

Fremont Inv. & Loan v Gay

2021 NY Slip Op 30305(U)

January 21, 2021

Supreme Court, Suffolk County

Docket Number: 021421/2007

Judge: Denise F. Molia

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT: Hon. DENISE F. MOLIA
Justice

Fremont Investment and Loan,

Plaintiff,

- against -

Michael Gay, Adam Tesoro and Assunta Tesoro;
Mortgage Electronic Registration Systems, Inc. as
nominee for Fremont Investment and Loan and "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,

Defendants.

CASE DISPOSED: NO
MOTION R/D: 10/18/2019
SUBMISSION DATE: 10/18/2019
MOTION SEQUENCE NO.: 005; MOTD
006 XMD

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Upon the following papers: Notice of Motion by Plaintiff, dated September 16, 2019, Affirmation of Bridget M. Demhler, Esq., dated September 16, 2018, Affidavit of Vital Philma, Vice President of PHH Mortgage Corporation, loan servicer, with supporting papers; Notice of Cross-Motion by Defendants Michael Gay, Adam Tesoro and Assunta Tesoro, dated November 12, 2019, Affirmation of Ronald D. Weiss, Esq., dated November 12, 2019, Affidavit of Michael Gay, sworn to on November 12, 2019, Affidavit of Adam Tesoro, sworn to on November 12, 2019, Affidavit of Assunta Tesoro, sworn to on November 12, 2019, with supporting papers; Affirmation in Opposition to Cross Motion and Reply in Further Support by Plaintiff's Counsel, Ellis M. Oster, Esq., dated November 21, 2019, with supporting papers; Stipulation of Adjournment dated October 11, 2019; and upon due consideration; it is

ORDERED that this motion (005) by the plaintiff for, *inter alia*, an order fixing the defaults of the non-answering defendants pursuant to CPLR 3215(f), appointing a referee to compute pursuant to RPAPL 1321 and amending the caption is granted solely to the extent stated below, otherwise denied with leave to renew within one hundred twenty (120) days of the date of this order; and it is

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ORDERED that the caption of this action is amended by removing the fictitious "JOHN DOE" defendant; 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

Fremont Investment and Loan,

Plaintiff,

-against-

Michael Gay, Adam Tesoro and Assunta Tesoro;
Mortgage Electronic Registration Systems, Inc. as
nominee for Fremont Investment and Loan,

Defendants.

; and it is

ORDERED that the plaintiff shall serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court, I.A.S. Part 39; and it is

ORDERED that this cross motion (006) by the defendants Michael Gay, Adam Tesoro and Assunta Tesoro for, *inter alia*, an order: (1) dismissing the complaint pursuant to CPLR 3211(a)(8) insofar as asserted against them; or, in the alternative, (2) pursuant to CPLR 2004, 2005, 3012(d) and 5015 vacating their second default and extending their time to interpose an answer a second time is denied in its entirety; 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 defendants Michael Gay, Adam Tesoro and Assunta Tesoro and by first-class mail upon all other parties that have appeared herein and not waived further notice, 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 Michael Gay on August 15, 2005 to Mortgage Electronic Registration Systems, Inc. (MERS), acting solely as a nominee for Fremont Investment & Loan (the plaintiff) and relating to certain real property in Suffolk County, New York. The note, secured by the mortgage, and executed by Michael was also given to the plaintiff on August 15, 2005.

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By deed dated December 8, 2005 and recorded on December 15, 2005, Michael transferred his interest in the property to Adam Tesoro and Assunta Tesoro (the Tesoro defendants).

Thereafter, by assignment of mortgage executed on March 18, 2013, the plaintiff purportedly transferred the mortgage to U.S. Bank National Association, as Trustee relating to J.P. Morgan Mortgage Acquisition Corp., 2005-FRE1, Asset Backed Pass-Through Certificates, Series 2005-FRE1. The assignment was subsequently recorded on August 26, 2014.

Michael allegedly defaulted on the note and mortgage by failing to make the monthly payments due on or about April 1, 2007, and each month thereafter. After Michael allegedly failed to cure the default in payment, the plaintiff commenced this action by the filing of the notice of pendency, summons and complaint on July 18, 2007. None of the defendants in this action interposed an answer and, thus, all are in default.

The plaintiff subsequently moved for and was granted an order of reference on February 8, 2008 (Molia, J.). Thereafter, the plaintiff moved for and was granted a judgment of foreclosure and sale (the judgment) dated April 13, 2009 (Molia, J.). On April 25, 2004, the plaintiff served the judgment with notice of entry dated April 23, 2014 on all of the defendants in this action.

In November, 2014, Michael and the Tesoro defendants (collectively the defendants) appeared in this action by untimely notice of appearance (*see* Plaintiff's Exh. M). At the same time, the defendants served the plaintiff with a combined document demand and interrogatories dated November 6, 2014.

In November, 2014, the defendants also moved by order to show cause for leave to vacate their default in answering and for leave to interpose an untimely answer, which was granted to the extent of, among other things, a hearing on November 7, 2014 (Tarantino, A.J.S.C.). By way of an interim order dated February 23, 2015 (Molia, J.), the defendants' motion was adjourned pending a status conference. After a series of conferences or adjournments, the defendants' motion was subsequently granted by order of the undersigned dated February 3, 2017. Additionally, the judgment was vacated and the defendants were granted leave to serve their answers within 30 days of the date of entry. Because the February, 2017 order was entered on April 21, 2017, the defendants' time to answer expired on Monday, May 22, 2017.

In an attempt to assist the parties in negotiating a settlement, foreclosure settlement conferences were also conducted or adjourned on March 31, May 24, August 29 and October 19, 2017, however, a settlement was never reached. Further, despite the vacatur of the judgment and being given leave to interpose an answer within 30 days of the entry date of the February 3, 2017 order, the defendants never interposed an answer. In the interim, by consent to change attorney filed on December 24, 2018, the firm of Shapiro, DiCaro & Barak, LLC was substituted as the plaintiff's counsel for outgoing counsel, Leopold & Leopold & Associates PLLC.

The plaintiff now moves for, *inter alia*, an order fixing the defaults of the non-answering defendants, appointing a referee to compute and amending the caption. In response, the defendants oppose the plaintiff's motion and cross move for, *inter alia*, an order: (1) dismissing the complaint pursuant to CPLR 3211(a)(8) insofar as asserted against them; or, in the alternative, (2) pursuant to CPLR 2004, 2005, 3012(d) and 5015

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vacating their second default and extending their time to interpose an answer a second time. The plaintiff filed papers in opposition to the cross motion and in reply and further support of its motion. By written stipulation dated October 11, 2019, the moving parties agreed to adjourn the plaintiff's motion on consent of both sides to November 22, 2019, the same return date as the cross motion, subject to the approval of this court.

Initially, the defendants' cross motion is procedurally defective to the extent that the moving papers submitted herein do not fully recite the grounds for the relief sought along with the specific provisions of the civil practice law and rules relating thereto (*see* CPLR 2214 [a]). The cross motion has been considered, however, because it is supported by, among other things, the affirmation of the defendants' counsel.

The court turns first to the branches of the defendants' cross motion made pursuant to CPLR 2004, 2005, 3012(d) and 5015. A defendant who has failed to timely appear or answer the complaint must provide a reasonable excuse for the default and demonstrate the existence of a potentially meritorious defense to the action in order to avoid the entry of a default judgment (*see* CPLR 5015[a][1]; *Eugene Di Lorenzo, Inv. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 501 NYS2d 8 [1986]; *Paulus v Christopher Vacirca, Inc.*, 128 AD3d 116, 6 NYS3d 572 [2d Dept 2015]; *Cervini v Cisco Gen. Constr., Inc.*, 123 AD3d 1077, 1 NYS3d 195 [2d Dept 2014]). A defendant who moves to compel the plaintiff to accept late service of an answer pursuant to CPLR 3012(d) is required to make a similar showing (*see* *Gershman v Ahmad*, 131 AD3d 1104, 16 NYS3d 836 [2d Dept 2015]; *Citimortgage, Inc. v Stover*, 124 AD3d 575, 2 NYS3d 147 [2d Dept 2015]; *Mannino Dev., Inc. v Linares*, 117 AD3d 995, 986 NYS2d 578 [2d Dept 2014]; *Maspeth Fed. Sav. & Loan Assn. v McGown*, 77 AD3d 889, 909 NYS2d 403 [2d Dept 2010]). The determination as to what constitutes a reasonable excuse lies within the sound discretion of the trial court (*see* *Segovia v Delcon Constr. Corp.*, 43 AD3d 1143, 842 NYS2d 536 [2d Dept 2007]). Moreover, absent a valid jurisdictional or abandonment defense, a party in default may not appear in the action and contest the plaintiff's right to relief unless the defaulter can establish grounds for the vacatur of his or her default (*see* *Schwartz v Reisman*, 112 AD3d 909, 976 NYS2d 883 [2d Dept 2013]; *HSBC Mtge. Corp. (USA) v Morocho*, 106 AD3d 875, 965 NYS2d 570 [2d Dept 2013]; *U.S. Bank N.A. v Gonzalez*, 99 AD3d 694, 952 NYS2d 59 [2d Dept 2012]).

The defendants' request for leave to vacate their second default and extend their time to answer again is denied because they did not demonstrate a reasonable excuse for their default in answering after being given leave to do so by this court (*see* *Deutsche Bank Trust Co. Ams. v Marous*, 127 AD3d 1012, 5 NYS3d 883 [2d Dept 2015]; *Mannino Dev., Inc. v Linares*, 117 AD3d 995). Counsel's statements that the defendants' time to answer did not expire, because notice of entry of the February 3, 2017 order was never served upon his office, even if true, is insufficient to demonstrate a reasonable excuse for the defendants' lengthy default in answering for a second time (*see* *US Bank N.A. v Louis*, 148 AD3d 758, 48 NYS3d 458 [2d Dept 2017]; *Wells Fargo Bank, NA v Besemer*, 131 AD3d 1047, 16 NYS3d 819 [2d Dept 2015]; *Mannino Dev., Inc. v Linares*, 117 AD3d 995). Contrary to counsel's statements, the terms of February 3, 2017 order did not require the plaintiff to serve the defendants with notice of entry of the order. Moreover, counsel does not allege law office failure as a potential excuse, nor does he allege that his office never received a copy of the order from the court in time to defend.

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The record shows that the defendants, who were represented by their present counsel, participated extensively in the defense of this action since, at least, November 6, 2014 (*see Wells Fargo Bank, N.A. v Cervini*, 84 AD3d 789, 921 NYS2d 643 [2d Dept 2011]). The defendants also waited to move to vacate their second default until after the plaintiff had already moved for another order of reference (*see JP Morgan Chase Bank, N.A. v Russo*, 121 AD3d 1048, 996 NYS2d 68 [2d Dept 2014]). Therefore, it is also unnecessary to consider whether the defendants sufficiently demonstrated the existence of a potentially meritorious defense (*see US Bank N.A. v Dedomenico*, 162 AD3d 962, 80 NYS3d 278 [2d Dept 2018]; *Wells Fargo Bank, N.A. v Pelosi*, 159 AD3d 852, 69 NYS3d 809 [2d Dept 2018]; *Bank of America, N.A. v Agarwal*, 150 AD3d 651, 57 NYS3d 153 [2d Dept 2017]; *Citimortgage, Inc. v Bustamante*, 107 AD3d 752, 968 NYS2d 513 [2d Dept 2013]).

The branch of the cross motion for an order dismissing the complaint pursuant to CPLR 3211(a)(8) is denied because the defendants waived their right to move for dismissal of the complaint by, among other things, serving a notice of appearance, combined demands and interrogatories in 2014, by serving and filing the instant cross motion to vacate their default a second time and extend their time to answer, by their appearance and participation in various court conferences, either personally or by counsel, and by execution of the stipulation to adjourn the plaintiff's motion, all of which constituted a formal appearance in this action (*see CPLR 320[a]*; *JPMorgan Chase Bank, N.A. v Lee*, 186 AD3d 685, 129 NYS3d 507 [2d Dept 2020]; *Residential Credit Solutions, Inc. v Guzman*, 178 AD3d 1109, 112 NYS3d 578 [2d Dept 2019]; *U.S. Bank N. A. v Pepe*, 161 AD3d 811, 76 NYS3d 560 [2d Dept 2018]; *American Home Mtge. Servicing, Inc. v Arklis*, 150 AD3d 1180, 56 NYS3d 332, 334 [2d Dept 2017]).

The remainder of the relief sought in the defendants' cross motion was also waived by their failure to answer the complaint (*see CPLR 3211[e]*; *see also Wilmington Trust, N.A. v Ashe*, ___ AD3d ___, 2020 NY Slip Op 07429 [2d Dept 2020]; *Deutsche Bank Natl. Trust Co. v Hall*, 185 AD3d 1006, 129 NYS3d 146 [2d Dept 2020]; *Deutsche Bank Natl. Trust Co. v Ford*, 183 AD3d 1168, 124 NYS3d 430 [3d Dept 2020]; *cf. RPAPL § 1302-a*). In any event, there is no merit to the defendants' contentions that the plaintiff lacked standing because the loan documents reflect that the plaintiff was the originating lender, and the plaintiff's representative averred that the plaintiff was still the holder of the note when it commenced this action (*see Generation Mtge. Co. v Medina*, 138 AD3d 688, 27 NYS3d 881 [2d Dept 2016]; *Wachovia Mtge. Corp. v Lopa*, 129 AD3d 830, 13 NYS3d 97 [2d Dept 2015]). Thus, any questions concerning whether the note was properly endorsed, or endorsed at all, are entirely irrelevant for purposes related to the plaintiff's standing.

The court next turns to the motion-in-chief. The plaintiff has submitted sufficient evidence entitling it to the relief requested (*see HSBC Bank USA, N.A. v Alexander*, 124 AD3d 838, 4 NYS3d 47 [2d Dept 2015]; *Wells Fargo Bank, NA v Ambrosov*, 120 AD3d 1225, 993 NYS2d 322 [2d Dept 2014]). This proof consists of, inter alia, the mortgage, the note, the default thereunder, an affidavit of the facts constituting the claim pursuant to CPLR 3215(f), a and affidavits of service. Thus, the plaintiff demonstrated its prima facie burden.

"[S]uccessful opposition to a CPLR 3215 motion for leave to enter a default judgment requires the same showing as an affirmative motion for leave to extend the time to answer," including, inter alia, demonstrating the existence of a reasonable excuse for the default (*Fried v Jacob Holding, Inc.*, 110 AD3d

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56, 66, 970 NYS2d 260 [2d Dept 2013]; see *Weinstein v Schacht*, 98 AD3d 1106, 950 NYS2d 711 [2d Dept 2012]). Additionally, defaulting defendants are "deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71, 760 NYS2d 727 [2003] [internal quotation marks and citations omitted]).

As noted above, the defendants failed to demonstrate that they have a reasonable excuse for their default (see *Deutsche Bank Natl. Trust Co. v Kuldip*, 136 AD3d 969, 25 NYS3d 653 [2d Dept 2016]; *Deutsche Bank Trust Co. Ams. v Marous*, 127 AD3d 1012, 5 NYS3d 883 [2d Dept 2015]). Because the defendants failed to answer the complaint and they did not make a timely motion to dismiss, they also waived the purported defenses they now attempt to raise (see CPLR 3211[a][e]; *Deutsche Bank Natl. Trust Co. v Hall*, 185 AD3d 1006; *Deutsche Bank Natl. Trust Co. v Ford*, 183 AD3d 1168).

The branch of the plaintiff's motion for an order amending the caption by excising the fictitious "JOHN DOE" defendant is granted (see *Citibank, N.A. v Van Brunt Props., LLC*, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]; *Neighborhood Hous. Servs. of N.Y. City, Inc. v Meltzer*, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]).

The branch of the motion for an order amending the caption by substituting U.S. Bank National Association, as Trustee relating to J.P. Morgan Mortgage Acquisition Corp. 2005-FRE1, Asset Backed Pass-Through Certificates, Series 2005-FRE1 (U.S. Bank) for the plaintiff is denied with leave to renew upon presentation of proper proof of the transfer of the note to J.P. Morgan (see *Citimortgage, Inc. v Bredehorn*, 160 AD3d 803, 76 NYS3d 88 [2d Dept 2018]; *Citicorp Mite. v Adams*, 153 AD3d 779, 60 NYS3d 337 [2d Dept 2017]; cf. *Aurora Loans Servs., LLC v Mandel*, 148 AD3d 965, 967, 50 NYS3d 154 [2d Dept 2017]). In support of this relief, the plaintiff's counsel avers, in sum and substance, that the mortgage was transferred to U.S. Bank after this action was commenced, and that said transfer was memorialized by an assignment of mortgage executed on March 18, 2013 and recorded August 26, 2014. The plaintiff's moving papers, however, are devoid of any allegations by one with personal knowledge, supported by relevant business records, that U.S. Bank now owns or holds the note. Furthermore, although the plaintiff has submitted certain assignments showing that the mortgage was purportedly assigned to U.S. Bank, the assignments are insufficient to transfer the note because there is no evidence that MERS, the first assignor, ever held the note.

Moreover, even though the purported endorsement to the note is irrelevant for standing purposes under the facts of this case (where the plaintiff is the originating lender), the plaintiff's representative did not specifically address the alleged endorsement to the note, which appears to be on a separate, undated piece of paper (see *U.S. Bank N.A. v Moulton*, 179 AD3d 734, 116 NYS3d 86 [2d Dept 2020]; *JPMorgan Chase Bank, N.A. v Grennan*, 175 AD3d 1513, 109 NYS3d 436 [2d Dept 2019]; *Bayview Loan Servicing, LLC v Charleston*, 175 AD3d 1229, 108 NYS3d 161 [2d Dept 2019]; *HSBC Bank USA, N.A. v Roumiantseva*, 130 AD3d 983, 15 NYS3d 117 [2d Dept 2015]; *US Bank N.A. v Nicholson*, 2013 NY Slip Op 33022 [U] [Sup Ct. Suffolk County 2013]). In this action, it cannot be ascertained from the copy of the note provided by the plaintiff, whether the separate page, which bears the endorsement in blank by the lender, was stamped on the back of the note, or on an allonge, and if on an allonge, whether the allonge was "so firmly affixed as to become a part thereof," as required under UCC 3-202(2) (see *Slutsky v Blooming*

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Grove Inn, Inc., 147 AD2d 208, 542 NYS2d 721 [2d Dept 1980]). Thus, the plaintiff did not establish the transfer of the note to U.S. Bank.

By its moving papers, the plaintiff established the default in answering on the part of the defendants Michael Gay, Adam Tesoro, Assunta Tesoro and MERS and Nominee for Fremont (*see* RPAPL 1321; *HSBC Bank USA, N.A. v Alexander*, 124 AD3d 838, 4 NYS3d 47 [2d Dept 2015]). Accordingly, the default in answering of all of the above-noted defendants is fixed and determined.

Because the plaintiff established the default in answering by all of the defendants in this action, it 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]); however, due to the above-noted deficiencies with respect to the proposed substitution request, the plaintiff's request for an order of reference is denied with leave to renew upon the presentation of the proof specified above.

In light of the above-noted deficiencies, the court need not consider the remainder of the relief requested by the plaintiff at this time. Accordingly, the proposed order of reference has been marked "not signed."

The foregoing constitutes the decision and Order of this Court.

Dated: January 21, 2021


HON. DENISE F. MOLIA A.J.S.C.