Allfour v Bono
2018 NY Slip Op 31288(U)
June 21, 2018
Supreme Court, Suffolk County
Docket Number: 041887/2010
Judge: James Hudson

[* 1]

SHORT FORM ORDER

INDEX NO. 041887/2010

SUPREME COURT - STATE OF NEW YORK
IAS PART 40 - SUFFOLK COUNTY

PRESENT: Hon. JAMES HUDSON
Acting Supreme Court Justice

ALLFOUR DBA ALBARANO HOLDING CO.

Plaintiff,

-against-

SALVATORE BONO, GEOFFREY M. PARKINSON, and LAURA J. NILES FOUNDATION INC., C/O/ MICHAEL G. LANGAN, PUBLIC ADMINISTRATOR OF SUFFOLK COUNTY, ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION, and "John Doe" and/or "Jane Doe," "(said name being fictitious it being the intention of Plaintiff to designate any and all occupants of the premises being foreclosed herein, and any parties corporations or entities if any, having or claiming an interest or lien upon the mortgaged premises.)"

Defendants.

MOTION DATE: 6-6-16 (010)
12-21-16 (011)
ADJ. DATE: 6-27-16 (010)
File Reassigned to this IAS Part 40
Mot Seq. #: 010-MG
Mot Seq. #: 011-MD

CHRISTOPHER THOMPSON, ESQ.
Attorney for Plaintiff
33 Davison Lane East
West Islip, NY 11795

FRANCESCO TINI, ESQ.
Attorney for Defendant
Salvatore Bono
425 Oak Street
Copiague, NY 11726

Upon the reading and filing of the following papers in this matter: (1) notice of motion by the plaintiff, dated May 11, 2016, and supporting papers; (2) the affirmation of the defendant Salvatore Bono's former counsel, Francesco P. Tini, Esq., dated June 20, 2016 in opposition to the plaintiff's motion; (3) the affirmation in reply of the plaintiff's counsel, Christopher Thompson, Esq., dated June 29, 2016; (4) notice of motion by the defendant, Salvatore Bono, dated December 14, 2016; the affirmation of the plaintiff's counsel, Christopher Thompson, Esq., dated January 10, 2017 in opposition; (5) the affidavit in reply of the defendant, Salvatore Bono, sworn to on January 30, 2017; (6) stipulation to adjourn dated June 3, 2016; (7) unsworn letters from Salvatore Bono dated December 13 and 21, 2017; and now it is

ORDERED that this motion (#010) by the plaintiff, and the motion (#011) by the defendant Salvatore Bono, which was improperly labeled a cross motion, are consolidated for the purposes of this determination; and it is

ORDERED that this motion by the plaintiff for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the defendant Salvatore Bono, striking his answer and dismissing the affirmative defenses and counterclaims asserted 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 is granted; and it is

ORDERED that the plaintiff is awarded summary judgment dismissing the affirmative defenses asserted in the answer, all with prejudice; and it is

ORDERED that pursuant to CPLR 3215(c) the counterclaims asserted in the answer are dismissed as abandoned; and it is

ORDERED that the caption is amended by excising the fictitious defendants "John Doe" and "Jane Doe," together with the related descriptive wording relating thereto; and it is

ORDERED that this motion by the defendant Salvatore Bono for, inter alia, an order: (1) denying the plaintiff's motion for summary judgment; and (2) awarding summary judgment in his favor against the plaintiff, and granting him certain declaratory relief voiding and discharging the mortgage; (3) fixing the defaults of certain other individuals purported to be third-party defendants; and (4) awarding him punitive damages is denied; and it is

ORDERED that the plaintiff shall serve a copy of this order with notice of entry amending the caption and dismissing the counterclaims upon the Calendar Clerk of this Court within thirty (30) days of the date herein; and it is further

ORDERED that counsel for the plaintiff shall serve a copy of this order with notice of entry by first-class mail upon the defendant Salvatore Bono at his last known address of record, 70 Sandy Hollow Drive, Smithtown, New York 11787 and all other appearing parties that have not waived further notice within thirty (30) days of the date herein, and he shall promptly file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on certain real property known as 885 Manor Lane, West Bay Shore New York 11706 ("the property"), and allegedly owned by the defendant Salvatore Bono ("Bono"). Bono defaulted on a note given by him on February 2, 2004, by failing to make the monthly payment of principal and interest due on or about February 1, 2005, and each month thereafter.

After Bono failed to cure the default in payment, the plaintiff commenced this action by the filing of the lis pendens, summons and complaint on November 17, 2010. Issue was joined by the interposition of Bono's answer, with an attached verification sworn to on March 24, 2011.
The remaining defendants have neither answered nor appeared herein.

In the answer, Bono denies all of the allegations in the complaint and asserts twenty-three affirmative defenses, alleging, inter alia, the statute of frauds, fraud in the origination and closing of the subject loan, the doctrine of unclean hands, estoppel, unconscionability, the failure to join all necessary parties, the statute of limitations, and the Federal Truth in Lending Act. In his answer, Bono also asserts seventeen counterclaims, alleging, among other things, fraud and slander of title. In response, the plaintiff served a reply dated July 30, 2012, whereby it denies all of the material allegations in the counterclaims.

Simultaneous with the answer, Bono filed a notice of removal to the U.S. District Court, Eastern District, however, this case was referred back to the Supreme Court (*see*, ***Allfour v Bono***, 11-CV-1619, 2011 US Dist LEXIS 67389, 2011 WL 2470742 [EDNY 2011], report and recommendation adopted by 2011 US Dist LEXIS

67442, 2011 WL 2470734 [EDNY 2011]). In the answer and notice of removal, Bono purports to interpose a third-party action, however, a third-party action was never commenced in this court (*see*, CPLR 304, 1007, 2012). On June 22, 2011, a judgment was also entered in the United States District Court, Eastern District of New York remanding this state court action to this court and closing the federal case.

Thereafter, by order dated August 1, 2012 (Emerson, J.), a motion by Bono for an order dismissing the complaint insofar as asserted against him was denied, and a motion by the plaintiff for, among other things, an order amending the complaint and the notice of pendency was granted to the extent that the plaintiff was permitted to serve and file an amended complaint adding three judgment creditors and a notice of pendency within 30 days after the date of entry of said order (*see*, ***Allfour v Bono***, 2012 NY Misc LEXIS 3708, 2012 WL 3230701 [U], 2012 NY Slip Op 32038 [U] [Sup Ct, Suffolk County 2012]). After the plaintiff filed and served the supplemental summons and amended complaint adding three creditors, Bono interposed an answer to the amended complaint, with an attached verification sworn to on February 20, 2014, even though another answer was not required (*see*, CPLR 3025[d]). In the second answer, Bono does not set forth any specific affirmative defenses and counterclaims, but instead alleges that he "incorporates and restates all of the [c]ounterclaims set forth in his [v]erified [a]nswer, [a]ffirmative [d]efenses and [c]ounterclaims dated March 24, 2011, as if more particularly set forth herein." It is not known whether the answer to the original complaint was attached to and served with the answer to the amended complaint. Although the plaintiff interposed a reply to the counterclaims in the 2011 answer, a reply to the counterclaims in the 2014 answer was never interposed (*see*, CPLR 3011).

By order dated August 7, 2014 (Emerson, J.), a motion by Bono to dismiss the plaintiff's amended complaint was denied. In its determination, the Court found, inter alia, that the plaintiff had demonstrated its standing to sue in this action. The Court also found that the statute of limitations was inapplicable because the subject mortgage loan was in writing.

The plaintiff now moves for, inter alia, an order: (1) awarding summary judgment in its favor and against Bono, striking his answer and dismissing the affirmative defenses and counterclaims asserted 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.

Thereafter, by stipulation dated June 3, 2016, the plaintiff's motion was adjourned to June 27, 2016 for the purpose of allowing Bono to file opposition papers. After securing said adjournment, Bono responded by moving six months later for, inter alia, an order: (1) denying the plaintiff's motion for summary judgment; and (2) awarding summary judgment in his favor against the plaintiff, and granting him certain declaratory relief voiding and discharging the mortgage; (3) fixing the defaults of certain other individuals purported to be third-party defendants; and (4) awarding him punitive damages.

By way of further background, after the submission of these motions, this action was transferred from the inventory of the Honorable William G. Ford, J.S.C. to this IAS Part 40 upon Justice Ford's recusal by written order dated May 17, 2018. Even though no excuse was proffered by Bono for the untimely motion, because the plaintiff addressed the merits of the same and because there is no prejudice in light of the recent re-assignment of this action, the court, in the exercise of its discretion, considers the dismissal motion (*compare*, ***Rodriguez v Tiwari***, 265 AD2d 247, 697 NYS2d 24 [1st Dept 1999], *with* ***Romeo v Ben-Soph Food Corp.***, 146 AD2d 688, 537 NYS2d 52 [2d Dept 1989]). In the interest of judicial economy, these two motions are consolidated for the

purposes of this determination, and the court turns first to Bono's motion, which was improperly denominated a cross motion.

At the outset, Bono's cross motion 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]). To the extent that the requested relief is supported by and affidavit from Bono, it has been considered.

The branches of Bono's cross motion for a default judgment pursuant to CPLR 3215 against the plaintiff and the purported third-party defendants are denied because, as noted above, a third-party action was never commenced in this Court (*see*, CPLR 304, 1007, 2012). In this case, the remand by the District Court merely sent the plaintiff's foreclosure action back to this Court, and Bono's attempt to engraft a third-party action on to this action by amending the caption of his moving papers is improper and of no effect. Parenthetically, the court notes that the so-ordered stipulation dated February 6, 2014 (Emerson, J.), the compliance conference order (Emerson, J.) and the note of issue filed by the plaintiff, maintained in the Suffolk County Clerk's physical file for this action, do not include any reference to a third-party action. Even if a third-party action had been filed, Bono has not demonstrated that he has any bona fide claims against the plaintiff or any other party to this action; nor has he demonstrated that he sustained, or would be entitled to, any damages (*see*, ***U.S. Bank N.A. v Slavinski***, 78 AD3d 1167, 912 NYS2d 285 [2d Dept 2010]; ***U.S. Bank N.A. v Pia***, 73 AD3d 752, 901 NYS2d 104 [2d Dept 2010]; ***Ladino v Bank of Am.***, 52 AD3d 571, 861 NYS2d 683 [2d Dept 2008]).

The branch of Bono's cross motion for summary judgment and certain declaratory relief against the plaintiff by voiding and discharging the subject mortgage is denied because a reply in response to the 2014 answer was never interposed (*see*, ***Blue Is. Dev., LLC v Town of Hempstead***, 131 AD3d 497, 501, 15 NYS3d 807 [2d Dept 2015]). A motion for summary judgment may not be made before issue is joined (*see*, CPLR 3212 [a]) and the requirement is strictly adhered to (***Rochester v Chiarella***, 65 NY2d 92, 101-102, 490 NYS2d 174 [1985]).

Under the circumstances presented herein, the counterclaims are dismissed as abandoned in their entirety pursuant to CPLR 3215(c) (*see*, ***Giglio v NTIMP, Inc.***, 86 AD3d 301, 926 NYS2d 546 [2d Dept 2011]). Bono failed to show any reason for the two year delay in moving herein (after the plaintiff already moved for summary judgment); nor has Bono established that the counterclaims are meritorious (*see*, ***Abdourahamane v Public Stor. Institutional Fund***, 113 AD3d 644, 978 NYS2d 685 [2d Dept 2014] [complaint failed to state a cause of action sounding in fraud]; ***Ladino v Bank of Am.***, 52 AD3d 571, *supra* [negligent imposter fraud is not a recognized tort in New York]). Also, to the extent that the counterclaims are based upon fraud and misrepresentation, they are untimely (*see*, CPLR 213 [8]; ***Williams-Guillaume v Bank of Am., N.A.***, 130 AD3d 1016, 14 NYS3d 466 [2d Dept 2015]; ***Pike v New York Life Ins. Co.***, 72 AD3d 1043, 901 NYS2d 76 [2d Dept 2010]).

The court next turns 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]).

By its submissions, 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 note, the mortgage 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.

The plaintiff submitted sufficient proof to establish, prima facie, that the 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*, ***Gillman v Chase Manhattan Bank, N. A.***, 73 NY2d 1, 537 NYS2d 787 [1988] [unconscionability generally not a defense]; ***Scholastic Inc. v Pace Plumbing Corp.***, 129 AD3d 75, 8 NYS3d 143 [1st Dept 2015] [compound, boilerplate defenses are in contravention of the civil practice rules]; ***Emigrant Mtge. Co., Inc. v Fitzpatrick***, 95 AD3d 1169, 945 NYS2d 697 [2d Dept 2012] [an affirmative defense asserting violations of General Business Law § 349 and/or engagement in deceptive business practices lacks merit where, inter alia, clearly written loan documents describe the terms of the loan]; ***La Salle Bank N.A. v Kosarovich***, 31 AD3d 904, 820 NYS2d 144 [3d Dept 2006] [an alleged violation of TILA does not constitute an affirmative defense to a defendant's default in payment]; ***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]; ***Connecticut Natl. Bank v Peach Lake Plaza***, 204 AD2d 909, 612 NYS2d 494 [3d Dept 1994] [defense based upon the doctrine of unclean hands lacks merit where a defendant fails to come forward with admissible evidence of showing immoral or unconscionable behavior]).

Furthermore, a borrower may not properly claim to have reasonably relied on a lender's representations that are plainly at odds with the loan documents governing the terms of the loan (***Aurora Loan Servs., LLC v Enaw***, 126 AD3d 830, 831, 7 NYS3d 146 [2d Dept 2015]), and "a party who signs a document without any valid excuse for having failed to read it is 'conclusively bound' by its terms" (***Patterson v Somerset Invs. Corp.***, 96 AD3d 817, 817, 946 NYS2d 217 [2d Dept 2012]). The plaintiff also demonstrated that the terms of the subject mortgage loan were fully set forth in the loan documents, and that no deceptive act or practice occurred in this case (*see*, ***Disa Realty, Inc. v Rao***, 137 AD3d 740, 25 NYS3d 677 [2d Dept 2016]; ***Shovak v Long Is. Commercial Bank***, 50 AD3d 1118, 858 NYS2d 660 [2d Dept 2008]).

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

It was thus incumbent upon Bono to submit proof sufficient to raise a genuine question of fact rebutting plaintiff's prima facie showing or in support of the affirmative defenses asserted in the answer (*see*, ***Grogg v South Rd. Assoc., LP***, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; ***Washington Mut. Bank, F.A. v O'Connor***, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]; ***JP Morgan Chase Bank, N.A. v Agnello***, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]). 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]).

In opposition to the motion, Bono has offered no proof or arguments in support of any of the pleaded defenses asserted in the answer, except fraud. The failure by Bono to raise and/or assert each of the remaining pleaded defenses in opposition to the plaintiff's motion warrants the dismissal of same as abandoned under the case authorities cited above (*see*, ***Kuehne & Nagel v Baiden***, 36 NY2d 539, *supra*; *see also*; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, *supra*). All of the unsupported affirmative defenses asserted in the answer are thus dismissed.

Notably, Bono did not deny having received the loan proceeds and having defaulted on the subject loan payments in an affidavit made by him in opposition to the motion (*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]). Thus, even when considered in the light most favorable to Bono, 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*, ***Emigrant Mtge. Co., Inc. v Beckerman***, 105 AD3d 895, 964 NYS2d 548 [2d Dept 2013]). Bono's opposition papers are also insufficient to demonstrate any bona fide defenses (*see*, CPLR 3211 [e]; ***Tribeca Lending Corp. v Lawson***, 159 AD3d 936, 73 NYS3d 575 [2d Dept 2018]; ***HSBC Bank USA, N.A. v Ozcan***, 154 AD3d 822, 64 NYS3d 38 [2017]; ***U.S. Bank N. A. v Richard***, 151 AD3d 1001, 57 NYS3d 509, 511 [2d Dept 2017]; ***HSBC Bank, USA v Hagerman***, 130 AD3d 683, 11 NYS3d 865 [2d Dept 2015] [bald assertion of forgery is insufficient to raise a triable issue of fact]; ***Rimbambito, LLC v Lee***, 118 AD3d 690, 986 NYS2d 855 [2d Dept 2014]; ***American Airlines Fed. Credit Union v Mohamed***, 117 AD3d 974, 986 NYS2d 530 [2d Dept 2014]; ***Cochran Inv. Co., Inc. v Jackson***, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007]). The court has examined Bono's remaining contentions and finds that such lack merit.

The plaintiff is therefore awarded summary judgment in its favor against Bono (*see*, ***Federal Home Loan Mtge. Corp. v Karastathis***, 237 AD2d 558, *supra*; *see also*, ***Emigrant Bank v Myers***, 147 AD3d 1027, 47 NYS3d 446 [2d Dept 2017] [unmeritorious and duplicative affirmative defenses and counterclaims dismissed]). The answer is stricken, and the affirmative defenses asserted therein are dismissed, all with prejudice. The court next turns to the ancillary relief in the plaintiff's motion.

The branch of the motion for an order amending the caption, by excising the fictitious "John Doe" and "Jane Doe" defendants, is granted (*see*, CPLR 1024; ***Deutsche Bank Natl. Trust Co. v Islar***, 122 AD3d 566, 996 NYS2d 130 [2d Dept 2014] ***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 remaining defendants, Geoffrey M. Parkinson and Laura J. Niles Foundation Inc. c/o Michael G. Langan, Public Administrator of Suffolk County, and Astoria Federal Savings and Loan Association (*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 Bono 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.

Accordingly, the plaintiff's motion for summary judgment is granted. The plaintiff is directed to settle, on not less than twenty (20) days notice to all appearing counsel, a proposed order of reference providing in blank for the court's designation of a referee to compute and such other matters necessarily attendant with such appointment and order or reference. The proposed order of reference must be accompanied by copy of this order.

Dated: June 21st 2018

Hon. JAMES HUDSON, A.S.C.J.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION