Chase Home Fin. LLC v Shirazi
2013 NY Slip Op 32314(U)
September 16, 2013
Sup Ct, Suffolk County
Docket Number: 15961-10
Judge: Thomas F. Whelan

[* 1]

SHORT FORM ORDER

INDEX No. 15961-10

ORIGINAL

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 7/25/13
ADJ. DATES 9/6/13
Mot. Seq. # 001- MG; Order Signed
Case Disp; Y___ N_x_

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CHASE HOME FINANCE LLC,

Plaintiff,

-against-

ASIF SHIRAZI, JPMORGAN CHASE BANK, NA, ET ALS,

Defendants.

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CULLEN & DYKMAN, LLP
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Upon the following papers numbered 1 to 11 read on this motion for accelerated judgments, deletion and/or substitution of parties and caption amendments to reflect same;, and the appointment of a referee to compute ; Notice of Motion/Order to Show Cause and supporting papers 1 - 4 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 5-7 ; Replying Affidavits and supporting papers 8-9 ; Other 10 (memorandum); 11 (memorandum) ; (~~and after hearing counsel in support and opposed to the motion~~, it is

ORDERED that this motion (#002) by the plaintiff for accelerated judgments against the defendants, substitution and deletion of parties, the appointment of a referee to compute and other incidental relief is considered under CPLR 3212, 3215, 1024 and RPAPL 1321 and is granted.

The plaintiff commenced this action to foreclose a mortgage given by defendant Shirazi on June 6, 2007 to secure a note executed on that same date in favor of the plaintiff's predecessor-in-interest by merger. The plaintiff alleges that defendant Shirazi defaulted in payment of amounts due under the terms of the note and mortgage obligation on December 1, 2008. Following service of the summons and complaint, issue was joined by service of an answer by the mortgagor defendant Shirazi. Said answer contained twelve affirmative defenses, none of which challenge the standing of the plaintiff,

who is the successor by merger to the original lender. The last four affirmative defenses are, however, denominated as counterclaims.

The plaintiff now moves for an order: (1) awarding it summary judgment against the answering defendant together with a dismissal of the affirmative defenses and counterclaims asserted against the plaintiff and, in effect, fixing the defaults in answering of those served with process who failed to answer such process; (2) identifying Dabassum Asif as John Doe #1 under CPLR 1024 and deleting as party defendants the remaining unknown defendants named in the caption together with a caption amendment to reflect these changes; and (3) appointing a referee to compute amounts due under the subject mortgage.

Defendant Shirazi contests the plaintiff's motion by the submission of opposing papers. The challenges advanced therein are premised solely upon purported defects in the plaintiff's compliance with the notice requirements imposed by RPAPL §§ 1303 and 1304. All other of the affirmative defenses set forth in the answer have been abandoned as defenses to the plaintiff's demands for summary judgment on its complaint. The opposing papers also contain assertions that the plaintiff's proof on its demand for a dismissal of the defendant Shirazi's four counterclaims is insufficient, thereby warranting a denial of the plaintiff's motion in its entirety. In each of his counterclaims, defendant Shirazi demands the recovery of money damages under the following theories: 1) GBL §349 violations; 2) misrepresentations that induced Shirazi into the subject mortgage loan that was doomed to failure due to Shirazi's inability to pay; 3) unconscionable conduct in structuring the subject loan; and 4) the plaintiff's failure to investigate the economic status of the defendant prior to making the subject unaffordable mortgage loan.

For the reasons stated below, the motion is considered under CPLR 3215, 3212 and RPAPL § 1321 and is granted.

Entitlement to a judgment of foreclosure may be established, as a matter of law, where the plaintiff produces both the mortgage and unpaid note, together with evidence of the mortgagor's default, thereby shifting the burden to the mortgagor to demonstrate, through both competent and admissible evidence, any defense which could raise a question of fact (*see* ***Emigrant Mtge. Co., Inc. v Beckerman***, 105 AD3d 895, 964 NYS2d 548 [2d Dept 2013]; ***Solomon v Burden***, 104 AD3d 839, 961 NYS2d 535 [2d Dept 2013]; ***US Bank Natl. Ass'n v Denaro,*** 98 AD3d 964, 950 NYS2d 581 [2d Dept 2012]; ***Baron Assoc., LLC v Garcia Group Enter.***, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; ***Citibank, N.A. v Van Brunt Prop., LLC***, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]; ***HSBC Bank v Shwartz,*** 88 AD3d 961, 931 NYS2d 528 [2d Dept 2011]; ***US Bank N.A. v Eaddy***, 79 AD3d 1022, 1022, 914 NYS2d 901 [2010]; ***Zanfini v Chandler***, 79 AD3d 1031, 912 NYS2d 911 [2d Dept 2010]).

Here, the moving papers established the plaintiff's entitlement to summary judgment on its complaint against the answering defendant as such papers included copies of the mortgage, the unpaid note executed by Shirazi on June 6, 2007, together with due evidence of a default under the terms thereof secured by the mortgage (*see* CPLR 3212; RPAPL § 1321; ***Emigrant Mtge. Co., Inc. v Beckerman***, 105 AD3d 895, *supra*; ***Solomon v Burden***, 104 AD3d 839, *supra*; ***US Bank Natl. Ass'n v Denaro,*** 98 AD3d 964, *supra*; ***Baron Assoc., LLC v Garcia Group Enter.***, 96 AD3d 793, *supra*). The moving papers further established, prima facie, that the affirmative defenses and counterclaims

asserted in the answer are without merit (*see generally* ***Jo–Ann Homes v Dworetz***, 25 NY2d 112, 302 NYS2d 799 [1969]; ***Graf v Hope Bldg. Corp.***, 254 NY 1, 4–5, 171 NE 884 [1930]; ***Patterson v Somerset Inv. Corp.***, 96 AD3d 817, 946 NYS2d 217 [2d Dept 2012]; *see also* ***Emigrant Mtge. Co. v Fitzpatrick***, 95 AD3d 1169, 945 NYS2d 697 [2d Dept 2012] [*claimed violations of General Business Law § 349 and/or engagement in deceptive business practices do not generally give rise to claims against lender*]; ***Wells Fargo Bank, NA v Meyers***, ___ AD3d ___ , 966 NYS2d 108 [2d Dept 2013]; ***Wells Fargo Bank, N.A. v Van Dyke***, 101 AD3d 638, 958 NYS2d 331 [1st Dept 2012]; ***Key Intern. Mfg. Inc. v Stillman***, 103 AD2d 475, 480 NYS2d 528 [2d Dept 1984]; ***JP Morgan Chase Bank Natl. Assn. v Ilardo***, 36 Misc3d 359, 940 NYS2d 829 [Sup. Ct. Suffolk County 2012] (*foreclosing plaintiff has no obligation to modify loan*]; ***Long Is. Sav. Bank v Denkensohn***, 222 AD2d 659, 635 NYS2d 683 [2d Dept 1995]; ***G.G.F. Dev. Corp. v Andreadis***, 251 AD2d 624, 676 NYS2d 488 [2d Dept 1998]; (*champerty not a defense*)]; *see also* ***Limpar Realty Corp. v Uswiss Realty Holding, Inc.***, 112 AD2d 834, 492 NYS2d 754 [1st Dept 1985]; ***Baron Assoc., LLC v Garcia Group Enter.***, 96 AD3d 793, *supra*; [*unconscionability not a defense*]; *see also* ***Emigrant Mtge. Co., Inc. v Fitzpatrick***, 95 AD3d 1169, *supra*; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]; *unaffordability of loan will not support damages claim against lender and is not a defense to foreclosure action*); *see also* ***Patterson v Somerset Inv. Corp.***, 96 AD3d 817, *supra*; (*"The fact that the plaintiff sought and received a loan [that] he [allegedly]* ***could not afford does*** *not mean that he can now proceed against the party that made his [purported] mistake possible"*); *see also* ***Rakylar v Washington Mut. Bank***, 51 AD3d 995, 858 NYS2d 759 [2d Dept 2008]; ***Standard Fed. Bank v Healy***, 7 AD3d 610, 777 NYS2d 499 [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 affirmative defenses asserted in his answer or otherwise available to him (*see* ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***Grogg Assocs. v South Rd. Assocs.***, 74 AD3d 1021 907 NYS2d 22 [2d Dept 2010]; ***Wells Fargo Bank v Karla,*** 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; ***Washington Mut. Bank v O'Connor***, 63 AD3d 832,880 NYS2d 696 [2d Dept 2009]; ***J.P. Morgan Chase Bank, NA v Agnello,*** 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; ***Aames Funding Corp. v Houston***, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]). Notably, self-serving and conclusory allegations do not raise issues of fact and do not require plaintiff to respond to alleged affirmative defenses which are based on such allegations (*see* ***Charter One Bank, FSB v Leone***, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007]; ***Rosen Auto Leasing, Inc. v Jacobs***, 9 AD3d 798, 780 NYS2d 438 [3d Dept 2004]). Where a defendant fails to oppose some or all matters advanced on a motion for summary judgment, the facts as alleged in the movant's papers may be deemed admitted as there is, in effect, a concession that no question of fact exists (*see* ***Kuehne & Nagel, Inc. v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; *see also* ***Madeline D'Anthony Enter., Inc. v Sokolowsky***, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591[2d Dept 2010]).

A review of the opposing papers submitted by defendant Shirazi reveals that the same do not contain assertions of any of the affirmative defenses set forth in its answer, except those asserting non compliance with the mandates of RPAPL §1303 and §1304. The plaintiff's prima facie showing of its entitlement to dismissal of the affirmative defenses abandoned by defendant Shirazi was not uncontroverted and all such defenses are dismissed. Left for consideration are the remaining affirmative

defenses of the answer which defendant Shirazi did assert as a basis for a denial of the plaintiff's motion, namely, failures to comply with RPAPL § 1303 and §1304 and the purported failure on the part of the plaintiff to establish to the legal insufficiency of defendant Shirazi's counterclaims,

In his opposing affidavit, defendant Shirazi does not deny receipt of either the RPAPL §1303 notice or the RPAPL §1304 notice. With respect to the 1303 notice, Shirazi admits receiving it with service of the summons and complaint. His challenge thereto is premised upon its purported non-compliance type mandated by that statute and the failure of the server of the summons and complaint to allege service of the notice in his affidavit of service. With respect to the 1304 notice, Shirazi states that " I do not recall receiving a copy of these notices as the plaintiff alleges were sent" but proof thereof is allegedly lacking (*see* ¶¶ 24-28).

These averments are, however, insufficient to raise any genuine question of fact which warrant denial of the plaintiff's motion on its pleaded claim for foreclosure and sale. The two asserted defects in RPAPL § 1303 are unsupported by defendant Shirazi's evidentiary submissions on his part and are factually refuted by the proof adduced by the plaintiff in its reply papers. Equally lacking in merit are Shirazi's challenges to the plaintiff's compliance with the notice requirements of RPAPL §1304 as the record contains due proof of the required mailings under the RPAPL §1304 notice (*see* ***US Bank Natl. Ass'n v Weinman***, 2013 WL 3172455 [Sup Ct. Suffolk County 2013]).

Equally unavailing are defendant Shirazi's claims that the plaintiff's proof was insufficient to establish any entitlement to a dismissal of the four counterclaims asserted in Shirazi's answer. The plaintiff's prima facie showing for an award of summary judgment dismissing these counterclaims was thus not controverted. The court, therefore, finds that the plaintiff is entitled to summary judgment on its complaint and dismissing the affirmative defenses and counterclaims set forth in the answer of the mortgagor defendant Those portions of this motion wherein the plaintiff seeks such relief are granted.

Those portions of the instant motion wherein the plaintiff seeks an order identifying Dabassum Asif as a defendant in the place of John Doe #1 and dropping as party defendants the remaining unknown defendants listed in the caption and an amendment of the caption to reflect same are granted. All future proceedings shall be captioned accordingly.

The moving papers further established the default in answering on the part of the newly identified defendant and the others named in the caption, none of whom served answers to the plaintiff's complaint. Accordingly, the defaults of all such defendants are hereby fixed and determined. Since the plaintiff has been awarded summary judgment against the sole answering defendant and has established a default in answering by the remaining defendants, the plaintiff is entitled to an order appointing a referee to compute amounts due under the subject note and mortgage (*see* RPAPL § 1321; ***Bank of East Asia, Ltd. v Smith***, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]; ***Vermont Fed. Bank v Chase***, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; ***LaSalle Bank, NA v Pace,*** 31 Misc3d 627, 919 NYS2d 794 [Sup. Ct. Suffolk County 2011], *aff'd,* 100 AD3d 970, 955 NYS2d 161 [2d Dept 2012]).

The record reflects that conferences of the type mandated by the Laws of 2008, Ch. 472 § 3-a as amended by the Laws of 2009 Ch. 507 § 10 or by CPLR 3408 were previously conducted on three occasions by personnel in the specialized mortgage foreclosure part of this court and that no further

conferences are required under any statute, law or rule. Under these circumstances, the plaintiff is entitled to the issuance of an order of reference due to the accelerated judgments granted to the plaintiff on this motion. .

Order appoint a referee to compute, as modified by the court, is signed simultaneously herewith.

DATED: 9/16/13

THOMAS F. WHELAN, J.S.C.