MEMO DECISION & ORDER

INDEX No. 16096-10

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 8/13/12
ADJ. DATES 9/14/12
Mot. Seq. # 001- Mot D
CDISP: No

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US BANK, NA, as Trustee for the Certificate holders of Banc of America Funding 2008-FT1 Trust, mortgage passthrough certificates, series 2008-FT1,

Plaintiff,

-against-

NANCY CROCITTO, BANK OF AMERICA, NA, MIDLAND FUNDING, LLC, ADVANTAGE ASSETS II, INC., CAPITAL ONE BANK, USA, NA, "JOHN DOE 1 to JOHN DOE 25", said names being fictitious, the persons or parties intended being the persons, parties, corporations or entities, if any, having or claiming an interest in or lien upon the mortgage premises described in the complaint,

Defendants.

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ELLEN DURST-BLAIR, ESQ.
Atty. For Defendants
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Upon the following papers numbered 1 to 10 read on this motion for summary and default judgment, and to appoint referee; Notice of Motion/Order to Show Cause and supporting papers 1 - 6; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 7-8; Replying Affidavits and supporting papers 9-10; Other ; (~~and after hearing counsel in support and opposed to the motion~~, it is

ORDERED that this motion (#001) by the plaintiff for summary judgment against the answering defendant, Nancy Crocitto, the appointment of a referee to compute and other incidental relief is considered under CPLR 3212, 3215 and RPAPL 1321 and is granted only to the extent that summary judgment against the answering defendant is awarded to the plaintiff.

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On May 5, 2010, the plaintiff commenced this action on to foreclose a March 25, 2004 mortgage given by defendant, Nancy Crocitto, to secure a line of credit advanced by Fleet National Bank. Prior to such commencement, the Bank of America, NA in its capacity as successor by merger to Fleet National Bank, assigned the subject note together with the debt represented by the line of credit note and security agreement to the plaintiff. Issue was joined by service of defendant Crocitto's answer. It includes some eleven affirmative defenses and one counterclaim which charges the plaintiff with reckless and negligent lending practices and the "gouging" of the defendant's equity interest in her real property.

The plaintiff now moves for an order awarding it summary judgment against the answering defendant together with dismissal of her answer containing the eleven affirmative defenses and one counterclaim and appointing a referee to compute amounts due under the subject mortgage. The motion is considered under CPLR, 3212 and RPAPL § 1321 and is granted only with respect to the plaintiff's demands for summary judgment.

The moving papers established the plaintiff's entitlement to summary judgment on its complaint to the extent it asserts claims against answering defendant, Crocitto, as it included copies of the mortgage, the unpaid note and due evidence of a default under the terms thereof (*see* CPLR 3212; RPAPL § 1321; ***HSBC Bank v Shwartz,*** 88 AD3d 961, 931 NYS2d 528 [2d Dept 2011]; ***Countrywide Home Loans v Delphonse***, 64 AD3d 624, 883 NYS2d 135 [2d Dept 2009]; ***J.P. Morgan Chase Bank v Agnello,*** 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; ***Wells Fargo Bank Minnesota v Perez***, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]; ***Household Fin. Realty Corp. of New York v Winn***, 19 AD3d 545, 796 NYS2d 533 [2d Dept 2005]; ***Ocwen Fed. Bank FSB v Miller***, 18 AD3d 527, 794 NYS2d 650 [2d Dept 2005]). The moving papers further established, prima facie, that the affirmative defenses, including those premised upon the plaintiff's purported lack of standing, and the counterclaim asserted in the defendant's answer, are without merit.

It was thus incumbent upon the answering defendant to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's prima facie showing or in support of the affirmative defenses asserted in her answer or otherwise available to her (*see* ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***Grogg Assocs. v South Rd. Assocs.***, 74 AD3d 1021 907 NYS2d 22 [2d Dept 2010]; ***Washington Mut. Bank v O'Connor***, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]; ***J.P. Morgan Chase Bank, NA v Agnello,*** 62 AD3d 662, *supra*; ***Household Fin. Realty Corp. of New York v Winn***, 19 AD3d 545, *supra*). In this regard, the court notes that where a defendant fails to oppose some or all matters advanced on a motion for summary judgment, the facts, as alleged in the movant's papers, may be deemed admitted as there is, in effect, a concession that no question of fact exists (*see* ***Kuehne & Nagel, Inc. v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; ***Argent Mtge. Co., LLC v Meutesana***, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). For the reasons stated below, the court finds that the opposing papers submitted by defendant Crocitto were insufficient to raise any genuine question of fact requiring a trial on the merits of the plaintiff's claims for foreclosure and sale and insufficient to demonstrate any bona fide defenses (*see* CPLR 3211[e]).

The opposing papers submitted by defendant Crocitto consist of an affirmation by her counsel together with certain exhibits attached to the plaintiff's moving papers. A review thereof reveals that none of the affirmative defenses set forth in the answer of defendant Crocitto are advanced in opposition to the plaintiff's motion for the defendant's challenges to the plaintiff's standing. All affirmative defenses not asserted by the defendant are thus dismissed under the case authorities set forth above.

Of the grounds advanced in the opposing papers the first rest upon claims that the plaintiff's proof is insufficient to establish its claims for foreclosure and sale. Such claims are without merit since the plaintiff's prima facie case was established upon its production of the mortgage, the unpaid note and due evidence of a default under the terms thereof (*see* CPLR 3212; RPAPL § 1321; ***HSBC Bank v Shwartz,*** 88 AD3d 961, 931 NYS2d 528 [2d Dept 2011]; ***Countrywide Home Loans v Delphonse***, 64 AD3d 624, *supra*; ***J.P. Morgan Chase Bank v Agnello,*** 62 AD3d 662, *supra*; ***Wells Fargo Bank Minnesota v Perez***, 41 AD3d 590, *supra*; ***Household Fin. Realty Corp. of New York v Winn***, 19 AD3d 545, *supra*; ***Ocwen Fed. Bank FSB v Miller***, 18 AD3d 527, *supra*).

The defendant's attack upon the plaintiff's standing, which is incorporated into her claims of an absence of sufficient proof, rest upon the alleged invalidity of the assignment upon which the plaintiff relies to establish its standing. As indicated above, the plaintiff's standing is premised upon an April 26, 2010 corporate assignment of the subject mortgage which included a transfer of the underling debt represented by the credit line agreement. This assignment was executed by a corporate officer of Bank Of America, NA, which is described therein as the successor by merger to the original lender, Fleet National Bank. The defendant claims that due to a purported absence any ownership in the note and mortgage by the assignor, Bank of America, NA, said assignment was ineffective to transfer the mortgage to the plaintiff especially in the absence of any prior assignment from the original lender, Fleet National Bank.

These claims are, however, unavailing in light of the provisions of Banking Law § 602, which govern the effect of a merger of banks. It is therein provided that the receiving bank "shall be considered the same business and corporate entity" as the bank merged into it, and that all of the property, rights, and powers of the merged bank shall vest in the receiving bank (*see* ***Ladino v Bank of America*** , 52 AD3d 571, 861 NYS2d 683 [2d Dept 2008]). The defendant's challenges to the validity of the assignment are thus rejected as unmeritorious. Moreover, the transfer of the note representing the mortgage debt by Bank of America, NA, as successor by merger to Fleet National Bank, contained in the April 26, 2010 assignment in favor of the plaintiff, was sufficient in and of itself to effect a transfer of the mortgage (*see* ***US Bank Natl. Assn. v Cange,*** 96 AD3d 825, 947 NYS2d 522 [2d Dept 2012]; ***GRP Loan, LLC v Taylor***, 95 AD3d 1172, 945 NYS2d 336 [2d Dept 2012]; ***Deutsche Bank Natl. Trust Co. v Rivas***, 95 AD3d 1061, 945 NYS2d 328 [2d Dept 2012]; ***US Bank, Natl. Assn. v Sharif***, 89 AD3d 723, 933 NYS2d 293 [2d Dept 2011]; ***U.S. Bank, NA v Collymore***, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; ***Deutsche Bank Natl. Trust Co. v Pietranico***, 33 Misc3d 528, 928 NYS2d 818 [Sup.Ct., Suffolk County, 2011]). The defendant thus failed to establish that her standing defense is sufficiently meritorious to defeat the plaintiff's motion for summary judgment.

The defendant further claims an entitlement to a default judgment on her counterclaim to recover a money judgment from the plaintiff in the principal amount of $60,000.00 due to the plaintiff's failure to reply to said counterclaim. As the plaintiff correctly points out, however, the defendant's demand for such relief is improperly asserted in her opposing papers which were served without benefit of notice of cross motion (*see* CPLR 2215). In addition, such demand is otherwise improper due the defendant's abandonment of her counterclaim by her failure to move for judgment thereon within the one year time period required by CPLR 3215(c) and her concomitant failure to advance a reasonable excuse for the delay (*see* ***Giglio v NTIIMP, Inc***, 86 AD3d 301, 926 NYS2d 546 [2d Dept 2011]). In any event, the defendant's counterclaim for recovery of money damages due to the gouging of her equity interest by reason of the purportedly unconscionable, unfair and unscrupulous terms of the loan are so wholly lacking in merit that a denial of a default judgment is warranted under CPLR 3215(f) (*see* ***Csaszar v. County of Dutchess,*** 95 AD3d 1009, 943 NYS2d 610, [2d Dept 2012]; see also ***Baron Assoc., LLC v Garcia Group Enter., Inc***., 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, *supra*; ***Ricca v Ricca*** 57 AD3d 868, 869, 870 NYS2d 419 [2d Dept 2008]).

Those portions of this motion wherein the plaintiff seeks summary judgment dismissing the affirmative defenses of defendant Crocitto and in favor of the plaintiff on its complaint against such defendant is thus granted. However, the plaintiff's application for the appointment of a referee to compute is denied, without prejudice, to a new application for the same relief upon proper papers.

It is well established that the appointment of a referee to compute as contemplated by RPAPL § 1321 is not appropriate unless the claims of the plaintiff have been adjudicated in its favor by the court and the only issues left for determination are those concerning the long account (*see* ***Vermont Fed. Bank v Chase***, 226 AD2d 1034, 641 NYS2d 440 [2d Dept 10996]). Favorable adjudications of the claims of the plaintiffs may be made by the fixation of defaults in answering or by an award of summary judgment on its complaint against the defendants (*see* ***Bank of East Asia Ltd. v Smith***, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]; ***Vermont Fed. Bank v Chase***, 226 AD2d 1034, *supra*; ***Perla v Real Prop. Holdings, LLC***, 23 Mics2d 697, 874 NYS2d 873 [Sup Ct. Kings County 2009]). Until the plaintiff's claims against all of the defendants joined in the foreclosure action have been so adjudicated, an application for the appointment of a referee to compute is premature (*see* RPAPL § 1321; ***Sharaga v Schwartzberg***, 149 AD2d 578, 540 NYS2d 451 [2d Dept 1989]).

Here, the plaintiffs' motion papers did not include a demand for a default judgment against the non-answering defendants with the requisite elements of proof required by CPLR 3215(f). The moving papers also failed to establish whether appearances by service of answers or otherwise were interposed by the defendants other than defendant Crocitto. Under these circumstances, the court denies the plaintiffs' motion for the appointment of a referee pursuant to RPAPL § 1321 as the same is premature. Said denial is without prejudice to the interposition of a new application for the fixation of the defaults of all non-answering defendants pursuant to CPLR 3215(f) and (g) and the appointment of a referee to compute as contemplated by RPAPL § 1321. Any such application shall include a copy of this order, as the award of summary

judgment in favor of the plaintiffs against the answering defendant set forth in this order is a necessary component of any future application for the issuance of an order of reference.

The record reflects that a conference of the type mandated by the Laws of Laws of 2008, Ch. 472 § 3-a as amended by the Laws of 2009 Ch. 507 § 10 and/or by CPLR 3408 was previously conducted once by this court on September 27, 2011 and nine times prior in the specialized mortgage foreclosure. It is quite apparent that no further conferences are required under any statute, law or rule.

In view of the foregoing, the instant motion is granted only to the extent set forth above. A copy of *this order must accompany any future application* for an order fixing the defaults of the defendants who have not answered and for an order of reference by virtue of all accelerated judgments granted to the plaintiffs pursuant to CPLR 3212 and 3215. Said application should also reflect that the conference requirement imposed upon court by above cited statutory provisions has been satisfied.

Proposed order granting summary judgement and appointing referee to compute has been marked "not signed" without prejudice.

DATED: 9/20/12

THOMAS F. WHELAN, J.S.C..