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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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HSBC BANK USA, NATIONAL ASSOCIATION AS TRUSTEE FOR WELLS FARGO ASSET SECURITIES CORPORATION, MORTGAGE ASSET-BACKED PASS-THROUGH CERTIFICATE SERIES 2007-PA4,

Index No.: 850353/2013

Plaintiff,

-against-

PAULA RICE, BOARD OF MANAGERS OF THE 374 MANHATTAN CONDOMINIUM, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, PEOPLE OF THE STATE OF NEW YORK and JOHN DOE (said name being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises),

Defendants.

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Edmead, J.,

In this foreclosure action, plaintiff HSBC Bank USA, National Association As Trustee For Wells Fargo Asset Securities Corporation, Mortgage Asset-Backed Pass-Through Certificate Series 2007-PA4 moves, pursuant to CPLR 3212, for summary judgment on its complaint against defendant Paula Rice (defendant); pursuant to CPLR 3211, for dismissal of the affirmative defenses set forth in defendant's answer, dated January 10, 2014; for a default judgment, pursuant to CPLR 3215 for all non-answering defendants; and for the appointment of a referee to determine the amount due and ascertain whether the premises can be sold in parcels.

BACKGROUND

The Note and The Mortgage

Defendant is the record owner and mortgagor of real property located at 316 West 116th Street, Unit 3A, New York, New York (the Property). As background, on February 16, 2007, defendant obtained a loan from Wells Fargo Bank, N.A. (Wells Fargo) for $876,000.00 (the Loan). On that day, defendant executed a consolidated note with Wells Fargo Bank, N.A., in the original principal amount of the Loan (the Note), which was secured by a Consolidation, Extension and Modification Agreement (the Mortgage). The Note and the Mortgage were then physically transferred to plaintiff, a national association. As prior to the commencement of this action, an assignment of the Mortgage to plaintiff was executed and publicly recorded, thus clearing title for future buyers.

In October of 2008, defendant defaulted on the loan payments. She was given opportunities to cure the default, but did not do so. As a result, plaintiff, as the holder and assignee of the Note, commenced this foreclosure action on November 22, 2013. In the answer, defendant asserted nine affirmative defenses.

The Notices of Default

A document attached to the Mortgage, as exhibit A, entitled "Initial Interest Adjustable Rate Note (the Adjustable Rate Note), provides that, in the event that defendant is in default,

> "the Note Holder may send [her] a written notice telling [her] that if [she does] not pay the overdue amount by a certain date, the Note Holder may require [her] to pay immediately the full amount of Principal which has not been paid and all interest that [she] owe[s]. That date must be at least 30 days after the date on which the notice is mailed to [her] or delivered by other means"

(plaintiff's notice of motion, exhibit A, the Mortgage, exhibit A, the Adjustable Rate Note). The

Adjustable Rate Note also required that defendant "will make a payment every month on the first day of the month beginning on April 01, 2007 . . . [and that she] will make [her] monthly payments to Wells Fargo Home Mortgage" (*id.*).

When defendant failed to make the proper payments on the Loan, pursuant to the terms of the Adjustable Rate Note, plaintiff was sent a notice of default, dated July 25, 2013 (the Notice of Default). In addition, pursuant to the requirements of RPAPL § 1304, plaintiff was sent a "90-Day Notice" (the 90-Day Notice), also dated July 25, 2013 (*see* plaintiff's reply, exhibit C, Notice of Default and exhibit D, 90-Day Notice).

The Notice of Default warned defendant that

> "[u]nless the payments on [her] loan can be brought current by 8/29/2013, it will become necessary to require immediate payment in full (also called acceleration) of [her] Mortgage Note and pursue the remedies provided for in [her] Mortgage or Deed of Trust, which include foreclosure"

(*id.*). The Notice of Default advised defendant that she must pay the funds owed to "Wells Fargo Home Mortgage" (*id.*).

In the 90-Day Notice, "Wells Fargo Home Mortgage" advised defendant that her loan had been in default for 1758 days and warned her that she risked losing her home if she did not cure the default. Defendant was provided an opportunity to cure said default "by making the payment of $276,202.47 of dollars by 8/29/2013" (*id.*). The 90-Day Notice also warned that "[i]f this matter is not resolved within 90 days from the date this notice was mailed, we may commence legal action against you" (*id.*).

The Affidavit of Natalie Bryant (Vice President of Loan Documentation of Wells Fargo Bank, N.A.)

In her affidavit, Natalie Bryant stated she is the vice president of loan documentation for

Wells Fargo, the loan servicer for the plaintiff. She further attested, in pertinent part:

> "2. In the regular performance of my job functions, I am familiar with business records maintained by Wells Fargo for the purpose of servicing mortgage loans. These records . . . are made at or near the time by, or from information provided by, persons with knowledge of the activity and transactions reflected in such records, and are kept in the course of business activity conducted regularly by Wells Fargo. It is the regular practice of Wells Fargo mortgage servicing business to make these records. In connection with making this affidavit, I have acquired personal knowledge of the matters stated herein by examining the business records relating to the subject mortgage loan and/or confirm the information to the best of my knowledge, information and belief.
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> * * *
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> "4. The Defendant is in default under the terms and conditions of the promissory note and mortgage, because the October 1, 2008 and subsequent payments were not made.
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> "5. I have 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, which is the mortgaged property. Submitted with Plaintiff's motion is a copy of the 90 day pre-foreclosure notice.
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> "6. I further confirm that within 3 business days of the mailing of the 90 day pre-foreclosure notice the filing requirements with the superintendent of banks was complied with. Confirmation number NYS3338518 was issued.
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> "7. In accordance with the provisions of the mortgage, a notice of default was mailed to the mortgagor(s) at the last known address provided by the mortagor(s) to this institution. The default stated in said notice was not cured. Submitted with Plaintiff's motion is a copy of the notice of default.
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> "8. Based on the default, Plaintiff elected to call due the entire unpaid principal balance together with interest and disbursements, including reasonable attorney fees and costs, allowable under the terms of the promissory note and mortgage"

(plaintiff's notice of motion, Bryant aff).

The Complaint and the Answer

When defendant failed to cure the default, on November 22, 2013, plaintiff commenced the instant foreclosure action by filing the summons and complaint. As of that time, the unpaid principal balance on the Loan was $876,000.00, together with interest and fees.

On January 10, 2014, defendant served an answer, which alleged the following affirmative defenses: failure to state a cause of action; failure to serve a notice of acceleration/default as required by the Mortgage; plaintiff's claim is barred by laches and/or equitable estoppel; plaintiff waived its right to accelerate payment and waived default; plaintiff has no standing; plaintiff has unclean hands; plaintiff violated Judiciary Law § 489; plaintiff violated HAMP; and the RPAPL § 1304 notice is defective.

The remaining defendants have not yet filed an answer in this action.

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Whether Plaintiff is Entitled to Foreclosure as a Matter of Law

"It is settled that in moving for summary judgment in an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default (*DiNardo v Patcam Serv. Sta.*, 228 AD2d 543, 543 [2d Dept 1996]; *Village Bank v Wild Oaks Holding*, 196 AD2d 812, 812 [2d Dept 1993]). The burden then shifts to the defendant "to assert any defenses which could properly raise a viable question of fact as to his default" (*Village Bank v Wild Oaks Holding*, 196 AD2d at 812; *DiNardo v Patcam Serv. Sta.*, 228 AD2d at 543).

Here, plaintiff has established a prima facie entitlement to foreclosure as a matter of law, by putting forth evidence that it was the holder of the Note and the Mortgage at the time the action was commenced, and that defendant defaulted under the Note and the Mortgage. In opposition, defendant does not submit any proof to dispute the existence of the Mortgage, the Note or the default. Rather, defendant argues that plaintiff's motion should be denied on the ground that plaintiff's moving papers are defective, because it failed to present proof in admissible form.

Specifically, defendant alleges that copies of the two mortgages that were consolidated by the Mortgage were not included in plaintiff's papers. Defendant argues that, since these documents have not been provided to the court, plaintiff cannot prove a prima facie case, because it cannot demonstrate compliance with the requirements of the mortgages, including the notice provisions. However, as argued by plaintiff, defendant's argument fails, because plaintiff is foreclosing on the Mortgage, which *was* submitted with plaintiff's motion, rather than the two prior mortgages, which were consolidated into the Mortgage.

Furthermore, at the time that the two previous mortgages were consolidated into the Mortgage, a single set of rights and obligations was formed. Accordingly, the terms of the prior individual mortgages are no longer controlling. Specifically, in Article III of the Mortgage, it is stated that the "Consolidated Note will supercede all terms, covenants, and provisions of the Notes" (plaintiff's notice of motion, exhibit D, the Mortgage). In addition, pursuant to Article IV of the Mortgage, defendant agreed "to be bound by the terms set forth in the Consolidated Mortgage which will supercede all terms, covenants, and provisions of the Mortgages" (*id.*).

As plaintiff has established its entitlement to summary judgment, the burden now shifts to defendant to put forth evidence demonstrating the existence of a triable issue of fact (*Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 607 [1st Dept 2012]).

The Affirmative Defenses

Here, defendant fails to raise a triable issue of fact as to any claim or defense. Although in her answer, defendant asserts nine affirmative defenses, in her opposition, she puts forth arguments in support of only three of them: that plaintiff failed to serve a proper notice of acceleration/default, as required by the Mortgage; that the notice required by RPAPL § 1304 was defective; and champerty, in that plaintiff acquired the Mortgage in violation of Judiciary Law § 489. As such, the unsupported defenses are deemed abandoned (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]).

Whether Plaintiff Complied With the Notice Requirements of the Mortgage

At the outset, defendant admits that she received the Notice of Default, dated July 25,

2013. However, she argues that she was not properly afforded 30 days to cure, as required by the Mortgage, because she received it less than 30 days prior to the August 29, 2013 cure date. Defendant also argues that Bryant's statement, "In accordance with the provisions of the mortgage, a notice of default was mailed to the mortgagor(s) at the last known address provided by the mortagor(s) to this institution," does not create a presumption of receipt on the part of defendant (plaintiff's reply, Bryant aff).

However, defendant's argument on this issue fails, because the Adjustable Rate Note specifically states that defendant must be afforded "at least 30 days after the date on which the notice is mailed to [her] or delivered by other means" to cure any default (plaintiff's notice of motion, exhibit A, the Mortgage, exhibit A, the Adjustable Rate Note). In her affidavit, Bryant attested to the fact that the Notice of Default, dated July 25, 2013, was mailed "[i]n accordance with the provisions of the [M]ortgage," and defendant has failed to prove otherwise (plaintiff's reply, Bryant aff).

Whether Plaintiff Complied With the Notice Requirements of RPAPL § 1304

Defendant also raises the alleged failure of plaintiff to comply with the requirements of RPAPL § 1304 as a defense to this foreclosure action. RPAPL § 1304 (1) requires, in pertinent part, as follows:

> "with regard to a home loan, at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower, including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower in at least fourteen-point type . . . [which includes the following language]
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> * * *
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> "If this matter is not resolved within 90 days from the date this notice was mailed,

we may commence legal action against you."

Here, defendant admits to having received the 90-Day Notice and does not dispute that said notice contained the requisite language required under the statute. Rather, defendant argues that, pursuant to RPAPL § 1304, the 90-Day notice was defective, because the notice, even if served on July 25, 2013, did not provide her with 90 days to cure the default "by making the payment of $276,202.47 dollars by 8/29/13" (plaintiff's reply, exhibit D, 90-Day Notice).

However, as put forth by plaintiff, RPAPL § 1304 only requires that a lender give at least 90 days notice to a borrower prior to commencing residential foreclosure legal actions (*see* RPAPL § 1304). As the 90-Day Notice was sent over three months prior to the commencement of the instant action, the 90-Day Notice was timely. Thus, plaintiff has properly complied with the notice requirements of RPAPL § 1304.

It should be noted that defendant also argues that the Notice of Default and the 90-Day Notice were defective, because they were issued by Wells Fargo Home Mortgage, Inc., a non-existent entity, and not plaintiff. In addition, defendant asserts that the notices were defective in that they were generally sent on behalf of an entire default management department, and not signed by a specific person.

Initially, contrary to defendant's assertion, a review of the notices reveals that they were actually sent by an entity known as "Wells Fargo Home Mortgage," the mortgage servicing division of Wells Fargo Bank, N.A. As plaintiff argues, said service was proper in light of the fact that the Mortgage does not impose any requirement that the lender itself issue the notice of default, and, in fact, RPAPL 1304 (2) provides that the 90-Day notice may be sent by a mortgage loan servicer.

Moreover, the terms of the Mortgage contemplates the use of a servicer. To that effect, paragraph 20 of the Mortgage states that "the entity that collects the periodic payments and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law is called the "Loan Servicer" (plaintiff's notice of motion, exhibit D, the Mortgage). Further, the Adjustable Rate Note specifically provides that defendant "will make a payment every month on the first day of the month beginning on April 01, 2007 . . . [and that she] will make [her] monthly payments to Wells Fargo Home Mortgage" (*id.*). As defendant was making payments to Wells Fargo Home Mortgage, she was at least familiar with the existence of the entity in relation to the Loan. Finally, defendant does not point to any authority whatsoever to establish that said notices must be signed by a particular person in order for plaintiff to be bound by them.

Whether Plaintiff Violated Judiciary Law § 489

Defendant also argues that plaintiff's complaint must be dismissed on the ground that the assignment of the Mortgage to plaintiff was champertous, in violation of Judiciary Law § 489. Judiciary Law § 489 "prohibits a corporation from taking an assignment of a 'promissory note . . . with the intent and for the purpose of bringing an action or proceeding thereon'" (*Congregation Atzei Chaim v 26 Adar N.B. Corp.*, 27 AD3d 412, 413 [2d Dept 2006]; *Ehrlich v Rebco Ins. Exch.*, 225 AD2d 75, 76-77 [1st Dept 1996]). "'To constitute the offense the primary purpose of the purchase must be to enable him to bring a suit, and the intent to bring a suit must not be merely incidental or contingent'" (*Limpar Realty Corp. v Uswiss Realty Holding*, 112 AD2d 834, 836 [1st Dept 1985] [citing "a legitimate business purpose" for the acquisition of the mortgage, the Court found no Judiciary § 489 violation where an assignee of a note and mortgage

commenced a foreclosure action within one month after the assignment], quoting *Moses v McDivitt*, 88 NY 62, 65 [1882]; *see also Red Tulip, LLC v Neiva*, 44 AD3d 204, 213 [1st Dept 2007]).

In support of this defense, defendant argues that the assignment of the Mortgage was executed less than one month prior to the commencement of a prior proceeding against defendant under Index No. 116175/2009, and for only one dollar. Plaintiff claims that it purchased the Loan, because it was a good mortgage investment.

As defendant has not proven that plaintiff purchased defendant's loan for the sole purpose of bringing the instant action for foreclosure, she has failed to prove the requisite intent needed to prove a meritorious defense to this action on the ground of champerty. "Nor is there merit to defendant['s] claim of champerty (Judiciary Law § 489), where the mortgage loan had already fallen into default and been accelerated before its assignment to plaintiff" (*BF Holdings I v South Oak Holding*, 251 AD2d 1, 1 [1st Dept 1998]).

Thus, plaintiff is entitled to summary judgment in its favor on its foreclosure action against defendant, as well as dismissal of the affirmative defenses set forth in defendants' answer. In addition, plaintiff is entitled to the appointment of a referee to determine the amount due to plaintiff, and ascertain whether the premises can be sold in parcels. As plaintiff has made no arguments in support of its request that all non-appearing defendants be deemed in default, said request is denied.

CONCLUSION

In summary, It is hereby

ORDERED that the motion of plaintiff HSBC Bank USA, National Association As

Trustee For Wells Fargo Asset Securities Corporation, Mortgage Asset-Backed Pass-Through Certificate Series 2007-PA4's motion, pursuant to CPLR 3212, for summary judgment on its complaint against defendant Paula Rice is granted, and the affirmative defenses of defendant are dismissed, and the motion is otherwise denied. And it is further

ORDERED that a referee shall be appointed to determine the amount due and ascertain whether the premises can be sold in parcels. And it is further

ORDERED that counsel for Plaintiff shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on all parties requiring service.

Settle Order.

DATED: July 22, 2015

Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD