JPMorgan Chase Bank v Federman
2014 NY Slip Op 31294(U)
February 18, 2014
Supreme Court, Suffolk County
Docket Number: 16989/09
Judge: Joseph A. Santorelli
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SHORT FORM ORDER

INDEX
NO.: 16989-09

SUPREME COURT - STATE OF NEW YORK
IAS PART 30 - SUFFOLK COUNTY

PRESENT: Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 5-30-13
ADJ. DATE
Mot. Seq. # 003-MotD

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, AS PURCHASER OF THE LOANS AND OTHER ASSETS OF WASHINGTON MUTUAL BANK, FORMERLY KNOWN AS WASHINGTON MUTUAL BANK, FA,

Plaintiff,

-against-

SAUL D. FEDERMAN II; LYNN D. FEDERMAN; AMERICAN EXPRESS CENTURION BANK; CITIBANK (SD), NA; FIA CARD SERVICES, N.A.; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; TARGET NATIONAL BANK; AMERICAN EXPRESS TRAVEL RELATED SERVICES, INC.; "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 10 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 10; 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 awarding summary judgment in its favor against the defendants Saul D. Federman and Lynn D. Federman, 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 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 9 Timber Ridge Drive, Huntington, New York 11743. On May 26, 2005, the defendant Saul D. Federman II executed a negative-amortizing adjustable-rate note in favor of Washington Mutual Bank, FA (WAMU) in the principal sum of $840,000.00. The note provided for a maximum negative amortization of $924,000.00. To secure said note, Mr. Federman and his wife, Lynn D. Federman (collectively the defendant mortgagors) gave WAMU a mortgage also dated May 26, 2005 on the property. Thereafter, on February 1, 2008, Mr. Federman executed and delivered to WAMU a loan modification agreement, whereby the note and the mortgage were modified to reflect, among other things, a new unpaid principal balance of $894,136.02 as of January 22, 2008.

By way of background, in September of 2008 WAMU failed and its assets were seized and placed into the hand of a receiver by the Federal Deposit Insurance Corporation (the FDIC). Under Purchase and Assumption Agreement dated October 2, 2008 (the Purchase Agreement) between the FDIC, as receiver of WAMU, and JPMorgan Chase Bank, National Association, as purchaser of the loans and other assets of Washington Mutual Bank, formerly known as WAMU (the plaintiff), certain assets, including all loans and loan commitments of WAMU, were acquired by the plaintiff. As a result, on September 25, 2008, the plaintiff became the owner of the loans and loan commitments of WAMU by operation of law.

Mr. Federman allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on June 1, 2008, and each month thereafter. After the defendant mortgagors allegedly failed to cure Mr. Federman's default, the plaintiff commenced the instant action by the filing of a summons and verified complaint on June 4, 2009, followed by the filing of a lis pendens on June 5, 2009. According to the records maintained by the Suffolk County Clerk's computerized database, the plaintiff re-filed the lis pendens on or about May 6, 2013.

Issue was joined by the interposition of the defendant mortgagors' joint verified answer dated and sworn to on August 31, 2009. By their answer, the defendant mortgagors admit that Mr. Federman executed and delivered a note and mortgage to WAMU, but generally deny the remaining material allegations set forth in the complaint. In their answer, the defendant mortgagors also assert seven affirmative defenses, alleging, inter alia, failure to state a cause of action; lack of personal jurisdiction; Lynn Federman did not sign the underlying note/obligation; standing; failure to properly accelerate the loan; waiver; and failure to comply with the notices required by RPAPL §§ 1303 and 1304. The remaining defendants have neither appeared nor answered the complaint.

In compliance with CPLR 3408, an initial settlement conference was scheduled to be held before this Court's specialized mortgage foreclosure part on October 8, 2009, but the same was stayed due to an intervening bankruptcy filing. After the bankruptcy stay was lifted, conferences were scheduled for and/or held April 15, 2010 and June 10, 2010. At the June, 2010 conference, this case was dismissed from the conference program because the parties could not reach an agreement to modify the loan or otherwise settle this action. Thereafter, additional conferences were held before Foreclosure Conference Part 10 on February 1, May 3 and June 5, 2013. On the last scheduled date, this case was marked to indicate that as a settlement again had not been reached. Accordingly, no further conference is required under any statute, law or rule.

By way of further background, a motion (001) by the defendant mortgagors for an order pursuant to CPLR 3211 dismissing the complaint on the grounds that the plaintiff lacked personal jurisdiction over them for failure to properly serve them pursuant to CPLR 308 (1) and (2), was randomly reassigned to Part 10 upon Justice Tanenbaum's recusal by Order dated July 3, 2010. After being reassigned and renumerated, the motion (002) was denied by Order dated September 22, 2010 (Jones Jr., J.). The plaintiff now moves (003) for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the defendant mortgagors, striking their answer and dismissing their 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; (4) amending the caption; and (5) awarding it certain nunc pro tunc relief. 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]).

Where, as here, an answer served includes the defense of standing or lack of capacity to sue, the plaintiff must prove its standing in order to be entitled to relief (*see*, ***CitiMortgage, Inc. v Rosenthal***, 88 AD3d 759, 931 NYS2d 638 [2d Dept 2011]). 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*, ***Bank of N.Y. v Silverberg***, 86 AD3d 274, 926 NYS2d 532 [2d Dept 2011]; ***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]). A mortgage "is merely security for a debt or other obligation, and cannot exist independently of the debt or obligation" (***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, 911, 961 NYS2d 200 [2d Dept 2013] [internal quotation marks and citations omitted]). Holder status is established

where the plaintiff is the special indorsee of the note or takes possession of a mortgage note that contains an endorsement in blank on its face or attached thereto, as the mortgage follows an incident thereto (*see*, ***Mortgage Elec. Registration Sys., Inc. v Coakley***, 41 AD3d 674, 838 NYS2d 622 [2d Dept 2007]; ***First Trust Natl. Assn. v Meisels***, 234 AD2d 414, 651 NYS2d 121 [2d Dept 1996]). "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident" (***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, *supra* at 754 [internal quotation marks and citations omitted]). Further, "[n]o special form or language is necessary to effect an assignment as long as the language shows the intention of the owner of a right to transfer it" (***Suraleb, Inc. v International Trade Club, Inc.***, 13 AD3d 612, 612, 788 NYS2d 403 [2d Dept 2004] [internal quotation marks and citations omitted]). Moreover, "a good assignment is made by delivery only" (***Fryer v Rockefeller***, 63 NY 268, 276 [1875]; ***U.S. Bank Natl. Assn. v Lanzetta***, 2013 NY Misc LEXIS 1509, 2013 WL 1699251, 2013 NY Slip Op 30755 [U] [Sup Ct, Suffolk County 2013, slip op, at 17]; ***Deutsche Bank Natl. Trust Co. v Bills***, 37 Misc3d 1209 [A], ___NYS2d___, 2012 NY Misc LEXIS 4842, 2012 WL 4868108, 2012 NY Slip Op 51943 [U] [Sup Ct, Essex County 2012, slip op, at 5]). Furthermore, UCC § 9-203(g) explicitly provides that the assignment of an interest of the seller or grantor of a security interest in the note automatically transfers a corresponding interest in the mortgage to the assignee.

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, *supra*). 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]). Moreover, the plaintiff submitted, inter alia, the affidavit from one of its officers wherein it is alleged that the plaintiff is the holder of the note (*see*, ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]). Additionally, the plaintiff submitted a recorded copy of the Purchase Agreement, which has been found to confer upon the purchaser the right to foreclose on a defaulting borrower (*see*, ***JP Morgan Chase Bank, N.A. v Shapiro***, 104 AD3d 411, 959 NYS2d 918 [1st Dept 2013]; ***JP Morgan Chase Bank, N.A. v Miodownik***, 91 AD3d 546, 937 NYS2d 192 [1st Dept 2012]; *see generally*, ***JPMorgan Chase Bank, N.A. v Calemmo***, 2013 NY Misc LEXIS 6375, 2013 WL 6994943, 2013 NY Slip Op 33525 [U] [Sup Ct, Suffolk County 2013]; ***OneWest Bank, FSB v Davies***, 38 Misc3d 1230 [A], 967 NYS2d 868 [Sup Ct, Suffolk County 2013]). Under these circumstances, the plaintiff demonstrated its prima facie burden as to the merits of this foreclosure action and as to its standing.

The plaintiff also submitted sufficient proof to establish, prima facie, that the remaining affirmative defenses set forth in the defendant mortgagors' 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]; ***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]; ***Manufacturers & Traders Trust Co. v Schlosser & Assoc.***, 242 AD2d 943, 665 NYS2d 949 [4th Dept 1997] [conclusory allegations of conduct constituting an 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] [no valid defense or claim of estoppel where mortgage provision bars oral modification]; ***Polish Natl. Alliance of Brooklyn v White Eagle Hall Co.***, 98 AD2d 400, 470 NYS2d 642 [2d Dept 1983] [the definition of a necessary party pursuant to RPAPL §1311 includes, inter alia, those having "an interest in possession" and "every person entitled to reversion, remainder, or inheritance of the real property, or any interest therein or undivided share thereof"]).

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]; ***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 Mentesana***, 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]).

The defendant mortgagors' 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 Mentesana***, 79 AD3d 1079, *supra*). In this case, the affirmative defenses asserted by the defendant mortgagors are factually unsupported and without apparent merit (*see*,

Becher v Feller, 64 AD3d 672, *supra*). By their first affirmative defense, the defendant mortgagors assert that the complaint fails to state a cause of action, however, they have not cross moved to dismiss the complaint on this ground (*see*, ***Butler v Catinella***, 58 AD3d 145, 868 NYS2d 101 [2d Dept 2008]). Also, as indicated above, the plaintiff has established its prima facie entitlement to summary judgment. Therefore, the first affirmative defense is surplusage, and the branch of the motion to strike such defense is denied as moot (*see,* ***Old Williamsburg Candle Corp. v Seneca Ins. Co., Inc.***, 66 AD3d 656, 886 NYS2d 480 [2d Dept 2009]; ***Schmidt's Wholesale, Inc. v Miller & Lehman Constr., Inc.***, 173 AD2d 1004, 569 NYS2d 836 [3d Dept 1991]).

In their third affirmative defense, the defendant mortgagors assert that Mrs. Federman did not sign the underlying note/obligation. While Mrs. Federman did not execute the note, she was a signatory to the mortgage. Mrs. Federman is also a fee owner of the property, as a tenant by the entirety. Therefore, Mrs. Federman is a necessary party to this proceeding, and the third affirmative defense, which relates only to a deficiency judgment, if any, fails to raise a triable issue of fact. In any event, 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 the 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]; *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 the defendant mortgagors (*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, the defendant mortgagors' answer is stricken, and the second as well as the fourth through the seventh enumerated affirmative defenses are dismissed.

The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by excising the fictitious named defendants, John Doe # 1-12, 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, *supra*). By its submissions, the plaintiff established the basis for the above-noted relief. All future proceedings shall be captioned accordingly.

By its submissions, the plaintiff demonstrated that the omission of the full lot description, 013.030 formerly known as 13.500, in the complaint and the notice of pendency was inadvertent, and that the substantial right of any party to this action has not been prejudiced (*see*, CPLR 2001; ***Household Fin. Realty Corp. of N.Y. v Emanuel***, 2 AD3d 192, 769 NYS2d 511 [1st Dept 2003]; ***Rennert Diana & Co. v Kin Chevrolet***, 137 AD2d 589, 524 NYS2d 481 [2d Dept 1988], *see also*, ***Serena Constr. Corp. v Valley Drywall Serv.***, 45 AD2d 896, 357 NYS2d 214 [3d Dept 1974]).

Accordingly, pursuant to CPLR 2001 and 3025(c), the second cause of action is granted and the lot number is deemed corrected nunc pro tunc to June 4, 2009.

By its submissions, the plaintiff also demonstrated its entitlement with respect to the remaining relief sought with respect to certain irregularities and/or mistakes contained in the complaint and with respect to certain omissions therein, as detailed in the affirmation of Kenneth Sheehan, Esq., dated May 2, 2013 (*see*, CPLR 2001; ***Household Fin. Realty Corp. of N.Y. v Emanuel***, 2 AD3d 192, *supra*). The complaint is therefore, corrected nunc pro tunc to June 4, 2009, as set forth in the proposed long form order signed concurrently herewith.

By its moving papers, the plaintiff further established the default in answering on the part of the defendants American Express, Centurion Bank, Citibank (SD), NA, FIA Card Services, N.A., New York State Department of Taxation and Finance, Target National Bank, American Express Travel Related Services, Inc. (*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 the defendant mortgagors, 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]).

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: FEB 18 2014

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

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**