

BAC Home Loan Servicing LP v Gurvich
2015 NY Slip Op 32494(U)
December 9, 2015
Supreme Court, Suffolk County
Docket Number: 15510-11
Judge: Emily Pines
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SHORT FORM ORDER

INDEX NUMBER: 15510-11

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 23, SUFFOLK COUNTY

COPY

Present: Hon. EMILY PINES
 J. S. C.

Original Motion Date: 10-2-14
 Motion Submit Date: 10-30-15
 Motion Sequence No.: 001

[] FINAL
 [x] NON FINAL

BAC Home Loan Servicing LP, f/k/a
Countrywide Home Loans Servicing LP,

Plaintiff,

- against -

Robert G. Gurvich, The People of the State of
New York, Berkoski Enterprises, Inc., Citibank
(South Dakota), N.A., Adam Kelson, and
"JOHN DOE #1" through "JOHN DOE #10",
the last ten names being fictitious and unknown
to the plaintiff, the person or parties, if any,
having or claiming an interest in or lien upon
the mortgaged premises described in the
Complaint,

Defendants.

 X

Attorney for Plaintiff

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Attorney for Defendant

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Upon the following papers numbered 1 to 26 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 13; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 14 - 19; Replying Affidavits and supporting papers 20 - 24; Other Letters 25 - 26; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by plaintiff for, inter alia, an order awarding summary judgment in its favor and against defendant Robert Gurvich, appointing a referee, amending the caption, and consolidating this action with another action entitled, ***BAC Home Loan Servicing LP f/k/a Countrywide Home Loans Servicing LP v Gurvich, et. al.***, and filed under Suffolk County Index No.: 30716-12, is granted; and it is

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ORDERED that the action filed under Index No.: 30716-12 is consolidated with this action under Index No.: 15510-11, so that all matters are now under Index No.: 15510-11; and it is

ORDERED that the caption of this action hereinafter appear as follows:

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF SUFFOLK

Bank of America, N.A.,

Plaintiff,

-against-

Robert G. Gurvich, The People of the State of New York,
Berkoski Enterprises, Inc., Citibank (South Dakota), N.A.
Adam Kelinson and Cedric Declarok,

Defendants.

ORDERED that plaintiff shall serve a copy of this order, inter alia, amending the caption upon the Calendar Clerk of this Court; and it is

ORDERED that plaintiff shall 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 shall promptly file the affidavits of service with the Clerk of the Court; and it is further

ORDERED that the County Clerk is directed to consolidate the action filed under Index No.: 30716-12, all documents relating to both actions filed under Index No.: 15510-11.

This is an action to foreclose a mortgage on real property situate in Suffolk County, New York. By its submissions, plaintiff established its prima facie entitlement to summary judgment on the complaint (*see*, CPLR 3212; RPAPL § 1321; *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]). Plaintiff produced, inter alia, the note and mortgage, the assignment 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]). Furthermore, plaintiff submitted proof that it was the owner/holder of the note at the time of commencement, and therefore has standing to bring this action (*see*, Banking Law § 602; *Ladino v Bank of Am.*, 52 AD3d 571, 861 NYS2d 683 [2d Dept 2008]; *see also*, *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]; *Wells Fargo Bank, N.A. v Zeyala*, 47 Misc3d 1228 [A], 2015 NY Slip Op 50870 [Sup Ct, Suffolk County 2015]; *Suntrust Mtge., Inc. v*

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Andriopoulos, 39 Misc3d 1208 [A], 971 NYS2d 75 [Sup Court, Suffolk County 2013]; *HSBC Bank USA, N.A. v Avila*, 2013 NY Misc LEXIS 4521, 2013 WL 5606741, 2013 NY Slip Op 32412 [U] [Sup Ct, Suffolk County 2013]).

It was thus incumbent upon answering defendant to submit proof sufficient to raise a genuine question of fact rebutting plaintiff's prima facie showing or in support of the affirmative defenses asserted in the answer (*see, Grogg v South Rd. Assoc., LP*, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; *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]).

In opposition to this motion, answering defendant has filed, inter alia, the affirmation of counsel and a memorandum of law. In response, the plaintiff has filed reply papers. The assertions by answering defendant concerning plaintiff's alleged lack of standing, which rest, inter alia, upon MERS' alleged inability to assign the note are misplaced because plaintiff demonstrated that it was the holder of the note at the time of commencement, by the submission of, inter alia, the affidavit of its officer, the endorsed note, and the assignment of the mortgage and evidence of the merger of the originating lender with plaintiff (*see, Banking Law* § 602; *Ladino v Bank of Am.*, 52 AD3d 571, *supra*; *see also, Kondaur Capital Corp. v McCary*, 115 AD3d 649, *supra*). Furthermore, MERS, as the disclosed nominee of the lender, had the authority to assign the mortgage (*see, Bank of New York v Silverberg*, 86 AD3d 274, 926 NYS2d 532 [2d Dept 2011]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]).

In response, answering defendant has not shown any valid basis to argue that the subject note produced herein by plaintiff was not the actual loan instrument executed by him (*see, JPMorgan Chase Bank, N.A. v Bauer*, 92 AD3d 641, 938 NYS2d 190 [2d Dept 2012]). Answering defendant also 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]).

In any event, the affirmation of answering defendant'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 [1st Dept 2005]; *see also, US Natl. Bank Assn. v Melton*, 90 AD3d 742, 934 NYS2d 352 [2d Dept 2011]). Answering defendant, therefore, failed to establish the merit of his defense based upon plaintiff's alleged lack of standing.

Contrary to answering defendant's contentions, the motion for summary judgment made by plaintiff imposed an automatic stay of discovery (*see, CPLR* 3214 [b]; *Schiff v Sallah Law Firm, P.C.*, 128 AD3d 668, 7 NYS3d 587 [2d Dept 2015]). In any event, answering defendant's argument that discovery is required is without merit because he failed to demonstrate that he made reasonable attempts to discover the facts which would give rise to a triable issue of fact or that further discovery might lead to relevant evidence (*see, CPLR* 3212 [f]; *Seaway Capital Corp. v 500 Sterling Realty Corp.*, 94 AD3d 856, 941 NYS2d 871 [2d Dept 2012]; *Swedbank, AB, N.Y. Branch v Hale Ave.*

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Borrower, LLC, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]; *JP Morgan Chase Bank v Agnello, N.A.*, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]). Mere hope and speculation that additional discovery might yield evidence sufficient to raise a triable issue of fact is not a basis for denying summary judgment (*Lee v T.F. DeMilo Corp.*, 29 AD3d 867, 868, 815 NYS2d 700 [2d Dept 2006]; *Sasson v Setina Mfg. Co., Inc.*, 26 AD3d 487, 488, 810 NYS2d 500 [2d Dept 2006]).

Thus, even when considered in the light favorable to answering defendant, the opposing papers submitted by him are insufficient to raise any genuine question of fact requiring a trial on the merits of 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]). Notably, answering defendant did not deny having received the loan proceeds and having defaulted on his 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]). The court has considered the remainder of answering defendant's contentions and finds that they are entirely without merit.

Plaintiff is therefore awarded summary judgment in its favor against answering defendant (see, *Federal Home Loan Mtge. Corp. v Karastathis*, 237 AD2d 558, 655 NYS2d 631 [2d Dept 1997]). Accordingly, the answer is stricken and the affirmative defenses set forth therein are dismissed.

Those portions of the instant motion wherein plaintiff seeks an order excising as party defendants the unknown defendants listed in the caption and an amendment of the caption to reflect the same 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]).

The branch of the motion wherein plaintiff seeks an order pursuant to CPLR 1021 substituting Bank of America, N.A. as plaintiff for it is granted (see, CPLR 1018; 3025[c]; *Citibank, N.A. v Van Brunt Props., LLC*, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]; see also, *IndyMac Bank F.S.B. v Thompson*, 99 AD3d 669, 952 NYS2d 86 [2d Dept 2012]; *Greenpoint Mtge. Corp. v Lamberti*, 94 AD3d 815, 941 NYS2d 864 [2d Dept 2012]; *Maspeth Fed. Sav. & Loan Assn. v Simon-Erdan*, 67 AD3d 750, 888 NYS2d 599 [2d Dept 2009]). The caption shall be amended accordingly.

By its moving papers, plaintiff established the default in answering on the part of the remaining defendants (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.

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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]; ***Bank of E. Asia v Smith***, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

The branch of the motion for consolidation of the action filed under Index No.: 30716-12 with this action is granted in light of the common questions of law and fact in both actions (*see*, CPLR 602). Accordingly, this motion by plaintiff for, inter alia, an order awarding it summary judgment and other relief is granted.

The proposed order of reference, as modified by the court, has been issued with this decision.

Dated: **12-9-15**
Riverhead, New York


Hon. EMILY PINES
J. S. C.