

Residential Credit Solutions, Inc. v Jeckel
2014 NY Slip Op 31825(U)
July 10, 2014
Supreme Court, Suffolk County
Docket Number: 17954-10
Judge: Joseph A. Santorelli
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**SUPREME COURT - STATE OF NEW YORK
IAS PART 10 - SUFFOLK COUNTY**

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

MOTION DATE 9-24-13
ADJ. DATE _____
Mot. Seq. #001-MotD

Residential Credit Solutions, Inc.,

Plaintiff,

-against-

Tandy Jeckel; Citibank, N.A., and "JOHN DOE #1" through "JOHN DOE #10", the last ten names being fictitious and unknown to the Plaintiff, the persons or parties intended being the person or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the complaint,

Defendants,

SHAPIRO, DICARO & BARAK, LLC
Attorneys for Plaintiff
250 Mile Crossing Boulevard
Suite One
Rochester, N. Y. 14624

SARISOHN LAW PARTNERS, LLP
Att: Justin M. Block, Esq.
Attorney for Defendant
Tandy Jeckel
1601 Veterans Memorial Highway
Islandia, N. Y. 11749

MIKE RUGGIERO
82 Shirley Court
Commack, N. Y. 11725

Upon the following papers numbered 1 to 12 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 12; 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/counterclaim-defendant for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the defendant/counterclaim-plaintiff Tandy Jeckel, striking her answer and dismissing the affirmative defenses and the counterclaims 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 is granted in part and denied in part as indicated below; and it is

ORDERED that the branch of the motion wherein the plaintiff requests an order awarding it the costs of this motion is denied without prejudice, leave to renew upon proper documentation for costs at the time of submission of the judgment; 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 the defendants Tandy Jeckel and Mike Ruggiero 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 82 Shirley Court, Commack, New York 11725. On March 6, 2006, the defendant Tandy Jeckel (the defendant mortgagor) executed an InterestFirst fixed-rate note in favor of Mortgageit, Inc. (the lender) in the principal sum of \$637,500.00. The note provides, among other things, for a 10-year interest only period. To secure said note, the defendant mortgagor gave the lender a mortgage also dated March 6, 2006 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. By way of two endorsements and two assignments, the note was transferred to Residential Credit Solutions, Inc. (the plaintiff) prior to commencement. Thereafter, the assignments were duly recorded in the Office of the Suffolk County Clerk.

The defendant mortgagor allegedly defaulted on the note and mortgage by failing to make the monthly payment of interest due on or about November 1, 2008, and each month thereafter. After the defendant mortgagor allegedly failed to cure her default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and complaint on May 12, 2010. Parenthetically, the plaintiff re-filed the lis pendens on or about July 2, 2013.

Issue was joined by the interposition of the defendant mortgagor's verified answer sworn to on June 16, 2010. By her answer, the defendant mortgagor admits some of the allegations contained in the complaint and denies other allegations set forth therein. In the answer, the defendant mortgagor asserts ten affirmative defenses, alleging, inter alia, the following: the doctrines of laches and waiver; the lack of standing; misrepresentation and fraud by the lender and the plaintiff in connection with the loan origination and servicing; improper commencement of the action; the lack of personal jurisdiction; and the failure to satisfy a condition precedent. In the answer, the defendant mortgagor also asserts four counterclaims, asserting, among other things, misrepresentation and fraud by the lender and the plaintiff in connection with the loan origination and servicing as well as misrepresentation and fraud by the plaintiff and its agents in connection with a loan modification application. By her counterclaims, the defendant mortgagor seeks monetary damages, or, in the alternative, a rescission of the note and mortgage. In its verified reply sworn to on July 1, 2010, the plaintiff denies all of the material allegations contained in the counterclaims, and asserts four affirmative defenses. The remaining defendants have neither answered nor appeared.

In compliance with CPLR 3408, a series of settlement conferences were conducted or adjourned before the specialized mortgage foreclosure part beginning on July 27, 2010 and continuing through to December 9, 2010. On the last date, this action was dismissed from the conference program and referred as an IAS case because the parties were unable to modify the loan or otherwise reach a settlement. 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 the defendant mortgagor, striking her answer and dismissing the affirmative defenses and the counterclaims 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. 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 endorsed 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, 651 NYS2d 121 [2d Dept 1996]). Furthermore, the plaintiff submitted proof of compliance with the notice requirements of RPAPL §§ 1303, 1304 and 1320 (*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 an affidavit from its representative wherein it is alleged that the note and mortgage were transferred to the plaintiff prior to commencement, memorialized by the assignments of the mortgage (*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]; *Chase Home Fin., LLC v Miciotta*, 101 AD3d 1307, 956 NYS2d 271 [3d Dept 2012]; *GRP Loan, LLC v Taylor*, 95 AD3d 1172, 945 NYS2d 336 [2d Dept 2012]). 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 and the counterclaim 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, Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178, 919 NYS2d 465 [2011]; *Morales v AMS*

Mtge. Servs., Inc., 69 AD3d 691, 692, 897 NYS2d 103 [2d Dept 2010] [CPLR 3016(b) requires that the circumstances of fraud be “stated in detail,” including specific dates and items]; *Bank of America, N.A. v Lucido*, 114 AD3d 714, 981 NYS2d 433 [2d Dept 2014] [plaintiff’s refusal to consider a reduction in principal does not establish a failure to negotiate in good faith]; *Washington Mut. Bank v Schenk*, 112 AD3d 615, 975 NYS2d 902 [2d Dept 2013]; *JPMorgan Chase Bank, N.A. v Ilardo*, 36 Misc3d 359, 940 NYS2d 829 [Sup Ct, Suffolk County 2012] [plaintiff not obligated to accept a tender of less than full repayment as demanded]; *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]; *La Salle Bank N.A. v Kosarovich*, 31 AD3d 904, 820 NYS2d 144 [3d Dept 2006]; *CFSC Capital Corp. XXVII v Bachman Mech. Sheet Metal Co.*, 247 AD2d 502, 669 NYS2d 329 [2d Dept 1998] [an affirmative defense based upon the notion of culpable conduct is unavailable in a foreclosure action]; *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]). Furthermore, with respect to the defendant mortgagor’s allegations that she was improperly denied a loan modification, there is ample authority emanating from the Appellate Division holding that “[n]othing in CPLR 3408 requires plaintiff to make the exact offer desired by [the] defendant[] [mortgagor], and the plaintiff’s failure to make that offer cannot be interpreted as a lack of good faith” (*Bank of America, N.A. v Lucido*, 114 AD3d 714, *supra* at 715-16, quoting *Wells Fargo Bank, N.A. v Van Dyke*, 101 AD3d 638, *supra* at 638).

As the plaintiff duly demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted to the defendant mortgagor (*see, HSBC Bank USA v Merrill*, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]). Accordingly, it was incumbent upon the defendant mortgagor 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 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 Mentosana*, 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 mortgagor’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 Mentosana*, 79 AD3d 1079, *supra*). In this case, the affirmative defenses and the counterclaims asserted by the defendant mortgagor are factually unsupported and without apparent merit (*see, Becher v Feller*, 64 AD3d 672, *supra*). In any event, the failure by the defendant mortgagor to raise and/or assert each of her pleaded defenses and counterclaims in opposition to the plaintiff’s

motion warrants the dismissal of the 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*).

Under these circumstances, the Court finds that the defendant mortgagor 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 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 and the counterclaims set forth therein are dismissed.

The branch of the motion wherein the plaintiff seeks an order pursuant to CPLR 1021 substituting a purported, post-commencement assignee of the note and mortgage, Bayview Loan Servicing, LLC (Bayview), for the plaintiff is denied without prejudice, leave to renew granted upon the submission proper proof (*see, CPLR 1018; 3025[c]; Wells Fargo Bank, N.A. v Concepcion*, 38 Misc3d 1225 (A), 969 NYS2d 807 [Sup Ct, Suffolk County 2013]; *cf., Citibank, N.A. v Van Brunt Props., LLC*, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]). The plaintiff has not demonstrated, by way of proof in admissible form, that Bayview consents to the requested substitution and submits to the jurisdiction of the court, by its retention of and appearance by the plaintiff's counsel or by counsel of its own choosing. Nor has the plaintiff annexed a copy of the recorded, post-commencement assignment to the moving papers. The plaintiff may continue to prosecute this action, however, notwithstanding the alleged post-commencement transfer of the note to Bayview (*see, GRP Loan, LLC v Taylor*, 95 AD3d 1172, *supra*; *Citimortgage Inc. v Lepore*, 2012 NY Misc LEXIS 4282, 2012 WL 3947031, 2012 NY Slip Op 32290 [U] [Sup Ct, Suffolk County 2012]).

The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by substituting Mike Ruggiero (Ruggiero) for the fictitious defendant John Doe #1, and excising the names of the remaining fictitious defendants, John Doe #2-10, 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]). By its submissions, the plaintiff established the basis for the above-noted relief. All future proceedings shall be captioned accordingly.

The branches of the motion for an order fixing the default of the non-answering defendant, Ruggiero, and appointing a referee are denied without prejudice to renewal, as the plaintiff failed to take a default judgment within the one-year period of Ruggiero's default (*cf., Cohen v Michelle Tenants Corp.*, 63 AD3d 1097, 882 NYS2d 282 [2d Dept 2009]). With respect to Ruggiero, it is also noted that plaintiff's motion was filed more than one year after said defendant's default in failing to answer the complaint (*see, CPLR 3215[c]*). Thus, the instant motion is untimely because service was complete with respect to Ruggiero on or about June 8, 2010, and further proceedings did not take place herein until the

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interposition of the same on September 3, 2013. Under such circumstances, the plaintiff must demonstrate sufficient cause why the complaint should not be dismissed as to Ruggiero (*see*, CPLR 3215[c]; *Shinn v City of New York*, 65 AD3d 621, 884 NYS2d 466 [2d Dept 2009]; *Butindaro v Grinberg*, 57 AD3d 932, 871 NYS2d 317 [2d Dept 2008]). Thus, the court may not appoint a referee to compute at this time (*see generally*, CPLR 3215 [a]; RPAPL § 1321; *Joosten v Gale*, 129 AD2d 531, 514 NYS2d 729 [1st Dept 1987]).

Accordingly, this motion for, inter alia, summary judgment and an order of reference is granted in part and denied in part as indicated above. In view of the foregoing, the proposed order submitted by the plaintiff has been marked "not signed."

Dated: **JUL 10 2014**



HON. JOSEPH A. SANTORELLI
J.S.C.

 FINAL DISPOSITION **X** NON-FINAL DISPOSITION