

<b>Municipal Credit Union v Price</b>
2014 NY Slip Op 33395(U)
November 20, 2014
Supreme Court, Suffolk County
Docket Number: 21429-12
Judge: Denise F. Molia
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COPY

SUPREME COURT - STATE OF NEW YORK  
IAS PART 39 - SUFFOLK COUNTY

PRESENT: Hon. DENISE F. MOLIA  
Acting Supreme Court Justice

\_\_\_\_\_  
MUNICIPAL CREDIT UNION,  
  
Plaintiff,

-against-

KAREN PRICE A/K/A KAREN E. PRICE, JAWAN  
INC. D/B/A EMPIRE BAIL BONDS, CLERK OF  
THE SUFFOLK COUNTY DISTRICT COURT,  
BROOKHAVEN MEMORIAL HOSPITAL, CACV  
OF COLORADO LLC, PEOPLE OF THE STATE OF  
NEW YORK, VK CREDIT RECOVERY SERVICES  
INC., AS ASSIGNEE OF CHASE MASTERCARD  
VISA, CAPITAL ONE BANK USA, N.A., UNITED  
STATES OF AMERICA - INTERNAL REVENUE  
SERVICE,

"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,

Defendants.  
\_\_\_\_\_ x

MOTION DATE: 5-21-14  
ADJ. DATE: \_\_\_\_\_  
Mot. Seq. #: 001-MotD

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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,

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

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**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 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 40 Prospect Avenue, Brentwood, New York 11717. On August 16, 2006, the defendant Karen Price (the defendant mortgagor) executed a fixed/adjustable-rate note in favor of Municipal Credit Union (the plaintiff) in the principal sum of \$273,300.00. To secure said note, the defendant mortgagor gave the plaintiff a mortgage also dated August 16, 2006 on the property. Thereafter, by loan modification agreement effective September 21, 2009 and executed on October 26, 2009 (the agreement), the note and the mortgage were modified to reflect, among other things, a new unpaid principal balance of \$265,633.63, and a new interest rate of 5.00%.

The defendant mortgagor allegedly defaulted on the note and mortgage, as modified, by failing to make the monthly payment of principal and interest due on November 1, 2011, and each month thereafter. After the defendant mortgagor allegedly failed to cure the default in payment, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on July 17, 2012.

Issue was joined by the interposition of the defendant mortgagor's verified answer sworn to on August 30, 2012. By her answer, the defendant mortgagor admits some of the allegations contained in the complaint, including the execution of the note, the mortgage and the agreement, and generally denies the other allegations set forth therein. In the answer, the defendant mortgagor also asserts six affirmative defenses and one counterclaim. By her affirmative defenses, the defendant mortgagor alleges, inter alia, inequitable conduct by the plaintiff as well as the failure to: state a cause of action; provide certified copies of the loan instruments; and comply with the notice requirements of sections 1303 and 1304 of the Real Property Actions and Proceedings Law.

By her counterclaim, the defendant mortgagor requests a cancellation of the lis pendens, attorneys fees pursuant to RPL § 282 and costs pursuant to CPLR 6514 (c). Parenthetically, the court notes that the purported counterclaim does not constitute a valid cause of action because it contains no supporting allegations (*see*, CPLR 3013). In its verified reply sworn to on September 5, 2012, the plaintiff denies all the material allegations contained in the counterclaim, and asserts eight affirmative defenses, alleging, among other things, the failure to state a cause of action; the failure to mitigate damages; an offset with liabilities owed to the plaintiff; any damages sustained by the defendant mortgagor were caused solely by her default; documentary evidence; ratification; the doctrine of



waiver, estoppel and unclean hands; and the parole evidence rule. The remaining defendants have neither answered, nor appeared herein.

In compliance with CPLR 3408, settlement conferences were conducted or adjourned before the specialized mortgage foreclosure part beginning on July 3, 2013 and continuing through to December 2, 2013. A representative of the plaintiff attended and participated in the settlement conferences. 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 counterclaim 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 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]). The plaintiff also submitted proof of compliance with the notice requirements of sections 1303 and 1304 of the Real Property Actions and Proceedings Law as well as the notice provisions of the mortgage prior to commencement (*see, PHH Mtge. Corp. v Israel*, \_\_ AD3d \_\_, 992 NYS2d 355 [2d Dept 2014]; *Wachovia Bank, N.A. v Carcano*, 106 AD3d 724, *supra*; *U.S. Bank N.A. v Tate*, 102 AD3d 859, 958 NYS2d 722 [2d Dept 2013]; *cf., Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]). Thus, the plaintiff demonstrated its prima facie burden as to the merits of this foreclosure action.

Moreover, the plaintiff submitted sufficient proof to establish, prima facie, that the remaining affirmative defenses and the counterclaim asserted in the 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, 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] [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]; *Connecticut Natl. Bank v Peach Lake Plaza*, 204 AD2d 909, 612 NYS2d 494 [3d Dept 1994] [defense based upon the doctrine of unclean hands lacks merit where a defendant fails to come forward with admissible evidence of showing immoral or unconscionable behavior]). Furthermore, “when a mortgagor defaults on loan payments, even if only for a day, a mortgagee may accelerate the loan, require that the balance be tendered or commence foreclosure proceedings, and equity will not intervene” (*Home Sav. of Am., FSB v Isaacson*, 240 AD2d 633, 633, 659 NYS2d 94 [2d Dept 1997]). Moreover, there is no known legal authority that stands for the proposition that certified copies of the mortgage and assignment must be annexed to the complaint.

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, 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 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 [1<sup>st</sup> 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 Mentasana*, 79 AD3d 1079, *supra*). In this case, the affirmative defenses



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and counterclaim 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 her pleaded defenses and counterclaim 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 Bellafore*, 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 counterclaim 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 substituting Mike Ford, Reginald Fraiser, Pedro Guzman and Julissa Cordero for the fictitious defendants, John Doe #1 through John Doe #4, and excising the remaining fictitious defendants, John Doe #5 through John Doe #12, is granted (*see, PHH Mtge. Corp. v Davis*, 111 AD3d 1110, 975 NYS2d 480 [3d Dept 2013]; *Flagstar Bank v Bellafore*, 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 remaining defendants Jawan Inc. doing business as Empire Bail Bonds, Clerk of the Suffolk County District Court, Brookhaven Memorial Hospital, CACV of Colorado LLC, People of the State of New York, VK Credit Recovery Services Inc., as Assignee of Chase Mastercard Visa, Capital One Bank USA, N.A. and United States of America-Internal Revenue Service as well as the newly substituted defendants, Mike Ford, Reginald Fraiser, Pedro Guzman and Julissa Cordero (*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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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: Nov. 20, 2014



Hon. DENISE F. MOLIA, A.J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION