Continental Home Loans v Allen
2013 NY Slip Op 33526(U)
December 4, 2013
Supreme Court, Suffolk County
Docket Number: 34679/11
Judge: Joseph Farneti
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SHORT FORM ORDER

INDEX
NO.: 34679-11

SUPREME COURT - STATE OF NEW YORK
IAS PART 37 - SUFFOLK COUNTY

PRESENT: Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 2-28-13
ADJ. DATE 9-26-13
Mot. Seq. #001-MotD

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CONTINENTAL HOME LOANS,

Plaintiff,

-against-

HAROLD A. ALLEN JR.; KELLY A EDWARDS-ALLEN; CLERK OF THE SUFFOLK COUNTY DISTRICT COURT; MIDLAND FUNDING LLC; NATIONAL LOAN RECOVERIES LLC; TEACHERS FEDERAL CREDIT UNION; FORD MOTOR CREDIT COMPANY; "JOHN DOES" and "JANE DOES" said names being fictitious, parties intended being possible tenants or occupants of premises, and corporations, other entities or persons who claim, or may claim, a lien against the premises,

Defendants.

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Upon the following papers numbered 1 to 7 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 7; 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 and against the defendants Harold A. Allen, Jr. and Kelly A. Edwards-Allen, and striking their answers and affirmative defenses; (2) pursuant to CPLR 3215, fixing the defaults of the non-answering defendants; and (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, is granted solely to the extent indicated below, and is otherwise denied; 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 promptly 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 234 Connetquot Avenue, East Islip, New York 11730. On December 18, 2009, the defendants Harold A. Allen, Jr. and Kelly A. Edwards-Allen (the "defendant mortgagors") executed a fixed-rate note in favor of Continental Home Loans, Inc. (the "plaintiff") in the principal sum of $323,000.00. To secure said note, the defendant mortgagors gave the plaintiff a mortgage also dated December 18, 2009 on the property. The mortgage indicates that Mortgage Electronic Registration Systems, Inc. ("MERS") was acting solely as a nominee for the plaintiff and its successors and assigns and that, for the purposes of recording the mortgage, MERS was the mortgagee of record. By assignment dated November 9, 2011 and recorded on January 4, 2010 in the Suffolk County Clerk's Office, the mortgage was transferred from MERS back to the plaintiff.

The defendant mortgagors allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on or about April 1, 2011, and each month thereafter. After the defendant mortgagors allegedly failed to cure their default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on November 21, 2011. Issue was joined by service of a verified answer sworn to on December 5, 2011 by Kelly A. Edwards-Allen ("Edwards-Allen"), and by service of an answer dated December 23, 2011 by Harold A. Allen, Jr. ("Allen").

By his answer, Allen generally denies some of the allegations in the complaint and admits other allegations, including the execution and delivery of the note and mortgage and the defendant mortgagors' interest in the property. Allen's answer also contains five affirmative defenses: lack of personal jurisdiction; failure to state a cause of action; a fatally defective complaint; payment; and breach of contract. By her answer, Edwards-Allen generally denies all of the allegations in the complaint and asserts, *inter alia*, five affirmative defenses: lack of personal jurisdiction; failure to receive a notice of default; the plaintiff's failure to properly send a 90-day notice in compliance with RPAPL 1304; partial/full payment; and financial hardship. The remaining defendants have not answered the complaint.

In compliance with CPLR 3408, a series of foreclosure settlement conferences were held in the court's foreclosure settlement conference part on April 10, July 18 and September 18, 2012. At the last conference, this case was dismissed from the conference program after the defendant mortgagors failed to appear or otherwise participate. Accordingly, no further conference is required.

The plaintiff now moves for, *inter alia*, an order: (1) pursuant to CPLR 3212, awarding summary judgment in its favor and against the defendant mortgagors, and striking their answers and affirmative defenses; (2) pursuant to CPLR 3215, fixing the defaults of the non-answering defendants; and (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. No opposition has been filed in response to this motion.

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], *quoting* ***Mahopac Natl. Bank v Baisley***, 244 AD2d 466, 467, 644 NYS2d 345 [2d Dept 1997]).

By its submissions, the plaintiff established its *prima facie* entitlement to summary judgment on the complaint (*see* CPLR 3212; RPAPL 1321; ***U.S. Bank, N.A. 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]). In the instant case, the plaintiff produced the note, the allonge, the mortgage and the assignment 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 (*cf.* ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]).

Further, the plaintiff submitted sufficient proof to establish, *prima facie*, that the affirmative defenses set forth in the defendant mortgagors' answers 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., N.A. 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 lacking in merit]; ***Wachovia Bank, N.A. v Carcano***, 106 AD3d 724, 965 NYS2d 516 [2d Dept 2013] [compliance with the 90-day notice set forth in RPAPL 1304 also satisfies the requirements of the 30-day notice requirement]; ***Wells Fargo Bank, N.A. v Cherot***, 102 AD3d 768, 957 NYS2d 886 [2d Dept 2013] ["due diligence" requirement of CPLR 308 (4) satisfied by three attempts at residence at different times on different days, including a Saturday]; ***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)]; ***Wells Fargo Bank, N.A. v Van Dyke***, 101 AD3d 638, 958 NYS2d 331 [1st Dept 2012]; ***EMC Mtge. Corp. v Stewart***, 2 AD3d 772, 769 NYS2d 408 [2d Dept 2003]; ***United Cos. Lending Corp. v Hingos***, 283 AD2d 764, 724 NYS2d 134 [3d Dept 2001]; ***First Fed. Sav. Bank v Midura***, 264 AD2d 407, 694 NYS2d 121 [2d Dept 1999] [foreclosing plaintiff has no obligation to modify loan before or after a default]; ***Shufelt v Bulfamante***, 92 AD3d 936, 940 NYS2d 108 [2d Dept 2012]; ***Long Island Sav. Bank, F.S.B. v Denkensohn***, 222 AD2d 659, 635 NYS2d 683 [2d Dept 1995] [dispute as to amount owed by the mortgagor is not a defense to a foreclosure action]; ***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]; ***Charter One Bank, FSB v Leone***, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007] [no competent evidence of an accord and satisfaction]; ***Manufacturers & 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]).

As the plaintiff duly demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted to the defendant mortgagors (*see* ***HSBC Bank USA v Merrill***, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]). Accordingly, it was incumbent upon the defendant mortgagors 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]).

The defendant mortgagors' answers are 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 mortgagors are factually unsupported and without apparent merit (*see* ***Becher v Feller***, 64 AD3d 672, *supra*).

The first affirmative defenses set forth in Allen and Edwards-Allen's answers, whereby the defendant mortgagors each allege that the Court lacks jurisdiction over them, are stricken as they do not allege that they were not properly served with process herein (*see* ***Associates First Capital Corp. v Wiggins***, 75 AD3d 614, 904 NYS2d 668 [2d Dept 2010]). These defenses were also waived as the defendant mortgagors each failed to move to dismiss the complaint as against them on this ground within sixty (60) days after serving their answers (*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]).

By his second and third affirmative defenses, Allen asserts that the complaint fails to state a cause of action and is fatally defective, however, he has not cross-moved to dismiss the complaint against him on this ground (*see* ***Butler v Catinella***, 58 AD3d 145, 868 NYS2d 101 [2d Dept 2008]). Also, the plaintiff has established its *prima facie* entitlement to summary judgment as indicated above. Therefore, the second and third affirmative defenses set forth in Allen's answer are surplusage, and the branch of the motion to strike such defenses are 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]). 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*, ***Kuehne & Nagel, Inc. v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; *see also*, ***Madeline D'Anthony Enters., Inc. v Sokolowsky***, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, *supra*). The failure by the defendant mortgagors to raise and/or assert each of their pleaded defenses in opposition to the plaintiff's motion warrants the dismissal of same as abandoned under the case authorities cited above (*see* ***Kuehne & Nagel, Inc. v Baiden***, 36 NY2d 539, *supra*; *see also* ***Madeline D'Anthony Enters., Inc. v Sokolowsky***, 101 AD3d 606, *supra*).

Under these circumstances, the Court finds that the defendant mortgagors 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, *supra*; *see generally* ***Hermitage Ins. Co. v Trance Nite Club, Inc.***, 40 AD3d 1032, 834 NYS2d 870 [2d Dept 2007]). The plaintiff, therefore, is awarded summary judgment against the defendant mortgagors (*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 mortgagors' answers are each stricken. All affirmative defenses set forth in Edwards-Allen's answer are dismissed, and the first, fourth and fifth affirmative defenses contained in Allen's answer are dismissed.

The branch of the instant motion wherein the plaintiff seeks an Order amending the caption by excising the fictitious defendants "John Does" and "Jane Does," 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. of 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 defendants (*see* RPAPL 1321; ***HSBC Bank USA, N.A. v Roldan***, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the defaults of the remaining defendants are fixed and determined. Since the plaintiff has been awarded summary judgment against the defendant mortgagors, and has established the 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; ***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, *inter alia*, 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: December 4, 2013

Hon. JOSEPH FARNETI, A.J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION