

U.S. Bank N.A., v Metzger

2014 NY Slip Op 32382(U)

August 26, 2014

Supreme Court, Suffolk County

Docket Number: 18022/10

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 23, SUFFOLK COUNTY

Present: **Hon. EMILY PINES**
 J. S. C.

Original Motion Date: 10-22-13
 Motion Submit Date:
 Motion Sequence No.: 001-MotD

[] FINAL
 [x] NON FINAL

_____ X
**U.S. Bank National Association as Trustee
 for the Certificateholders Citigroup Mortgage
 Loan Trust Inc. Asset-Backed Pass-Through
 Certificates Series 2007-AHL3,**

Plaintiff,

- against -

**Thomas Metzger, and "JOHN DOE #1"
 through "JOHN DOE #10", the last ten
 names being fictitious and unknown to the
 plaintiff, the person or parties, if any, having
 or claiming an interest in or lien upon the
 Mortgage premises described in the
 Complaint,**

Defendants.

_____ X

Attorney for Plaintiff

FRENKEL, LAMBERT, WEISS,
 WEISMAN & GORDON, LLP
 53 Gibson Street
 Bay shore, N. Y. 11706

Attorney for Defendant

THE WEINSTEIN GROUP, P.C.
 3 Crossways Park Drive West
 Woodbury, N. Y. 11797

Upon the following papers numbered 1 to 14 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 14; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers _____; Other _____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

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ORDERED that this unopposed motion by the plaintiff for, inter alia, an order awarding summary judgment in its favor, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption is determined as set forth below; and it is

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

ORDERED that the plaintiff is directed to serve a copy of this Order with notice of entry upon all parties who have appeared herein and not waived further notice pursuant to CPLR 2103(b)(1), (2) or (3) within thirty (30) days of the date herein, and to promptly file the affidavits of service with the Clerk of the Court.

The plaintiff, U.S. Bank National Association as Trustee for the Certificateholders Citigroup Mortgage Loan Trust Inc. Asset-Backed Pass-Through Certificates Series 2007-AHL3, commenced this action to foreclose a mortgage on the property known as 150 Awixa Avenue, Bay Shore, New York 11706. On December 1, 2006, the defendant Thomas Metzger (the defendant mortgagor) executed an interest only adjustable-rate note in favor of Accredited Home Lenders, Inc., a California Corporation (the lender) in the principal sum of \$583,000.00. To secure said note, the defendant mortgagor gave the lender a mortgage also dated December 1, 2006 on the property. Thereafter, by loan modification agreement effective January 1, 2009 (the agreement), the note and the mortgage were modified to reflect, among other things, a single lien and a new unpaid principal balance of \$632,098.94. The agreement also provided for, inter alia, payments of interest at a yearly rate of 7%, for a period of 60 months, from December 1, 2008 through to November 1, 2013.

The mortgage indicates that Mortgage Electronic Registration Systems, Inc. (MERS) was acting solely as a nominee for the lender and its successors and assigns and that, for the purposes of recording the mortgage, MERS was the mortgagee of record. By way of an undated allonge, the note was transferred to the plaintiff, memorialized by an assignment of the mortgage dated April 5, 2010. The assignment was subsequently corrected by another assignment dated April 29, 2010.

The defendant mortgagor allegedly defaulted on the note, the mortgage and the agreement by failing to make the monthly payment of principal and interest due on or about January 1, 2009, and each month thereafter. After the defendant mortgagor allegedly failed to cure his default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on May 12, 2010. The complaint contains two causes of action. In the first cause of action, the plaintiff seeks, inter alia, a foreclosure and sale of the property, and in the second cause of action, the plaintiff demands, inter alia, attorneys' fees, disbursements and allowances. The plaintiff subsequently re-filed the lis pendens on May 1, 2013.

Issue was joined by the interposition of the defendant mortgagor's answer sworn to on June 22, 2010. By his answer, the defendant mortgagor generally denies all of the material allegations contained in the complaint, and asserts eight affirmative defenses alleging, among other things, the following: the failure to state a cause of action and mitigate damages; the lack of personal jurisdiction; the statute of limitations; inequitable conduct; laches; res judicata; and the doctrine of

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unclean hands. The remaining defendants have neither answered nor appeared.

According to the court's records, the parties began a prolonged period of negotiations in an attempt to agree on a loan modification, and five foreclosure settlement conferences were conducted or adjourned before the foreclosure settlement part beginning on November 16, 2010 and lasting until June 9, 2011. At the June, 2011 conference, this case was dismissed from the conference program as the parties were unable to reach a settlement. Thereafter, an additional conference was conducted before Foreclosure Conference Part 23 on May 16, 2013. Accordingly, the conference requirements imposed by CPLR 3408 have been satisfied and no further foreclosure settlement conference is required.

The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the defendant mortgagor, striking his answer and dismissing the affirmative defenses set forth 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. No opposition has been filed in response to this motion.

A plaintiff in a mortgage foreclosure action establishes a prima facie case for summary judgment by submission of the mortgage, the note, bond or obligation, and evidence of default (*see, Valley Natl. Bank v Deutsch*, 88 AD3d 691, 930 NYS2d 477 [2d Dept 2011]; *Wells Fargo Bank v Das Karla*, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; *Washington Mut. Bank, F.A. v O'Connor*, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]). The burden then shifts to the defendant to demonstrate "the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff" (*Capstone Bus. Credit, LLC v Imperia Family Realty, LLC*, 70 AD3d 882, 883, 895 NYS2d 199 [2d Dept 2010], quoting *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 467, 644 NYS2d 345 [2d Dept 1997]).

By its submissions, the plaintiff established its prima facie entitlement to summary judgment on the complaint (*see, CPLR 3212; RPAPL § 1321; Wachovia Bank, N.A. v Carcano*, 106 AD3d 724, 965 NYS2d 516 [2d Dept 2013]; *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 note with an endorsed allonge, the mortgage, the assignments 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]). Thus, the plaintiff demonstrated its prima facie burden as to the merits of this foreclosure action.

The plaintiff also submitted sufficient proof to establish, prima facie, that the affirmative defenses set forth in the defendant mortgagor's 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

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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]; **Wells Fargo Bank, N.A. v Van Dyke**, 101 AD3d 638, 958 NYS2d 331 [1st Dept 2012]; **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]; **Patterson v Somerset Invs. Corp.**, 96 AD3d 817, 817, 946 NYS2d 217 [2d Dept 2012] [“a party who signs a document without any valid excuse for having failed to read it is ‘conclusively bound’ by its terms”]; **La Salle Bank N.A. v Kosarovich**, 31 AD3d 904, 820 NYS2d 144 [3d Dept 2006]; **CFSC Capital Corp. XXVII v Bachman Mech. Sheet Metal Co.**, 247 AD2d 502, 669 NYS2d 329 [2d Dept 1998] [an affirmative defense based upon the notion of culpable conduct is unavailable in a foreclosure action]). Furthermore, “when a mortgagor defaults on loan payments, even if only for a day, a mortgagee may accelerate the loan, require that the balance be tendered or commence foreclosure proceedings, and equity will not intervene” (**Home Sav. of Am., FSB v Isaacson**, 240 AD2d 633, 633, 659 NYS2d 94 [2d Dept 1997]). Moreover, the applicable statute of limitations for a mortgage foreclosure action is six years (*see*, CPLR 213 [4]).

As the plaintiff duly demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted to the defendant mortgagor (*see*, **HSBC Bank USA v Merrill**, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]). Accordingly, it was incumbent upon the defendant mortgagor 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]).

Self-serving and conclusory allegations do not raise issues of fact, and do not require the plaintiff to respond to alleged affirmative defenses which are based on such allegations (*see*, **Charter One Bank, FSB v Leone**, 45 AD3d 958, 845 NYS2d 513 [2d Dept 2007]; **Rosen Auto Leasing, Inc. v Jacobs**, 9 AD3d 798, 780 NYS2d 438 [3d Dept 2004]). 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]; **Argent Mtge. Co., LLC v Mentasana**, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). 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]).

The defendant mortgagor’s answer is insufficient, as a matter of law, to defeat the plaintiff’s unopposed motion (*see*, **Flagstar Bank v Bellafiore**, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; **Argent Mtge. Co., LLC v Mentasana**, 79 AD3d 1079, *supra*). In this case, the affirmative defenses asserted by the defendant mortgagor are factually unsupported and without apparent merit (*see*, **Becher v Feller**, 64 AD3d 672, *supra*). In any event, the failure by the defendant mortgagor

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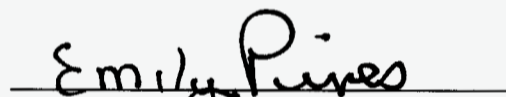
to raise and/or assert each of his pleaded defenses in opposition to the plaintiff's motion warrants the dismissal of the same as abandoned under the case authorities cited above (*see, Kuehne & Nagel v Baiden*, 36 NY2d 539, *supra*; *see also, Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, *supra*).

The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by substituting Ana Khanamrger and Joseph Metzger for the fictitious defendants John Doe #1-2, and by excising the names of the remaining fictitious defendants, John Doe #3-10, is granted (*see, PHH Mtge. Corp. v Davis*, 111 AD3d 1110, 975 NYS2d 480 [3d Dept 2013]; *Flagstar Bank v Bellafiore*, 94 AD3d 1044, *supra*; *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 further established the default in answering on the part of the newly substituted defendants Ana Khanamrger and Joseph Metzger (*see, RPAPL § 1321; HSBC Bank USA, N.A. v Roldan*, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the defaults of all of the above-noted defendants are fixed and determined. Since the plaintiff has been awarded summary judgment against the defendant mortgagor, 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]).

Accordingly, this motion for, inter alia, summary judgment and an order of reference is determined as set forth above. The proposed long form order appointing a referee to compute pursuant to RPAPL § 1321, as modified by the Court, has been signed concurrently herewith.

Dated: 8-26-14
 Riverhead, New York


 EMILY PINES
 J. S. C.