National City Bank v Ramirez
2014 NY Slip Op 32865(U)
October 22, 2014
Sup Ct, Suffolk County
Docket Number: 19582-09
Judge: W. Gerard Asher

SHORT FORM ORDER

COPY

INDEX NO.: 19582-09

SUPREME COURT - STATE OF NEW YORK
IAS PART 28 - SUFFOLK COUNTY

PRESENT: Hon. W. GERARD ASHER
Justice of the Supreme Court

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NATIONAL CITY BANK, SUCCESSOR-BY-MERGER TO NATIONAL CITY MORTGAGE CO.
3232 Newmark Drive
Miamisburg, OH 45342

Plaintiff,

-against-

PATRICIA RAMIREZ; GOOD SAMARITAN HOSPITAL; NY FINANCIAL SERVICES LLC; STATE OF NEW YORK; STATE OF NEW YORK O/B/O UNIVERSITY HOSPITAL I/P,

JOHN DOE (Said name being fictitious, it being the intention of the plaintiff to designate any and all occupants of premises being foreclosed herein, and any, having or claiming an interest or lien upon the mortgaged premises.)

Defendants.

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MOTION DATE 8-28-13
ADJ. DATE_____
Mot. Seq. #002- #003 MOT D

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Upon the following papers numbered 1 to 14 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 14; 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 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

ORDERED that the second cause of action set forth in the plaintiff's complaint, wherein it demands a judgment extinguishing certain prior mortgages and/or liens allegedly held by the defendants, Good Samaritan Hospital and State of New York on behalf of University Hospital I/P 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 real property known as 6 Meriod Road, Brentwood, New York 11717. On January 23, 2007, the defendant Patricia Ramirez (the defendant mortgagor) executed a fixed-rate note in favor of National City Mortgage (the lender) in the principal sum of $252,000.00. To secure said note, the defendant mortgagor gave the lender a mortgage also dated January 23, 2007 on the property.

The defendant mortgagor allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on or about July 1, 2008, and each month thereafter. After the defendant mortgagor allegedly failed to cure her default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on May 21, 2009. The complaint contains two causes of action. In the first cause of action, the plaintiff seeks, inter alia, a foreclosure and sale of the property, and in the second cause of action, the plaintiff demands a declaratory judgment pursuant to Article 15 of the Real Property Actions and Proceedings Law invalidating and extinguishing certain adverse and prior liens. The plaintiff subsequently re-filed the lis pendens on February 14, 2012.

Issue was joined by the interposition of the defendant mortgagor's verified answer sworn to on June 15, 2009. By her answer, the defendant mortgagor generally admits some of the allegations set forth in the complaint and admits other allegations therein. In the answer, the defendant mortgagor asserts two enumerated affirmative defenses, alleging, among other things, the following: the inability to afford the loan due to series of personal and financial misfortunes; violations of the Truth In Lending Act (TILA) (15 USC § 1601, *et seq.*); and an anticipated mortgage modification. The defendant Good Samaritan Hospital (Good Samaritan) has appeared herein and waived all, but certain, notices. The remaining defendants have neither appeared nor answered.

In compliance with CPLR 3408, a series of settlement conferences were conducted or adjourned before Foreclosure Conference Part 29 beginning on April 8, 2010 and continuing through to December 2, 2010 as well as before Foreclosure Conference Part 32 beginning on January 27, 2011 and concluding on January 26, 2013. A representative of the plaintiff attended and participated in all settlement conferences. On the last date, this case was dismissed from the conference program as the parties were unable to reach a settlement or otherwise settle the action. Accordingly, no further conference is required under any statute, law or rule.

By way of background, the plaintiff previously moved for, among other things, an order granting it summary judgment and an order of reference; however, the same was subsequently marked

withdrawn. The plaintiff now moves again for, inter alia, an order: (1) pursuant to CPLR 3212 awarding partial summary judgment in its favor and against the defendant mortgagor, striking her answer and dismissing the affirmative defenses 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, 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]). 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 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]; ***HSBC Bank USA v Picarelli***, 36 Misc3d 1218 [A], 959 NYS2d 89 [Sup Ct, Queens County 2012] [TILA requirements satisfied where the lender provided the required information and forms to the obligor at the closing]). Furthermore, "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]). Moreover, "[a]ny sympathy which the [defendant] mortgagor['s] situation might

arouse cannot be permitted to undermine the stability of contractual obligations" (***Jamaica Sav. Bank v Cohan***, 36 AD2d 743, 744, 320 NYS2d 471 [2d Dept 1971]).

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 Mentesana***, 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 unopposed motion (*see*, ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***Argent Mtge. Co., LLC v Mentesana***, 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 her 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 Mentesana***, 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 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 motion wherein the plaintiff seeks an order pursuant to CPLR 1021 substituting PNC Bank, National Association (PNC) for the plaintiff is 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]). The plaintiff demonstrated that effective November 6, 2009, PNC merged with the plaintiff (*see*, Banking Law § 602; ***Ladino v Bank of Am.***, 52 AD3d 571, 861 NYS2d 683 [2d Dept 2008]). Additionally, the branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by substituting the defendants Gaudy Guarniz (Guarniz) and Julian Taylor (Taylor) for the fictitious defendant, "John Doe," 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 defendants Good Samaritan, NY Financial Services LLC, State of New York and State of New York on behalf of University Hospital I/P (New York) as well as the newly substituted defendants, Guarniz and Taylor, 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 Good Samaritan and New York as indicated in the plaintiff's second cause of action (*see*, CPLR 3215[f]; RPAPL §§ 1515; 1519). 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 the defendants 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: October 22, 2014

W. Gerard Asher

Hon. W. GERARD ASHER, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION