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SHORT FORM ORDER

INDEX
NO.: 32801/10

SUPREME COURT - STATE OF NEW YORK
IAS PART 37 - SUFFOLK COUNTY

PRESENT: Hon. JOSEPH FARNETI
Justice of the Supreme Court

MOTION DATE 1-27-12
ADJ. DATE 9-13-12
Mot. Seq. # 001 MG

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THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK, AS TRUSTEE, FOR CWABS, INC., ASSET-BACKED CERTIFICATES, SERIES 2007-12,

Plaintiff,

-against-

MARILYN FUENTES; FERNANDO ARNALDO; JOSE ORTIZ; TOYOTA MOTOR CREDIT CORPORATION, "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 mortgaged premises described in the complaint,

Defendants,

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Upon the following papers numbered 1 to 31 read on this motion for summary judgment, an order of reference and other affirmative relief ; Notice of Motion and supporting papers 1-19 ; Affirmation/Affidavit in Opposition and supporting papers 20-26 ; Replying Affidavits and supporting papers 27-31 ; Other Memorandums of law ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the plaintiff for an Order: (1) pursuant to CPLR 3025 (b), granting Plaintiff leave to amend the reply to counterclaims to assert a statute of limitations defense in response to Borrower's federal statutory counterclaim and affirmative defense under the Truth in Lending Act; (2) pursuant to CPLR 3212, granting summary judgment in favor of Plaintiff and against the Borrower, on the grounds that there are no triable issues of fact in this proceeding, that the Borrower's affirmative defenses and counterclaims asserted in her Answer lack merit and fail to state valid defenses to foreclosure, and that accordingly, upon the presentation and coming in of the Referee's Report, Plaintiff is entitled to all of the relief requested in its complaint, including a

judgment of foreclosure and sale as a mater of law; (3) dismissing each of the Borrower's five affirmative defenses and four counterclaims as each is without merit; (4) pursuant to 3125 (c), entering judgment on default against defendant Toyota Motor Credit Corporation as it has failed to appear, answer or otherwise move with respect to the Complaint, after being duly served and the time in which to do so has passed; (5) amending the caption of this proceeding by directing that: (i) the names of the "John Doe" defendants be deleted, and (ii) the names of Fernando Arnoldo and Jose Ortiz also be deleted as this action has been voluntarily discontinued against these judgment creditors; (6) pursuant to RPAPL 1321, referring this action to some suitable person as referee (the "Referee"), (ii) to ascertain and compute the amount due Plaintiff for principal and interest under the loan set forth in the complaint and for any other amounts due and owing Plaintiff or the original mortgagee under the terms of the Mortgage, (iii) to examine and report whether the mortgage premises should be sold in a single parcel, and (iv) to direct that upon presentation and coming in of the Referee's Report, Plaintiff have the usual judgment of foreclosure and sale, is hereby granted; and it is further

ORDERED that the amended reply by plaintiff setting forth affirmative defenses of a stature of limitations defense to the defendants' affirmative defense/counterclaims attached to its moving papers shall be deemed served *nunc pro tunc* to the date of service of this motion; and it is further

ORDERED that plaintiff shall serve a copy of this Order with notice of entry within sixty (60) days of the date this Order is signed upon counsel for the defendant pursuant to CPLR 2103 (b), (1), (2) or (3), and thereafter file the affidavit(s) of service with the Clerk of the Court.

The present action involves the foreclosure of a mortgage alleging that the defendant Marilyn Fuentes (hereinafter "Fuentes") defaulted in repaying a note and mortgage which was secured by real property located at 119 Deauville Parkway, Lindenhurst, New York 11757.

Issue was joined by the service of Fuentes answer with two affirmative/counterclaims on or about September 14, 2010. In response to the counterclaims, plaintiff, as a defendant on the counterclaims, served a reply answer on or about January 5, 2011.

The Court will first address that branch of the plaintiff's motion which seeks to amend its reply to defendant's counterclaim to assert a stature of limitations defense to the defendants' federal statutory counterclaim and affirmative defense under the Truth in Lending Act. Fuentes opposes the motion and submits her affidavit and counsels affirmation in opposition to the motion both facts of the motion.

CPLR 3025 (b) provides:

> (b) Amendments and supplemental pleadings by leave. A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occupancies, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just.

Leave to amend a pleading is within a court's discretion should be freely granted in the absence of a showing of prejudice or surprise resulting directly from the delay (*see* ***McCaskey Davies & Assoc. Inc. v New York City Health and Hosps. Corp.,*** 59 NY 2d 755, 463 NYS2d 434 [1983]; ***Fahey v County of Ontario,*** 44 NY2d 934, 408 NYS2d 314 [1978]).

The Appellate Division, Second Department, in ***U.S. Bank, N. A. v Sharif***, 89 AD3d 723, 724, 933 NYS 2d 293 (2d Dept 2011) has explained:

> " 'Motions for leave to amend pleadings should be freely granted, absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit' (***Aurora Loan Servs., LLC v Thomas*** , 70 AD3d at 987 [2010]; *see* CPLR 3025 [b]; ***Lucido v Mancuso,*** 49 AD3d 220, 222 [2008]). "Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine "' ***Public Adm'r of Kings County v Hossain Constr. Corp.,*** 27 AD 3d 714, 716 [2006]; quoting ***Edenwald Constr. Co. v City of New York***, 60 NY2d 957, 959 [1983]; *see* ***Abrahamian v Tak Chan*** , 33 AD3d 947, 949 [2006]).

The Court finds that the proposed amended answer by plaintiff is not palpably insufficient or devoid of merit (*see* ***U.S. Bank N.A. v Collymore,*** 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; ***Slutsky v Blooming Grove Inn,*** 147 AD2d 208, 542 NYS 2d 721 [2d Dept 1989]). Therefore that branch of the plaintiff's motion to amend its counterclaim answer to assert a statute of limitations affirmative defense is granted.

Plaintiff additionally moves for summary judgment (*see* CPLR 3212 [a]; ***Myung Chun v North American Mortgage Co.,*** 285 AD2d 42; 729 NYS2d 716 [1st Dept 2001]) to dismiss Fuentes' answer, affirmative defenses/counterclaims and for the issuance of an order of reference. "[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, 764 NYS2d 635 [2d Dept 2003]; *see also* ***Wells Fargo Bank v Cohen,*** 80 AD3d 753, 915 NYS2d 569 [2d Dept 2011]).

Plaintiff has established a *prima facie* case in this foreclosure action by the submission of the affidavit testimony Keith F. Goforth, an AVP of plaintiff's servicer and counsel's affirmation along along with copies of the pleadings, and relevant mortgage documents, such as the note and mortgage signed by Fuentes on July 6, 2001, and documentary evidence of Fuentes' default since November 1, 2008 and that the default to date has not been cured (*see* ***Valley Natl. Bank v Deutsch,*** 88 AD3d 691, 930 NYS2d 477 [2d Dept 2011]; ***Wells Fargo Bank v Karla,*** 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; ***Wash. Mut Bank F.A. v O' Conner,*** 63 AD3d 832, 889 NYS2d 696 [2d Dept 2009]; ***Bercy Invs. v Sun,*** 239 AD2d 161, 657 NYS2d 47 [1st Dept 1997]; ***Bank of Leumi Trust Co. of New York v Lightning Park, Inc,*** 215 AD2d 246, 626 NYS2d 202 [1st Dept 1995]; ***Village Bank v Wild Oaks Holding, Inc.,*** 196 AD2d 812, 601 NYS2d 940 [2d Dept 1993]; ***Dart Assoc. v Rosa Meat Mkt.,*** 39 AD2d 564, 321 NYS2d 853 [2d Dept 1972]; ***Gould v McBride,*** 36 AD2d 706, 319 NYS2d 125

[1st Dept 1971]; *aff'd* 29 NY2d 708, 36 NYS2d 565 [1971]), and other documentary proof that it is a current holder in due course of a valid note and mortgage executed by Fuentes (*see* ***Deutsche Bank Natl' Trust Co. v Pietranoico,*** 33 Misc3d 528, 928 NYS 2d 818 [Sup Ct Suffolk County 2011]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Plaintiff has established and Fuentes does not deny the existence of a valid note and mortgage. Plaintiff also alleges and noticed the past due, unpaid mortgage balance, which Fuentes has not contested as well as the acceleration default notice (*see* ***Fed. Home Loan Mtge Corp. v Karastathis,*** 237 AD2d 558, 655 NYS2d 631 [2d Dept 1997]; ***First Trust Natl. Ass'n v Meisels*** 234 AD2d 414, 651 NYS2d 121 [2d Dept 1996]). Thus, plaintiff has made a *prima facie* showing of entitlement to summary judgment in its favor (*see* ***Northeast Sav. v Rodriguez,*** 159 AD2d 820, 553 NYS2d 490 [3d Dept 1991]; *app dism* 76 NY2d 889, 561 NYS2d 550 [1990]).

Since plaintiff has presented documentary evidence of its entitlement to summary judgment as a matter of law, it now becomes incumbent upon Fuentes to come forward with evidentiary facts proving the existence of a triable issue with regards to bona fide defenses to the action such as waiver, estoppel, bad faith, fraud, oppressive and/or unconscionable conduct on the part of the plaintiff or its predecessor in interest (*see* ***Marine Midland Bank, N.A. v Freedom Rd. Realty Assoc.,*** 203 AD2d 538, 611 NYS2d 34 [2d Dept 1994]; ***Village Bank v Wild Oaks Holding, Inc.,*** 196 AD2d 812, *supra*; ***Marton Assoc. v Vitale,*** 172 AD2d 501, 568 NYS2d 119 [2d Dept 1991]; ***Andre v Pomery,*** 35 NY2d 362 NYS2d 131 [1974]). Fuentes has not met that burden. Fuentes general denials and denial of information sufficient to form a belief, are insufficient, as a matter of law, and summary judgment will be granted when "the Answer proffers nothing more than general denials" (***Fairbanks Co. v Simplex Supply Co.,*** 126 AD2d 882, 511 NYS2d 171 [3d Dept 1987]; (*see also* ***1130 Anderson Ave. Realty Corp. v Mina Equities Corp.***, 95 AD2d 169, 465 NYS2d 511 [1st Dept 1983]). "Where . . . the cause of action is based upon documentary evidence, the authenticity of which is not disputed, a general denial, without more, will not suffice to raise an issue of fact" (***Gould v McBride,*** 36 AD2d 706, 319 NYS2d 125 [1st Dept 1971]; *affd* 29 NY2d 768, 326 NYS2d 565 [1971]).

Further, speculation and conjecture is insufficient to defeat plaintiff's motion (*see* ***Capobianco v Mari,*** 267 AD2d 191, 699 NYS2d 487 [2d Dept 1999]; ***Presta v Houssian,*** 186 AD2d 542, 589 NYS2d 791 [2d Dept 1992]). In opposition, Fuentes has failed to offer any valid evidentiary defense or counterclaim to the motion (*see* ***Castro v Liberty Bus Co.***, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]). As noted herein, Fuentes does not even deny in her affidavit that she is in default in her mortgage payments. Fuentes states in her affidavit that after closing on the loan she learned that her earnings were insufficient to make the monthly mortgage payments. Fuentes was a signatory to the Truth in Lending Disclosure Statement on July 7, 2007, the closing date for the loan. " A party is under an obligation to read a document before he or she signs it, and a party cannot generally avoid the effect of a [document] on the ground that he or she did not read it or know its contents" (***Martino v Kaschak,*** 208 AD2d 698, 617 NYS2d 529 [2d Dept 1994]; *see also* ***Lavi v Hamedin*** , 234 AD2d 428, 631 NYS2d [2d Dept 1996]). Her allegations of a violation of the Federal Truth in Lending Act are just that, allegations unsupported by factual allegations. These allegations do not give the Court and the plaintiff notice of the transactions, occurrence, or series of transactions or occurrences intended to be proved (*see* CPLR 3013). Accordingly, the conclusory allegations of a violation of the federal act,

without more, is insufficient to state a legally cognizable defense or claim (*see* ***Cedeno v IndyMac Bancorp , Inc.*** 2008 WL 39992304 [SDNY]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]; ***Glassman v Zoref,*** 291 AD2d 430, 737 NYS2d 537 [2d Dept 2002]; ***Rebecchi v Whitmore,*** 172 AD2d 600 [2d Dept 1991]; ***Zuckerman v City of New York*** , 49 NY 2d 557, 427 NYS 2d 595 [1980]), and the defenses and counterclaims are dismissed as being without merit in law and fact.

In essence, Fuentes seeks a stay of the foreclosure proceedings to allow her to recover from personal misfortunes which occurred after the issuance of the mortgage. However, she has not provided any legally sufficient grounds to support a stay of the foreclosure sale. Furthermore, "[a]ny sympathy which the mortgagors situation might arouse cannot be permitted to undermine the stability of contractual obligations" (***Jamaica Savings Bank v Cohen***, 36 AD2d 743, 320 NYS2d 471 [2d Dept 1971]). While this Court is sympathetic to Fuentes' plight, the plaintiff has demonstrated that all the proceedings in this foreclosure action have been regular and in accordance with the contract and accordingly, the contract must be upheld; it cannot relieve the defendant from the consequences of her failure to pay the mortgage payments because the results are harsh (*see* ***Graf v Hope Bldg Corp.,*** 254 NY 1 [1930]).

Accordingly, the motion for summary judgment and for the appointment of a referee to compute and amend the caption amongst other affirmative relief is granted. The Order of Reference is being concurrently signed with this Order. All matters not decided herein are hereby deemed denied.

This constitutes the decision and Order of the Court.

Dated: September 14, 2012
Riverhead, NY

Hon. Joseph Farneti
Acting Justice Supreme Court

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**