

<b>Poupart v Federal Natl. Mtge. Assn.</b>
2018 NY Slip Op 33269(U)
December 17, 2018
Supreme Court, New York County
Docket Number: 656272/2016
Judge: David Benjamin Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:    HON. DAVID BENJAMIN COHEN                      PART                      IAS MOTION 58EFM**

*Justice*

-----X  MARITZA POUPART,  Plaintiff,  - v -  FEDERAL NATIONAL MORTGAGE ASSOCIATION, JP MORGAN CHASE BANK, NATIONAL ASSOCIATION, GFI MORTGAGE BANKERS, INC.,  Defendant.	INDEX NO. <u>656272/2016</u>  MOTION DATE <u>12/02/2016</u>  MOTION SEQ. NO. <u>001</u>
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**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 39, 40, 41 were read on this motion to/for STAY.

Upon the foregoing documents, it is

This is an action to vacate the non-judicial foreclosure sale of the shares and proprietary lease for a cooperative apartment, based on improper notice under section 9-611(f) of the Uniform Commercial Code ("UCC").

Plaintiff, Maritza Poupart, moves, by order to show cause, to stay the non-judicial foreclosure sale.

Defendants Federal National Mortgage Association ("FNMA") and JPMorgan Chase Bank, National Association ("Chase") cross-move, pursuant to CPLR 3211(a)(1), to dismiss the Complaint. For the reasons stated below, the order to show cause is granted and the cross motion is denied.

**BACKGROUND**

The following facts are gleaned from the submission of the parties. On May 13, 2008, plaintiff executed a Promissory Note (Not of Cross Mot, Exh A), Loan Security Agreement (Not

of Cross Mot, Exh B), and Recognition Agreement (*id.*) To borrow the principal sum of \$230,000.00 from defendant GFI Mortgage Bankers, Inc. (“GFI”) to purchase 356 shares of capital stock and the proprietary lease for Unit 37 at 444 Fort Washington Avenue, New York, New York (the “co-op”). The Loan Security Agreement and Recognition Agreement required plaintiff to repay the loan in monthly installments. Also on May 13, 2018, GFI executed an Assignment of Security Agreement and Other Collateral Documents assigning its interest in the loan to Chase (Not of Cross Mot, Exh C).

Plaintiff failed to pay the installment due on April 1, 2010, or any payment thereafter. Chase sent plaintiff a written Acceleration Warning (Notice of Intent to Foreclose), dated July 31, 2010, which included the action required to cure the default (Not of Cross Mot, Exh F). On November 4, 2010, attorneys for Chase sent plaintiff a Notice of Default, seeking payment of arrears totaling \$12,143.12 within 30 days. Thereafter, plaintiff sought various loan modifications, which were denied by Chase.

Chase asserts that it sent a 90-day pre-foreclosure notice, by certified mail, return receipt requested, and first-class mail, to plaintiff at the co-op, on September 13, 2012 (*see* Not of Cross Mot, Exh G). Plaintiff denied receiving the notice.

On April 23, 2014, attorneys for Chase sent plaintiff a Notice of Sale for the liquidation of Chase’s interest in the shares and proprietary lease for the co-op. Chase scheduled a non-judicial foreclosure sale of the co-op’s shares and proprietary lease for June 4, 2014. On the day of the sale, Chase submitted the successful bid. On June 24, 2014, Chase executed an Assignment of Bid, assigning the bid to FNMA (Not of Cross Mot, Exh H).

Thereafter, FNMA commenced a holdover proceeding in Civil Court, New York County, Housing Part. On November 30, 2016, Civil Court issued a Warrant of Eviction, permitting FNMA to evict plaintiff from the co-op. The eviction was scheduled for December 2, 2016.

Plaintiff commenced this action to vacate the non-judicial foreclosure sale and stay the eviction. The Complaint alleges, in essence, that the non-judicial foreclosure sale was unlawful because the Notice of Sale did not comply with the notice requirement set forth in UCC 9-611(f). Specifically, plaintiff alleges that she did not receive the 90-day notice required by UCC 9-611(f). On December 2, 2016, this Court (Cohen, J.) signed the temporary restraining order staying the eviction.

Defendants seek to dismiss the Complaint based on documentary evidence.

### DISCUSSION

UCC 9-611(f) requires lenders to notify co-op owners 90 days before the disposition of the owners' cooperative interest after a default, stating:

“In addition to such other notification as may be required pursuant to subsection (b) of this section and section 9-613 of this article, a secured party whose collateral consists of a residential cooperative interest used by the debtor and whose security interest in such collateral secures an obligation incurred in connection with financing or refinancing of the acquisition of such cooperative interest and who proposes to dispose of such collateral after a default with respect to such obligation, shall send to the debtor, no less than ninety days prior to the date of the disposition of the cooperative interest, an additional predisposition notice as provided herein.”

The purpose of the 90-day notice is to afford owners of cooperative shares protections similar to those provided to the owners of real property under RPAPL 1304 (*see Stern-Obstfeld v Bank of Am.*, 30 Misc 3d 901, 905 [Sup Ct, NY County 2011]). The cases that discuss RPAPL 1304 have been interpreted as applicable to the 90-day notice required under UCC 9-611(f).

“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” (*id.*). “The 90-day notice is very particular in its requirements, and provides information about counseling services and other matters that may assist cooperative apartment owners in obtaining help when faced with the potential loss of a home” (*id.* at 905-906). The lender has the burden to establish proper notice under UCC 9-611(f) (*see id.*).

Here, as stated, Chase insists that it sent 90-day foreclosure notices to plaintiff by certified mail, return receipt requested, and by first class mail at the co-op on September 13, 2012. To support its position, Chase submits copies of the 90-day notices it reportedly sent to plaintiff, as well as affidavits from two of its “Authorized Signers” stating that based on their review of the business records associated with plaintiff’s loan, a 90-day pre-foreclosure notice, dated September 13, 2012, was sent by certified and first-class mail to plaintiff at the co-op (*see* Not of Cross Mot, Exh H). The submissions also include copies of certificates of bulk mailings by Chase (Not of Cross Mot, Exh G-1), a copy of Chase’s internal register of certified regulatory mail, and a copy of Chase’s internal first-class proof of mailing report listing mailings to plaintiff (*id.*).

However, the submissions do not include an affidavit from anyone with personal knowledge that the required notices were mailed to plaintiff (*see U.S. Bank Natl. Assn. v. Glusky*, 50 Misc 3d 313, 316 [Sup Ct, Westchester County 2015]) or a familiarity with the bank’s mailing practices and procedures designed to ensure that items are properly addressed and mailed (*CitiMortgage, Inc. v. Moran*, 2018 NY Slip Op 08435 [1<sup>st</sup> Dept December 11, 2018]; *HSBC Bank USA, N.A.*, 161AD3d 618 [1<sup>st</sup> Dept 2018]; *Nationstar Mtge. LLC v. Cogen*, 159 AD3d 428 [1<sup>st</sup> Dept 2018]; *HSBC Bank USA v. Rice*, 155 AD3d 443 [1<sup>st</sup> Dept 2017]). Nor do the submissions include a copy of the return receipt from the certified mailing (*see Rice*, 155 AD3d

443 [undated unsigned return receipt not sufficient to establish proof of mailing] *citing Wells Fargo, N.A. v. Trupia*, 150 AD3d 1049, 1051 [2d Dept 2017]).

Accordingly, it is

ORDERED that plaintiff's order to show cause is granted, and the eviction proceeding is stayed; and it is further

ORDERED that the cross motion to dismiss the Complaint is denied.

12/17/2018

DATE

CHECK ONE:

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CASE DISPOSED

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GRANTED

☐

DENIED

APPLICATION:

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SETTLE ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

☒

NON-FINAL DISPOSITION

☒

GRANTED IN PART

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SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☐

OTHER J.S.

☐

REFERENCE

HON. DAVID B. COHEN