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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MADDEN Justice

PART 11

ROBERTA YATES

-v-

ESTATE SAVINGS BANK

INDEX NO. 402229/11

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion And cross motion are are determined in accordance with the annexed decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

APR 26 2012

NEW YORK COUNTY CLERK'S OFFICE

Dated: April 23, 2012

HON. JOAN A. MADDEN J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11
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ROBERTA C. YAFIE,

Plaintiff,

-against-

EASTERN SAVINGS BANK FSB,

Defendant.

INDEX NO. 402229/11

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JOAN A. MADDEN, J.:

Plaintiff initially commenced this action *pro se* by securing an order to show cause staying the non-judicial sale of the shares of the stock in her cooperative apartment located at 145 East 15th Street, Unit #11T, New York, New York. In her affidavit in support of the order to show cause, plaintiff states that she is seeking the following relief: "I want the court to stay the foreclosure sale of my coop apartment, enable me to enter the court's loss mitigation program to see if I qualify for a loan modification and, failing this, give me the time to sell my home and save my only equity, so I do not become homeless." Plaintiff's *pro se* complaint seeks the identical relief.

Defendant opposes plaintiff's motion and cross-moves for an order pursuant to CPLR 3211(a)(2) and (7) dismissing the complaint and the action with prejudice. Now represented by counsel, plaintiff submits an attorney's affirmation opposing defendant's cross-motion and in further support of her order to show cause. Plaintiff's counsel asserts that "[b]ased on the

documents executed between the debtor and the bank and the nature of the loan, this loan is not collectible and the security interest of the bank is void." Plaintiff's counsel argues that the loan "is void in term of interest rate and security interest in the property," and that it violates various provisions of New York Banking Law § 6-l. Plaintiff's counsel states that the court "should grant the Debtor's request for an injunction and deny the Defendant's motion to dismiss."

The following facts are gleaned from defendant's motion papers and supporting documents, and are not controverted by plaintiff.[1] On August 22, 2007, plaintiff obtained a $330,000 loan from defendant bank, which was secured by a security interest in the 452 shares of stock allocated to and the proprietary lease referable to, her cooperative apartment. The loan is evidenced by a Note and a Security Agreement executed on August 22, 2007. Plaintiff defaulted on the loan when she failed to make the payment due October 1, 2009 in the amount of $4,364.59, and each subsequent monthly payment.[2]

As a result of plaintiff's default, in accordance with the Uniform Commercial Code, a non-judicial sale was scheduled for January 22, 2010. However, on January 21, 2010, plaintiff filed for bankruptcy. On March 8, 2010, plaintiff filed a Chapter 13 Plan and requested Loss Mitigation in accordance with the Loss Mitigation Procedures for the United States Bankruptcy Court for the Southern District of New York. Plaintiff's Chapter 13 Plan includes the following

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[1]Plaintiff submits only an attorney's affirmation and not an affidavit, in response to defendant's cross-motion.

[2]The monthly $4,364.59 payment includes principal and interest on the loan, as well as the cooperative's monthly maintenance in the amount of $1,053.16.

statement: "I would like to explore a renegotiation of terms with the creditor, Eastern Savings Bank. Failing that, I am prepared to put the property on the market, pending some necessary repairs, to obtain full market value. This action would also be contingent on status of my employment situation [and] my ability to make timely payments to the creditor."

According to defendant, during the next eight months, the parties conferenced, negotiated and reached an agreement with respect to the bankruptcy proceedings. Specifically, on or about June 15, 2010, Narissa A. Joseph, Esq., filed a motion to be substituted as plaintiff's attorney in the bankruptcy, and simultaneously submitted a First Amended Plan and a Status Report.[3] The Status Report states in relevant part as follows:

> 2. After discussion with Debtor regarding her income, equity in property and potential employment it was determined that Debtor essentially had two options which is either to sell the property or apply for a reverse mortgage. Debtor is unable to resume making her monthly mortgage payments. Debtor's income is approximately $2,541.02 and the current monthly mortgage is approximately $4,500.00.
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> 3. On May 15, 2010, Debtor and I spoke with a representative from Bank of America who advised that Debtor did not qualify for a reverse mortgage.
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> 4. Debtor decided that since she is currently unemployed and does not have enough income to make her monthly mortgage payment she had no option but to sell the property.

On or about July 21, 2010, plaintiff's counsel filed a Status Report and an Amended Chapter 13 Plan, stating that "Debtor's counsel, Debtor and Secured Lender's Counsel have negotiated an acceptable plan," in which they have "agreed upon adequate protection payments and time frame within which Debtor has to sell her residence." As explained by defendant's counsel, "[a]s a result of extensive negotiations and conferences between Plaintiff, Eastern and

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[3]Notably, Ms. Joseph is representing plaintiff in the instant action.

the Bankruptcy Trustee, Plaintiff had agreed that in order to pay off the debt to Eastern she would sell the Co-Op [and] . . . requested that she be given a sufficient amount of time to sell and in return she had agreed to pay Eastern adequate protection payments in the amount of $200.00 per month commencing in July 2010 until February 2011." In Section A of the July 2010 Amended Plan, plaintiff states in relevant part as follows:

> Debtor intends to sell her cooperative apartment located at 145 East 15th Street, Unit 11T, New York New York 10003 on or before February, 2011. Debtor intends to use the sale proceeds to pay all timely filed proofs of claim including the mortgagee a 100% dividend. Currently the estimated proofs of claim including the mortgage totals $440,000. In the event, Debtor does not sell her cooperative apartment on or before February 2011, or fails to pay the agreed upon adequate protection payments set forth in Section D, Category 2 [$200 per month beginning in July 2010] the stay shall be deemed lifted with respect to ESB [Eastern Savings Bank]. Debtor hereby consents hereto ESB shall immediately proceed with its right to its foreclosure auction with any surplus proceeds being distributed in accordance with law.

Defendant submits an affidavit from its Senior Asset Manager, Terry Brown, stating that plaintiff made just two of the $200 monthly payments and did not retain a real estate broker to sell her cooperative apartment.

On November 17, 2010, plaintiff submitted another Status Report to the Bankruptcy Court, in which her attorney advised that "[d]ue to Debtor's mental and physical health she has been unable to attend to her Bankruptcy case," explaining that the "Debtor is suffering from a blood clot in her leg and depression," and that she "should be fully recovered by November 26, 2010 and would be able to satisfy her requirement as a Chapter 13 Debtor." Plaintiff's attorney requested an adjournment of "the Debtor's confirmation hearing to allow the Debtor to bring her trustee payment current and meet the other requirement as a Chapter 13 Debtor."

Defendant's counsel states that plaintiff "did not make payments to Eastern or put the Co-Op up for sale," and "failed to filed required documents prompting the [Bankruptcy] Court to grant the [Bankruptcy] Trustee's motion to dismiss on January 20, 2011." Defendant's counsel further states that "[o]n March 21, 2011, 90 days in advance of a new proposed sale, Eastern sent the notice required by UCC 9-611," advising that a UCC sale was scheduled for August 18, 2011.[4]

On August 16, 2011, plaintiff commenced the instant action by filing a *pro se* order to show cause, with a summons and complaint, seeking "to stop" the sale of her apartment scheduled for August 18, 2011, so she can "enter into the court's loss mitigation program to see if I qualify for a loan modification and, failing this, give me the time to sell my home and save my only equity, so I do not become homeless." Over defendant's objection, this court signed plaintiff's order to show cause and enjoined defendant from proceeding with the sale. Defendant thereafter cross-moved to dismiss the complaint and action with prejudice, pursuant to CPLR 3211(a)(2) and (7). Plaintiff's counsel submits an affirmation in opposition to the cross-motion, attacking the validity of the underlying loan in terms of its "interest rate and security interest in the property," and as violating "various provisions" of New York Banking Law § 6-l.

Defendant's cross-motion to dismiss is granted. Plaintiff fails to establish a legal or factual basis for concluding that the loan is "void" and that defendant "has no right to foreclose."

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[4]Defendant has not submitted a copy of the notice dated March 21, 2011, to show that it complied with the mandatory notice requirements of UCC § 9-611(f). The only notice in the record before this court, is a notice annexed to plaintiff's order to show cause, which is dated July 7, 2011 and does not comply with UCC § 9-611(f).

Plaintiff's counsel misstates the terms of the loan as having an adjustable interest rate of 12.0692% that is "capped" at 18.500%," and "subject to further change" based on "changes in the Index," which according to plaintiff's counsel is "the "Weekly Average yield on United States Treasury Securities adjusted to a constant maturity of one year as made available by the Federal Reserve Board plus 4.625 percentage points." By its clear and express terms, the Note conclusively establishes that the loan has a fixed interest rate that actually decreases each year over time. Specifically, in the paragraph entitled "Interest," the Note states that interest is chargeable at the rate of 12.990% from the date of the Note through August 31, 2008; at the rate of 12.740% from September 1, 2008 through August 31, 2009; at the rate of 12.190% from September 1, 2009 through August 31, 2010; at the rate of 11.640% from September 1, 2010 through August 31, 2011; at the rate of 11.090% from September 1, 2011 through August 31, 2012; at the rate of 10.540% from September 1, 2012 through August 31, 2013; at the rate of 9.990% from September 1, 2013 through August 31, 2014; and at the rate of 9.490% from September 1, 2014 until maturity of the loan.

Plaintiff's counsel also asserts that the "language governing the interest rate is ambiguous," and alleges that Section 2 of the Note states that "the debtor 'will pay' interest at a yearly rate of 10.750% but that this rate 'may change' pursuant to Section 4 [which] . . . states that the interest rate 'will change' on the first payment due date and that it 'will never be lower than 5.750%." Contrary to plaintiff's description, Section 4 is entitled "Borrower's Right to Prepay," and has nothing do with the interest rate on the Note.[5]

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[5]Plaintiff's counsel also misstates that the lender is "Gateway Funding Diversified Mortgage Service LP" and Eastern Savings Bank. Defendant Eastern Savings Bank is the one and only lender.

Plaintiff's counsel further argues that the loan is a "high cost home loan" in violation of New York Banking Law §6-l.[6] The loan documents, however, demonstrate that the instant loan in the principal amount of $330,000, was not a "high cost home loan" as that term was defined in Banking Law §6-l, as of the date of the making of the subject loan, i.e. August 22, 2007, since mortgage loans with principal amounts exceeding $300,000 were not covered by the statute in effect at that time. See Banking Law §§ 6-l (1)(d) and 6-l(1)(e)(I) [L 2002, c 626 § 1]; Tribeca Lending Corp v. Bartlett, 84 AD3d 496 (1st Dept 2011); Deutsche Bank National Trust Co v. Campbell, 26 Misc3d 1206(A) (Sup Ct, Kings Co, 2009); Wells Fargo Bank Nat Ass'n v. Rolon, 24 Misc3d 1216(A) (Sup Ct, Queens Co, 2009).[7] Moreover, at the time the instant loan was made, Banking Law § 6-l (1)(e)(iv) did not define a "high cost home loan" to include a

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[6]Citing no legal authority, defendant asserts that it is a federal savings bank governed by the Office of the Comptroller of the Currency, and New York Banking Law is preempted. Contrary to defendant's assertion, "when Congress enacted the NBA [National Banking Act], it create a 'mixed state/federal regime in which the federal Government exercises general oversight while leaving state substantive law in place.'" New York State Division of Human Rights v. H&R Block Tax Services, Inc, 71 AD3d 540, 544 (1st Dept), lv app den 15 NY3d 702 (2010) (quoting Cuomo v. Clearing House Ass'n LLC, 557 US 519 [2009]). "'[N]ational banks are subject to the laws of a State in respect of their affairs unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as federal agencies or conflict with the paramount law of the United States.'" Id (quoting First National Bank in St. Louis v. Missouri, 263 US 640 [1924]). "Accordingly, '[s]tates are permitted to regulate the activities of national bank where doing so does not prevent or significantly interfere with the national bank's or the national bank regulator's exercise of its powers." Id (quoting Watters v. Wachovia Bank, N.A., 550 US 1 [2007]).

[7]At the time of plaintiff's loan, subparagraph (i) had read: "The principal amount of the loan does not exceed the lesser of: (A) conforming loan size limit for a comparable dwelling as established from time to time by the federal national mortgage association; or (B) three hundred thousand dollars." Although that subparagraph was amended in October 2007 to eliminate the $300,000 limit, the statute as amended applies only to loans for which applications were made on or after the October 14, 2007 effective date.

cooperative apartment loan, and was limited to a "loan secured by a mortgage or deed of trust on real estate upon which there is located or there is to be located a structures intended principally for occupancy of from one to four families which is or will be occupied by the borrower as the borrower's principal dwelling."[8]

Finally, plaintiff's original request in her order to show cause and complaint seeking to "stop" the sale of her cooperative apartment, so she can "enter the court's loss mitigation program to see if I qualify for a loan modification, and failing this give me time to sell my home and save my only equity," is denied. As stated above, plaintiff does not dispute that she has already had an opportunity to participate in the loss mitigation program available in the Bankruptcy Court, and as a result entered into a agreement with defendant and the bankruptcy trustee in which she was given at least seven months to sell her apartment in return for adequate protection payments of $200 per month from July 2010 to February 2011. Unfortunately, plaintiff made only two payments and apparently took no steps to sell her apartment. While it also appears that plaintiff may have been suffering from physical and emotional problems, under the circumstances presented, this court is unable to provide her with any additional relief.[9]

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[8]In 2009, section 6-l(1)(e)(iv) was amended to include cooperative apartment loans: "The loan is secured by a mortgage or deed of trust on real estate improved by a one to four family dwelling, or by a condominium unit, or by any certificate of stock or other evidence of ownership in, and a proprietary lease from, a corporation, partnership or other entity formed for the purpose of cooperative ownership of real estate, in either case used or occupied or intended to be used or occupied, wholly or partly, as the home or residence of one or more persons and which is or will be occupied by the borrower as the borrower's principal dwelling."

[9]At oral argument, plaintiff's counsel argued that plaintiff never received a copy of the Note or the "pay-off letter." A copy of the Note is annexed to defendant's cross-motion, along with a copy of the Security Agreement. Plaintiff does not dispute that her initials and signature appear on both documents. As to the pay-off letter, counsel for defendant bank advised the court that bank had sent plaintiff a pay-off letter, and would send her another one.

In view of the foregoing, the court concludes that plaintiff has not provided any viable legal or factual grounds for granting temporary or permanent injunctive relief staying the foreclosure sale of her apartment, and for that reason defendant's cross-motion to dismiss the complaint must be granted.

To the extent plaintiff's original order to show cause sought the court's assistance in securing a modification of her loan, the mortgage foreclosure settlement conference mandated by CPLR 3408 is not applicable to plaintiff's cooperative apartment loan, since shares in a cooperative apartment are personal property and not real property. See Friedman v. Sommer, 63 NY2d 788 (1984); LI Equity Network, LLC v. Village in the Woods Owners Corp, 79 AD3d 26 (2nd Dept 2010); Brief v. 120 Owners Corp, 157 AD2d 515 (1st Dept 1990); .

The court notes, however, that as a condition precedent to proceeding with any future non-judicial sale of the shares in plaintiff's apartment, defendant must serve plaintiff with a new 90-day pre-disposition notice that complies with the statutory mandates of UCC § 9-611(f). See Goldman v. Emigrant Savings Bank – Long Island, 32 Misc3d 1238 (A) (Sup Ct, Queens Co, 2011); Stern-Obstfeld v. Bank of America, 30 Misc3d 901 (Sup Ct, NY Co, 2011); Howard v. Citimortgage, Inc, 2011 WL 7025340 (Sup Ct, NY Co 2011); 2 Mortgages & Mortgage Foreclosure in NY, §33:3.70 (2011). Under UCC § 9-611(f), a secured party must send a specific type of notice to a homeowner 90 days prior to the sale or other disposition of cooperative shares held as collateral. Section 9-611(f) is "very particular in its requirements," by specifying both the form and content of the notice, which must include information about counseling services and other matters that may assist a cooperative apartment homeowner in obtaining help when faced with the potential loss of a home. Stern-Obstfeld v. Bank of America, supra at 905-906. "Proper

service of a UCC 9-611(f) notice complying with the statutory mandates is a condition precedent to foreclosure." Goldman v. Emigrant Savings Bank – Long Island, supra; accord Stern-Obstfeld v. Bank of America, supra at 906.

Accordingly, it is

ORDERED that plaintiff's motion is denied in its entirety; and it is further

ORDERED that defendant's cross- motion to dismiss the action and the complaint is granted, and the action and the complaint are dismissed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that any stay in effect is hereby vacated.

FILED

DATED: April 23, 2012

ENTER: APR 26 2012

NEW YORK
COUNTY CLERK'S OFFICE

J.S.C..