

**Bertino v Azzara**

2015 NY Slip Op 31374(U)

April 17, 2015

Supreme Court, Suffolk County

Docket Number: 15431-12

Judge: Denise F. Molia

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122 [2d Dept 2012]; *see also*, Uniform Rules Trial Cts [22 NYCRR §130-1.1A]); and it is

**ORDERED** that the plaintiff is directed to file proof of filing of an additional or a successive notice of pendency with the proposed judgment of foreclosure (*see*, CPLR 6513; 6516[a]; *Ames Funding Corp. v Houston*, 57 AD3d 808, 872 NYS2d 134 [2d Dept 2008]; *EMC Mtge. Corp. v Stewart*, 2 AD3d 772, 769 NYS2d 408 [2d Dept 2003]; *Horowitz v Griggs*, 2 AD3d 404, 767 NYS2d 860 [2d Dept 2003]); 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.

In this mortgage foreclosure action, the plaintiff moves for an order: (1) awarding it summary judgment against the answering defendant, Annette Azzara; (2) fixing the defaults in answering of the non-answering defendants; (3) substituting one or more occupants found at the premises for unknown defendants named in the caption and/or otherwise excising as party defendants certain named defendants; and (4) appointing a referee to compute amounts due under the subject mortgage. The motion is considered under CPLR 3215, 3212 and RPAPL §1321 and is granted.

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 entitlement to summary judgment on the complaint to the extent it asserts claims against answering defendant as such papers included copies of the mortgage, the unpaid note, and evidence of a default under the terms thereof (*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]; *Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753, 915 NYS2d 569 [2d Dept 2011]). In support of the motion, the plaintiff also submitted, inter alia, a death certificate for Dominic Azzara (the mortgagor) who died on December 31, 2010, and an original certificate of ancillary letters testamentary, evidencing the plaintiff's

appointment as executor of the estate of Charlene Bertino (the mortgagee), who died on March 19, 2011. By virtue of the plaintiff's appointment as executor on November 23, 2011 by the Surrogate's Court, Suffolk County, she was authorized to act as fiduciary of the mortgagee's estate and to prosecute this action. Parenthetically, although the copy of the mortgage submitted by the plaintiff is missing a signature page, a review of the physical file for this action maintained by the Office of the Suffolk County Clerk shows that a complete, executed copy of the mortgage, containing a legal description, an acknowledgment and a recording page, is attached to the original complaint.

Furthermore, the plaintiff submitted sufficient proof to establish, prima facie, that the affirmative defenses set forth in the 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, Manufacturers & Traders Trust Co. v Schlosser & Assoc.*, 242 AD2d 943, 665 NYS2d 949 [4<sup>th</sup> Dept 1997] [conclusory allegations of conduct constituting an alleged waiver are insufficient to raise a triable issue of fact]; *FGH Realty Credit Corp. v VRD Realty Corp.*, 231 AD2d 489, 647 NYS2d 229 [2d Dept 1996] [no valid defense or claim of estoppel where mortgage provision bars oral modification]; *Schmidt's Wholesale, Inc. v Miller & Lehman Constr., Inc.*, 173 AD2d 1004, 569 NYS2d 836 [3d Dept 1991]; *First Fed. Sav. & Loan Assn. of Rochester v Capalongo*, 152 AD2d 833, 544 NYS2d 44 [3d Dept 1989] [the doctrine of laches is no defense to a foreclosure action if it is brought within the limitations period]; *Wells Fargo Bank, N.A. v Van Dyke*, 101 AD3d 638, 958 NYS2d 331 [1st Dept 2012]; *Long Is. Sav. Bank of Centereach, F.S.B. v Denkensohn*, 222 AD2d 659, 635 NYS2d 683 [2d Dept 1995]; *Crest/Good Mfg. Co., Inc. v Baumann*, 160 AD2d 831, 554 NYS2d 264 [2d Dept 1990] [dispute as to amount owed by the mortgagor is not a defense to a foreclosure action]; *Charter One Bank, FSB v Leone*, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007] [no competent evidence of an accord and satisfaction]; *Connecticut Natl. Bank v Peach Lake Plaza*, 204 AD2d 909, 612 NYS2d 494 [3d Dept 1994] [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]). 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]).

Since the plaintiff duly demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted to the answering defendant (*see, HSBC Bank USA v Merrill*, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]). Accordingly, it was incumbent upon the answering defendant 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]; *JP Morgan Chase Bank, N.A. v Agnello*, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]).

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, *supra*; *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, Inc. v Baiden*, 36 NY2d 539, 369 NYS2d 667 [1975]; *see also, Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1<sup>st</sup> 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 [1<sup>st</sup> Dept 1999] [internal quotation marks and citations omitted]).

A review of the opposing papers submitted by the answering defendant shows that the same are insufficient to raise any genuine issue 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 such claim (*see, CPLR 3211[e]; Rimbambito, LLC v Lee*, 118 AD3d 690, 986 NYS2d 855 [2d Dept 2014]; *Bank of Smithtown v 219 Sagg Main, LLC*, 107 AD3d 654, 968 NYS2d 95 [2d Dept 2013]; *Wells Fargo Bank Minn., N.A. v Perez*, 41 AD3d 590, *supra*; *U.S. Bank Trust N.A. Trustee v Butti*, 16 AD3d 408, 792 NYS2d 505 [2d Dept 2005]). In opposition to the motion, the answering defendant has offered no proof or arguments in support of any of her pleaded defenses, except as to the plaintiff's alleged unclean hands in the prosecution of this action and the alleged insufficiency of certain papers submitted by the plaintiff in this action. The failure by the answering defendant to raise and/or assert each of her remaining pleaded defenses in opposition to the plaintiff's motion warrants the dismissal of 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*). All of the answering defendant's unsupported affirmative defenses are thus dismissed.

Rejected as unmeritorious are the answering defendant's challenges to the sufficiency of the proof upon which the plaintiff relies to support its motion for summary judgment. Contrary to the answering defendants' contentions, the affidavit of the plaintiff, as the duly appointed representative of the deceased mortgagee's estate, is legally sufficient and comports with the requirements of CPLR 3212 (*see, Charter One Bank, FSB v Leone*, 45 AD3d 958, *supra*; *Fleet Bank v Pine Knoll Corp.*, 290 AD2d 792, 736 NYS2d 737 [3d Dept 2002]; *see also, HSBC Bank USA, N.A. v Sage*, 112 AD3d 1126, 977 NYS2d 446 [3d Dept 2013]; *cf., HSBC Bank USA, N.A. v Betts*, 67 AD3d 735, 888 NYS2d 203 [2d Dept 2009]; *Cadle Co. v Gregory*, 293 AD2d 335, 739 NYS2d 825 [1<sup>st</sup> Dept 2002]). The answering defendant has also not demonstrated any prejudice by the plaintiff's failure to furnish a certificate of conformity for the affidavit in support of the motion, which may be provided nunc pro tunc (*see, CPLR 2001; Midfirst Bank v Agho*, 121 AD3d 343, 991 NYS2d 623 [2d Dept 2014]; *Betz v Daniel Conti, Inc.*, 69 AD3d 545, 892 NYS2d 477 [2d Dept 2010]; *Smith v Allstate Ins. Co.*, 38 AD3d 522, 832 NYS2d 587 [2d Dept 2007]).

Regarding standing, the plaintiff demonstrated that the note and the recorded mortgage were in her possession at the time of commencement, as indicated above, by attaching a copies of the same to the complaint (*see, Bank of N.Y. Mellon Trust Co., N.A. v Sachar*, 95 AD3d 695, 981 NYS2d 547 [2d Dept 2014]). Such evidence demonstrates that the plaintiff holds the original note and mortgage. In response, the answering defendant has not shown any valid basis to argue that this was not the actual note executed by the mortgagor.

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With respect to the plaintiff's request for attorneys' fees, since there is no statute in New York authorizing the recovery of an attorney's fee in a mortgage foreclosure action, such a fee may only be recovered if it is contractually authorized (*Neighborhood Hous. Servs. N.Y. City, Inc. v Hawkins*, 97 AD3d 554, 554-555, 947 NYS2d 321 [2d Dept 2012]). Contrary to the answering defendant's contention, the mortgage documents created such an obligation on the part of the mortgagor (*see, Vigo v 501 Second St. Holding Corp.*, 121 AD3d 778, 994 NYS2d 354 [2d Dept 2014]). The court has considered the answering defendant's remaining contentions and finds that they are entirely without merit.

Notably, the answering defendant does not deny that the mortgagor received the loan proceeds, which inured to her benefit by virtue of, inter alia, the property transfer to her, or that she has defaulted on the mortgage loan payments in her affidavit (*see, Citibank, N.A. v Souto Geffen Co.*, 231 AD2d 466, 647 NYS2d 467 [1<sup>st</sup> Dept 1996]; *see also, Stern v Stern*, 87 AD2d 887, 449 NYS2d 534 [2d Dept 1982]). Thus, even when considered in the light favorable to the answering defendant, the opposing papers are insufficient to raise any genuine question of fact requiring a trial on the merits of the plaintiff's claims for foreclosure and sale (*see, Mishal v Fiduciary Holdings, LLC*, 109 AD3d 885, 971 NYS2d 334 [2d Dept 2013]; *Emigrant Mtge. Co., Inc. v Beckerman*, 105 AD3d 895, 964 NYS2d 548 [2d Dept 2013]; *Horizons Invs. Corp. v Breceovich*, 104 AD3d 475, 961 NYS2d 112 [1<sup>st</sup> Dept 2013]; *Layden v Boccio*, 253 AD2d 540, 686 NYS2d 763 [2d Dept 1998]). The plaintiff, therefore, is awarded summary judgment in its favor against the answering defendant (*see, Federal Home Loan Mtge. Corp. v Karastathis*, 237 AD2d 558, 655 NYS2d 631 [2d Dept 1997]; *see generally, Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Accordingly, the answer is stricken and the affirmative defenses 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 excising the fictitious defendants, John Doe and Jane Doe, is granted (*see, Deutsche Bank Nat. Trust Co. v Islar*, 122 AD3d 566, 996 NYS2d 130 [2d Dept 2014]; *PHH Mtge. Corp. v Davis*, 111 AD3d 1110, 975 NYS2d 480 [3d Dept 2013]; *Flagstar Bank v Bellafigliore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *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. All future proceedings shall be captioned accordingly.

By its moving papers, the plaintiff established the default in answering on the part of the remaining defendants, People of the State of New York and United States of America (*see, RPAPL § 1321; HSBC Bank USA, N.A. v Alexander*, 124 AD3d 838, \_\_\_ NYS2d \_\_\_, 2015 NY Slip Op 00728 [2d Dept, Jan. 28, 2015]; *U.S. Bank, N.A. v Razon*, 115 AD3d 739, 981 NYS2d 571 [2d Dept 2014]; *Wells Fargo Bank, N.A. v Ambrosov*, 120 AD3d 1225, 993 NYS2d 322 [2d Dept 2014]; *HSBC Bank USA, N.A. v Roldan*, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the defaults of all such defendants are fixed and determined. Since the plaintiff has been awarded summary judgment against the answering defendant 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*

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*of E. Asia v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]). Those portions of the instant motion wherein the plaintiff demands such relief are thus granted.

According to the court's records, a foreclosure settlement conference was conducted on June 30, 2014 in the mortgage foreclosure part of this court. On the aforesaid date, this case was marked to indicate that the answering defendant was not eligible for a conference of the type contemplated by CPLR 3408. Accordingly, no further conference is required. Under these circumstances, the plaintiff is entitled to the issuance of an order or reference as set forth in the plaintiff's cause of action for a judgment of foreclosure and sale and a deficiency judgment.

The proposed order appointing a referee to compute, as modified by the court, has been signed concurrently herewith.

Dated: April 17, 2015

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

       FINAL DISPOSITION      X   NON-FINAL DISPOSITION