BAC Home Loan Servicing, LP v Krajeski
2014 NY Slip Op 33489(U)
December 17, 2014
Supreme Court, Suffolk County
Docket Number: 41587-09
Judge: Jerry Garguilo
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[* 1]

SHORT FORM ORDER

COPY

INDEX NO.: 41587-09

SUPREME COURT - STATE OF NEW YORK
IAS PART 47- SUFFOLK COUNTY

PRESENT: Hon. JERRY GARGUILO
Justice of the Supreme Court

BAC HOME LOAN SERVICING, LP, FKA COUNTRYWIDE HOME LOANS SERVICING, LP,

Plaintiff,

-against-

HOLLY KRAJESKI; ANTHONY KRAJESKI; "JOHN DOE #1-5" AND "JANE DOE #1-5" said names being fictitious, it being the intention of Plaintiff to designate any and all occupants, tenants, persons or corporations, if any, having or claiming an interest in or lien upon the premises being foreclosed herein,

Defendants.

MOTION DATE: 2-21-14
ADJ. DATE: 5-21-14
Mot. Seq. # 001-MotD

FEIN, SUCH & CRANE, LLP
Attorneys for Plaintiff
1400 Old Country Road, Suite C103
Westbury, N. Y. 11590

ERNEST M. BONGERMINO, ESQ.
Attorneys for Defendants
Holly Krajeski
Anthony Krajeski
267 Carleton Avenue, Suite 200
Central Islip, N. Y. 11722

Upon the following papers numbered 1 to 18 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 13 - 15; Replying Affidavits and supporting papers 16 - 18; Other Stipulations: 19 - 20; Letters: 21 - 22; (~~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 defendants Holly Krajeski and Anthony Krajeski, striking their answer and dismissing affirmative defenses set forth therein, 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 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 160 Coram-Mount Sinai Road, Coram, New York 11727. On August 20, 2008, the defendants Holly Krajeski and Anthony Krajeski (the defendant mortgagors) executed a fixed-rate note in favor of Precision Financial, Inc. (the lender) in the principal sum of $347,130.00. To secure said note, the defendant mortgagors gave the lender a mortgage also dated August 20, 2008 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 endorsed allonge with physical delivery, the note was allegedly transferred to BAC Home Loans Servicing, LP formerly known as Countrywide Home Loans Servicing, LP (the plaintiff) prior to commencement, memorialized by an assignment of the mortgage also executed prior to commencement. The assignment was subsequently duly recorded in the Suffolk County Clerk's Office.

The defendant mortgagors allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on February 1, 2009, and each month thereafter. After the defendant mortgagors allegedly failed to cure the default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on October 16, 2009. Parenthetically, the plaintiff re-filed the lis pendens on January 29, 2014.

Issue was joined by the interposition of the defendant mortgagors' joint verified answer sworn to on November 14, 2009. By their answer, the defendant mortgagors admit some of the allegations in the complaint, including the execution of the note and the mortgage as well as their default thereunder, and deny the remaining allegations set forth therein. In the answer, the defendant mortgagors also assert two affirmative defenses, alleging, inter alia, their application for a loan modification, delayed by a loan transfer, and the subsequent approval for a loan modification by the current loan servicer. The remaining defendants have neither answered the complaint, nor appeared herein and, thus, defaulted in appearing in this action.

By way of further background, the parties began a prolonged period of negotiations in an attempt to agree on a loan modification, and a series of foreclosure settlement conferences were conducted or adjourned beginning on June 8, 2010, and lasting until April 18, 2011. A representative of the plaintiff attended and participated in all settlement conferences. On April 18, 2011, this case was dismissed from the conference program and referred as an IAS case because the defendant mortgagors did not appear or otherwise participate. Thereafter, two status conferences were held before Reserve Part 47 on July 17, and September 25, 2013. Additional settlement conferences were subsequently held before Foreclosure Conference Part 47 on December 4, 2013 as well as on January 22 and February 26, 2014; however, the parties were unable to reach an agreement to modify the loan or otherwise settle this action. Accordingly, the conference requirement imposed upon the Court by CPLR 3408 and/or the Laws of 2008, Ch. 472 § 3-a, as amended by Laws of 2009 Ch. 507 § 10, has been satisfied, and 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 mortgagors, striking their 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]).

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 with an endorsed allonge, the mortgage, the assignment 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, among other things, two affidavits from its representatives wherein it is alleged that the plaintiff, directly or through a custodian, was the holder of the note prior to commencement of this action, 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]). Additionally, the documentary evidence submitted includes, among other things, the note transferred via an endorsed allonge (*cf.*, ***Slutsky v Blooming Grove Inn, Inc.***, 147 AD2d 208, 542 NYS2d 721 [2d Dept 1989]). Moreover, the documentary evidence includes an assignment of the mortgage, which was subsequently duly recorded, whereby the transfer of the note to the plaintiff was memorialized (*see*, ***GRP Loan, LLC v Taylor,*** 95 AD3d 1172, 945 NYS2d 336 [2d Dept 2012]). Therefore, it appears that the plaintiff is the transferee and holder of the original note and the assignee of the mortgage by virtue of the written assignment. Thus, the plaintiff demonstrated its prima facie burden as to the merits of this foreclosure action and as to its standing.

Furthermore, the plaintiff submitted sufficient proof to establish, prima facie, that the 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 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]; ***JP Morgan 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]; ***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, "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, "[a]ny sympathy which the [defendant] mortgagors' situation might arouse cannot be permitted to undermine the stability of contractual obligations" (***Jamaica Sav. Bank v Cohan***, 36 AD2d 743, 744, 320 NYS2d 471 [2d Dept 1971]).

Since 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 [3d Dept 2007]; ***Rosen Auto Leasing, Inc. v Jacobs***, 9 AD3d 798, 780 NYS2d 438 [3d Dept 2004]).

In opposition to the motion, the defendant mortgagors have submitted an affidavit from Mr. Krajeski. A review of the opposing affidavit shows that the same is 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]; ***Rimbambito, LLC v Lee***, 118 AD3d 690, 986 NYS2d 855 [2d Dept 2014]; ***Bank of Smithtown v 219 Sagg Main, LLC***, 107 AD3d 654, 968 NYS2d 95 [2d Dept 2013]; ***Wells Fargo Bank Minn., N.A. v Perez***, 41 AD3d 590, *supra*; ***U.S. Bank Trust N.A. Trustee v Butti***, 16 AD3d 408, 792 NYS2d 505 [2d Dept 2005]). Rejected as unmeritorious are the challenges by the defendant mortgagors to the sufficiency of the proof upon which the plaintiff relies to support its motion for summary judgment. Contrary to the defendant mortgagors' contentions, the two affidavits from the plaintiff's representatives in support of the motion contain sufficient allegations as to the possession of the note by the plaintiff prior to commencement, and these affidavits 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 mortgagors concerning the plaintiff's alleged lack of standing, which rest, inter alia, upon MERS' alleged inability to assign the note are misplaced (*see*, ***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]). The plaintiff demonstrated, as indicated above, that the note with an endorsed allonge was delivered to it by the lender prior to commencement, and that it remained in its possession, directly or through a custodial agent, since that time (*see*, ***Kondaur Capital Corp. v McCary***, 115 AD3d 649, *supra*; ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, *supra;* ***Bank of N.Y. Mellon Trust Co., N.A. v Sachar***, 95 AD3d 695, 981 NYS2d 547 [2d Dept 2014]). The plaintiff also attached a copy of the endorsed note to the complaint. Such evidence demonstrates that the plaintiff holds the original note and mortgage. Additionally, the plaintiff submitted, inter alia, a copy of the recorded assignment of the mortgage executed on September 25, 2009, which memorialized the transfer of the mortgage to it prior to

commencement, and thus, clarifying the chain of title (*see*, ***GRP Loan, LLC v Taylor***, 95 AD3d 1172, *supra*). Furthermore, MERS, as the disclosed nominee of the lender, had the authority to assign the mortgage (*see*, ***Bank of New York v Silverberg***, 86 AD3d 274, 926 NYS2d 532 [2d Dept 2011]; ***Aurora v Weisblum***, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]).

In response, the defendant mortgagors have not shown any valid basis to argue that this was not the actual note executed by them (*see*, ***JPMorgan Chase Bank, N.A. v Bauer***, 92 AD3d 641, 938 NYS2d 190 [2d Dept 2012]). To the contrary, by their answer, the defendant mortgagors admitted, among other things, the plaintiff's allegations concerning the assignment of the mortgage to it as well as the allegations that the plaintiff is the owner and the holder of the note. In any event, the defendant mortgagors waived an affirmative defense based upon standing because they failed to interpose such a defense in their answer, or in a pre-answer motion to dismiss the complaint (*see*, CPLR 3211[e]; ***U.S. Bank N.A. v Denaro***, 98 AD3d 964, *supra*; ***Wells Fargo Bank Minn., N.A. v Mastropaolo***, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]).

The defendant mortgagors' contentions concerning their efforts to obtain a loan modification are unavailing. A foreclosing plaintiff has no obligation to modify the terms of its loan before or after a default in payment (*see*, ***Wells Fargo Bank, N.A. v Van Dyke***, 101 AD3d 638, 958 NYS2d 331 [1st Dept 2012]; ***EMC Mtge. Corp. v Stewart***, 2 AD3d 772, 769 NYS2d 408 [2d Dept 2003]; ***United Cos. Lending Corp. v Hingos***, 283 AD2d 764, 724 NYS2d 134 [3d Dept 2001]; ***First Fed. Sav. Bank v Midura***, 264 AD2d 407, 694 NYS2d 121 [2d Dept 1999]). Further, 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[ ], 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). The remaining contentions advanced by the defendant mortgagors in opposition to the plaintiff's motion are similarly without merit.

Notably, absent from Mr. Krajeski's opposing affidavit are any allegations by him that the defendant mortgagors did not receive the proceeds of the loan transaction, or any allegations by him denying the defendant mortgagors' default in payment. In any event, by their answer, the defendant mortgagors admitted, inter alia, their default in payment, as noted above. Thus, even when viewed in the light most favorable to the defendant mortgagors, Mr. Krajeski's affidavit submitted in opposition to the motion 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*, ***American Airlines Fed. Credit Union v Mohamed***, 117 AD3d 974, 986 NYS2d 530 [2d Dept 2014]; ***Emigrant Mtge. Co., Inc. v Beckerman***, 105 AD3d 895, 964 NYS2d 548 [2d Dept 2013]; ***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 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 affirmative defenses set forth therein are dismissed in their entirety.

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 named defendants, "John Doe #1-5" and "Jane

Doe #1-5", is granted (*see*, ***PHH Mtge. Corp. v Davis***, 111 AD3d 1110, 975 NYS2d 480 [3d Dept 2013]; ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***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. These submissions include an affirmation from counsel that none of the fictitious defendants were served with process, and that they are not necessary defendants to this action. All future proceedings shall be captioned accordingly.

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 plaintiff demonstrated that it merged with and into Bank of America, N.A. effective July 1, 2011 (*see*, Banking Law § 602; ***Ladino v Bank of Am.***, 52 AD3d 571, 861 NYS2d 683 [2d Dept 2008]; *see also*, ***Kondaur Capital Corp. v McCary***, 115 AD3d 649, *supra*). Banking Law § 602, which governs the effect of a merger, provides that the receiving bank "shall be considered the same business and corporate entity" as the bank that merged into it and that all of the property, rights, and powers of the merged bank shall vest in the receiving bank. Thus, no formal assignment is required to effect a transfer of the assets of the merged bank, and the plaintiff is not required to submit proof that the subject loan was assigned in order to establish its entitlement to summary judgment (***Ladino v Bank of Am.***, 52 AD3d 571, *supra* at 572-573). The caption shall be amended accordingly.

Because the plaintiff has already been awarded summary judgment against the defendant mortgagors, and there are no other defendants in this action, it 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]).

Accordingly, this motion for, inter alia, 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 concurrently herewith.

Dated: 12/17/14

Hon. JERRY GARGUILO, J.S.C.

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