SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH SUPREME COURT JUSTICE *Justice* PART 61

Index Number : 850125/2013
TITAN CAPITAL ID,LLC
vs.
NICHOLAS R.H.TOMS AND
SEQUENCE NUMBER : 001
SUMMARY JUDGEMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum opinion.

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 1/17/14

HON. ANIL C. SINGH, J.S.C.
SUPREME COURT JUSTICE

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☒ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☒ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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TITAN CAPITAL ID, LLC,

Plaintiff,

-against-

NICHOLAS R.H. TOMS AND WILLIAM HAAS as TRUSTEES OF THE DAWN W. TOMS TRUST, a QUALIFIED DOMESTIC TRUST, NICHOLAS R.H. TOMS, CAROLINE TOMS, JP MORGAN CHASE, N.A., AS SUCCESSOR-IN-INTEREST TO WASHINGTON MUTUAL BANK, FA, and JOHN DOE #"1" through #"20,"

Defendants.

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DECISION AND ORDER

Index No. 850125/13

HON. ANIL C. SINGH, J.:

Plaintiff moves for an order: 1) granting plaintiff summary judgment pursuant to CPLR 3212; 2) appointing a referee to compute the sums due and owing and to report whether the mortgaged premises should be sold in one parcel; 3) amending the caption to discontinue this action as against defendant JP Morgan Chase, N.A., as successor-in-interest to Washington Mutual Bank, FA; and 4) amending the caption to delete references to the "John Doe" defendants.

Defendants Nicholas R.H. Toms and William Haas as Trustees of the Dawn W. Toms Trust, a Qualified Domestic Trust; Nicholas R.H. Toms; and Caroline Toms

oppose the motion.

Plaintiff Titan Capital ID, LLC commenced this action to foreclose a mortgage encumbering the subject premises at 154 Waverly Place in Manhattan. Fee title to the premises was vested in Nicholas R.H. Toms & William Haas as Trustees of The Dawn W. Toms Trust, a Qualified Domestic Trust (the "trustees").

On January 22, 2013, the trustees executed and delivered to plaintiff an Amended and Restated Mortgage Note (the "note"). To secure payment for the note, the trustees executed and delivered to plaintiff a consolidated and amended mortgage encumbering the premises. Contemporaneously, defendants Nicholas R.H. Toms and Caroline Toms executed unconditional guaranty agreements.

The trustees and the plaintiff entered into a written Interest Reserve and Security Agreement ("IRSA") dated January 22, 2013. Under the terms of the agreement, the trustees were required to replenish the "Interest Reserve Fund," as defined in the IRSA, in the sum of $50,000.00 within 90 days of the January 22, 2013 closing.

Paragraph 2D of the IRSA states as follows:

> 2. Interest Reserve Fund.
>
> D. Replenishment. WITH TIME BEING OF HE [sic.] ESSENCE, Borrower shall tender the sum of $50,000.00 to the Lender within 90 days of the date hereof, which sum shall be added to the Interest

> Reserve Fund and held by the Lender in accordance with the terms and conditions of this Agreement. Borrower's failure to comply herewith shall constitute a default and an Event of Default under the Note and Mortgage.

(Motion, exhibit E, p. 2, para. 2).

Plaintiff exhibits the sworn affidavit of David Saferstein, who states that he is a manager of plaintiff Titan Capital ID, LLC. He asserts that the trustees failed to replenish the Interest Reserve Fund within the ten (10) day grace period afforded by the note; that such failure was an event of default under the note and mortgage; and that plaintiff, by letter to the trustees dated May 6, 2013, exercised its option under the note and declared the entire upaid balance of the note, plus interest, to be immediately due and payable, and thereby accelerated the maturity of the note.

"A party moving for summary judgment on its foreclosure claim establishes its prima facie entitlement to judgment as a matter of law by submitting the relevant mortgages, underlying notes, and evidence of default" (78 N.Y.Jur.2d Mortgages section 629). "Upon such a showing, the burden shifts to the mortgagor to raise a triable issue of fact" (Id.; see also Red Tulip, LLC v. Neiva, 44 A.D.3d 204, 209 [1st Dept., 2007]).

In short, the Court finds that plaintiff has made a prima facie showing on its

foreclosure claim.

In opposition, defendants assert that the motion should be denied for two reasons: 1) plaintiff failed to satisfy section 1304 of the Real Property Actions and Proceedings Law, which requires a lender in the case of home loans to issue a special notification at least ninety days prior to filing the foreclosure action; and 2) plaintiff prematurely seeks deficiency liability.

The requirements for sending ninety-day notices to borrowers under RPAPL 1304 apply only to "lenders," which are defined as "mortgage bankers" under the New York Banking Law (N.Y. Bank Law section 590(1)(f)). However, plaintiff exhibits a reply affidavit by David Saferstein, who states that plaintiff never applied for or received a mortgage banking license of any type from the State of New York or from any other state.

In light of the reply affidavit, the Court finds that there is no proof that the party seeking foreclosure in this matter is a "mortgage banker" under the Banking Law.

It is important to note, too, that the term "borrower" is defined by RPAPL 1304(5)(a)(i) as a "natural person." By contrast, the borrower in the instant matter, as trustees, do fall within the definition of "natural person."

Defendants' contention that plaintiff prematurely seeks deficiency liability

is equally meritless. On its face, the complaint seeks such relief only in the event a deficiency exists after the sale of the premises pursuant to RPAPL 1371 (Verified Complaint, p. 8).

Finally, the branches of plaintiff's motion to amend the caption to delete as parties the defendant JP Morgan Chase, N.A., as successor-in-interest to Washington Mutual Bank, FA, and the "John Doe" defendants, is unopposed and should be granted.

Accordingly, plaintiff's motion for summary judgment is granted; and it is further

ORDERED that plaintiff's counsel shall settle order on notice to include an order of reference and amendment of the caption.

Date: JAN 12, 14
New York, New York

Anil C. Singh

HON. ANIL C. SINGH
SUPREME COURT JUSTICE