

**CitiMortgage, Inc. v Stines**

2016 NY Slip Op 32206(U)

September 15, 2016

Supreme Court, Suffolk County

Docket Number: 13-24873

Judge: Howard H. Heckman, Jr.

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**COPY**

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 18 - SUFFOLK COUNTY

**PRESENT:**

Hon. HOWARD H. HECKMAN JR.  
Justice of the Supreme Court

MOTION DATE 4-17-15 (001)  
MOTION DATE 5-15-15 (002)  
ADJ. DATE 5-15-15 (001)  
Mot. Seq. # 001 -MotD  
Mot. Seq. # 002 -XMD

-----X  
CITIMORTGAGE, INC.

Plaintiff,

- against -

PATRICIA A. STINES A/K/A PATRICIA A. PARISI; MANUEL CARVALHO; MARIA CARVALHO; CLERK OF THE RIVERHEAD TOWN JUSTICE COURT; PEOPLE OF THE STATE OF NEW YORK; TONY SANNS MUSIC STORE, INC DBA SOUND BEACH MUSIC; "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.  
-----X

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Attorneys for Plaintiff  
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ELIAS N. SAKALIS, ESQ.  
Attorney for Defendant  
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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the plaintiff, dated March 12, 2015, and supporting papers, (including Memorandum of Law dated March 12, 2015); (2) Notice of Cross Motion by the defendant Patricia A. Stines, dated April 30, 2015, and supporting papers; (3) Affirmation in Opposition/Reply by the plaintiff, dated May 12, 2015, and supporting papers, (including Memorandum of Law dated May 13, 2015); (4) Other: stipulation dated April 13, 2015; ~~(and after hearing counsels' oral arguments in support of and opposed to the motion);~~ and now it is

**ORDERED** that this motion (001) by the plaintiff, and the motion (002) by the answering defendant Patricia A. Stines, which was improperly labeled a cross motion, are consolidated for the purposes of this determination and decided herewith; and it is

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**ORDERED** that this motion (001) by the plaintiff for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor against the defendant Patricia A. Stines, striking her answer, and dismissing the counterclaims asserted 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 is determined as indicated 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 Louis Parisi for the fictitious defendants "JOHN DOES," and by excising the names of the remaining fictitious defendants JANE DOES" is granted; 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

CITIMORTGAGE, INC.

Plaintiff,

-against-

PATRICIA A. STINES A/K/A PATRICIA A. PARISI,  
MANUEL CARVALHO, MARIA CARVALHO, CLERK  
OF THE RIVERHEAD TOWN JUSTICE COURT;  
PEOPLE OF THE STATE OF NEW YORK; TONY  
SANN'S MUSIC STORE, INC. DBA SOUND BEACH  
MUSIC, and LOUIS PARISI,

Defendants; and it is

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

**ORDERED** that this motion (002) by the defendant Patricia A. Stines for, inter alia, an order: (1) pursuant to CPLR 3211 and 3212 dismissing the complaint insofar as asserted against her on the grounds that the plaintiff lacks standing; or, in the alternative, (2) allowing her to conduct discovery is denied in its entirety; and it is

**ORDERED** that the plaintiff shall serve a copy of this order with notice of entry upon Elias N. Sakalis, Esq., counsel for the defendant Patricia A. Stines pursuant to CPLR 2103 (b) (1), (2) or (3), and by regular mail upon all other parties, if any, who have appeared herein and not waived further notice within thirty (30) days of the date herein, and it shall promptly file the affidavits of service with the Clerk of the Court; and it is

**ORDERED** that the defendant Patricia A. Stines shall serve a copy of this order with notice of entry upon Locke Lord LLP, counsel for the plaintiff pursuant to CPLR 2103 (b) (1), (2) or (3), and by regular mail upon all other parties, if any, who have appeared herein and not waived further notice, within thirty (30) days of the date herein, and she shall promptly file the affidavits of service with the Clerk of the Court.

By its submissions, the 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]). In the instant case, the plaintiff produced, inter alia, the endorsed note, the 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]). The plaintiff also submitted an affidavit from its representative, wherein it is alleged that it was the holder of the note at the time of commencement (*see*, *Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 12 NYS3d 612 [2015]; *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]). The documentary evidence submitted also includes, among other things, the note transferred via a specific endorsement (*cf.*, *Slutsky v Blooming Grove Inn, Inc.*, 147 AD2d 208, 542 NYS2d 721 [2d Dept 1989]). In any event, the plaintiff's officer alleges that a copy of the note was annexed to the complaint as an exhibit at the initiation of this action (*see*, *Nationstar Mtge., LLC v Catizone*, 127 AD3d 1151, 9 NYS3d 315 [2d Dept 2015]; *Wells Fargo Bank, N.A. v Burke*, 34 NYS3d 865, 2016 NY Slip Op 26181 [Sup Ct, Suffolk County 2016]; *see also*, *Bank of N.Y. Mellon Trust Co. NA v Sachar*, 95 AD3d 695, 943 NYS2d 893 [2d Dept 2012]; *cf.*, *Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680, 954 NYS2d 551 [2d Dept 2012]). Such evidence demonstrates that the plaintiff holds the original note and mortgage. Therefore, it appears that the plaintiff is 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 remaining affirmative defenses and the counterclaims set forth in the 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*, *Gillman v Chase Manhattan Bank, N. A.*, 73 NY2d 1, 537 NYS2d 787 [1988] [unconscionability generally not a defense]; *Emigrant Mtge. Co., Inc. v Fitzpatrick*, 95 AD3d 1169, 945 NYS2d 697 [2d Dept 2012] [an affirmative defense asserting violations of General Business Law § 349 and/or engagement in deceptive business practices lacks merit where, inter alia, clearly written loan documents describe the terms of the loan]; *HSBC Bank USA v Picarelli*, 36 Misc3d 1218 [A], 959 NYS2d 89, *affd on other grounds* by 110 AD3d 1031, 974 NYS2d 90 [2d Dept 2013] [TILA requirements satisfied where the lender provided the required information

and forms to the obligor at the closing]). Further, a borrower may not properly claim to have reasonably relied on representations that are plainly at odds with the loan documents governing the terms of the loan (*Aurora Loan Servs., LLC v Enaw*, 126 AD3d 830, 831, 7 NYS3d 146 [2d Dept 2015]), and “a party who signs a document without any valid excuse for having failed to read it is ‘conclusively bound’ by its terms” (see, *Patterson v Somerset Invs. Corp.*, 96 AD3d 817, 817, 946 NYS2d 217 [2d Dept 2012]).

To the extent that the answering defendant alleges fraud in the inducement, generally, a representation by a lender that a borrower can afford to repay a prospective loan is an expression of opinion of present or future expectations, which is not actionable and cannot form the basis for a claim against the lender (see, *Goldman v Strough Real Estate*, 2 AD3d 677, 770 NYS2d 94 [2d Dept 2003]; *Crossland Sav., F.S.B. v SOI Dev. Corp.*, 166 AD2d 495, 560 NYS2d 782 [2d Dept 1990]). Furthermore, the legal relationship between a borrower and a bank is a contractual one of debtor and creditor and does not create a fiduciary relationship between the bank and its borrower or its guarantors (see, *Standard Fed. Bank v Healy*, 7 AD3d 610, 777 NYS2d 499 [2d Dept 2004]; see also, *Walts v First Union Mtge. Corp.*, 259 AD2d 322, 686 NYS2d 428 [1<sup>st</sup> Dept 1999]).

By its submissions, the plaintiff also established that the counterclaims, sounding in, inter alia, fraud and misrepresentation lack merit as a matter of law because the answering defendant failed to allege that the plaintiff or its predecessor owed her a fiduciary duty with respect to her future ability to afford the mortgage (see generally, *Schwatka v Super Millwork, Inc.*, 106 AD3d 897, 965 NYS2d 547 [2d Dept 2013]; *Levin v Kitsis*, 82 AD3d 1051, 920 NYS2d 131 [2d Dept 2011]; see also, *Aurora Loan Servs., LLC v Enaw*, 126 AD3d 830, *supra*). Additionally, the answering defendant’s general factual assertions do not satisfy the pleading requirements of fraud (see, *Abdourahamane v Public Stor. Institutional Fund*, 113 AD3d 644, 978 NYS2d 685 [2d Dept 2014]; *Goel v Ramachandran*, 111 AD3d 783, 975 NYS2d 428 [2d Dept 2013]; *Jones v OTN Enter., Inc.*, 84 AD3d 1027, 922 NYS2d 810 [2d Dept 2011]; see also, *High Tides, LLC v DeMichele*, 88 AD3d 954, 931 NYS2d 377 [2d Dept 2011]).

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 the answer (see, *Grogg v South Rd. Assoc., L.P.*, 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, N.A.*, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]). Contrary to the answering defendant’s contentions, the instant motion for summary judgment made by the 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, the answering defendant failed to demonstrate that she 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. 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]).

The branch of the answering defendant's motion for this action to be restored to the foreclosure conference calendar, and which is not contained in the notice of motion, is denied as procedurally deficient and without merit (*see*, CPLR 2214 [a]). According to the court's records, a conference of the type mandated by CPLR 3408 was scheduled to be held on March 3, 2014. On the aforesaid date, this case was marked to indicate that the answering defendant did not appear for, or otherwise participate in, the conference. While the answering defendant alleges that she never received notice of a conference, she failed to demonstrate the merits of this argument by submitting any evidence of the filing of a notice of appearance by counsel with the court dated prior to the date of the conference (*see*, CPLR 321; ***Wells Fargo Bank, N.A. v Arthur***, 50 Misc3d 1226 [A], 2016 NY Misc LEXIS 698, 2016 WL 903950, 2016 NY Slip Op 50270 [U] [Sup Ct, Suffolk County 2016]). Further, the court notes that the conference notice was never returned as undeliverable by the United States Postal Service to the clerk as addressed to answering defendant (*see*, ***Residential Holding Corp. v Scottsdale Ins. Co.***, 286 AD2d 679, 729 NYS2d 776 [2d Dept 2001]). The answering defendant also failed to demonstrate any evidence of a pending loan modification (*see*, ***Deutsche Bank Natl. Trust Co. v. Kent***, 2013 NY Misc LEXIS 4921, 2013 WL 5823056, 2013 NY Slip Op 32661 [U] [Sup Ct, Suffolk County 2013]). In any event, the court notes that the instant request, made approximately seventeen months after the interposition of the answer, would unduly delay the resolution of this action and prejudice the plaintiff. Accordingly, no further conference is required under any statute, law or rule.

The assertions by answering defendant concerning plaintiff's alleged lack of standing, which rest, inter alia, upon Mortgage Electronic Registration Systems, Inc. ("MERS") alleged inability to assign the mortgage are misplaced because plaintiff demonstrated, as indicated above, that it was the holder of the note at the time of commencement (*see*, ***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 N.Y. 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]; *see also*, ***Wells Fargo Bank, N.A. v Zelaya***, 47 Misc3d 1228 [A], 18 NYS3d 852 [Sup Ct, Suffolk County 2015]; ***Suntrust Mtge., Inc. v Andriopoulos***, 39 Misc3d 1208 [A], 971 NYS2d 75 [Sup Court, Suffolk County 2013]). The court finds that none of the answering defendants' allegations give rise to a question of fact as to the plaintiff's standing (*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]). The answering defendant, therefore, failed to establish the merit of the standing defense in the answer, or the merits of the branch of her motion for dismissal of this action based upon that defense.

Notably, the answering defendant did not deny having received the loan proceeds and having defaulted on the subject loan payments in her opposing and moving papers (*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]). Thus, even when considered in the light favorable to the answering defendant, 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]; ***Wells Fargo Bank, N.A. v Ali***, 122 AD3d 726, 995 NYS2d 735 [2d Dept 2014]; ***American Airlines Fed. Credit Union v Mohamed***, 117 AD3d 974, 986 NYS2d 530 [2d Dept 2014]; ***Washington***

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*Mut. Bank v Schenk*, 112 AD3d 615, 975 NYS2d 902 [2d Dept 2013]; *U.S. 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 answering defendant (*see, Federal Home Loan Mtge. Corp. v Karastathis*, 237 AD2d 558, *supra*). Accordingly, the answer and the affirmative defenses set forth therein are stricken. Further, the counterclaims asserted in the answer are dismissed in their entirety. In light of the foregoing, the answering defendant's motion, which has been rendered academic, is denied as moot.

The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by substituting Louis Parisi for the fictitious defendants, "JOHN DOES," and by excising the remaining fictitious defendants, "JANES DOES," 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, Louis Parisi, Manuel Carvalho, Maria Carvalho, Clerk of the Riverhead Town Justice Court, People of the State of New York, Tony Sanns Music Store, Inc. doing business as Sound Beach Music (*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. Because the plaintiff has been awarded summary judgment against the answering defendant 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]; *Bank of E. Asia v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]). Those portions of the instant motion wherein the plaintiff demands such relief are thus granted.

Accordingly, the motion is determined as indicated above. Because the plaintiff did not submit a proposed long form order appointing a referee, the provisions of same have been incorporated in this short form order and decision. Submit a proposed order of reference.

Dated: September 15, 2016

  
Hon. HOWARD H. HECKMAN JR., J.S.C.

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