

U.S. Bank N.A. v Amandola
2015 NY Slip Op 31070(U)
February 24, 2015
Supreme Court, Suffolk County
Docket Number: 32908/09
Judge: Paul J. Baisley
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

COPY

COPY

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

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U.S. BANK NATIONAL ASSOCIATION, AS
TRUSTEE FOR BART 2004-7,

Plaintiff,

-against-

CHRISTOPHER L. AMANDOLA, DIANE C.
AMANDOLA, JK ASSOCIATES REALTY LLC,
PETER MAKRIS, WELLS FARGO BANK, N.A.,
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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INDEX NO.: 32908/09
MOTION DATE: 12/23/14
MOTION NO.: 002 MG

PLAINTIFF'S ATTORNEY:
GROSS POLOWY ORLANS, LLC
25 Northpointe Parkway, Suite 25
Amherst, New York 14228

DEFENDANTS' ATTORNEY:
FINKELSTEIN & FEIL, LLP
666 Old Country Road, Suite 210
Garden City, New York 11530

Upon the following papers numbered 1 to 29 read on this motion for summary judgment and an order of reference :
Notice of Motion/ Order to Show Cause and supporting papers 1- 23 ; ~~Notice of Cross Motion and supporting papers~~ ;
Answering Affidavits and supporting papers 24-27 ; Replying Affidavits and supporting papers 28-29 ; ~~Other~~ ; ~~(and after~~
~~hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion (motion sequence no. 002) of plaintiff, U.S. Bank National Association, as Trustee for BART 2004-7 ("US Bank"), for an order pursuant to CPLR R. 3212 granting summary judgment in its favor against defendants Christopher L. Amandola and Diane C. Amandola (collectively referred to as "defendants"), fixing the defaults as to the non-answering, non-appearing defendants, for leave to amend the caption, and for an order of reference pursuant to RPAPL §1321 is granted; and it is further

ORDERED that the caption is hereby amended by deleting plaintiff's address and by striking therefrom defendant "John Doe"; and it is further

ORDERED that plaintiff is directed to serve a copy of this order 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

U.S. BANK NATIONAL ASSOCIATION, AS
 TRUSTEE FOR BART 2004-7,

Plaintiff,

-against-

CHRISTOPHER L. AMANDOLA, DIANE C.
 AMANDOLA, JK ASSOCIATES REALTY LLC,
 PETER MAKRIS, WELLS FARGO BANK, N.A.,

Defendants.

This is an action to foreclose a mortgage on property known as 3 Meadow Rue Lane, East Northport, New York. On May 28, 2004, defendants executed an adjustable rate note in favor of Wells Fargo Bank, N.A. ("Wells Fargo") agreeing to pay the sum of \$403,500.00 at the starting yearly interest rate of 2.625%. On said date, defendants also executed a mortgage in the principal sum of \$403,500.00 on the subject property. The mortgage was recorded on June 25, 2004 in the Suffolk County Clerk's Office. Thereafter, on July 16, 2009, the note and mortgage were transferred by assignment of mortgage from Wells Fargo to plaintiff US Bank. The assignment of mortgage was recorded on August 4, 2009 with the Suffolk County Clerk's Office.

Wells Fargo Home Mortgage sent a notice of default on November 16, 2008 to defendants stating that they had defaulted on their mortgage loan and that the amount past due was \$6,375.61. As a result of defendants' continuing default, plaintiff commenced this foreclosure action on August 18, 2009. In its complaint, plaintiff alleges in pertinent part that defendants breached their obligations under the terms of the note and mortgage by failing to pay the installment due on October 1, 2008. Defendants interposed an answer with two affirmative defenses.

The Court's computerized records indicate that a foreclosure settlement conference was held on December 6, 2012. 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 affirmation of Amy L. Rohe-Kipp, Esq. in support of the motion; the affirmation of Amy L. Rohe-Kipp, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the affidavit of Emily Armas, vice president loan documentation of Wells Fargo; the pleadings; the note, mortgage and an assignment of mortgage; proof of notices pursuant to RPAPL §1320, §1303 and §1304; affidavits of service of the summons and complaint; an affidavit of service of the instant summary judgment

motion upon defendants' counsel in this action; and a proposed order appointing a referee to compute. Defendant Christopher Amendola, through his attorney, has submitted opposition to plaintiff's 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, 764 NYS2d 635 [2d Dept 2003]; see *Argent Mtge. Co., LLC v Mentasana*, 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 has established its *prima facie* entitlement to summary judgment against the answering defendants as such papers included a copy of the mortgage, the unpaid note together with due evidence of defendants' 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 their answer or otherwise available to them (see *Flagstar Bank v Bellafore*, 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]; *Ames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]). Where a defendant fails to oppose some or all matters advanced on a motion for summary judgment, the facts as alleged in the movant's papers may be deemed admitted as 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 Enter., 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]). The opposing papers submitted by the defendants are insufficient to raise any genuine question of fact requiring a trial on the merits of the plaintiff's claims for foreclosure and sale and insufficient to demonstrate any *bona fide* defense to the plaintiff's claim for a judgment of foreclosure and sale (see *Emigrant Funding Corp. v Agard*, 121 AD3d 935, 995 NYS2d 154 [2d Dept 2014]; *Cochran Inv. Co., Inc. v Jackson*, 38 AD3d 704, 834 N.Y.S.2d 198 [2d Dept 2007]).

Addressing 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 in *Mastropaolo* further held 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 issue does not constitute meritorious defense on application to vacate default]; *Ames 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 defendants 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).

Defendant’s proffered defense based upon plaintiff’s alleged bad faith in completing a loan modification is also unavailing. There is no requirement that a foreclosing plaintiff modify its mortgage loan prior to or after a default in payment (see *Graf v Hope Bldg. Corp.*, 254 NY 1, 171 NE 884 [1930]; *Wells Fargo Bank, NA v Meyers*, 108 AD3d 9, 966 NYS2d 108 [2d Dept 2013]; *Wells Fargo Bank, NA v Van Dyke*, 101 AD3d 638, 958 NYS2d 331 [1st Dept 2012]; *Key Intern. Mfg. Inc. v Stillman*, 103 AD2d 475, 480 NYS2d 528 [2d Dept 1984]). While the parties to a mortgage are generally required to enter into good faith negotiations aimed at reaching a mutual resolution, including a loan modification if possible (see CPLR §3408), same does not qualify as a defense to a foreclosure action.

Here, defendants have failed to demonstrate, through the production of competent and admissible evidence, a viable defense which could raise a triable issue of fact (*Deutsche Bank Natl. Trust Co. v Posner*, 89 AD3d 674, 933 NYS2d 52 [2d Dept 2011]). Based upon the foregoing, the motion for summary judgment is granted against defendants Christopher L. Amandola and Diane C. Amandola. 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]).

Proposed order appointing a referee to compute pursuant to RPAPL §1321, as modified by the Court, signed simultaneously herewith.

Dated: February 18, 2015

HON. PAUL J. BAISLEY, JR.

J.S.C.

At a(n) IAS Term of the Supreme Court held in the County of Suffolk, at the thereof, PA 36
of Riverhead, New York, on the 24 day of February, 2013.

PRESENT: HON. PAUL J. BAISLEY, JR.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X
U.S. BANK NATIONAL ASSOCIATION, AS
TRUSTEE FOR BART 2004-7
3476 Stateview Boulevard
Ft. Mill, SC 29715

MOTION/CROSS/OCC
FEE PAID
Judith A. Pascale
Suffolk County Clerk

Plaintiff,

vs.

CHRISTOPHER L. AMANDOLA, DIANE C.
AMANDOLA, J K ASSOCIATES REALTY LLC,
PETER MAKRIS, WELLS FARGO BANK, N.A.,

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.)

Defendant(s).

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ORDER

INDEX NO.: 32908/09

MORTGAGED PREMISES:
3 MEADOW RUE LANE
EAST NORTHPORT, NY 11731

SBL #:
185.00-01.00-076.000

Upon reading the summons, complaint, affidavits of service upon all defendants, and the notice of motion for summary judgment dated October 30, 2013, as well as the answer submitted by defendants Christopher L. Amandola and Diane C. Amandola by their attorney, Michael S. Finkelstein, Esq., and the attached affirmation of Amy L. Rohe-Kipp, Esq., associate of Gross Polowy Orleans, LLC, the attorney of record for plaintiff together with the exhibits attached thereto, all prior papers filed in this action,

And after hearing plaintiff's attorney in support of motion for summary judgment and defendant's attorney in opposition thereto,

And upon an answer served by the defendants,

And upon the affidavit in support of summary judgment submitted on behalf of plaintiff, setting forth the facts which entitle plaintiff to the relief prayed for and plaintiff's memorandum of law in support of summary judgment;

And upon proof of compliance with all statutory conditions precedent to a foreclosure action,

And upon the notice of settlement conference and the last conference being held on December 6, 2012, which was attended by the defendants,

And it appearing to the satisfaction of this court from said documents that this action was brought to foreclose a mortgage on real property located in the County of Suffolk, State of New York, that the entire unpaid balance secured thereby is due and owing,

NOW, on motion of Gross Polowy Orlans, LLC, attorney for the plaintiff, it is hereby

ORDERED, that defendants Wells Fargo Bank, N.A. and Peter Makris have not appeared or answered in this matter and are deemed in default; and it is further

Ans JSC { ORDERED that summary judgment is granted in favor of plaintiff; ~~that the affirmative defenses raised in defendants' answer are dismissed~~ and that the defendants' answer be treated as a notice of appearance in this action; and it is further

ORDERED, that the answer of the defendants, Christopher L. Amandola and Diane C. Amandola, be treated as a limited notice of appearance, entitling defendants to receive, without prior notice, a copy of the notice of sale, notice of discontinuance and notice of surplus money, if any; and it is further

hym JSC { ORDERED, that ROBERT A. CACCESE JR., Esq. with an address of 1000 Delmar Dr., Laurel, NY 11948 631-298-5121 **except attorney's fee** is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due plaintiff, and to examine and report whether the mortgaged premises can be sold in parcels; and it is further

ORDERED, that, if required, the Referee take testimony pursuant to RPAPL § 1321; and it is further

ORDERED, that by accepting this appointment the Referee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to § 36.2 (c) ("Disqualifications from appointment"), and § 36.2 (d) ("Limitations on appointments based upon compensation"); and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

Ans JSC { ORDERED, plaintiff is to include in any proposed order for a judgment of foreclosure and sale language complying with the Suffolk County Local Rule for filing of the Foreclosure Action Surplus Monies form contained in Suffolk County Administrative Order # 41-13, and it is further

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JSC

ORDERED, that pursuant to CPLR § 8003(a)(the statutory fee of \$50.00)(in the discretion of the court, a fee of \$250.00), shall be paid to the Referee for the computation of the amount due and upon the filing of his/her report, the Referee shall not request or accept additional compensation for the computation unless it has been fixed by the court in accordance with CPLR § 8003 (b); and it is further

ORDERED, that the Referee is prohibited from accepting or retaining any funds for him/herself or paying funds to him/herself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED, that the address of the plaintiff be deleted from the caption and that the caption be amended to reflect the deletion; and it is further

ORDERED, that, "John Doe" be dropped as a party defendant in this action as no occupants reside at the premises, and that the caption of this action be amended to reflect the deletion of "John Doe" as a party defendant; and it is further

ORDERED, that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X

U.S. BANK NATIONAL ASSOCIATION, AS
TRUSTEE FOR BART 2004-7,

Plaintiff,

vs.

CHRISTOPHER L. AMANDOLA, DIANE C.
AMANDOLA, J K ASSOCIATES REALTY LLC,
PETER MAKRIS, WELLS FARGO BANK, N.A.,

Defendant(s).

-----X

INDEX NO.: 32908/09

MORTGAGED PREMISES:
3 MEADOW RUE LANE
EAST NORTHPORT, NY 11731

SBL #:
185.00-01.00-076.000

and it is further

ORDERED, that a copy of this order with notice of entry shall be served upon any party entitled thereto.

ENTER:
Francis M...
2/24/15