

<b>Wells Fargo Bank, N.A. v Rettaliata</b>
2015 NY Slip Op 32502(U)
December 22, 2015
Supreme Court, Suffolk County
Docket Number: 27720-2012
Judge: Glenn A. Murphy
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**COPY**

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

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

**MOTION DATE 07-23-14/08-20-14**  
**ADJ. DATE 12-22-15**  
**MOT. SEQ # 001- MG**  
**# 002 -XMD**

\_\_\_\_\_  
WELLS FARGO BANK, N.A. x

Plaintiff,

**HOGAN LOVELLS US LLP**  
David Dunn, Esq.  
Michael Shiba, Esq.  
*Attorneys for Plaintiff Wells Fargo Bank, NA*  
875 Third Avenue  
New York, New York 10022

-against-

**DANIELLE RETTALIATA; JEFFREY RETTALIATA;**  
**“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,**

**ROSICKI, ROSICKI & ASSOCIATES, P.C.**  
*Co-Counsel for Plaintiff*  
51 E. Bethpage Road  
Plainview, New York 11803

Defendants,

\_\_\_\_\_ x

Upon the following papers numbered 1 to 27 read on this motion for summary judgment and an order of reference; Notice of Motion/ ~~Order to Show Cause~~ and supporting papers 1-15; Notice of Cross Motion and supporting papers 16-26; Answering Affidavits and supporting papers 27; ~~Replying Affidavits and supporting papers~~; 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 Wells Fargo Bank., N.A. (Wells Fargo), pursuant to CPLR §3212 for summary judgment on its complaint, to strike the answer and counter-claim of Danielle and Jeffrey Rettaliata, and, for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law (RPAPL) §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

**ORDERED** that “JOHN DOE” is removed as a party defendant; and it is further,

**ORDERED** that the caption of this action shall be amended to read as follows;

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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF SUFFOLK

\_\_\_\_\_x  
**WELLS FARGO BANK, N.A.,**

**Index No. 27720-12**

Plaintiff,

-against-

**DANIELLE RETTALIATA; JEFFREY RETTALIATA,**

Defendants.  
 \_\_\_\_\_x

This is an action to foreclose a mortgage on premises known as 33 Lanier Lane, Bay Shore, New York. On July 28, 2009, the defendant executed a note and mortgage in favor of Wells Fargo, agreeing to pay the sum of \$ 424,297.00 at the yearly rate of 4.00 % (percent). The mortgage was recorded on August 5, 2009 in the Suffolk County Clerk's Office.

A notice of default, dated April 10, 2012, was sent to the defendant stating that he had defaulted on his mortgage loan and that the amount past due was \$ 14,640.34. On that same date, the plaintiff sent by certified 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 September 7, 2012. 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 fourteen (14 ) affirmative defenses and three (3) counter-claims.

The Court's computerized records indicate that two (2) foreclosure settlement conferences were held. The final conference occurred on July 16, 2013, 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 affidavit of Alisha Mulder, Vice president of Loan Documentation of Wells Fargo Bank, N.A., the loans originator, holder and servicer; the affirmations of Michael Shiba 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.

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“[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 Mgt. Co., LLC v Mentasana*, 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]).

The defendant filed opposition to the plaintiffs’ motion and cross-moved to file an amended answer (Motion 002). The motion is based in part upon the affidavits of the defendants. The defendants affidavits are based upon a reading of their attorneys affirmation attacking the plaintiff standing. They offered no direct evidence in support of their cross- motion. The affirmation of defendants counsel, was based upon the affidavit of his clients and some general information obtained on the internet. The lynch pin of the defendants motion for denial of the summary judgment motion is based on the assumption that the note was sold to Government National Mortgage Association (GNMA). The defendants nor their attorney provided any documentary evidence to directly support their allegations.

This Court finds, based upon the uncontroverted documentation presented by the plaintiff that standing has been established. The plaintiff showed that the plaintiff was the loans originator, and continuously held both the note and mortgage from its inception on July 28, 2008. The defendants allegations to the contrary have no support in the record. The defendants opposition is based solely upon the defendants and defense counsels conclusory and speculative allegations. The affirmation is not based upon personal knowledge and as such is “without evidentiary value” See *Zuckerman v. City of New York*, 49 NY 2d 557(1980); see also *Weingarten v. Marcus*, 118 AD 2d 640 (2d Dept 1986); *Reuben Israelson v. Sidney Rubin*, 20 AD2d 668, 247 NYS2d 85 (2d Dept 1964) Affd 14 NY2d 887(1964); *Erin Federico v. City of Mechanicville*, 141 AD2d 1002, 531 NYS2d 42 (3<sup>rd</sup> Dept. 1988); *Cohen v. Pannia*, 7 AD2d 886, 181 NYS2d 220 (4<sup>th</sup> Dept. 1959). “Motions for summary judgment may not be defeated merely by surmise, conjecture or suspicion” *Shaw v Time-Life Records*, 38 NY2d 201, 379NYS2d 390 [1975]. Here, 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]). Notably, the defendant does not deny that he has not made 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].

Turning to the defendants motion to amend the pleadings, the Court notes: Leave to amend a pleading [pursuant to CPLR 3025 (b) should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit, or unless prejudice or surprise to the opposing party results directly from the delay in seeking leave to amend (*see Giunta's Meat Farms, Inc. v Pina Constr. Corp.*, 80 AD3d 558, 914 NYS2d 641 [2d Dept 2011]; *Rosicki, Rosicki & Assoc., P.C. v Cochems*, 59 AD3d 512, 873 NYS2d 184 [2d Dept 2009]; *see also Seidman v Industrial Recycling Properties, Inc.*, 83 AD3d 1040, 1040-1041, 922 NYS2d 451 [2d Dept 2011]).] Here, the defense is devoid of merit.

It is therefore:

**ORDERED** that the plaintiffs motion for summary judgment is granted. It is further

**ORDERED** that the defendants cross-motion is denied.

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 Maria Gasparis, Esq., with an office located at 2929 Expressway Drive N Islandia, NY 11749 Ph #631-582-4000, 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 mortgage 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

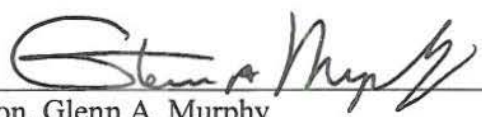
**ORDERED**, that the Referee is prohibited from accepting or retaining any funds for him/herself or paying funds to him/herself without compliance with Part 36 of the rules of the Chief Administrative Judge; and it is further

**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: DEC 22 2015

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

       FINAL DISPOSITION      X   NON-FINAL DISPOSITION