

US Bank N.A. v Blake-Hovanec
2015 NY Slip Op 32689(U)
January 23, 2015
Supreme Court, Suffolk County
Docket Number: 12-31419
Judge: Marlene L. Budd
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SHORT FORM ORDER

INDEX No. 12-31419

SUPREME COURT - STATE OF NEW YORK
PART 26 - SUFFOLK COUNTY

PRESENT:

Hon. MARLENE BUDD
Acting Justice of the Supreme Court

MOTION DATE 8-24-13
MOTION DATE 10-15-13
MOTION DATE 1-21-14
ADJ. DATE _____
Mot. Seq. # 001 - MotD
Mot. Seq. # 002 - XMD
Mot. Seq. # 003 - MG

US BANK NATIONAL ASSOCIATION, AS
TRUSTEE, FOR CHASE MORTGAGE FINANCE
CORPORATION MULTI-CLASS MORTGAGE
PASS THROUGH CERTIFICATES SERIES 2006-S1

Plaintiff,

- against -

CHRISTINA BLAKE-HOVANEC; LAW OFFICES
OF MELVIN H BERNHEIMER, P.C. AND DENISE
LUPARELLO, P.C.; JPMORGAN CHASE BANK,
NA; "JOHN DOES" and "JANE DOES", said names
being fictitious, parties intended being possible tenants
or occupants of premises, and corporations, other
entities or persons who claim, or may claim, a lien
against the premises,

Defendants.

ROSICKI, ROSICKI & ASSOCIATES, P.C.
Attorneys for Plaintiff
51 E Bethpage Road
Plainview, New York 11803

CHRISTINA BLAKE-HOVANEC
Defendant Pro Se
20 Mason Court
East Northport, New York 11731

KEANE & BERNHEIMER, PLLC
Attorneys for Defendant Melvin H.
Bernheimer, P.C.
40 Saw Mill River Road - Suite UL1
Hawthorne, New York 10532

WILLIAM MCDONALD, P.C.
Attorney for Defendant Denise Luparello, P.C.
666 Old Country Road, Suite 305
Garden City, New York 11530

Upon the following papers numbered 1 to 38 read on this motion for summary judgment and an order of reference: Notice of Motion (001) and supporting papers 1 - 13; Notice of Cross Motion (002) and supporting papers 14 - 16; Affirmation in Opposition to motion for default judgment and Cross Motion (Bernheimer) and supporting papers 17 - 21; Affirmation in Opposition to default judgment and Cross Motion (McDonald) and supporting papers 22 - 24; Affirmation in Opposition to Cross Motion 25 - 26; Affidavit in further support of Cross Motion 27 - 29; Notice of Motion (003) and supporting papers 30 - 36; Affirmation in Response 37 - 38; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (001) by plaintiff, US Bank National Association, as Trustee, for Chase Mortgage Finance Corporation Multi-Class Mortgage Pass Through Certificates Series 2006-S-I (US Bank) and the motion (003) brought on by defendant, Law Offices of Melvin H. Bernheimer, P.C., are consolidated for purposes of this determination; and it is further

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ORDERED that the motion (001) by plaintiff, US Bank, for an order pursuant to CPLR 3212 granting summary judgment in its favor against defendant Christina Blake-Hovanec (hereinafter referred to as defendant), for leave to amend the caption, and for an order of reference pursuant to RPAPL 1321 is granted; and it is further

ORDERED that the branch of motion (001) by plaintiff for an order fixing the defaults of the non-appearing, non-answering defendants, is granted as to JPMorgan Chase Bank, NA; and it is further

ORDERED that the branch of motion (001) by plaintiff for an order fixing the defaults of the non-appearing, non-answering defendants, is denied as to the Law Offices of Melvin H. Bernheimer, P.C. and Denis W. Luparello, P.C.; and it is further

ORDERED that the cross motion (002) by defendant for an order pursuant to CPLR 3212 dismissing the complaint due to a purported lack of standing on the part of the plaintiff or, in the alternative, for leave to serve an amended answer and other relief is considered under CPLR 3212 and 3025 and is denied; and it is further

ORDERED that the motion (003) by defendant Law Offices of Melvin H. Bernheimer, P.C. (Bernheimer) for an order pursuant to CPLR 3211(a)(5) and 3211(a)(7) dismissing defendant's cross-claim as against Bernheimer and dismissing the plaintiff's complaint as against Bernheimer is granted; and it is further

ORDERED that the caption is hereby amended by striking therefrom defendants "John Does" and "Jane Docs"; and it is further

ORDERED that the caption is further amended by striking therefrom defendants Bernheimer and Denis W. Luparello, P.C.; and it is further

ORDERED that plaintiff is directed to serve a copy of this order upon the Calendar Clerk of this Court; and it is further

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

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

US BANK NATIONAL ASSOCIATION, AS TRUSTEE,
FOR CHASE MORTGAGE FINANCE CORPORATION
MULTI-CLASS MORTGAGE PASS THROUGH
CERTIFICATES SERIES 2006-S1

Plaintiff,

- against -

CHRISTINA BLAKE-HOVANEC;
JPMORGAN CHASE BANK,

Defendants.
_____X

This is an action to foreclose a mortgage on property known as 20 Mason Court, East Northport, New York. On February 27, 2006, defendant executed a fixed rate note in favor of JPMorgan Chase Bank, N.A. (JPMorgan) agreeing to pay the sum of \$418,000.00 at the yearly interest rate of 6.750%. On said date, defendant also executed a mortgage in the principal sum of \$418,000.00 on the subject property. The mortgage was recorded on March 10, 2006 in the Suffolk County Clerk's Office. Thereafter, on May 3, 2012, the mortgage was transferred by assignment of mortgage from JPMorgan to plaintiff US Bank. The assignment of mortgage was recorded on June 5, 2012 with the Suffolk County Clerk's Office.

Plaintiff sent a notice of default on August 1, 2011 to defendant at her last known address, 20 Mason Court, East Northport, New York. As a result of her continuing default, plaintiff commenced this foreclosure action on October 10, 2012. In its complaint, plaintiff alleges in pertinent part that defendant breached her obligations under the terms of the note and mortgage by failing to pay the installment due on May 1, 2011 and subsequent payments thereafter. Defendant interposed an answer with affirmative defenses and a cross-claim.

The Court's computerized records indicate that a foreclosure settlement conference was held on April 12, 2013 at which time this matter was referred as an IAS case since a resolution or settlement had not been achieved. Thus, there has been compliance with CPLR 3408 and no further settlement conference is required.

Plaintiff now moves for summary judgment on its complaint. In support of its motion, plaintiff submits among other things, the affirmation of Andrew Morganstern, Esq. in support of the motion; the affirmation of Christine Krehl, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the affidavit of Ceedra D. Allen, vice president of JPMorgan; the pleadings; the note, mortgage and an assignment of mortgage; proof of notices pursuant to RPAPL 1320,

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1303 and 1304; affidavits of service of the summons and complaint; an affidavit of service of the instant summary judgment motion upon the defendants in this action; and, a proposed order appointing a referee to compute. Defendant has submitted a cross motion opposing plaintiff's motion and seeking an order dismissing the complaint on the grounds that plaintiff does not have standing.

"[I]n an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default" (*Republic Natl. Bank of N.Y. v O'Kane*, 308 AD2d 482, 764 NYS2d 635 [2d Dept 2003]; see *Argent Mtge. Co., LLC v Montesana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]; *Wells Fargo Bank, N.A. v Webster*, 61 AD3d 856, 877 NYS2d 200 [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'" (*U.S. Bank Natl. Assn. TR US 6/01/98 [Home Equity Loan Trust 1998-2] v Alvarez*, 49 AD3d 711, 711, 854 NYS2d 171 [2d Dept 2008], quoting *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 664 NYS2d 345 [2d Dept 1997], *lv to appeal dismissed* 91 NY2d 1003, 676 NYS2d 129 [1998]; see also *Emigrant Mtge. Co., Inc. v Beckerman*, 105 AD3d 895, 895, 964 NYS2d 548 [2d Dept 2013]).

Here, plaintiff has established its *prima facie* entitlement to summary judgment against the answering defendant as such papers included a copy of the mortgage, the assignments of mortgage, the unpaid note together with due evidence of defendant's default in payment under the terms of the loan documents (see *Jessabell Realty Corp. v Gonzales*, 117 AD3d 908, 985 NYS2d 897 [2d Dept 2014]; *Bank of New York Mellon Trust Co. v McCall*, 116 AD3d 993, 985 NYS2d 255 [2d Dept 2014]; *North Bright Capital, LLC v 705 Flatbush Realty, LLC*, 66 AD3d 977, 889 NYS2d 596 [2d Dept 2009]; *Countrywide Home Loans, Inc. v Delphonse*, 64 AD3d 624, 883 NYS2d 135 [2d Dept 2009]).

It was thus incumbent upon the answering defendant to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's *prima facie* showing or in support of the affirmative defenses asserted in her answer or otherwise available to her (see *Flagstar Bank v Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Grogg Assocs. v South Rd. Assocs.*, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; *Wells Fargo Bank v Karla*, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; *Washington Mut. Bank v O'Connor*, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]; *J.P. Morgan Chase Bank, N.A. v Agnello*, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; *Aames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]). Where a defendant fails to oppose some or all matters advanced on a motion for summary judgment, the facts as alleged in the movants' papers may be deemed admitted as 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 Enter., Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; *Argent Mtge. Co., LLC v Montesana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). A review of the opposing papers submitted by the defendant reveals that the same were insufficient to raise any genuine question 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 the plaintiff's claim for a judgment of foreclosure and sale (see *Emigrant Funding Corp. v Agard*, 121 AD3d 935, 995 NYS2d 154 [2d Dept 2014]; *Cochran Inv. Co., Inc. v Jackson*, 38 AD3d 704, 834 N.Y.S.2d 198 [2d Dept 2007]).

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Addressing defendant's opposition which raises an allegation of lack of standing, it is well established that "where a defendant does not challenge a plaintiff's standing, the plaintiff may be relieved of its obligation to prove that it is the proper party to seek the requested relief." (*Wells Fargo Bank Minnesota Natl. Assn. v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). The court further reasoned that "an argument that a plaintiff lacks standing, if not asserted in the defendant's answer or in a pre-answer motion to dismiss the complaint, is waived pursuant to CPLR 3211(e)" [citations omitted] (*see Wells Fargo Bank Minn., NA v Mastropaolo*, 42 AD3d 239; *see also US Bank, NA v Emmanuel*, 83 AD3d 1047, 921 NYS2d 320 [2d Dept 2011]; *Deutsche Bank Natl. Trust Co. v Hussain*, 78 AD3d 989, 912 NYS2d 595 [2d Dept 2010]; *Countrywide Home Loans Serv., LP v Albert*, 78 AD3d 983, 912 NYS2d 96 [2d Dept 2010]; *Deutsche Bank Natl. Trust Co. v Young*, 66 AD3d 819, 886 NYS2d 617 [2d Dept 2009] [standing issue unavailing on application to vacate default judgment]; *HSBC Bank, USA v Dammond*, 59 AD3d 679, 875 NYS2d 490 [2d Dept 2009] [waived standing issues does not constitute meritorious defense on application to vacate default]; *Ames Funding Corp. v Houston*, 57 AD3d 808, 872 NYS2d 134 [2d Dept 2008]). Based upon the foregoing, defendant's assertion of a standing defense is unavailing since the defendant waived such defense by failing to assert it in a timely pre-answer motion to dismiss or as an affirmative defense in an answer (*see Deutsche Bank Natl. Trust Co. v Young*, 66 AD3d 819).

As to defendant's application seeking leave to amend its answer, such is denied. Leave to amend a pleading should be "freely given absent prejudice or surprise" (*Rosicki, Rosicki & Assoc., P.C. v Cochems*, 59 AD3d 512, 873 NYS2d 184 [2d Dept 2009]) and "[a] court should not examine the merits or legal sufficiency of the proposed amendment unless it is palpably insufficient or patently devoid of merit on its face" (*Rosicki*, 59 AD3d 512; *see Greco v Christoffersen*, 70 AD3d 769, 896 NYS2d 363 [2d Dept 2010]). "A determination whether to grant such leave is within the Supreme Court's broad discretion, and the exercise of that discretion will not be lightly disturbed" (*Greco v Christoffersen*, 70 AD3d at 770, 896 NYS2d 363 [internal quotation marks omitted]). The movant, however, must make some evidentiary showing that the proposed amendment has merit or a proposed amendment will not be permitted (*see Buckholz v Maple Garden Apts., LLC*, 38 AD3d 584, 832 NYS2d 255 [2d Dept 2007]; *Curran v Auto Lab Serv. Cetr.*, 280 AD2d 636, 721 NYS2d 662 [2d Dept 2001]). In this instance, it is noted that defendant's original verified answer is dated October 26, 2012. Defendant, after a delay in excess of one year, seeks to file an amended answer without providing any explanation for such delay. Likewise, defendant's conclusory self-serving statement that "there is no prejudice or surprise to Plaintiff" fails to demonstrate by credible evidence a lack of prejudice to the plaintiff, who has already moved for summary judgment (*see generally Majestic Investors, Ltd. v Lopez*, 111 AD2d 844, 490 NYS2d 585 [2d Dept 1985]). Lastly, defendant has failed to show any meritorious grounds which would support an amended answer and moreover, has failed to annex a copy of the proposed amended answer to the cross-motion. "Motions for summary judgment may not be defeated merely by surmise, conjecture or suspicion" (*see Shaw v Time-Life Records*, 38 NY2d 201, 379 NYS2d 390 [1975]). Here, defendant has failed to demonstrate, through the production of competent and admissible evidence, a viable defense which could raise a triable issue of fact (*Deutsche Bank Natl. Trust Co. v Posner*, 89 AD3d 674, 933 NYS2d 52 [2d Dept 2011]). As such, her cross motion is denied in its entirety.

The application (003) by defendant Bernheimer is granted. Bernheimer and Denise Luparello, P.C. were named as defendants in the instant action as plaintiff's search of the real property records

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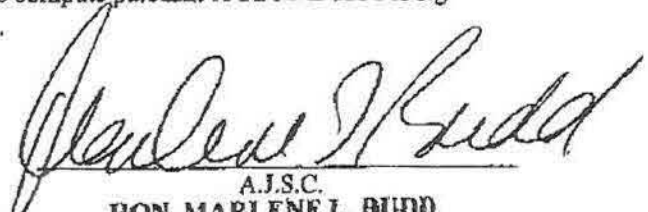
revealed that they had obtained a judgment against defendant Christina Blake-Hovanec in connection with a legal fee dispute. Said judgment was entered with the Suffolk County Clerk on December 27, 2010. Thereafter, by order dated May 11, 2011 (Pitts, J.), defendant Blake-Hovanec successfully moved to vacate the judgment against her. However, Blake-Hovanec, as the prevailing party, failed to take the necessary steps to remove the judgment from the rolls of the Suffolk County Clerk. As a result thereof, Bernheimer and Denise Luparello, P.C. remained necessary parties to this foreclosure action as judgment creditors when the action was commenced on October 10, 2012. On October 21, 2013 defendant Bernheimer docketed an order vacating the aforementioned judgment from the Suffolk County Clerk's rolls thereby extinguishing any claims that he and/or Denise Luparello, P.C. might have had in this action. As they are no longer necessary parties to this action, the action is discontinued as against defendants Bernheimer and Denise Luparello, P.C. on consent of the plaintiff.

Based upon the foregoing, the motion for summary judgment is granted against defendant Blake-Hovanec. That branch of the motion seeking to fix the defaults as against the remaining defendants who have not answered or appeared herein is granted as to defendant JPMorgan Chase Bank, NA. Plaintiff's request for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is also granted (see *Green Tree Serv. v Cary*, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]; *Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *Bank of East Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

Defendant's cross motion (002) is denied in its entirety. Defendant Bernheimer's motion (003) is granted to the extent reflected herein.

The proposed order appointing a referee to compute pursuant to RPAPL 1321 is signed simultaneously herewith as modified by the court.

Dated: 4/23/15



A.J.S.C.
HON. MARLENE L. BUDD

 FINAL DISPOSITION X NON-FINAL DISPOSITION