

**Financial Freedom Acquisition LLC v Malloy**

2012 NY Slip Op 31160(U)

April 25, 2012

Sup Ct, Suffolk County

Docket Number: 19276-11

Judge: Joseph C. Pastoressa

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SUPREME COURT - STATE OF NEW YORK  
IAS PART 34 - SUFFOLK COUNTY

PRESENT: Hon. JOSEPH C. PASTORESSA  
Justice of the Supreme Court

MOTION DATE 2-3-12  
ADJ. DATE \_\_\_\_\_  
MOT. SEQ. # 001-MotD  
MOT. SEQ. #: 002-XMD

\_\_\_\_\_  
Financial Freedom Acquisition LLC, x

Plaintiff,

-against-

Kevin J. Malloy, Esq.-Guardian Ad Litem for unknown distributee, heirs at law, next of kin of Howard Harris, deceased, if any be living; and if any be dead, their respective distributees, heir at law, next of kin, legatees, devisees, executors, administrators, assigns and successors in interest all of whose names, whereabouts and addresses are unknown and cannot be ascertained with due diligence, being any persons interested in the Estate of Howard Harris, deceased, as distributee or otherwise, David Roochvarg, Individually and as Administrator of the Estate of Howard Harris, deceased, Daniel Roochvarg, Residuary Beneficiary of the Estate of Howard Harris, deceased Secretary of Housing and Urban Development, Internal Revenue Service - United States of America, New York State Department of Taxation and Finance - Tax Compliance Division - C.O. - ATC,

“JOHN DOE”, “RICHARD ROE”, “JANE DOE”, “CORA COE”, “DICK MOE” and “RUBY POE”, the six defendants last named in quotation marks being intended to designate tenants or occupants in possession of the herein described premises or portions thereof, if any there be, said names being fictitious, their true name being unknown to plaintiff,

Defendants, \_\_\_\_\_ x

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CA

Upon the following papers numbered 1 to 23 read on this motion and cross motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 13; Notice of Cross Motion and supporting papers 14 - 19; Answering Affidavits and supporting papers \_\_\_\_\_; Replying Affidavits and supporting papers 20 - 23; Other \_\_\_\_\_; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that this motion (001) by the plaintiff/counterclaim-defendant for, inter alia, an order: (1) pursuant to CPLR 3212 awarding partial summary judgment in favor of the plaintiff and against the answering defendants, David Roochvarg and Daniel Roochvarg (a) striking the Roochvarg defendants' joint answer, affirmative defenses and counterclaims; (2) pursuant to RPAPL § 1321 fixing the defaults of the non-answering defendants and 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; (3) amending the caption by (a) excising the fictitious named defendants, John Doe, Richard Doe, Jane Doe, Cora Doe, Dick Moe and Ruby Poe and (b) by substituting OneWest Bank, FSB for the plaintiff and (4) awarding the costs of this motion to the plaintiff, is determined as indicated below; and it is further

**ORDERED** that this cross motion (002) by the defendants/counterclaim-plaintiffs, David Roochvarg and Daniel Roochvarg, for, inter alia, an order: (1) denying the plaintiff's motion for summary judgment and a reference to compute; (2) pursuant to CPLR 32.12 awarding summary judgment in their favor and against the plaintiff and dismissing the complaint; and (3) directing summary judgment on the counterclaims in favor of the defendants, David Roochvarg and Daniel Roochvarg, and against the plaintiff, is denied.

Financial Freedom Acquisition LL ("the plaintiff"), commenced this action to foreclose a mortgage on certain real property known as 83 Orange Street, Central Islip, New York 11722 ("the property") by the filing of a summons and complaint on June 14, 2011. On May 31, 2007, Howard Harris ("the decedent") executed an adjustable rate home equity conversion mortgage in favor of Cambridge Home Capital, LLC ("Cambridge") in the maximum principal amount of \$544,185.00 ("the mortgage") as collateral security for an adjustable rate note ("the note") and home equity conversion loan agreement ("the agreement") also dated May 31, 2007. The agreement required the lender to advance the sums secured by the mortgage to the borrower in certain intervals as set forth in the agreement/note. The mortgage and agreement/note provide that the loan is due and payable upon the borrower's death, or upon the borrower ceasing to use the property as his primary residence. The note contains an undated blank endorsement without recourse by Brenda Philips, Vice President of Financial Freedom Senior Funding Corporation, a subsidiary of IndyMac Bank, FSB ("Financial"). By undated Allonge Cambridge purportedly endorsed the note without recourse to Financial. Also, the note and mortgage were purportedly transferred by Cambridge to Financial by an assignment dated May 31, 2007 and recorded on September 6, 2007, and then transferred from Financial to Mortgage Electronic Registration Systems, Inc. ("MERS") by assignment dated September 30, 2009 and recorded on November 28, 2009. Thereafter, the mortgage and note were transferred by MERS to the plaintiff by assignment dated November 18, 2010 and recorded on February 8, 2011. Subsequent to the commencement of this action, the subject note and mortgage were transferred by the plaintiff to OneWest Bank FSB ("OneWest") by assignment dated September 21, 2011.

By way of background, the decedent died on February 15, 2009 leaving a Last Will and Testament dated April 17, 2003 (“the will”). In his will, the decedent left one-half of his residuary estate, after payments of taxes and expenses, to the each of the defendants, David Roochvarg and Daniel Roochvarg (“the Roochvarg defendants”), as the sole beneficiaries named in the will. By Decree Granting Probate Administration C.T.A. dated April 5, 2011 (Czygier, J.), the will was admitted to probate and Letters of Administration C.T.A. were issued to David Roochvarg under Surrogate’s Court file number 2010-653. Parenthetically, in his Decision granting Probate Administration C.T.A. dated April 5, 2011, Surrogate Czygier refers, inter alia, to “the limited value of the estate” as well as an affidavit by petitioner David Roochvarg, in which David Roochvarg, stated under oath that “there were no unpaid debts of decedent”. In the Petition for Probate and Letters of Administration C.T.A. dated February 13, 2010 and filed on February 24, 2010, David Roochvarg estimated the value of all improved real property in New York State at approximately \$200,000. The defendant, Kevin J. Malloy, Esq., as Guardian Ad Litem for unknown distributees, heirs at law and next of kin of the decedent, appeared in that proceeding and filed a report consenting to probate of the will. In addition, the Attorney General of the State of New York appeared in the proceeding to probate the will and did not object to any of the relief requested.

In the complaint, the plaintiff alleges, inter alia, that the mortgage was assigned to it prior to the commencement of this action, and that the plaintiff was the mortgagee of record and holder of the instrument of indebtedness at the time this action was commenced. The plaintiff also alleges that even though it advanced the monies required pursuant to the mortgage and note, the Roochvarg defendants have failed to pay the balance due and owing the plaintiff although notice of default was provided after the decedent’s death.

Issue was joined by the Roochvarg defendants by joint answer with counterclaims dated July 18, 2011. In response to the counterclaims, the plaintiff, as a defendant on the counterclaims, interposed a reply denominated an answer dated July 22, 2011 (*see*, CPLR 3011). The defendants Secretary of Housing and Urban Development and the Internal Revenue Service-United States of America have appeared by notice of appearance and waiver dated June 29, 2011. None of the other defendants have appeared or answered.

By their answer, the Roochvarg defendants deny all of the allegations set forth in the complaint, except the decedent’s date of demise, and assert, inter alia, the following: (a) affirmative defenses: standing; legal capacity to sue; failure to state of cause of action; no personal liability; and (b) affirmative defenses/counterclaims: violations of the Truth In Lending Act (15 U.S.C. §1601, *et seq.*); the decedent’s alleged incapacity; and unconscionable loan terms.

By its reply, the plaintiff, as a defendant on the counterclaims, denies the allegations set forth in the counterclaims and asserts as seven affirmative defenses: failure to state a cause of action; the statute of limitations; unclean hands; plaintiff provided all required disclosure at the time of origination of the subject mortgage; the decedent received the benefit of the loan proceeds; and the Roochvarg defendants have no privity or contractual relationship with the plaintiff.

The plaintiff now moves for an order: (1) pursuant to CPLR 3212 awarding partial summary judgment in favor of the plaintiff and against the answering defendants, David Roochvarg and Daniel

Roochvarg (a) striking the Roochvarg defendants' joint answer, affirmative defenses and counterclaims; (2) pursuant to RPAPL § 1321 fixing the defaults of the non-answering defendants and 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; (3) amending the caption by (a) excising the fictitious named defendants, John Doe, Richard Doe, Jane Doe, Cora Doe, Dick Moe and Ruby Poe and (b) by substituting OneWest Bank, FSB for the plaintiff; and (4) awarding the costs of this motion to the plaintiff.

In response to the motion, the Roochvarg defendants cross move for, inter alia, an order: (1) denying the plaintiff's motion for summary judgment and a reference to compute; (2) pursuant to CPLR 3212 awarding summary judgment in their favor and against the plaintiff and dismissing the complaint; and (3) directing summary judgment in their favor and against the plaintiff on the counterclaims. The plaintiff has filed opposition/reply papers.

A plaintiff in a mortgage foreclosure action establishes a prima facie case for summary judgment by submission of the mortgage, the mortgage note, bond or obligation, and evidence of default (*see, Valley Natl. Bank v Deutsche*, 88 AD3d 691, 930 NYS2d 477 [2d Dept 2011]; *Wells Fargo Bank v Karla*, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; *Wash. 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, 201 [2d Dept 2010]). In the instant case, the plaintiff produced the note, the agreement and the mortgage executed by the decedent, evidence of his death and nonpayment as well as the acceleration/default notice (*see, Fed. 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]). As the plaintiff duly demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted to the Roochvarg defendants (*see, HSBC Bank USA v Merrill*, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]). Accordingly, it was incumbent upon the Roochvarg defendants 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, Argent Mtge. Co., LLC v Mentosana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]; *Aames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]).

In opposition to the motion and in support of their cross motion, the Roochvarg defendants have offered no arguments in support of any of the any of their pleaded defenses or counterclaims except the sixth affirmative defense/second counterclaim and the seventh affirmative defense/third counterclaim. 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 generally, Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 369 NYS2d 667 [1975]; *Argent Mtge. Co., LLC v Mentosana*, 79 AD3d 1079, *supra*; *Madison Park Invs., LLC v Atlantic Lofts Corp.*, 33 Misc 3d 1215A [Sup Ct, Kings County, Oct. 18, 2011, Cutrona, J.]).

The plaintiff demonstrated its prima facie entitlement to judgment as a matter of law with respect to the sixth affirmative defense/second counterclaim and the seventh affirmative defense/third

counterclaim by establishing that the decedent received the proceeds of the subject reverse mortgage loan after execution of the subject mortgage documents, and that it is entitled to recover the mortgage debt (*see, Matter of Augustine v Bank United FSB*, 75 AD3d 596, 905 NYS2d 652 [2d Dept 2010]; *Preshaz v Preshaz*, 51 AD3d 752, 858 NYS2d 290 [2d Dept 2008]; *Whitehead v Town House Equities, Inc.*, 8 AD3d 367, 780 NYS2d 15 [2d Dept 2004]; *Trustco Bank, N.A. v Victoria Assocs.*, 251 AD2d 995, 674 NYS2d 542 [4<sup>th</sup> Dept 1998]; *Mahopac v Natl. Bank v Baisley*, 244 AD2d 466, 664 NYS2d 345 [2d Dept 1997]; *Home Sav. Bank v Schorr Bros. Dev. Corp.*, 213 AD2d 512, 624 NYS2d 53 [2d Dept 1995]; *Lawrence v Kennedy*, 34 Misc3d 711, 936 NYS2d 487 [Sup Ct, Nassau County, Sep. 22, 2011, Bucaria, J.]).

With respect to the sixth affirmative defense and the second counterclaim, the Roochvarg defendants have failed to come forward with any admissible evidence demonstrating that the decedent was legally incapacitated at the time of the execution of the subject mortgage, and that such incapacity was known, or could have been reasonably known, to the plaintiff, and the plaintiff's representatives and agents (*see generally, Smith v Comas*, 173 AD2d 535, 570 NYS2d 135 [1991], *appeal denied* 80 NY2d 754, 587 NYS2d 906 [1992]; *S.D. v N.D.*, 27 Misc3d 1215A, 910 NYS2d 765 [Sup Ct, Kings County, Apr. 8, 2010, Thomas, J.]; *Presvelis v Forella*, 2008 NY Slip Op 31640U [Sup Ct, Queens County, Mar. 14, 2008, Golia, J.]; *see, e.g., Matter of Doar*, 28 Misc3d 759, 900 NYS2d 593 [Sup Ct, Queens County, Thomas, J.]) (*confirmed diagnosis of chronic paranoid schizophrenic at the time of execution of reverse mortgage documents*). Accordingly, the sixth affirmative defense is stricken and the second counterclaim is dismissed.

The seventh affirmative defense is stricken and the third counterclaim is dismissed as the Roochvarg defendants have failed to come forward with any admissible evidence showing that the loan was unconscionable or that the plaintiff/Cambridge engaged in predatory loan practices or bad faith with respect to the subject loan (*see, Gillman v Chase Manhattan Bank, N.A.*, 73 NY2d 1, 537 NYS2d 787 [1988]; *Citibank, N.A. v Walker*, 12 AD3d 480, 787 NYS2d 48 [2d Dept 2004], *abrogated on other grounds by Butler v Catinella*, 58 AD3d 145, 868 NYS2d 101 [2d Dept 2008]; *CFSC Capital Corp. XXVII v Bachman Mech. Sheet Metal Co.*, 247 AD2d 502, 669 NYS2d 329 [2d Dept 1998]; *Connecticut Natl. Bank v Peach Lake Plaza*, 204 AD2d 909, 612 NYS2d 494 [3d Dept 1994]; *Gendot Assocs. Inc. v Kaufold*, 2012 NY Slip Op 30599U [Sup Ct, Suffolk County, Mar. 7, 2012, Spinner, J.]; *10 Connor Lane v C. Connor Lane Assoc.*, 2011 NY Slip Op 31439 [Sup Ct, Suffolk County, May 10, 2011, Martin, J.]). Moreover, inasmuch as the Roochvarg defendants are not parties to the subject mortgage and note/agreement herein or intended third-party beneficiaries of the reverse mortgage loan, they do not have standing to bring their counterclaims pursuant to the mortgage and note/agreement (*see, Griffin v DaVinci Dev., LLC*, 44 AD3d 1001, 845 NYS2d 97 [2d Dept 1997]; *HSBC Bank USA, N.A. v Baksh*, 2012 NY Slip Op 50511U [Sup Ct, Queens County, Mar. 21, 2012, Markey, J.]).

Contrary to the Roochvarg defendants' contentions, they have failed to demonstrate that discovery is necessary with respect to any affirmative defense or counterclaim asserted by them in their answer (*see generally, JP Morgan Chase Bank, N.A. v Agnello*, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; *US Bank Natl. Assn. v Walker*, 2012 NY Slip Op 30821U [Sup Ct, Suffolk County, Mar. 19, 2012, Molia, J.]). Further, "[t]he mere hope that discovery would yield evidence of a triable issue of fact is not a basis for denying summary judgment" (*Lee v T.F. DeMilo Corp.*, 29 AD3d 867, 868, 815 NYS2d 700 [2d Dept

2006]).

Even when viewed in the light most favorable to Roochvarg defendants, their submissions are insufficient to raise a triable issue of fact as to their affirmative defenses or counterclaims (*see, Neighborhood Hous. Servs. N.Y. City, Inc. v Meltzer*, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]; *Cochran Inv. Co. Inc. v Jackson*, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007]). Under these circumstances, the Court finds that the Roochvarg defendants failed to rebut the prima facie showing made by the plaintiff of its entitlement to summary judgment (*see, Valley Natl. Bank v Deutsche*, 88 AD3d 691, *supra*; *Rossrock Fund II, L.P. v Commack Inv. Group, Inc.*, 78 AD3d 920, 912 NYS2d 71 [2d Dept 2010]; *Matter of Augustine v BankUnited FSB*, 75 AD3d 596, *supra*; *Capstone Bus. Credit, LLC v Imperia Family Realty, LLC*, 70 AD3d 882, *supra*). The plaintiff, therefore, is awarded summary judgment in its favor and against the Roochvarg defendants (*see, Argent Mtge. Co., LLC v Mentasana*, 79 AD3d 1079; *Fed. 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 Roochvarg defendants' joint answer and affirmative defenses are stricken and the Roochvarg defendants' counterclaims 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 fictitious named defendants, John Doe, Richard Doe, Jane Doe, Cora Doe, Dick Moe and Ruby Poe, is granted (*see, Neighborhood Hous. Servs. N.Y. City, Inc. v Meltzer*, 67 AD3d 872, *supra*). Also, the branch of the motion wherein the plaintiff seeks an order pursuant to CPLR 1021 substituting OneWest Bank, FSB for the plaintiff is also granted. By its submissions, the plaintiff established the basis for this 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 remaining defendants, neither of whom served answers to the plaintiff's complaint. Accordingly, the defaults of all such defendants are fixed and determined. Since the plaintiff has been awarded summary judgment against the Roochvarg defendants, and has established a default in answering or appearing by 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 [2005], *appeal dismissed* 5 NY3d 824, 804 NYS2d 37 [2005]; *Vt. Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *Bank of E. Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

Accordingly, this motion by the plaintiff is determined as indicated above, and the cross motion by the Roochvarg defendants is denied in its entirety. The Proposed Order appointing a referee to compute pursuant to RPAPL § 1321 is signed as modified by the Court.

Dated: \_\_\_\_\_

APRIL 25, 2012

  
 Hon. JOSEPH C. PASTORESSA, J.S.C.

\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION