OneWest Bank FSB v Laino
2013 NY Slip Op 32557(U)
September 12, 2013
Sup Ct, Suffolk County
Docket Number: 35035-09
Judge: Joseph C. Pastoressa
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[* 1]

SHORT FORM ORDER

INDEX
NO.: 35035-09

SUPREME COURT - STATE OF NEW YORK
IAS PART 34 - SUFFOLK COUNTY

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

MOTION DATE: 8-24-12
ADJ. DATE: ____
Mot. Seq. #: 001 MG

ONEWEST BANK FSB,

Plaintiff,

-against-

JOSEPH LAINO, III; "JOHN DOE # 1-5" AND "JANE DOE # 1-5" said names being fictitious, it being the intention of Plaintiff to designate any and all occupants, tenants, persons, or corporations, if any, having or claiming an interest in or lien upon the premises being foreclosed herein

Defendants.

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Upon the following papers numbered 1-22 read on this motion for summary judgment, an order of reference and other related relief; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17; Affirmation in opposition and supporting papers 18-19; Replying Affidavits and supporting papers 20-22; 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) pursuant to CPLR 3211 [b] striking the answer and defenses and counterclaims of the defendant Joseph Laino, III and granting plaintiff summary judgment pursuant to CPLR 3212 on the grounds that the defense has no merit; (2) striking from the caption the names of "JOHN DOE #1" through "JOHN DOE # 5" and "JANE DOE # 1"through "JANE DOE #1" through "JANE DOE # 5" inclusive, and that the title of this action be amended accordingly without prejudice to any of the proceedings heretofore had herein or to be had herein; (3) referring the within matter to a referee to ascertain and compute the amount due upon the note and mortgage being foreclosed and to report whether the mortgage premises should be sold in one parcel; and for such other and further relief as to this Court may deem just and equitable 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 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 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 to reflect the excising of the "John Doe " AND "Jane Doe" 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 mortgagor on the note Joseph Laino, III (hereinafter " Laino ") defaulted in repaying a note and mortgage secured by real property located at 1121 Nandac Avenue, Bay shore, NY 11786. The action was commenced on September 4, 2009.

Issue was joined by the service of an answer by counsel for Laino on or about October 8, 2009 which consisted of general denials, four affirmative defenses and four affirmative defenses/ counterclaims. The court's computerized records indicate that a settlement conference was scheduled and held pursuant to CLR 3408, on August 1, 2012. 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 additionally moves for summary judgment (*see* CPLR 3212 [a]; ***Myung Chun v North American Mortgage Co.,*** 285 AD 2d 42; 729 NYS 2d 716 [1st Dept 2001]) to dismiss Laino's answer, affirmative defenses/counterclaims 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 v Cohen,*** 80 AD3d 753, 915 NYS 2d 569 [2d Dept 2011]).

Plaintiff has established a prima facie case in this foreclosure action by the submission of the affidavit testimony Forrest McKnight and Caryn Edwards officers of plaintiff and counsels' affirmation along with copies of the pleadings, and relevant mortgage documents, such as the CEMA note and mortgage signed by Laino January 23, 2008 and documentary evidence of Laino's default since February 1, 2009 and every month thereafter and that the default to date has not been cured (*see* ***Valley Natl. Bank v Deutsch,*** 88 AD 3d 691, 930 NYS 2d 477 [2d Dept 2011]; ***Wells Fargo Bank v Karla,*** 71 AD 3d 1006, 896 NYS 2d 681 [2d Dept 2010]; ***Wash. Mut Bank F.A. v O' Conner,*** 63 AD 3d 832, 889 NYS 2d 696 [2d Dept 2009]; ***Bercy Invs. v Sun,*** 239 AD2d 161, 657 NYS2d 47 [1st Dept 1997]; ***Bank of Leumi Trust Co. of New York v Lightning Park, Inc,*** 215 AD2d 246, 626 NYS2d 202 [1st Dept 1995]; ***Village Bank v Wild Oaks Holding, Inc.,*** 196 AD2d 812, 601 NYS2d

940 [2d Dept 1993]; ***Dart Assoc. v Rosa Meat Mkt.,*** 39 AD2d 564, 321 NYS2d 853 [2d Dept 1972]; ***Gould v McBride,*** 36 AD2d 706, 319 NYS2d 125 [1st Dept 1971]; *aff'd* 29 NY2d 708, 36 NYS2d 565 [1971]), and other documentary proof that it is a current holder in due course of a valid note and mortgage executed by Fuentes (*see* ***Deutsche Bank Natl' Trust Co. v Pietranoico,*** 33 Misc 3d 528, 928 NYS 2d 818 [Sup Ct Suffolk County 2011]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Plaintiff has established and Laino does not deny the existence of a valid note and mortgage. Plaintiff also alleges and noticed the past due, unpaid mortgage balance, which Laino tewr has not contested in opposition to plaintiff's moving papers as well as the acceleration default notice (*see* ***Fed. Home Loan Mtge Corp. v Karastathis,*** 237 AD 2d 558, 655 NYS 2d 631 [2d Dept 1997]; ***First Trust Natl. Ass'n v Meisels*** 234 AD 2d 414, 651 NYS 2d 121 [2d Dept 1996]). Thus, plaintiff has made a prima facie showing of entitlement to summary judgment in its favor (*see* ***Northeast Sav. v Rodriguez,*** 159 AD2d 820, 553 NYS2d 490 [3d Dept 1991]; *app dism* 76 NY2d 889, 561 NYS2d 550 [1990]).

Since plaintiff has presented documentary evidence of its entitlement to summary judgment as a matter of law, it now becomes incumbent upon Laino to come forward with evidentiary facts proving the existence of a triable issue with regards to bona fide defenses to the action such as waiver, estoppel, bad faith, fraud, oppressive and/or unconscionable conduct on the part of the plaintiff or its predecessor in interest (*see* ***Capstone Bus. Credit, LLC v Imperia Family Realty, LLC, 70 AD 3d 882 Marine Midland Bank, N.A. v Freedom Rd. Realty Assoc.,*** 203 AD2d 538, 611 NYS2d 34 [2d Dept 1994]; ***Village Bank v Wild Oaks Holding, Inc.,*** 196 AD2d 812, *supra*; ***Marton Assoc. v Vitale,*** 172 AD2d 501, 568 NYS2d 119 [2d Dept 1991]; ***Andre v Pomery,*** 35 NY2d 362 NYS2d 131 [1974]). Laino has not met that burden. Laino's denials and denial of information sufficient to form a belief, are 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]; (*see also* ***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 NYS 2d 125 [1st Dept 1971]; *affd* 29 NY2d 768, 326 NYS2d 565 [1971]).

. The opposition papers ignores and does not even address the remaining affirmative defenses and counterclaims Laino submitted in his answer. Counsel in his affirmation in opposition ingeniously attempts to divert the affirmative defense in defendant's answer into a separate issue, wherein Laino did not have to submit proof sufficient to raise a genuine question of fact casting doubt on the plaintiff's prima facie showing or implicating support for the affirmative defenses and/or counterclaims asserted in Laino's answer (*see* ***Grogg v South Road Assocs.***, 74 AD 3d 1021, 907 NYS 22 [2d Dept 2010]; ***Washington Mut. Bank v O'Conner,*** 63 AD 3d 832, 880 NYS 2d 696 [2d Dept 2009]). In effect The general contentions of Laino's counsel in his affirmation does not provide sufficient basis under CPLR 3212(f) addressed herein, for delaying determination of plaintiff's motion for summary judgment (*see* ***Lewis v Safety Disposal Sys. of Pennsylvania, Inc.,*** 12 AD3d 324, 786 NYS2d 146 [1st Dept 2004]).

"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, *supra*). 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 Collymore,*** 68 AD 3d 752, 890 NYS 2d [2d Dept 2009]).

The documentary evidence submitted herein consisted of a note transferred via an endorsement in blank. The effect of the endorsement is to make the note " payable to bearer pursuant to UCC § 1-201 [5]. When an instrument is indorsed in blank (and thus payable to bearer) it may be negotiated by transfer of possession alone (*see* UCC §§ 3-202 [1]; 3-204[2]). Furthermore, UCC § 9-203 [g] explicitly provides that the assignment of an interest of the seller or other grantor of a security interest in the note automatically transfers a corresponding interest in the mortgage to the assignee. The relevant provision states, "The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security in the security instrument, mortgage of other lien." Under UCC § 9-203 [g], if theholder of the note in question demonstrated that it had an attached security in the note, the holder of the note in question would also have a security interest the mortgage securing the note even in the absence of a separate assignment of the mortgage.. Here the plaintiff has established its lawful status as assignee, by the written assignment and physical delivery of the note prior to the filing of the complaint and which is noted in the complaint. Plaintiff has been in continuous possession of the note and includes in its moving papers the affidavit testimony of Caryn Edwards an officer of plaintiff attesting to the veracity of the submitted application as per the Administrative Order of the Chief Judge AO431/11 Where as in this foreclosure action plaintiff has produced sufficient documentary evidence and has eliminated all material issues of fact, the Court finds that the affirmation of counsel alone in his affirmation and cross motion is insufficient (*see* ***Zuckerman v City of New York,*** 49 NY 2d 557, *supra*), 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]).

Further, speculation and conjecture is insufficient to defeat plaintiff's motion (*see* ***Capobianco v Mari,*** 267 AD2d 191, 699 NYS2d 487 [2d Dept 1999]; ***Presta v Houssian,*** 186 AD2d 542, 589 NYS2d 791 [2d Dept 1992]). In opposition, Laino has failed to offer any valid evidentiary defense or counterclaim to the motion (*see* ***Castro v Liberty Bus Co.***, 79 AD 2d 1014, 435 NYS 2d 340 [2d Dept 1981]).

"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 [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]; 3d 816, 941 218 [2d Dept 2012]; ***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])

Laino 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. Thus, the facts as alleged by the plaintiff in its moving papers as to the alleged defenses may be deemed admitted , and there is in effect a concession that no question of fact exists (*see* ***Kuehue & Nagel, Inc. v Baiden***, 36 NY 2d 539, 369 NYS 2d 667 [1975]). Additionally, "uncontradicted facts are deemed admitted" (***Tortorello v Carlin,*** 260 AD 2d 201, 688 NYS 2d 64 [1st Dept 1999]). Therefore, the defendant's answer with its affirmative defenses are dismissed as a matter of law .

However, as noted herein the defendants' answer with counterclaims was served on or about October 8, 2009. The record before the Court does not indicate. that the defendant sought a default judgment against plaintiff within the one year time limit of CPLR 3215 [c] (*see* ***Giglio v NTIMP,*** 86 AD 3d 301, 926 NYS 2d 546 [2d Dept 2011]). Therefore the counterclaims are dismisses as a matter of law.

The assertions by Laino'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 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]). Most, importantly, the Court noted that Laino has not set forth any specific facts as to his ability to repay the subject mortgage

loan.

A referee to compute the amount due is prescribed when a defendant admits the right of the plaintiff in a foreclosure action by its answer (see RPAPL § 1`321 [1]; *see also* ***Scharaga v Schwartzber,*** 149 AD 2d 578, 540 NYS 2d 451 [2d Dept 1989]). Here, the defendant has answered the complaint and has opposed plaintiff's motion for summary judgment. However, for the above reasons, the defendant has not produced sufficient evidence to establish a genuine issue of material fact for trail relating to the mortgage foreclosure. Therefore, pursuant to RPAPL § 1321 the Court is appointing a Referee to ascertain and compute the amount due to plaintiff under the note and Mortgage and to report whether the premises should be sold in one parcel.

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 24th 2013
Riverhead, NY

HON. JOSEPH C. PASTORESSA J..S. C.

_____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION