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| HSBC Bank, USA, NA v Margineanu |
| 2019 NY Slip Op 31724(U) |
| June 12, 2019 |
| Supreme Court, Suffolk County |
| Docket Number: 609027/15 E |
| Judge: Thomas F. Whelan |
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MEMO DECISION & ORDER

INDEX No. 609027/15 E

ORIGINAL

SUPREME COURT - STATE OF NEW YORK IAS PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 4/17/19
SUBMIT DATE 5/17/19
Mot. Seq. # 006 - MG
Mot. Seq. # 007 - XMD
CDISP Y ___ N X

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HSBC BANK, USA, NA, :

Plaintiff, :

-against- :

MIHAI MARGINEANU and JULIA :

MARGINEANU a/k/a JULIA MARGINEANU, :

a/k/a JULIA VARGA, if they be living and if they :

be dead, the respective heirs at law, next of kin, :

distributees, executors, administrators, trustees, :

devisees, legatees, assignors, lienors, creditors, and :

successors, in interest and generally having or :

claiming under by or through said defendants who :

may be deceased, by purchase, inheritance, lien or :

otherwise of any right, title or interest in and to the :

premises described in the complaint herein and their :

respective husbands, wives, widow, if any and each :

and every person not specifically named who may be :

entitled to or claim to have any right, title or :

interest in the property described in the verified :

complaint, all of whom and whose names and places :

of residence unknown and cannot after diligent :

inquiry be ascertained by the plaintiff, THE :

UNITED STATES OF AMERICA o/b/o :

INTERNAL REVENUE SERVICE, NEW YORK :

STATE DEPARTMENT OF TAXATION AND :

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FINANCE, STATE FARM BANK FSB, :
PALISADES COLLECTION, LLC, LVNV :
FUNDING LLC, MANDEE SHOPS, a div. of Big :
“M”, Inc., MAYRA A. VILES, MIGUEL RIVERA :
EVELYN QUINONES, :
: :
Defendants. :
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Upon the following papers numbered 1 to 11 read on this motion to appoint a referee to compute among other things and cross motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 5; Notice of Cross Motion and supporting papers: 6-8; Opposing papers: _____; Reply papers 9-10; 11; Other _____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion (#006) for, among other things, summary judgment, amendment of the caption and the appointment of a referee to compute, is granted in its entirety; and it is further

ORDERED that the cross motion (#007) by defendants, Mihai & Julia Margineanu, for an order granting renewal of defendants’ cross motion (#005) for summary judgment and, upon renewal, an order granting said motion and dismissing the action is denied; and it is further

ORDERED that the proposed Order submitted by plaintiff, as modified by the court, is signed simultaneously herewith; and it is further

ORDERED that plaintiff is directed to file a notice of entry within five days of receipt of this Order pursuant to 22 NYCRR § 202.5-b(h)(2).

Familiarity with this Court’s order dated October 9, 2018 is presumed, wherein plaintiff’s motion to appoint a receiver (#004) and defendants’ cross motion (#005) for summary judgment were denied. The plaintiff has now filed the instant motion (#006) for summary judgment, default judgments against the non-answering defendants, and the appointment of a referee to compute. Defendants, Mihai Margineanu and Julia Margineanu, have cross moved (#007) for renewal of their prior motion for summary judgment. Notably, although defendants’ counsel’s affirmation purports to be “In Support of Motion to Renew a Prior Motion and In Opposition to Plaintiff’s Motion,” there is no opposition within the document.¹

The Court first considers the cross motion (#007) by the defendants as determination thereof may render determination of the plaintiff’s motion, academic.

¹The Court refuses to entertain defendants’ reply papers, since a reply is not permitted pursuant to CPLR 2214, 2215.

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The defendants seek leave to renew their prior cross motion (#005) for summary judgment and, upon renewal, an order granting defendants summary judgment dismissing the complaint. A motion for leave to renew pursuant to CPLR 2221(e) “shall be based upon new facts not offered on a prior motion that would change the prior determination and shall contain reasonable justification for the failure to present such facts on the prior motion” (*Mellon v Izmiriligil*, 88 AD3d 930, 931 NYS2d 667 [2d Dept 2011]; *Siegel v Morsey New Sq. Trails Corp.*, 40 AD3d 960, 836 NYS2d 678 [2d Dept 2007]). Alternatively, a motion for renewal may rest upon a demonstration “that there has been a change in the law that would change the prior determination” (CPLR 2221[e][2]).

The defendants here posit two arguments. They assert first that there has been a “change and clarification” in the law, relying on the March 13, 2019 decision in *Bank of New York Mellon v Dieudonne* (171 AD3d 34, 96 NYS3d 354 [2d Dept 2019]). Next, they contend that the de-acceleration letter relied upon by the Court in the October 9, 2018 order as revoking any claimed acceleration was improperly mailed to defendants’ prior counsel instead of the defendants and, therefore, was of no effect. As a result of the change in law and the failure of plaintiff to properly serve defendants with the de-acceleration letter, defendants opine that they are entitled to renewal and, upon renewal, dismissal of the complaint.

The defendants correctly contend that the Court in *Dieudonne* rejected the interpretation of the mortgage contract language as one that does not trigger an acceleration of the entire mortgage debt, until the entry of a judgment of foreclosure, and that, “[t]o the extent that decisional law interpreting the same contractual language holds otherwise,” such an interpretation should not be followed (*Bank of NY Mellon v Dieudonne*, 171 AD3d at 40, *supra*). Notably, however, this Court’s October 9, 2018 decision provided no less than four reasons for denial of the defendants’ motion, only one of which was addressed in *Dieudonne*. Thus, contrary to defendants’ assertions, the result of applying the holding in *Dieudonne* in this case would not change this Court’s prior ultimate determination that the action was not untimely.

The defendants’ additional assertion regarding plaintiff’s failure to properly serve defendants with the de-acceleration letter fails for the same reason. Additionally, however, to the extent the defendants seek to assert such as “facts or materials in existence at the time of the original motion but not known or otherwise unavailable to the party seeking renewal” (*see Nesternko v Starrett City Assocs, L.P.*, 123 AD3d 1099, 997 NYS3d 636 [2d Dept 2016]), the defendants have failed to provide a reasonable justification for failing to present such facts on the original motion. As a result, the Court lacks discretion to grant renewal (*see DLJ Mtge. Capital, Inc. v David*, 147 Ad3d 1024, 48 NYS3d 234 [2d Dept 2017]; *Central Mtge. Co. v Resheff*, 136 AD3d 962, 26 NYS3d 323 [2d Dept 2016]; (*see Wells Fargo Bank, N.A. v Rooney*, 132 AD3d 980, 19 NYS3d 543 [2d Dept 2015]; *Wells Fargo Bank v Allen*, 130 AD3d 717, 11 NYS3d 876 [2d Dept 2016]).

Turning then to plaintiff’s motion in chief (#006), the plaintiff addresses its burden of proof in the moving papers on this summary judgment motion, and refutes the affirmative defenses and counterclaims in the answer. Therefore, plaintiff has satisfied its prima facie burden on this summary judgment motion (*see HSBC Bank USA, Natl. Assn. v Espinal*, 137 AD3d 1079, 28

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NYS3d 107 [2d Dept 2016]; *U.S. Bank Natl. Assn. v Cox*, 148 AD3d 692, 49 NYS3d 527 [2d Dept 2017]). The burden then shifts to the defendants (*see Bank of America, N.A. v DeNardo*, 151 AD3d 1008, 58 NYS3d 469 [2d Dept 2017]) and it was 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 or otherwise available to them (*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, NA v Agnello*, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; *Ames 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 movant's 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 Mentessana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). In addition, the failure to raise pleaded affirmative defenses in opposition to a motion for summary judgment renders those defenses abandoned and thus without any efficacy (*see New York Commercial Bank v J. Realty F Rockaway, Ltd.*, 108 AD3d 756, 969 NYS2d 796 [2d Dept 2013]; *Starkman v City of Long Beach*, 106 AD3d 1076, 965 NYS2d 609 [2d Dept 2013]).

As noted above, defendants' submission does not oppose plaintiff's application. Thus, the portions of plaintiff's application seeking summary judgment as against the answering defendants is granted and the answer is stricken accordingly. Plaintiff's moving papers additionally established all of the elements necessary for the fixation of the remaining defendants' defaults in answering and the appointment of referee to compute amounts due under the subject note and mortgage as contemplated by RPAPL § 1321 (*see CPLR 3215; RPAPL § 1321; Todd v Green*, 122 AD3d 831, 832, 997 NYS2d 155 [2d Dept 2014]; *US Bank v Razon*, 115 AD3d 739, 740, 981 NYS2d 583 [2d Dept 2014]). The moving papers further established the plaintiff's entitlement to an order amending the caption (*see CPLR 1024; Flagstar Bank v Bellafiore*, 94 AD3d at 1044, 1046, 943 NYS2d 551, [2d Dept 2012]; *Neighborhood Hous. Servs. of NY City, Inc. v Meltzer*, 67 AD3d 872, 873-874 [2009]).

In light of the above, plaintiff has satisfied its prima facie burden on this summary judgment motion (*see HSBC Bank USA v Ozcan*, 154 AD2d 822, 64 NYS3d 38 [2d Dept 2017]; *HSBC Bank USA, Natl. Assn. v Espinal*, 137 AD3d 1079, 28 NYS3d 107 [2d Dept 2016]), and the defendants have failed to raise any issue of fact. The Court thus grants plaintiff's motion (#006) for an order appointing a referee to compute, granting it default judgments as against all non-appearing defendants, and to amend the caption (*see CPLR 3212, 3215, 1003 and RPAPL § 1321; Wells Fargo Bank, N.A. v Ali*, 122 AD3d 726, 995 NYS2d 735 [2d Dept 2014]; *Central Mtge. Co. v McClelland*, 119 AD3d 885, 991 NYS2d 87 [2d Dept 2014]; *Peak Fin. Partners, Inc. v*

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Brook, 119 AD3d 916, 987 NYS2d 916 [2d Dept 2014]; *Plaza Equities, LLC v Lamberti*, 118 AD3d 688, 986 NYS2d 843 [2d Dept 2014]).

The Court also grants that portion of plaintiff's motion seeking to substitute MTGLQ Investors, LP as plaintiff herein. Where a plaintiff in a mortgage foreclosure action transfers the note by written assignment or by physical delivery to a third party during the pendency of such action, the transferee may continue to prosecute the action in the name of the original plaintiff or it may seek leave to have itself formally substituted for the named plaintiff pursuant to CPLR 1018 (see *U.S. Bank Natl. Assn. v Akande*, 136 AD3d 887, 26 NYS3d 164 [2d Dept 2015]; *Woori Am. Bank v Global Universal Group Ltd.*, 134 AD3d 699, 20 NYS3d 597 [2d Dept 2015]; *Brighton BK, LLC v Kurbatsky*, 131 AD3d 1000, 17 NYS3d 137 [2d Dept 2015]). Here, the affidavit of Justin Jenkins, Assistant Secretary of Rushmore Loan Managements Services, LLC, servicer and attorney-in-fact for plaintiff's successor in interest, avers that MTGLQ Investors, LP is in possession of the note (see *U.S. Bank Natl. Assn. v Akande*, 136 AD3d 887, *supra*; *Woori America Bank v Global Universal Group Ltd.*, 134 AD3d 699, *supra*; *Brighton BK, LLC v Kurbatsky*, 131 AD3d 1000, *supra*). The substitution is, therefore, granted.

Accordingly, plaintiff's motion (#006) is granted and defendants' cross motion (#007) is denied. The proposed order of reference, as modified by the court, has been signed simultaneously with this memorandum decision and order.

DATED: 6/12/19



THOMAS F. WHELAN, J.S.C.