

Bankunited v Taylor

2014 NY Slip Op 30880(U)

February 21, 2014

Sup Ct, Suffolk County

Docket Number: 30335-10

Judge: Joseph C. Pastoressa

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

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

**MOTION DATE 6-5-13
ADJ. DATE _____
Mot. Seq. #001-MotD**

BANKUNITED,

Plaintiff,

**ROSICKI, ROSICKI & ASSOCIATES, P.C.
Attorneys for Plaintiff
51 E. Bethpage Road
Plainview, N. Y. 11803**

-against-

**EDWARD J. GROSSMAN, ESQ.
Attorney for Defendant
Donna Taylor
135 W. Main Street, Suite 204
Smithtown, N. Y. 11787**

**DONNA TAYLOR; JOHN TAYLOR; CAPITAL
ONE BANK (USA) NA; COMMISSIONER OF
TAXATION AND FINANCE - TAX COMPLIANCE
DIVISION - CHILD SUPPORT ENFORCEMENT;
COMMISSIONER OF TAXATION AND
FINANCE CCED CHILD SUPPORT ENFORCEMENT
SECTION; GOLD BOND FINANCIAL SERVICES
LLC; INDEPENDENCE RECEIVABLES
CORPORATION ASSIGNEE OF BALLY'S TOTAL
FITNESS CENTERS; KMT ENTERPRISES INC
A/A/O PROVIDIAN BANK; JOHN McHUGH;
PEOPLE OF THE STATE OF NEW YORK;
QUALITY AFFORDABLE LANDSCAPING;
JOHN SHEDRICK; SUFFOLK COUNTY WATER
AUTHORITY; TEACHERS FEDERAL CREDIT
UNION; THOMAS GUGLIOTTA; "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,**

**JOHN TAYLOR,
Defendant Pro Se
56 Beaver Drive
Kings Park, N. Y. 11754**

Defendants.
_____x

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,

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ORDERED that this unopposed motion by the plaintiff for, inter alia, an order awarding summary judgment in its favor against the defendant Donna Taylor, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption is determined as indicated below; and it is

ORDERED that the plaintiff shall submit with the proposed judgment of foreclosure, a certificate of conformity with respect to the affidavit of service upon the defendant Thomas Gugliotta, executed outside the State of New York (*see*, CPLR 2309[c]; *U.S. Bank N.A. v Dellarmo*, 94 AD3d 746, 942 NYS2d 122 [2d Dept 2012]); and it is

ORDERED that the plaintiff is directed to serve a copy of this order amending the caption upon the Calendar Clerk of this Court; 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 56 Beaver Drive, Kings Park, New York 11754. On November 20, 2007, the defendant Donna Taylor executed an adjustable-rate note in favor of BankUnited, FSB (BankUnited) in the principal sum of \$520,000.00. The note contains, inter alia, provisions allowing for changes in the monthly interest rate charged, the monthly payments required and the principal balance, with a maximum negative amortization in the sum of \$598,000.00. To secure said note, Mrs. Taylor and her husband, John Taylor (collectively the defendant mortgagors) gave BankUnited a mortgage also dated November 20, 2007 on the property. The mortgage indicates that Mortgage Electronic Registration Systems, Inc. (MERS) was acting solely as a nominee for the lender and its successors and assigns and that, for the purposes of recording the mortgage, MERS was the mortgagee of record.

Mrs. Taylor allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on September 1, 2009, and each month thereafter. After the defendant mortgagors allegedly failed to cure Mrs. Taylor's default, the plaintiff commenced the instant action by the filing of a summons and verified complaint on September 3, 2010, followed by the filing of a lis pendens on September 7, 2010. According to the records maintained by the Suffolk County Clerk's computerized database, the plaintiff re-filed the lis pendens on or about September 4, 2013.

Issue was joined by the interposition of Mrs. Taylor's verified answer sworn to on September 27, 2010. By her answer, Mrs. Taylor generally denies all of the material allegations set forth in the complaint and asserts three affirmative defenses, alleging, inter alia, lack of personal jurisdiction; failure to meet all required conditions precedent; and failure to credit answering defendant with all payments and adjustments. The defendant KMT Enterprises, Inc. A/A/O Providian Bank, has

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appeared herein and waived all, but certain notices to obtain surplus monies and notice of settlement or discontinuance of this action. The remaining defendants have neither appeared herein nor answered the complaint.

In compliance with CPLR 3408, a series of settlement conferences were scheduled for and/or held before this Court's specialized mortgage foreclosure part on June 10, August 2, September 20 and December 6, 2011 as well as on March 7, April 25 and May 29, 2012. On the last scheduled date, this case was dismissed from the conference program as the parties could not reach an agreement to modify the loan or otherwise settle this action. Accordingly, no further conference is required under any statute, law or rule.

The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against Mrs. Taylor, striking her answer and dismissing her 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 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 Deutsch*, 88 AD3d 691, 930 NYS2d 477 [2d Dept 2011]; *Wells Fargo Bank v Das Karla*, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; *Washington 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; Wachovia Bank, N.A. v Carcano*, 106 AD3d 724, 965 NYS2d 516 [2d Dept 2013]; *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, inter alia, the note, the mortgage and evidence of nonpayment (*see, Federal 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]). Furthermore, the plaintiff submitted proof of compliance with the notice requirements of RPAPL §§ 1303 and 1304 (*see, Castle Peak 2012-I Trust v Choudhury*, 2013 NY Misc LEXIS 5510, 2013 WL 6229919, 2013 NY Slip Op 32971 [U] [Sup Ct, Queens County 2013]; *M & T Bank v Romero*, 40 Misc3d 1210 [A], 977 NYS2d 667 [Sup Ct, Suffolk County 2013]; *cf., Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]). Under these circumstances, the plaintiff demonstrated its prima facie burden as to the merits of this foreclosure action.

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The plaintiff also submitted sufficient proof to establish, prima facie, that the affirmative defenses set forth in Mrs. Taylor'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., 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 are lacking in merit]; see also, *Bank of N.Y. Mellon v Scura*, 102 AD3d 714, 961 NYS2d 185 [2d Dept 2013]; *Scarano v Scarano*, 63 AD3d 716, 880 NYS2d 682 [2d Dept 2009] [process server's sworn affidavit of service is prima facie evidence of proper service]; *Shufelt v Bulfamante*, 92 AD3d 936, 940 NYS2d 108 [2d Dept 2012]; *Long Is. Sav. Bank of Centereach, 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. Assoc., 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]).

As the plaintiff duly demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted to Mrs. Taylor (see, *HSBC Bank USA v Merrill*, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]). Accordingly, it was incumbent upon Mrs. Taylor 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]; *Washington Mut. Bank v Valencia*, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]).

Self-serving and conclusory allegations do not raise issues of fact, and do not require the 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 [2d Dept 2007]; *Rosen Auto Leasing, Inc. v Jacobs*, 9 AD3d 798, 780 NYS2d 438 [3d Dept 2004]). 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 Mentasana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Additionally, "uncontradicted facts are deemed admitted" (*Tortorello v Carlin*, 260 AD2d 201, 206, 688 NYS2d 64 [1st Dept 1999] [internal quotation marks and citations omitted]).

Mrs. Taylor'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 Mentasana*, 79 AD3d 1079, *supra*). In this case, the affirmative defenses asserted by Mrs. Taylor are factually unsupported and without apparent merit (see, *Becher v Feller*, 64 AD3d 672, *supra*). The first affirmative defense, in which Mrs. Taylor alleges that the Court lacks jurisdiction over her, was also waived as she failed to move to dismiss the complaint against her on this ground within 60 days after serving the answer (see, CPLR 3211[e]; *Putnam County Sav. Bank v Mastrantone*, 111 AD3d 914, 975 NYS2d 684 [2d Dept 2013]; *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, the failure by Mrs. Taylor to raise and/or assert each of her pleaded defenses in opposition to the plaintiff's motion warrants the dismissal of the same as abandoned under the case authorities

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cited above (*see, Kuehne & Nagel 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 Mrs. Taylor 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 Mentasana*, 79 AD3d 1079, *supra*; *Rossrock Fund II, L.P. v Commack Inv. Group, Inc.*, 78 AD3d 920, 912 NYS2d 71 [2d Dept 2010]; *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 in its favor against Mrs. Taylor (*see, Federal 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, Mrs. Taylor's answer is stricken and the affirmative defenses set forth therein are dismissed.

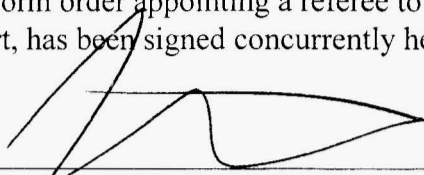
The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by excising the defendant John Shedrick as well as the fictitious named defendants, John Does and Jane Does, is granted (*see, PHH Mtge. Corp. v Davis*, 111 AD3d 1110, 975 NYS2d 480 [3d Dept 2013]; *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]). The branch of the motion wherein the plaintiff seeks an order pursuant to CPLR 1021 substituting Castlepeak 2012-1 Loan Trust Mortgage Backed Notes, Series 2012-1 for the plaintiff is also granted (*see, CPLR 1018; 3025[c]; Citibank, N.A. v Van Brunt Props., LLC*, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]; *see also, IndyMac Bank F.S.B. v Thompson*, 99 AD3d 669, 952 NYS2d 86 [2d Dept 2012]; *Greenpoint Mtge. Corp. v Lamberti*, 94 AD3d 815, 941 NYS2d 864 [2d Dept 2012]; *Maspeth Fed. Sav. & Loan Assn. v Simon-Erdan*, 67 AD3d 750, 888 NYS2d 599 [2d Dept 2009]). By its submissions, the plaintiff established the basis for the above-noted relief. All future proceedings shall be captioned accordingly.

By its moving papers, the plaintiff further established the default in answering on the part of the defendants John Taylor, Capital One Bank (USA) NA, Commissioner of Taxation and Finance - Tax Compliance Division - Child Support Enforcement, Commissioner of Taxation and Finance CCED Child Support Enforcement Section, Gold Bond Financial Services LLC, Independence Receivables Corporation Assignee of Ballys Total Fitness Centers, KMT Enterprises Inc A/A/O Providian Bank, John McHugh, People of the State of New York, Quality Affordable Landscaping, Suffolk County Water Authority, Teachers Federal Credit Union and John Gugliotta (*see, RPAPL § 1321; HSBC Bank USA, N.A. v Roldan*, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the defaults of all of the above-noted defendants are fixed and determined. Since the plaintiff has been awarded summary judgment against Mrs. Taylor, and has established the default in answering by all of the non-answering 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]; *Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *Bank of E. Asia v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

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Accordingly, this motion for, inter alia, summary judgment and an order of reference 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: February 21, 2014



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

FINAL DISPOSITION NON-FINAL DISPOSITION