

<b>IndyMac Fed. Bank FSB v Feffer</b>
2015 NY Slip Op 30937(U)
January 9, 2015
Supreme Court, Suffolk County
Docket Number: 9610-09
Judge: Denise F. Molia
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SUPREME COURT - STATE OF NEW YORK  
IAS PART 39 - SUFFOLK COUNTY

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

\_\_\_\_\_ x  
IndyMac Federal Bank FSB,

Plaintiff,

-against-

Roger D. Feffer, 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 Mortgaged premises described in  
the Complaint,

Defendants.

\_\_\_\_\_ x

MOTION DATE: 11-20-12 (002)  
1-29-14 (003)

ADJ. DATE: \_\_\_\_\_  
Mot. Seq. # 002 - MG  
003 - XMD

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Upon the following papers numbered 1 to 48 read on this motion for summary judgment and an order of reference;  
Notice of Motion/ Order to Show Cause and supporting papers 1 - 22; Notice of Cross Motion and supporting papers 23 - 35;  
Answering Affidavits and supporting papers 36 - 46; Replying Affidavits and supporting papers 47 - 48; ~~Other \_\_\_\_\_; (and  
after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that the motion (002) by plaintiff IndyMac Federal Bank, FSB (IndyMac)  
pursuant to CPLR 3212 for an order granting summary judgment on its complaint against defendant  
Roger D. Feffer (defendant), fixing the defaults as against the non-answering and non-appearing  
defendants. to amend the caption of this action pursuant to CPLR 3025 (b) and, for an order of  
reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law §  
1321, is granted: and it is further

**ORDERED** that the cross motion (003) by defendant for an order dismissing the complaint  
or, to amend the answer pursuant to CPLR 3025(b) or, to deny plaintiff's motion for summary  
judgment is denied; and it is further

**ORDERED** that the caption is hereby amended by substituting OneWest Bank, FSB in place  
of IndyMac, as plaintiff and by striking therefrom the names of defendants "John Doe #1" through  
"John Doe #10; and it is further

RST

**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

\_\_\_\_\_  
One West Bank, FSB,

Plaintiff,

-against-

Roger D. Feffer

Defendant.  
\_\_\_\_\_x

This is an action to foreclose a mortgage on premises known as 53 Eastfield Lane, Melville, New York. On September 28, 2001, defendant executed a note in favor of L'Argent Funding Consultants, LTD (L'Argent) agreeing to pay the sum of \$308,000.00. On the same date defendant also executed a mortgage in the principal sum of \$308,000.00 on the subject property. The mortgage was recorded on October 9, 2001 in the Suffolk County Clerk's Office. Thereafter, the note and mortgage were transferred by assignment of mortgage dated September 28, 2001 from L'Argent to IndyMac, the plaintiff herein. The assignment of mortgage was recorded on October 9, 2001 with the Suffolk County Clerk's Office. Thereafter, defendant executed a consolidation, extension and modification agreement (CEMA) dated July 24, 2003 in which the aforementioned note and mortgage were consolidated with a second note in the sum of \$17,054.36 and second mortgage. The consolidated note in the sum of \$320,000.00 and mortgages formed a consolidated lien on the subject premises. The second mortgage and CEMA were recorded on December 3, 2003 in the Suffolk County Clerk's Office. Subsequently, by agreement dated April 1, 2008, defendant and IndyMac 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 \$315,647.69. Thereafter, the consolidated note and mortgage were transferred by assignment of mortgage dated July 14, 2009 from IndyMac to OneWest Bank FSB. The assignment of mortgage was recorded on August 10, 2010 with the Suffolk County Clerk's Office

IndyMac sent a notice of default dated January 9, 2009 to defendant stating that he had defaulted on his mortgage loan and the amount past due was \$22,989.17. As a result of defendant's continuing default, plaintiff commenced this foreclosure action on March 16, 2009. In its complaint, plaintiff alleges in pertinent part that defendant breached his obligations under the terms of the note and mortgage by failing to make his monthly payments commencing with the May 1, 2008 payment. Defendant interposed an answer with affirmative defenses.

The Court's computerized records indicate that a foreclosure settlement conference was held

on March 10, 2011 at which time this matter was referred as an IAS case since a resolution or settlement had not been achieved. Thus, there has been compliance with CPLR 3408 and no further settlement conferences are required.

Plaintiff now moves for summary judgment on its complaint. In support of its motion, plaintiff submits among other things: the sworn affidavit of Reynaldo Rivera, assistant secretary of OneWest Bank, FSB, assignee of the named plaintiff IndyMac; the affirmation of Shawn S. Spielberg, Esq. in support of the instant motion; the affirmation of Shawn S. Spielberg, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the pleadings; the notes, mortgages and assignments of mortgage; a CEMA; a loan modification agreement; notices pursuant to RPAPL 1320 and 1303; affidavits of service for the summons and complaint; an affidavit of service for the instant summary judgment motion upon defendant's counsel; and a proposed order appointing a referee to compute.

“[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, 764 NYS2d 635 [2d Dept 2003]; *see Argent Mtge. Co., LLC v Montesana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]; *Wells Fargo Bank, N.A. v Webster*, 61 AD3d 856, 877 NYS2d 200 [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’ ” (*U.S. Bank Natl. Assn. TR U/S 6/01/98 [Home Equity Loan Trust 1998–2] v Alvarez*, 49 AD3d 711, 711, 854 NYS2d 171 [2d Dept 2008], *quoting Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 664 NYS2d 345 [2d Dept 1997], *lv to appeal dismissed* 91 NY2d 1003, 676 NYS2d 129 [1998]; *see also Emigrant Mtge. Co., Inc. v Beckerman*, 105 AD3d 895, 895, 964 NYS2d 548 [2d Dept 2013]).

Here, plaintiff established its prima facie entitlement to summary judgment by providing evidence of the assignments, the mortgages, the notes, a CEMA, a loan modification agreement, the default of defendant, and by demonstrating that his affirmative defenses are without merit (*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]). Reynaldo Rivera avers by affidavit that defendant defaulted under the terms and conditions of the note and mortgage by failing to tender payment for the monthly installment due on May 1, 2008; that a RPAPL 1304 90 day pre-foreclosure notice was not required in the instant matter as the complaint was filed before January 14, 2010 and that the loan at issue was not a “subprime home loan”, a non-traditional home loan”, or a “high cost home loan”; that a 30 day notice of default was mailed to borrower on January 9, 2009; and, that the default stated was not cured.

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 his answer or otherwise available to him (*see Flagstar Bank v Bellafiore*, 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]).

Defendant cross-moves for leave to serve an amended answer and opposes plaintiff's motion based on lack of standing when the action was commenced. Addressing defendant's application for leave to serve an amended answer, the Court notes that as a general rule, motions for leave to amend pleadings are to be liberally granted absent prejudice or surprise resulting from the delay (*see Glaser v County of Orange*, 20 AD3d 506, 799 NYS2d 120 [2d Dept 2005]). The movant, however, must make some evidentiary showing that the proposed amendment has merit or a proposed amendment will not be permitted (*see Buckholz v Maple Garden Apts., LLC*, 38 AD3d 584, 832 NYS2d 255 [2d Dept 2007]; *Curran v Auto Lab Serv. Cetr.*, 280 AD2d 636, 721 NYS2d 662 [2d Dept 2001]). In this instance, it is noted that defendant's original verified answer is dated April 6, 2009. Defendant, after nearly a four year delay, seeks to file an amended answer without providing any explanation for such a prolonged deferment. Likewise, defendant has failed to demonstrate by any credible evidence a lack of prejudice to the plaintiff, who has already moved for summary judgment (*see generally Majestic Investors, Ltd. v Lopez*, 111 AD2d 844, 490 NYS2d 585 [2d Dept 1985]). Lastly, the defendant's application fails to make a sufficient evidentiary showing as to the proposed added affirmative defenses and counterclaims. In view of the foregoing, the Court in exercising its discretion, denies that branch of defendant's order to show cause seeking leave to amend his answer.

As to defendant's opposition which raises an allegation of lack of standing, it is well established that "where a defendant does not challenge a plaintiff's standing, the plaintiff may be relieved of its obligation to prove that it is the proper party to seek the requested relief." (*Wells Fargo Bank Minnesota Natl. Assn. v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). The court went on to hold that "an argument that a plaintiff lacks standing, if not asserted in the defendant's answer or in a pre-answer motion to dismiss the complaint, is waived pursuant to CPLR 3211(e)" [citations omitted] (*see Wells Fargo Bank Minn., NA v Mastropaolo*, 42 AD3d 239; *see also US Bank, NA v Emmanuel*, 83 AD3d 1047, 921 NYS2d 320 [2d Dept 2011]; *Deutsche Bank Natl. Trust Co. v Hussain*, 78 AD3d 989, 912 NYS2d 595 [2d Dept 2010]; *Countrywide Home Loans Serv., LP v Albert*, 78 AD3d 983, 912 NYS2d 96 [2d Dept 2010]; *Deutsche Bank Natl. Trust Co. v Young*, 66 AD3d 819, 886 NYS2d 617 [2d Dept 2009] [standing issue unavailing on application to vacate default judgment]; *HSBC Bank, USA v Dammond*, 59 AD3d 679, 875 NYS2d 490 [2d Dept 2009] [waived standing issues does not constitute meritorious defense on application to vacate default]; *Aames Funding Corp. v Houston*, 57 AD3d 808, 872 NYS2d 134 [2d Dept 2008]). Based upon the foregoing, defendant's assertion of a standing defense is unavailing since the defendant waived such defense by failing to assert it in a timely pre-answer motion to dismiss or as an affirmative defense in an answer (*see Deutsche Bank Natl. Trust Co. v Young*, 66 AD3d 819).

The remaining arguments in opposition to plaintiff's motion are rejected by the Court as unmeritorious. Defendant failed to raise a triable issue of fact concerning any bona fide defense to foreclosure in opposition to the motion for summary judgment and by his remaining affirmative

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defenses (*see Rimbambito, LLC v Lee*, 118 AD3d 690, 986 NYS2d 855 [2d Dept 2014]; *American Airlines Federal Credit Union v Mohamed*, 117 AD3d 974, 986 NYS2d 530 [2d Dept 2014] [lack of good faith in denying loan modification]; *Putnam County Sav. Bank v Mastrantone*, 111 AD3d 914, 975 NYS2d 684 [2d Dept 2013] [lack of personal jurisdiction]; *Bank of Smithtown v 219 Sagg Main, LLC*, 107 AD3d 654, 968 NYS2d 95 [2d Dept 2013][unclean hands]). Notably, defendant Feffer in his affidavit does not deny that he defaulted on his mortgage payments.

Accordingly, the motion for summary judgment is granted against defendant Feffer. That branch of the motion seeking to fix the defaults as against the remaining defendants who have not answered or appeared herein is granted. 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 Green Tree Serv. v Cary*, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]; *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 defendant's cross motion seeking, *inter alia*, leave to amend his answer, is denied in its entirety.

The proposed order appointing a referee to compute pursuant to RPAPL 1321 is signed simultaneously herewith as modified by the court.

Dated: January 9, 2015

  
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 AJSC

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