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| GMAC Bank v Carroll |
| 2012 NY Slip Op 32294(U) |
| August 21, 2012 |
| Supreme Court, Suffolk County |
| Docket Number: 20806-10 |
| Judge: Emily Pines |
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SUPREME COURT - STATE OF NEW YORK
IAS PART 23 - SUFFOLK COUNTY

COPY

PRESENT: Hon. EMILY PINES
Justice of the Supreme Court

Motion Date: 01-10-12
Submit Date: 5-31-2012
Mot. Seq. # 001 MG
Mot. Seq. # 002 MD

GMAC BANK, x

Plaintiff,

-against-

FRANK CARROLL, and "JOHN DOE #1"
through "JOHN DOE #10", the last ten names
being fictitious and unknown to the plaintiff,
the person or parties intended being the persons
or parties, if any, having or claiming an interest
in or lien upon the Mortgage premises
described in the Complaint,

BRYAN CAVE LLP
Attorneys for Plaintiff
1290 Avenue of Americas
New York, N. Y. 10104

LAW OFFICES OF NEIL H.
GREENBERG & ASSOCIATES, P.C.
Attorneys for Defendant
Frank Carroll
900 Merchants Concourse, Suite 314
Westbury, N. Y. 11590

Defendants,

x

Upon the following papers numbered 1 to 24 read on this motion for summary judgement and related relief; Notice of Motion/ Order to Show Cause and supporting papers (memorandum of law) 1- 17 ; Notice of Cross Motion and supporting papers 18-20 ; Answering/ Replying Affidavits and supporting papers (memorandum of law 21-25 ; Other 0 ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (001) by the plaintiff for an order and/or judgment; (1) pursuant to CPLR 3025 (b) granting Plaintiff leave to amend the reply to counterclaims to assert a statute of limitations defense in response to Borrower's federal statutory counterclaim and affirmative defense under the Truth in Lending Act; (2) pursuant to CPLR 3212, granting summary judgment in favor of Plaintiff and against the defendant Frank Carroll ("Borrower"), on the grounds that there are no triable issues of fact in this proceeding, that the Borrower's affirmative defenses and counterclaims asserted in his Answer lack merit and fail to state valid

defenses to foreclosure, and that accordingly, upon the presentation and coming in of the Referee's Report, Plaintiff is entitled to all of the relief requested in its complaint, including judgment of foreclosure and sale as a matter of law ; (3) dismissing each of the Borrower's five affirmative defenses and four counterclaims as each is without merit; (4) pursuant to RPAPL 1321(1) referring this action to some suitable person as a referee (the "Referee") (i) to ascertain and compute the amount due Plaintiff for principal and interest under the loan set forth in the complaint and for any other amounts due and owing Plaintiff or the original mortgagee under the terms of the Mortgage, (ii) to examine and report whether the mortgaged premises should be sold in a single parcel, (iii) to direct that upon submission of the Referee's Report, Plaintiff have the usual judgment of foreclosure and sale, and (iv) amending the caption of this proceeding by directing that the names of the "John Doe" defendants be deleted from the caption, is granted: and it is further

ORDERED that the unopposed amended reply by plaintiff setting forth an affirmative defense of statute of limitations to the defendants federal statutory counterclaim and an affirmative defense under the Truth in Lending Act shall be deemed served upon the defendant upon service of a copy of this Order with Notice of entry; and it is further

ORDERED that the cross-motion (002) by the defendant for an Order pursuant to CPLR 3211(a)(3) dismissing the plaintiff's complaint in its entirety on the ground that plaintiff lacked standing to commence this action and lacks standing to maintain this action is denied; and it is further

ORDERED that this action be referred to Keith O'Halloran, Esq. (Fid. Id. # 415965), 32 Mill Rd., Westhampton Beach, N.Y. 11978, (631) 998-3601, as Referee to compute the amount due Plaintiff as sought in Plaintiff's Complaint herein, including without limitation any and all sums for principal, interest, water and sewer rents, taxes, insurance premiums, and for any other charges and liens upon the subject premises, including, without limitation, any such charges or liens arising by virtue of any payment or advance made by Plaintiff or the original mortgagee pursuant to the terms of the subject mortgage or pursuant to the order of any Court, with interest on said sums from the dates of the respective payments and advances thereof, and a sum in respect of reasonable attorneys' fees and expenses incurred by Plaintiff in connection with the collection of the indebtedness due upon the subject mortgage and the foreclosure of said mortgage; and to examine and report whether the mortgaged premises should be sold in a single parcel; and that the

said Referee make his or her report to the Court with all convenient speed; and it is further

ORDERED that pursuant to CPLR 8003(a) and in the discretion of the Court, upon the filing of the Referee's report, the Referee shall be paid a fee of \$250.00 for the computation stage; and it is further

ORDERED that by accepting this appointment, the Referee certifies that the Referee is in compliance with 22 NYCRR Part 36, including but not limited to § 36.2(c) ("Disqualifications from Appointment") and § 36.2(d) ("Limitations on appointments based upon compensation"); and it is further

ORDERED that the branch of the Plaintiff's motion to amend the caption is granted and the "John Doe" defendants are hereby deleted from the caption which shall henceforth read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF SUFFOLK

-----X
 GMAC Bank,

Index No.: 20806/10

Plaintiff,

-against-

FRANK CARROLL,

Defendant.

-----X

and it is further;

ORDERED that the Plaintiff shall submit with the Proposed Judgment, the required

affidavit of non-military status of the Defendant pursuant to 50 U.S.C. 521 et seq.; and it is further

ORDERED that plaintiff shall serve a copy of this order with Notice of Entry within sixty (60) days of the date this Order is signed upon counsel for the defendant pursuant to CPLR 2103(b)(1), (2) or (3) and thereafter file the affidavit of service with the Clerk of the Court.

The present action involves the foreclosure on a mortgage alleging that the defendant Frank Carroll defaulted in repaying a note and mortgage which was secured by real property located at 1 Hillcrest Road, a/k/a 210 River Road, Nissequogue, New York 11780.

Issue was joined on or about July 31, 2010, by the service of Carroll's answer with five affirmative defenses and four counterclaims. In response to the counterclaims, plaintiff, as a defendant on the counterclaims served a reply on or about August 20, 2010, thus joining issue.

The Court will first address that part of the plaintiff's motion which seeks to amend its reply to defendant's counterclaims to assert a statute of limitations defense to the defendant's federal statutory counterclaim and an affirmative defense under the Truth in Lending Act. Leave to amend a pleading is within the Court's discretion. The Court finds that the defendant has not been prejudiced. The motion was served upon the defendant's counsel on December 22, 2011, and defendant subsequently submitted a cross-motion which only addressed plaintiff's standing to bring the action and did not address plaintiff's request to amend its reply to the defendant's counterclaims. Thus, that part of plaintiff's motion is unopposed and is granted on default. Lack of opposition is tantamount to consent (*see Hermitage Ins. Co. v Trance Nite Club, Inc.*, 40 AD3d 1032 [2d Dept 2007]; CPLR 3215; *Zino v Jaob Taxi, Inc.*, 20 AD3d 521 [2d Dept 2005]; *Woodson v Mendon Leasing Corp.*, 100 NY2d 62 [2003]; *Neuman v Zurich N. Am.*, 36 AD3d 601 [2d Dept 2007]).

Plaintiff also moves for summary judgment and made a prima facie showing of entitlement to judgment as a matter of law by the submission of the affidavits of Michael Labrum, an AVP of plaintiff's servicer, Brandie Parry, also an officer of plaintiff's servicer, along with copies of the pleadings and relevant mortgage documents, including the note and mortgage signed by defendant, and documentary evidence of defendant's default since July 1, 2009, and that the default to date has not been cured (*see Valley Natl. Bank v Deutsch*, 88 AD3d 691 [2d Dept 2011]; *Wells Fargo Bank v Karla*, 71 AD3d 1006 [2d Dept 2010]; *Wash. Mut Bank F.A. v O'*

Conner, 63 AD3d 832 [2d Dept 2009]; *Bercy Invs. v Sun*, 239 AD2d 161 [1st Dept 1997]; *Bank of Leumi Trust Co. of New York v Lightning Park, Inc.*, 215 AD2d 246 [1st Dept 1995]; *Village Bank v Wild Oaks Holding, Inc.*, 196 AD2d 812 [2d Dept 1993]; *Dart Assoc. v Rosa Meat Mkt.*, 39 AD2d 564 [2d Dept 1972]; *Gould v McBride*, 36 AD2d 706 [1st Dept 1971]; *aff'd* 29 NY2d 708 [1971]), and other documentary proof that it is a current holder in due course of a valid note and mortgage executed by defendant (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). Plaintiff has established and defendant does not deny the existence of a valid note and mortgage. Plaintiff also alleges a past due, unpaid mortgage balance, which defendant has not contested, as well as the acceleration/default notice (*see Fed. Home Loan Mtge Corp. v Karastathis*, 237 AD2d 558 [2d Dept 1997]; *First Trust Natl. Ass'n v Meisels* 234 AD 2d 414 [2d Dept 1996]). Thus, plaintiff has made a prima facie showing of entitlement to summary judgment (*see Northeast Sav. v Rodriguez*, 159 AD2d 820 [3d Dept 1991]; *app. disp.* 76 NY2d 889, 561 NYS2d 550 [1990]).

Since plaintiff has presented documentary evidence of its entitlement to summary judgment as a matter of law, it now becomes incumbent upon defendant to come forward with proof of evidentiary facts showing the existence of a triable issue with regard to bona fide defenses to the action such as waiver, estoppel, bad faith, fraud, oppressive and/or unconscionable conduct on the part of the plaintiff or its predecessor in interest (*see Marine Midland Bank, N.A. v Freedom Rd. Realty Assoc.*, 203 AD2d 538 [2d Dept 1994]; *Village Bank v Wild Oaks Holding, Inc.*, 196 AD2d 812, *supra*; *Marton Assoc. v Vitale*, 172 AD2d 501 [2d Dept 1991]; *Andre v Pomery*, 35 NY2d 362 [1974]). Defendant has not met that burden.

Defendant's general denials and denial of information sufficient to form a belief, are insufficient, as a matter of law, and summary judgment will be granted when "the Answer proffers nothing more than general denials" (*Fairbanks Co. v Simplex Supply Co.*, 126 AD2d 882 [3d Dept 1987]). Bare denials, such as those asserted by Carroll without more, are insufficient to defeat plaintiff's motion for summary judgment (*see 1130 Anderson Ave. Realty Corp. v Mina Equities Corp.*, 95 AD2d 169 [1st Dept 1983]). "Where . . . the cause of action is based upon documentary evidence, the authenticity of which is not disputed, a general denial, without more, will not suffice to raise an issue of fact" (*Gould v McBride*, 36 AD2d 706 [1st Dept 1971]; *aff'd* 29 NY2d 768 [1971]).

Further, speculation and conjecture is insufficient to defeat plaintiff's motion (*see Capobianco v Mari*, 267 AD2d 191 [2d Dept 1999]; *Presta v Houssian*, 186 AD2d 542 [2d Dept

1992]). In fact, defendant has not submitted an affidavit either in support of his pleadings, affirmative defenses and counterclaims or in opposition to plaintiff's motion for summary judgment. Lack of opposition is tantamount to consent and in effect a concession that no question(s) of fact exist (*see Argent Mtge. Co., LLC v Mentesa*, 70 AD3d 1070 [2d Dept 2010]; *Hermitage Ins. Co. v Trance Nite Club, Inc.*, 40 AD3d 1032, *supra* : CPLR 3215; *Zino v Jaob Taxi, Inc.*, 20 AD3d 521, *supra* ; *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, *supra* ; *see also Neuman v Zurich N. Am.*, 36 AD3d 601, *supra* ; *Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539 [1975]). Additionally, "uncontradicted facts are deemed admitted" (*Tortorello v Larry M. Carlin*, 260 AD2d 201, *supra*).

Turning to the defendant's cross-motion seeking an order pursuant to CPLR 3211(a)(3) (*see Wells Fargo Bank Minn. National Association v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]) dismissing the plaintiff's complaint in its entirety on the ground that plaintiff lacked standing to commence this action and lacks standing to maintain this action, the general contentions of defendant's counsel do not provide sufficient basis under CPLR 3212(f) for delaying determination of plaintiff's motion for summary judgment (*see Lewis v Safety Disposal Sys. of Pennsylvania, Inc.*, 12 AD3d 324 [1st Dept 2004]).

"In order to commence a foreclosure action, the plaintiff must have a legal or equitable interest in the mortgage" (*Wells Fargo Bank, N.A. v Marchione*, 69 AD 3d 204, 207, *supra*). A plaintiff has standing where it is both (1) the holder or assignee of the subject mortgage and; (2) the holder or assignee of the underlying note, either by physical delivery or execution of a written assignment prior to the commencement of the action with the filing of the complaint (*see Wells Fargo Bank, N.A. v Marchione*, 69 AD 3d 204, *supra* ; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752 [2d Dept 2009]).

The documentary evidence submitted herein consists of a note transferred via an endorsement in blank. The effect of the endorsement is to make the note payable to bearer pursuant to UCC § 1-201 (5). When an instrument is indorsed in blank (and thus payable to bearer) it may be negotiated by transfer of possession alone (*see UCC §§ 3-202 [1]; 3-204[2]*). Furthermore, UCC § 9-203(g) explicitly provides that the assignment of an interest of the seller or other grantor of a security interest in the note automatically transfers a corresponding interest in the mortgage to the assignee. The relevant provision states, "the attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also

attachment of a security in the security instrument, mortgage or other lien.” Under UCC § 9-203 (g), if the holder of the note in question demonstrated that it had an attached security in the note, the holder of the note in question would also have a security interest the mortgage securing the note even in the absence of a separate assignment of the mortgage. Plaintiff has been in continuous possession of the note as set for in the affidavit of Michael Labium prior to the commencement of the action (*see Deutsche Bank v Barnett*, 88 AD3d 636 [2d Dept 2011]). In opposition to defendant’s cross-motion, counsel for plaintiff affirms categorically and confirms that counsel is in possession of the original note in its office. Here, the plaintiff has established its lawful status as assignee, by the written assignment and physical delivery of the note prior to the filing of the complaint and which is reflected in the complaint. Whereas in this foreclosure action plaintiff has produced sufficient documentary evidence and has eliminated all material issues of fact, the Court finds that the affirmation of defendant’s counsel alone in this cross motion is insufficient (*see Zuckerman v City of New York*, 49 NY 2d 557, *supra*), and is without probative value in opposition to plaintiff’s motion (*see Dicupe v City of New York*, 124 AD2d 542 [2d Dept 1986]). Therefore the cross- motion is denied and the affirmative defense of lack of standing is dismissed.

Accordingly, the motion for summary judgment and for the appointment of a referee to compute and amend the caption amongst other affirmative relief is granted. The cross-motion is denied. All matters not decided herein are hereby deemed denied.

This constitutes the *DECISION* and *ORDER* of the Court.

Dated: August 21, 2012
Riverhead, New York



Emily Pines
J. S. C.

[] FINAL [X] NON-FINAL