

Emigrant Bank v Kanner
2016 NY Slip Op 32514(U)
September 19, 2016
Supreme Court, Suffolk County
Docket Number: 14-3772
Judge: William G. Ford
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. WILLIAM G. FORD
Justice of the Supreme Court

MOTION DATE 4-23-15
ADJ. DATE _____
Mot. Seq. # 001 - MG

-----X
Emigrant Bank as successor by merger to
Emigrant Savings Bank-Brooklyn/Queens as
assignee of Emigrant Mortgage Company, Inc.,

Plaintiff,

- against -

Mark Kanner a/k/a Mark A. Kanner, Susan Bach
a/k/a Susan Guggino a/k/a Susan Kanner, MRC
Receivables Corp., Midland Funding LLC, KMT
Group, LLC, Pinpoint Technologies LLC, Clerk of
the Suffolk County District Court, People of the
State of New York and Majestic Pool Service,
Inc.,

John Doe #1 through John Doe #20 (Said names
being fictitious, it being the intention of Plaintiff
to designate any and all occupants of premises
being foreclosed herein, including, without
limitation, tenants or other occupants who may
have some interest in or lien upon the Premises
subordinate to the lien of the Plaintiff's mortgage
sought to be foreclosed herein),

Defendants.
-----X

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Attorney for Defendants
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KMT Group, LLC
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Upon the following papers on this motion for summary judgment and an order of reference: proposed order of reference, affirmation of plaintiff's counsel, Helmut Borchert, Esq. dated March 4, 2015 with supporting exhibits A-J; affirmation in opposition of defendant's counsel, Donald J. Neidhardt, Esq., dated April 14, 2015; affirmation in reply of plaintiff's counsel Helmut Borchert, Esq. dated April 22, 2015; and upon due consideration and deliberation, it is

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ORDERED that this motion (001) by the plaintiff for, inter alia, an order awarding summary judgment in its favor and against the answering defendants, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption is **GRANTED**; and it is

ORDERED that the non-answering defendants are deemed in default; and it is

ORDERED that **Susan Jeanne Scarpati, Esq** with an office at **30 Fresh Pond Road, Northport, New York, 11768, telephone: 631-525-7017** is appointed Referee to ascertain and compute the amount due upon the note and mortgage documents which this action was brought to foreclose, except attorneys fees, and to examine and report whether the mortgaged property can be sold in parcels; and it is

ORDERED that pursuant to CPLR 8003 (a), in the discretion of the court, the sum of \$250.00 shall be paid to Referee for the computation stage, and upon the filing of her report; and it is

ORDERED that, by accepting this appointment, the Referee appointed herein is subject to the requirements of Rule 36.2 (c) of the Chief Judge, and, if the Referee is disqualified from receiving an appointment pursuant to the provision of that Rule, the Referee shall notify the Appointing Judge forthwith; and it is

ORDERED that by accepting this appointment Referee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including but not limited to, section 36.2 (c) ("Disqualifications from appointment") and section 36.2 (d) ("Limitations on appointments based upon compensation"); and it is

ORDERED that the Referee is prohibited from accepting or retaining any funds for herself or paying funds to herself without compliance with Part 36 of the Rules of the Chief Judge; and it is

ORDERED, the plaintiff is to include in any proposed order for a judgment of foreclosure and sale language complying with the Suffolk County Local Rule for filing of the Foreclosure Action Surplus Monies form contained in Suffolk County Administrative Order #41-13; and it is

ORDERED that the caption is amended by excising the names of the fictitious defendants "JOHN DOE 1 " through "JOHN DOE #20 ; 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

Emigrant Bank as successor by merger to
Emigrant Savings Bank-Brooklyn/Queens as
assignee of Emigrant Mortgage Company, Inc.

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Plaintiff,

-against-

Mark Kanner a/k/a Mark A. Kanner, Susan Bach a/k/a Susan Guggino a/k/a Susan Kanner, MRC Receivables Corp., Midland Funding LLC, KMT Group, LLC, Pinpoint Technologies LLC, Clerk of the Suffolk County District Court, People of the State of New York and Majestic Pool Service, Inc.,

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 further

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon Donald J. Neidhardt, Esq. counsel for the defendants Mark Kanner and Susan Kanner, and Kirschenbaum & Phillips, P.C., counsel for KMT Group, LLC, 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.

This is an action to foreclose a mortgage on real property situate in Suffolk County, New York. 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]). The plaintiff produced, inter alia, the note with an endorsed allonge, 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 proof of compliance with the notice requirements of section 1304 of the Real Property Actions and Proceedings Law, as well as the notice provisions of the mortgage prior to commencement (*see*, *PHH Mtge. Corp. v Israel*, 120 AD3d 1329, 992 NYS2d 355 [2d Dept 2014]; *Wachovia Bank, N.A. v Carcano*, 106 AD3d 724, 965 NYS2d 516 [2d Dept 2013]; *see also*, *JP Morgan Chase Bank, N.A. v Schott*, 130 AD3d 875, 15 NYS3d 359 [2d Dept 2015]; *Wells Fargo v Moza*, 129 AD3d 946, 13 NYS3d 127 [2d Dept 2015]). Furthermore, the plaintiff submitted proof that it is the owner/holder of the note and assignee of the note as well as the mortgage, and therefore has standing to bring this action (*see*, *Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 12 NYS3d 612 [2015]; *Emigrant Bank v Larizza*, 129 AD3d 904, 13 NYS3d 129 [2d Dept 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]; *see also*, *Chase Home Fin.*,

LLC v Miciotta, 101 AD3d 1307, 956 NYS2d 271 [3d Dept 2012]). This proof consists of, inter alia, the note with an endorsed allonge, the assignment of the mortgage and the note executed on November 19, 2009, the complaint with a “verification” made by an Assistant Treasurer of the plaintiff, and the affidavit in support made by the same officer of the plaintiff. Additionally, in the complaint, the plaintiff set forth the specific details of the merger of Emigrant Savings Bank-Brooklyn/Queens with and into Emigrant Bank, under the name Emigrant Bank on a date prior to commencement (*see*, Banking Law § 602; *Capital One, N.A. v Brooklyn Flatiron, LLC*, 85 AD3d 837, 925 NYS2d 350 [2d Dept 2011]; *Ladino v Bank of Am.*, 52 AD3d 571, 861 NYS2d 683 [2d Dept 2008]). Such evidence demonstrates that the plaintiff holds the original note and mortgage. 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 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*, *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178, 919 NYS2d 465 [2011]; *Morales v AMS Mtge. Servs., Inc.*, 69 AD3d 691, 692, 897 NYS2d 103 [2d Dept 2010] [CPLR 3016 (b) requires that the circumstances of fraud be “stated in detail,” including specific dates and items]; *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]; *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]; *Connecticut Natl. Bank v Peach Lake Plaza*, 204 AD2d 909, 612 NYS2d 494 [3d Dept 1994] [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]). Moreover, in this case, the plaintiff was free to transfer the note and mortgage, absent any language which expressly prohibited the assignment (*see*, *Matter of Stralem*, 303 AD2d 120, 758 NYS2d 345 [2d Dept 2003]).

It was thus incumbent upon the answering defendants 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 response, the answering defendants have not come forward with any evidence to raise a triable issue of fact as to the plaintiff’s standing (*see*, *JP Morgan Chase Bank, N.A. v Weinberger*, 2016 NY App Div LEXIS 5730, 2016 WL 4443712, 2016 NY Slip Op 05850 [2d Dept 2016]; *Emigrant Bank v Larizza*, 129 AD3d 904, *supra*).

Rejected as unmeritorious are the answering defendants’ challenges to the sufficiency of the proof upon which the plaintiff relies to support its motion for summary judgment. Contrary to the answering defendants’ contentions, the affidavit of the plaintiff’s representative is legally sufficient and comports with the requirements of CPLR 3212 (*see*, *Deutsche Bank Natl. Trust Co. v Monica*, 131 AD3d 737, 15 NYS3d 863 [3d Dept 2015]; *Fleet Bank v Pine Knoll Corp.*, 290 AD2d 792, 736 NYS2d

737 [3d Dept 2002]; *see also*, **HSBC Bank USA, N.A. v Sage**, 112 AD3d 1126, 977 NYS2d 446 [3d Dept 2013]; *cf.*, **Citibank N.A. v Cabrera**, 130 AD3d 861, 14 NYS3d 420 [2d Dept 2015]; **US Bank N.A. v Madero**, 125 AD3d 757, 5 NYS3d 105 [2d Dept 2015]; **Cadle Co. v Gregory**, 293 AD2d 335, 739 NYS2d 825 [1st Dept 2002]). The answering defendants' assertions that the affidavit is hearsay because the affiant did not personally service the subject account are also unavailing in light of the affiant's unchallenged assertion of personal knowledge of the plaintiff's possession of the note since origination (**Charter One Bank, FSB v Leone**, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007]). In his affidavit, the plaintiff's affiant alleges, inter alia, that he reviewed the original note, mortgage, other loan documents and related business records, which were made by him, or from information transmitted by a person with knowledge of the events described therein, at or near the time of the events described, and kept in the ordinary course of business at or near the time of the transactions or events by or from a person with personal knowledge. Additionally, as noted above, in the complaint, which was verified by the same affiant, the plaintiff alleges, inter alia, that it is as the holder and the holder of the note.

Contrary to the answering defendants' 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 defendants failed to demonstrate that they 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]).

In any event, the affirmation of the answering defendants' 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]). The answering defendants, therefore, failed to establish the merit of their defenses based upon the plaintiff's alleged lack of standing. Further, the assertions of answering defendants' counsel is insufficient to raise a triable issue of fact regarding the plaintiff's service of the 30-day and 90-day pre-foreclosure notices.

Notably, the answering defendants did not deny having received the loan proceeds and having defaulted on the subject loan payments in an affidavit made by them (*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]). Thus, even when considered in the light favorable to the answering defendants, 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

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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 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 court has considered the answering defendants' remaining contentions in opposition to the motion and finds that such lack merit.

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.

The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by excising the fictitious defendants, "JOHN DOE 1" through "JOHN DOE 20," 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, MRC Receivables Corp., Midland Funding LLC, KMT Group, LLC, Pinpoint Technologies LLC, Clerk of the Suffolk County District Court, People of the State of New York, and Majestic Pool Service, Inc. (*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 answering defendants 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.

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.

Dated: September 19, 2016
Riverhead, New York


Hon. WILLIAM G. FORD, J.S.C.

___ FINAL DISPOSITION X NON-FINAL DISPOSITION