

GMAC Mtge., LLC v Freeman
2013 NY Slip Op 32202(U)
August 26, 2013
Supreme Court, Suffolk County
Docket Number: 44830/09
Judge: Joseph C. Pastoressa
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**SUPREME COURT - STATE OF NEW YORK
IAS PART 34 - SUFFOLK COUNTY**

PRESENT: Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 1-30-13
ADJ. DATE _____
Mot. Seq. #001 MG

GMAC MORTGAGE, LLC,

Plaintiff,

**BERKMAN, HENOCH, PETERSON,
PEDDY & FENCHEL, P.C.**
Attorneys for Plaintiff
100 Garden City Plaza
Garden City, N. Y. 11530

-against-

**GARNIE FREEMAN A/K/A GARNIE M.
FREEMAN, SAXON MORTGAGE INC.,
TEACHERS FEDERAL CREDIT UNION,**

**KLEMANOWICZ, HOLMQUIST &
VANDE STOUWE, LLP**
Attorneys for Defendant
Garnie Freeman
300 Old Country Road, Suite 241
Mineola, N. Y. 11501

“JOHN DOE #1” through “JOHN DOE #12”,
the last twelve names being fictitious and
unknown to plaintiff, the persons or parties
intended being the tenants, occupants, persons
or corporations, if any, having or claiming an
interest in or lien upon the premises, described
in the complaint,

SAXON MORTGAGE, INC.
80 State Street
Albany, N. Y. 12207

Defendants.
_____x

TEACHERS FEDERAL CREDIT UNION
2410 North Ocean Avenue
Farmingville, N. Y. 11738

JANE DOE
s/h/a “John Doe #1”
37 Buckskin Lane
Selden, N. Y. 11784

Upon the following papers numbered 1 to 23 read on this motion for summary judgment, an order of reference and related relief; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19; Affirmation in opposition 20-21; Replying Affidavits and supporting papers 22-23; Other 0; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the part of the motion by the plaintiff for an Order: (1) pursuant to CPLR 3212, granting summary judgment for the relief demanded in the Verified Complaint upon the grounds there are no triable issues of fact; (2) that there is no merit to the defenses asserted in the verified answer of the defendant, Garnie Freeman a/k/a Garnie M. Freeman (the defendant); (3) striking the

verified answer with affirmative defenses of the defendant; (4) deeming all non-appearing and non-answering defendants in default pursuant to CPLR 3215 (a); (5) substituting Jane Doe as a party defendant in the caption as "JOHN DOE #1"; (6) discontinuing this action against the defendants sued herein as "JOHN DOE # 2" through "JOHN DOE #12"; (7) appointing a referee to ascertain and compute the amount due to the plaintiff on the note and mortgage upon which this action is brought and to examine and report whether the mortgaged premises can be sold in one or more parcels; and (8) and for such other and further relief to the plaintiff as this Court may deem just and proper is granted and that part of the motion which seeks costs for the motion is denied at this time without prejudice as being premature; and it is further

ORDERED that the plaintiff shall serve a copy of this Order with Notice of Entry pursuant to CPLR 2106 (b), (1), (2) or (3) upon counsel for the defendant mortgagor and upon the remaining parties who were served with a copy of this motion by first class mail with a Certificate of Mailing and thereafter file the affidavits(s) of service with the Clerk of the Court; and it is further

ORDERED that the plaintiff shall also serve a copy of this Order with Notice of Entry upon the Calendar Clerk of this IAS Part 34 and the Clerk of the Court by first class mail with a Certificate of Mailing. The Calendar Clerk and the Clerk of the Court shall both note in their respective computerized records the amendment of the caption as set forth in the Order of Reference. That all future submission of documents under this Index Number shall reflect the amended caption.

The present action involves the foreclosure on a note and mortgage pertaining to and alleging that the defendant mortgagor Garnie Freeman a/k/a Garnie M. Freeman (hereinafter "Freeman ") defaulted in repaying a note and mortgage secured by real property located at 37 Buckskin Lane, Selden, NY. The action was commenced on November 16, 2009. A successor Notice of Pendency was filed on November 13, 2012.

Issue was joined by the service of an answer by counsel for Freeman consisting of general denials and two affirmative defenses on or about December 12, 2009. A settlement conferences pursuant to CPLR 3408 was held on January 24, 2013. Accordingly, the conference requirements imposed upon the court by CPLR 3408 and/or the Laws of 2008, Ch 472 § 3 as amended by the Laws of Ch 507 § 10 have been satisfied. No further conference is required under any statute, law or rule and the matter was subsequently referred to this IAS part for the plaintiff to proceed with an order of reference.

Plaintiff now moves for summary judgment (see CPLR 3212 [a] ; *Myung Chun v North Am. Mtg. Co.*, 285 AD2d 42, 729 NYS 2d 716 [1st Dept 2001]) to dismiss the answer and, affirmative defenses set forth by Freeman 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 Thomas E. Kennedy an officer of 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 Freeman on November 7, 2005 in addition to documentary evidence of Freeman's default since February 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 Mentosana*, 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*); CPLR 3212; RPAPL § 1321. 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 Bank of New York v Alderazi*, 99 AD 3d 837, 951 NYS 2d 900 [2d Dept 2012]; *JPMorgan Chase Bank 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 Freeman to lay bare her proof and demonstrate, by admissible evidence, the existence of a material issue of 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'Connor*, 63 AD 3d 832, 880 NYS 2d 696 [2d Dept 2009]; *Ames Funding Corp. v Houston*, 44 AD 3d 692, 843 NYS 2d 660 [2d Dept 2007]; *lv app den* 10 NY3d 704, 857 N.S. 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]).

“The denials in defendants’ 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 [3rd Dept 1984] *citation omitted*). A defendant cannot shelter himself behind general or specific denials, or denials of knowledge or information sufficient to form a belief. He must show that his denial or his 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 [1st Dept 1922] *rev on other grounds*). Freeman’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 Freeman 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 [1st 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 [1st Dept 1971]; *affd* 29 NY2d 768, 326 NYS2d 565 [1971]).

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 [1st Dept

1986]).

The only pleaded defense raised by the answering defendant on the motion was the lack of standing defense. The failure to raise or assert the remaining pleaded defense in opposition to the plaintiff's motion for summary judgment warrants the dismissal of the abandoned affirmative defense (*see Kuehne & Nagel v Baiden* , 36 NY 2d 539, 539, 369 NYS 2D 667 [1975]; *Cochran Inv. Co. Inc. v Jackson*, 38 AD 3d 704, b34 NYS 2d 198 [2d Dept 2007]). Freeman did not submit an affidavit in opposition to plaintiff prima facie showing of entitlement to summary judgment nor submit any evidentiary and admissible proof in support of the affirmative defenses submitted in the answer (*see Einstein v Levy*, 121 AD 2d 499., 503 NYS 2d 821 [2d Dept 1986]) Additionally, "uncontradicted facts are deemed admitted" (*Tortorello v Carlin* 260 AD 2d 201, 688 NYS 2d 64 [1st Dept 1999]).

"In order to commence a foreclosure action, the plaintiff must have a legal or equitable interest in the mortgage" (*Wells Fargo Bank, N.A. v Marchione*, 69 AD 3d 204, 207, 887 NYS 2d 615 [2d Dept 2009]). A plaintiff has standing where it is both (1) the holder or assignee of the subject mortgage and; (2) the holder or assignee of the underlying note, either by physical delivery or execution of a written assignment prior to the commencement of the action with the filing of the complaint (*see Wells Fargo Bank, N.A. v Marchione*, 69 AD 3d 204, *supra* ; *U.S. Bank, N.A. v Adrian Collymore*, 68 AD 3d 752, 890 NYS 2d [2d Dept 2009]).

With respect to the standing defense, the Court finds that such a defense is without merit. 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 N.A. v Silverberg*, 86 AD 3d 274, 926 NYS 2d 532 [2d Dept 2011]; *Wells Fargo Bank, N.A. v Marchione*, 69 AD 3d 204, 887 NYS 2d 615 [2d Dept 2009]) *US Bank, N.A. v Adrian Collymore* 68 AD 3d 752, *supra*). Because "a mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation" (*Deutsche Bank v Natl Trust Co. v Spanos*, 102 AD 3d 909, 911, 961 NYS 2d 200 [2d Dept 2013] *internal citations omitted*), a mortgage passes as an incident of the note upon such note's physical delivery to the plaintiff (*see U.S. Bank Nat. Assn v Cange* , 96 AD 3d 825, 947 NYS 2d 522 [2d Dept 2012]. The delivery of the note also effects an unwritten assignment of both the note and mortgage (*see Bank of N.Y. v Silverberg*, 86 AD 3d 274 , *supra*; *US Bank, N.A. Collymore*, 68 AD 3d 752, *supra*; *LaSalle BsBank Natl Assn v Ahern*; 59 AD 3d 911 , 875 NYS 2d 595 [3d Dept 2009]). Here, the record reveals that the original note bears an indorsement on its face thereof in favor of GMAC Mortgage Corporation to whom plaintiff is a successor by merger dated October 24, 2006 which in turn effected a concomitant transfer of the mortgage all of which vests in the plaintiff the requisite holder status that is sufficient for standing purposes (*see Mortgage Elec. Registration Sys. Inc. v Coakley*, 41 AD 3d 674, 838 NYS 2d 622 [2d Dept 2007]). An assignment in favor of the plaintiff is not necessary to establish the standing of the plaintiff. .

Where plaintiff has produced sufficient documentary evidence and has eliminated all material issues of fact, the Court finds that the affirmation of counsel alone is insufficient to raise any issue of fact (see **Zuckerman v City of New York**, 49 NY 2d 557, 427 NYS 2d 595 [1980]), and is without probative value in opposition to plaintiff's motion (see **Dicupe v City of New York**, 124 AD2d 542, 507 NYS2d 687 [2d Dept 1986]). In view of the foregoing, the defendant's answer and the affirmative defense(s) are dismissed as a matter of law.

The Court denies without prejudice that branch of the motion seeking attorney's fees at this time as being premature. Attorneys fees and disbursements are incidents of litigation which the prevailing party may not collect from the loser unless such an award is authorized by an agreement, by statute or by court (see **RAD Venture v Artukmac**, 31 AD 3d 412, 818 NYS 2d 527 [2d Dept 2006] *lv app denied* 7 NY 3d 412, 826 NYS 2d 181 [2006]). Although recovery of attorneys fees is available to the plaintiff herein pursuant to terms of the Note and Mortgage, that branch of the motion for same is premature (see **Fried v Tucker**, 22 Misc. 3d 1133 (A), 880 NYS 2d 872 [Sup Ct Kings County 2008] *reargument denied* 25 Misc. 3d 1223 (A), 906 NYS 2d 772 [Sup Ct Kings County 2009]). "Said fees may be awarded, subject to the court's discretion, in the event of, and upon submission of an appropriate judgment" (**Fried v Tucker**, 22 Misc. 3d 1133 (A), * 6, *supra*)

Accordingly, the motion for summary judgment, for the appointment of a referee to compute and other related relief is granted. The Order of Reference is being contemporaneously currently signed with this Short Form Order. This constitutes the Order and decision of the Court.

Dated: August 20th 2013
Riverhead, NY



Hon JOSEPH C. PASTORESSA J.S.C

____ FINAL DISPOSITION X NON-FINAL DISPOSITION