

<b>E*Trade Bank v Spivey</b>
2016 NY Slip Op 31465(U)
August 1, 2016
Supreme Court, Suffolk County
Docket Number: 0946-2014
Judge: Glenn A. Murphy
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**COPY**

**SUPREME COURT - STATE OF NEW YORK  
IAS PART 25 - SUFFOLK COUNTY**

**PRESENT: Hon. GLENN A. MURPHY  
Acting Justice of the Supreme Court**

\_\_\_\_\_  
**E\*TRADE BANK,**  
  
Plaintiff,

**MOTION DATE 07-24-14  
ADJ. DATE \_\_\_\_\_  
MOT. SEQ #001 MG  
#002 MD**

**-against-**

**CRAIG SPIVEY, SUSAN SPIVEY, JPMORGAN CHASE BANK, N.A., and JOHN DOE AND JANE DOE #1 THROUGH #7,** the last names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the complaint,

**STEINE & ASSOCIATES, P.C.**  
*Attorneys for Plaintiff*  
Charles W. Marino, Esq.  
187 East Main Street  
Huntington, New York 11743

**MACCO & STERN, LLP**  
*Attorney for Defendant*  
Charles Wallshein, Esq.  
135 Pinelawn Road, Suite 120S  
Melville, New York 11747

Defendants,  
\_\_\_\_\_x

Upon the following papers numbered 1 to 31 read on this motion for summary judgment and an order of reference ; Notice of Motion/ Order to Show Cause and supporting papers 1-16 ; Notice of Cross Motion and supporting papers 17-20 ; Answering Affidavits and supporting papers \_\_\_\_\_; Replying Affidavits and supporting papers 23-31 ; Other \_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is hereby

**ORDERED** that this motion by the plaintiff E\*Trade Bank, pursuant to CPLR §3212 for summary judgment on its complaint, to strike the answer and counter-claim of Craig Spivey and Susan Spivey and, for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law (RPAPL) §1321, is granted; and it is further

**ORDERED** that the plaintiff's application for leave to amend the caption of this action pursuant to CPLR §3025 (b), is granted; and it is further

**ORDERED** that the defendants' counterclaims are hereby stricken, and it is further

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**ORDERED** that this action be discontinued against the defendants "JOHN DOE AND JANE DOE 1 through #7" and the caption of this action be amended accordion to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF SUFFOLK

\_\_\_\_\_  
 E \*TRADE BANK,

Plaintiff,

INDEX NO. 0946-14

-against-

CRAIG SPIVEY, SUSAN SPIVEY, JPMORGAN CHASE  
 BANK, N.A.,

Defendants.

\_\_\_\_\_  
 X

**ORDERED** that the plaintiff is directed to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court.

**ORDERED** that within 30 days of the entry date of this order, plaintiff shall serve a copy of the order of reference with notice of entry upon all parties who have appeared in this action and thereafter file the affidavit of service with the Clerk of the Court.

**ORDERED** that the plaintiff is granted default judgment pursuant to CPLR §3215 against the defendant JPMorgan Chase, N.A.

This is an action to foreclose a mortgage on premises known as 6 Camel Hollow Road, Lloyd Harbor, New York. On March 15, 2005, the defendant executed a note in favor of J.P. Morgan Chase Bank, N.A., agreeing to pay the sum of \$1,100,000.00 at the yearly rate of 5.5 % (percent). On the same date, the defendants executed a first mortgage in like sum on the subject property. The mortgage was recorded on March 29, 2009 in the Suffolk County Clerk's Office. On February 28, 2013 the mortgage was assigned to the plaintiff by its attorney infact, E\*Trade Bank. The assignment of mortgage was filed with the Suffolk County Clerk's Office on March 15, 2013.

A notice of default, dated May 24, 2013, was sent to the defendant stating that he had defaulted on his mortgage loan and that the amount past due was \$ 198,861.40. On July 24, 2013, the plaintiff sent by certified and regular mail a ninety (90) day notice pursuant to RPAPL §1304. As a result of the defendant's continuing default, the plaintiff commenced this foreclosure action on January 14, 2014. In its complaint, the plaintiff alleges in pertinent part that the defendants breached their obligations under the terms of the note and mortgage by failing to make monthly payments. The summons and complaint comply with the requirement of RPAPL §1302. The defendants interposed an answer consisting of general denials and fifteen (15 ) affirmative defenses and three (3) counter-claims.

The Court's computerized records indicate that a foreclosure settlement conference was held on May 19, 2014, at which time this matter was referred as an IAS case as the defendant defaulted. Thus, there has been compliance with CPLR §3408 and no further settlement conference is required.

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The plaintiff now moves for summary judgment on its complaint contending that the defendants failed to comply with the terms of the loan agreement and mortgage and, that the defendant's general denials raised no issues of fact for trial. In support of its motion, the plaintiff submits among other things: the sworn affidavit of Lauren Blain, Document Coordinator of Bayview Loan Servicing, LLC, the servicer of the plaintiffs loan; the affirmations of Charles W. Marimo in support of the instant motion together with his affirmation pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the pleadings; the note, mortgage, and assignment of mortgage; notice of default; notices pursuant to RPAPL §§ 1320, 1304 and 1303; affidavits of service for the summons and complaint; and, an affidavit of service for the instant summary judgment motion upon the defendant's counsel.

"[I]n an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default" (*Republic Natl. Bank of N.Y. v O'Kane*, 308 AD2d 482, 482, 764 NYS2d 635 [2d Dept 2003]; see *Argent Mtge. Co., LLC v Mentasana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Once a plaintiff has made this showing, the burden then shifts to defendant to produce evidentiary proof in admissible form sufficient to require a trial of their defenses (see *Ames Funding Corp. v Houston*, 44 ASD3d 692, 843 NYS2d 660 [2d Dept 2007]; *Household Fin. Realty Corp. Of New York v Winn*, 19 AD3d 545, 796 NYS2d 533 [2d Dept 2005] see also *Washington Mut. Bank v Valencia*, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]).

Here, plaintiff has established its entitlement to summary judgment against the answering defendant as such papers included a copy of the mortgage, a copy of the assignment of mortgage, the unpaid note together with due evidence of his default in payment under the terms of the loan documents (see CPLR §3212; RPAPL §1321; *Neighborhood Hous. Serv. of New York City v Hawkins*, 97 AD3d 554, 947 NYS2d 321 [2d Dept 2012]; *Baron Assoc., LLC v Garcia Group Enter.*, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; *Citibank, N.A. v Van Brunt Prop., LLC*, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]; *Archer Capital Fund, L.P. v GEL, LLC*, 95 AD3d 800, 944 NYS2d 179 [2d Dept 2012]; *Swedbank, AB v Hale Ave. Borrower, LLC.*, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]; *Rossrock Fund II, L.P. v Osborne*, 82 AD3d 737, 918 NYS2d 514 [2d Dept 2011]).

The defendant filed opposition to plaintiff's summary judgment motion with a cross-motion seeking leave to amend their answer. The defendant argues leaves should be granted as the defendant did not have the opportunity to inspect documents related to the foreclosure until he had the opportunity to review papers that were filed with the summary judgment motion. The defendant argues that when they reviewed the documents they discovered "severe" documentary defects and questioned the chain of title on the note.

The defendant however, fails to note that the note and all assignments of mortgage were included in the plaintiff's complaint. Leave to amend a pleading [pursuant to CPLR 3025 (b) should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit, or unless prejudice or surprise to the opposing party results directly from the delay in seeking leave to amend (see *Giunta's Meat Farms, Inc. v Pina Constr. Corp.*, 80 AD3d 558, 914 NYS2d 641 [2d Dept 2011]; *Rosicki, Rosicki & Assoc., P.C. v Cochems*, 59 AD3d 512, 873 NYS2d 184 [2d Dept 2009]; see also *Seidman v Industrial Recycling Properties, Inc.*, 83 AD3d 1040, 1040-1041, 922 NYS2d 451 [2d Dept 2011]).] Here, the defense is devoid of merit.

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The defendants opposition suggests several areas of deficiency that warrants denial of plaintiff's motion for summary judgment. The lynch pin of the defendants argument is based on the assumption that E\* Trade would not have purchased the note from Chase as the matter was in default prior to the E\*Trade transfer. The defendant surmises that E\*Trade would not have purchased the package in default as the defendant admitted he had stopped making payments prior to the transfer. Based upon the defendants assumption the defendant believed ... "Chase sold our loan to another entity long before its (sic) assigned the mortgage to E\* Trade".

As noted in the plaintiffs' affirmation in reply, the defendant offered no evidence of any such transaction. The defendants arguments are based on sheer speculation. This Court finds, based upon the uncontroverted documentation presented by the plaintiff that standing has been established. The plaintiff showed that the plaintiff was the holder of the mortgage and note when the matter was commenced. The defendants allegations to the contrary have no support in the record. The defendants opposition is based solely upon the defendants' and defense counsels' speculative allegations. The affirmation is not based upon personal knowledge and as such is "without evidentiary value" See *Zuckerman v. City of New York*, 49 NY 2d 557(1980); see also *Weingarten v. Marcus*, 118 AD 2d 640 (2d Dept 1986); *Reuben Israelson v. Sidney Rubin*, 20 AD2d 668, 247 NYS2d 85 (2d Dept 1964) Affd 14 NY2d 887(1964); *Erin Federico v. City of Mechanicville*, 141 AD2d 1002, 531 NYS2d 42 (3<sup>rd</sup> Dept. 1988); *Cohen v. Pannia*, 7 AD2d 886, 181 NYS2d 220 (4<sup>th</sup> Dept. 1959). "Motions for summary judgment may not be defeated merely by surmise, conjecture or suspicion" *Shaw v Time-Life Records*, 38 NY2d 201, 379NYS2d 390 [1975]. Here, the defendant has failed to demonstrate, through the production of competent and admissible evidence, a viable defense which could raise a triable issue of fact (see *Deutsche Bank Natl. Trust Co. V Posner*, 89 AD3d 674, 933 NYS2d 52 [2d Dept 2011]). Notably, the defendant does not deny that he has not made payments of interest or principal on the note. see *Citibank, N.A. v Souto Geffen Co.*, 231 AD2d 466, 647 NYS2d 467 [1<sup>st</sup> Dept 1996].

In light of the foregoing, the motion for summary judgment is granted against the defendants and the defendant's answer is stricken. The plaintiff's request for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is also granted (see *Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *Bank of East Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

**ORDERED**, further that this action is hereby referred to Frank M. Maffei, Jr., Esq., with an office located at 969 Middle Country Road Saint James, New York 11780 Ph # 631-360-0400, who is hereby appointed Referee to ascertain and compute the total amount due plaintiff for unpaid principal, accrued interest and all (other disbursements advanced as provided for by statute) mortgage costs and expenses other than attorneys' fees secured by the note and mortgage set forth in the complaint, and to examine and report as to whether the mortgaged premises can be sold in one parcel; and it is further

**ORDERED**, that plaintiff shall provide the Referee all required documents to compute within sixty (60) days from the date of this Order, and the Referee shall make his/her report no later than thirty (30) days thereafter and that, except for good cause shown, the plaintiff shall move for judgment no later than thirty (30) days of the date of the Referee's Report; and it is further

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**ORDERED**, that by accepting this appointment the Referee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to section 36.2 (c) ("Disqualifications from appointment"), and section 36.2 (d) ("Limitations on appointments based upon compensation"); and it is further

**ORDERED**, that upon submission of the Referee's Report, plaintiff shall pay pursuant to CPLR §8003 (a) \$250.00 to the Referee as compensation for his/her services, which sum may be recouped as a cost of litigation; and it is further

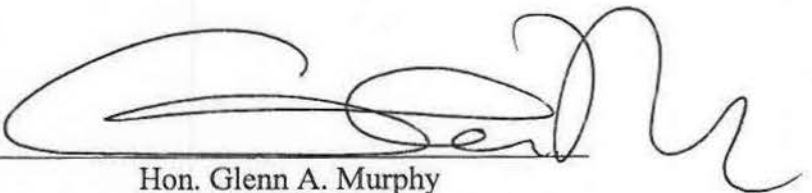
**ORDERED**, that the Referee is prohibited from accepting or retaining any funds for him/herself or paying funds to him/herself without compliance with Part 36 of the rules of the Chief Administrative Judge; and it is further

**ORDERED**, that the Referee appointed herein is subject to the requirements of Rule 36.2 (c) of the Chief Judge, and if the Referee is disqualified from receiving an appointment pursuant to the provision of that Rule, the Referee shall notify the appointing Justice forthwith; and it is further

**ORDERED**, plaintiff is to include in any proposed order for a judgment of foreclosure and sale language complying with the Suffolk County Local Rule for filing of the Foreclosure Action Surplus Monies form contained in Suffolk County Administrative Order #41-13; and it is further

**ORDERED**, that a copy of this order with Notice of Entry shall be served upon the designated Referee, the owner of the equity of redemption, any tenants named in this action and any other party entitled notice within twenty (20) days of entry and no less than thirty (30) days prior to any hearing before the Referee. The Referee shall not proceed to take evidence as provided herein without proof of such service, which must accompany any application for Final Judgment of Foreclosure and Sale.

Dated: August 1, 2016

  
\_\_\_\_\_  
Hon. Glenn A. Murphy  
Acting Justice Supreme Court

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

JP Morgan Chase Bank, N.A.  
One Chase Manhattan Plaza  
New York, New York 10005