

<b>PHH Mtge. Corp. v Galeja</b>
2015 NY Slip Op 32257(U)
October 30, 2015
Supreme Court, Suffolk County
Docket Number: 17726-12
Judge: Jr., Andrew G. Tarantino
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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: 10-20-14  
Adj. Date: \_\_\_\_\_  
Mot. Seq. #001-MotD

\_\_\_\_\_  
PHH Mortgage Corporation

Plaintiff,

-against-

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Rochester, N.Y. 14624

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Nicholas C. Galeja a/k/a Nicholas Galeja;  
RBS Citizens, N.A., and "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 18 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers \_\_\_\_; Answering Affidavits and supporting papers 12 - 14; Replying Affidavits and supporting papers 15 - 18; 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 defendant 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, leave to renew upon proper documentation for same at the time of submission of the judgment; and it is

**ORDERED** that the caption is amended by substituting Elizabeth Galeja for the fictitious "JOHN DOE" defendant; 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 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 defendant Nicholas C. Galeja (the defendant mortgagor); (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.

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 an affidavit from its officer wherein it is alleged that it is also known as Coldwell Banker Mortgage (hereinafter "CBM"), the originating lender/mortgagee (*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]). Additionally, plaintiff's submissions include, inter alia, a copy of a certificate executed on April 26, 2006 by Bradley I. Abelow, State Treasurer, Department of Treasury, State of New Jersey, and a certificate executed on September 30, 2009 by Rholda L. Ricketts, Deputy Superintendent of Banks on behalf of Richard H. Neiman, Superintendent of Banks. The certificates show that plaintiff's alternate name is CBM and that plaintiff and CBM were authorized to carry on the business of a licensed mortgage banker under, among other things, either name. 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 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

PHH Mortgage Corporation v Galeja, et. al.

Index No.: 17726-12

Pg. 3

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 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]; *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 Mgt. 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]).

In opposition to the motion, the defendant mortgagor has offered no proof or arguments in support of any of his pleaded defenses, except as to the plaintiff's alleged lack of standing. The failure by the defendant mortgagor to raise and/or assert each of his 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 mortgagor's unsupported affirmative defenses are thus dismissed.

In response to the motion, the defendant mortgagor has not shown any valid basis to argue that the subject note and mortgage produced herein by plaintiff were not the actual loan instruments executed by

PHH Mortgage Corporation v Galeja, et. al.

Index No.: 17726-12

Pg. 4

him (*see, JPMorgan Chase Bank, N.A. v Bauer*, 92 AD3d 641, 938 NYS2d 190 [2d Dept 2012]). The defendant mortgagor has not supplied any documentary evidence that would raise a question of fact as to whether plaintiff is not the lawful owner or holder of the note and mortgage (*see, Peak Fin. Partners, Inc. v Brook*, 119 AD3d 539, 987 NYS2d 916 [2d Dept 2014]; *cf., Countrywide Home Loans, Inc. v Gress*, 68 AD3d 709, 888 NYS2d 914 [2d Dept 2009]).

Notably, the defendant mortgagor did not deny that he received the loan proceeds and that he has defaulted on his loan payments in an affidavit made by him (*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]). In any event, the affirmation of defendant mortgagor's attorney, who has no personal knowledge of the operative facts, is without probative value and insufficient to defeat the motion (*see, Matter of Ziomek*, 40 AD3d 774, 833 NYS2d 906 [2d Dept 2007]; *Barcov Holding Corp. v Bexin Realty Corp.*, 16 AD3d 282, 792 NYS2d 408 [1<sup>st</sup> Dept 2005]; *see also, US Natl. Bank Assn. v Melton*, 90 AD3d 742, 934 NYS2d 352 [2d Dept 2011]).

Thus, even when considered in the light favorable to the defendant mortgagor, 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, 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]). The opposition papers are also insufficient to demonstrate any bona fide defenses (*see, CPLR 3211 [e]; American Airlines Fed. Credit Union v Mohamed*, 117 AD3d 974, 986 NYS2d 530 [2d Dept 2014]; *Washington Mut. Bank v Schenk*, 112 AD3d 615, 975 NYS2d 902 [2d Dept 2013]; *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 is therefore awarded summary judgment in its favor against the defendant mortgagor (*see, Federal Home Loan Mtge. Corp. v Karastathis*, 237 AD2d 558, 655 NYS2d 631 [2d Dept 1997]). Accordingly, the defendant mortgagor's answer is stricken, and the affirmative defenses set forth therein are dismissed in their entirety.

The branch of the instant motion, wherein plaintiff seeks an order pursuant to CPLR 1024 amending the caption by substituting Elizabeth Galeja for the fictitious "JOHN DOE" defendant is granted (*see, PHH Mtge. Corp. v Davis*, 111 AD3d 1110, 975 NYS2d 480 [3d Dept 2013]; *Neighborhood Hous. Servs. of N.Y. City, Inc. v Meltzer*, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]). By its submissions, plaintiff established the basis for the above-noted relief. All future proceedings shall be captioned accordingly.

By its moving papers, plaintiff established the default in answering on the part of the remaining defendants, Elizabeth Galeja and RBS Citizens, N.A. (*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.

In compliance with CPLR 3408, a series of settlement conferences were conducted or adjourned before the specialized foreclosure conference part beginning on September 28, 2012 through to May 14,

PHH Mortgage Corporation v Galeja, et. al.

Index No.: 17726-12

Pg. 5

2013. A representative of plaintiff appeared at all of the conferences. On the last date, this action was dismissed from the foreclosure program because the parties were unable to modify the loan or otherwise settle this action. Accordingly, no further conference is required under any statute, law or rule.

In light of the foregoing, 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]).

The proposed order of reference, as modified by the Court, has been signed concurrently with this order.

Dated: 10/30/2015

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

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