Everhome Mtge. Co. v Karnadi
2018 NY Slip Op 31015(U)
May 14, 2018
Supreme Court, Suffolk County
Docket Number: 33039-2010
Judge: C. Randall Hinrichs

SHORT FORM ORDER **INDEX NO.: 33039-2010**

SUPREME COURT OF THE STATE OF NEW YORK
I.A.S PART 49 - SUFFOLK COUNTY

PRESENT: Hon. C. RANDALL HINRICHS
Justice of the Supreme Court

Motion Date: 003: 9-18-2017; 004: 10-30-2017
Adjourned Date: 2-5-2018
Motion Sequence: 003: ~~MD~~; 004: MD
MG

x

EVERHOME MORTGAGE COMPANY
8120 Nations Way
Building 100
Jacksonville, FL 32256,

Plaintiff,

-against-

ROBIJANTO KARNADI, NANIE HADIDJAJA, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR HSBC MORTGAGE CORPORATIONS, SAG HARBOR SAVINGS BANK, "JOHN DOE" (Said name being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises.),

Defendants.

x

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Upon the following papers numbered 1 to 24 read on this motion for summary judgment and this cross motion for dismissal; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8 ; Notice of Cross Motion and supporting papers 9 - 14 ; Answering Affidavits and supporting papers 15 - 17 ; Replying Affidavits and supporting papers 18 - 20 ; and Other 21 - 24 ; it is,

ORDERED that this renewed motion (#003) by the plaintiff for, inter alia, an order awarding summary judgment in its favor against the defendant Robijanto Karndai, striking his answer, and dismissing the affirmative defenses asserted therein; fixing the defaults of the non-answering defendants; appointing a referee; and amending the caption is determined as indicated below; and it is

ORDERED that the plaintiff is granted summary judgment dismissing the affirmative defenses asserted in the defendant Robijanto Karnadi's answer, all with prejudice; and it is

ORDERED that the caption is amended by substituting "John" Karnadi for the fictitious "JOHN DOE" defendants, together with the related descriptive wording relating thereto; and it is

ORDERED that the plaintiff shall to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court; and it is

ORDERED that this renewed cross motion (#004) by the defendants Robojanto Karnadi and Nanie Hadidjaja for, inter alia, an order dismissing the complaint, or, in the alternative, denying plaintiff's summary judgment motion, granting leave to compel discovery, and rescheduling foreclosure conferences is denied in its entirety; and it is further

ORDERED that the moving parties shall serve a copy of this order with notice of entry by first-class mail upon opposing counsel and upon all appearing defendants that have not waived further notice within thirty (30) days of the date of this order, and they shall promptly file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on certain real situate in Suffolk County. The defendants Robijanto Karnadi and Nanie Hadidjaja ("the defendant mortgagors") allegedly defaulted on a note dated November 10, 2003, by failing to make the monthly payment of principal and interest due on or about August 1, 2009, and each month thereafter.

After the defendant mortgagors allegedly failed to cure the default in payment, the plaintiff commenced this action by the filing of the lis pendens, summons and complaint on September 8, 2010. Issue was joined by the interposition of Mr. Karnadi's answer dated September 23, 2010. The remaining defendants have neither answered nor appeared herein.

By order of the undersigned dated April 28, 2017, a prior motion made by the plaintiff for summary judgment was denied with leave to renew on account of certain deficiencies. A prior cross motion made by the defendant mortgagors for dismissal of the complaint, or in the alternative, discovery, was determined to the extent of permitting limited discovery within sixty days of the date of the aforesaid order.

The plaintiff now renews its motion for an order granting it summary judgment in its favor against the defendant mortgagors, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption. The defendant mortgagors oppose the plaintiff's motion and renew their cross move for, inter alia, an order dismissing the complaint, or, in the alternative, denying plaintiff's summary judgment motion, granting leave to compel discovery, rescheduling foreclosure conferences and amending the answer. Opposition and reply papers have been submitted.

Turning to the defendant mortgagors' cross motion, the court notes that the same is procedurally defective to the extent that the moving papers submitted herein do not fully recite the grounds for the relief sought along with the specific provisions of the civil practice law and rules relating thereto (*see*, CPLR 2214 [a]). Additionally, as noted in this court's prior determination, because the defendant Hadidjaja never answered the complaint and never moved to vacate her default, she is not entitled to request any relief herein at this time (*see*, ***HSBC Bank USA, N.A. v Clayton***, 146 AD3d 942, 45 NYS3d 543 [2d Dept 2017]; ***PHH Mtge. Corp. v Celestin***, 130 AD3d 703, 11 NYS3d 871 [2d Dept 2015]; ***TD Bank, N.A. v Spector***, 114 AD3d 933, 980 NYS2d 836 [2d Dept 2014]).

The branch of the defendant mortgagors' motion for an order dismissing the complaint on the grounds that the plaintiff failed to timely file a note of issue in this action is denied for the same reasons set forth in this court's prior order that is now law of the case (*see*, ***Aguilar v Feygin***, 151 AD3d 798, 56 NYS3d 536 [2d Dept 2017]; ***Posin v Russo***, 294 AD2d 344, 741 NYS2d 893 [2d Dept 2002]). There is no evidence before the court that a valid 90-day demand was ever made pursuant to CPLR 3216 (*see*, ***Chase v Scavuzzo***, 87 NY2d 228, 638 NYS2d 587 [1995]; ***Alli v Baijnath***, 101 AD3d 771, 957 NYS2d 166 [2d Dept 2012]). Moreover, because a note of issue has not been filed herein, dismissal pursuant to CPLR 3404 is not appropriate (*see*, ***Lopez v Imperial Delivery Serv.***, 282 AD2d 190, 725 NYS2d 57 [2d Dept 2001]).

By its submissions, the plaintiff demonstrated that this case should be restored to active status (*see*, ***Chase v Scavuzzo***, 87 NY2d 228, *supra*). The court notes that the plaintiff's first motion (001) was made prior in time to the interposition of the defendant mortgagors' first motion (002), and that a conference was subsequently held in an effort to afford the parties the opportunity to settle this action. Thus, this case has been properly restored.

The branch of the cross motion whereby the moving defendants request that this action be restored to the foreclosure part for another mandatory settlement conference is denied because the plaintiff demonstrated compliance with the requirements of CPLR 3408 (*see*, ***Wells Fargo Bank, N.A. v Van Dyke***, 101 AD3d 638, 958 NYS2d 331 [1st Dept 2012]). The court also finds that the totality of the circumstances in this case, do not support a finding that plaintiff failed to negotiate in good faith (*see*, ***Wells Fargo Bank, N.A. v Miller***, 136 AD3d 1024, 26 NYS3d 176 [2d Dept 2016]; ***Wells Fargo Bank, N.A. v Van Dyke***, 101 AD3d 638, *supra*; *cf.* ***U.S. Bank, N.A. v Sarmiento***, 121 AD3d 187, 991 NYS2d 68 [2d Dept 2014]; ***Bank of Am., N.A. v Lucido***, 114 AD3d 714, 981 NYS2d 433 [2d Dept 2014]). The court's records and the parties' submissions show that mandatory settlement conferences were conducted or continued in this court's specialized mortgage foreclosure part on December 14, 2010, February 7, 2011 and May 4, 2011. On the last date, this action was released from the conference program and referred as an IAS case because the parties were unable to agree on a loan modification or otherwise settle this action. Accordingly, there has been compliance with CPLR 3408; no further conference is required under any statute, law or rule. Moreover, the defendant mortgagors are not entitled to any other court conference for the purpose of having the plaintiff present the note, because the plaintiff has already provided a copy in accordance with CPLR 4518(a).

The branch of the cross motion to amend the answer is denied (*see*, ***Majestic Invs., Ltd. v Lopez***, 111 AD2d 844, 490 NYS3d 585 [2d Dept 1985] [no excuse for several year delay in moving to amend, inadequate affidavit of merits, and movants' failure to demonstrate a lack of prejudice]; ***Tarantini v Russo Realty Corp.***, 273 AD2d 458, 712 NYS2d 358 [2d Dept 2000] [leave to amend denied where the proposed amendment is palpably insufficient as a matter of law or is totally devoid of merit]; *see also*, ***Lighting Horizons, Inc. v E. A. Kahn & Co.***, 120 AD2d 648, 502 NYS2d 398 [2d Dept 1986] [where motion-in-chief is granted, cross motion rendered academic when that cross motion seeks a determination that could not have any practical effect on the existing controversy]). The remaining branches of the cross motion are denied because the same are also without merit (*see*, ***Deutsche Bank Natl. Trust Co. v Francis***, 2017 NY Misc. LEXIS 1999, 2017 WL 2304042, 2017 NY Slip Op 31113 [U] [Sup Ct, Suffolk County 2017]; ***Wilmington Trust Co. v Hurtado***, 48 Misc3d 1201[A], 18 NYS3d 582 [Sup Ct, Suffolk County 2015]).

Turning to the motion-in-chief, 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]).

On renewal, the plaintiff established its prima facie entitlement to summary judgment on the complaint (*see*, CPLR 3212; RPAPL § 1321; ***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 endorsed note, mortgage, assignments 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.

Where, as here, an answer served includes the defense of standing, the plaintiff must prove its standing in order to be entitled to relief (*see*, ***CitiMortgage, Inc. v Rosenthal***, 88 AD3d 759, 931 NYS2d 638 [2d Dept 2011]). The standing of a plaintiff in a mortgage foreclosure action is measured by its ownership, holder status or possession of the note and mortgage at the time of the commencement of the action (*see*, ***Bank of N.Y. v Silverberg***, 86 AD3d 274, 926 NYS2d 532 [2d Dept 2011]; ***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]).

The plaintiff established that it had standing to commence this action by submitting the affidavit of a vice president of the plaintiff's loan servicer, which established that the plaintiff had physical possession of the note at the time it commenced this action (*see*, ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, 12 NYS3d 612 [2015]; ***HSBC Bank USA, N.A. v Armijos***, 151 AD3d 943, 57 NYS3d 205 [2d Dept 2017]; ***Silvergate Bank v Calkula Props., Inc.***, 150 AD3d 1295, 56 NYS3d 189 [2d Dept 2017]; ***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]). In her affidavit, the plaintiff's representative alleges that the original promissory note was delivered to the plaintiff on July 2, 2007, and that it has maintained possession of the original note since that time.

By its submissions, the plaintiff demonstrated compliance with the 90-day notice requirements of RPAPL 1304 (*see*, ***Zarabi v Movahedian***, 136 AD3d 895, 26 NYS3d 153 [2d Dept 2016]; ***JP Morgan Chase Bank, N.A. v Schott***, 130 AD3d 875, 15 NYS3d 359 [2d Dept 2015]; ***Wells Fargo v Moza***, 129 AD3d 946, 13 NYS3d 127 [2d Dept 2015]; ***Wachovia Bank, N.A. v Carcano***, 106 AD3d 724, 965 NYS2d 516 [2d Dept 2013]). Thus, a presumption of receipt arises (*see*, ***Viviane Etienne Med. Care v Country-Wide Ins. Co.***, 25 NY3d 498, 14 NYS3d 283 [2015]).

With respect to RPAPL 1303, the plaintiff's submissions sufficiently establish proper service of the notice requirements pursuant to same (*see*, ***Nationstar Mtge., LLC v Kamil***, 155 AD3d 968, 63 NYS3d 890 [2d Dept 2017]; ***PHH Mtge. Corp. v Israel***, 120 AD3d 1329, 992 NYS2d 355 [2d Dept 2014]; ***U.S. Bank N.A. v Tate***, 102 AD3d 859, 958 NYS2d 722 [2d Dept 2013]). The plaintiff's submissions include affidavits of service of the RPAPL 1303 notice upon the defendant mortgagors. The plaintiff's agent also alleges that the title of this notice was printed in twenty-point type in compliance with RPAPL 1303.

The fourth affirmative defense, whereby Mr. Karnadi alleges a violation of Banking Law "61" which the court construes to be an alleged violation of Banking Law 6-l, lacks merit because the mortgage loan was not a "home loan," as the term was defined in this section as of the date of origination (*see*, Banking Law § 6-l [1][d]; former Banking Law § 6-l [e][i] [L 2002, ch 626, § 1, eff. April 1, 2003]). Prior to the amendment (effective October 14, 2007 [L 2007, ch 552, § 2]) to former Banking Law § 6-l (e)(i) (L 2007, ch 552, § 1), mortgage loans in principal amounts exceeding $300,000.00 were not covered by the statute (*see*, L 2002, ch 626, § 4; Banking Law § 6-1 (***Lewis v Wells Fargo Bank, N.A.***, 134 AD3d 777, 22 NYS3d 461 [2d Dept 2015]; ***Endeavor Funding Corp. v Allen***, 102 AD3d 593, 958 NYS2d 300 [1st Dept 2013]; ***Deutsche Bank Natl. Trust Co. v Holler***, 56 Misc3d 1214 [A], 65 NYS3d 491[Sup Ct, Suffolk County 2017]).

The plaintiff submitted sufficient proof to establish, prima facie, that the remaining affirmative defenses set forth 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] [unsupported affirmative defenses are lacking in merit]; *see also*, ***Scholastic Inc. v Pace Plumbing Corp.***, 129 AD3d 75, 8 NYS3d 143 [1st Dept 2015] [boilerplate list of defenses dismissed]; ***Bank of Am., N.A. v Patino***, 128 AD3d 994, 9 NYS3d 656 [2d Dept 2015][those without privity of contract or who are not the intended third-party beneficiaries thereof cannot bring defenses/claims under the contract or assignments]; ***CFSC Capital Corp. XXVII v Bachman Mech. Sheet Metal Co.***, 247 AD2d 502, 669 NYS2d 329 [2d Dept 1998] [an affirmative defense based upon the notion of culpable conduct is unavailable in a foreclosure action]). Also, it is well settled that once a mortgagor defaults on loan payments, a mortgagee is not required to accept less than the full repayment as demanded (*see*, ***EMC Mtge. Corp. v Stewart***, 2 AD3d 772, 769 NYS2d 408 [2d Dept 2003]; ***First Fed. Sav. Bank v Midura***, 264 AD2d 407, 694 NYS2d 121 [2d Dept 1999]; *see also*, ***Charter One Bank, FSB v Leone***, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007]).

Because the plaintiff duly demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted Mr. Karnadi (*see*, ***HSBC Bank USA v Merrill***, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]). Accordingly, it was incumbent upon Mr. Karndai 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]).

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 v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; *see also*; ***Argent Mtge. Co., LLC v Mentesana***, 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 [1st Dept 1999] [internal quotation marks and citations omitted]).

The plaintiff demonstrated its standing, as indicated above. In response, Mr. Karnadi has not come forward with any evidence to raise a triable issue of fact as to the plaintiff's standing, or the validity of the assignments (*see*, ***JPMorgan Chase Bank, N.A. v Weinberger***, 142 AD3d 643, 37 NYS3d 286 [2d Dept 2016]; ***Wells Fargo Bank, N.A. v Charlaff***, 134 AD3d 1099, 24 NYS3d 317 [2d Dept 2015]; ***LNV Corp. v Francois***, 134 AD3d 1071, 22 NYS3d 543 [2d Dept 2015]). Under the facts presented herein, the validity of the assignments of the mortgage and note are irrelevant to the issue of the plaintiff's standing, or to the plaintiff's entitlement to summary judgment. Moreover, Mr. Karnadi's speculation and contentions questioning the intent of the parties to the assignment, which appear aimed at obscuring the issue of nonpayment, are also without merit (*see*, ***Finance v Abundant Life Church, U.P.C., Inc.***, 122 AD3d 918, 998 NYS2d 387 [2d Dept 2014]; ***Hypo Holdings, Inc. v Chalasani***, 280 AD2d 386, 721 NYS2d 35 [1st Dept 2001]). Mr. Karnadi, therefore, failed to establish the merit of the standing defenses in the answer.

Notably, in their moving papers, the defendant mortgagors admit their default in payment under the terms of the note and mortgage (*see*, ***Citibank, N.A. v Souto Geffen Co.***, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]; *see also*, ***Stern v Stern***, 87 AD2d 887, 449 NYS2d 534 [2d Dept 1982]). In any event, the affirmation of the defendant mortgagors' attorney, who has no personal knowledge of the operative facts, is without probative value and insufficient to defeat the motion (*see*, ***Matter of Ziomek***, 40 AD3d 774, 833 NYS2d 906 [2d Dept 2007]; ***Barcov Holding Corp. v Bexin Realty Corp.***, 16 AD3d 282, 792 NYS2d 408 [1st Dept 2005]; *see also*, ***US Natl. Bank Assn. v Melton***, 90 AD3d 742, 934 NYS2d 352 [2d Dept 2011]).

Thus, even when considered in the light favorable to Mr. Karndai, the opposing papers are insufficient to raise any genuine question of fact requiring a trial on the merits of the plaintiff's claims for foreclosure and sale (*see*, ***Retained Realty, Inc. v Syed***, 137 AD3d 1099, 26 NYS3d 889 [2d Dept 2016]; ***Bank of Smithtown v 219 Sagg Main, LLC***, 107 AD3d 654, 968 NYS2d 95 [2d Dept 2013]; ***Emigrant Mtge. Co., Inc. v Beckerman***, 105 AD3d 895, 964 NYS2d 548 [2d Dept 2013]; *see also*, ***Gee Tai Chong Realty v GA Ins. Co. of N.Y.***, 283 AD2d 295, 727 NYS2d 388 [1st Dept 2001] [prior determination of the court is law of the case and binding on the parties]). Mr. Karnadi's moving and opposition papers are also insufficient to demonstrate any bona fide defenses (*see*, CPLR 3211 [e]; ***Wells Fargo Bank, N.A. v Ali***, 122 AD3d 726, 995 NYS2d 735 [2d Dept 2014]; ***American Airlines Fed. Credit Union v Mohamed***, 117 AD3d 974, 986 NYS2d 530 [2d Dept 2014]; ***Washington Mut. Bank v Schenk***, 112 AD3d 615, 975 NYS2d 902 [2d Dept 2013]; ***U.S. Bank N.A. v Slavinski***, 78 AD3d 1167, 912 NYS2d 285 [2d Dept 2010]).

The plaintiff is therefore granted summary judgment in its favor as indicated herein (*see*, ***Federal Home Loan Mtge. Corp. v Karastathis***, 237 AD2d 558, *supra*). The affirmative defenses asserted in the answer are dismissed, all with prejudice. The court next turns to the ancillary relief in the plaintiff's motion.

The branch of the instant motion for an order amending the caption, by substituting "John" Karnadi for the fictitious "JOHN DOE" defendants, is granted (*see*, ***PHH Mtge. Corp. v Davis***, 111 AD3d 1110, 975 NYS2d 480 [3d Dept 2013]; ***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 established the default in answering on the part of the defendants Nanie Hadisjaja, Mortgage Electronic Registration Systems, Inc., as Nominee for HSBC Mortgage Corporation, SAG Harbor Savings Bank, and "John" Karnadi (*see*, RPAPL § 1321; ***HSBC Bank USA, N.A. v Alexander***, 124 AD3d 838, 4 NYS3d 47 [2d Dept 2015]; ***Wells Fargo Bank, NA v Ambrosov***, 120 AD3d 1225, 993 NYS2d 322 [2d Dept 2014]). Accordingly, the default in answering of all of the non-answering defendants is fixed and determined.

Because the plaintiff has been awarded summary judgment against Mr. Karnadi 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]). Those portions of the instant motion wherein the plaintiff demands such relief are thus granted.

All other relief requested by the moving parties and not specifically discussed herein, is denied. Accordingly, the plaintiff's motion for summary judgment is determined as set forth above, and the defendant mortgagors' cross motion is denied. The proposed order of reference, as modified by the court, has been signed with this decision.

Dated: May 14, 2018

C. RANDALL HINRICHS, J.S.C.

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