Deutsche Bank Natl. Trust Co. v Felicioni
2013 NY Slip Op 32256(U)
September 3, 2013
Sup Ct, Suffolk County
Docket Number: 34937-09
Judge: Denise F. Molia

SHORT FORM ORDER

INDEX
NO.: 34937-09

SUPREME COURT - STATE OF NEW YORK
IAS PART 39 - SUFFOLK COUNTY

PRESENT: Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE: 11-28-12
ADJ. DATE: _____
MOT. SEQ. #:001 MG

Deutsche Bank National Trust Company as Trustee for MS MTL 2004-4,

Plaintiff,

-against-

Al Felicioni; Filomena Pancottini, and "JOHN DOE #1" through "JOHN DOE #10", the last ten names being fictitious and unknown to the Plaintiff, the person or parties intended being the person or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the complaint,

Defendants.

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Rochester, N. Y. 14624

STAGG, TERENZI, CONFUSIONE & WABNIK, LLP
Attorney for Defendants
Al Felicioni and Filomena Pancottini
401 Franklin Avenue
Garden City, N. Y. 11530

Upon the following papers numbered 1 to 20 read on this motion for summary judgment, and order of reference and other related relief ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16 ; Affirmation in opposition and supporting papers 17-18 ; Replying Affidavits and supporting papers 19-20 ; Other 0 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the Plaintiff for an Order: (1) directing the entry of summary judgment in favor of the plaintiff and against the defendants, Al Feliciano and Filomena Pancottini for the relief demanded in the complaint on the grounds that there is no defense to the cause of action asserted in the complaint; (2) for a default against all other parties in default of answering; (3) appointing a referee to compute; (4) amending the title of this action by dropping the defendants heretofore mentioned in the summons and complaint as "John Doe #1" through "John Doe # 10"; and (5) for such other and further relief as may be just and proper is granted; and it is further

ORDERED that the plaintiff shall serve a copy of this Order with Notice of Entry upon counsel for the answering defendant, Virginia Connolly, within ninety (90) days of the date the Order is signed by the Court pursuant to CLR 2103 (b), (1), (2), or (3) and thereafter file the affidavit 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 39 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 to reflect the excising of the "John Does " defendants and as set forth in the Order of Reference and incorporated herein by 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 mortgagors Al Felicini and Filomena Pancottini (hereinafter collectively " Felicioni ") defaulted in repaying a note and mortgage secured by real property located at 339 Landing Avenue, Smithtown, NY 11787. The action was commenced on September 4th , 2009. A successor Notice of Pendency was filed on December 13th , 2012.

Issue was joined by the service of an answer by counsel for Felicioni on or about October 1st, 2009 which consisted of general denials and eight affirmative defenses. A settlement conference was scheduled and held pursuant to CLR 3408, on February 22nd , 2013 wherein defendants defaulted in appearing. Accordingly, the conference requirements imposed upon the court by CLR 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 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 Felicioni 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 Helen Haney an officer of plaintiff's servicer 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 Felicioni on May 4th , 2004 in addition to documentary evidence of Felicioni's default since March 1st , 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 Mentesana ,*** 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 Felicioni to lay bare his 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]). 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 [2dDept 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]). 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, Feticioni has failed to raise a triable issue of fact (*accord* ***JPMorgan Chase Bank, National Association v Shapiro***, 104 AD 23d 411, *supra*).

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]; ***Aames 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 [1st Dept 1986]).

Notably, self serving and conclusory allegations do not raise issues of fact and does notrequire plaintiff to respond to an alleged affirmative defense' which is based on such allegations (*see* ***Charter One Bank , FSB v Leone,*** 45AD 3d 958 845 NYS 2d 513 [3rd Dept 2007]; ***Rosen Auto Leasing Inc. v Jacobs,*** 9 AD 3d 798, 780 NYS 2d 338 [3rd Dept 2004]). Where a defendant fails to oppose all or some of the matter advanced on a motion for ***s***ummary 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 Mentesana,*** 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 [1st 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 affirmative defenses 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 Felicioni's answer are insufficient to defeat the motion for summary udgment" (***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. A defendant must show that his or 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 [1st Dept 1922] *rev on other grounds*). Felicioni'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 Felicioni 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]).

"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 Assn, Inc.*** 295 AD 2d 681, 744 NYS 2d 220 [3rd Dept 2002] *citations omitted*); *see also* ***Sturtevant v Home Town Bakery,*** 192 AD 2d 904, 597 NYS 2d 176 [3rd 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*** 49 NY 2d 557, 427 NYS 2d 595 [1980])

In opposition Felicioni has failed to raise a triable issue of fact and has not even submitted an affidavit in opposition. Indeed, Felicioni does not make any attempt to justify the affirmative defenses nor does counsel reference them in his affirmation except for the defense of standing which the Court has addressed herein and has found it to be lacking in evidentiary facts and without a basis in law. Therefore, the answer and affirmative defenses are dismissed as a matter of law.

The assertions by Felicioni'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, 888 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 (***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*). Furthermore, there is no court order requiring plaintiff to comply with discovery (*see* ***Emigrant Mtge. Co., Inc. v Beckerman,*** 105 AD 3d 895, 964 NYS 2d 548 [2d Dept 2013]).

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: September 3 2013
Riverhead, NY

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

_____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION