

Wells Fargo Bank, N.A. v Gaymon

2015 NY Slip Op 30968(U)

January 23, 2015

Supreme Court, Suffolk County

Docket Number: 18939-12

Judge: Jr., Andrew G. Tarantino

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INDEX
NO.: 18939-12

**SUPREME COURT - STATE OF NEW YORK
IAS PART 50 - SUFFOLK COUNTY**

**PRESENT: Hon. ANDREW G. TARANTINO JR.
Acting Supreme Court Justice**

Motion Date: 4-24-14
Adj. Date: _____
Mot. Seq. # 001-MotD

WELLS FARGO BANK, N.A.,

Plaintiff,

-against-

**RONALD GAYMON A/K/A RONALD W. GAYMON;
SEARS ROEBUCK AND CO; "JOHN DOES" and
"JANE DOES", said names being fictitious, parties
intended being possible tenants or occupants of
premises, and corporations, other entities or persons
who claim, or may claim, a lien against premises,**

Defendants.

**ROSICKI, ROSICKI & ASSOCIATES, PC
Attorneys for Plaintiff
26 Harvester Avenue
Batavia, N. Y. 14020**

**NICHOLAS P. SCUNZIANO
Attorney for Defendant
Ronald Gaymon
8304 13th Avenue
Brooklyn, N. Y. 11228**

**MARCUS GAYMON
36 Hamlin Avenue
West Babylon, N. Y. 11704**

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 8; 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 Ronald Gaymon, 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 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 the real property known as 314 Hamlin Avenue, West Babylon, New York 11704. On March 28, 2008, the defendant Ronald Gaymon (the defendant mortgagor) executed a fixed-rate note in favor of Euro Mortgage Bankers, Inc. (the lender) in the principal sum of \$292,320.00. To secure said note, the defendant mortgagor gave the lender a mortgage also dated March 28, 2008 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.

The note and mortgage were modified pursuant to a loan modification agreement dated April 3, 2009, which created, inter alia, a single lien in the amount of \$301,573.24, a reduced interest rate of 5.000%, and a new monthly payment of principal and interest of \$1,618.91 due and payable beginning on June 1, 2009, and each month thereafter until paid in full. Pursuant to the agreement, the maturity date was also extended to May 1, 2039. By way of a blank endorsement with physical delivery, the note was transferred to Wells Fargo Bank, N.A. (the plaintiff) prior to commencement, and memorialized by an assignment of the mortgage executed on November 9, 2011. Thereafter, the assignment was duly recorded in the Office of the Suffolk County Clerk on December 6, 2011.

The defendant mortgagor allegedly defaulted on the note and mortgage, as modified, by failing to make the monthly payment of principal and interest due on or about January 1, 2011, and each month thereafter. After the defendant mortgagor allegedly failed to cure the aforesaid default in payment, the plaintiff commenced the instant action by the filing of a summons and complaint on June 21, 2012, followed by the filing of a lis pendens on June 25, 2012.

Issue was joined by the interposition of the defendant mortgagor's answer dated July 19, 2012. By his answer, the defendant mortgagor admits some of the allegations contained in the complaint, and denies the remaining allegations therein. The defendant mortgagor also asserts nine affirmative defenses, alleging, among other things, the following: lack of standing, failure to mitigate damages, failure to state a cause of action, inequitable conduct/the doctrine of unclean hands, fraud/misrepresentation in connection with the frustration of the defendant mortgagor's ability to perform the loan modification, lack of good faith with respect to a loan modification, and failure to comply with conditions precedent to commencement, including the lack of proper acceleration. The remaining defendants have neither appeared nor answered the complaint.

In compliance with CPLR 3408, a settlement conference was conducted before this Court's specialized mortgage foreclosure part on November 29, 2012, and subsequently continued on February 25, 2013. On the last date, this case was dismissed from the conference program because the defendant mortgagor failed to 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 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 endorsed note, the mortgage, the assignment 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]). The plaintiff also submitted proof of compliance with the notice requirements set forth in the mortgage regarding a default (*see, Wachovia Bank, N.A. v Carcano*, 106 AD3d 724, *supra*; *IndyMac Bank, F.S.B. v Kamen*, 68 AD3d 931, 890 NYS2d 649 [2d Dept 2009]). Further, the plaintiff submitted two affidavits from its officers wherein it is alleged that the plaintiff has been in continuous possession of the endorsed note since prior to commencement (*see, Kondaur Capital Corp. v McCary*, 115 AD3d 649, 981 NYS2d 547 [2d Dept 2014]; *Deutsche Bank Natl. Trust Co. v Whalen*, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]; *HSBC Bank USA, N.A. v Avila*, 2013 NY Misc LEXIS 4521, 2013 WL 5606741, 2013 NY Slip Op 32412 [U] [Sup Ct, Suffolk County 2013]). Additionally, the documentary evidence submitted includes, among other things, the note transferred via an endorsement in blank (*cf., Slutsky v Blooming Grove Inn, Inc.*, 147 AD2d 208, 542 NYS2d 721 [2d Dept 1989]). Therefore, it appears that the plaintiff is the owner and the holder of the original note and the assignee of the mortgage by virtue of the written assignment. Thus, the plaintiff demonstrated its prima facie burden as to the merits of this foreclosure action and as to its standing.

The plaintiff also submitted sufficient proof to establish, prima facie, that the remaining 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]; *see also, Bank of America, N.A. v Lucido*, 114 AD3d 714, 981 NYS2d 433 [2d Dept 2014] [plaintiff's refusal to consider a reduction in principal does not establish a failure to negotiate in good faith]; *Washington Mut. Bank v Schenk*, 112 AD3d 615, 975 NYS2d 902 [2d Dept 2013]; *JP Morgan Chase Bank, N.A. v Ilardo*, 36 Misc3d 359, 940 NYS2d 829 [Sup Ct, Suffolk County 2012] [plaintiff not obligated to accept a tender of less than full repayment as demanded]; *Wells Fargo Bank, N.A. v Van Dyke*, 101 AD3d 638, 958

NYS2d 331 [1st Dept 2012]; *Connecticut Natl. Bank v Peach Lake Plaza*, 204 AD2d 909, 612 NYS2d 494 [3d Dept 1994] [defense based upon the doctrine of unclean hands lacks merit where a defendant fails to come forward with admissible evidence of showing immoral or unconscionable behavior]; *Patterson v Somerset Invs. Corp.*, 96 AD3d 817, 817, 946 NYS2d 217 [2d Dept 2012] [“a party who signs a document without any valid excuse for having failed to read it is ‘conclusively bound’ by its terms”]; *La Salle Bank N.A. v Kosarovich*, 31 AD3d 904, 820 NYS2d 144 [3d Dept 2006]; *CFSC Capital Corp. XXVII v Bachman Mech. Sheet Metal Co.*, 247 AD2d 502, 669 NYS2d 329 [2d Dept 1998] [an affirmative defense based upon the notion of culpable conduct is unavailable in a foreclosure action]. Moreover, “when a mortgagor defaults on loan payments, even if only for a day, a mortgagee may accelerate the loan, require that the balance be tendered or commence foreclosure proceedings, and equity will not intervene” (*Home Sav. of Am., FSB v Isaacson*, 240 AD2d 633, 633, 659 NYS2d 94 [2d Dept 1997]).

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 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 Mentessana*, 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 mortgagor’s 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 Mentessana*, 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 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 mortgagor 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 Mentessana*, 79 AD3d 1079, *supra*;

Wells Fargo Bank, N.A. v Gaymon

Index No.: 18939-12

Pg. 5

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 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 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 Marcus Gaymon for the fictitious defendants, John Does, and by excising the remaining fictitious named defendants, 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. 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 Sears Roebuck and Co. as well as the newly substituted defendant Marcus Gaymon (*see, RPAPL § 1321; HSBC Bank USA, N.A. v Roldan*, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the default in answering of the above-noted 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 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]).

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: 1.23.2015



Hon. ANDREW G. SARANTINO, Jr., A.J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION