

Wells Fargo Bank, N.A. v Blachut
2015 NY Slip Op 30101(U)
January 14, 2015
Supreme Court, Suffolk County
Docket Number: 14183-12
Judge: Joseph C. Pastoressa
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SUPREME COURT - STATE OF NEW YORK
IAS PART 34 - SUFFOLK COUNTYPRESENT: Hon. JOSEPH C. PASTORESSA
Justice of the Supreme CourtWells Fargo Bank, N.A.,

Plaintiff,

-against-

Dennis Blachut, Angela Blachut, Wells Fargo Bank, N.A. United States of America, and "JOHN DOE #1" through "JOHN DOE #10", the last ten names being fictitious and unknown to the plaintiff, the person or parties, if any, having or claiming an interest in or lieu upon the Mortgage premises described in the Complaint,

Defendants.

COPY

MOTION DATE 4-25-14
ADJ. DATE _____
Mot. Seq. #001-MotD

FRENKEL, LAMBERT, WEISS,
WEISMAN & GORDON, LLP
Attorneys for Plaintiff
One Whitehall Street, 20th Fl
New York, N. Y. 10004

BLUTTER & BLUTTER
Attorneys for Defendant
Dennis Blachut
Angela Blachut
497 South Oyster Bay Road
Plainview, N. Y. 11803

Upon the following papers numbered 1 to 11 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 11; 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 answering defendants Dennis Blachut and Angela Blachut, 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.

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This is an action to foreclose a mortgage on the real property known as 7 Avdon Lane, Huntington, New York 11743. On May 5, 2008, the defendants Dennis Blachut and Angela Blachut (the defendant mortgagors) executed a fixed-rate note in favor of Wells Fargo Bank, N.A. (the plaintiff) in the principal sum of \$417,000.00. To secure said note, the defendant mortgagors gave the plaintiff a mortgage also dated May 5, 2008 on the property.

The defendant mortgagors allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on or about September 1, 2011, and each month thereafter. After the defendant mortgagors allegedly failed to cure the aforesaid default in payment, the plaintiff commenced the instant action by the filing of the lis pendens, summons and complaint on May 7, 2012. The complaint includes three causes of action, whereby the plaintiff demands, *inter alia*, the following: a foreclosure and sale of the property; all costs, including reasonable attorneys' fees, disbursements and allowances provided by law; and a reformation of the legal description in the mortgage recorded on May 16, 2008, *nunc pro tunc* to the date of filing of the complaint.

Issue was joined by the interposition of the defendant mortgagors' joint answer dated May 29, 2012. By their answer, the defendant mortgagors generally 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 three affirmative defenses, alleging, among other things, the lack of personal jurisdiction, standing and an improperly recorded assignment. The defendant United States of America (the USA) has appeared herein and waived all, but certain, notices. The remaining defendants have neither appeared nor answered the complaint.

In compliance with CPLR 3408, a series of settlement conferences were conducted or adjourned before the specialized mortgage foreclosure part beginning on November 20, 2012 and continuing through to July 2, 2013. On the last date, this action was dismissed from the conference program and referred as an IAS case because the parties failed to reach a settlement. 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 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

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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]). The plaintiff also submitted an affidavit from its representative wherein it is alleged that the plaintiff was the holder of the note at the time of commencement as the originating lender, and that it has maintained possession of the same since that time (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]). Thus, the plaintiff demonstrated its *prima facie* burden as to the merits of this foreclosure action and as to its standing.

Furthermore, the plaintiff 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]; see also, *Bank of N.Y. Mellon v Scura*, 102 AD3d 714, 961 NYS2d 185 [2d Dept 2013]; *Scarano v Scarano*, 63 AD3d 716, 880 NYS2d 682 [2d Dept 2009] [process server’s sworn affidavit of service is *prima facie* evidence of proper service]). 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 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, Inc. 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 mortgagors’ 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 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 Mentesana*, 79 AD3d 1079, *supra*; *Rosrock 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.

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 Doe #1 through John Doe #10, 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 Wells Fargo Bank, N.A. (as a subordinate mortgagee) and the USA (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 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

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AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; ***Bank of E. Asia v Smith***, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994].

To the extent that the plaintiff moves for a reformation of the legal description contained in the subject mortgage instrument, the same is denied without prejudice to renewal. In the third cause of action, the plaintiff alleges, *inter alia*, that the legal description of the subject property, contained in the mortgage, is incorrect. The plaintiff also alleges, in relevant part, that "the deed and the mortgage were intended to describe the same property identified on the tax map of Suffolk County as Section 070.00, Block 082.001, District 0400 and thus, reformation of the legal description in the mortgage is warranted". The request for the reformation, however, is not supported by any further explanation or evidentiary proof of the circumstances surrounding the alleged erroneous recording, such as an affidavit of facts from one with personal knowledge, nor does it include a copy of the recorded source deed to the subject property, the best evidence of the legal property description. Additionally, while the mortgage includes lot numbers 082.000 and 007.000, the lis pendens only includes lot 082.001. Moreover, the submitted "Schedule A" (description of the mortgaged premises) does not include any references to district, section, block or lot. Thus, under the facts herein, the mere submission of the "Schedule A" is insufficient to demonstrate that the plaintiff is entitled to the relief requested in the third cause of action.

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: January 14, 2015



HON. JOSEPH C. PASTORESSA, J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION