

<b>OneWest Bank, F.S.B. v Khan</b>
2013 NY Slip Op 31513(U)
June 3, 2013
Sup Ct, Suffolk County
Docket Number: 29708-10
Judge: Denise F. Molia
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SUPREME COURT - STATE OF NEW YORK  
IAS PART 39 - SUFFOLK COUNTYPRESENT: Hon. DENISE F. MOLIA  
Justice of the Supreme CourtOneWest Bank, F.S.B., x

Plaintiff,

-against-

Muhammed E. Khan, Robin J. Khan,  
Mortgage Electronic Registration Systems, Inc.,  
As nominee for IndyMac Bank, F.S.B., Discover  
Bank, Charter One Auto Finance Corp.,  
Great Seneca Financial Corporation AO  
Household Orchard Bank, Sears Roebuck &  
Co, A Corporation, People of the State of  
New York, Auto Expo Ent. Inc., Fairfield  
at Riverhead LLC, Palisades Collection LLC,

“JOHN DOE”, “RICHARD ROE”,  
“JANE DOE”, “CORA COE”,  
“DICK MOE” and “RUBY POE”, the  
six defendants last names in quotation marks  
being intended to designate tenants or occupants  
in possession of the herein described premises  
or portions thereof, if any there be, said names  
being fictitious, their true name being  
unknown to plaintiff,

Defendants.

MOTION DATE: 9-14-12  
ADJ. DATE: 10-15-12  
MOT. SEQ. #: 001 MG

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Upon the following papers numbered 1 to 27 read on this motion for summary judgement, an order of reference and other related relief; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18; Notice of Cross Motion and supporting papers 0; Affirmation in Opposition and supporting papers 19-24; Replying Affidavits and supporting papers 25-27; Other Plaintiff's memorandum of law; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion by the plaintiff seeking an Order; (1) for summary judgment pursuant to CPLR 3212; (2) for an order of reference; and (3) for such other an further relief as this

Court may seem just and proper and proper is granted; 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 by the Court upon counsel for the defendant mortgagors pursuant to CPLR 2103 (b), (1), (2) or (3) and thereafter file the affidavit of service with the Clerk of the Court; and is further

**ORDERED** that the plaintiff shall serve a copy of this Order with Notice of Entry upon the Calendar Clerk of this IAS Part 39 and the Clerk of the Court who shall note in the courts computerized records the caption amendment as to the substitution of the John and Jane Doe defendants and all future submissions under this Index Number to the Court shall reflect the caption amendment.

The present action involves the foreclosure on a note and mortgage pertaining to and alleging that the mortgagor defendants' Mohamed E. Khan and Robin J. Khan ( hereinafter collectively "Khan") defaulted in repaying the note and mortgage secured by real property located at 131 Helmig Street, Brentwood, NY 11717.

Issue was joined by the service of an answer by counsel consisting of general denials and sixteen affirmative defenses and three counterclaims on or about September 27, 2010.

Plaintiff now moves for summary judgment ( *see* CPLR 3212 [a] ; *Myung Chun v North Am. Mtg. Co.*, 285 AD2d 42, 729 NYS 2d 716 [ 1<sup>st</sup> Dept 2001 ] ) to dismiss the answer, affirmative defenses and counterclaim set forth by Khan and for the issuance of an order of reference. "[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 AD 2d 482, 764 NYS 2d 635 2d Dept 2003 ] ( *citation omitted* ).; *see also Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753, 915 NYS 2d 569 [ 2d Dept 2011 ]).

Plaintiff submits the affidavit testimony of Desiree Rodriguez and Nicole Washington officers of the the plaintiff and the affirmation of plaintiff's counsel along with copies of the pleadings and the relevant mortgage documents, such as the note and mortgage signed by Khan on March 30, 2007, in addition to documentary evidence of Khan's default since September 1, 2009 and that to the date of this motion said default remains uncured ( *see Emigrant Mtg. Co., Inc. v Fisher*, 90 AD 3d 823, 935 NYS 2d 313 [ 2d Dept 2011 ]; *Argent Mtge. Co., LLC v Mentessana*, 79 AD 3d 1079, 915 NYS. 2d 591 [ 2d Dept 2010 ]; *Chiarelli v Kotsifos*, 5 AD 3d 345, 772 NYS 2d 531 [ 2d Dept 2004 ]; *Republic Natl. Bank of N.Y. v O'Kane*, 308 AD 2d 482, *supra* ).

It is well settled that on a motion for summary judgment in foreclosure, a plaintiff establishes its prima facie entitlement to judgment as against a defendant mortgagor by submitting copies of the subject signed mortgage and note ( *see JPMorgan Chase Bank, National Association v Shapiro*, 104 AD 23d 411, 959 NYS 2d 918 [ 2d Dept 2013 ]; *JPMorgan Chase Bank, N.A. v Agnello*, 62 AD 3d 878 NYS 2d 397 [ 2d Dept 2009 ]; *Cochran Inv. Co., Inc. v Jackson*, 38 AD 3d 704, 834 NYS. 2d 198 [ 2d Dept 2007 ]; *Household Fin. Realty Corp. of New York v Winn*, 19 AD 3d 545, 796 NYS.

2d 533 [ 2d Dept 2005]; **Marine Midland Bank, N.A. v Freedom Rd. Realty Assoc.**, 203 AD 2d 538, 611 NYS 2d 34 [ 2d Dept 1994]). With this established, the burden shifted to Khan to lay bare their proof and demonstrate, by admissible evidence, the existence of a material issue fact requiring a trial ( see **Grogg v South Road Assoc., L.P.**, 74 AD 3d 1021, 907 NYS 2d 22 [ 2d Dept 2010 ]; **Washington Mut. Bank v O’Conner** , 63 AD 3d 832, 880 NYS 2d 696 [ 2d Dept 2009]; **Aames Funding Corp. v Houston**, 44 AD 3d 692, 843 NYS 2d 660 [ 2d Dept 2007 ]; *lv app den* 10 NY3d 704, 857 NYS 2d 37 [ 2008 ]; *reargument den.* 10 NY 3d 916, 862 NYS 2d 222 [ 2008]; **Charter One Bank v Houston**, 300 AD 2d 429, 751 NYS 2d 573 [ 2d Dept 2002 ]; *lv app dismissed* 99 NY 2d 651, 760 NYS 2d 104 [2003 ]). It is well settled that on a motion for summary judgment in foreclosure, a plaintiff establishes its prima facie entitlement to judgment as against a defendant mortgagor by submitting copies of the subject signed mortgage and note ( see **JPMorgan Chase Bank, N.A. v Agnello**, 62 AD 3d 878 NYS 2d 397 [ 2d Dept 2009 ]; **Cochran Inv. Co., Inc. v Jackson**, 38 AD 3d 704, 834 NYS. 2d 198 [ 2d Dept 2007]; **HSBC Bank USA v Merrill**, 37 AD 3d 899, 830 NYS 2d 598 [ 3d Dept 2007]; **Household Fin. Realty Corp. of New York v Winn**, 19 AD 3d 545, 796 NYS. 2d 533 [ 2d Dept 2005]; **Marine Midland Bank, N.A. v Freedom Rd. Realty Assoc.**, 203 AD 2d 538, 611 NYS 2d 34 [ 2d Dept 1994]). The moving papers further established, prima facie, that the plaintiff had standing to prosecute its pleaded claims for foreclosure and sale by, among other things, its possession of the mortgage note bearing an indorsement in blank by the previous holder of the note at the time of commandment of this action.

The standing of a plaintiff in a mortgage foreclosure action is measured by its ownership, holder status or possession of the note and mortgage at the time of the commencement of the action ( see **U.S Bank of N.Y. v Silverberg**, 86 AD 3d 274, 926 NYS 2d 532 [ 2d Dept 2011]; **U.S. Bank v Adrian Collymore**, 68 AD 3d 572 , 890 NYS 2d 578 [ 2d Dept 2009 ]; **Wells Fargo Bank, N.A. v Marchione**, 69 AD 3d 204, 887 NYS 2d 615 [ 2d Dept 2009]). Because a “mortgage is merely security for a debt or other obligation and cannot exist independent of the debt or obligation” ( **Deutsche Bank Natl. Trust Co. v Spanos**, 102 AD 3d 909, 910, 961NYS 200 [ 2d Dept 2013 ] *internal citations omitted* ). A mortgage passes as an incident of the note upon its physical delivery to the plaintiff. Holder status is established where the plaintiff is the special indorsee of the note or takes possession of a mortgage note that contains an indorsement in blank on the face thereof as the mortgage follows as an incident thereto ( see UCC § 3-202; UCC § 3-204; UCC § 9-203 [g]).

Here the plaintiff established that it took possession of the note, prior to the commencement of the action and was the holder thereof as said note contained an indorsement in blank on the face thereof ( see **Mortgage Elec. Registration Sys. Inc. v Coakley**, 41 AD 3d 674, 838 NYS 2d 632 [ 2d Dept 2007]; **Deutsche Bank Natl. Trust co. v Pietrano**, 33 Misc. 3d 528, 928 NYS 2d 818 [ Sup Ct Suffolk County 2011], *affd* 102 AD 3d 724, 957 NYS 2d 868 [ 2d Dept 2013 ]). In further support of its standing to bring the foreclosure action plaintiff submitted the affidavit of Forrest McKnight, an officer of plaintiff. in its reply papers further settling further evidentiary proof of plaintiff’s standing to commence and maintain this foreclosure action. Furthermore, the plaintiff in a residential foreclosure action is required to file with the Court an affirmation of the mortgagee’s counsel verifying among other things, the accuracy of the notarizations contained in the supporting documents filed with the foreclosure action. Counsel is required to represent that he or she communicated with a representative of the plaintiff who reviewed the documents and records relating to the action and the papers filed with

the court confirming the factual accuracy of the plaintiff's pleadings ( *see* Administrative Order 548/10 which has been replaced by Administrative Order 431/11). The plaintiff has established, prima facie, that it has standing to prosecute this action ( *see U.S. Bank of N.Y. v Silverberg*, 86 AD 3d 274, *supra*; *U.S. Bank v Adrian Collymore*, 68 AD 3d 572, *supra*; *Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD 3d 674, 838 NYS 622 [ 2d Dept 2007]). In opposition, Khan has failed to raise a triable issue of fact ( *accord JPMorgan Chase Bank, National Association v Shapiro*, 104 AD 23d 411, *supra* ).

The burden of proving that personal jurisdiction has been acquired over a defendant in an action rests with the plaintiff ( *see Anderson v GHI Auto Serv.*, 45 AD 3d 512, 845 NYS 2d 129 [ 2d Dept 2007]; *Kearney v Neurosurgeons of N.Y.*, 31 AD 3d 390 , 817 NYS 2s 502 [ 2d Dept 2006]; *Bankers Trust Co. of Cal. v Tsoukas*, 303 AD 2d 343, 756 NYS 2d 92 [ 2d Dept 2003]). The affirmative defense that the Court lacked jurisdiction over Khan is dismissed as they failed to submit an affidavit contesting service of process ( *see, Associates First Capital Corp. v Wiggins*, 75 AD3d 614, 904 NYS2d 668 [2d Dept 2010]). Moreover, this defense was waived as Khan failed to move to dismiss the complaint against them on this ground within sixty (60) days after service of their answer ( *see, CPLR 3211 [e]; Reyes v Albertson*, 62 AD3d 855, 878 NYS2d 623 [2d Dept 2009]; *Dimond v Verdon*, 5 AD3d 718, 773 NYS2d 603 [2d Dept 2004]).

It was thus incumbent upon the answering defendant to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's prima facie showing or in support of the remaining affirmative defenses asserted in their answer or otherwise available to them ( *see Flagstar Bank v Bellafiore*, 94 AD 3d 1044, 943 NYS 2d 551 [ 2d Dept 2012]; *Grogg Assocs. v South Rd. Assocs.* 74 AD 3d 1021, 907 NYS 2d 22 [ 2d Dept 2010]; *Wells Fargo Bank v Karla*, 71 AD 3d 1006, 896 NYS 2d 681 [ 2d Dept 2010]; *Washington Mut. Bank v O'Conner*, 63 AD 3d 832, 880 NYS 2d [ 2d Dept 2009 ] ; *JPMorgan Chase Bank, N.A. v Agnello*, 62 AD 3d 662, 878 NYS 2d 397 [ 2d Dept 2009]; *Ames Funding Corp. v Houston*; 44 AD 3d 692, 843 NYS 2d 660 [ 2d Dept 2007]).

A defense not properly stated or one which has no merit is subject to dismissal pursuant to CLR 3211 [b]. It thus may be the target of a summary judgment motion by a plaintiff seeking dismissal of any affirmative defense after the joinder of issue. In order for a defendant to successfully oppose such a motion, the defendant must show his or her possession of a bona fide defense , i.e. one having a plausible ground or basis which is fairly arguable and of substantial character and should shown by affidavits or other proofs ( *see Einstein v Levy*, 121 AD 2d 499, 503 NYS 2d 821 [ 1<sup>st</sup> Dept 1986 ]).

Notably, self serving and conclusory allegations do not raise issues of fact and do not require plaintiff to respond to an alleged affirmative defense' which are based on such allegations ( *see Charter One Bank , FSB v Leone*, 45AD 3d 958 845 NYS 2d 513 [ 3<sup>rd</sup> Dept 2007]; *Rosen Auto Leasing Inc. v Jacobs*, 9 AD 3d 798, 780 NYS 2d 338 [ 3<sup>rd</sup> Dept 2004]). Where a defendant fails to oppose all or some of the matter advanced on a motion for summary judgment, the facts as alleged in the movants' papers may be deemed admitted as there is in effect a concession that no question of fact exists ( *see Kuehm & Nagel, Inc. v Baiden*, 36 NY 2sd 539, 369 NYS 2d 667 [ 1975 ] ; *see also Madeline D'Anthony Enter. Inc. v Skowsky*, 101 AD 3d 606 , 957 NYS 88 [2d Dept 2012]; *Argent Mtge Co., LLC Mentasana*, 79 AD 3d 1079, 915 NYS 2d 591 [ 2d Dept 2010]). Additionally,

“uncontradicted facts are deemed admitted” ( *Tortorello v Carlin*, 260 AD 2d 201, 688 NYS.2d 64 [ 1<sup>st</sup> Dept 1999]) and considered by the Court be on default ( *see Rokina Optical Co. v Camera King Inc.*, 63 NY 2d 728, 480 NY S 2d 197 [ 1984 ]; *Acupuncture Works, P.C. as Assignee of Jacqueline Roman Garcia, v Interboro Ins. Co.* 34 Misc 134A, 946 NYS 2d 65 [ Supreme Court of New York, Appellate Term, Second Department 2011]). Thus, the remaining fourteen affirmative defenses and are treated as abandoned ( *see US Bank v Flynn*, 27 Misc 3d 897, 897 NYS 2d 855 [ Sup Ct Suffolk County 2010]; *accord Bankers Trust of Rockland Cnty v Keesler*, 49 ADd 2d 918, 373 NYS 637 [ 2d Dept 1975]).

“The denials in Khan’s answer are insufficient to defeat the motion for summary judgment” ( *New York Higher Education Services v Ortiz*, 104 AD 2d 864, 685, 479 NYS 2d 910 [ 3<sup>rd</sup> Dept 1984] *citation omitted* ). A defendant cannot shelter herself behind general or specific denials, or denials of knowledge or information sufficient to form a belief. She must show that her denial or defense is not false and sham, but interposed in good faith and not for delay ( *see Dwan v Massarene*, 199 AD 872, 192 NYS 577 [ 1<sup>st</sup> Dept 1922] *rev on other grounds* ). Khan’s denials of information sufficient to form a belief, are patently 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, 511 NYS2d 171 [3d Dept 1987]). Bare denials, such as those asserted by Khan 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, 465 NYS2d 511 [1<sup>st</sup> 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, 319 NYS2d 125 [1<sup>st</sup> Dept 1971]; *affd* 29 NY2d 768, 326 NYS2d 565 [1971]).

To the extent that Khan is attempting to assert counterclaims, they are fatally defective as they consists of only conclusory and un-support allegations unrelated to the fact that Khan is in default. Such general claims plainly are insufficient to raise triable issues of fact “statements in a pleading shall be sufficiently particular to give the court and parties notice of the transaction, occurrence , or series of transactions, intended to be proved and the material elements of each cause of action or defense” ( CPLR 3013 ). Counterclaims asserting unsubstantiated allegations concerning the impropriety of plaintiff’s conduct are insufficient to raise a triable issue of fact with respect to the foreclosure of a mortgage ( *see Bank of Tokyo-Mitsubiishi Trust Co. v Meredith Avenue Associates*, 256 AD 2d 532, 683 NYS 2d 106 [ 2d Dept 1998]). As such, Khan’s counterclaims are dismissed in their entirety as a matter of law..

“An affidavit from one who has no personal knowledge of the operative facts is without probative value and consequently is insufficient to defeat the motion” ( *Bronson v Algonquin Lodge Ass’n, Inc.* 295 AD 2d 681, 744 NYS 2d 220 [ 3<sup>rd</sup> Dept 2002] *citations omitted*); *see also Sturtevant v Home Town Bakery*, 192 AD 2d 904, 597 NYS 2d 176 [ 3<sup>rd</sup> Dept 1998]). It is also well settled as a matter of law that an attorney’s affirmation of conclusory assertions not based upon personal knowledge, but hearsay, is legally insufficient to raise a material issue of fact to defeat a summary judgment motion ( *see Winter v Black*, 95 AD 3d 1208, 943 NYS 2d 909 [ 2d Dept 2012]; *Currie v Wilhouski*. 93 AD 816, 941 NYS 2d 218 [ 2d Dept 2012]; *Iacone v Passanisi* , 89 AD 3d 991, 933 NYS 2d 373 [ 2d Dept 2011]; ]; *Lampkin v Chan*, 68 AD 3d 727, 891 NYS 2d 113 [ 2d Dept 2009]; *Palo v Principo*, 303 AD 2d 478, 756 NYS 2d 623 [ 2d Dept 2003]; *Zuckerman v City of New York*,

49 NY 2d 557, 427 NYS 2d 595 [1980])

In opposition Khan has failed to raise a triable issue of fact or even submit an affidavit in opposition. Indeed, Khan does not make any attempt to justify the affirmative defenses or counterclaims, nor seeks dismissal upon the other fourteen affirmative defenses, nor does counsel even reference them in his affirmation. Likewise as noted herein, the Court finds Khan’s counterclaims to be patently without merit and no support for them is proffered by counsel in his opposition papers. In view of the foregoing, the defendant’s answer, affirmative defenses and counterclaims are dismissed as a matter of law.

The assertions by Khan’s counsel that summary judgment is premature because discovery is ongoing and their demands have not been answered is rejected. CPLR 3212 [f] provides that “ should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but that it cannot be then stated, a court may deny the motion or may order a continuance to permit affidavits or disclosure to be had and may make such other order as may be just.” One seeking discovery “ must offer an evidentiary basis to show that discovery may lead to relevant evidence and that essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff.” ( *Martinez v Kreychmar*, 84 AD 3d 1037, 923 NYS 2d 648 [ 2d Dept 2011]; see *Seaway Capital Corp. v 500 Sterling Realty Corp.*, 94 AD 3d 856, 941 NYS 2d 871 [ 2d Dept 2012]; *Swedbank AB v Hale Ave. Borrower, LLC*, 89 AD 3d 922, 540 [ 2d Dept 2011]; *McFadyen Consulting Group, Inc. v Puritan Pride*, 87 AD 3d 620, 928 NYS 2 87 [ 2d Dept 2011]; *Urstadt Biddle Prop., inc. v Excelsior Realty* , 65 AD 3d 1135, 885 NYS 2d 510 [ 2d Dept 2009 ] ). The “mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered by further discovery is an insufficient basis for denying the motion” *Woodard v Thomas*, 77 AD 3d 738, 740, 913 NYS 2d 103 [ 2d Dept 2010] internal citations omitted ); see also *Friendlander Org., LLC v Ayoride* , 94 AD 3d 693, 943 NYS 538 [ 2d Dept 2012 ]; *Stoian v Reed*, 66 AD 3 1278, 1280, 888 NY NYS 2d 639 [ 3d Dept 2009]). In the absence of some evidentiary showing suggesting that discovery will yield material and and relevant evidence it is not an abuse of the courts discretion to deny the request ( see *Saratoga Assoc. Landscape Architects, Architects, Engrs. & Planners, P.C. v Lauler Decv Group*, 77 AD 3d 1219, 1222, 910 NYS 2d 571 [ 3d Dept 2010] internal citation omitted ). Rather, Khan’s speculation about plaintiff’s lack of standing constitutes “ mere hope that evidence sufficient to defeat the motion may be uncovered ” ( *Stoian v Reed*, 66 AD 3 1278, 1280, supra) internal citations omitted ). Furthermore, there is no court order requiring plaintiff to comply with discovery ( see *Emigrant Mtge. Co., Inc. v Beckerman*, \_\_\_ AD 3d \_\_\_, \_\_\_ NYS 2d \_\_\_ [ 2d Dept 2013]; 2013 WL 1632059).

Accordingly, the plaintiff’s motion for summary judgment and for and order of reference is granted. The Order of Reference is being contemporaneously signed with this Short Form Order. This constitutes the Order and decision of the Court.

Dated: 6.3 2013  
Riverhead, NY

  
HON. DENISE F. MOLIA J.S. C.

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