OneWest Bank FSB v Tinney
2013 NY Slip Op 32241(U)
September 5, 2013
Sup Ct, Suffolk County
Docket Number: 39664/10
Judge: Arthur G. Pitts
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SHORT FORM ORDER

INDEX
NO.: 39664/10

SUPREME COURT - STATE OF NEW YORK
IAS PART 43 - SUFFOLK COUNTY

PRESENT: Hon. ARTHUR G. PITTS
Justice of the Supreme Court

OneWest Bank, FSB,

Plaintiff,

-against-

Debra R. Tinney, Citibank, N.A., 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 lien upon the Mortgage premises described in the Complaint,

Defendants.

MOTION DATE: 2-11-13
ADJ. DATE: 8-29-13
Mot. Seq. # 001-MotD

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Upon the following papers numbered 1 to 9 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 9; 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: (1) pursuant to CPLR 3212 awarding summary judgment in its favor against the defendant Debra R. Tinney, and striking her answer and affirmative defenses; (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, is determined as indicated below; 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 file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on residential real property known as 73 Highview Drive, Sag Harbor, New York 11963. On October 25, 2005, the defendant Debra R. Tinney (the defendant mortgagor) executed a mortgage note in the principal amount of $615,500.00 in favor of Meritage Mortgage

Corporation (Meritage). To secure said note, the defendant mortgagor gave Meritage a mortgage also dated October 27, 2005. The mortgage indicates that Mortgage Electronic Registration Systems, Inc. (MERS) was acting solely as a nominee for Meritage and its successors and assigns and that, for the purposes of recording the mortgage, MERS was the mortgagee of record.

By assignment dated October 29, 2007 and recorded on December 27, 2007, the transfer of the note and mortgage by Meritage to IndyMac Bank, F.S.B. (IndyMac) was memorialized. Thereafter, by agreement dated November 28, 2007 and recorded December 27, 2007, the note was restated and the mortgage was extended and modified. Pursuant to the agreement, the restated note was given by the defendant mortgagor in favor of IndyMac Bank, F.S.B. (IndyMac), in the principal sum of $417,000.00. The extension and modification agreement restated, among other things, the amounts then due and owing, and provided for a fixed rate of interest at a yearly rate of 6.50% for a term of thirty years. The restated note also contains an undated endorsement in blank and without recourse by IndyMac Bank, whereby IndyMac transferred the same to the plaintiff. The transfer of the restated note and of the extended and modified mortgage to the plaintiff was memorialized by an assignment dated October 18, 2010 and recorded on March 14, 2011.

The defendant mortgagor allegedly defaulted on the consolidated note and mortgage by failing to make her loan payments due on May 1, 2010 and thereafter. Upon the failure of the defendant mortgagor to cure her default, the loan was accelerated. After the defendant mortgagor allegedly failed to cure her default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on October 21, 2010.

Issue was joined by the interposition of the defendant mortgagor's answer dated November 16, 2010. By her answer, the defendant mortgagor generally denies some of the allegations set forth in the complaint and admits other allegations, including the execution of the note and mortgage and ownership of the property. The defendant mortgagor also asserts seven affirmative defenses, alleging failure to state a cause of action; waiver and estoppel; claims barred by release, payment and/or waiver; the statute of frauds; the lack of personal jurisdiction; claims barred by failure to satisfy statutory and/or contractual conditions precedent; and failure to comply with the 90-day notice requirement of RPAPL § 1304. The remaining defendants have neither answered nor appeared.

According to the information maintained by the Court's database, settlement conferences for this case were held in this Court's mortgage foreclosure conference part on September 28, 2011 and January 25, 2012. At the last conference, this case was dismissed from the conference program as a settlement or other resolution had not been achieved. As a result, this matter was referred as IAS case. Accordingly, there has been compliance with CPLR 3408 and no further settlement conference is required.

The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor against the defendant mortgagor, and striking her answer and affirmative defenses; (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 papers have been filed herein.

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 Deutsche***, 88 AD3d 691, 930 NYS2d 477 [2d Dept 2011]; ***Wells Fargo Bank v Karla***, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; ***Wash. 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 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]).

By its submissions, the plaintiff established its prima facie entitlement to summary judgment on the complaint (*see*, CPLR 3212; RPAPL § 1321; ***U.S. Bank Natl. Assn. 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]; ***HSBC Bank USA, N.A. v Schwartz***, 88 AD3d 961, 931 NYS2d 528 [2d Dept 2011]). In the instant case, the plaintiff produced the restated note, the mortgage and the assignments as well as evidence of nonpayment (*see*, ***Fed. 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, inter alia, an affidavit from an officer of the plaintiff, whereby it is alleged that a 90-day notice was served in compliance with RPAPL § 1304. Additionally, the plaintiff submitted sufficient proof to establish, prima facie, that the affirmative defenses set forth in the defendant mortgagor's 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., Natl. Assn. 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*, ***Wachovia Bank, Natl. Assn. v Carcano***, 106 AD3d 726, 964 NYS2d 246 [2d Dept 2013]; ***Bank of N.Y. Mellon v Scura***, 102 AD3d 714, 961 NYS2d 185 [2d Dept 2013] [*process server's sworn affidavit of service is prima facie evidence of proper service pursuant to CPLR 308(2)*]; ***Grogg v South Rd. Assocs., L.P.***, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010] [*the mere denial of receipt of the notice of default is insufficient to rebut the presumption of delivery*]; ***Manufacturers and Traders Trust Co. v David G. Schlosser & Assocs.***, 242 AD2d 943, 665 NYS2d 949 [4th Dept 1997][*conclusory allegations of the conduct constituting alleged waiver are insufficient to raise a triable issue of fact*]; ***FGH Realty Credit Corp. v VRD Realty Corp.***, 231 AD2d 489, 647 NYS2d 229 [2d Dept 1996]; ***Prudential Home Mtge. Co. v Cermele***, 226 AD2d 357, 640 NYS2d 254 [2d Dept 1996] [*no valid defense or claim of estoppel where mortgage provision bars oral modification*]; ***Naugatuck Sav. Bank v Gross***, 214 AD2d 549, 625 NYS2d 572 [2d Dept 1995] [*unsubstantiated allegations of facts are insufficient to raise a triable issue of fact with respect to an estoppel defense*]; ***Charter One Bank, FSB v Leone***, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007] [*no competent evidence of an accord and satisfaction*]).

As the plaintiff duly demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted to the defendant mortgagor (*see*, ***HSBC Bank USA v Merrill***, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]). Accordingly, it was incumbent upon the defendant mortgagor 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]; ***Wash. Mut. Bank v Valencia***, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]; ***Grogg v South Rd. Assocs., LP***, 74 AD3d 1021, *supra*).

The defendant mortgagor's 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, 915 NYS2d 591 [2d Dept 2010]). Further, the affirmative defenses asserted by the defendant mortgagor are factually unsupported and without apparent merit (*see*, ***Becher v Feller***, 64 AD3d 672, *supra*). Also, by her first affirmative defense, the defendant mortgagor asserts that the complaint fails to state a cause of action, however, the defendant mortgagor has not cross moved to dismiss the complaint on this ground (*see*, ***Butler v Catinella***, 58 AD3d 145, 868 NYS2d 101 [2d Dept 2008]), and, in any event, the plaintiff has established its prima facie entitlement to summary judgment as indicated above. Therefore, the first affirmative defense is surplusage, and the branch of the motion to strike such defense is denied as moot (*see*, ***Old Williamsburg Candle Corp. v Seneca Ins. Co.***, 66 AD3d 656, 886 NYS2d 480 [2d Dept 2009]; ***Schmidt's Wholesale, Inc. v Miller & Lehman Const., Inc.***, 173 AD2d 1004, 569 NYS2d 836 [3d Dept 1991]). Moreover, the fifth affirmative defense, in which the defendant mortgagor alleges that the Court lacks jurisdiction over the defendant mortgagor, is stricken as she does not allege that she was not properly served with process herein (*see*, ***Associates First Capital Corp. v Wiggins***, 75 AD3d 614, 904 NYS2d 668 [2d Dept 2010]). Additionally, this defense was waived as the defendant mortgagor failed to move to dismiss the complaint against her on this ground within 60 days after serving his 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]).

In any event, in instances where a defendant fails to oppose a motion for summary judgment, the facts, as alleged in the moving papers, may be deemed admitted and there is, in effect, a concession that no question of fact exists (*see generally*, ***Kuehne & Nagel, Inc. v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]). Additionally, "uncontradicted facts are deemed admitted" (***Tortorello v Larry M. Carlin***, 260 AD2d 201, 206, 688 NYS2d 64 [1st Dept 1999]). Under these circumstances, the Court finds that the defendant mortgagor 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*; ***Rossrock Fund II, L.P. v Commack Inv. Group, Inc.***, 78 AD3d 920, 912 NYS2d 71 [2d Dept 2010]; ***Wells Fargo Bank Minn., N.A. v Perez***, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]; *see generally*, ***Hermitage Ins. Co. Trance Nite Club, Inc.***, 40 AD3d 1032, 834 NYS2d 870 [2d Dept 2007]). The plaintiff, therefore, is awarded summary judgment against the defendant mortgagor (*see*, ***Fed. 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 mortgagor's answer, and the second through seventh affirmative defenses contained therein, are stricken.

The branch of the instant motion wherein the plaintiff seeks an order amending the caption by excising the fictitious defendants, John Doe #1 through #10, is granted pursuant to CPLR 1024. By its submissions, the plaintiff established the basis for this relief (*see*, ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, *supra*; ***Neighborhood Hous. Servs. N.Y. City, Inc. v Meltzer***, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]). All future proceedings shall be captioned accordingly.

By its moving papers, the plaintiff further established the default in answering on the part of the remaining defendant, Citibank, N.A., which never answered the complaint (*see*, RPAPL § 1321; ***HSBC Bank USA, N.A. v Roldan***, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the default of

Citibank, N.A. is fixed and determined. Since the plaintiff has been awarded summary judgment against the defendant mortgagor, and has established the default in answering by Citibank, N.A., the plaintiff is entitled to an order appointing a referee to compute amounts due under the subject note and mortgage (*see*, RPAPL § 1321; ***Ocwen Fed. Bank FSB v Miller***, 18 AD3d 527, 794 NYS2d 650 [2d Dept 2005];***Vt. Fed. Bank v Chase***, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; ***Bank of E. Asia, Ltd. v Smith***, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

Accordingly, this motion for summary judgment and to appoint a referee to compute is determined as indicated 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: September 5, 2013

Hon. ARTHUR G. PITTS, J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**