

<b>Wells Fargo Bank, NA v McPhillips</b>
2019 NY Slip Op 33185(U)
October 25, 2019
Supreme Court, Suffolk County
Docket Number: 015562/2013
Judge: Martha L. Luft
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SUPREME COURT - STATE OF NEW YORK  
IAS PART 50 - SUFFOLK COUNTY

PRESENT: Hon. MARTHA L. LUFT  
Acting Justice Supreme Court

\_\_\_\_\_ x  
WELLS FARGO BANK, NA, Plaintiff,

-against-

ELINORE McPHILLIPS, "JOHN DOE", said name being fictitious, it being the intention of Plaintiff to-designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises,  
  
\_\_\_\_\_ x  
Defendants.

MOTION DATE: 04/17/2018 (001)  
MOTION DATE: 07/09/2018 (002)  
ADJ. DATE: 07/17/2018  
Mot. Seq. # 001 -MG  
Mot. Seq. # 002 -XMD

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Upon the following papers: Notice of Motion by Plaintiff, dated February 15, 2018, with supporting papers, including Memorandum of Law dated February 15, 2018; Notice of Cross-Motion by Defendant, dated June 18, 2018, with supporting papers; Memorandum of Law in Opposition to Cross Motion and in Reply by Plaintiff, dated August 14, 2018, with supporting papers; and upon due consideration; it is

**ORDERED** that this motion (001) by the plaintiff for an order granting summary judgment on the complaint against the defendant Celeste Stalker, appointing a referee and amending the caption is granted; and it is

**ORDERED** that the affirmative defenses asserted in the defendant's answer are dismissed with prejudice; and it is

**ORDERED** that, pursuant to CPLR 3211(b), the counterclaims asserted in the defendant's answer are dismissed with prejudice; and it is

**ORDERED** that the caption is amended by excising the fictitious "JOHN DOE" defendant and the remaining descriptive words relating thereto; and it is

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SUFFOLK

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WELLS FARGO BANK, N.A.,

Plaintiff,

-against-

ELINOR McPHILLIPS,

Defendant.

\_\_\_\_\_ ; and it is

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

**ORDERED** that this cross motion (002) by the defendant Elinore McPhillips for, inter alia, an order granting the defendant leave to amend her answer to interpose a defense based upon non-compliance with 24 CFR 203.604, and, upon such amendment, denying the plaintiff's motion for summary judgment and granting the defendant summary judgment dismissing the complaint on the ground that the plaintiff failed to comply with the provisions of 24 CFR 203.604 is denied; and it is further

**ORDERED** that the plaintiff shall promptly serve a copy of this order pursuant to CPLR 2103(b)(1), (2), (3), (6) or (7) upon counsel for the defendant Elinor McPhillips, and the plaintiff shall promptly file the affidavit(s) of service with the Clerk of the Court.

This is an action to foreclose a mortgage given by the defendant Elinor McPhillips (the defendant) on March 10, 2011 to Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for Residential Home Funding Corp. (Residential), and relating to certain residential property situate in Suffolk County, New York. The note, secured by the mortgage, was given to Residential on March 10, 2011. The note and mortgage were subsequently transferred to Wells Fargo Bank, N.A. (the plaintiff), prior to commencement.

The defendant allegedly defaulted on the note by failing to make the monthly payment of principal and interest due on or about August 1, 2012, which date was advanced to November 1, 2012, due to some partial payments. After the defendant allegedly failed to cure the continuing default in payment, the plaintiff commenced this action by the filing of the lis pendens, summons and complaint on June 14, 2013.

In response to the complaint, the defendant interposed an answer dated July 16, 2013, with an attached verification made by the defendant. In the answer, the defendant admits some and denies other allegations in the complaint, and asserts sixteen enumerated affirmative defenses and four counterclaims. In response to the counterclaims, the plaintiff interposed a reply.

The plaintiff now moves for, inter alia, an order granting summary judgment in its favor and against the defendant, appointing a referee and amending the caption. The defendant opposes the plaintiff's motion and cross moves for, inter alia, an order granting the defendant leave to amend her answer to interpose a defense based upon non-compliance with 24 CFR 203.604, and, upon such amendment, denying the plaintiff's motion for summary judgment and granting the defendant summary judgment dismissing the complaint on the ground that the plaintiff failed to comply with the provisions of 24 CFR 203.604.

In her affidavit in opposition to the motion in chief and in support of the cross motion, the defendant alleges that she never had a face-to-face meeting with a representative of the plaintiff at any time prior to the commencement of this action to discuss "[her] payment default." She also alleges, among other things, the plaintiff never sent her a letter by certified mail requesting to have a face-to-face interview at the property, and the plaintiff never attempted to personally visit her at the property for such purposes. In response, the plaintiff submitted papers which serve opposition and reply papers.

The court turns first to the cross motion because the resolution of such may render the motion-in-chief academic. The branch of the cross motion to amend the answer is denied because the defendant failed to demonstrate by any credible evidence a lack of prejudice to the plaintiff, who has already moved for summary judgment and because no excuse has been proffered for the approximate five year delay in moving for such relief (*see Aurora Loan Servs., LLC v Baritz*, 144 AD3d 618, 41 NYS3d 55 [2d Dept 2016]; *Majestic Invs., Ltd. v Lopez*, 111 AD2d 844, 490 NYS3d 585 [2d Dept 1985]; *see also Lighting Horizons, Inc. v E. A. Kahn & Co.*, 120 AD2d 648, 502 NYS2d 398 [2d Dept 1986]). An amendment of the answer at this juncture would be significantly prejudicial to the plaintiff and would unduly delay the resolution of this action (*see Wells Fargo Bank, N.A. v Fanto*, 146 AD3d 1012, 45 NYS3d 546 [2d Dept 2017]; *South Point, Inc. v Rana*, 139 AD3d 935, 30 NYS3d 710 [2d Dept 2016]).

The branch of the cross motion for dismissal of the complaint is denied because a defense predicted upon non-compliance with the provisions of 24 CFR 203.604 was waived by failing to assert such as an affirmative defense in the answer (*see CPLR 3018[b]*, 3015[a], 3211[a][e]; *see also Nationstar Mtge., LLC v Vordermeier*, 165 AD3d 822, 86 NYS3d 191 [2d Dept 2018]; *First N. Mortgage Corp. v Yatrakis*, 154 AD2d 433, 546 NYS2d 9 [2d Dept 1989]). In any event, the plaintiff demonstrated substantial compliance with the requirements of 24 CFR 203.604 (*see US Bank N.A. v McMullin*, 55 Misc3d 1053, 47 NYS3d 882 [Sup Ct, Albany County 2017]). More specifically, the plaintiff demonstrated that its subsidiary sent, among other things, a letter dated September 23, 2012 to the defendant at the property by certified mail, providing her with an opportunity to arrange a face-to-face meeting to discuss mortgage payment assistance options. The plaintiff's submissions show other attempts to communicate with the defendant as well as a loan modification review prior to the commencement of this action. Moreover, the defendant received the benefit of, among other things, two post-commencement foreclosure settlement conferences, which were attended by a representative of the plaintiff (*see US Bank N.A. v McMullin*, 55 Misc3d 1053).

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The court turns next to the motion-in-chief and the issue of the plaintiff's compliance with certain conditions precedent to this action. The plaintiff established, prima facie, that it complied with the notice requirements of RPAPL 1304 (*see CitiMortgage, Inc. v Barber*, 170 AD3d 654, 95 NYS3d 311 [2d Dept 2019]). In opposition, the defendant failed to raise a triable issue of fact.

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] [unsupported affirmative defenses are lacking in merit]; *see also Wells Fargo Bank, N.A. v Osias*, 156 AD3d 942, 943, 68 NYS3d 115 [2d Dept 2017] [copy of endorsed note attached to the complaint as an exhibit]; *Bethpage Fed. Credit Union v Caserta*, 154 AD3d 691, 61 NYS3d 645 [2d Dept 2017] [standing demonstrated by physical possession of the note]; *Scholastic Inc. v Pace Plumbing Corp.*, 129 AD3d 75, 8 NYS3d 143 [1st Dept 2015] [combined affirmative defenses containing multiple defenses are in contravention of the civil practice rules]). Further, "a party who signs a document without any valid excuse for having failed to read it is 'conclusively bound' by its terms" (*Patterson v Somerset Invs. Corp.*, 96 AD3d 817, 817, 946 NYS2d 217 [2d Dept 2012]).

The generalized allegations set forth in the defendant's counterclaims also do not satisfy the pleading requirements of fraud (*see Abdourahmane 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]). In any event, the counterclaims are untimely (*see CPLR 213[8]*; *Williams-Guillaume v Bank of Am., N.A.*, 130 AD3d 1016, 14 NYS3d 466 [2d Dept 2015]; *Pike v New York Life Ins. Co.*, 72 AD3d 1043, 901 NYS2d 76 [2d Dept 2010]).

Turning to the merits of this action, 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 mortgage, the endorsed note, the assignment and evidence of nonpayment (*see Bank of Am., N.A. v Cudjoe*, 157 AD3d 653, 69 NYS3d 101 [2d Dept 2018]; *Emigrant Bank v Marando*, 143 AD3d 856, 39 NYS3d 83 [2d Dept 2016]).

Accordingly, it was incumbent upon the defendant to produce evidentiary proof in admissible form sufficient to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action (*see Baron Assoc., LLC v Garcia Group Enters., Inc.*, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; *Washington Mut. Bank v Valencia*, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]).

In instances where a defendant fails to oppose a motion for summary judgment, the facts, as alleged in the moving papers, may be deemed admitted and there is, in effect, a concession that no question of fact exists (*see Kuehne & Nagel v Baiden*, 36 NY2d 539, 369 NYS2d 667 [1975]; *see also Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]). Additionally, "uncontradicted facts are deemed admitted" (*Tortorello v Carlin*, 260 AD2d 201, 206, 688 NYS2d 64 [1st Dept 1999] [internal quotation marks and citations omitted]).

As noted above, a defense predicted upon non-compliance with the provisions of 24 CFR 203.604 was waived because the same was not asserted in the answer (*see CPLR 3018[b]*; CPLR 3211[a][e]), and,

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in any event, the plaintiff has demonstrated that such lacks merit. Thus, even when considered in the light most favorable to the 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. The defendant's opposition papers are also insufficient to demonstrate any bona fide defenses (*see* CPLR 3211[e]; *Wells Fargo Bank, N.A. v Soskil*, 155 AD3d 923, 63 NYS3d 726 [2d Dept 2017]; *Rimbambito, LLC v Lee*, 118 AD3d 690, 986 NYS2d 855 [2d Dept 2014]).

The plaintiff is therefore awarded summary judgment in its favor against the defendant (*see Federal Home Loan Mtge. Corp. v Karastathis*, 237 AD2d 558, 655 NYS2d 631 [2d Dept 1997]; *see also Emigrant Bank v Myers*, 147 AD3d 1027, 47 NYS3d 446 [2d Dept 2017] [unmeritorious and duplicative affirmative defenses dismissed]). The answer is stricken, and the affirmative defenses asserted therein are dismissed with prejudice. Therefore, 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]).

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

Dated: 10/25/19

Martha L. Luft  
Hon. MARTHA L. LUFT, A.J.S.C.

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION