SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

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JPMORGAN CHASE BANK, N.A. f/k/a CHASE HOME FINANCE, LLC, SUCCESSOR BY MERGER TO THE CHASE MANHATTAN MORTGAGE CORPORATION, A NEW JERSEY CORPORATION,

Plaintiff,

- against -

CHAKA R. POWELL, AS ADMINISTRATOR AND HEIR OF THE ESTATE OF ANNIE GREEN, DECEASED; DAVON WELCH AND JACQUELINE PALMER-MINTER a/k/a AS HEIRS OF THE ESTATE OF ANNIE GREEN a/k/a ANNIE R. GREEN, DECEASED; UNITED STATES OF AMERICA; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; MIDLAND FUNDING, LLC, DOING BUSINESS IN NEW YORK AS MIDLAND FUNDING OF DELAWARE, LLC; CITY OF NEW YORK NEW YORK CITY DEPARTMENT OF FINANCE-PARKING VIOLATIONS BUREAU PAYMENT AND ADJUDICATION CENTER OF QUEENS; CITY OF NEW YORK NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; CRIMINAL COURT OF THE CITY OF NEW YORK.

Defendants.

Index No.: 14433/2011

Motion Date: 10/22/14

Motion No.: 73

Motion Seq.: 1

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The following papers numbered 1 to 14 were read on this motion by the plaintiff, JPMORGAN CHASE BANK, N.A. for an order striking the answer with affirmative defenses and counterclaim of defendant CHAKA R. POWELL AS ADMINISTRATOR AND HEIR OF THE ESTATE OF ANNIE GREEN, DECEASED; granting summary judgment pursuant to CPLR 3212; for an order granting a default judgment pursuant to CPLR 3215 against all other non-answering defendants; for an order amending the caption; and for an order pursuant to RPAPL § 1321 appointing a referee to ascertain and compute the amount due to the plaintiff:

Papers
Numbered

Notice of Motion-Affidavits-Exhibits-Memo of Law.....1 - 7
Affidavit in Partial Opposition.....8 - 11
Reply Affirmation.....12 - 14

In this mortgage foreclosure action, plaintiff moves for an order striking the answer with affirmative defenses and counterclaim of defendant Chaka R. Powell as Administrator and Heir of the Estate of Annie Green, deceased; granting summary judgment against said defendant on the ground that the answer contains no valid defense and that no triable issues of fact exist; granting a default judgment against the remaining defendants who have not answered; appointing a referee to compute the sums due and owing to plaintiff; amending the caption; and amending the complaint nunc pro tunc.

This action pertains to the property located at 13-15 Caffrey Avenue, Far Rockaway, New York, 11691. Based upon the record before this court, Annie Green entered into a mortgage with Approved Funding Corp. on March 21, 2001 to secure a loan in the principal amount of $60,000. Defendant also executed and delivered a Note to Approved Funding Corp. acknowledging the loan, the rate of interest, and the monthly installments. On the same day, March 21, 2001 the note was indorsed and made payable to Chase Manhattan Mortgage Corporation. The assignment of mortgage to Chase was recorded on April 16, 2001.

Annie Green passed away on June 8, 2008. The mortgage payments were not paid by the Estate following the death and the plaintiff elected to accelerate the defendant's mortgage and brought an action to foreclose by filing a lis pendens and summons and complaint on September 20, 2010 under Index No. 23768/2010. Because the Estate was not named as a defendant in that action, the plaintiff discontinued the first action by stipulation of discontinuance dated November 28, 2011.

The instant action naming Chaka Powell as Administrator of the Estate of Annie Green was commenced by the filing of a summons and complaint and lis pendens on June 16, 2011. In the complaint the plaintiff asserts that it is the holder of the note and the mortgage and has complied with RPAPL § 1304 by mailing a 30 day default letter and by serving a 90 day pre-foreclosure notice on the defendant by certified and first class mail. Counsel asserts that all of the defendants have been duly served with a copy of the summons and verified complaint

None of the defendants answered the complaint with the exception of Chaka R. Powell, the Administrator, who served a verified answer dated November 9, 2012. The answer contains a general denial and asserts nine affirmative defenses and a counterclaim. A Residential Foreclosure Settlement conference was held on February 13, 2014 at which time the Referee, Maria Bradley, directed the plaintiff to move by notice of motion for summary judgment and an order of reference.

In support of the motion for summary judgment, the plaintiff submits the affirmation of counsel, Sean R. Gajewski, Esq., the affidavit of merit of Andrew M. Bartz, Assistant Secretary of JPMorgan Chase Bank, N.A.; a copy of the note and mortgage; copies of the affidavits of service on all the defendants; a copy of the pleadings; a copy of the 90 day notice of intent to foreclose; a copy of the RPAPL § 1304 notice served on the defendant with the summons and complaint; and a copy of the attorney affirmation pursuant to the Administrative Order of the Chief Administrative Judge dated July 29, 2014, under AO/548/10, executed by Sean R. Gajewski, Esq.

In his affirmation, plaintiff's counsel asserts that pursuant to the affidavit of service, defendant Chaka R. Powell was served on June 21, 2011 pursuant to CPLR 308(2), by service upon a person of suitable age and discretion at the defendant's place of residence. Defendant, although raising lack of personal service as an affirmative defense, has not disputed the propriety of the service nor has she moved to dismiss the complaint for lack of personal jurisdiction within 60 days of service of the answer as required by CPLR 3211(e). Therefore, plaintiff asserts that as the defendant was properly served with a summons and complaint, the court has acquired personal jurisdiction.

In his affidavit in support of the motion, Andrew Bartz, states that based upon his personal review of Chase's business records, plaintiff is in possession of the original note and was in possession of same at the time of the filing of the complaint. He also states that defendant defaulted under the terms of the Mortgage by failing to make monthly payments as of December 1, 2009. He states that the unpaid principal balance as of April 17, 2014 is $27,160.79. The total due with interest and taxes, hazard insurance and other costs including an escrow advance balance is $88,447.24. He states that his review of the records reveals that a notice of default was sent to the borrower and a 90 day pre-foreclosure notice was issued to the defendant.

This Court finds that plaintiff has made a prima facie showing that it is entitled to a judgment of foreclosure and

sale. It is well settled that a plaintiff in a mortgage foreclosure action establishes a prima facie case of entitlement to summary judgment through submission of proof of the existence of the underlying note, mortgage and default in payment after due demand (see Witelson v Jamaica Estates Holding Corp. I, 40 AD3d 284 [1st Dept. 2007]; Marculescu v Ouanez, 27 AD3d 701 [2d Dept. 2006]; US. Bank Trust National Assoc. v Butti, 16 AD3d 408 [2d Dept. 2005); Layden v Boccio, 253 AD2d 540 [2d Dept. 1998); State Mortgage Agency v Lang, 250 AD2d 595[2d Dept. 1998]). The plaintiff demonstrated proper service of the summons and complaint and showed by admissible evidence that it had properly been assigned the note and mortgage as of the date of the commencement of the action. In addition, the plaintiff has submitted sufficient proof to show that notices were served on the defendant in compliance with RPAPL §§ 1303 and 1304.

The moving papers demonstrate, prima facie, that none of the asserted defenses set forth in the answer of defendant are meritorious and that plaintiff is entitled to summary judgment on its claims against defendants (see Baron Assoc., LLC v Garcia Group Enters., Inc., 96 AD3d 793 [2d Dept. 2012]; North Bright Capital, LLC v 705 Flatbush Realty, LLC, 66 AD3d 977 [2d Dept. 2009]; Witelson v Jamaica Estates Holding Corp. I, 40 AD3d 284 [1st Dept. 2007]; EMC Mortg. Corp. v Riverdale Assocs., 291 AD2d 370 [2d Dept. 2002]; State of New York v Lang, 250 AD2d 595 [2d Dept. 1998]). As stated above, the complaint herein sufficiently sets forth a valid cause of action for foreclosure.

Defendant, Chaka R. Powell, submits an affidavit in partial opposition in which she does not oppose the motion for summary judgment on the merits, but rather, seeks additional time to sell the property on the open market rather than having the property sold at a judicial sale. She states that she is continuing to entertain fair offers and to negotiate the sale of the property through a retained brokerage firm.

This Court finds that the evidence submitted by the plaintiff including a copy of the note assigned to the plaintiff and an affidavit from Andrew Bartz stating that based upon his personal review of the records plaintiff was in possession of the note and mortgage at the time the action was commenced, is sufficient to establish standing to commence the action (see Bank of N.Y. v Silverberg, 86 AD3d 274 [2d Dept. 2011][in a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced]; U.S. Bank, N.A. v Collymore, 68 AD3d 752 [2d Dept. 2009]). "Where a note is transferred, a mortgage securing the

debt passes as an incident to the note" (Deutsche Bank Natl. Trust Co. v Spanos, 102 AD3d 909 [2d Dept. 2013]). Therefore, "either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation" (HSBC Bank USA v Hernandez, 92 AD3d 843 [2d Dept. 2012]). Since the mortgage passes with the debt that is evidenced by the note as an inseparable incident thereto, the plaintiff established its standing to commence the within action (see US Bank Natl. Assn. v Cange, 96 AD3d 825 [2d Dept. 2012]; U.S. Bank, NA v Sharif, 89 AD3d 723[2d Dept 2011]; Bank of New York v Silverberg, supra]).

As defendant has failed to raise a material issue of fact in opposition, the plaintiff is entitled to the relief sought (see Baron Assoc., LLC v Garcia Group Enters., Inc., 96 AD3d 793 [2d Dept. 2012]; Wells Fargo Bank Minn., Natl. Assn. v Perez, 41 AD3d 590 [2d Dept. 2007], lv dismissed 10 NY3d 791 [2008]).

Therefore, the plaintiff's motion for summary judgment is granted and the affirmative defenses contained in the defendant's answer are stricken. Plaintiff is entitled to a default judgment against the non-answering defendants. Plaintiff's further application for the appointment of a referee to compute the amounts due under the subject mortgage is also granted as is the plaintiff's application for an order deleting the John Doe defendants and amending the caption.

However, the granting of the within motion does not in any way eliminate the possibility that the house may be sold at a short sale subject to the bank's approval prior to a referee's sale.

Order of Reference signed contemporaneously herewith.

Dated: December 11, 2014
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.