Bank of N.Y. Mellon v Butler
2015 NY Slip Op 30884(U)
January 5, 2015
Supreme Court, Suffolk County
Docket Number: 14940-12
Judge: Denise F. Molia

[* 1]

SHORT FORM ORDER

COPY

INDEX
NO.: 14940-12

SUPREME COURT - STATE OF NEW YORK
IAS PART 39 - SUFFOLK COUNTY

PRESENT: Hon. DENISE F. MOLIA
Acting Supreme Court Justice

x

The Bank of New York Mellon fkaThe Bank of New York, as Trustee for the Certificateholders of the CWMBS, Inc., CHL Mortgage Pass-Through Trust 2005-05, Mortgage Pass-Through Certificates, Series 2005-05,

Plaintiff,

-against-

Wendy Butler, United States of America, and "JOHN DOE #1" through "JOHN DOE #10, the last ten names being fictitious and unknown to the plaintiff, the person or parties, if any, having or claiming an interest in or lien upon the Mortgage premises described in the Complaint,

Defendants.

x

MOTION DATE: 5-16-14
ADJ. DATE: _____
Mot. Seq. #: 001-MotD

FRENKEL, LAMBERT, WEISS, WEISMAN & GORDON, LLP
Attorneys for Plaintiff
53 Gibson Street
Bay Shore, N. Y. 11706

WENDY BUTLER
Defendant Pro Se
53 Deer Path Road
Central Islip, N. Y. 11722

Upon the following papers numbered 1 to 12 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 12; 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,

ORDERED that this unopposed motion by the plaintiff for, inter alia, an order awarding summary judgment in its favor against the defendant Wendy Butler, 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.

This is an action to foreclose a mortgage on real property known as 53 Deer Path Road, Central Islip, New York 11722. On January 6, 2005, the defendant Wendy Butler (the defendant mortgagor) executed a fixed-rate note in favor of America's Wholesale Lender (the lender) in the principal sum of $420,000.00. To secure said note, the defendant mortgagor gave the lender a mortgage also dated January 6, 2005 on the property. The mortgage indicates that Mortgage Electronic Registration Systems, Inc. (MERS) was acting solely as a nominee for the lender and its successors and assigns and that, for the purposes of recording the mortgage, MERS was the mortgagee of record.

By agreement made on February 22, 2010 and subsequently sworn to on March 2, 2010, the note and mortgage modified pursuant to a loan modification agreement, which created a single lien in the amount of $398,486.91 as of May 1, 2010. The loan was also modified to reflect a reduced interest rate beginning at 3.000% on April 1, 2010, increasing to 4.000% on April 1, 2012 and further increasing to 5.000% on April 1, 2015.

By way of an undated endorsement in blank, the note was allegedly transferred to the plaintiff, The Bank of New York Mellon formerly known as The Bank of New York, as Trustee for the Certificateholders of the CWMBS, Inc., CHL Mortgage Pass-Through Trust 2005-05, Mortgage Pass-Through Certificates, Series 2005-05, prior to commencement. The transfer of the note to the plaintiff was memorialized by an assignment executed on September 13, 2011, and subsequently recorded on November 29, 2011.

The defendant mortgagor allegedly defaulted on the note and mortgage, as modified, 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 the aforesaid default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on May 14, 2012. The complaint sets forth two causes of action. In the first cause of action, the plaintiff seeks foreclosure and sale, and in the second cause of action, the plaintiff requests counsel fees relating to the prosecution of this action.

Issue was joined by the interposition of the defendant mortgagor's answer dated June 4, 2012. By her answer, the defendant mortgagor generally denies all of the allegations contained in the complaint, and asserts several affirmative defenses, alleging, among other things, the following: the lack of standing; a dispute as to escrow payments; non-compliance with the applicable Federal Home Affordable Modification Program (HAMP) guidelines (*see*,12 USC § 5219a); and non-compliance with the notice requirements of section 1304 of the Real Property Actions and Proceedings Law prior to commencement. The defendant United States of America (USA), appeared herein and waived all, but certain, notices. The remaining defendants have neither appeared nor answered herein.

In response to a paragraph in the answer by which the defendant mortgagor asserts "[o]ther facts concerning [the] mortgage, [the] home, or defenses or counter claims [sic]", the plaintiff interposed a reply dated June 14, 2012. Parenthetically, the reply, noted in the electronic records

maintained by the Suffolk County Clerk's Office for this action, is also contained in its physical file. By its reply, the plaintiff denies all of the material allegations set forth in the counterclaims, to the extent they are construed counterclaims, and asserts eleven affirmative defenses, alleging, inter alia, the following: breach of contract; the failure to state a claim or a cause of action as improperly pleaded; documentary evidence; insufficient particularity and detail to satisfy the requirements of CPLR 3018(b); the doctrines of estoppel, waiver, ratification, laches and/or unclean hands; compliance with all required laws and statutes in connection with the commencement of this action; no duty owned to the defendant mortgagor; and standing based upon the lawful possession of the endorsed promissory note as well as the assignment of the mortgage.

In compliance with CPLR 3408, a series of settlement conferences were conducted or adjourned before the specialized mortgage foreclosure part beginning on January 29, 2013 and continuing through to October 17, 2013. A representative of the plaintiff attended and participated in all settlement conferences. On the last date, this action was dismissed from the conference program and referred as an IAS case because the parties were unable to modify the loan or otherwise reach a settlement. 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 her answer and dismissing the affirmative defenses 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.

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 assignments 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 section 1304 of the Real Property Actions and Proceedings Law (*see*, ***PHH Mtge. Corp. v Israel***, 120 AD3d 1329, 992 NYS2d 355 [2d Dept 2014]; *see also*, ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]). Furthermore, the plaintiff submitted, inter alia, an affidavit from its representative wherein it is alleged that the plaintiff is the holder of the note and that it was assigned the mortgage prior to commencement (*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]). Additionally, the documentary evidence submitted includes, among other things, the note transferred via an undated endorsement (*cf.*, ***Slutsky v Blooming Grove Inn, Inc.***, 147 AD2d 208, 542 NYS2d 721 [2d Dept 1989]), and an assignment of the mortgage, whereby the transfer of the note to the plaintiff was memorialized (*see*, ***GRP Loan, LLC v Taylor,*** 95 AD3d 1172, 945 NYS2d 336 [2d Dept 2012]). Thus, the plaintiff demonstrated its prima facie burden as to the merits of this foreclosure action and as to its standing.

Also, the plaintiff submitted sufficient proof to establish, prima facie, that the affirmative defenses and the 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*, ***Bank of America, N.A. v Lucido***, 114 AD3d 714, 981 NYS2d 433 [2d Dept 2014] [plaintiff's refusal to consider a reduction in principal does not establish a failure to negotiate in good faith]; ***Washington Mut. Bank v Schenk***, 112 AD3d 615, 975 NYS2d 902 [2d Dept 2013]; ***JP Morgan Chase Bank, N.A. v Ilardo***, 36 Misc3d 359, 940 NYS2d 829 [Sup Ct, Suffolk County 2012] [plaintiff not obligated to accept a tender of less than full repayment as demanded]; ***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). 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 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 Mentesana***, 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 Mentesana***, 79 AD3d 1079, *supra*). In this case, the affirmative defenses and the counterclaims 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 her 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 Mentesana***, 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; the affirmative defenses and the counterclaims set forth therein are dismissed in their entirety.

The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by substituting John Doe (refused name) for the fictitious defendant, John Doe #1, and excising the remaining fictitious defendants, John Doe #2-10, 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. These submissions include an affidavit from the plaintiff's agent that John Doe (refused name) is an occupant residing in the property. 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 USA and the newly substituted defendant, John Doe (refused name) (*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 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]). To the extent that the mortgage does not provide that the mortgaged property may be sold in one parcel, as alleged in the motion, the plaintiff may move for such relief at the time of judgment and sale (*see*, CPLR 2001).

Accordingly, this motion for, inter alia, summary judgment and an order of reference 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: 1.5.15

Hon. DENISE F. MOLIA, A.J.S.C.

____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**