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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____ PART 48

Justice

Prompt Mortgage

- v -

Direct Realty

INDEX NO. 116882/09

MOTION DATE _____

MOTION SEQ. NO. 03

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

settled order

"This motion is decided in accordance with the annexed decision and order of the Court"

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 8/8/11

JEFFREY K. OING
J.S.C. J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48
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PROMPT MORTGAGE PROVIDERS OF NORTH AMERICA, L.L.C. and LOUIS GALPERN,

Plaintiffs,

-against-

DIRECT REALTY, L.L.C., THE CITY OF NEW YORK, EXPRESS SERVICES FORWARDING, INC., THE NEW YORK CITY DEPARTMENT OF HOUSING AND PRESERVATION DEVELOPMENT,

Defendants.

Index No.: 116889/09

Mtn Seq. No. 003

DECISION AND ORDER

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JEFFREY K. OING, J.:

Plaintiffs, Prompt Mortgage Providers of North America L.L.C. ("Prompt Mortgage") and Louis Galpern ("Galpern"), move, pursuant to CPLR 3212, for a judgment of foreclosure against defendant, Direct Realty, L.L.C. ("Direct Realty").

Direct Realty cross-moves, pursuant to CPLR 3211(a)[7], for an order dismissing the complaint for failure to state a cause of action.

Plaintiffs seek a judgment of foreclosure based on Direct Realty's default in repaying a $1 million loan. On August 9, 2007, Direct Realty, in consideration of its receipt of the funds, executed a promissory note (the "note") (Moving Papers, Ex. A). Pursuant to the terms of the note, Direct Realty was required to make monthly payments of $10,000, representing 12% per annum interest on the principle balance. In the event of default, the promissory note required Direct Realty to repay the principal and interest on the note at the rate of 24% per annum, commencing on the day of the default, which is defined in

paragraph 6(B) of the note. As collateral security for the loan, Direct Realty executed a mortgage whereby Direct Realty granted, released, and conveyed to plaintiffs the Manhattan premises located at 244-346 West 46th Street, Block 1036, Lots 47-48 (the "premises") (Moving Papers, Ex. B). Plaintiffs maintain that the mortgage was recorded with the Office of the City Register of the City of New York on August 21, 2007 (Shakhnevich Affirm., ¶ 12).

Plaintiffs claim that Direct Realty defaulted on the note by failing to make the monthly payment due on March 1, 2009, and monthly payments due on the first day of each consecutive month thereafter to the present. As such, pursuant to paragraph 6(B) of the note, plaintiff Galpern, a partner at Prompt Mortgage, alleges that on June 24, 2009 he served Direct Realty with a notice of default (Galpern Aff., ¶ 10). Galpern claims that the notice of default stated that in the event Direct Realty failed to pay the outstanding interest and late fees on or before July 29, 2009, the loan will be accelerated requiring Direct Realty to immediately repay the entire amount of the principal, along with the accrued interest and late fees (Id.). Plaintiffs claim that Direct Realty failed to cure the default by July 29, 2009. As such, plaintiffs are claiming that $1,426,675 is now due and owing.

Here, plaintiffs have established, prima facie, entitlement to summary judgment by providing the mortgage documents and proof of defendant's default (Chemical Bank v Broadway 55-56th Street Associates, 220 AD2d 308 [1st Dept 1995]). When faced with plaintiff's prima facie case, it is incumbent upon defendant to

raise viable factual issues as to its default (Village Bank v Wild Oaks Holding, Inc., 196 AD2d 812 [2nd 1993]).

Defendant Direct Realty argues that plaintiffs have not established that they served the notice of acceleration required by paragraph 6(C) of the note. Paragraph 6(C) of the note, entitled "Notice of Default", provides as follows:

> If I am in default, the Note Holder may send me a written notice telling me that, if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of principal, which has not been paid, and all interest that I owe on that amount. That date must be at least thirty (30) days after the date on which the notice is delivered or mailed to me.

(Moving Papers, Ex. A). Direct Realty argues that paragraph 6(C) requires plaintiffs to effectuate a proper mailing of the notice of acceleration as a condition to acceleration of the loan and commencement of a foreclosure action. In support of this argument, Direct Realty refers to HSBC Mortgage Corporation v Erneste, 22 Misc 3d 1115A [Sup Ct, Kings County 2009], and argues that Supreme Court in that case held that a provision identical to paragraph 6(C) mandates service of a notice of acceleration of the mortgage as a prerequisite to initiation of a foreclosure action. Here, Direct Realty claims that it never received a notice of acceleration and points out that plaintiff's only proof of effectuating this mailing is plaintiff Galpern's affidavit that the notice of acceleration was served on June 24, 2009.

Contrary to defendants' argument, the mortgage documents in HSBC Mortgage Corporation v Erneste, 22 Misc 3d 1115A, supra, are distinguishable from the documents herein. There, the mortgage

document included a provision that "Lender may require Immediate Payment in Full ... only if all of the following conditions are met," including an acceleration notice (Id.). In that case, Supreme Court found that a condition precedent to the lender accelerating loan payment and foreclosing on the mortgage was proof that the acceleration notice, required by the note and mortgage documents, was provided to the mortgagor (Id.). Here, Direct Realty does not point to similar language in its note or mortgage documents. Indeed, paragraph 4 of the mortgage provides as follows:

> That the whole of said principal sum and interest shall become due at the option of the mortgagee: After default in the payment of any installment of principal or of interest for fifteen days; or after default in the payment of any tax, water rate, sewer rent or assessment for thirty days after notice and demand; or after default after notice and demand either in assigning and delivering the policies insuring the buildings against loss by fire or in reimbursing the mortgagee for premiums paid on such insurance, as hereinbefore provided.

(Moving Papers, Ex. B). Noticeably absent from the first clause concerning default in payment are the words "after notice and demand", which are found in the subsequent two default clauses of paragraph 4. As such, the mortgage here does not contain a condition precedent requiring notice to the "whole said principal sum and interest" becoming due after default in the payment of any installment of principal or interest for 15 days. This absence, along with the language in paragraph 6(C) of the note, that the note holder "may send" a written notice of acceleration, demonstrates that the documents in this case do not contain any condition precedent to accelerating the loan and commencing a

foreclosure action. Although liability has been established, a triable issue of fact exists as to the amount of damages plaintiffs are entitled due to the default on the mortgage.

Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment is granted on the issue of liability, and defendant Direct Realty's cross-motion to dismiss is denied.

Settle order with a reference to a referee to compute.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 8/8/11

HON. JEFFREY K. OING, J.S.C.