SHORT FORM ORDER

INDEX
NO.: 3363-14

SUPREME COURT - STATE OF NEW YORK
IAS PART 22 - SUFFOLK COUNTY

PRESENT: Hon. CAROL MacKENZIE
Justice of the Supreme Court

MOTION DATE 10-14-14
ADJ. DATE
Mot. Seq. # 001-MD

HSBC BANK USA, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE HOLDERS OF CERTIFICATES ISSUED BY DEUTSCHE ALT-B SECURITIES MORTGAGE LOAN TRUST, SERIES 2006-AB4

Plaintiff,

-against-

ALBERT GARARD III, PATRICIA GARARD A/K/A PATRICIA HARRIS A/K/A PATRICIA HARRIS-GARARD A/K/A PATRICIA HARRISGARARD, KAREN PALERMO, NEW YORK STATE DEPT OF TAXATION AND FINANCE, PEOPLE OF THE STATE OF NEW YORK, STATE OF NEW YORK,

JOHN (being fictitious, the names unknown to Plaintiff intended to be tenants, occupants, persons or corporations having or claiming an interest in or lien upon the property described in the complaint or their heirs at law, distributees, executors, administrators, trustees, guardians, assignees, creditors or successors.)

Defendants,

GROSS POLOWY, LLC
Attorneys for Plaintiff
25 Northpointe Parkway, Suite 25
Amherst, N. Y. 14228

MICHAEL KENNEDY KARLSON, ESQ.
Attorney for Defendants
Albert Garard III
Patricia Garard
60 Seaman Avenue, 4E
New York, N. Y. 10034

Upon the following papers numbered 1 to 17 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 11 - 14; Replying Affidavits and supporting papers 15 - 17; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by the plaintiff for, inter alia, an order awarding summary judgment in its favor and against the defendants Albert Garard and Patricia Garard, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption is denied in its entirety; and it is further

ORDERED that the plaintiff is directed to serve a copy of this order with notice of entry upon all parties who have appeared herein and not waived further notice within thirty (30) days of the date herein, and to promptly file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on real property known as 77 Hudson Avenue, Brentwood, New York 11717 ("the property"). On June 14, 2006, the defendants Albert Garard executed an "InterestFirst" fixed-rate note in favor of Lancaster Mortgage Bankers ("the lender") in the principal sum of $231,000.00. The note provides, inter alia, for payments of interest only for the first 120 months, and then principal and interest. To secure said note, Mr. Garard and his wife, Patricia Garard (collectively "the defendant mortgagors") gave the lender a mortgage also dated June 14, 2006 on the property. The mortgage, which was recorded on October 17, 2006, indicates that Mortgage Electronic Registration Systems, Inc. ("MERS") was acting solely as a nominee for the lender and its successors and assigns and that, for the purposes of recording the mortgage, MERS was the mortgagee of record. The mortgage, at section "B" specifies that the defendant mortgagors' address at the time of execution of the loan documents was 4 Chen Court, Middle Island, New York 11953 ("the Middle Island residence"), not the subject property.

In connection with the note and mortgage, the defendant mortgagors also executed a 1-4 Family Rider (Assignment of Rents) on June 14, 2006, which provides, inter alia, that the requirement at section "6" in the mortgage concerning the occupancy requirement was deleted (Rider § "F"), and that the defendant mortgagors "shall not seek, agree to or make a change in the use of the [p]roperty or its zoning classification, unless the [l]ender has agreed in writing to the change" (Rider §"B"). Parenthetically, the rider also provides that, upon the [l]ender's request after default, "[the defendant mortgagors] shall assign to [l]ender all leases of the [p]roperty and all security deposits made in connection with leases of the property" (Rider § "G").

By way of an undated allonge to the note made by Darlene Pereira as Vice President of Loan Documentation of the lender, the note and mortgage were allegedly transferred to the plaintiff, HSBC Bank USA, National Association, as Trustee for the Holders of the Certificates issued by Deutsche Alt-B Securities Mortgage Loan Trust, Series 2006-AB4, prior to commencement. The transfer of the note and mortgage was memorialized by an assignment of the mortgage executed on July 19, 2012, and subsequently duly recorded in the Suffolk County Clerk's Office on September 10, 2012.

Mr. Garard allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on March 1, 2013, and each month thereafter. The plaintiff allegedly provided Mr. Garard with notice of his default by two letters each dated July 18, 2013. One letter was addressed to Mr. Garard at the property. The other letter was addressed to Mr. Garard at the Middle Island residence. The plaintiff also allegedly sent two 90-day notice letters each dated October 15, 2013 to the defendant mortgagors by first class mail and certified mail. One was addressed to the defendant mortgagors at the property. The other one was addressed to the defendant mortgagors at the Middle Island residence. After the defendant mortgagors allegedly failed to cure said default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on February 18, 2014.

In response to the complaint, the defendant mortgagors interposed two individual verified answers. By their answers, the defendant mortgagors generally deny all of the material allegations set forth in the complaint, and assert nine affirmative defenses, including, inter alia, the plaintiff's lack of standing; an invalid assignment by MERS by virtue of the lender's voluntary bankruptcy proceeding for a chapter 7 discharge; the lack of authority to assign the mortgage; the collection of excessive payments; violations of the statute of frauds and the Truth In Lending Act (TILA) (15 USC § 1601, *et seq.*) as well as Federal Reserve Board Regulation Z (Regulation Z) (12 CFR part 226); and the plaintiff's failure to: comply with all conditions precedent, including the notice of default and the notice pursuant to RPAPL § 1304; and properly credit all payments. The remaining defendants have neither answered nor appeared herein, and thus are in default.

By way of further background, a settlement conference of the type contemplated by CPLR 3408 was held before the specialized foreclosure conference part on August 1, 2014. A representative of the plaintiff attended and participated in said conference. At the conference, the presiding referee reported to the Court that the defendant mortgagors were not eligible for foreclosure settlement conference pursuant to CPLR 3408 because the property was not their primary residence at that time (*see*, CPLR 3408; RPAPL § 1304 [5] [a]; ***Emigrant Sav. Bank v Sia***, 2012 NY Misc LEXIS 3377, 2012 WL 3134214, 2012 NY Slip Op 31854 [U] [Sup Ct, Suffolk County 2012]). As a result, this case was dismissed from the foreclosure conference program. Accordingly, no further foreclosure settlement conference is required under any statute, law or rule.

The plaintiff now moves for, inter alia, an order: (1) awarding summary judgment in its favor and against the defendant mortgagors, striking their answers and dismissing the affirmative defenses set forth therein; (2) pursuant to CPLR 3215 fixing the defaults of the non-answering defendants; (3) 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 (4) amending the caption. In opposition, the defendant mortgagors have filed, inter alia, an affirmation from their counsel. In response, the plaintiff has a filed a reply.

In his opposing affirmation, counsel on behalf of the defendant mortgagors, re-asserts the following pleaded affirmative defenses in the answers: an invalid assignment by MERS by virtue of the lender's voluntary bankruptcy proceeding for a chapter 7 discharge; the lack of authority to assign the mortgage; and the plaintiff's failure to: comply with all conditions precedent, including the notice of default and the notice pursuant to RPAPL § 1304. Counsel also asserts that the entire 90-day notice, inclusive of the portion which contains the housing counseling agencies, is not in the required 14-point type.

When moving to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is "without merit as a matter of law" (*see*, CPLR 3211 [b]; ***Vita v New York Waste Servs., LLC***, 34 AD3d 559, 559, 824 NYS2d 177 [2d Dept 2006]). In reviewing a motion to dismiss an affirmative defense, this court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference (*see*, ***Fireman's Fund Ins. Co. v Farrell***, 57 AD3d 721, 869 NYS2d 597 [2d Dept 2008]). Moreover, if there is any doubt as to the availability of a defense, it should not be dismissed (*see, id.*).

A plaintiff in a mortgage foreclosure action establishes a prima facie case for summary judgment by submission of the mortgage, the note, bond or obligation, and evidence of default (*see*, ***Valley Natl. Bank v Deutsch***, 88 AD3d 691, 930 NYS2d 477 [2d Dept 2011]; ***Wells Fargo Bank v Das Karla***, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; ***Washington 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], *quoting* ***Mahopac Natl. Bank v Baisley***, 244 AD2d 466, 467, 644 NYS2d 345 [2d Dept 1997]).

In its present form, RPAPL § 1304 provides that in a legal action, including a residential mortgage foreclosure action, at least 90 days before the lender commences an action against the borrower, the lender must send a notice to the borrower including certain language and the notice must be in 14-point type. The notice must be sent by registered or certified mail and also by first-class mail to the last known address of the borrower, and if different, to the residence that is the subject of the mortgage (*see*, RPAPL § 1304). Such notice shall be sent by the lender, assignee or mortgage loan servicer in a separate envelope from any other mailing or notice (*id.*). The statute further provides that the notice shall contain a list of at least five housing counseling agencies that serve the region where the borrower resides (*id.*). RPAPL § 1304 provides that the notice must be sent to the "borrower," a term not defined in the statute (***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 105, 923 NYS2d 609 [2d Dept 2011]).

Proper service of the RPAPL § 1304 notice containing the statutorily-mandated content on the "borrower" or "borrowers" is a condition precedent to the commencement of a foreclosure action, and the plaintiff's failure to show strict compliance requires dismissal (***Hudson City Sav. Bank v DePasquale***, 113 AD3d 595, 596, 977 NYS2d 895 [2d Dept 2014]; ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, 910, 961 NYS2d 200 [2d Dept 2013]; ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, *supra* at 103 [2d Dept 2011]; *see also*, ***Pritchard v Curtis***, 101 AD3d 1502, 1504, 957 NYS2d 440 [3d Dept 2012]). Since this action was commenced on April 22, 2011, the 90-day notice requirement set forth in the statute is applicable. Thus, in support of its motion for summary judgment on the complaint, the plaintiff was required to prove its allegations by tendering sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL § 1304, and failure to make this showing requires denial of the motion, regardless of the opposing papers (***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d at 106 [citation omitted]).

In meeting this burden, the plaintiff benefits from the long-standing doctrine of presumption of regularity: generally, a letter or notice that is properly stamped, addressed, and mailed is presumed to be delivered by that addressee (***Trusts & Guar. Co. v Barnhardt***, 270 NY 350, 352 [1936]; ***News Syndicate Co. v Gatti Paper Stock Corp.***, 256 NY 211, 214-216 [1931]; ***Connolly v Allstate Ins. Co.***, 213 AD2d 787, 787, 623 NYS2d 373 [3d Dept 1995]; ***Kearney v Kearney***, 42 Misc3d 360, 369, 979 NYS2d 226 [Sup Ct, Monroe County 2013]). The presumption of receipt by the addressee "may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed" (***Residential Holding Corp. v Scottsdale Ins.***

Co., 286 AD2d 679, 680, 729 NYS2d 776 [2d Dept 2001]). CPLR 2103(f)(1) defines mailing as "the deposit of a paper enclosed in a first class postpaid wrapper, addressed to the address designated by a person for that purpose or, if none is designated, at that person's last known address, in a post office or official depository under the exclusive care and custody of the United States Postal Service within the state" (*see*, ***Lindsay v Pasternack Tilker Ziegler Walsh Stanton & Romano LLP***, 129 AD3d 790, 2015 NY Slip Op 04819 [2d Dept 2015]). "If that proof is established, the burden shifts to the borrower," and "the final legal truism prevails: once the presumption of proper service has been established, mere denial of receipt is insufficient to rebut the presumption" (***Kearney v Kearney***, 42 Misc3d 360, *supra* at 370; *see*, ***Matter of ATM One v Landaverde***, 2 NY3d 472, 478, 779 NYS2d 808 [2004]).

The plaintiff failed to establish its prima facie entitlement to judgment as a matter of law because it did not demonstrate that it complied with the condition precedent contained in the subject mortgage agreement, which required that it provide the defendant mortgagors with notice of default prior to demanding payment of the loan in full (*see*, ***Nationstar Mtge., LLC v Dimura***, 127 AD3d 1152, 7 NYS3d 573 [2d Dept 2015]; ***HSBC Mtge. Corporation (USA) v Gerber***, 100 AD3d 966, 955 NYS2d 131 [2d Dept 2012]; *cf.*, ***Deutsche Bank Natl. Trust Co. v MacPherson***, 122 AD3d 896, 998 NYS2d 394 [2d Dept 2014]; ***Indymac Bank, F.S.B. v Kamen***, 68 AD3d 931, 890 NYS2d 649 [2d Dept 2009]). The unsubstantiated and conclusory statements in the affidavit of the plaintiff's officer that "in accordance with the terms of the mortgage, a notice of default was sent to the mortgagor(s) in at the last known address provided by the mortgagors," even when combined with a copies of the notice of default, did not establish that the required notice was mailed by first class mail or actually delivered to the notice address if sent by other means, as required by the terms of the mortgage agreement (*see*, ***GMAC Mtge. LLC v Bell***, 128 AD3d 772, 11 NYS3d 73 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v Eisler***, 118 AD3d 982, 988 NYS2d 682 [2d Dept 2014]; *cf.*, ***JPMorgan Chase Bank v Kang***, 2015 NY Misc LEXIS 1953, 2015 NY Slip Op 30955 [U] [Sup Ct, Queens County 2015] [affidavit of merit of plaintiff's "Legal Specialist III" sufficiently detailed proof of mailing of the default notice, by indicating that she had knowledge of and has reviewed business records, which were maintained in the course of the plaintiff's regularly conducted business activities, and said records included proof of mailing documentation obtained from the United States Post Office at or near the time of mailing was made]). In her affidavit, the plaintiff's officer provided a summary of relevant events, including the execution of the mortgage and the note, an unspecified date prior to which the plaintiff allegedly came into possession of the note and the mortgage, the default in payments, and the amounts due.

The plaintiff's officer, however, did not allege sufficient facts as to how compliance with the default notice provisions in the mortgage were accomplished; nor did she identify the individual who allegedly did so (*see*, ***Nocella v Fort Dearborn Life Ins. Co. of N.Y.***, 99 AD3d 877, 955 NYS2d 70 [2d Dept 2012]; *cf.*, ***Preferred Mut. Ins. Co. v Donnelly***, 111 AD3d 1242, 974 NYS2d 682 [4th Dept 2013]). More specifically, the affiant did not give any indication that she is familiar with the standard mailing practices or procedures of the entity alleged to have sent the notices, and that those practices or procedures were followed in this instance. The affiant also made no attempt to explain the significance of the certain documentation submitted herein and allegedly addressed to the defendant mortgagors, in which the default notices were allegedly mailed.

While compliance with the 90-day notice requirements of RPAPL § 1304 satisfies the 30-day default notice requirements in a mortgage document (*see*, ***Wachovia Bank, N.A. v Carcano***, 106 AD3d 724, 965 NYS2d 516 [2d Dept 2013]), the plaintiff also failed to supply adequate evidentiary proof of compliance with RPAPL § 1304 for the same reasons articulated above (*see*, ***Hudson City Sav. Bank v DePasquale***, 113 AD3d 595, 977 NYS2d 895 [2d Dept 2014]; *cf.*, ***TD Bank, N.A. v Leroy***, 121 AD3d 1256, 995 NYS2d 625 [3d Dept 2014]; ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, *supra*; ***US Bank N.A. v Caronna***, 92 AD3d 865, 938 NYS2d 809 [2d Dept 2012]). In any event, the conclusory statements set forth in the affidavit of the plaintiff's officer that she reviewed "the 90-day pre-foreclosure notice sent to borrower(s) by certified mail and also by first-class mail to the borrower(s) last known address, and to the mortgaged property," even when combined with copies of certain documentation submitted herein, is insufficient to meet the requirements of the statute (*see*, ***Hudson City Sav. Bank v DePasquale***, 113 AD3d 595, *supra*; ***US Bank Natl. Assn. v Lampley***, 46 Misc3d 630, 996 NYS2d 499 [Sup Ct, Kings County 2014]). The plaintiff's officer did not allege sufficient facts as to how compliance was accomplished. She also does not state that she served the notice; nor does she identify the individual who allegedly did so. Additionally, the plaintiff submitted neither an affidavit of service of the 90-day notice upon the defendant mortgagors, nor an affidavit from one with personal knowledge of the mailing, along with copies of the certified mailing receipts stamped by the United States Post Office on the date of the alleged mailing (*see*, ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, *supra*). In any event, in the absence of an affidavit from one with personal knowledge of the facts of this case, the mere unsworn statement contained in the memorandum of law, even combined with certain other submissions, is insufficient establish that the 90-day default notice pursuant to RPAPL §1304 was not required (*see*, ***Bank of Am., N.A. v Rodomista***, 47 Misc3d 1228 [A], 2015 NY Slip Op 50871 [U] [Sup Ct, Suffolk County 2015]; *see also*, ***US Bank N.A. v Caronna***, 92 AD3d 865, 938 NYS2d 809 [2d Dept 2012]).

Thus, the plaintiff failed to establish its prima facie entitlement to judgment as a matter of law with respect to the defendant mortgagors. The plaintiff's failure to make a prima facie showing requires the denial of the motion, regardless of the sufficiency of the defendant mortgagors' opposing papers (*see*, ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Accordingly, the plaintiff's motion is denied in its entirety.

In view of the foregoing, the proposed order submitted by the plaintiff has been marked "not signed."

Dated: July 22, 2015

Hon. CAROL MacKENZIE, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION