignee of Bank One Delaware N.A., Yasirys Osorio, 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,

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Upon the following papers numbered 1 to 15 read upon this motion for summary judgment: Notice of Motion and supporting papers, 1 - 15; it is

**ORDERED** that this unopposed motion by the plaintiff for, inter alia, an order awarding summary judgment in its favor, 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 shall file an amended lis pendens in the Office of the Suffolk County Clerk within sixty (60) days of the date of this order, reflecting the correction to the legal description attached to the recorded mortgage 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 mortgage on real property known as 253 Thrift Street, Ronkonkoma, New York 11779. On March 18, 2005, the defendants Jose Rodriguez and Andrea Rodriguez (the defendant mortgagors) executed a fixed-rate note in favor of Continental Capital Corp. (the lender) in the principal sum of \$344,000.00. To secure said note, the defendant mortgagors gave the lender a mortgage also dated March 18, 2005 on the property. By way of an undated endorsement, *inter alia*, the note was transferred to the plaintiff, Wells Fargo Bank, N.A., and memorialized by an assignment of the mortgage. Thereafter, the assignment was duly recorded in the Suffolk County Clerk's office.

The defendant mortgagors allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on or about May 1, 2009, and each month thereafter. After the defendant mortgagors allegedly failed to cure their default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on March 1, 2010. Parenthetically, the plaintiff re-filed the lis pendens on or about April 9, 2014. Issue was joined by the interposition of the defendant mortgagors' joint verified answer sworn to on March 24, 2010. By their answer, the defendant mortgagors admit some of the allegations contained in the complaint, and generally deny the remaining allegations set forth therein. The defendant mortgagors do not, however, assert any affirmative defenses. The defendants Town Supervisor, Town of Islip, Lunt and Bell, LLC, Midland Funding LLC doing business as Midland Funding of Delaware LLC and Good Samaritan Hospital Medical Center have appeared herein and waived all but certain notices. The remaining defendants have neither appeared nor answered herein.

In compliance with CPLR 3408, a foreclosure settlement conference was initially scheduled for April 29, 2010, and adjourned to July 13, 2010. On the last date, this action was dismissed from the conference program and referred as an IAS case because the defendant mortgagors did not appear or otherwise participate. Accordingly, no further conference is required.

The plaintiff now moves for an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the defendant mortgagors and striking their 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 the 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]).

As the plaintiff duly demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted to the defendant mortgagors (see, *HSBC Bank USA v Merrill*, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]). Accordingly, it was incumbent upon the defendant mortgagors 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]).

The defendant mortgagors’ 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 Mentasana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). 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 [1<sup>st</sup> Dept 2012]; *Argent Mtge. Co., LLC v Mentasana*, 79 AD3d 1079, *supra*). Additionally, “uncontradicted facts are deemed admitted” (*Tortorello v Carlin*, 260 AD2d 201, 206, 688 NYS2d 64 [1<sup>st</sup> Dept 1999] [internal quotation marks and citations omitted]).

Under these circumstances, the court finds that the defendant mortgagors 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 Mentasana*, 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 mortgagors (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 mortgagors’ answer is stricken.

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, and by excising the defendants Emanuel Portelos, Erik Skaalerud and Yasirys Osorio, none of whom were served with process herein, 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. More specifically, the plaintiff demonstrated that there are no unknown occupants in the property, and that the defendants Emanuel Portelos, Erik Skaalerud and Yasirys Osorio, who were not served with process, are not necessary parties herein. All future proceedings shall be captioned accordingly.

By its moving papers, the plaintiff further established the default in answering on the part of the remaining defendants (*see, RPAPL § 1321; HSBC Bank USA, N.A. v Roldan*, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the default in answering of the remaining defendants is fixed and determined. Since the plaintiff has been awarded summary judgment against the defendant mortgagors, 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]).

By its submissions, the plaintiff demonstrated that the incorrect property description set forth in the mortgage was inadvertent, and that the substantial right of any party to this action has not been prejudiced (*see, CPLR 2001; Household Fin. Realty Corp. of N.Y. v Emanuel*, 2 AD3d 192, 769 NYS2d 511 [1<sup>st</sup> Dept 2003]; *Rennert Diana & Co. v Kin Chevrolet*, 137 AD2d 589, 524 NYS2d 481 [2d Dept 1988], *see also, Serena Constr. Corp. v Valley Drywall Serv.*, 45 AD2d 896, 357 NYS2d 214 [3d Dept 1974]). In this regard, the court notes that the property description set forth in the mortgage, which was recorded in the Suffolk County Clerk's Office on April 4, 2005 in Liber 21015 at page 736, was inaccurate insofar as the filed map date recited "April 3, 1944", whereas it should read "May 19, 1968". Accordingly, pursuant to CPLR 2001 and 3025(c), the second cause of action is granted, and the legal description in the mortgage is amended *nunc pro tunc* to March 1, 2010 to read, in relevant part, as follows:


"ALL that certain plot, piece or parcel of land, situate, lying and being in the Town of Islip, County of Suffolk and State of New York, known and designated as Lot No. 32 and part of Lot Number 33, on a certain map entitled, "Map of Lake Hills Acreage, Unit K" and filed in the Office of the Clerk of the County of Suffolk, on May 19, 1968, as Map Number 1403, said Lot and part of Lot being bounded and described as follows:"

The proposed long form order appointing a referee to compute pursuant to RPAPL §

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1321, as modified by the Court, has been signed concurrently herewith.

Dated: 11/24/2014

  
**HON. WILLIAM B. REBOLINI, J.S.C.**

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