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COPY

SHORT FORM ORDER

INDEX No. 10-10120

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 8-14-12 (#003)
MOTION DATE 11-14-12 (#004)
ADJ. DATE 5-10-13
Mot. Seq. # 003 - MG
004 - MD

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HSBC BANK USA, NATIONAL ASSOCIATION AS TRUSTEE FOR DALT 2006-A,
Plaintiff,

- against -

FILOMEINA CARPINELLI, and "JOHN DOE #1" TO "JOHN DOE #10," the last 10 names being fictitious and unknown to plaintiff, the persons or parties intended being the persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the verified complaint,
Defendants.

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McCABE, WEISBERG & CONWAY, P.C.
Attorney for Plaintiff
145 Huguenot Street, Suite 499
New Rochelle, New York 10801

MACCO & STERN, LLP
Attorney for Defendant Carpinelli
135 Pinelawn Road, Suite 120 South
Melville, New York 11747

Upon the following papers numbered 1 to 16 read on this motion for an order of reference, upon default, appointing a referee; Notice of Motion/ Order to Show Cause and supporting papers 1 - 7; Notice of Cross Motion and supporting papers 8 - 11; Answering Affidavits and supporting papers 12 - 14; Replying Affidavits and supporting papers 15 - 16; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion sequence #003 and #004 are combined herein for purposes of this determination; and it is further

ORDERED that the motion (#003) by plaintiff for an order of reference upon the default of all defendants in answering and other incidental relief is considered under CPLR 3215(f) and RPAPL § 1321 and is granted; and it is further

ORDERED that the motion (#004) by defendant Filomeina Carpinelli for leave to file a late answer is considered under CPLR § 3012(d) and is denied.

The plaintiff commenced this action to foreclose a mortgage on residential real property located in

Greenlawn, New York given by defendant Filomeina Carpinelli ("Carpinelli") in September 2007 to a predecessor in interest of the plaintiff as security for a loan in the principal sum of $665,000. In its complaint, the plaintiff alleges that Carpinelli failed to make the payments due under the terms of the note and mortgage as of October 1, 2009 and thereafter. On March 16, 2010, the plaintiff commenced this action. Carpinelli did not interpose an answer.

The record reflects that subsequent to the filing of the summons and complaint and the proofs of service, on June 4, 2010, pursuant to CPLR 3408, the case was set down for the statutorily mandated settlement conference in the specialized mortgage foreclosure part. Following the original screening in June, the case was adjourned to August 11, 2010, and then to September 20, 2010 at which time it was determined that Carpinelli did not reside at the property. Therefore, the case was referred to IAS and assigned to this Part for adjudication of the merits as Carpinelli was not eligible for the mandatory settlement conference contemplated by the statute (*see* CPLR 3408[a] [the court shall hold a mandatory conference "in any residential foreclosure action involving a home loan...in which the defendant is a resident of the property subject to foreclosure..."]).

On July 20, 2012, the plaintiff made the instant motion for an order amending the caption to reflect the plaintiff's name as HSBC Bank USA, National Association as Trustee for DALT 2006-AR6, to reflect Lynda Stubbolo, Marianna Stubbolo and Kenny Stubbolo as defendants in place of the John Doe #1 to #3 defendants, striking the remaining named John Doe defendants, fixing the defaults in answering of all the named defendants, and appointing a referee to compute the amount due under the note and mortgage. In response, on August 9, 2012, Carpinelli interposed an answer which was rejected in writing on September 9, 2012 as untimely by plaintiff's counsel. Thereafter, by order to show cause, Carpinelli, by her attorney, moved for, and on October 23, 2012 was granted a temporary restraining order restricting the plaintiff from taking any further steps to prosecute this foreclosure action pending a determination of her motion pursuant to CPLR 3012(d) for leave to file a late answer.

It is well settled that "'a defendant who has failed to timely appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action, when ... moving to extend the time to answer or to compel the acceptance of an untimely answer'" (***Maspeth Fed. Sav. & Loan Assn. v McGown***, 77 AD3d 890, 891, 909 NYS2d 642 [2d Dept 2010], *quoting* ***Lipp v Port Auth. of N.Y. & NJ***, 34 AD3d 649, 649, 824 NYS2d 671 [2d Dept 2006]). This standard governs applications made both prior and subsequent to a formal fixation of a default on the part of the defendants by the court (*see* ***Bank of New York v Espejo***, 92 AD3d 707, 939 NYS2d 105 [2d Dept 2012]; ***Integon Natl. Ins. Co. v Norterile***, 88 AD3d 654, 930 NYS2d 260 [2d Dept 2011]; ***Ennis v Lema***, 305 AD2d 632, 760 N.Y.S.2d 197 [2d Dept 2003]). The determination as to what constitutes a reasonable excuse lies within the sound discretion of the trial court (*see* ***Segovia v Delcon Constr. Corp.***, 43 AD3d 1143, 842 NYS2d 536 [2d Dept 2007]; ***Matter of Gambardella v Ortov Light.***, 278 AD2d 494, 717 NYS2d 923 [2d Dept 2000]).

Here, Carpinelli has submitted, *inter alia*, an affirmation in support wherein she offers a purported excuse and asserts that she has a meritorious defense. Under the heading "Reasonable Excuse", Caprinelli explains that she obtained the mortgage loan so that she, together with her daughter and grandchildren could live at the property. Carpinelli confirms, however, that she no longer lives at the property having moved out in late 2008, and that her daughter still lives there. Carpinelli asserts that due to a decrease in

her daughter's income, her daughter sought a modification of the mortgage loan, but did not qualify as the payments were not delinquent. Upon becoming delinquent, Carpinelli states that she did not qualify for a loan modification because she no longer lived at the property and it was determined by the loan servicer that her income was insufficient. Her daughter also did not qualify for a modification because she was not the record owner of the property. Carpinelli states that she has not been treated equitably in these proceedings, as it is her belief that her daughter could afford to make payments if the loan was modified to reflect the market rate and market value of the property.

"When a default results not from an isolated inadvertent mistake, but from repeated neglect...there is no requirement that the court grant the requested relief" (***Chery v Anthony***, 156 AD2d 414, 417, 548 NYS2d 535 [2d Dept 1989]). Carpinelli's motion demonstrates a pattern of neglect as she failed to seek vacatur of her default or an extension of time to answer since she was personally served with the summons and complaint on March 22, 2010, after the case was moved out of the settlement conference part on September 20, 2010, or anytime thereafter. Indeed, it appears that Carpinelli was prompted to address her default in failing to serve an answer only after the plaintiff made the instant motion in August 2012.

Furthermore, although Carpinelli asserts that the mortgage payments would be affordable if the plaintiff modified the loan, a foreclosing plaintiff has no obligation to modify the terms of its loan before or after a default in payments (*see* ***Wells Fargo Bank, N.A. v Van Dyke***, 101 AD3d 638, 958 NYS2d [1st Dept 2012]; ***EMC Mtge. Corp. v Stewart***, 2 AD3d 772, 769 NYS2d 408 [2d Dept 2003]; ***United Cos. Lending Corp. v Hingos***, 283 AD2d 764, 724 NYS2d 134 [3d Dept 2001]; ***First Fed. Sav. Bank v Midura***, 264 AD2d 407, 694 NYS2d 121 [2d Dept 1999]; ***JP Morgan Chase Bank, N.A. v Ilardo***, 36 Misc3d 359, 940 NYS2d 829 [Sup Ct, Suffolk County 2012]). Morever, as there is no dispute that Carpinelli defaulted in making payments under the terms of the note and mortgage, "the court (cannot) abrogate the right of foreclosure and sale ... which is incorporated in the contract and on the strength of which (the creditor) lent [its] money" (***Onewest Bank, FSB v Davies***, 38 Misc.3d 1230(A), *5, 967 NYS2d 868 [Sup Ct Suffolk County 2013] and the cases quoted therein]). Additionally, recent appellate case authorities have reminded trial courts that the "stability of contract obligations must not be undermined by judicial sympathy" (***Wells Fargo Bank, N.A. v Meyers***, 108 AD3d 9, 22, 966 NYS2d 108 [2d Dept 2013]; ***Emigrant Mtge. Co., Inc. v Fisher***, 90 AD3d 823, 824, 935 NYS2d 313 [2d Dept 2011] quoting ***First Natl. Stores v. Yellowstone Shopping Ctr.***, 21 NY2d 630, 638, 290 NYS2d 721 [1968] and ***Graf v Hope Bldg. Corp.***, 254 NY 1, 4–5, 171 NE 884 [1930]).

That Carpinelli did not retain an attorney until September 2012 is also not a reasonable excuse for her failure to interpose an answer. The summons served upon Carpinelli contains the requisite language of RPAPL 1320 warning that the failure to respond by serving an answer could result in a default judgment being entered and the loss of her home. Hence, Carpinelli was put on notice of the consequences of not serving an answer. It has also been held that where statutorily mandated special notices, expressly warning of the gravity of the subject matter of a foreclosure action and of the consequences in failing to timely answer a summons and complaint in accordance with directives set forth therein, are served upon a defendant, the failure to heed such directives does not constitute a reasonable excuse for the default (*see* ***Bank of New York v Jayaswal***, 33 Misc.3d 1214(A), 2011 WL 5061626 [Sup Ct Suffolk County 2011]).

Therefore, the assertions by Carpinelli do not amount to a reasonable excuse for her failure to timely interpose an answer. Having made such a determination, the court need not address whether she has a

meritorious defense (*see* ***Deutsche Bank Natl. Trust Co. v Pietranico***, 102 AD3d 724, 957 NYS2d 868 [2d Dept 2013]; ***U.S. Bank N.A. v Stewart***, 97AD3d 740, 948 NYS2d 411 [2d Dept 2012]; ***Reich v Redley***, 96 AD3d 1038, 947 NYS2d 564 [2d Dept 2012]). Thus, the motion by Carpinelli is denied.

Turning to the plaintiff's motion, to establish entitlement to a default judgment pursuant to CPLR 3215, a plaintiff "is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing" (***Green Tree Servicing, LLC v Cary***, 106 AD3d 691, 692, 965 NYS2d 511 [2d Dept 2013] [internal quotation marks omitted]). In support of its motion for leave to enter a default judgment as against the defendants, the plaintiff offered the affidavits of service, an affirmation by its counsel, a copy of the mortgage and note, and the affidavit of Steven Irwin of Onewest Bank, FSB, the plaintiff's servicer and attorney-in-fact, who attests to Carpinelli's failure to make payments as agree. Therefore, the plaintiff has established its prima facie entitlement to a default judgment.

The arguments advanced by Carpinelli in opposition to the plaintiff's motion rest upon claims that the plaintiff lacks standing to prosecute its claims for foreclosure and sale. It is now well established that standing is an affirmative defense which is waived by a defendant who fails to interpose an answer or file a timely pre-answer motion pursuant to CPLR 3211(e) asserting such a defense (***HSBC Bank USA, NA v Taher***, 104 AD3d 815, 962 NYS2d 301 [2d Dept 2013]; ***Bank of N.Y. v Alderazi***, 99 AD3d 837, 951 NYS2d 900 [2d Dept 2012]; ***JPMorgan Chase Bank, N.A. v Bauer***, 92 AD3d 641, 938 NYS2d 190 [2d Dept 2012]; ***Deutsche Bank Natl. Trust Co. v Hussain***, 78 AD3d 989, 912 NYS2d 595 [2d Dept 2010]); ***Wells Fargo Bank Minn., NA v Perez***, 70 AD3d 817, 894 NYS2d 509 [2010]; *leave to appeal denied*, 14 NY3d 710, 903 NYS2d 769 [2010], *cert. denied*, 131 S Ct 648 [2010]); ***HSBC Bank, USA v Dammond***, 59 AD3d 679, 875 NYS2d 679 [2d Dept 2009]; ***Wells Fargo Bank Minn., N.A. v Mastropaolo***, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). A plaintiff is thus under no obligation to plead and prove its standing in the first instance. It is only where standing is put in issue by a defendant's answer or pre-answer motion that the plaintiff must prove it has standing (*see* ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]; ***Wells Fargo Bank Minn, NA v. Mastropaolo***, *supra*; ***US Bank, NA v Collymore***, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; ***TPZ Corp. v Dabbs***, 25 AD3d 787, 808 NYS2d 746 [2d Dept 2006]; *see also* ***Society of Plastics Indus. v County of Suffolk***, 77 NY2d 761,570 NYS2d 778 [1991]). Here, having failed to succeed on her application pursuant to CPLR 3012(d) to file a late answer, Carpinelli has waived this defense (*see* ***Bank of N.Y. v Alderazi***, *supra*; ***Deutsche Bank Natl. Trust Co. v Hussain***, *supra*; ***HSBC Bank, USA v Dammond***, *supra*; ***Wells Fargo Bank Minn., N.A. v. Mastropaolo***, *supra*).

In any event, "[t]he mere possession of a promissory note endorsed in blank (just like a check) provides presumptive ownership of that note by the current holder" (***Deutsche Bank National Trust Co. v Pietranico***, *supra* at 545). The holder of the note is deemed the owner thereof with standing to foreclose (*id.*, citing *see, e.g.*, ***Mortgage Elec. Registration Sys., Inc. v Coakley***, *supra*). Since the mortgage follows as an incident of the note, when the note changed hands, the mortgage interest automatically followed (*see* ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, 961 NYS2d 200 [2d Dept 2013]; ***U.S. Bank Natl. Assn. v Cange***, 96 AD3d 825, 826, 947 NYS2d 522 [2d Dept 2012]); ***U.S. Bank, NA v Sharif***, 89 AD3d 723, 933 NYS2d 293 [2d Dept 2011]; ***Bank of New York v Silverberg***, *supra*; ***U.S. Bank, N.A. v Collymore***, *supra*).

Based on the evidence before the court, the plaintiff was in possession of the note on the date the instant action was commenced, having annexed to the complaint the note indorsed by the original lender/mortgagee to IndyMac Bank, which in turn indorsed the note in blank. Therefore, the plaintiff is deemed the presumptive owner of the note and mortgage with standing to prosecute its claim for foreclosure and sale (*see* ***U.S. Bank Natl. Assn. v Cange***, *supra;* ***U.S. Bank, NA v Sharif***, *supra*), and thus, rendering any arguments as to the assignment of the mortgage, of no consequence.

Thus, the arguments in opposition by Carpinelli are insufficient to overcome plaintiff's prima facie showing, thereby entitling plaintiff to the entry of a default judgment. The plaintiff is also entitled to amend the caption susbtitute the Lynda Stubbolo, Marianna Stubbolo and Kenny Stubbolo as defendants in place of John Doe # 1 through #3, having established that they were served with the summons and complaint and failed to answer or otherwise appear in the action.

The branch of the plaintiff's motion to correct the name of the plaintiff to HSBC Bank USA, National Association as Trustee for DALT 2006-AR6 is granted. Plaintiff explains that the "R6" in the actual trust DALT 2006-AR6, was inadvertently omitted. Leave to amend the complaint should be freely granted absent prejudice (CPLR 3025[b]; ***Edenwald Contracting Co., Inc. v. City of New York***, 60 N.Y.2d 957, 471 NYS2d 55 [1983]). There is no indication of prejudice to the defendants and no substantive rights affected by the amendment (*see generally* ***Madison Physical Therapy, P.C. v 3311 Shore Parkway Realty Corp.***, 79 AD3d 978, 912 NYS2d 889[2d Dept 2010]; ***Key Bank, NA v Stern***, 14 AD3d 656, 789 NYS2d 297 [2d Dept 2005]; ***Poughkeepsie Sav. Bank FSB v Maplewood Land Dev. Co., Inc.***, 201 AD2d 606, 620 NYS2d 161 [3d Dept 1994]), especially in light of the fact that Carpinelli's counsel pointed out that the trust "DALT 2006-A" does not exist.

Therefore, the plaintiff's motion, for entry of a default judgment and an order of reference appointing a referee to compute is granted as its moving papers clearly demonstrate its entitlement to such relief (*see* RPAPL 1321; CPLR 3215[f]). It is also noted that there has been compliance with the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11), as before the court is the affirmation of Mark Golab, Esq.

Any arguments by the parties not explicitly addressed herein have been reviewed and deemed to be without merit.

Accordingly, the motion (#003) by plaintiff is granted and the motion (#004) by defendant Carpinelli is denied. The temporary injunction is vacated. The proposed order appointing a referee to compute, as modified by the court, has been signed simultaneously herewith.

Dated: 9/27/13

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION

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COPY

At an IAS of the Supreme Court of the State of New York, held in and for the County of Suffolk at the Courthouse thereof, Supreme Court Building, ~~235 Griffing~~ One Court Street Ave., Riverhead, New York on the 27th day of September, 2013.

PRESENT: Jerry Garguilo
Hon. ~~Daniel Martin~~,

Justice.

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HSBC BANK USA, NATIONAL ASSOCIATION AS TRUSTEE FOR DALT 2006-A

Plaintiff.

-against-

FILOMEINA CARPINELLI, and "JOHN DOE #1" to "JOHN DOE #10," the last 10 names being fictitious and unknown to plaintiff, the persons or parties intended being the persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the verified complaint,

Defendants.

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Index No. 10120/2010

ORDER OF REFERENCE

Premises:

311 Greenlawn Road
Greenlawn, New York

UPON the summons and complaint herein, and proof that all the defendants have been duly served with said summons, or have voluntarily appeared in this action; and upon the affidavits of service heretofore filed, and upon the notices of appearance, if any, hereto annexed and heretofore filed herein, from all of which it appears that none of the defendants answered, moved or appeared with respect to the complaint, although the time for them to do so has expired and has not been extended by court order or otherwise; and it further appearing that defendants captioned as JOHN DOE # 4 through JOHN DOE #10 were not served with copies of the summons and complaint and are not necessary parties defendant, so that none of the defendants are entitled to notice hereof; and

that none of the defendants are infants, incompetents or absentees, or in the military;, and that since the filing of the lis pendens, the complaint herein has not been amended so as to make new parties to the action or so as to embrace real property other than that described in the original complaint or so as to extend plaintiff's claim against the premises;

AND upon the affirmation of Matthew Russell, Esq., an associate of the firm of McCabe, Weisberg & Conway, P.C., attorneys for the plaintiff, dated July 20, 2012 showing what proceedings have heretofore been had herein, and setting forth the requisite facts entitling plaintiff to the within relief; and upon all proceedings heretofore had herein, and all the papers filed herein;

NOW, upon motion of McCabe, Weisberg & Conway, P.C. attorneys for plaintiff, it is

ORDERED, that this action be and the same is hereby referred to John Gioni's Certilman Balin 90 Merrick Avenue, East Meadow, NY 11554, telephone number 516-794-2700, as Referee to ascertain and compute the amount due to the plaintiff herein for principal, interest, and other disbursements advanced as provided for in the note and mortgage upon which this action was brought, except attorneys fees, to examine and report whether or not the mortgaged premises can be sold in parcels, and that the Referee complete his/her report with all convenient speed date and that, except for good cause shown, that plaintiff shall move for judgment no later than 60 days of the date of the Referee's report; and it is further

ORDERED, that the name of the defendant listed in the caption as John Doe #1, be amended to read Lynda Stubbolo, that the name of the defendant listed in the caption as John Doe #2, be amended to read Marianna Stubbolo, that the name of the defendant listed in the caption as John Doe #3, be amended to read Kenny Stubbolo, and the caption be amended accordingly; and it is further

ORDERED, the caption be amended by changing Plaintiff's name to HSBC Bank USA, National Association as Trustee for DALT 2006-AR6 and names of defendants JOHN DOE # 4 through JOHN DOE #10 be severed and stricken from the caption herein and that the action be discontinued as to them, all of the foregoing without prejudice to any of the proceedings heretofore had herein or to be had herein and the caption hereinafter to read as follows:

SUPREME COURT THE STATE OF NEW YORK:
COUNTY OF SUFFOLK
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HSBC BANK USA, NATIONAL ASSOCIATION AS TRUSTEE FOR DALT 2006-AR6 Index No: 10120/2010

Plaintiff.

-against-

FILOMEINA CARPINELLI,
LYNDA STUBBOLO,
MARIANNA STUBBOLO,
KENNY STUBBOLO,

Defendants.
----------X

and it is further

ORDERED, that by accepting this appointment, the Referee certifies that the Referee is in compliance with 22 NYCRR Part 36, including but not limited to Section 36.2(c) ("Disqualifications from Appointment") and Section 36.2(d) ("Limitations on appointments based on compensation"); and it is further

ORDERED, that pursuant to CPLR 8003 (a) ~~(the statutory fee of $50.00)~~ (in discretion of the court a fee of $500.00), shall be paid to the Referee for the computation stage and upon the filing of his/her report, and it is further

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ORDERED, that a copy of this Order with Notice of Entry shall be served upon the owner of the equity of redemption, any tenants named in this action and any other party entitled to notice.

ENTER:

J.S.C. 9/27/13

HON. JERRY GARGUILO

GRANTED

SEP [illegible] 2013