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SHORT FORM ORDER

INDEX NO. 19574/2011

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 49 SUFFOLK COUNTY

PRESENT: HON. C. RANDALL HINRICHS
Justice of the Supreme Court

Motion Date: 11-13-2014
Adj. Date: 2-26-15
Motion Sequence.: 001: MotD

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JPMorgan Chase Bank, National Association,

Plaintiff,

-against-

Robert Corrado; Kim Corrado; JPMorgan Chase Bank, National Association successor in interest to Washington Mutual Bank FA; United States of America; Town Supervisor, Town of Brookhaven; New York State Department of Taxation and Finance, and "JOHN DOE #1" through "JOHN DOE #10", the last ten names being fictitious and unknown to the Plaintiff, the person or parties intended being the person or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the complaint,

Defendants.

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111 Eighth Avenue
New York, NY 10011

TOWN SUPERVISOR, TOWN OF BROOKHAVEN
1 Independence Hill
Farmingville, NY 11738

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the plaintiff dated October 16, 2014, and supporting papers; (2) Affirmation in Opposition by defendants Robert Corrado and Kim Corrado, dated January 20, 2015, and supporting papers; it is

ORDERED that the motion by the plaintiff for an order awarding summary judgment in its favor and against defendants Robert Corrado and Kim Corrado, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption is granted to the extent set forth below, and is otherwise denied; and it is

ORDERED that pursuant to CPLR 3212(g), the court hereby finds that the sole remaining issues of fact are whether or not the plaintiff complied with the mailing requirements relevant to the notices of default required by the note/mortgage and RPAPL §1304, and that the trial of this action shall be limited to these issues; and it is further

ORDERED that a pre-trial conference shall be held in this action on September 21, 2016 at 9:30 a.m. At IAS Part 49, Arthur M. Cromarty Court Complex, Fourth Floor, Courtroom 16, 210 Center Drive, Riverhead, New York 11901, at which counsel are directed to appear.

This is an action to foreclosure a mortgage on real property known as Lot#3 Westminster Ct., Nesconset, New York, and situated at 26 Westminster Court South, Nesconset, New York 11767 ("the property"). On or about May 3, 2004, defendants Robert Corrado and Kim Corrado ("the defendants") executed a note in the principal sum of $487,500.00. To secure said note, the defendants executed a mortgage on the property also dated May 3, 2004. The defendants allegedly defaulted on the note and mortgage by failing to make the monthly payments due on February 1, 2011, and each month thereafter. The plaintiff commenced the instant action on June 17, 2011. Issue was joined by service of the defendants' answer dated July 15, 2011. In their answer, the defendants generally deny some of the material allegations in the complaint, and also assert the following fifteen (15) affirmative defenses: (1) plaintiff's failure to state a cause of action; (2) plaintiff's failure to comply with RPAPL §1302; (3) plaintiff's failure to provide proper Notice of Default, notice of acceleration and failure to comply with RPAPL §1304; (4) improper verification of the complaint; (5) plaintiff's failure to comply with RPAPL §1303; (6) defendants have paid some of the amounts claimed; (7) action barred by statute of limitations; (8) action barred by statute of frauds; (9) action should be dismissed based upon documentary evidence; (10) defendants never received notice of default and/or notice of acceleration; (11) plaintiff's failure to comply with federal and state requirements regarding verifying the debt; (12) lack of personal jurisdiction over defendant Robert Corrado; (13) lack of personal jurisdiction over defendant Kim Corrado; (14) plaintiff's failure to join all necessary and interested parties; and (15) plaintiff's lack of standing.

Settlement conferences were held on August 27, 2012 and October 17, 2012, after which the case was marked "not settled."

By notice of motion dated October 16, 2014, the plaintiff moved for summary judgment. In opposition, the defendants address only the plaintiff's failure to comply with RPAPL §1304. The defendants' opposition is supported by an affidavit of Kim Corrado, indicating that she does not recall receiving the pre-foreclosure notices required by the mortgage and RPAPL §1304.

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 [2d Dept 2011]; *Wells Fargo Bank v Das Karla*, 71 AD3d 1006 [2d Dept 2010]; *Washington Mut. Bank, F.A. v O'Connor*, 63 AD3d 832 [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 [2d Dept 2010], quoting *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 467 [2d Dept 1997]). When moving to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is "without merit as a matter of law" (*see* CPLR 3211[b]; *Vita v New York Waste Servs., LLC*, 34 AD3d 559, 559 [2d Dept 2006]). In order for a defendant to successfully oppose such a motion, the defendant must show his or her possession of a bona fide defense, *i.e.*, one having "a plausible ground or basis which is fairly arguable and of substantial character" (*Feinstein v Levy*, 121 AD2d 499, 500 [2d Dept 1986]). Self-serving and conclusory allegations do not raise issues of fact (*see Rosen Auto Leasing, Inc. v Jacobs*, 9 AD3d 798, 799-800 [3d Dept 2004], and do not require the plaintiff to respond to alleged affirmative defenses which are based on such allegations (*Charter One Bank, FSB v Leone*, 45 AD3d 958, 959 [3d Dept 2007]).

The court first turns to the standing defense asserted in the defendants' answer. Where plaintiff's

standing has been placed in issue by the defendants' answer, plaintiff also must establish its standing as part of its prima facie showing (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355 [2015]; *Loancare v Firshing*, 130 AD3d 787 [2d Dept 2015]; *HSBC Bank USA, N.A. v Baptiste*, 128 AD3d 773 [2d Dept 2015]). A plaintiff establishes its standing by demonstrating that, when the action was commenced, it was either the holder or assignee of the underlying note (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355 [2015]; *Wells Fargo Bank, NA v Rooney*, 132 AD3d 980 [2d Dept 2015]). In the instant action, the original holder of the Note and Mortgage was Washington Mutual Bank, FA. Through its moving papers, the plaintiff has established that following the execution of the original note and mortgage but before this action was commenced, on September 25, 2008, the United States Office of Thrift Supervision closed Washington Mutual Bank and appointed the Federal Deposit Insurance Corporation (FDIC) as Receiver. On that same date, the bulk of Washington Mutual's assets were transferred to JPMorgan Chase Bank, NA pursuant to a Purchase and Assumption Agreement. Courts have held that this Purchase and Assumption Agreement evinces that JPMorgan Chase Bank, NA (the plaintiff herein) purchased all of Washington Mutual Bank's loans and loan commitments, and therefore had standing to foreclose on mortgages formerly held by Washington Mutual (*see JP Morgan Chase Bank, N.A. v Shapiro*, 104 AD3d 411 [1st Dept 2013]; *JP Morgan Chase Bank N.A. v Miodownki*, 91 AD3d 546 [1st Dept 2012]; *Haynes v JP Morgan Chase Bank*, N.A., 2011 WL 2581956 [MD Ga 2011]) Therefore, the plaintiff demonstrated its prima facie burden as to its standing. In opposition, the defendants do not address this defense and thus fail to raise a triable issue of fact (*see Wells Fargo Bank, N.A. v Charlaff*, 134 AD3d 1099 [2d Dept 2015]). Accordingly, the fifteenth affirmative defense asserted in the answer is stricken.

The court next turns to the third and tenth affirmative defenses raised in the defendants' answer. Proper service of the RPAPL §1304 notice is a condition precedent to the commencement of a residential foreclosure action, once raised, and is plaintiff's burden to establish (*see Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909 [2d Dept 2013]). Thus, in support of its motion for summary judgment on the complaint, the plaintiff was required to prove its allegations by tendering sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL §1304, and failure to make this showing requires denial of the motion, regardless of the opposing papers (*Aurora Loan Servs., LLC v Weisblum*, 85 AD3d at 106 [citation omitted]). The plaintiff has failed to establish its prima facie entitlement to judgment as a matter of law because it failed to supply adequate evidentiary proof of compliance with RPAPL §1304 *(see Bank of N.Y. Mellon v Aquino*, 131 AD3d 1186 [2d Dept 2015]; *Wells Fargo Bank, NA v Burke*, 125 AD3d 765 [2d Dept 2015]; *Hudson City Sav. Ban v DePasquale*, 113 AD3d 595 [2d Dept 2014]). The plaintiff submitted neither an affidavit of service of the 90-day notice nor an affidavit from one with personal knowledge of the mailing, along with copies of the certified mailing receipts stamped by the United States Post Office on the date of the alleged mailing (*see Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909 [2d Dept 2013]). The conclusory statements set forth in the affidavit of Patrick C. Raymond, a Vice President of JPMorgan Chase Bank, N.A., even when combined with copies of certain submitted documentation, are insufficient to meet the requirements of the statute (*see Hudson City Sav. Bank v DePasquale*, 113 AD3d 595, *supra*; *US Bank N.A. v Lampley*, 46 Misc3d 630 [Sup Ct, Kings County 2014]). Mr. Raymond does not allege sufficient facts as to how or when compliance was accomplished. Additionally, he does not state that he served the notice, nor does he identify the individual who allegedly did so. Further, it is noted that Mr. Raymond's affidavit does not constitute proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed by certified mail and by first class mail (*see Nocella v Fort Dearborn Life Ins. Co. of N.Y.*, 99 AD3d 877 [2d Dept 2012]; *cf., Preferred Mut. Ins. Co. v. Donnelly*, 111 AD3d 1242 [4th Dept 2013]; *Residential Holding Corp. v Scottsdale Ins. Co.*, 286 AD2d 679 [2d Dept 2001]).

The plaintiff also fails to establish its prima facie entitlement to summary judgment as a matter of law because it did not demonstrate that it complied with the condition precedent contained in the mortgage, which required that it provide the defendant mortgagors with notice of default prior to demanding payment of the loan in full (*see, Nationstar Mtge., LLC v Dimura*, 127 AD3d 1152 [2d Dept 2015]; *HSBC Mtge. Corp (USA) v Gerber*, 100 AD3d 966 [2d Dept 2012]). The unsubstantiated and conclusory statements in the affidavit of the plaintiff's officer, even when combined with copies of the notice of default, did not establish that the required notice was mailed by first class mail or actually delivered to the notice address as required by the terms of the mortgage agreement *(see GMAC Mtge., LLC v Bell*, 128 AD3d 772 [2d Dept 2015]; *Wells Fargo Bank, N.A. v Eisler*, 118 AD3d 982 [2d Dept 2014]). The plaintiff's officer did not allege sufficient facts as to how compliance with the default notice provisions in the mortgage were accomplished; nor did he identify the individual who allegedly did so (*see Nocella v Fort Dearborn Life Ins. Co. of N.Y.*, 99 AD3d 877 [2d Dept 2012]). More specifically, he did not give any indication that he is familiar with the standard mailing practices or procedures of the entity alleged to have sent the notices, and that those practices or procedures were followed in this instance. Thus, the plaintiff failed to establish its prima facie entitlement to judgment as a matter of law. The plaintiff's failure to make a prima facie showing requires the denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

With respect to the remaining affirmative defenses asserted in the defendants' answer (first, second, fourth, fifth, sixth, seventh, eighth, ninth, eleventh, twelfth, thirteenth and fourteenth), the plaintiff has submitted sufficient proof to establish that they are subject to dismissal due to their unmeritorious nature (*see Becher v Feller*, 64 AD3d 672, 884 NYS2d 83 [2d Dept 2009]). As there are no facts or arguments supported by facts, submitted by the defendants to support these affirmative defenses, those claims are dismissed. The failure to raise pleaded affirmative defenses in opposition to a motion for summary judgment renders those defenses abandoned and thus subject to dismissal (*see New York Commercial Bank v J. Realty F. Rockaway, Ltd.*, 108 AD3d 756 [2d Dept 2013]; *Starkman v City of Long Beach*, 106 AD3d 1076 [2d Dept 2013]).[1] Accordingly, the first, second, fourth, fifth, sixth, seventh, eighth, ninth, eleventh, twelfth, thirteenth and fourteenth affirmative defenses are dismissed.

The plaintiff's motion otherwise establishes its entitlement to summary judgment as it included copies of the mortgage, the unpaid note and due evidence of default under the terms thereof (see CPLR 3212; RPAPL §1321; *One West Bank, FSB v DiPilato*, 124 AD3d 735 [2d Dept 2015]; *Deutsche Bank Natl. Trust Co. v Islar*, 122 AD3d 566 [2d Dept 2014]). That portion of the instant motion wherein the plaintiff seeks an order for an amendment of the caption to excise the fictitious defendants "John Doe #1 through "John Doe #10" is granted (*see PHH Mtge. Corp. v Davis*, 111 AD3d 1110 [3d Dept 2013]; *Flagstar Bank v Bellafiore*, 94 AD3d 1044 [2d Dept 2012]). According to the confirmatory assignment of mortgage dated July 15, 2014, and pursuant to CPLR 1018, "U.S. Bank National Association, as Trustee, for Banc of America Funding Corporation Mortgage Pass-Through Certificates Series 2004-2" is hereby substituted for JPMorgan Chase Bank, National Association as plaintiff herein, and the caption is amended accordingly. By its moving papers, the plaintiff established the default in answering on the

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[1] The court also notes, incidentally, that the twelfth and thirteenth affirmative defenses of lack of personal jurisdiction have been waived as the defendants failed to move to dismiss the complaint against them on this ground within 60 days after serving the answer (*see* CPLR 3211[e]; *Putnam County Sav. Bank v Mastrantone*, 111 AD3d 914 [2d Dept 2013]); *Reyes v Albertson*, 62 AD3d 855 [2d Dept 2009]; *Dimond v Verdon*, 5 AD3d 718 [2d Dept 2004]).

part of the remaining defendants (*see* RPAPL §1321; *HSBC Bank USC, N.A. v Roldan*, 80 AD3d 566 [2d Dept 2011]). Accordingly, the defaults of such defendants are fixed and determined.

In view of the foregoing, and pursuant to CPLR 3212(g), the court hereby finds that the sole remaining issues of fact are whether or not the plaintiff complied with the mailing requirements relevant to the notices of default required by the note/mortgage and RPAPL 1304, and that the trial of this action shall be limited to these issues. In view of these open questions, the proposed order submitted by the plaintiff has been marked "not signed."

Counsel are directed to appear ready to confer with the court on the readiness of this matter for the trial on the limited issue framed above at the conference scheduled herein for **September 21, 2016.**

DATED: Aug 11, 2016

C. RANDALL HINRICHS
J.S.C.

[ ] FINAL DISPOSITION **[X] NON-FINAL DISPOSITION**