

Citimortgage, Inc. v Machado
2015 NY Slip Op 31623(U)
April 23, 2015
Supreme Court, Suffolk County
Docket Number: 22840-11
Judge: Ralph T. Gazzillo
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SUPREME COURT - STATE OF NEW YORK
IAS PART 6 - SUFFOLK COUNTY

PRESENT: Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 11-14-13
ADJ. DATE _____
Mot. Seq. #001-MotD

CITIMORTGAGE, INC.
1000 Technology Drive
O Fallon, MO 63368-2240

SWEENEY, GALLO, REICH
& BOLZ, LLP
Attorneys for Plaintiff
95-25 Queens Blvd., 11th floor
Rego Park, N. Y. 11374

Plaintiff,

-against-

JOHN MACHADO, NY FINANCIAL SERVICES LLC,
TOWN SUPERVISOR TOWN OF ISLIP,

ADAM C. GOMERMAN, ESQ.
Attorney for Defendant
John Machado
807 E. Jericho Turnpike
Huntington Sta., N. Y. 11746

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.

_____ x

Upon the following papers numbered 1 to 12 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers _____; Other _____; (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 John Machado, 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 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.

This is an action to foreclose a mortgage on real property known as 939 Americus Avenue, East Patchogue, New York 11772. On April 14, 2009, the defendant John Machado (the defendant mortgagor) executed a fixed-rate note in favor of CitiMortgage, Inc. (the plaintiff) in the principal sum of \$176,739.00. To secure said note, the defendant mortgagor gave the plaintiff a mortgage also dated April 14, 2009 on the property. The mortgage indicates that Mortgage Electronic Registration Systems, Inc. (MERS) was acting solely as a nominee for the plaintiff and its successors and assigns and that, for the purposes of recording the mortgage, MERS was the mortgagee of record. By way of an assignment executed on June 24, 2011 and a duplicate assignment executed on June 28, 2011, the mortgage was transferred to the plaintiff. The initial assignment and the duplicate assignment were subsequently duly recorded in the Suffolk County Clerk's Office.

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 May 1, 2010, and each month thereafter. After the defendant mortgagor allegedly failed to cure his default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on July 14, 2011. Issue was joined by the interposition of the defendant mortgagor's answer dated July 20, 2011. By his answer, the defendant mortgagor denies some of the allegations contained in the complaint, and admits other allegations therein, including the execution of the note and the property address. The defendant mortgagor also asserts five affirmative defenses, alleging, inter alia, the following: the lack of personal jurisdiction; the failure to state a cause of action; a fatally defective complaint; payment; and breach of contract. The defendant Town Supervisor Town of Islip (Islip) appeared herein and waived all, but certain, notices. The remaining defendants have neither answered, nor appeared herein.

In compliance with CPLR 3408, a settlement conference was held before the specialized foreclosure conference part on February 14, 2013; however, on that date, this action was dismissed from the conference program because the defendant mortgagor failed to attend or otherwise participate. Accordingly, no further conference is required under any statute, law or rule.

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 his answer and dismissing the affirmative defenses 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. No opposition has been filed in response to this motion.

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, the assignments 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 an affidavit from its representative wherein it is alleged that it was the holder of the note on the date of commencement (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]; see also, *Suntrust Mtge., Inc. v Andriopoulos*, 39 Misc 3d 1208(A), 971 NYS2d 75 [Sup Court, Suffolk County 2013]). Therefore, it appears that the plaintiff is also the owner and the holder of the original note and the assignee of the mortgage by virtue of the written assignments. 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 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, *Bank of N.Y. Mellon v Scura*, 102 AD3d 714, 961 NYS2d 185 [2d Dept 2013]; *Scarano v Scarano*, 63 AD3d 716, 880 NYS2d 682 [2d Dept 2009] [process server's sworn affidavit of service is prima facie evidence of proper service]; *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] [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]). Furthermore, "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]).

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 unopposed motion (*see, Flagstar Bank v Bellafore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Argent Mtge. Co., LLC v Mentasana*, 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*; *U.S. Bank N.A. v Slavinski*, 78 AD3d 1167, 912 NYS2d 285 [2d Dept 2010]). In any event, the failure by the defendant mortgagor to raise and/or assert each of his pleaded defenses 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 Bellafore*, 94 AD3d 1044, *supra*; *Argent Mtge. Co., LLC v Mentasana*, 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 substituting “Jane” Machado #1 and “Jane” Machado #2 for the fictitious defendant, John Doe, and excising the remaining descriptive wording related thereto is granted (*see, PHH Mtge. Corp. v Davis*, 111 AD3d 1110, 975 NYS2d 480 [3d Dept 2013]; *Flagstar Bank v*

