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MEMO DECISION & ORDER AFTER HEARING

INDEX No. 4754/10

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

COPY

***PRESENT:***

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 2/04/13
ADJ. DATES 6/7/13
Mot. Seq.# 001- MG
Mot. Seq. #002 - MD
HEARING HELD 6/7/13:

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|---|---|
| US BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR CREDIT SUISSE FIRST BOSTON CSFB ARMT 2006-1<br><br>Plaintiff | HOGAN & LOVELLS, US LLP<br>Attys for Plaintiff<br>875 Third Avenue<br>New York, NY 10022 |
| -against- | |
| CAROLINE WALOSKI WEINMAN, and JOHN DOE, (said the name being fictitious it being the intention of Plaintiff to designate any all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises),<br><br>Defendants. | MICHAEL ROMANO & ASSN.<br>Attys. For Defendant Weinman<br>220 Old Country Rd.<br>Mineola, NY 11501 |

**DECISION AFTER HEARING**

Upon the following papers numbered 1 to 22 read on this motion for summary judgment, the deletion of parties and the appointment of a referee to compute and cross motion for summary judgment, sanctions and dismissal pursuant to CPLR 3211 (a)(7) and 3126; Notice of Motion/Order to Show Cause and supporting papers 1-3; 4-5; Notice of Cross Motion and supporting papers 6-8; Answering Affidavits and supporting papers 9-10; Reply papers 11-12; Other 13-14 (Memorandum of Law in support of motion) 15-16 (Memorandum of Law in support of motion); 17-18 (Memorandum of Law in support of motion); 19-20 (Memorandum of Law in support of cross motion); 21-22 (Memorandum in support of Cross Motion); and after issuing an Order of the Court dated March 29, 2013 which scheduled this matter for a hearing on June 7, 2013 and the hearing having been held on June 7, 2013 at which counsel was heard in support of and in opposition to the motions, the Court makes the following determination.

Familiarity with this Court's prior Order of March 29, 2013, which detailed the issues raised in the underlying motion and cross motion, is presumed. As noted therein, the complaint charges defendant Weinman with defaults in payment of the monthly installments due under the terms of the note and mortgage beginning on September 1, 2009. This default in payment, which continues to date, is admitted in the answers served by defendant Weinman. One of the various demands set forth in the cross motion, included a demand for dismissal due to the absence of proof of service of the RPAPL §1304 notice. The Court directed a hearing of the type contemplated by CPLR 2218 and/or CPLR 3212(c), regarding service of the RPAPL § 1304 notice and held in abeyance final determination of the respective motions.

That hearing was held on June 7, 2013 at which time plaintiff produced a witness, Amber Ott, who explained her duties as a loan verification analyst for the plaintiff servicer. She detailed her knowledge of the case history and the system of records established to service the loan. She explained her familiarity with the business practices and procedures with respect to the sending of the RPAPL § 1304 notice, that is, the 90-day letters. She also explained her familiarity with the record keeping procedures and practices of the servicer and set forth a proper foundation for the admission of that history. She further explained the archived collection notes and provided the Court with the business records concerning the subject loan. She demonstrated the admissibility of the defendant's payment history on the note and the business records of the servicer under the business records exception to the hearsay rule (*see* CPLR 4518[a]; *compare* ***JP Morgan Chase Bank, NA v Rads Group, Inc.***, 88 AD3d 766, 930 NYS2d 899 [2d Dept 2011]).

With that foundation, the business record, that is the Collection/Customer Service Loan Activity Archive, was admitted into evidence without objection (*see* Pl. Ex. 1). An examination of the business record (*see* Pl Ex. 1, p. 2878339) reveals that on October 18, 2009, the plaintiff issued separate notices of default as required by RPAPL § 1304 by certified mail (*see* Pl Ex. 2) and regular mail (*see* Pl Ex. 3). As explained upon cross examination, it is only after the servicer's mailing unit delivers the 90-day letters to the U.S. Postal Service, that the notations are made in the archived collection notes (*see* Pl Ex. 1, p. 2878339), confirming the sending of the notices. Copies of same are digitally forwarded back to the loss mitigation unit (*see* Pl Ex. 2 and 3). The witness explained that for tracking purposes, the certified mailing codes are no longer maintained by the U.S. Postal Service, after such an extended period of time. The witness did acknowledge that there existed no green card on file confirming receipt, but noted that there is no requirement to confirm receipt of the 90 day notice.

RPAPL § 1304(2) provides that the requisite notice "shall be sent by such ... servicer to the borrower, by registered or certified mail and also by first-class mail to the last known address of the borrower..." Here, defendant Weinman did acknowledge the proper address set forth on the 90-day notice letters, which were sent on October 18, 2009 (*see* Pl Ex. 2 and 3). While various cases

discuss the necessity of proper service of a RPAPL § 1304 notice on the borrower as a condition precedent to the commencement of a foreclosure action (*see* ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 104, 923 NYS2d 609 [2d Dept 2011]) and that the failure to submit an affidavit of service of same necessitates denial of a summary judgment motion on that issue (*see* ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, 961 NYS2d 200 [2d Dept 2013]; ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 106, *supra*), there is no requirement in the statute that proof of service can only be accomplished by way of a filed affidavit of service (*compare* CPLR 308[2], [4]; *and* RPAPL § 735[2][a] *with* CPLR 2103[b][2] "service by mail shall be complete upon mailing"). In fact, the statute only requires that the notices "shall be sent by such ... servicer..." Here, the witness detailed the servicer's custom and practice surrounding mailings of RPAPL § 1304 notices and, in particular, the notices with respect to this loan. Thus, in support of its motion for summary judgment, plaintiff has proved its allegation by tendering sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL § 1304. Moreover, there is no claim that the statutorily-mandated content was omitted from the notice, as required by RPAPL § 1304(2) (*compare* ***Wells Fargo Bank, NA v Barrett***, 33 Misc3d 1207[A], 938 NYS2d 230 [Sup Ct, Queens County 2011]).

Therefore, the Court holds that by virtue of the testimony and the accompanying records, plaintiff met its prima facie burden pursuant to RPAPL § 1304. Rejected as insufficient is the defendant's denial of receipt of the RPAPL § 1304 notice. Such denial rests upon her failure to recall receipt of the certified mail notice. The Court notes that initially, there was no denial of receipt of the RPAPL § 1304 notice set forth in the defendant's moving papers. The only complaint offered therein was that the plaintiff failed to produce a copy of such notice. In response, the plaintiff attached a copy of such notice to its opposing/reply papers which, as noted at the hearing, provides evidence of mailing on the face thereof that supports the plaintiff's pleaded claim that it complied with the notice requirements of RPAPL § 1304 (*see* RPAPL § 1302). In her reply papers and in her hearing testimony, the defendant asserts a denial of receipt of the RPAPL § 1304 notice.

However, upon cross examination, defendant failed to recollect allegations set forth in her recent papers supplied to the Court, which occurred just a few months ago. The bare and unsubstantiated denial of receipt is insufficient to rebut the testimonial and documentary proof of proper sending of the 90-day notices (*see* ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 103, *supra*; ***Deutsche Bank Natl. Trust Co. v Hussain***, 78 AD3d 989, 912 NYS2d 595 [2d Dept 2010]; *see e.g.* ***US Bank Natl. Assn. v Tate,*** 102 AD3d 859. 958 NYS2d 722 [2d Dept 2013]; ***Stevens v Charles***, 102 AD3d 763, 958 NYS3d 443 [2d Dept 2013]; ***Irwin Mtge. Corp. v Devis***, 72 AD3d 743, 898 NYS2d 854 [2d Dept 2010]; ***Beneficial Homeowner Serv. Corp. v Girault***, 60 AD3d 984, 875 NYS2d 815 [2d Dept. 2009]; ***Citimortgage, Inc. v Pembelton***, 39 Misc3d 454, 960 NYS2d 867 [Sup. Ct Suffolk County 2013]).

In any event, as noted above, it is the moment of posting that is controlling, regardless of the claimed lack of delivery to or receipt by the addressee (*see* ***St. Clare's Hosp. v Allcity Ins. Co.***, 201 AD2d 718, 608 NYS2d 325 [2d Dept 1994]; ***Barton v La Point***, 67 AD2d 760, 412 NYS2d 463 [3d Dept 1979]). The defendant's claims and defenses regarding a lack of compliance with the alleged §1304 notice are dismissed as unmeritorious.

There remains one reserved claim from this Court's Order of March 29, 2013. As noted therein, the defendant's cross moving papers did not contain a demand for summary judgment on her FOURTH Counterclaim in which she asserts a claim for damages under the Federal Truth-in-Lending Law [TILA]. Discussion of that defense was advanced only as opposition to the plaintiff's motion-in-chief wherein it sought dismissal of all counterclaims and affirmative defenses. Having resolved, after hearing, the predicate question regarding service of the RPAPL § 1304 default notice, the Court now turns its determination to the nature, scope and viability and/or merits of the defendant's FOURTH counterclaim.

Plaintiff argues that the original loan documents are in full compliance with TILA. A Truth in Lending Disclosure Statement was executed by defendant Weinman on July 14, 2005. This statement reflected the loan in the amount of $600,000.00 at 6.5% with an APR at 6.37%. It also included a break down of the 360 monthly installments due during the thirty year term of the loan. Payments of principal and/or interest were listed in the amount of $3,792.41 together with $193.23 for taxes and $251.00 for insurance for a total monthly payment of $4,236.72. This monthly installment payment of $3,792.41 was the same as that set forth in the note and mortgage, wherein it was noted that it was subject to change. The Truth in Lending Disclosure Statement also included notations that the $3,792.41 monthly installment figure for principal and/or interest would continue for 120 months and that for the next 239 months, that amount would be reduced to $3,664.17 and that a final payment of $3,645.46 would be due on August 1, 2036.

The FOURTH Counterclaim only asserts a claim for damages and not one for rescission, since the defendant has not alleged that she can tender to the mortgagor the principal of the loan (*see* ***Cervini v Zanoni***, 95 AD3d 919, 944 NYS2d 574 [2d Dept 2012]). TILA compels lenders to provide certain specific information to borrowers, such as interest rates, finance charges, and annual percentage rates, so that they can make educated decisions (*see e.g.* ***Stein v JP Morgan Chase Bank***, 279 F Supp2d 286, 291 [SDNY 2003]). "TILA requires creditors to disclose, clearly and accurately, all the material terms of consumer credit transactions" (***McKenna v First Horizon Home Loan Corp.***, 475 F3d 418, 421 [1st Cir. 2007]). Upon review of the papers submitted, summary judgment is appropriate in that plaintiff has shown that there are no issues of fact regarding whether the disclosure requirements under TILA were violated.

In seeking damages under TILA for deficient disclosures, defendant has failed to establish violations that were "apparent on the face of the disclosure statement" (15 USC §§ 1641[a]; 1641[e][1]; *see* ***U.S. Bank Natl. Assn. v Pia***, 73 AD3d 752, 901 NYS2d 104 [2d Dept 2010]; *see also* ***Akar v Federal Natl. Mtge. Assn.***, 845 F Supp2d 381, 394 [D Mass 2012]). Additionally, although there is some caselaw to the contrary, the Court believes that the failure to show actual damages under 15 USC § 1641(g) mandates dismissal of the statutory damage claim (*see* ***Parham v HSBC Mtge. Corp.***, 826 F Supp2d 906, 913 [ED Va 2011], *affd* 473 Fed Appx 244, 2012 WL 1655391 [4th Cir 2012]; ***Byrd v Guild Mtge. Co.***, 2011 WL 6736049, at *5 [SD Cal 2011]; ***Turner v American Home Key Inc.***, 2011 WL 3606688 [ND Tex 2011]; ***Borowiec v Deutsche Bank Natl. Trust Co.***, 2011 WL 2940489 [D Hawaii 2011]; *cf* ***Foley v Wells Fargo Bank, NA***, 849 F Supp2d 1345 [SD Flor 2012]). Defendant has offered only conclusory allegations, which are insufficient to defeat a motion for summary judgment (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

In view of the foregoing, the courts denies the defendant's cross motion. The court hereby grants the plaintiff's motion (#001) for summary judgment and other relief. It is therefore

***ORDERED*** that this motion (#001) by the plaintiff for summary judgment against defendant, Caroline Waloski Weinman, the deletion of the unknown defendants, the appointment of a referee to compute and other incidental relief is considered under CPLR 3212, 3215 and RPAPL § 1321 and is granted; and it is further

***ORDERED*** that the cross motion (#002) by defendant, Caroline Waloski Weinman, for summary judgment on a claim of breach of contract; an order imposing sanctions; dismissal of the complaint pursuant to CPLR 3211(a)(7) and for failure to satisfy "prerequisites to foreclosure" and/or dismissal pursuant to CPLR 3126 is considered under CPLR 3212, 22 NYCRR Part 130-1, CPLR 3211, and 3126 and is denied; and it is further

***ORDERED*** that the plaintiff shall settle a separate order appointing a referee to compute, upon a copy of this order, providing in blank for the court's appointment of such referee and all other matters attendant with such appointments consistent with the terms of this order and the prior order of the court.

Dated: June 11, 2013

THOMAS F. WHELAN, J.S.C.