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SHORT FORM ORDER

INDEX
NO.: 32624-10

SUPREME COURT - STATE OF NEW YORK
IAS PART 28 - SUFFOLK COUNTY

PRESENT: Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 11-30-12
ADJ. DATE
Mot. Seq. #001-MG

BENEFICIAL HOMEOWNER SERVICE CORPORATION,

Plaintiff,

-against-

ANA M. GIANNAKOULOPOULOS, ANASTASIOS GIANNAKOULOPOULOS, WORLDWIDE ASSET PURCHASING, LLC, "JOHN DOE #1-5" AND "JANE DOE #1-5" said names being fictitious, it being the intention of Plaintiff to designate any and all occupants, tenants, persons or corporations, if any, having or claiming an interest in or lien upon the premises being foreclosed herein

Defendants.

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Upon the following papers numbered 1 to 10 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 10; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers _____; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this unopposed motion by the plaintiff for, inter alia, an order pursuant to CPLR 3212 awarding summary judgment in its favor against the defendants Ana M. Giannakoulopoulos and Anastasios Giannakoulopoulos, and striking their joint answer and affirmative defenses; pursuant to RPAPL § 1321 appointing a referee to compute amounts due under the subject mortgage; and amending the caption, is granted; and it is

ORDERED that the second cause of action set forth in the plaintiff's complaint, wherein it demands a judgment extinguishing a certain prior mortgage and/or lien allegedly held by the defendant Worldwide Asset Purchasing, LLC, and/or declaring it to be subordinate to the mortgage that is the subject of this action, is considered under CPLR 3215 and RPAPL §1501, and the same is dismissed; and it is

7-1-13

ORDERED that the plaintiff shall move, at the time of submission of the proposed judgment of foreclosure, for the complaint to be conformed to the evidence to reflect the following: the mortgage was executed by Ana M. Giannakoulopoulos (Complt. ¶ "THIRD"); Ana M. Giannakoulopoulos is record owner, mortgagor and a co-obligor ("Schedule B-Defendants"); and Anastasios Giannakoulopoulos is a co-obligor ("Schedule B - Defendants") (*see*, CPLR 3025[c]; *see generally*, ***McGinnis Bankers Life Co.***, 39 AD2d 393, 334 NYS2d 270 [2d Dept 1972]); and it is

ORDERED that the plaintiff shall submit with the proposed judgment of foreclosure, an affidavit or affirmation of non-military status of the defendants Ana M. Giannakoupoulos and Anastasios Giannakoulopoulos, pursuant to 50 USC 521 *et seq*.; and it is further

ORDERED that the plaintiff is directed to serve a copy of this Order with notice of entry upon opposing counsel and upon all other parties who have appeared herein and not waived further notice, pursuant to CPLR 2103(b)(1), (2) or (3) within thirty (30) days of the date herein, and to file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on residential real property known and described as 432 Islip Avenue, Islip, New York 11751 (the property). The defendant Ana M. Giannakoulopoulos and Anastasios Giannakoulopoulos (the defendant mortgagors) executed a fixed-rate loan agreement dated January 23, 2007 (the loan agreement/note) in favor of Beneficial Homeowner Service Corporation (the plaintiff) in the principal sum of $309,743.07. To secure said loan agreement/note, Ana M. Giannakoulopoulos, as the record owner, gave the plaintiff a mortgage also dated January 23, 2007 (the mortgage) on the property.

The defendant mortgagors allegedly defaulted on their monthly payments of interest and principal due on July 27, 2009 and each month thereafter. After the defendant mortgagors allegedly failed to cure their default, the plaintiff commenced the instant action by the filing of a notice of pendency, summons and verified complaint on September 2, 2010. Issue was joined by interposition of the defendant mortgagors' joint answer dated September 15, 2010. By their answer, the defendant mortgagors generally deny the material the allegations set forth in the complaint and assert three affirmative defenses, alleging that the remedy of foreclosure is barred by the doctrines of waiver, laches and unclean hands; a violation of the "New York Banking Law or the Federal Truth in Lending Law;" and lack of standing. The remaining defendants have neither answered nor appeared in this action.

According to the records maintained by the Court's computerized database, in compliance with CPLR 3408 a series of settlement conferences were held in this Court's Foreclosure Conference Part on October 21, 2010 (pre-screening) and December 20, 2010 as well as on March 24 and June 6, 2011. On June 6, 2011, this case was dismissed from the conference program after the defendant mortgagors failed to appear or otherwise participate. Thereafter, another settlement conference was held on September 12, 2012 before Foreclosure Conference Part 32. On the last date, this case was again

dismissed from the conference program as a loan modification or other settlement had not been achieved. Accordingly, the conference requirement imposed upon the Court by CPLR 3408 and/or the Laws of 2008, Ch. 472 § 3-a as amended by Laws of 2009 Ch. 507 § 10 has been satisfied. No further conference is required under any statute, law or rule.

The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor against the defendant mortgagors, and striking their joint answer and affirmatives defenses; (2) pursuant to RPAPL § 1321 appointing a referee to (a) compute amounts due under the subject mortgage; and (b) examine and report whether the subject premises should be sold in one parcel or multiple parcels; and (3) amending the caption. No opposition has been filed in response to this motion.

A plaintiff in a mortgage foreclosure action establishes a prima facie case for summary judgment by submission of the mortgage, the loan agreement/note, bond or obligation, and evidence of default (*see*, ***Valley Natl. Bank v Deutsche***, 88 AD3d 691, 930 NYS2d 477 [2d Dept 2011]; ***Wells Fargo Bank v Karla***, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; ***Wash. Mut. Bank, F.A. v O'Connor***, 63 AD3d 832, 880 NYS2d 696 [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, 895 NYS2d 199 [2d Dept 2010]).

By its submissions, the plaintiff established its prima facie entitlement to summary judgment on the complaint (*see*, CPLR 3212; RPAPL § 1321; ***U.S. Bank Natl. Assn. v Denaro***, 98 AD3d 964, 950 NYS2d 581 [2d Dept 2012]; ***Capital One, N.A. v Knollwood Props. II, LLC***, 98 AD3d 707, 950 NYS2d 482 [2d Dept 2012]; ***HSBC Bank USA, N.A. v Schwartz***, 88 AD3d 961, 931 NYS2d 528 [2d Dept 2011]). In the instant case, the plaintiff produced the loan agreement/note and the mortgage executed by the defendant mortgagors as well as evidence of nonpayment (*see*, ***Fed. Home Loan Mtge. Corp. v Karastathis***, 237 AD2d 558, 655 NYS2d 631 [2d Dept 1997]; ***First Trust Natl. Assn. v Meisels***, 234 AD2d 414, 651 NYS2d 121 [2d Dept 1996]). The plaintiff also submitted, inter alia, an affidavit from a representative of the plaintiff, whereby it is alleged, inter alia, that the plaintiff is the holder and is in possession of the loan agreement/note and mortgage and has been since inception as the original lender (*see*, ***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]). The plaintiff also submitted, inter alia, an affidavit from an officer of the plaintiff whereby it is alleged that a 90-day notice was served in compliance with RPAPL § 1304. Additionally, the plaintiff submitted sufficient proof to establish, prima facie, that the affirmative defenses set forth in the defendant mortgagors' answer are subject to dismissal due to their unmeritorious nature (*see*, ***Becher v Feller***, 64 AD3d 672, 884 NYS2d 83 [2d Dept 2009]; ***Wells Fargo Bank Minn., Natl. Assn. v Perez***, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]; ***Coppa v Fabozzi***, 5 AD3d 718, 773 NYS2d 604 [2d Dept 2004] [*unsupported affirmative defenses are lacking in merit*]; *see also*, ***Wells Fargo Bank, N.A. v Meyers***, 2013 NY Slip Op 3085 [2d Dept, May 1, 2013]; ***La Salle Bank Nat. Assn. v Kosarovich***, 31 AD3d 904, 820 NYS2d 144 [3d Dept 2006] [*claimed violations of the Truth In Lending Act do not constitute affirmative defenses to a foreclosure action*]; ***CFSC Capital Corp.***

XXVII v W. J. Bachman Mech. Sheet Metal Co., 247 AD2d 502, 669 NYS2d 329 [2d Dept 1998]; ***Manufacturers and Traders Trust Co. v David G. Schlosser & Assocs.***, 242 AD2d 943, 665 NYS2d 949 [4th Dept 1997] [*conclusory allegations of the conduct constituting alleged waiver are insufficient to raise a triable issue of fact*]; ***FGH Realty Credit Corp. v VRD Realty Corp.***, 231 AD2d 489, 647 NYS2d 229 [2d Dept 1996]; ***Prudential Home Mtge. Co. v Cermele***, 226 AD2d 357, 640 NYS2d 254 [2d Dept 1996] [*no valid defense or claim of estoppel where mortgage provision bars oral modification*]; ***Naugatuck Sav. Bank v Gross***, 214 AD2d 549, 625 NYS2d 572 [2d Dept 1995] [*unsubstantiated allegations of facts are insufficient to raise a triable issue of fact with respect to an estoppel defense*]; ***Connecticut Natl. Bank v Peach Lake Plaza***, 204 AD2d 909, 612 NYS2d 494 [3d Dept 1994] [*defense based upon the doctrine of unclean hands lacks merit where a defendant fails to come forward with admissible evidence of showing immoral or unconscionable behavior*]).

As the plaintiff duly demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted to the defendant mortgagors (*see*, ***HSBC Bank USA v Merrill***, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]). Accordingly, it was incumbent upon the defendant mortgagors to produce evidentiary proof in admissible form sufficient to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action (*see*, ***Baron Assoc., LLC v Garcia Group Enters., Inc.***, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; ***Aames Funding Corp. v Houston***, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]).

The defendant mortgagors failed to raise a triable issue of fact as the general denials set forth in their answer are insufficient, as a matter of law, to defeat the plaintiff's unopposed motion (*see*, ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 951 [2d Dept 2010]). Moreover, the affirmative defenses asserted by the defendant mortgagors are factually unsupported and without apparent merit (*see*, ***Grogg v South Road Assocs., L.P.***, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; ***Daniel Perla Assoc., LP v 101 Kent Assoc., Inc.***, 40 AD3d 677, 836 NYS2d 630 [2d Dept 2007]; ***First Trust Natl. Assn. v Meisels***, 234 AD2d 414, *supra*; ***Citibank, N.A. v Souto Geffen Co.***, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]; ***Kahraman v Countrywide Home Loans, Inc.***, 886 F Supp 2d 114 [US Dist Ct, ED NY 2012]).

In any event, in instances where a defendant fails to oppose a motion for summary judgment, the facts, as alleged in the moving papers, may be deemed admitted and there is, in effect, a concession that no question of fact exists (*see generally*, ***Kuehne & Nagel, Inc. v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]). Additionally, "uncontradicted facts are deemed admitted" (***Tortorello v Larry M. Carlin,*** 260 AD2d 201, 206, 688 NYS2d 64 [1st Dept 1999]). Under these circumstances, the Court finds that the defendant mortgagors failed to rebut the plaintiff's prima facie showing of its entitlement to summary judgment requested by it (*see*, ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, *supra*; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, *supra*; ***Rossrock Fund II, L.P. v Commack Inv. Group, Inc.***, 78 AD3d 920, 912 NYS2d 71 [2d Dept 2010]; ***Wells Fargo Bank Minn., N.A. v Perez***, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]; *see generally,* ***Hermitage Ins. Co. Trance Nite Club, Inc***., 40 AD3d 1032, 834 NYS2d 870 [2d Dept 2007]). The plaintiff, therefore, is awarded summary judgment against the defendant mortgagors (*see*, ***Fed. Home Loan Mtge. Corp. v***

Karastathis, 237 AD2d 558, *supra*; *see generally*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Accordingly, the defendant mortgagors' answer, and the affirmative defenses contained therein,. are stricken.

The branch of the instant motion wherein the plaintiff seeks an order amending the caption by substituting Spyridon Giannakoulopoulous as a defendant in place of the fictitious defendant John Doe #1, and excising the names of the remaining fictitious defendants, John Doe #2-5 and Jane Doe #1-5, is granted pursuant to CPLR 1024. By its submissions, the plaintiff established the basis for this relief (*see*, ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, *supra*; ***Neighborhood Hous. Servs. N.Y. City, Inc. v Meltzer***, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]). All future proceedings shall be captioned accordingly.

By its moving papers, the plaintiff further established the default in answering on the part of the newly substituted defendant, Spyridon, and the defendant Worldwide Asset Purchasing LLC (World Wide) since these defendants never interposed answers to the complaint (*see*, RPAPL § 1321; ***HSBC Bank USA, N.A. v Roldan***, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the default in answering on the part of Spyridon and Worldwide is fixed and determined. Since the plaintiff has been awarded summary judgment against the defendant mortgagors, and has established a default in answering or appearing by Spyridon and World Wide, the plaintiff is entitled to an order appointing a referee to compute amounts due under the subject note and mortgage (*see*, RPAPL § 1321; ***Ocwen Fed. Bank FSB v Miller***, 18 AD3d 527, 794 NYS2d 650 [2d Dept 2005]; ***Vt. Fed. Bank v Chase***, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; ***Bank of E. Asia, Ltd. v Smith***, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

Accordingly, this motion for, inter alia, summary judgment and to appoint a referee to compute is granted. The proposed long form order appointing a referee to compute pursuant to RPAPL § 1321, as modified by the Court, has been signed concurrently herewith.

Dated: JUNE 26, 2013

W. Gerard Asher

Hon. W. GERARD ASHER, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION