

HSBC Bank USA, N.A. v Johnson

2015 NY Slip Op 30287(U)

February 27, 2015

Supreme Court, Suffolk County

Docket Number: 38029-09

Judge: Joseph A. Santorelli

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SUPREME COURT - STATE OF NEW YORK
IAS PART 10 - SUFFOLK COUNTY

PRESENT: Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 2-26-14
ADJ. DATE 4-23-14
Mot. Seq. # 004-MotD

HSBC BANK USA, NATIONAL ASSOCIATION, AS
TRUSTEE FOR FBR SECURITIZATION TRUST
2005-3,

KOZENY, McCUBBIN & KATZ, LLP
Attorney for Plaintiff
395 North Service Road, Suite 401
Melville, N. Y. 11747

Plaintiff,

-against-

GATES & GOLDSTEIN, LLP
Attorneys for Defendants
Angela D. Johnson
Martin C. Johnson
600 Old Country Road Ste. 203
Garden City, N. Y. 11530

ANGELA D. JOHNSON, MARTIN C. JOHNSON,
CAVELIER CONSTRUCTION LTD., DAWN
WILLIAMS, HUNTINGTON DOG CLUB, INC.
D/B/A LITTLE SHELTER, MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, INC.
AS NOMINEE FOR FREMONT INVESTMENT &
LOAN, PEOPLE OF THE STATE OF NEW YORK,
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 and entities, if any, having or
claiming an interest or lien upon the mortgaged
premises.)

Defendants,

_____ x

Upon the following papers numbered 1 to 8 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 7; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers _____; Other Stipulation 8; (~~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 defendants Angela Johnson and Martin Johnson, 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 branch of the motion wherein the plaintiff requests an order awarding it 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

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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 real property known as 182 Monroe Drive, Mastic Beach, New York 11951. On August 15, 2005, the defendants Angela Johnson and Martin Johnson (the defendant mortgagors) executed an adjustable-rate note in favor of Fremont Investment & Loan (Fremont) in the principal sum of \$248,000.00. To secure said note, the defendant mortgagors gave Fremont a mortgage also dated August 15, 2005 on the property. By way of a blank endorsement, the note was allegedly transferred to the plaintiff, HSBC Bank USA, National Association, As Trustee for FBR Securitization Trust 2005-3, prior to commencement. The transfer of the note to the plaintiff was memorialized by an assignment of the mortgage executed on September 4, 2009, and subsequently duly recorded in the Office of the Suffolk County Clerk on October 8, 2009.

The defendant mortgagors allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on or about August 1, 2008, and each month thereafter. After the defendant mortgagors allegedly failed to cure the default in payment, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on September 23, 2009. Parenthetically, the plaintiff re-filed the lis pendens on or about January 17, 2014.

Issue was joined by the interposition of the defendant mortgagors' joint answer dated November 11, 2009. By their answer, the defendant mortgagors deny all of the allegations contained in the complaint, but do not assert any affirmative defenses. The remaining defendants have neither appeared nor answered herein and, thus, defaulted in appearing in this action.

By way of background, a series of settlement conferences were conducted or adjourned before this Court's specialized Mortgage Foreclosure Part beginning on March 23, 2010 and continuing through to November 1, 2010. On the last date, this case was dismissed from the conference program as the parties were unable to reach a settlement. Thereafter, an additional series of settlement conferences were conducted or adjourned before Foreclosure Conference Part 6 beginning on July 6, 2011 and lasting until February 15, 2012. A representative of the plaintiff attended and participated in all settlement conferences. At the last conference, this action was marked to indicate that the parties could not reach an agreement to modify the loan or otherwise settle this action. Accordingly, the conference requirement imposed upon the Court by CPLR 3408 and/or the Laws of 2008, Ch. 472 § 3-a, as amended by Laws of 2009 Ch. 507 § 10, has been satisfied. No further conference is required under any statute, law or rule.

By way of further background, in response to a motion by defendant mortgagors for dismissal of the complaint insofar as against them, the prior justice assigned to this action recused himself by Order

dated October 17, 2011 (Gazzillo, J.), and this case was randomly reassigned to the Honorable John J. Jones, Jr., J.S.C. Thereafter, pursuant to Order dated February 17, 2012 (Jones, J.), the Court denied the defendant mortgagors' dismissal motion, finding, inter alia, that the plaintiff had not acted in bad faith in connection with the above-noted settlement conferences, and that the defendant mortgagors had been afforded sufficient settlement opportunities by virtue of the conference program. A subsequent motion by the defendant mortgagors for dismissal of the complaint was denied as withdrawn by Order dated October 3, 2012 (Jones, J.). Upon Justice Jones' retirement, this action was randomly assigned to the undersigned.

The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the defendant mortgagors and striking their answer; (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]). Thus, the plaintiff demonstrated its prima facie burden as to the merits of this foreclosure action.

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

The defendant mortgagors' 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 Montesana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). 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 [1st Dept 2012]; *Argent Mtge. Co., LLC v Montesana*, 79 AD3d 1079, *supra*). 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]).

Under these circumstances, the court finds that the defendant mortgagors failed to rebut the plaintiff's prima facie showing of its entitlement to summary judgment requested by it (*see, Flagstar Bank v Bellafiore*, 94 AD3d 1044, *supra*; *Argent Mtge. Co., LLC v Montesana*, 79 AD3d 1079, *supra*; *Rossrock Fund II, L.P. v Commack Inv. Group, Inc.*, 78 AD3d 920, 912 NYS2d 71 [2d Dept 2010]; *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 mortgagors (*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 mortgagors' answer is stricken.

The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by excising the name of the fictitious named defendant, John Doe, 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. These submissions include an affidavit from the plaintiff's agent that there are no unknown tenants/occupants residing in the property. All future proceedings shall be captioned accordingly.

By its submissions, the plaintiff demonstrated its entitlement to an amendment of the complaint and correction of a certain scrivener's error therein, whereby the complaint incorrectly sets forth that the plaintiff is a national association and not a national banking association, and it appearing that the substantial right of any party to this action has not been prejudiced (*see, CPLR 2001; Household Fin. Realty Corp. v Emanuel*, 2 AD3d 192, 769 NYS2d 511 [1st Dept 2003]; *Rennert Diana & Co. v Kin Chevrolet, Inc.*, 137 AD2d 589, 524 NYS2d 481 [2d Dept 1988], *see also, Serena Constr. Corp. v Valley Drywall Serv.*, 45 AD2d 896, 357 NYS2d 214 [3d Dept 1974]). Accordingly, pursuant to CPLR 2001 and 3025(c), paragraph "FIRST" of the complaint is amended nunc pro tunc to September 23, 2009 to state as follows:

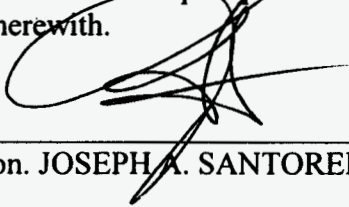
"FIRST: Plaintiff is a national association duly organized and existing under and by virtue of the laws of the United States of America and having its principle place of business in McLean, VA, and the owner and holder of a note

and mortgage being foreclosed.”

By its moving papers, the plaintiff further established the default in answering on the part of the defendants Cavalier Construction LTD., Dawn Williams, Huntington Dog Club, Inc d/b/a Little Shelter, Mortgage Electronic Registration Systems, Inc. as nominee for Fremont and People of the State of New York (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 mortgagors, 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: FEB 27 2015



Hon. JOSEPH A. SANTORELLI, J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION