

Deutsche Bank Natl. Trust Co. Ams. v Avitto
2015 NY Slip Op 30376(U)
March 11, 2015
Supreme Court, Suffolk County
Docket Number: 17807-07
Judge: James C. Hudson
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INDEX
NO.: 17807-07

**SUPREME COURT- STATE OF NEW YORK
IAS PART 18 - SUFFOLK COUNTY**

HON. JAMES HUDSON

PRESENT: ~~Hon. STEPHEN M. BEHAR~~

Acting Supreme Court Justice

DEUTSCHE BANK NATIONAL TRUST COMPANY
AMERICAS F/K/A BANKERS TRUST COMPANY,
AS TRUSTEE AND CUSTODIAN FOR MORGAN
STANLEY MSAC 2007-NC1
C/O Saxon Mortgage Services, Inc.
4708 Mercantile Drive North
Forth Worth, TX 76137-3605

Plaintiff,

-against-

JOANN AVITTO, JEFFERY AGIUS, LORI
AGIUS, FC CAPITAL CORP., MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, INC.
AS NOMINEE FOR FREMONT INVESTMENT AND
LOAN, MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC. AS NOMINEE
FOR WMC MORTGAGE CORP.

“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.

MOTION DATE: 6-12-13
ADJ. DATE: _____
Mot. Seq. # 001-MotD

LEOPOLD & ASSOCIATES, PLLC
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Attorney for Defendants
Joann Avitto and Jeffrey Agius
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Patchogue, N. Y. 11772

MOTION SEQUENCE # _____
RETURN DATE _____
FINAL SUBMITTED DATE _____

_____x

Upon the following papers numbered 1 to 10 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 10; 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 partial 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

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ORDERED that the second cause of action set forth in the plaintiff's complaint, wherein it demands a judgment extinguishing certain prior mortgages allegedly held by the defendants FC Capital Corp., MERS as nominee for Fremont Investment and Loan, and MERS as nominee for WMC Mortgage Corp., and/or declaring said mortgages to be subordinate to the mortgage that is the subject of this action, is considered under CPLR 3215 and RPAPL §1501, and the same is severed and dismissed without prejudice; 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.

This is an action to foreclose a mortgage on residential property known as 129 Mount Vernon Avenue, Patchogue, New York 11772. On August 30, 2006, the defendant Joann Avitto executed a fixed/adjustable-rate note in favor of New Century Mortgage Corporation (the lender) in the principal sum of \$418,200.00. The note provides for, inter alia, an interest rate change date of October 1, 2008, and a interest-only period from the date of the note through October 1, 2011. To secure said note, the defendants Joann Avitto and Jeffrey Agius (the defendant mortgagors) gave the lender a mortgage also dated August 30, 2006 on the property. 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 endorsement placed on the note and an assignment of the mortgage, the loan instruments were transferred to the plaintiff, Deutsche Bank National Trust Company Americas formerly known as Bankers Trust Company, as Trustee and Custodian for Morgan Stanley MSAC 2007-NC1.

Joann Avitto allegedly defaulted on the note and mortgage by failing to make the monthly payment of interest due on February 1, 2007. After the defendant mortgagors allegedly failed to cure Joann Avitto's default, the plaintiff commenced the instant action by the filing of a lis pendens, the summons and verified complaint on June 12, 2007. The plaintiff subsequently re-filed the lis pendens on May 4, 2010, and again on May 7, 2010 (due to an incomplete caption).

Issue was joined by the interposition of the defendant mortgagors' joint answer dated June 20, 2007. By their answer, the defendant mortgagors admit some and deny other allegations in the complaint, but do not assert any affirmative defenses. The remaining defendants have neither appeared nor answered the complaint.

According to the records maintained by the court's computerized database, a foreclosure settlement conference was scheduled for November 1, 2012; however, on that date, this action was dismissed from the conference program because the defendant mortgagors failed to appear or otherwise participate. Accordingly, the conference requirement imposed upon the Court by CPLR 3408 and/or the Laws of 2008,

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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.

The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding partial 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]). Under these circumstances, 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

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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 substituting Kristine Avitto for the fictitious defendant John Doe, and excising the name of Lori Agius, who died prior to the commencement of this action, 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]). The branch of the motion wherein the plaintiff seeks an order pursuant to CPLR 1021 substituting Deutsche Bank National Trust Company as Trustee for Morgan Stanley ABS Capital I Inc. Trust 2007-NC1 Mortgage Pass-Through Certificates, Series 2007-NC1 for the plaintiff is also granted (*see, CPLR 1018; 3025[c]; 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 defendants Kristine Avitto, FC Capital Corp., MERS as nominee for Fremont Investment and Loan and MERS as nominee for WMC Mortgage Corp., set forth in the first cause of action sounding in foreclosure and sale (*see, RPAPL § 1321; HSBC Bank USA, N.A. v Roldan*, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the defaults 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 all of the non-answering defendants, the plaintiff is entitled to an order appointing a referee to compute 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]).

Concerning the second cause of action for declaratory relief, the plaintiff failed to address, let alone establish, its possession of cognizable claims for relief pursuant to RPAPL Article § 1501 declaring the invalidity and extinguishment of certain mortgages and/or liens and/or interests of the defendants FC Capital Corp., MERS as nominee for Fremont Investment and Loan and MERS as nominee for WMC Mortgage Corp. as indicated in the plaintiff’s second cause of action (*see, CPLR 3215[f]; RPAPL §§ 1515; 1519*).

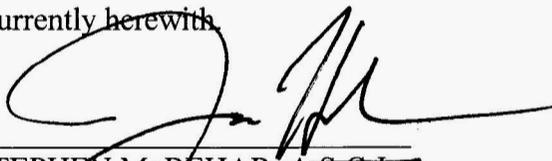
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Thus, the plaintiff is not entitled to an order fixing the defaults of the defendants set forth in the plaintiff's second cause of action, as it failed to assert facts which constitute cognizable claims for the declaratory relief demanded against FC Capital Corp., MERS as nominee for Fremont Investment and Loan and MERS as nominee for WMC Mortgage Corp., as set forth in the plaintiff's second cause of action (*see*, CPLR 3215[f]; *Resnick v Lebovitz*, 28 AD3d 533, 813 NYS2d 480 [2d Dept 2006]).

In addition, the court finds that the plaintiff abandoned its second cause of action for declaratory relief by its interposition of this motion. It is axiomatic that the appointment of a referee to compute pursuant to RPAPL § 1321 is not appropriate unless all pleaded claims of the parties have been adjudicated by the court and the only issues left for determination are those concerning the long account (*see*, *Vermont Fed. Bank v Chase*, 226 AD2d 1034, *supra*). In mortgage foreclosure actions, the issues of the long account are limited to the amounts due the plaintiff by reason of the obligor's default under the terms of the note, mortgage and/or guaranty sued upon and the other matters specified in RPAPL § 1321 (*see*, *New York State Mtge. Loan Enforcement & Admin. Corp. v New Colony Camp Houses, Inc.*, 187 AD2d 955, 590 NYS2d 635 [4th Dept 1992]). Consequently, in a mortgage foreclosure, a plaintiff is only entitled to an order appointing a referee to compute amounts due under the subject note and mortgage if it has been awarded judgment after trial or pursuant to CPLR 3212 and/or 3215 against all defendants joined to the action (*see*, RPAPL § 1321; *Vermont Fed. Bank v Chase*, 226 AD2d 1034, *supra*; *Bank of E. Asia v Smith*, 201 AD2d 522, *supra*; *Citimortgage Inc. v Lepore*, 2012 NY Misc LEXIS 4282, 2012 WL 3947031, 2012 NY Slip Op 32290 [U] [Sup Ct, Suffolk County 2012]). By moving for the appointment of a referee without establishing its entitlement to a default judgment on its claims for declaratory relief, the plaintiff effectively abandoned those claims. Accordingly, the second cause of action in the plaintiff's complaint is severed and dismissed without prejudice.

Accordingly, this motion for, inter alia, partial 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: March 11, 2015



~~Hon. STEPHEN M. DEBAR, A.S.C.J.~~
HON. JAMES C. HUDSON **ATS C**

FINAL DISPOSITION NON-FINAL DISPOSITION