

**JPMorgan Chase Bank v Goldstein**

2013 NY Slip Op 30597(U)

March 11, 2013

Supreme Court, Suffolk County

Docket Number: 04712/2011

Judge: William B. Rebolini

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK**

**I.A.S. PART 7 - SUFFOLK COUNTY**

**PRESENT:**

**WILLIAM B. REBOLINI**  
**Justice**

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JPMorgan Chase Bank, National Association,  
Plaintiff,

Motion Sequence No.: 001; MG  
Motion Date: 7/12/12  
Submitted:

-against-

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Mitchell Goldstein, JPMorgan Chase Bank, NA,  
Security Pacific National Bank, State Street Bank  
and Trust Company, "John Does" and "Jane Does",  
said names being fictitious, parties intended being  
possible tenants or occupants of premises, and  
corporations, other entities or persons who claim  
or may claim, a lien against the premises,

Attorneys/Parties [See Rider Annexed]

Defendants.

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Upon the following papers numbered 1 to 16 read upon this motion for summary judgment and order of reference: Notice of Motion and supporting papers, 1 - 12; Answering Affidavits and supporting papers, 13 - 14; Replying Affidavits and supporting papers, 15 - 16; it is

**ORDERED** that this motion by plaintiff JP Morgan Chase Bank, National Association (Chase) pursuant to CPLR 3212 for summary judgment on its verified complaint, to strike the answer of defendant Mitchell Goldstein (Goldstein), awarding plaintiff a default judgment as to the remaining non-appearing and non-answering defendants, and for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is granted; and it is further

**ORDERED** that 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 caption is hereby amended by striking the names of defendants "John Does" and "Jane Does"; and it is further

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**ORDERED** that the caption of this action hereinafter appear as follows:

**SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF SUFFOLK**

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JPMORGAN CHASE BANK, NATIONAL  
 ASSOCIATION,

Plaintiff,

-against-

MITCHELL GOLDSTEIN; JPMORGAN CHASE  
 BANK NA; SECURITY PACIFIC NATIONAL  
 BANK; STATE STREET BANK AND TRUST  
 COMPANY;

Defendants.

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This is an action to foreclose a mortgage on premises known as 17 Fenwick Place, Montauk, New York. On June 21, 2007, defendant Goldstein executed an adjustable rate note in favor of Washington Mutual Bank, FA (Washington Mutual), agreeing to pay the sum of \$880,000.00 at the starting rate of 6.750 percent per annum. On June 21, 2007, defendant Goldstein executed a first mortgage in the principal sum of \$880,000.00 on the subject property. The mortgage was recorded on July 5, 2007 in the Suffolk County Clerk's Office. The note is indorsed in blank by Cynthia Riley, vice president of Washington Mutual. Plaintiff Chase asserts that they are the holder of the note and mortgage.

Chase sent a notice of default dated December 6, 2010 to defendant Goldstein stating that he had defaulted on his mortgage loan and that the amount past due was \$24,379.22. As a result of defendant's continuing default, plaintiff commenced this foreclosure action on February 17, 2011. In its complaint, plaintiff alleges, in pertinent part, that defendant breached his obligations under the terms and conditions of the note and mortgage by failing to make the monthly payments commencing with his September 1, 2010 payment and subsequent months thereafter. Defendant Goldstein interposed an answer consisting of a general denial with no affirmative defenses or counterclaims.

The Court's computerized records indicate that a foreclosure settlement conference was held on September 4, 2012 at which time this matter was referred as an IAS case since a resolution or settlement had not been achieved. Thus, there has been compliance with CPLR 3408 and no further settlement conference is required.

Plaintiff now moves for summary judgment on its complaint contending that defendant Goldstein breached his obligations under the terms and conditions of the note and mortgage by failing to make his monthly payments commencing with the September 1, 2010 payment and subsequent months thereafter and that the answer of defendant raises no triable issues of fact or meritorious defenses to the instant proceeding. In support of its motion, plaintiff submits among other things: the sworn affidavit of Tiffany Rutherford, vice president to Chase; the sworn affidavit of Robert C. Shoppe, receiver in charge for FDIC as receiver of Washington Mutual; the affirmations of Richard Fay, Esq. in support of the instant motion; the reply affirmation of Jessica Bookstaver, Esq.; the affirmation of Richard Fay, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the summons and complaint; the note and mortgage; defendant Goldstein's answer, a notice of default; notices pursuant to RPAPL §§ 1320, 1303 and 1304; affidavits of service for the summons and complaint; and, a proposed order appointing a referee to compute.

Defendant Goldstein opposes the summary judgment motion asserting, *inter alia*, that plaintiff has not made a *prima facie* showing based on a failure to provide adequate proof; that plaintiff does not have standing; and, plaintiff failed to provide evidence as to how it arrived at the figure it claims is due and owing.

“[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” (*see Republic Natl. Bank of N.Y. v O’Kane*, 308 AD2d 482, 482, 764 NYS2d 635 [2d Dept 2003]; *Village Bank v Wild Oaks Holding*, 196 AD2d 812, 601 NYS2d 940 [2d Dept 1993]; *see also Argent Mtge. Co., LLC v Mentessana*, 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 Aames Funding Corp. v Houston*, 44 AD3d 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 produced the note with blank indorsement and mortgage executed by defendant Goldstein, the affidavit of Robert C. Shoppe, as well as evidence of defendant's nonpayment, thereby establishing a *prima facie* case as a matter of law (*see Wells Fargo Bank Minnesota, Natl. Assn. v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). Tiffany Rutherford, vice president to Chase, avers that defendant Goldstein failed to comply with the terms of the note and mortgage by failing to make monthly payments commencing on September 1, 2010; that the defendant has not cured the default; that a letter of default was sent to defendant on December 6, 2010; that in accordance with RPAPL § 1304, plaintiff forwarded a ninety day notice to the last known address of defendant on October 8, 2010; and, that Chase is the holder of the note. Robert C. Shoppe, receiver in charge for FDIC as receiver of Washington Mutual, avers that on September 25, 2008, Washington Mutual was closed by the Office of Thrift Supervision and the FDIC was named receiver; that the FDIC as receiver of Washington Mutual, may transfer any asset or liability without any approval or assignment; that pursuant to the terms and conditions of a

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Purchase and Assumption Agreement between the FDIC and Chase dated September 25, 2008, Chase acquired all loans and all loan commitments of Washington Mutual and, as a result thereof, Chase became owner of the loans and loan commitments of Washington Mutual by operation of law.

Once plaintiff has made a prima facie showing, it is incumbent on 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" (*see Cochran Inv. Co., Inc. v Jackson*, 38 AD3d 704, 834 NYS2d 198, 199 [2d Dept 2007] quoting *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 467, 664 NYS2d 345 [2d Dept 1997]). Here, defendant Goldstein has failed to demonstrate, through the production of competent and admissible evidence, a viable defense which could raise a triable issue of fact (*Deutsche Bank Natl. Trust Co. v Posner*, 89 AD3d 674, 933 NYS2d 52 [2d Dept 2011]). "Motions for summary judgment may not be defeated merely by surmise, conjecture or suspicion" (*see Shaw v Time-Life Records*, 38 NY2d 201, 379 NYS2d 390 [1975]). Furthermore, defendant Goldstein's failure to raise lack of standing as an affirmative defense in his answer constitutes a waiver of that defense (*see CPLR 3211[e]; see also Citibank v Swiatkowski*, 98 AD3d 555, 949 NYS2d 635 [2d Dept 2012]; *US Bank, Natl. Assoc. v Sharif*, 89 AD3d 723, 933 NYS2d 293 [2d Dept 2011]).

Based upon the foregoing, the motion for summary judgment is granted and the defendant's answer is stricken. That branch of the motion for a default judgment against the remaining defendants who have not answered or appeared herein is granted.

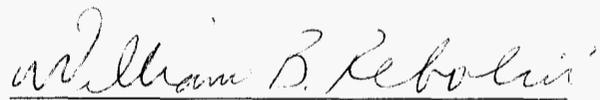
In addition, plaintiff's request for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is granted (*see Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *Bank of East Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d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

The proposed order appointing a referee to compute pursuant to RPAPL §1321 is signed as modified by the court.

Plaintiff is directed to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court

Dated:

3/11/2013

  
HON. WILLIAM B. REBOLINI, J.S.C.

\_\_\_\_\_ FINAL DISPOSITION \_\_\_X\_\_\_ NON-FINAL DISPOSITION

**RIDER**

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Attorney for Defendant

Mitchell Goldstein:

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Defendants:

JPMorgan Chase Bank, NA  
CT Corp. System  
111 8<sup>th</sup> Avenue, 13<sup>th</sup> Floor  
New York, NY 10011

Security Pacific National Bank  
265 Montauk Highway  
Islip, NY 11751

State Street Bank and Trust Company  
One Lincoln Street  
Boston, MA 02111

Occupants  
17 Fenwick Place  
Montauk, NY 11954

Clerk of the Court