

Bank of Am., N.A. v Germain
2015 NY Slip Op 30911(U)
January 16, 2015
Supreme Court, Suffolk County
Docket Number: 38132-11
Judge: Thomas F. Whelan
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COPY

SUPREME COURT - STATE OF NEW YORK
IAS PART 3 - SUFFOLK COUNTY

PRESENT: Hon. Hon. Thomas Whelan
Justice of the Supreme Court

MOTION DATE 10-29-13
~~FILE DATE~~ Submi DATE 1/16/15
Mot. Seq. #001-MotD

_____ x

BANK OF AMERICA, N.A.,

Plaintiff,

DAVIDSON FINK LLP
Attorneys for Plaintiff
28 East Main Street, Suite 1700
Rochester, N.Y. 14614

-against-

VENICE P. GERMAIN, JOSEPH C. GERMAIN,
"JOHN DOE 1 to JOHN DOE 25", said names
being fictitious, the persons or parties intended being
the persons, parties, corporations or entities, if any,
having or claiming an interest in or lien upon the
mortgaged premises described in the complaint,

VENICE P. GERMAIN
Defendant Pro Se
1 Westover Court
Shoreham, N. Y. 11786

Defendants.

_____ x

Upon the following papers numbered 1 to 21 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 8; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 9 - 13; Replying Affidavits and supporting papers 14 - 17; Other Sur-reply 18 - 21; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the plaintiff for, inter alia, an order awarding summary judgment in its favor against the defendant Venice P. Germain, 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 1 Westover Court, Shoreham, New York 11786. By way background, Venice P. Germain and Joseph C. Germain acquired an interest in the property as tenants in common by deed dated December 23, 2005, which was subsequently duly recorded in the Suffolk County Clerk's Office on January 12, 2006. Shortly thereafter, the defendant Joseph C. Germain allegedly died on or about August 13, 2006. Then, on October 13, 2006, the defendant Venice P. Germain (the defendant mortgagor) executed a fixed-rate note in favor of Bank of America, N.A. (the plaintiff) in the principal sum of \$804,000.00. To secure said note, the defendant mortgagor gave the plaintiff a mortgage also dated October 13, 2006 on the property. Thereafter, the mortgage was duly recorded in the Suffolk County Clerk's Office on December 14, 2006.

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 her default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on December 14, 2011.

Issue was joined by the interposition of the defendant mortgagor's verified answer sworn to on February 27, 2012. By her answer, the defendant mortgagor denies all of the material allegations contained in the complaint and asserts seventeen affirmative defenses, alleging, among other things, the lack of standing and legal capacity; fraud and misrepresentation in connection with the origination, servicing and closing of the loan; the lack of good faith with respect to a loan modification; and the plaintiff's unclean hands, failure to state a cause of action, mitigate damages, properly verify the complaint and 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 remaining defendants have neither appeared nor answered the complaint.

In compliance with CPLR 3408, the parties began a prolonged period of negotiations in an attempt to agree on a loan modification, and foreclosure settlement conferences were conducted or adjourned beginning on August 9, 2012 and continuing through to February 19, 2013. A representative of the plaintiff attended and participated in all settlement conferences. On the last date, the parties were unable to reach a settlement and, as a result, this action was referred as an IAS case. Accordingly, no further conference is required.

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. Opposition, reply and sur-reply papers have been filed herein. The court notes that the opposition, consisting of unsigned and unsworn papers, is lacking an affidavit of service (*see*, CPLR 2101[a]; Uniform Rules Trial Cts [22 NYCRR §130-1.1-a]). The sur-reply, which is also unsworn, was filed without leave of court and more than one month after the return date of the motion (*see*, CPLR 2214).

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 note, the mortgage 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 sections 1303 and 1304 of the Real Property Actions and Proceedings Law as well as the notice provisions of the mortgage prior to commencement (*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]). Moreover, the plaintiff submitted an affidavit from its representative wherein it is alleged that the plaintiff was the holder of the note at the time of commencement as the originating lender, and that it has maintained possession of the same since that time (*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]). 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] [CPLR

3016(b) requires that the circumstances of fraud be “stated in detail,” including specific dates and items]; *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] [plaintiff not obligated to accept a tender of less than full repayment as demanded]; *Wells Fargo Bank, N.A. v Van Dyke*, 101 AD3d 638, 958 NYS2d 331 [1st Dept 2012] [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]; *Long Is. Sav. Bank of Centereach, F.S.B. v Denkensohn*, 222 AD2d 659, 635 NYS2d 683 [2d Dept 1995] [dispute as to amount owed by the mortgagor is not a defense to a foreclosure action]; *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]). Furthermore, with respect to the assertion set forth in the tenth affirmative defense that the defendant mortgagor was improperly refused a loan modification, there is ample authority emanating from the Appellate Division holding that “[n]othing in CPLR 3408 requires plaintiff to make the exact offer desired by [the] defendant[], and the plaintiff’s failure to make that offer cannot be interpreted as a lack of good faith” (*Bank of America, N.A. v Lucido*, 114 AD3d 714, *supra* at 715-16, quoting *Wells Fargo Bank, N.A. v Van Dyke*, 101 AD3d 638, *supra* at 638). Moreover, there is no requirement that a complaint in a foreclosure action be verified (*see generally*, CPLR 3020; *see also*, CPLR 3022).

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]).

The defendant mortgagor's answer is insufficient, as a matter of law, to defeat the plaintiff's motion (*see, Flagstar Bank v Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Argent Mtge. Co., LLC v Montesana*, 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*). In any event, the failure by the defendant mortgagor to raise and/or assert each of her pleaded defenses by way of admissible proof 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 Montesana*, 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 excising the fictitious named defendants, John Doe 1-25, 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]). The plaintiff also demonstrated that Joseph C. Germain who predeceased the mortgage and the commencement of the instant action, should be excised from the caption (*see, Scharaga v Schwartzberg*, 149 AD2d 578, 540 NYS2d 451 [2d Dept 1989]). By its submissions, the plaintiff established the basis for the above-noted relief. The submissions include an affidavit by a representative of the plaintiff that there are no unknown occupants residing at the property. All future proceedings shall be captioned accordingly.

Since the plaintiff has been awarded summary judgment against the defendant mortgagor, 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]). Parenthetically, the mortgage in this action is secured only up to the interest of the defendant mortgagor because Joseph C. Germain, a non-party to the note and mortgage, held an adverse and paramount claim to title to that of the plaintiff at the time of his death (*see, 1,2,3 Holding Corp. v Exeter Holding, Ltd.*, 72 AD3d 1040, 900 NYS2d 356 [2d Dept 2010]; *CitiFinancial Co. (DE) v McKinney*, 27 AD3d 224, 811 NYS2d 359 [1st Dept 2006]; *Scharaga v Schwartzberg*, 149 AD2d 578, *supra*; *Federal Natl. Mtge. Assn. v Connelly*, 84 AD2d 805, 444 NYS2d 147 [2d Dept 1981]; *Winter v Kram*, 3 AD2d 175, 159 NYS2d 417 [2d Dept 1957]; *Stevens v Breen*, 258 AD 423, 16 NYS2d 909 [2d Dept 1940]; *East N.Y. Sav. Bank v Alston*, 145

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Misc2d 540, 547 NYS2d 198 [Sup Ct, Queens County [1989]]. Therefore, anyone buying the property at the foreclosure sale would purchase it subject to the title of the unnamed heir(s).

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: _____

1/16/15



Hon. Thomas Whelan

J.S.C.

____ FINAL DISPOSITION NON-FINAL DISPOSITION