

Wells Fargo Bank N.A. v Shapiro

2015 NY Slip Op 31375(U)

April 10, 2015

Supreme Court, Suffolk County

Docket Number: 19051-12

Judge: Jr., Andrew G. Tarantino

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[* 1]

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SHORT FORM ORDER

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ORIGINAL
WHEN BLUE

SUPREME COURT - STATE OF NEW YORK
IAS PART 50 - SUFFOLK COUNTY

PRESENT: Hon. ANDREW G. TARANTINO JR.

Acting Supreme Court Justice

Motion Date: 3-18-14

Adj. Date: _____

Mot. Seq. # 001-MotD

WELLS FARGO BANK NA,

Plaintiff,

KOZNEY, MCCUBBIN & KATZ, LLP
Attorney for Plaintiff
395 North Service Rd., Suite 401
Melville, N. Y. 11747

-against-

JOANN F. SHAPIRO
Defendant Pro Se
55 East Chanel Drive
Shirley, N. Y. 11967

LOUIS SHAPIRO, JOANN F. SHAPIRO, BEAULIEU,
A DIVISION OF MOHAWK CARPET CORPORATION,
TOWN SUPERVISOR TOWN OF BROOKHAVEN, and
"JOHN DOE" and "JANE DOE", the last two names
being fictitious, said parties intended being tenants
or occupants, if any, having or claiming an interest in,
or lien upon t he premises described in the complaint,

LOUIS SHAPIRO
Defendant Pro Se
55 East Chanel Drive
Shirley, N. Y. 11967

Defendants.

Upon the following papers numbered 1 to 17 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 7; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 8 - 13; Replying Affidavits and supporting papers 14 - 17; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the plaintiff for an order awarding it summary judgment against the answering defendants and default judgments against the remaining defendants joined by service of process, identifying and/or deleting unknown defendants, amending the caption, and for an order appointing a referee to compute, is considered under CPLR 3212, 3215, 1003 and RPAPL §1321, and is determined as set forth 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 with 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 file proof of filing of an additional or a successive notice of pendency with the proposed judgment of foreclosure (*see*, CPLR 6513; 6516[a]; *Aames 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 within 30 days of the entry date of this order, plaintiff shall serve a copy of the order of reference with notice of entry upon all parties who have appeared in this action and not waived further notice, and thereafter file the affidavit 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 defendants Louis Shapiro and Joann F. Shapiro (the defendant mortgagors); (2) fixing the defaults in answering of the remaining defendants; (3) substituting one or more occupants found at the premises for unknown defendants named in the caption and/or otherwise deleting 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 determined.

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, Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753, 915 NYS2d 569 [2d Dept 2011]; *Zanfini v Chandler*, 79 AD3d 1031, 912 NYS2d 911 [2d Dept 2010] *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, PHH Mtge. Corp. v Israel*, 120 AD3d 1329, 992 NYS2d 355 [2d Dept 2014]; *Wachovia Bank, N.A. v Carcano*, 106 AD3d 724, *supra*; *U.S. Bank N.A. v Tate*, 102 AD3d 859, 958 NYS2d 722 [2d Dept 2013]). 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.

By its submissions, the plaintiff further demonstrated that the affirmative defenses asserted in the defendant mortgagors' 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 Am., 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]; *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]).

Since the plaintiff duly demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted to the defendant mortgagors (*see, HSBC Bank USA v Merrill*, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]). Accordingly, it was incumbent upon the defendant mortgagors 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]; *Washington Mut. Bank, F.A. v O'Connor*, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]; *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, 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, 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 [1st Dept 2012]; *Argent Mtge. Co., LLC v Mentosana*, 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]).

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In opposition to the motion, the defendant mortgagors have offered no proof or arguments in support of any of their pleaded defenses, except as to their efforts to enter into a loan modification or to otherwise take steps in an attempt to avoid further foreclosure proceedings. The failure by the answering defendants to raise and/or assert each of their 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 defendant mortgagors' unsupported affirmative defenses are thus dismissed.

Mr. Shapiro's contentions concerning the defendant mortgagors' past attempts to obtain a loan modification and their efforts to now sell the property by way of short sale are unavailing because a foreclosing plaintiff has no obligation to modify the terms of its loan before or after a default in payment (*see, Wells Fargo Bank, N.A. v Van Dyke*, 101 AD3d 638, *supra*; *EMC Mtge. Corp. v Stewart*, 2 AD3d 772, 769 NYS2d 408 [2d Dept 2003]; *United Cos. Lending Corp. v Hingos*, 283 AD2d 764, 724 NYS2d 134 [3d Dept 2001]; *First Fed. Sav. Bank v Midura*, 264 AD2d 407, 694 NYS2d 121 [2d Dept 1999]; *LoanCare v Koullias*, 2014 NY Misc LEXIS 5047, 2014 WL 6775807, 2014 NY Slip Op 32979 [U] [Sup Ct. Suffolk County 2014]; *Bank of Am., N.A. v Donati*, 2014 NY Misc LEXIS 2383, 2014 WL 6775807, 2014 NY Slip Op 31384 [U] [Sup Ct, Suffolk County 2014]). Further, 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 Am., N.A. v Lucido*, 114 AD3d 714, 715-16, *supra*, quoting *Wells Fargo Bank, N.A. v Van Dyke*, 101 AD3d 638, *supra* at 638). The plaintiff also has no obligation to permit the defendant mortgagors to sell the property by way of a short sale because the same is not a defense to a foreclosure action (*see, Residential Credit Solutions, Inc. v Lalji*, 39 Misc3d 1218 [A], 975 NYS2d 369 [Sup Ct, Queens County 2013]). Instead, the defendant mortgagors are required to comply with the redemption requirements mandated by RPAPL § 1341 in order to redeem the property prior to foreclosure. The remaining contentions advanced by the defendant mortgagors in opposition to the plaintiff's motion are similarly without merit.

Notably, the defendant mortgagors do not deny that they received the loan proceeds, or that they have defaulted on the mortgage loan payments in the opposing papers (*see, Citibank, N.A. v Souto Geffen Co.*, 231 AD2d 466, 647 NYS2d 467 [1st 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 defendant mortgagors, 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, Deutsche Bank Natl. Trust Co. v Islar*, 122 AD3d 566, 996 NYS2d 130 [2d Dept 2014]; *Bank of Smithtown v 219 Sagg Main, LLC*, 107 AD3d 654, 968 NYS2d 95 [2d Dept 2013]; *Emigrant Mtge. Co., Inc. v Beckerman*, 105 AD3d 895, 964 NYS2d 548 [2d Dept 2013]; *U.S. Bank Trust N.A. Trustee v Butti*, 16 AD3d 408, 792 NYS2d 505 [2d Dept 2005]).

The opposing papers are also insufficient to demonstrate any bona fide defenses (*see, CPLR 3211[e]*; *Rimbambito, LLC v Lee*, 118 AD3d 690, 986 NYS2d 855 [2d Dept 2014]; *American Airlines Fed. Credit Union v Mohamed*, 117 AD3d 974, 986 NYS2d 530 [2d Dept 2014];

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Washington Mut. Bank v Schenk, 112 AD3d 615, *supra*; *US Bank N.A. v Slavinski*, 78 AD3d 1167, 912 NYS2d 285 [2d Dept 2010]; *Cochran Inv. Co., Inc. v Jackson*, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007]). The plaintiff, therefore, is awarded summary judgment in its favor against the defendant mortgagors (*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 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, PHH Mtge. Corp. v Davis*, 111 AD3d 1110, 975 NYS2d 480 [3d Dept 2013]; *Flagstar Bank v Bellafiore*, 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, Beaulieu, A Division of Mohawk Carpet Corporation and Town of Brookhaven sued herein as "Town Supervisor Town of Brookhaven" (*see, RPAPL § 1321; 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 defendant mortgagors 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]). Those portions of the instant motion wherein the plaintiff demands such relief are thus granted.

In compliance with CPLR 3408, a series of foreclosure settlement conferences were conducted on January 22 and April 18, 2013 in the specialized mortgage foreclosure part of this court. On July 10, 2013, this case was marked to indicate that the defendant mortgagors failed to appear at the conference or otherwise participate in the same. Accordingly, the requirements of CPLR 3408 have been satisfied and no further conference is required under any statute, law or rule. Under these circumstances, the plaintiff is entitled to the issuance of an order of 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 10 2015



Hon. ANDREW G. TARANTINO, A.J.S.C.

___ FINAL DISPOSITION ___ X NON-FINAL DISPOSITION