

U.S. Bank Natl. Assn. v Aros

2013 NY Slip Op 31733(U)

May 28, 2013

Supreme Court, Suffolk County

Docket Number: 41790-09

Judge: W. Gerard Asher

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SUPREME COURT - STATE OF NEW YORK
IAS PART 28 - SUFFOLK COUNTY

PRESENT: HON. W. GERARD ASHER
Justice of the Supreme Court

U.S. Bank National Association, as Trustee,
for JPM ALT 2006-S1,

Plaintiff,

-against-

Aclicio Ivan Aros, and "JOHN DOE #1" through
"JOHN DOE #10", the last ten names being
fictitious and unknown to the Plaintiff, the
person or parties intended being the person
or parties, if any, having or claiming an
interest in or lien upon the mortgaged premises
described in the complaint,

Defendant,

x

MOTION DATE 2-16-12
ADJ. DATE _____
Mot. Seq. # 003-MotD

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Upon the following papers numbered 1 to 13 read on this motion for summary judgment; Notice of Motion/
Order to Show Cause and supporting papers 1 - 13; 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,

ORDERED that this unopposed motion (003) by the plaintiff for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor against the defendant, Alicio Ivan Aros, and striking his answer; (2) 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; (4) amending the caption; and (5) awarding the plaintiff the costs and disbursements, including reasonable attorney's fees, for this motion, is granted solely to the extent indicated below, otherwise denied; and it is

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ORDERED that the plaintiff's request for the costs of this motion is denied without prejudice, leave to renew upon proper documentation for costs at the time of submission of the judgment; and it is

ORDERED that the plaintiff shall submit with the proposed judgment of foreclosure, proof of filing of a new or successive notice of pendency (*see*, CPLR 6513; 6516[a]; *Ames Funding Corp. v Houston*, 57 AD3d 808, 872 NYS2d 134 [2d Dept 2008]; *EMC Mtge. Corp. v Stewart*, 2 AD3d 772, 769 NYS2d 408 [2d Dept 2003]; *Horowitz v Griggs*, 2 AD3d 404, 767 NYS2d 860 [2d Dept 2003]); and it is

ORDERED that the plaintiff shall submit with the proposed judgment of foreclosure, a certificate of conformity with respect to the two affidavits from an officer of the plaintiff's servicer, executed outside the state of New York (*see*, CPLR 2309[c]; *U.S. Bank Natl. Assn. v Dellarmo*, 94 AD3d 746, 942 NYS2d 122 [2d Dept 2012]); 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 file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on residential real property known and described as 10 William Street, Central Islip, New York 11722 (the property). Aclicio Ivan Aros (the defendant mortgagor) executed a fixed-rate note dated December 29, 2005 (the note) in favor of PHH Mortgage Corp. (PHH) in the principal sum of \$192,000.00. To secure said note, the defendant mortgagor gave PHH a mortgage also dated December 29, 2005 (the mortgage) on the property. The mortgage indicates that Mortgage Electronic Registration Systems, Inc. (MERS) was acting solely as a nominee for PHH and its successors and assigns and that, for the purposes of recording the mortgage, MERS was the mortgagee of record. The note contains two allonges. The first allonge contains an undated endorsement without recourse by PHH transferring the note to Bishops Gate Residential Mortgage Trust (Bishops). The second allonge contains an undated endorsement in blank by PHH as Administrative Agent for Bishops. Also, by assignment dated October 15, 2009 and recorded on November 2, 2009, MERS as nominee for PHH transferred its interest in the mortgage to the plaintiff.

The defendant mortgagor allegedly defaulted on his monthly payment of principal and interest due on June 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 October 19, 2009. Parenthetically, according to the records maintained by the Suffolk County Clerk's computerized database, the plaintiff filed a new notice of pendency on October 5, 2012, however, a copy of same was not annexed to this application.

Issue was joined by the interposition of the defendant mortgagor's pro se answer dated November 16, 2009. By his answer, the defendant mortgagor admits some of the allegations set forth

in the complaint and generally denies other allegations. The answer, however, does not include any affirmative defenses. The remaining defendants have neither answered nor appeared.

By Order dated May 4, 2010 (Cohen, J), a prior application (001) by the plaintiff for summary judgment was denied without prejudice for, among other things, the plaintiff's failure to provide information whether compliance with the applicable Federal Home Affordable Modification Program guidelines was required and/or had occurred (*see*, 12 USC § 5219a). By Order dated June 12, 2012 (Asher, J.), the plaintiff's prior motion (002) for, inter alia, summary judgment in its favor against the defendant mortgagor was denied without prejudice to renew upon proper papers which were to include, among other things, proof of compliance with the 90-day default notice required pursuant to RPAPL § 1304, if applicable; and proof as to whether the action involves a "high-cost home loan" or a "subprime home loan" (as such terms are defined in Banking Law § 6-l and § 6-m, respectively).

The plaintiff moves again for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor against the defendant, Alicia Ivan Aros, and striking his answer; (2) 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; (4) amending the caption; and (5) awarding the plaintiff the costs and disbursements, including reasonable attorney's fees.

In support of the motion, the plaintiff has submitted, among other things, the two affidavits from an officer of PHH as the plaintiff's servicer and an affirmation from counsel. In one of his affidavits, a representative of PHH alleges, inter alia, the defendant mortgagor is in default for failing to make all of the monthly mortgage payments due the plaintiff since June 1, 2009. He also alleges, among other things, that the plaintiff has acted in good faith in its dealings with the defendant mortgagor and has complied with all State and Federal statutes, laws, rules, regulations and codes as well as the requirements of the mortgage. In his other affidavit, the officer alleges that the plaintiff has complied with all conditions precedent to the commencement of this action including all mandates and executive orders with respect to mortgage foreclosure, foreclosure prevention and home retention. The officer further alleges that the servicer and investor herein are not participating in the Home Affordable Modification Program. In his affirmation, counsel avers that the 90-day notice was not required herein as the mortgage loan did not meet the definition of a "high cost", "subprime" or "non-traditional" loan. No opposition has been filed in response to this motion. Upon renewal, the motion is determined as set forth below.

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 Deutsche**, 88 AD3d 691, 930 NYS2d 477 [2d Dept 2011]; **Wells Fargo Bank v Karla**, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; **Wash. 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]). In the instant case, the plaintiff produced the note, the allonges, the mortgage, the assignment and

evidence of nonpayment (*see, Fed. 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]).

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]; *Wash. Mut. Bank v Valencia*, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]; *Ames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]).

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, 915 NYS2d 591 [2d Dept 2010]). In any event, 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 generally, Kuehne & Nagel, Inc. 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, *supra*; *Madison Park Invs., LLC v Atlantic Lofts Corp.*, 33 Misc3d 1215A, 941 NYS2d 538 [Sup Ct, Kings County 2011]). Under these circumstances, the Court finds that the defendant mortgagor failed to rebut the plaintiff's prima facie showing of its entitlement to summary judgment requested by it (*see, Rossrock Fund II, L.P. v Commack Inv. Group, Inc.*, 78 AD3d 920, 912 NYS2d 71 [2d Dept 2010]; *see generally, Hermitage Ins. Co. Trance Nite Club, Inc.*, 40 AD3d 1032, 834 NYS2d 870 [2d Dept 2007]).

The branch of the instant motion wherein the plaintiff seeks an order amending the caption by substituting Ana B. Melendez as a party defendant for John Doe #1, Marvin Bonilla as a party defendant for John Doe #2, Jose Melendez as a party defendant for John Doe #3, Victoria Melendez as a party defendant for John Doe #4, Gloria Flores as a party defendant for John Doe #5 and Marvin Flores as a party defendant for John Doe #6, and excising the remaining fictitious defendants sued herein as John Doe #7 through John Doe #10, is granted pursuant to CPLR 1024. By its submissions, the plaintiff established the basis for this relief (*see, Flagstar Bank v Bellafiore*, 94 AD3d 1044, *supra*; *Neighborhood Hous. Servs. N.Y. City, Inc. v Meltzer*, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]). 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 B. Melendez, Marvin Bonilla, Jose Melendez, Victoria Melendez, Gloria Flores and Marvin Flores (the tenants/occupants), as these defendants never interposed answers to the complaint (*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 non-answering 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 tenants/occupants, the plaintiff is entitled to an order appointing a referee to compute amounts due under the subject note and

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mortgage (*see*, RPAPL § 1321; *Ocwen Fed. Bank FSB v Miller*, 18 AD3d 527, 794 NYS2d 650 [2d Dept 2005]; *Vt. Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *Bank of E. Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

Accordingly, this motion by the plaintiff is determined as indicated above. The proposed order appointing a referee to compute pursuant to RPAPL § 1321 has been signed herewith as modified by the Court.

Dated: May 28, 2013



Hon. W. GERARD ASHER, J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION