

Citimortgage, Inc. v Kaushik

2014 NY Slip Op 31635(U)

June 9, 2014

Supreme Court, Suffolk County

Docket Number: 15651-09

Judge: W. Gerard Asher

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SUPREME COURT - STATE OF NEW YORK
IAS PART 28 - SUFFOLK COUNTY

PRESENT: Hon. W. GERARD ASHER
Justice of the Supreme Court

CITIMORTGAGE, INC.,

Plaintiff,

-against-

VEKRUM KAUSHIK; A/K/A VEKRAM KAUSHIK;
MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC.; CITIBANK, NA: "JOHN DOE
#1 through "JOHN DOE #10" inclusive, the names of
the ten last name Defendants being fictitious, real
names unknown to the Plaintiff, the parties
intended being persons or corporations having
interest in, or tenants or persons in possession of,
portions of the mortgaged premises described
in the Complaint,

Defendants.

MOTION DATE 7-10-13
ADJ. DATE 8-27-13
Mot. Seq. # 001-MotD

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

MICHAEL POSNER, ESQ.
Attorney for Defendant
Vekrum Kaushik
255 West 36th Street, 8th floor
New York, N.Y. 10010

Upon the following papers numbered 1 to 19 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 10 - 13 ; Replying Affidavits and supporting papers 14 - 17 ; Other Letters 18 - 19 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the plaintiff for, inter alia, an order awarding summary judgment in its favor against the defendant Vekrum Kaushik, 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 Vekrum Kaushik, 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


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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 real property known as 65 Hildreth Avenue, Bridgehampton, New York 11932. On April 27, 2009, the defendant Vekrum Kaushik (the defendant mortgagor) executed an adjustable-rate note in favor of CitiMortgage, Inc. (the plaintiff) in the principal sum of \$1,260,000.00. To secure said note, the defendant mortgagor gave the plaintiff a mortgage also dated April 27, 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. The transfer of the mortgage to the plaintiff was memorialized by way of an assignment executed on April 17, 2009, and thereafter duly recorded in the Suffolk County Clerk's Office. On August 24, 2012, MERS subsequently executed a correction assignment, whereby its full name was set forth in the assignment. The correction assignment was thereafter duly recorded in the Suffolk County Clerk's Office.

The defendant mortgagor allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on or about October 1, 2008, and each month thereafter. After the defendant mortgagor allegedly failed to cure his default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on April 27, 2009. Parenthetically, the plaintiff re-filed the lis pendens on November 20, 2012.

Issue was joined by the interposition of the defendant mortgagor's verified answer sworn to on May 27, 2009. By his answer, the defendant mortgagor generally denies all of the allegations set forth in the complaint and asserts seven affirmative defenses, alleging, inter alia, the failure to state a cause of action (alleged as a first and fifth affirmative defense); an improperly verified complaint; the lack of standing and/or legal capacity (alleged as a third, fourth and sixth affirmative defense); and the lack of personal jurisdiction. The remaining defendants have neither answered nor appeared.

The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the defendant mortgagor, striking his answer and dismissing the affirmative defenses set forth therein; (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. Opposition and reply papers have been filed herein.

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, "[o]ur courts have repeatedly held that a bond or mortgage may be transferred by delivery without a written instrument of assignment" (*Flyer v Sullivan*, 284 AD 697, 699, 134 NYS2d 521 [1st Dept 1954]). Thus, "a good assignment of a mortgage is made by delivery only" (*Curtis v Moore*, 152 NY 159, 162 [1897], quoting *Fryer v Rockefeller*, 63 NY 268, 276 [1875]; *see, People's Trust Co. v Tonkonogy*, 144 AD 333, 128 NYS 1055 [2d Dept 1911]).

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, the assignments 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 an affidavit from its representative wherein it is alleged that the plaintiff was the holder of the note at the time of commencement as the originating lender, and that it has maintained possession of the same since that time (*see, Kondaur Capital Corp. v McCary*, 115 AD3d 649, 981 NYS2d 547 [2d Dept 2014]; *Deutsche Bank Natl. Trust Co. v Whalen*, 107 AD3d

931, 969 NYS2d 82 [2d Dept 2013]; **HSBC Bank USA, N.A. v Avila**, 2013 NY Misc LEXIS 4521, 2013 WL 5606741, 2013 NY Slip Op 32412 [U] [Sup Ct, Suffolk County 2013]). Thus, 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 affirmative defenses set forth in the defendant mortgagor'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]). Furthermore, there is no requirement that a complaint in a foreclosure action be verified (see generally, CPLR 3020; see also, CPLR 3022).

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 [3d 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 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]).

A review of the opposing papers shows that the same are insufficient to raise any genuine issue of fact requiring a trial on the merits of the plaintiff's claims for foreclosure and sale, and insufficient to demonstrate any bona fide defense to such claim (see, CPLR 3211[e]; **U.S. Bank Trust N.A. Trustee v Butti**, 16 AD3d 408, 792 NYS2d 505 [2d Dept 2005]; see also, **Flagstar Bank v Bellafiore**, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; **Argent Mtge. Co., LLC v Mentasana**, 79 AD3d 1079, *supra*). In opposition to the motion, the defendant mortgagor has offered no proof or arguments in support of any of his pleaded defenses, except as to the plaintiff's alleged lack of standing and/or legal capacity. The failure by the defendant mortgagor to raise and/or assert each of his remaining 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 v Baiden**, 36 NY2d 539, *supra*; see also, **Madeline D'Anthony Enters., Inc. v Sokolowsky**, 101 AD3d 606, *supra*). All of the defendant mortgagor's unsupported affirmative defenses are thus dismissed.

Rejected as unmeritorious are the defendant mortgagor's challenges to the sufficiency of the proof upon which the plaintiff relies to support its motion for summary judgment. Contrary to the defendant mortgagor's contentions, the affidavits of the plaintiff's representative are legally sufficient and comport with the requirements of CPLR 3212 (see, **Charter One Bank, FSB v Leone**, 45 AD3d 958, *supra*; **Fleet Bank v Pine Knoll Corp.**, 290 AD2d 792, 736 NYS2d 737 [3d Dept 2002]; see

also, *HSBC Bank USA, N.A. v Sage*, 112 AD3d 1126, 977 NYS2d 446 [3d Dept 2013]; *LaSalle Bank, N.A. v Pace*, 31 Misc3d 627, 919 NYS2d 794, *affd* 100 AD3d 970, 955 NYS2d 161 [2d Dept 2012]).

The assertions by the defendant mortgagor as to the plaintiff's alleged lack of standing, which rest, inter alia, upon alleged defects in the assignments, rife with speculation and innuendo, are also rejected as unmeritorious (*see, Chase Home Fin., LLC v Miciotta*, 101 AD3d 1307, 956 NYS2d 271 [3d Dept 2012]; *Bank of N.Y. Mellon Trust Co., N.A. v Sachar*, 95 AD3d 695, 943 NYS2d 893 [1st Dept 2012]; *Hypo Holdings, Inc. v Chalasani*, 280 AD2d 386, 721 NYS2d 35 [1st Dept 2001]; *see also, OneWest Bank FSB v Carey*, 104 AD3d 444, 960 NYS2d 306 [1st Dept 2013]; *U.S. Bank N.A. v Cange*, 96 AD3d 825, 947 NYS2d 522 [2d Dept 2012]). The plaintiff demonstrated, as indicated above, that the original endorsed note was in its continuous possession as the originating lender on the date of commencement of this action (*see, Kondaur Capital Corp. v McCary*, 115 AD3d 649, *supra*; *Deutsche Bank Natl. Trust Co. v Whalen*, 107 AD3d 931, *supra*). Additionally, the plaintiff submitted, inter alia, a copy of the assignment of the mortgage executed on April 17, 2009, and thereafter duly recorded in the Office of the Suffolk County Clerk, which memorialized the transfer of the mortgage back to it for land purposes prior to commencement (*see, GRP Loan, LLC v Taylor*, 95 AD3d 1172, 945 NYS2d 336 [2d Dept 2012]; *see also, Suntrust Mtge., Inc. v Andriopoulos*, 39 Misc 3d 1208(A), 971 NYS2d 75 [Sup Court, Suffolk County 2013]). The plaintiff also submitted, inter alia, the corrective assignment, which was subsequently duly recorded in the Suffolk County Clerk's Office. The defendant mortgagor, therefore, failed to establish the merit of his defenses based upon the alleged lack of standing and legal capacity.

Furthermore, even if the plaintiff were not a holder in due course, but only a holder or assignee/transferee and thus subject to all defenses (*see, UCC 3-306*), it is still entitled to summary judgment since the defendant mortgagor failed to raise a triable issue of fact regarding his proffered defenses (*see, Carlin v Jemal*, 68 AD3d 655, 891 NYS2d 391 [1st Dept 2009]; *see also, National Union Fire Ins. Co. of Pittsburgh, Pa. v Allen*, 232 AD2d 80, 85, 662 NYS2d 8 [1st Dept 1997]). The remaining contentions advanced by the defendant mortgagor are similarly without merit.

Notwithstanding the general denials in the answer, notably absent from the opposition papers are any allegations by the defendant mortgagor denying his continuous default in payment. Thus, even when viewed in the light most favorable to the defendant mortgagor, the opposition is insufficient to raise any genuine question of fact requiring a trial on the merits of the plaintiff's claims for foreclosure and sale, and insufficient to demonstrate any bona fide defenses (*see, CPLR 3211[e]*; *see, Emigrant Mtge. Co., Inc. v Beckerman*, 105 AD3d 895, 964 NYS2d 548 [2d Dept 2013]; *Bank of Smithtown v 219 Sagg Main, LLC*, 107 AD3d 654, 968 NYS2d 95 [2d Dept 2013]; *Valley Natl. Bank v Deutsch*, 88 AD3d 691, *supra*; *Rossrock Fund II, L.P. v Commack Inv. Group, Inc.*, 78 AD3d 920, 912 NYS2d 71 [2d Dept 2010]; *Cochran Inv. Co., Inc. v Jackson*, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007]). The plaintiff, therefore, is awarded summary judgment in its favor against the defendant mortgagor (*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 mortgagor's answer is stricken, and the affirmative defenses set forth therein are dismissed in their entirety.

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The branch of the motion wherein the plaintiff seeks an order pursuant to CPLR 1021 substituting SRMOF 2009-1 Trust for the plaintiff is 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]). The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by excising the names of the fictitious defendants, John Doe #1-12, is also 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]). 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 MERS and Citibank, N.A. (*see*, RPAPL § 1321; *HSBC Bank USA, N.A. v Roldan*, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the defaults of the above-noted defendants are fixed and determined. Since the plaintiff has been awarded summary judgment against the defendant mortgagor, 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]; *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 is determined as set forth 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: June 9, 2014



 Hon. W. GERARD ASHER, J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION