SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

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JPMORGAN CHASE BANK NATIONAL ASSOCIATION,

Plaintiff,

- against -

CECILIA ABREU; RAFAEL ABREU; EMPIRE PORTFOLIOS INC., FLEET NATIONAL BANK; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; NEW YORK CITY PARKING VIOLATIONS BUREAU; NEW YORK CITY TRANSIT ADJUDICATION BUREAU; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; STATE FARM INDEMNITY CO., UNITED STATES OF AMERICA-INTERNAL REVENUE SERVICE; "JOHN DOES' and "JANE DOES," said names being fictitious, parties intended being possible tenants or occupants of premises, and corporations, other entities or persons who claim, or may claim, a lien against the premises,

Defendants.

Index No.: 13682/2012

Motion Date: 10/03/13

Motion No.: 48

Motion Seq.: 1

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The following papers numbered 1 to 15 were read on this motion by plaintiff for an order dismissing the answer of plaintiff, Cecilia Abreu; granting summary judgment in favor of the plaintiff; for a default judgment against all remaining defendants; for an order pursuant to RPAPL § 1321 appointing a referee to ascertain and compute the amount due to the plaintiff; and for an order amending the caption to strike the names of the "John Doe" and "Jane Doe" defendants:

	Papers Numbered
Notice of Motion Affidavits-Exhibits-Memo of Law	1 - 7

Affirmation in Opposition-Affirmation.....8 - 10
Reply Affirmation.....11 - 15

In this mortgage foreclosure action, plaintiff moves for an order striking the answer of defendant Cecilia Abreu; granting summary judgment against said defendant on the ground that her answer contains no valid defense and no triable issue of fact; granting a default judgment against the remaining defendants who have not answered; appointing a referee to compute the sum due and owing to plaintiff, and amending the caption. Defendant Cecilia Abreu has submitted opposition to the motion.

This foreclosure action pertains to the property located at 158-20 80th Street, Howard Beach, New York. Based upon the record before this court, the defendants Cecilia Abreu and Rafael Abreu entered into a note and mortgage with Fleet Mortgage Corp on December 17, 1999 in the principal amount of $240,000.00. Installment payments of principal and interest were to be made on the note at the rate of $1,781.99 beginning on February 1, 2000. As collateral security for the payments on the note, defendants also executed a mortgage in favor of Fleet Mortgage Corp. dated December 17, 1999. Plaintiff asserts that the mortgage was acquired thereafter by the plaintiff through merger agreements. The plaintiff submits that defendants defaulted on the note when they failed to make their monthly mortgage payments beginning October 1, 2011. Plaintiff contends that there is now due and owing to the plaintiff the sum of $55,683.40.

The plaintiff subsequently accelerated the defendants' mortgage and brought an action to foreclose its mortgage by filing a lis pendens and summons and complaint on June 29, 2012. Cecilia Abreu was served on July 10, 2012 with a copy of the summons and complaint as well as the appropriate notices pursuant to RPAPL § 1303.

Defendant, Cecilia Abreu, served a verified answer dated August 29, 2012, containing a general denial and asserting seven affirmative defenses including plaintiff's failure to comply with all conditions precedent; failure to obtain personal jurisdiction over the defendant; failure to state a cause of action; failure to join all necessary parties; lack of capacity to sue; lack of standing; and failure to identify and allege proof as to the proper assignments of the mortgage to JPMorgan Chase Bank.

A foreclosure settlement conference was held on December 20, 2012. The Referee found that there was litigation in the Surrogate's Court involving the subject property which precluded settlement negotiations at that time. A second conference was held on April 11, 2013, after which the referee directed the

plaintiff to file an application seeking an order of reference.

In support of the instant motion for summary judgment and an order of reference, the plaintiff submits the affirmation of counsel Richard Fay, Esq., the affidavit of Ryan K. Bucholtz, a Vice President of JP Morgan Chase Bank, National Association; a copy of the Note and Mortgage; copies of the affidavits of service on all the defendants; a copy of the pleadings; a copy of the mortgage assignment; 90 day notice of default and intent to foreclose; and a copy of the RPAPL 1304 notices sent to the defendant with the summons and complaint.

Plaintiff asserts that it is the present holder of the note and mortgage and contends that the evidence submitted demonstrates that a sum of money was advanced to the defendants, that defendants signed the note and mortgage containing the terms of repayment, that the defendants failed to pay the installments as provided for in the note and mortgage following proper service of the appropriate default notices, and that the answer interposed by the defendant fails to set forth a triable issue of fact or a meritorious defense.

With respect to the defendant's affirmative defenses, counsel submits first that the plaintiff complied with all conditions precedent. The affidavit of Ryan K. Bucholtz, a Vice president of JPMorgan Chase dated June 25, 2013 states that based upon his personal knowledge and review of Chase's business records, the defendant executed a note dated December 17, 1999 for $240,000 secured by a mortgage encumbering the subject property. The mortgage was recorded in Queens County on January 20, 2000. He states that Chase is the present holder of the note. The affidavit states that defendant defaulted under the terms of the note and mortgage by failing to tender payment for the monthly installment due on October 1, 2011. The borrower's default has not been cured and the loan balance was accelerated. The unpaid balance as of June 25, 2013 is $55,683.40. The notice of default and a ninety day pre-foreclosure notice required by RPAPL § 1304 were sent to the defendant on November 1, 2011.

Counsel also asserts that the plaintiff was properly served and personal jurisdiction obtained pursuant to CPLR 308(4) as evidenced by the copy of the affidavit of service annexed to the motion and filed with the Court on July 24, 2012. Further plaintiff asserts that defendant has waived the defense of lack of personal jurisdiction by failing to move for dismissal on that ground within 60 days after service of the answer (see CPLR 3211[e]). With respect to the affirmative defense of failure to state a cause of action counsel asserts that the complaint is

sufficient on its face as it clearly alleges all of the elements necessary to state a cause of action for foreclosure including the fact that the plaintiff is the holder of a note and mortgage on which the defendants defaulted and failed to cure the default despite given adequate notice of default.

Counsel also asserts that all of the necessary parties have been joined as defendants based upon a title search and report from the title company listing all necessary party defendants. In addition, the defendant's answer does not identify any party not served with process who is necessary for the adjudication of the matter on the merits.

Counsel also asserts that JP MORGAN has the lawful capacity to bring the action as a bank organized under the laws of the State of New York that transacts business in the State of New York (citing Banking Law § 200).

With respect to standing, counsel states that a plaintiff has standing where it is both the holder or assignee of the underlying note and mortgage at the time the action is commenced (citing CitiMortgage, Inc. v Rosenthal, 88 AD3d 759 [2d Dept. 2011][in a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced]; Bank of N.Y. v Silverberg, 86 AD3d 274, [2d Dept. 2011]; U.S. Bank, N.A. v Collymore, 68 AD3d 752 [2d Dept. 2009]). Counsel states that in this case the note was endorsed in blank by the original lender Fleet Mortgage Corp and is therefore payable to the bearer. Citing UCC 3-204(2), counsel asserts that plaintiff's physical possession of the note which is endorsed in blank establishes the deliverance of the note as well as the plaintiff's ownership of the note. The note submitted with the plaintiff's papers contains the endorsement in blank by Fleet Mortgage Company. Further, plaintiff submits documents showing that Washington Mutual Bank, FA by merger on June 1, 2001 became successor in interest to Fleet Mortgage Corp. Said merger agreement was recorded in 2002. Plaintiff also submits a copy of a purchase and assumption agreement dated September 28, 2008 and an affidavit of the FDIC dated October 2, 2008 indicating that pursuant to the terms of the Purchase and Assumption Agreement between FDIC as receiver of Washington Mutual Bank and JPMorgan Chase Bank that JPMorgan Chase acquired certain of the assets including all loans and all loan commitments of Washington Mutual by operation of law. Plaintiff asserts that pursuant to Banking Law § 602 JPMorgan Chase as the receiving corporation acquired the right to enforce the note and mortgage.

In opposition, Jeffrey Guerra, Esq. Counsel for defendant Cecilia Abreu contends that summary judgment should be denied because there is a question of fact as to when the delivery of the note was made to the plaintiff. Defendant claims that although the mortgage and note were acquired by plaintiff on September 25, 2008 when the purchase and assumption agreement was entered into between Washington Mutual and JPMorgan Chase, plaintiff's submissions fail to offer any specifics as to the nature of the physical delivery of the note and whether the physical delivery occurred prior to the commencement of the action. Defendant asserts that despite having possession of the note and mortgage, plaintiff must also provide testimony from an individual with personal knowledge stating the circumstances in which the note and mortgage were delivered to plaintiff prior to the commencement of the action (citing HSBC Bank USA v Hernandez, 92 AD3d 843 [2d Dept. 2012][either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation]). Counsel claims that the plaintiff's moving papers do not include factual details as to the nature of the physical transfer of ownership.

Secondly, defendant alleges that plaintiff has failed to join all necessary parties. Counsel states that defendants Cecilia Abreu and Rafael Abreu were married at the time the mortgage was entered into. Counsel claims that in August 2008, based upon mental incapacity, Rafael Abreu executed certain advance directives including a power of attorney naming Gloria Adorno as attorney in fact and trustee of an irrevocable trust which contains the substantive assets of Rafael Abreu. Counsel asserts that Gloria Adorno paid the mortgage on behalf of the defendants. Counsel also asserts that JPMorgan Chase was on notice of the defendant's durable power of attorney. Cecilia Abreu submits an affidavit stating that in 2010 her husband became incapacitated based upon an injury he sustained as a young adult. In 2008 she states that he signed a power of attorney naming his daughter Gloria as attorney in fact and trustee of the living trust. She states that there is an action pending in Surrogates Court requesting that Gloria Adorno pay her husband's arrears including the arrears on the mortgage.

Here, the plaintiff established prima facie, its entitlement to summary judgment through submission of proof of the existence of the underlying note, mortgage and default in payment after due demand (see GRP Loan, LLC v Taylor, 95 AD3d 1172[2d Dept 2012]; Deutsche Bank Natl. Trust Co. v Posner, 89 AD3d 674 [2d Dept. 2011]) Bancorp v Pompee, 82 AD3d 935 [2d Dept.2011]; Wells Fargo Bank v Cohen, 80 AD3d 753 [2d Dept. 2011]). Witelson v Jamaica

Estates Holding Corp. I, 40 AD3d 284 [1st Dept. 2007]; Marculescu v Ouanez, 27 AD3d 701 [2d Dept. 2006]; Campaign v Barba, 23 AD3d 327 [2d Dept.2005]; US. Bank Trust National Assoc. v Butti, 16 AD3d 408 [2d Dept. 2005]).

This Court finds that the plaintiff's submissions are sufficient to establish its entitlement to summary judgment against defendant mortgagor Cecilia Abreu. The plaintiff's moving papers demonstrate, prima facie, that none of the asserted defenses set forth in the answer of defendant are meritorious and plaintiff is entitled to summary judgment on its claims against Cecilia Abreu (see EMC Mortg. Corp. v Riverdale Assocs., 291 AD2d 370 [2d Dept. 2002]; State of New York v Lang, 250 AD2d 595 [2d Dept. 1998]). As stated above, the complaint herein sufficiently sets forth a valid cause of action for foreclosure. Plaintiff has submitted a copy of the mortgage, note, and affidavit from Mr. Bucholtz establishing defendants' default in payment. The plaintiff demonstrated proper service of the summons and complaint and showed by admissible evidence that it had been properly been assigned the note and mortgage as of the date of the commencement of the action. Plaintiff demonstrated that Fleet mortgage Corp. merged into Washington Mutual Home Loans in 2001. Plaintiff also presented sufficient evidence that JPMorgan Chase purchased the loans and other assets of Washington Mutual on September 2, 2008. At that time JPMorgan Chase became the lawful holder of the note pursuant to the valid Purchase and Assumption Agreement. The Appellate Division has held that the acquiring bank pursuant to a purchase and assumption agreement from the FDIC has standing to maintain a foreclosure action (see JPMorgan Chase Bank, N.A. v. Shapiro, 104 AD3d 411 [1st Dept. 2013]; JP Morgan Chase Bank Natl. Assn. v Miodownik, 91 AD3d 546 [1st Dept. 2012][the P & A Agreement evinced that JPMC purchased all of WAMU's loans and loan commitments, and therefore had the right to foreclose on a defaulting borrower]).

Further, Mr. Bucholtz states in his affidavit, which is dated prior to the commencement of the action, and is based upon his personal review of the records, that JPMorgan is the holder of the note and mortgage. Plaintiff also submitted a copy of the note showing that it was the holder of the note that was endorsed in blank by Fleet. Thus, plaintiff presented sufficient proof that it had standing to commence the action as it was both the holder and assignee of the subject mortgage and underlying note at the time the action is commenced (see Homecomings Fin., LLC v Guldi, 108 AD3d 506 [2d Dept 2013]; Deutsche Bank Natl. Trust Co. v. Whalen, 107 AD3d 931 [2d Dept. 2013]; US Bank N.A. v Cange, 96 AD3d 825[2d Dept 2012]).

Lastly, contrary to the defendant's contention, plaintiff is authorized to commence this mortgage foreclosure action. Even if JPMorgan Chase is a foreign bank which is not licensed in New York State, Banking Law § 200 authorizes foreign banks to loan money secured by mortgages on property in this State and to commence actions to enforce obligations under those mortgages (see First Wis. Trust Co. v Hakimian, 237 A.D.2d 249 [2d Dept. 1997]; Banque Arabe Et Internationale D'Investissement v One Times Sq. Assocs. Ltd. Partnership, 193 AD2d 387 [1st Dept. 1993]).

As the plaintiff has made a prima face case for summary judgment, the burden shifts to the defendant to produce evidence in admissible form sufficient to raise a material issue of fact In opposition to the motion, although the defendant's counsel made several allegations with regard to standing which do not have merit, defendant, in her affidavit, has not disputed that she executed the note and mortgage, defaulted on her loan payments, received notice of the default, attempted to cure her default or was not properly served with the summons and complaint. In addition, although defendant Cecilia Abreu states that her husband's attorney-in-fact, Gloria Adorno was not joined as a necessary party, the defendant has failed to submit a copy of the terms of the purported power of attorney or shown that said power of attorney is still viable or that it has been filed with the court. This court finds, therefore, that the defendant's assertions in opposing the motion are without merit.

Accordingly, this court finds that plaintiff's submissions are sufficient to establish its entitlement to summary judgment and also finds that the allegations set forth in defendant's affirmative defenses are insufficient to defeat the motion for summary judgment. Therefore, the plaintiff's motion for summary judgment is granted and the affirmative defenses contained in the defendant's answer are stricken. The submissions further reflect that plaintiff is entitled to amend the caption to delete the names of the John Doe and Jane Doe defendants. That branch of the motion for a default judgment against the remaining defendants who have not answered or appeared herein is granted. Plaintiff's application for the appointment of a referee to compute the amounts due under the subject mortgage is also granted.

Settle order on notice.

Dated: December 11, 2013
Long Island City, N.Y

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ROBERT J. MCDONALD
J.S.C.