

Nationstar Mtge. LLC v Sudmann

2015 NY Slip Op 30413(U)

February 24, 2015

Supreme Court, Suffolk County

Docket Number: 21095/2013

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK**I.A.S. PART 7 - SUFFOLK COUNTY****PRESENT:****WILLIAM B. REBOLINI**
JusticeNationstar Mortgage LLC d/b/a
Champion Mortgage Company,

Plaintiff,

-against-

Allan E. Sudmann, Betty C. Sudmann,
United States of America o/b/o
Secretary of Housing and Urban Development;
"John Does" and "Jane Does", said names being
fictitious, parties intended being possible tenants
or occupants of the premises, and corporations,
other entities or persons who claim, or may claim,
a lien against the premises,

Defendants.

Motion Sequence No.: 001; MOT.D
Motion Date: 4/24/14
Submitted: 1/12/15Index No.: 21095/2013Attorney for Plaintiff:Rosicki, Rosicki & Associates, P.C.
26 Harvester Avenue
Batavia, NY 14020Attorney for DefendantsAllan E. Sudmann
and Betty C. Sudmann:Joel S. Kaplan, Esq.
666 Old Country Road, Suite 602
Garden City, NY 11530Clerk of the CourtUpon the following papers numbered 1 to 14 read upon this motion for summary judgment:
Notice of Motion and supporting papers, 1 - 14; it is**ORDERED** that this unopposed motion by the plaintiff for, inter alia, an order awarding
summary judgment in its favor and against the defendants Allan Sudmann and Betty Sudmann,
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.

This is an action to foreclose a reverse mortgage on the property known as 155 Wyona Avenue, Lindenhurst, New York 11757. On July 2, 2009, the defendants Allan Sudmann and Betty Sudmann (the defendant mortgagors) executed a fixed-rate home equity conversion note (the note) in favor of MetLife Home Loans, a Division of MetLife Bank, N.A. (the lender) in the maximum principal sum of \$705,000.00. To secure said note, the defendant mortgagors gave the lender a reverse mortgage (the mortgage) also dated July 2, 2009 on the property. By way of, inter alia, a blank endorsement with delivery, the note was allegedly transferred to Nationstar Mortgage LLC doing business as Champion Mortgage Company (the plaintiff), and memorialized by an assignment of the mortgage executed on September 7, 2012 as well as a subsequent assignment of the mortgage executed on February 2, 2013. Thereafter, the assignments were duly recorded in the Office of the Suffolk County Clerk.

The mortgage and note provide, inter alia, that the loan is due and payable upon one or more of several conditions, one of which is the failure of the defendant mortgagors to perform an obligation required by the mortgage. According to the plaintiff, the defendant mortgagors allegedly defaulted on the note and mortgage by failing to pay the real estate taxes and by failing to maintain hazard insurance on the property beginning on or about July 9, 2009 through to August 6, 2013, and continuing. After the defendant mortgagors allegedly failed to cure the aforesaid default in payment, the plaintiff commenced the instant action by the filing of a lis pendens, summons and complaint on August 7, 2013.

Issue was joined by the interposition of the defendant mortgagors' joint verified answer sworn to on September 3, 2013. By their answer, the defendant mortgagors admit some of the allegations contained in the complaint, and deny the remaining allegations set forth therein. In the answer, the defendant mortgagors also assert two affirmative defenses, alleging, among other things, the failure to state a cause of action and the lack of privity of contract. The defendant United States of America on behalf of Secretary of Housing and Urban Development (HUD) has appeared herein and waived notice of all, but certain notices. The remaining defendants have neither answered nor appeared herein.

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, striking their 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 the 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 mortgagors' 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]). Furthermore, in this case, the plaintiff was free to transfer the note and mortgage, absent any language which expressly prohibited the assignment (*see, Matter of Stralem*, 303 AD2d 120, 758 NYS2d 345 [2d Dept 2003]).

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]).

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

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

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, and the affirmative defenses set forth therein are dismissed in their entirety.

The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by excising the names of the fictitious named defendants, John Does and Jane Does, 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 affirmation from counsel that none of the fictitious defendants are necessary defendants to this action. All future proceedings shall be captioned accordingly.

By its moving papers, the plaintiff further established the default in answering on the part of HUD (*see, RPAPL § 1321; HSBC Bank USA, N.A. v Roldan*, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the default of HUD is 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 defendant, 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*

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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: 2/24/2015


HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION _____ X _____ NON-FINAL DISPOSITION