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| JPMorgan Chase Bank v Nunez |
| 2015 NY Slip Op 31621(U) |
| April 21, 2015 |
| Supreme Court, Suffolk County |
| Docket Number: 10182-13 |
| Judge: Ralph T. Gazzillo |
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COPY

**SUPREME COURT - STATE OF NEW YORK
IAS PART 6 - SUFFOLK COUNTY**

**PRESENT: Hon. RALPH T. GAZZILLO
Justice of the Supreme Court**

**MOTION DATE 2-27-14
ADJ. DATE _____
Mot. Seq. #001-MotD**

JPMORGAN CHASE BANK, NATIONAL
ASSOCIATION,

Plaintiff,

**ROSICKI, ROSICKI
& ASSOCIATES, P.C.
Attorneys for Plaintiff
26 Harvester Avenue
Batavia, N. Y. 14020**

-against-

**MARIA NUNEZ; ADVANTAGE ASSETS II, INC.;
CAPITAL ONE BANK (USA) N.A.; CHASE BANK
USA NA; CITIBANK NA; CITIBANK SOUTH
DAKOTA NA; CLERK OF THE SUFFOLK COUNTY
DISTRICT COURT; EMPIRE BAIL BONDS DBA
JAWUM INC. LVNV FUNDING LLC; MIDLAND
FUNDING LLC; NEW YORK STATE DEPARTMENT
OF TAXATION AND FINANCE; STATE
FARM BANK, FSB; TOWN OF BABYLON TOWN
SUPERVISOR; PORTFOLIO RECOVERY ASSOCIATES,
LLC; "JOHN DOES" and "JANE DOES", said
names being fictitious, parties intended being
possible tenants or occupants of premises, and
corporations, other entities or persons who claim
or may claim a lien against the premises,**

**MILAGROS ROGERS
Attorney for Defendant
Maria Nunez
4 West Main Street
Bay Shore, N. Y. 11706**

Defendants.

x

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, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption is determined as set forth below; and it is

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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 126 Hilltop Drive, Brentwood, New York 11717. On June 12, 2006, the defendant Maria Nunez (the defendant mortgagor) executed a fixed-rate note in favor of JPMorgan Chase Bank, N.A. (the plaintiff) in the principal sum of \$278,000.00, secured by a mortgage of the same date. Thereafter, on May 6, 2011, the defendant mortgagor executed a note in favor the plaintiff in the principal sum of \$6,265.98, secured by a mortgage of the same date. On May 6, 2011, the defendant mortgagor also executed an amended and restated note as well as a consolidation, extension and modification agreement (the CEM) in favor of the plaintiff, consolidating the aforementioned mortgages and notes to form a single lien in the sum of \$268,234.00.

The defendant mortgagor allegedly defaulted on the note and mortgage by failing to make the monthly payment of interest and principal due on or about August 1, 2012, 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 summons and complaint on April 11, 2013, followed by the filing of a lis pendens on April 12, 2013.

Issue was joined by the interposition of the defendant mortgagor's verified answer sworn to on April 29, 2013. By her answer, the defendant mortgagor generally denies all of the material allegations contained in the complaint, however, she does not assert any affirmative defenses. The defendant Town Supervisor, Town of Babylon sued herein as Town of Babylon Town Supervisor (Town of Babylon) has appeared herein and waived all, but certain notices. The remaining defendants have neither appeared, nor answered herein.

According to the records maintained by the court's computerized database, a settlement conference was scheduled for and/or held in this Court's specialized mortgage foreclosure part on September 16, 2013. On said date, this case was marked to indicate that the defendant mortgagor was not eligible for an additional settlement conference of the type contemplated by CPLR 3408. As a result, this action dismissed from the conference program. In any event, the plaintiff's submissions, which include a 1-4 family rider for the assignment of rents, reflect that the property was purchased for investment purposes and is not owner-occupied. Accordingly, no further conference is required.

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 and striking her answer; (2) pursuant to CPLR 3215 fixing the defaults of the non-answering defendants; (3) pursuant to RPAPL §

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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 notes, the mortgages, the CEM 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]).

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, 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 [1st Dept 2012]; *Argent Mtge. Co., LLC v Mentasana*, 79 AD3d 1079, *supra*). 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]).

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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 Montesana*, 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.

The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by substituting Raymond Memdm (Memdm) and Roosevelt Vargas (Vargas) for the fictitious defendants, John Does, and by substituting Jennifer Carias (Carias) for the fictitious defendants, Jane Does, 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 submissions, the plaintiff demonstrated its entitlement to an amendment of the complaint and a correction of certain a scrivener's error therein, and it appearing that the substantial right of any party to this action has not been prejudiced (*see, CPLR 2001; Household Fin. Realty Corp. v Emanuel*, 2 AD3d 192, 769 NYS2d 511 [1st Dept 2003]; *Rennert Diana & Co. v Kin Chevrolet, Inc.*, 137 AD2d 589, 524 NYS2d 481 [2d Dept 1988], *see also, Serena Constr. Corp. v Valley Drywall Serv.*, 45 AD2d 896, 357 NYS2d 214 [3d Dept 1974]). Accordingly, pursuant to CPLR 2001 and 3025(c), paragraph "3" of the complaint is amended nunc pro tunc to April 11, 2013 to state as follows:

"3. On or about June 12, 2006, MARIA NUNEZ executed and delivered to JPMORGAN CHASE BANK, N.A., a note bearing date that day, whereby MARIA NUNEZ covenanted and agreed to pay the sum of \$278,000.00 which sum, with interest on the unpaid balance thereof at the rate of 6.75 per cent annum to be computed from the date of said note, by payments of \$1,803.10 on August 1, 2006, and thereafter in payments of \$1,803.10 on the like date of each subsequent month, except that the final payment of principal and interest remaining due, if not sooner paid, shall become due and payable on July 1, 2036."

By its moving papers, the plaintiff further established the default in answering on the part of the defendants Advantage Assets II, Inc., Capital One Bank (USA), N.A., Chase Bank USA, N.A., Citibank, N.A., Citibank South Dakota, N.A., Clerk of the Suffolk County District Court, Empire Bail Bonds doing business as Jawum Inc., LVNV Funding LLC, Midland Funding LLC, New York State Department of Taxation and Finance, State Farm Bank, FSB, Town of Babylon, Portfolio Recovery Associates, LLC as well as the newly substituted defendants, Memdm, Vargas and Carias (*see, RPAPL § 1321; HSBC Bank USA, N.A. v Roldan*, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]).

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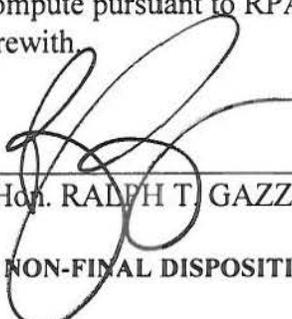
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Accordingly, the defaults of all of the above-noted defendants are fixed and determined. Since the plaintiff has been awarded summary judgment against the defendant mortgagor, and has established the default in answering by the remaining defendants, 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]).

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: 4/24/15



Hon. RALPH T. GAZZILLO, A.J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION