

U.S. Bank Natl. Assn. v Pontecorvo
2014 NY Slip Op 33413(U)
December 29, 2014
Supreme Court, Suffolk County
Docket Number: 11-31898
Judge: Joseph Farneti
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

P R E S E N T :

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 9-27-13
ADJ. DATE _____
Mot. Seq. # 002 - MG
Mot. Seq. # 003 - XMD

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U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE REGISTERED HOLDERS OF AEGIS ASSET BACKED SECURITIES TRUST 2005-1, MORTGAGE BACKED NOTES,	LEOPOLD & ASSOCIATES, PLLC Attorneys for Plaintiff 80 Business Park Drive, Suite 110 Armonk, NY 10504
Plaintiff,	
-against-	
CATHERINE M. PONTECORVO, as Administratrix of the Estate of JOSEPH P. OCCHIOGROSSO, unknown heirs at law of JOSEPH P. OCCHIOGROSSO, and if they be dead, any and all persons unknown to plaintiff, claiming, or who may claim to have an interest in, or generally or specific lien upon the real property described in this action; such unknown persons being herein generally described and intended to be included in the following designation, namely: the wife, widow, husband, widower, heirs at law, next of kin, descendants, executors, administrators, devisees, legatees, creditors, trustees, committees, lienors, and assignees of such deceased, any and all persons deriving interest in or lien upon, or title to said real property by, through or under them, or either of them, and husbands, widowers, heirs at law, next administrators, devisees, legatees, creditors, trustees, committees, lienors and assigns, all of who and whose names, except as states, are unknown to plaintiff; PEOPLE OF THE STATE OF NEW YORK, CAPITAL ONE BANK (USA) N.A., CACH, LLC, EQUABLE ASCENT FINANCIAL LLC F/K/A HILCO RECEIVABLES, LLC, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, UNITED STATES OF AMERICA "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,	DONOHUE, McGAHAN, CATALANO & BELITSIS Attorneys for Defendant CATHERINE M. PONTECORVO 380 North Broadway, Suite 306 PO Box 350 Jericho, NY 11753
Defendants.	
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US Bank v Pontecorvo

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Upon the following papers numbered 1 to 27 read on this motion for summary judgment and an order of reference; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; Notice of Cross Motion and supporting papers 17 - 27; ~~Answering Affidavits and supporting papers _____~~; ~~Replying Affidavits and supporting papers _____~~; Other _____; it is,

ORDERED that this motion (seq. #002) by plaintiff, U.S. Bank National Association, as Trustee for the Registered Holders of Aegis Asset Backed Securities Trust 2005-1, Mortgage Backed Notes (“US Bank”) for an Order, pursuant to CPLR 3212, granting summary judgment on its complaint against defendant Catherine M. Pontecorvo, as Administratrix of the Estate of Joseph P. Occhiogrosso (“defendant”), for *nunc pro tunc* relief, for leave to amend the caption of this action pursuant to CPLR 3025 (b), and to appoint a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is granted; and it is further

ORDERED that this cross-motion (seq. #003) by defendant for an Order, pursuant to CPLR 3211 (a) (3) and (a) (7), dismissing the action based upon, *inter alia*, plaintiff’s failure to comply with the required conditions precedent and notice obligations in the commencement of this action, is denied; and it is further

ORDERED that the caption is hereby amended by striking therefrom defendants “John Doe #1” through “John Doe #12”; 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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U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE
FOR THE REGISTERED HOLDERS OF AEGIS ASSET
BACKED SECURITIES TRUST 2005-1, MORTGAGE
BACKED NOTES,

Plaintiff,

-against-

CATHERINE M. PONTECORVO, as Administratrix of the
Estate of JOSEPH P. OCCHIOGROSSO, unknown heirs at
law of JOSEPH P. OCCHIOGROSSO, and if they be dead,
any and all persons unknown to plaintiff, claiming, or who
may claim to have an interest in, or generally or specific lien
upon the real property described in this action; such unknown
persons being herein generally described and intended to be
included in the following designation, namely: the wife, widow,
husband, widower, heirs at law, next of kin, descendants,
executors, administrators, devisees, legatees, creditors, trustees,
committees, lienors, and assignees of such deceased, any and all
persons deriving interest in or lien upon, or title to said real
property by, through or under them, or either of them, and
husbands, widowers, heirs at law, next administrators, devisees,
legatees, creditors, trustees, committees, lienors and assigns, all
of who and whose names, except as states, are unknown to
plaintiff; PEOPLE OF THE STATE OF NEW YORK, CAPITAL
ONE BANK (USA) N.A., CACH, LLC, EQUABLE ASCENT
FINANCIAL LLC F/K/A HILCO RECEIVABLES, LLC, NEW
YORK STATE DEPARTMENT OF TAXATION AND FINANCE,
UNITED STATES OF AMERICA,

Defendants.

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This is an action to foreclose a mortgage on property known as 20 Deepdale Drive, Commack, New York. On November 3, 2004, Joseph P. Occhiogrosso (“decendent”) executed an adjustable rate note in favor of First Continental Mortgage and Investment Corp. (“First Continental”) agreeing to pay the sum of \$260,000.00 at the starting yearly rate of 6.250 percent. On the same date, decendent also executed a mortgage in the principal sum of \$260,000.00 on the subject property. The mortgage indicated First Continental to be the lender and Mortgage Electronic Registration Systems, Inc. (“MERS”) to be the nominee of First Continental as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on January 7, 2005 in the Suffolk County Clerk’s Office. By agreement dated January 14, 2011, decendent and Ocwen Loan Servicing, LLC (“Ocwen”)

agreed to amend and supplement the mortgage loan by executing a loan modification agreement which created, *inter alia*, a single lien in the principal amount of \$277,459.66. Thereafter, by assignment dated September 21, 2011, MERS, as nominee for First Continental, assigned the mortgage to the plaintiff herein, US Bank.

Ocwen sent a notice of default, dated April 15, 2011, to decedent stating that he had defaulted on his mortgage loan and that the amount past due was \$2,455.24. As a result of decedent's continuing default, plaintiff commenced this foreclosure action. In its amended complaint, plaintiff alleges in pertinent part that decedent breached his obligations under the terms of the note and mortgage by failing to make his monthly payments commencing with the March 1, 2011 payment and subsequent payments thereafter. Defendant interposed a verified answer with 13 affirmative defenses.

Plaintiff now moves for summary judgment on its complaint. In support of its motion, plaintiff submits among other things: the sworn affidavit of Stephen Lee, contract management coordinator for Ocwen, servicer and attorney-in-fact for plaintiff; the affirmation of Sarah J. Greenberg, Esq. in support of the motion; the affirmation of Wendi M. Edelman, 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; a notice of default; notices pursuant to RPAPL 1320, 1304 and 1303; affidavits of service for the summons and complaint; a proposed order appointing a referee to compute; and an affidavit of service for the instant summary judgment motion upon defendant's counsel. Defendant opposes the summary judgment motion.

"[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]).

Here, plaintiff produced the note and mortgage executed by decedent, as well as evidence of decedent'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]). Stephen Lee avers that decedent defaulted under the terms and conditions of the note and mortgage by failing to tender payment for the monthly installment due for March 1, 2011 and subsequent payments thereafter; that a notice of default was sent to decedent; that a 90 day pre-foreclosure notice dated June 7, 2011 was sent to decedent; and, that plaintiff has complied with the pre-foreclosure requirements of RPAPL 1306.

Here, plaintiff has established its entitlement to summary judgment against defendant as such papers included a copy of the mortgage, the unpaid note together with due evidence of their default in payment under the terms of the loan documents (see *Jessabell Realty Corp. v Gonzales*, 117 AD3d 908, 985 NYS2d 897 [2d Dept 2014]; *Bank of New York Mellon Trust Co. v McCall*, 116 AD3d 993, 985 NYS2d 255 [2d Dept 2014]; *North Bright Capital, LLC v 705 Flatbush Realty, LLC*, 66 AD3d 977,

889 NYS2d 596 [2d Dept 2009]; *Countrywide Home Loans, Inc. v Delphonse*, 64 AD3d 624, 883 NYS2d 135 [2d Dept 2009]).

It was thus incumbent upon the answering defendant to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's *prima facie* showing or in support of the affirmative defenses asserted in her answer or otherwise available to her (*see Flagstar Bank v Bellafigliore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Grogg Assocs. v South Rd. Assocs.*, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; *Wells Fargo Bank v Karla*, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; *Washington Mut. Bank v O'Connor*, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]; *J.P. Morgan Chase Bank, N.A. v Agnello*, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; *Aames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]).

In her cross-motion, defendant re-asserts her pleaded affirmative defenses that the plaintiff did not comply with the pre-commencement notices and her discovery demands. Neither the defenses raised in her answer nor those asserted in her cross-motion rebut the plaintiff's *prima facie* showing of its entitlement to summary judgment.

Proper service of the notices required by RPAPL 1303 and 1304 is a condition precedent to the commencement of a residential foreclosure action, and is the plaintiff's burden to establish (*see Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909, 961 NYS2d 200 [2d Dept 2013]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]; *First Natl. Bank of Chicago v Silver*, 73 AD3d 162, 899 NYS2d 256 [2d Dept 2010]). The arguments in opposition and in support of the sixth and eighth affirmative defenses regarding the plaintiff's purported failure to comply with RPAPL 1304 and 1306 are unavailing. RPAPL 1304 provides, *inter alia*, that at least ninety days before a lender, assignee or loan servicer commences an action against a borrower to foreclose on a mortgage, notice must be provided to the borrower advising that the loan is in default and his or her home is at risk (*see* RPAPL 1304 [1]; *Aurora Services, LLC v Weisblum*, *supra*). The statutorily mandated content of the 90-day notice and the method by which service must be effected are set forth in RPAPL 1304 subdivisions (1) and (2). It has been held that "proper service of the RPAPL 1304 notice containing the statutorily-mandated content is a condition precedent to the commencement of the foreclosure action" (*Aurora Services, LLC v Weisblum*, *supra* at 103). A plaintiff's failure to demonstrate strict compliance with the manner of service and that the notice contains the mandatory language as set forth in the statute requires denial of a motion for summary judgment (*see Deutsche Bank Natl. Trust Co. v Spanos*, *supra*).

Here, the borrower, Joseph P. Occhiogrosso, was deceased prior to commencement of this action. There is nothing in the record before the Court to indicate that the co-executors assumed the mortgage or obtained a new mortgage in their own names. Therefore, as the statute requires only that the borrower be given notice, the provisions of RPAPL 1304 are inapplicable herein (*see* RPAPL 1304 [3]). Thus, also inapplicable is the condition precedent found in RPAPL 1306 which requires filing the pre-foreclosure notice with the superintendent of banks and the requirement for a notice of default set forth in the mortgage loan.

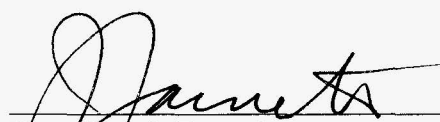
Likewise denied is the defendant's claim that the plaintiff's motion is essentially premature due to the absence of discovery, as defendant failed to offer an evidentiary basis to suggest that discovery may lead to relevant evidence or that facts essential to opposing the motion are exclusively within the knowledge and control of plaintiff (*see* CPLR 3212 [f]; *Deleg v Vinci*, 82 AD3d 1146, 919 NYS2d 396 [2d Dept 2011]; *Kimyagarov v Nixon Taxi Corp.*, 45 AD3d 736, 846 NYS2d 309 [2d Dept 2007]; *Fenko v Mealing*, 43 AD3d 856, 841 NYS2d 378 [2d Dept 2007]). "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion" (*Lopez v WS Distrib. Inc.*, 34 AD3d 759, 825 NYS2d 516 [2d Dept 2006]; *see also Arazashvili v Executive Fleet Mgt., Corp.*, 90 AD3d 682, 934 NYS2d 341 [2d Dept 2011]).

With respect to her remaining affirmative defenses, defendant has failed to raise any triable issues 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 (*see Cochran Inv. Co., Inc. v Jackson*, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007] *quoting Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 664 NYS2d 345 [2d Dept 1997]). Here, answering defendant has failed to demonstrate, through the production of competent and admissible evidence, a viable defense which could raise a triable issue of fact (*see Deutsche Bank Natl. Trust Co. v Posner*, 89 AD3d 674, 933 NYS2d 52 [2d Dept 2011]). "Motions for summary judgment may not be defeated merely by surmise, conjecture or suspicion" (*Shaw v Time-Life Records*, 38 NY2d 201, 379 NYS2d 390 [1975]).

Based on the foregoing, plaintiff's motion for summary judgment is granted as against defendant Catherine M. Pontecorvo, as Administratrix of the Estate of Joseph P. Occhiogrosso. 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: December 29, 2014


 Hon. Joseph Farneti
 Acting Justice Supreme Court

____ FINAL DISPOSITION X NON-FINAL DISPOSITION