

<b>Wells Fargo Bank, NA v Mineo</b>
2014 NY Slip Op 30832(U)
January 27, 2014
Supreme Court, Suffolk County
Docket Number: 22523-10
Judge: Denise F. Molia
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**COPY**INDEX  
NO.: 22523-10SUPREME COURT - STATE OF NEW YORK  
IAS PART 39 - SUFFOLK COUNTY**PRESENT: Hon. DENISE F. MOLIA**  
Acting Supreme Court Justice

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WELLS FARGO BANK, NA SUCCESSOR BY  
MERGER TO WELLS FARGO HOME  
MORTGAGE, INC.  
3476 Stateview Boulevard  
Ft. Mill, SC 29715

Plaintiff,

-against-

JOHN MINEO; TEACHERS FEDERAL CREDIT  
UNION;JOHN DOE (Said names 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.  

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MOTION DATE: 5-23-13  
ADJ. DATE: \_\_\_\_\_  
Mot. Seq. #: 001-MotDROSICKI, ROSICKI & ASSOCIATES, PC  
Attorneys for Plaintiff  
26 Harvester Avenue  
Batavia, N. Y. 14020DOUGLAS A DURNIN, ESQ.  
Attorney for Defendant  
John Mineo  
5355 Merrick Road  
Massapequa, N. Y. 11758TEACHERS FEDERAL CREDIT UNION  
2410 North Ocean Avenue  
Farmingville, N. Y. 11738JOHN M. (Refused Surname)  
466 West 4<sup>th</sup> Street  
West Islip, N. Y. 11795

Upon the following papers numbered 1 to 12 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 12; 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 by the plaintiff for, inter alia, an order awarding summary judgment in its favor against the defendant John Mineo, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption is determined as indicated below; and it is

**ORDERED** that the appearance by the defendant John Mineo is limited to a notice of appearance and waiver of service of all papers and of notices of all proceedings in this action, except a copy of the notice of sale, notice of discontinuance and notice of proceedings to obtain surplus monies; and it is

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**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.

This is an action to foreclose a mortgage on residential real property known as 466 West 4<sup>th</sup> Street, West Islip, New York 11795. On November 9, 2007, the defendant John Mineo (the defendant mortgagor) executed a fixed-rate note in favor of Wells Fargo Bank, N.A. (the lender) in the principal sum of \$297,500.00. To secure said note, the defendant mortgagor gave the lender a mortgage also dated November 9, 2007 on the property.

The defendant mortgagor allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on November 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 June 17, 2010. Parenthetically, the plaintiff re-filed the lis pendens on June 11, 2013.

Issue was joined by the interposition of the defendant mortgagor's verified answer sworn to on July 20, 2010. By his answer, the defendant mortgagor generally denies all of the material allegations set forth in the complaint, and asserts three affirmative defenses, alleging, inter alia, a defense based upon documentary evidence; the statute of frauds; and failure to state a cause of action. The remaining defendants have neither answered nor appeared herein.

According to the records maintained by the Court's computerized database, a series of settlement conference were scheduled for and/or held before this Court's specialized mortgage foreclosure part on October 27, 2010 as well as on January 20 and February 16, 2011. On the last scheduled date, this case was dismissed from the conference program as the defendant mortgagor did not appear or otherwise participate. Accordingly, no further conference is required under any statute, law or rule.

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 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, the mortgage 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]). Under these circumstances, 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 merit]).

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, 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 [1<sup>st</sup> 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 [1<sup>st</sup> 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 to raise and/or assert each of his pleaded defenses in opposition to the plaintiff's motion warrants the dismissal of the first and second affirmative defenses as abandoned under the case authorities cited above (*see, Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, *supra*; *see also, Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, *supra*).

By his third affirmative defense, the defendant mortgagor asserts that the complaint fails to state a cause of action, however, he has not cross moved to dismiss the complaint on this ground (*see, Butler v Catinella*, 58 AD3d 145, 868 NYS2d 101 [2d Dept 2008]). Also, as indicated above, the plaintiff has established its prima facie entitlement to summary judgment. Therefore, the third affirmative defense is surplusage, and the branch of the motion to strike such defense is denied as moot (*see, Old Williamsburg Candle Corp. v Seneca Ins. Co.*, 66 AD3d 656, 886 NYS2d 480 [2d Dept 2009]; *Schmidt's Wholesale, Inc. v Miller & Lehman Constr., Inc.*, 173 AD2d 1004, 569 NYS2d 836 [3d Dept 1991]).

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, Bank of Smithtown v 219 Sagg Main, LLC*, 107 AD3d 654, 968 NYS2d 95 [2d Dept 2013]; *Flagstar Bank v Bellafigliore*, 94 AD3d 1044, *supra*; *Argent Mtge. Co., LLC v Mentasana*, 79 AD3d 1079, *supra*; *Rossrock Fund II, L.P. v Commack Inv. Group, Inc.*, 78 AD3d 920, 912 NYS2d 71 [2d Dept 2010]; *Wells Fargo Bank Minn., N.A. v Perez*, 41 AD3d 590, *supra*; *see generally, Hermitage Ins. Co. v Trance Nite Club, Inc.*, 40 AD3d 1032, 834 NYS2d 870 [2d Dept 2007]). The plaintiff, therefore, is awarded summary judgment in its favor against the defendant mortgagor (*see, Federal Home Loan Mtge. Corp. v Karastathis*, 237 AD2d 558, *supra*; *see generally, Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Accordingly, the defendant mortgagor's answer is stricken, and the first and second affirmative defenses set forth therein are dismissed.

The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by substituting the defendant John M. (who refused to provide his surname) for the fictitious named defendant, John Doe, is granted (*see, Flagstar Bank v Bellafigliore*, 94 AD3d 1044, *supra*; *Neighborhood Hous. Servs. of N.Y. City, Inc. v Meltzer*, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]). The branch of the motion wherein the plaintiff seeks an order pursuant to CPLR 1021 substituting SRMOF 2009-1 Trust for the plaintiff is also granted (*see, CPLR 1018; 3025[b]; Citibank, N.A. v Van Brunt Props., LLC*, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]; *see also, IndyMac Bank F.S.B. v Thompson*, 99 AD3d 669, 952 NYS2d 86 [2d Dept 2012]; *Greenpoint Mtge. Corp. v Lamberti*, 94 AD3d 815, 941 NYS2d 864 [2d Dept 2012]; *Maspeth Fed. Sav. & Loan Assn. v Simon-Erdan*, 67 AD3d 750, 888 NYS2d 599 [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 defendant Teachers Federal Credit Union (Teachers) and the newly substituted defendant, John M. (*see, RPAPL § 1321; HSBC Bank USA, N.A. v Roldan*, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the defaults of Teachers and John M. 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 non-answering defendants, the plaintiff is entitled to an order appointing a referee to compute



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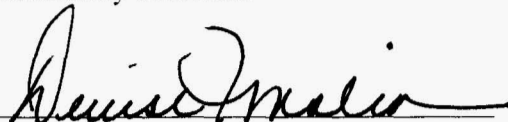
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amounts due under the subject note and mortgage (*see*, RPAPL § 1321; *Ocwen Fed. Bank FSB v Miller*, 18 AD3d 527, 794 NYS2d 650 [2d Dept 2005]; *Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *Bank of E. Asia v Smith*, 201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

Accordingly, this motion for, inter alia, summary judgment and an order of reference is determined as indicated 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: January 27, 2014

  
Hon. DENISE F. MOLIA, A.J.S.C.

       FINAL DISPOSITION      X   NON-FINAL DISPOSITION