

**Federal Natl. Mtge. Assoc. v Arklan**

2015 NY Slip Op 32280(U)

November 5, 2015

Supreme Court, Suffolk County

Docket Number: 08841/2013

Judge: Glenn A. Murphy

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**COPY**  
SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK  
IAS PART 25 - SUFFOLK COUNTY**

**PRESENT: Hon. GLENN A. MURPHY  
Acting Justice Supreme Court**

**MOTION DATE 10-17-14  
ADJ. DATE 11-5-15  
Mot. Seq. #001 MG**

\_\_\_\_\_  
**FEDERAL NATIONAL MORTGAGE ASSOCIATION,**

**Plaintiff,**

**-against-**

**TAMER ARKLAN, AMERICAN GENERAL HOME EQUITY, INC.; ILBEY AYKAC; ILTER AYKAC; MEHPARE AYKAC; MIDLAND CREDIT MANAGEMENT INC; "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,**

**Defendants.**

\_\_\_\_\_  
x

**ROSICKI, ROSICKI & ASSOCIATES, P.C.**  
Richard P. Fay, Esq..  
*Attorneys for Plaintiff*  
26 Harvester Avenue  
Batavia, New York 14020

**TAMER ARKLAN, pro se**  
31 Somerset Place  
Deer Park, New York 11729

**AMERICAN GENERAL HOME EQUITY, INC  
CT CORPORATION SYSTEM**  
111 8<sup>th</sup> Avenue  
New York, New York 10011

**ILBEY AYKAC**  
32 Studley Street  
Brentwood, New York 11717

**ILTER AYKAC**  
31 Somerset Place  
Deer Park, New York 11729

Upon the following papers numbered 1 to 14 read on this motion for summary judgment and an order of reference; 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; Replying Affidavits and supporting papers 14; ~~Other \_\_\_\_\_~~; (and after hearing counsel in support and opposed to the motion) it is;

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is hereby

**ORDERED** that this motion by the plaintiff Federal National Mortgage Association (Federal Mortgage), pursuant to CPLR §3212 for summary judgment on its complaint, to strike the answer and counter-claim of Tamer Arklan and, for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law §1321, is granted; and it is further

**ORDERED** that the plaintiff's application for leave to amend the caption of this action pursuant to CPLR §3025 (b), is granted; and it is further

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**ORDERED** that the caption be amended by substituting TURK KOCAK in place of the defendant(s) "JOHN DOES" and "JANE DOES," and by striking therefrom the names of the remaining "JOHN DOES" and "JANE DOES," such names being fictitious; and all papers and proceedings heretofore filed herein shall be deemed amended accordingly; and it is further

**ORDERED** that the caption as amended shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF SUFFOLK

\_\_\_\_\_  
 FEDERAL NATIONAL MORTGAGE ASSOCIATION, X

Index No.: 08841-13

Plaintiff,

-against-

TAMER ARKLAN, AMERICAN GENRAL HOME EQUITY,  
 INC.; ILBEY AYKAC; ILTER AYKAC; MEHPARE AYKAC;  
 MIDLAND CREDIT MANAGEMENT INC; TURK KOCAK,;

Defendants.

\_\_\_\_\_  
 X

**ORDERED** that the plaintiff is directed to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court.

This is an action to foreclose a mortgage on premises known as 31 Somerset Place, Deer Park, New York. On April 26, 2006, the defendant executed a note in favor of Greenpoint Mortgage Funding, Inc., (Greenpoint) agreeing to pay the sum of \$417,000.00 at the yearly rate of 6.750 percent. On the same date, the defendants executed a first mortgage in like sum on the subject property. The mortgage was recorded on July 11, 2006 in the Suffolk County Clerk's Office. The mortgage named Mortgage Electronic Registration Systems (MERS) as the nominee for Greenpoint. On March 4, 2013, the mortgage was assigned to MERS as nominee for Greenpoint to plaintiff. On or about December 2, 2009, the defendant entered into a modification agreement with the then note holder Bac Home Loans Servicing LP where by the mortgage amount was increased to \$449,834.80. The rate of the loan was reduced to 4.00 percent for five (5) years. Thereafter, the rate was to increase to 5.00 percent.

A notice of default, dated October 26, 2011, was sent to the defendant stating that he had defaulted on his mortgage loan and that the amount past due was \$10,284.75. On December 16, 2012, the plaintiff sent by certified and/or registered letter and regular mail a ninety (90) day notice pursuant to RPAPL §1304. As a result of the defendant's continuing default, the plaintiff commenced this foreclosure action on March 27, 2013. In its complaint, the plaintiff alleges in pertinent part that the defendants breached their obligations under the terms of the note and mortgage by failing to make monthly payments. The summons and complaint comply with the requirement of RPAPL §1302. The defendants interposed an answer consisting of general denials and seven (7) affirmative defenses.



The Court's computerized records indicate that five (5) foreclosure settlement conferences were held on this matter. The final conference occurred on August 14, 2014, at which time this matter was referred as an IAS case since a resolution or settlement had not been achieved. Thus, there has been compliance with CPLR §3408 and no further settlement conference is required.

The plaintiff now moves for summary judgment on its complaint contending that the defendants failed to comply with the terms of the loan agreement and mortgage and, that the defendant's general denials raised no issues of fact for trial. In support of its motion, the plaintiff submits among other things: the sworn affidavits of Andrew Fay, Foreclosure Specialist of Seterus, the plaintiff's loan servicer; the affirmations of Richard Fay and Catherine Gran in support of the instant motion together with his affirmation pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the pleadings; the note, mortgage, and assignment of mortgage; notice of default; notices pursuant to RPAPL §§ 1320, 1304 and 1303; affidavits of service for the summons and complaint; and, an affidavit of service for the instant summary judgment motion upon the defendant's counsel. The pro se defendant has submitted an affirmation in opposition.

"[I]n an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default" (*Republic Natl. Bank of N.Y. v O'Kane*, 308 AD2d 482, 482, 764 NYS2d 635 [2d Dept 2003]; see *Argent Mtge. Co., LLC v Montesana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Once a plaintiff has made this showing, the burden then shifts to defendant to produce evidentiary proof in admissible form sufficient to require a trial of their defenses (see *Aames Funding Corp. v Houston*, 44 ASD3d 692, 843 NYS2d 660 [2d Dept 2007]; *Household Fin. Realty Corp. Of New York v Winn*, 19 AD3d 545, 796 NYS2d 533 [2d Dept 2005] see also *Washington Mut. Bank v Valencia*, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]).

Here, plaintiff has established its entitlement to summary judgment against the answering defendant as such papers included a copy of the mortgage, a copy of the assignment of mortgage, the unpaid note together with due evidence of his default in payment under the terms of the loan documents (see CPLR §3212; RPAPL §1321; *Neighborhood Hous. Serv. of New York City v Hawkins*, 97 AD3d 554, 947 NYS2d 321 [2d Dept 2012]; *Baron Assoc., LLC v Garcia Group Enter.*, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; *Citibank, N.A. v Van Brunt Prop., LLC*, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]; *Archer Capital Fund, L.P. v GEL, LLC*, 95 AD3d 800, 944 NYS2d 179 [2d Dept 2012]; *Swedbank, AB v Hale Ave. Borrower, LLC.*, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]; *Rossrock Fund II, L.P. v Osborne*, 82 AD3d 737, 918 NYS2d 514 [2d Dept 2011]).

In opposition, the defendant argues the plaintiff lacks standing attacking the note assignment as well as the mortgage agreement. The plaintiff submitted two (2) affidavits of Andrew Fay, in support of their motion. The second affidavit, clearly establishes delivery of the note prior to commencement of the action. Mr. Fry, indicated the note was delivered to the plaintiff on October 12, 2011. The defendant does not contest validity of the statement with any evidence creating a triable question of fact. As the Court of Appeals has recently announced that possession of the note alone in a foreclosure action conveys standing. *Aurora v. Taylor* 25 NY3d 355 (2015).



Although, *Aurora* provides sufficient footing for the plaintiff to establish standing in this matter, the defendant attacks the assignment of mortgages. The plaintiff's proof establishes that the defendant originally executed a mortgage to MERS as nominee for Greenpoint. The mortgage was then assigned by MERS to the plaintiff, on March 4, 2013. The assignment occurred prior to the commencement of the action (March 27, 2013), and as such the plaintiff established standing. The plaintiff therefore established it was both the holder of the note and mortgage prior to commencement of the action.

With respect to his remaining affirmative defenses, the defendants have failed to raise any triable issues 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 (*see Cochran. Inv. Co., Inc. v Jackson*, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007] quoting *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 664 NYS2d 345 [2<sup>nd</sup> Dept 1997]). Here, answering the defendant has failed to demonstrate, through the production of competent and admissible evidence, a viable defense which could raise a triable issue of fact (*see Deutsche Bank Natl. Trust Co. V Posner*, 89 AD3d 674, 933 NYS2d 52 [2d Dept 2011]). "Motions for summary judgment may not be defeated merely by surmise, conjecture or suspicion" (*Shaw v Time-Life Records*, 38 NY2d 201, 379 NYS2d 390 [1975]). Notably, the defendant does not deny that they have failed to make payments of interest or principal on the note (*see Citibank, N.A. v Souto Geffen Co.*, 231 AD2d 466, 647 NYS2d 467 [1<sup>st</sup> Dept 1996]).

In light of the foregoing, the motion for summary judgment is granted against the defendants and the defendant's answer is stricken. The plaintiff's request for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is also granted (*see Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *Bank of East Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

**ORDERED**, further that this action is hereby referred to Dara M. Orlando, Esq., with an office located at 330 Motor Parkway Suite 400 Hauppauge, New York 11788 PH #631-745-3567, who is hereby appointed Referee to ascertain and compute the total amount due plaintiff for unpaid principal, accrued interest and all (other disbursements advanced as provided for by statute) mortgage costs and expenses other than attorneys' fees secured by the note and mortgage set forth in the complaint, and to examine and report as to whether the mortgaged premises can be sold in one parcel; and it is further

**ORDERED**, that plaintiff shall provide the Referee all required documents to compute within sixty (60) days from the date of this Order, and the Referee shall make his/her report no later than thirty (30) days thereafter and that, except for good cause shown, the plaintiff shall move for judgment no later than thirty (30) days of the date of the Referee's Report; and it is further

**ORDERED**, that by accepting this appointment the Referee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to section 36.2 (c) ("Disqualifications from appointment"), and section 36.2 (d) ("Limitations on appointments based upon compensation"); and it is further

**ORDERED**, that upon submission of the Referee's Report, plaintiff shall pay pursuant to CPLR §8003 (a) \$250.00 to the Referee as compensation for his/her services, which sum may be recouped as a cost of litigation; and it is further

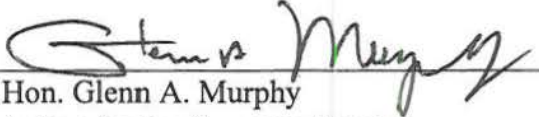
**ORDERED**, that the Referee is prohibited from accepting or retaining any funds for him/herself or paying funds to him/herself without compliance with Part 36 of the rules of the Chief Administrative Judge; and it is further

**ORDERED**, that the Referee appointed herein is subject to the requirements of Rule 36.2 (c) of the Chief Judge, and if the Referee is disqualified from receiving an appointment pursuant to the provision of that Rule, the Referee shall notify the appointing Justice forthwith; and it is further

**ORDERED**, plaintiff is to include in any proposed order for a judgment of foreclosure and sale language complying with the Suffolk County Local Rule for filing of the Foreclosure Action Surplus Monies form contained in Suffolk County Administrative Order #41-13; and it is further

**ORDERED**, that a copy of this order with Notice of Entry shall be served upon the designated Referee, the owner of the equity of redemption, any tenants named in this action and any other party entitled notice within twenty (20) days of entry and no less than thirty (30) days prior to any hearing before the Referee. The Referee shall not proceed to take evidence as provided herein without proof of such service, which must accompany any application for Final Judgment of Foreclosure and Sale.

Dated: 11/5/15

  
\_\_\_\_\_  
Hon. Glenn A. Murphy  
Acting Justice Supreme Court

       FINAL DISPOSITION      X   NON-FINAL DISPOSITION