

<b>BAC Home Loans Serving L.P. v Clemente</b>
2014 NY Slip Op 32339(U)
August 4, 2014
Supreme Court, Suffolk County
Docket Number: 8768-10
Judge: Arthur G. Pitts
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SUPREME COURT - STATE OF NEW YORK  
IAS PART 43 - SUFFOLK COUNTYPRESENT: Hon. ARTHUR G. PITTS  
Justice of the Supreme Court

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BAC HOME LOANS SERVICING, L.P. FKA  
COUNTRYWIDE HOME LOANS SERVICING L.P.,

Plaintiff,

-against-

JACK CLEMENTE, ELIZABETH M. RING,  
MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC. AS NOMINEE FOR DELTA  
FUNDING CORPORATION, NEW YORK  
STATE DEPARTMENT OF TAXATION AND  
FINANCE, PEOPLE OR THE STATE OF NEW  
YORK, TIMOTHY RING, TOWN SUPERVISOR  
TOWN OF BROOKHAVEN, UNITED STATES  
OF AMERICA ACTING THROUGH THE IRS,

“JOHN DOE #1” through “JOHN DOE #12”,  
the last twelve names being fictitious and unknown  
to plaintiff, the persons or parties intended being  
the tenants, occupants, persons or corporations,  
if any, having or claiming an interest or lien upon  
the premises, described in the complaint,

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Defendants.

X

Upon the following papers numbered 1 to 8 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 8; 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 partial summary judgment in its favor, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption is determined as set forth 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

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**ORDERED** that the second cause of action set forth in the plaintiff's complaint, wherein it demands a judgment extinguishing certain prior judgments and/or liens allegedly held by the defendants, Town Supervisor Town of Brookhaven, Timothy Ring and Elizabeth M. Ring and/or declaring said judgments and/or liens to be subordinate to the mortgage that is the subject of this action, is considered under CPLR 3215 and RPAPL §1501, and the same is severed and dismissed without prejudice; 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 the property known as 682 Elmwood Road, West Babylon, New York 11704. On October 7, 2005, the defendant Jack Clemente (the defendant mortgagor) executed a fixed-rate note in favor of Countrywide Home Loans, Inc. (the lender) in the principal sum of \$340,000.00. To secure said note, the defendant mortgagor gave the lender a mortgage also dated October 7, 2005 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 an undated endorsement and/or a corporate merger, the note and mortgage were transferred to and/or acquired by the plaintiff, BAC Home Loans Servicing, L.P., formerly known as Countrywide Home Loans Servicing, L.P. The aforesaid transfer and/or acquisition of the note by the plaintiff was memorialized by an assignment of the mortgage dated February 24, 2010, and subsequently 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 principal and interest due on or about October 1, 2009, 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 March 3, 2010. The complaint contains two causes of action. In the first cause of action, the plaintiff seeks, inter alia, a foreclosure and sale of the property, and in the second cause of action, the plaintiff demands a declaratory judgment pursuant to Article 15 of the Real Property Actions and Proceedings Law invalidating and extinguishing certain adverse and prior judgments and/or liens of the defendants Town Supervisor Town of Brookhaven (Brookhaven), Timothy Ring and Elizabeth M. Ring (the Ring defendants). The plaintiff subsequently re-filed the lis pendens on April 16, 2013.

Issue was joined by the interposition of the defendant mortgagor's verified answer sworn to on March 29, 2010. By his answer, the defendant mortgagor generally admits some of the allegations set forth in the complaint and denies other allegations therein; however, he does not assert any affirmative defenses. The defendant United States of America acting through the IRS (USA) has appeared herein and waived all, but certain, notices. The remaining defendants have neither appeared nor answered.

In compliance with CPLR 3408, a series of settlement conferences were conducted or adjourned before this court's specialized Foreclosure Conference Part beginning on July 20, 2010 and continuing through to March

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22, 2012. A representative of the plaintiff attended and participated in all settlement conferences. On the last date, this case was dismissed from the conference program as the parties were unable to reach a settlement or otherwise settle the 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 partial summary judgment in its favor and against the defendant mortgagor and striking his answer; (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]). Thus, the plaintiff demonstrated its *prima facie* burden as to the merits of this foreclosure action.

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]).

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.*,

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**LLC v Mentesana**, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). 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 [1<sup>st</sup> Dept 2012]; **Argent Mtge. Co., LLC v Mentesana**, 79 AD3d 1079, *supra*). Additionally, “uncontradicted facts are deemed admitted” (**Tortorello v Carlin**, 260 AD2d 201, 206, 688 NYS2d 64 [1<sup>st</sup> Dept 1999] [internal quotation marks and citations omitted]).

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 Mentesana**, 79 AD3d 1079, *supra*; **Rosrock 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.

The branch of the motion wherein the plaintiff seeks an order pursuant to CPLR 1021 substituting Bank of America, N.A. 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 substituting Michael Clemente for John Doe #1 and Paul Clemente for John Doe #2, and by excising the names of the remaining fictitious defendants, John Doe #2-12, 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 Ring defendants, the defendants MERS as nominee Delta Funding Corporation, New York State Department of Taxation and Finance, People of the State of New York, Brookhaven and USA as well as the newly substituted defendants Michael Clement and Paul Clemente set forth in the first cause of action sounding in foreclosure and sale (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 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; **Green Tree Servicing, LLC v Cary**, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]; **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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Concerning the second cause of action for declaratory relief, the plaintiff failed to address, let alone establish, its possession of cognizable claims for relief pursuant to RPAPL Article § 1501 declaring the invalidity and extinguishment of certain mortgages and/or liens and/or interests of the Ring defendants and Brookhaven, as indicated in the plaintiff's second cause of action (see, CPLR 3215[f]; RPAPL §§ 1515; 1519). Thus, the plaintiff is not entitled to an order fixing the defaults of the defendants set forth in the plaintiff's second cause of action, as it failed to assert facts which constitute cognizable claims for the declaratory relief demanded against the defendants set forth in the plaintiff's second cause of action (see, CPLR 3215[f]; **Resnick v Lebovitz**, 28 AD3d 533, 813 NYS2d 480 [2d Dept 2006]).

In addition, the court finds that the plaintiff abandoned its second cause of action for declaratory relief by its interposition of this motion. It is axiomatic that the appointment of a referee to compute pursuant to RPAPL § 1321 is not appropriate unless all pleaded claims of the parties have been adjudicated by the court and the only issues left for determination are those concerning the long account (see, **Vermont Fed. Bank v Chase**, 226 AD2d 1034, *supra*). In mortgage foreclosure actions, the issues of the long account are limited to the amounts due the plaintiff by reason of the obligor's default under the terms of the note, mortgage and/or guaranty sued upon and the other matters specified in RPAPL § 1321 (see, **New York State Mtge. Loan Enforcement & Admin. Corp. v New Colony Camp Houses, Inc.**, 187 AD2d 955, 590 NYS2d 635 [4th Dept 1992]). Consequently, in a mortgage foreclosure, a plaintiff is only entitled to an order appointing a referee to compute amounts due under the subject note and mortgage if it has been awarded judgment after trial or pursuant to CPLR 3212 and/or 3215 against all defendants joined to the action (see, RPAPL § 1321; **Vermont Fed. Bank v Chase**, 226 AD2d 1034, *supra*; **Bank of E. Asia v Smith**, 201 AD2d 522, *supra*; **Citimortgage Inc. v Lepore**, 2012 NY Misc LEXIS 4282, 2012 WL 3947031, 2012 NY Slip Op 32290 [U] [Sup Ct, Suffolk County 2012]). By moving for the appointment of a referee without establishing its entitlement to a default judgment on its claims for declaratory relief, the plaintiff effectively abandoned those claims. Accordingly, the second cause of action in the plaintiff's complaint is severed and dismissed without prejudice.

Accordingly, this motion for, inter alia, partial summary judgment and an order of reference 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 simultaneously herewith.

Dated: August 4, 2014

  
J.S.C.

FINAL DISPOSITION  NON-FINAL DISPOSITION