M E M O R A N D U M

SUPREME COURT - QUEENS COUNTY
I.A.S. PART 14

FAIRFIELD FINANCIAL MORTGAGE GROUP, INC., Plaintiff(s), -against- SHAN M. BUTTA, etc., et al., Defendant(s).	Index No. 705374/2015 By: **ELLIOT, J.** Date: February 18, 2016 Motion Cal. No. 52 Motion Seq. No. 1 Motion Date: January 20, 2016

Plaintiff commenced this action to foreclose a mortgage against real property known as 90-39 184th Place, Hollis, New York. Defendant Harry N. Ramnauth (defendant Harry) executed a note in the amount of $470,000.00 in favor of Fairfield Financial Mortgage Group, Inc., on July 18, 2007. As security for the payment of said indebtedness, defendant Harry, defendant Krishna P. Deonarain, defendant Munilall Raghunandan, and defendant Roopnarine Ramnauth executed a corresponding mortgage on that same date. Pursuant to its verified complaint, plaintiff alleges it is the owner and holder of the subject note and mortgage, that defendants have failed to comply with the terms of the note and mortgage by defaulting in the payment of the monthly installment of principal and interest which became due and payable on May 1, 2012, and all subsequent payments and that, as a result, it elected to accelerate the debt by virtue of the commencement of this action on May 26, 2015.

All defendants herein were served with process, with the exception of "John Doe #1" through "John Doe #10," who are unnecessary parties, and none answered nor appeared except for defendant Harry and defendant Shan M. Butta, s/h/a Shan M. Butta a/k/a Shan M. Bhutta (defendant Shan), who interposed a verified answer together with thirteen affirmative defenses.

Plaintiff now moves for an order granting it summary judgment against defendants Harry and Shan, dismissing their affirmative defenses, granting it judgment by default against the remaining defendants, amending the caption, and appointing a referee to compute.

In a mortgage foreclosure action, a plaintiff establishes its *prima facie* entitlement to judgment as a matter of law by producing the mortgage and the unpaid note, and evidence of the default (*see Emigrant Funding Corp. v Agard*, 121 AD3d 935 [2014]; *KeyBank N.A. v Chapman Steamer Collective, LLC*, 117 AD3d 991 [2014]; *Mendel Group, Inc. v Prince*, 114 AD3d 732 [2014]; *Independence Bank v Valentine*, 113 AD3d 62 [2013]). Further, where, as here, plaintiff's standing is placed in issue by the answering defendants, plaintiff must also prove its standing as part of its *prima facie* showing, which may be established either by written assignment of the underlying note or the physical delivery of the note prior to commencement of the action (*see LNV Corp. v Francois*, 134 AD3d 1071 [2015]; *Citimortgage, Inc. v Goldberg*, 134 AD3d 880 [2015]; *YMJ Meserole, LLC v 98 Meserole Street, LLC*, 133 AD3d 848 [2015]).

Plaintiff has met its *prima facie* burden of establishing its entitlement to judgment on its action to foreclose a mortgage by submission of, *inter alia*, a copy of the complaint, verified by plaintiff's president, a copy of the note and mortgage – with plaintiff being the originator of the loan – as well as the affidavit of Charles Levesque, plaintiff's President and Chief Executive Officer, detailing, among other things, defendant Harry's default in payment (*see RBS Citizens, N.A. v Galperin*, 135 AD3d 735 [2016]). Plaintiff further established its standing herein by virtue of: Mr. Levesque's affidavit, establishing that plaintiff had physical possession of the note when it commenced this action; the fact that plaintiff is the originator of the loan; and the attachment of the loan documents to the summons and verified complaint (*see Wells Fargo Bank, N.A. v Charlaff*, 134 AD3d 1099 [2015]; *Nationstar Mtge., LLC v Catizone*, 127 AD3d 1151 [2015]; *Emigrant Mortg. Co., Inc. v Persad*, 117 AD3d 676 [2014]).

In opposition to the motion, the answering defendants present only the affidavit of defendant Shan, a subsequent owner of record. Defendant Shan contends that plaintiff is not entitled to summary judgment on the following grounds: (1) the action is barred by the statute of limitations; (2) neither he nor defendant Harry received a notice of default as a condition precedent to commencement; (3) plaintiff failed to comply with RPAPL § 1304 in that he was never served with a 90-day pre-foreclosure notice; (4) plaintiff is not in possession of the original note; and (5) Rafiqa Khan, who is not named as a party herein, is still in the chain of title of the subject premises.

As to the first claim that the action is barred by the applicable statute of limitations, defendant Shan states that the mortgage was made by defendant Harry on July 18, 2007; that no mortgage payments were ever made on the loan and that, accordingly, the statute of limitations on this action expired in July 2013. Defendant Shan further states that, plaintiff's allegation that there was a default in payment in 2012 is "solely interposed to cover up the expiration of the statute of limitations problem."

Though plaintiff cited to the incorrect statutory authority (CPLR § 213 [2] [action upon a contractual obligation]), it is correct in that an action to foreclose a mortgage governed by a six-year statute of limitations (CPLR § 213 [4] [action upon a bond or note, the payment of which is secured by a mortgage upon real property, or upon a bond or note and mortgage so secured, or upon a mortgage of real property, or any interest therein]). "With respect to a mortgage payable in installments, separate causes of action accrued for each installment that is not paid, and the statute of limitations begins to run, on the date each installment becomes due. However, even if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt" (*Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980 [2012] [internal quotation marks and citations omitted]; *see also Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753 [2010]).

Here, the April 9, 2015 Notice of Loan Default Letter cites paragraph 22 of the mortgage, which allows the lender the right to accelerate the debt if the borrower fails to cure

the default. The commencement of the within action served as an acceleration of the debt and the statute of limitations as to the entire debt began to run on that date (*see Clayton Natl. v Guldi*, 307 AD2d 982 [2003]; *see also* 1-5 Bergman on New York Mortgage Foreclosures § 5.11). Furthermore, plaintiff established that there was a default on the installment which became due on May 1, 2012, and all subsequent payments; thus, the action – having been commenced within six years of said date – is not time-barred. Defendant Shan is not the obligor and did not become owner of record until March 16, 2012. He does not state the basis for his ability (by virtue of his personal knowledge) to dispute the date of defendant Harry's default as proffered by plaintiff's president and CEO.

To the extent defendant Shan argues that he never received a notice of default, inasmuch as he is not a signatory on the note or mortgage, he has not demonstrated that he is entitled to such a notice. Moreover, and to that end, this defendant has not established his authority to speak on behalf of defendant Harry (*see e.g. Nash v Duroseau*, 39 AD3d 719 [2007]) or, for that matter, that he has personal knowledge that defendant Harry failed to receive such a notice.

As to defendant Shan's claim that he was not served with a 90-day pre-foreclosure notice, since he is not a borrower, plaintiff established that he is not entitled to such a notice (RPAPL § 1304 [5]; *see Mendel Group, Inc. v Prince*, 114 AD3d 732[2014]).

As to the issue of standing, defendant Shan's conclusory statement that he believes plaintiff not to be in possession of the note is insufficient to raise a triable issue of

fact in that regard. Further, it is well-settled that defendant Shan's mere hope or speculation that further discovery would present evidence sufficient to raise a triable issue of fact is not a basis for denying summary judgment (*see JP Morgan Chase Bank, N.A. v Agnello*, 62 AD3d 662 [2009]).

Finally, defendant Shan urges dismissal since Rafiqa Khan is still in the chain of title of the subject premises. However, despite the fact that the two deeds conveying title from Rafiqa Khan into defendant Shan were recorded on different days, they were executed by Rafiqa Khan on the same day. Thus, defendant's position that Khan is still in the chain of title is unclear (*see generally* RPL § 244 [explaining, among other things, that a deed need not be recorded for purposes of transferring ownership]). In any event, the absence of a necessary party does not warrant dismissal of an action; it simply leaves that party's rights unaffected by the judgment (*see 6820 Ridge Realty LLC v Goldman*, 263 AD2d 22 [1999]; *Marine Midland Bank, N.A. v Freedom Road Realty Assoc.*, 203 AD2d 538 [1994]). Thus, defendant Shan has failed to raise a triable issue of fact with respect to this defense.

Plaintiff has otherwise established its entitlement to the remaining prayers for relief per its motion.

Accordingly, the motion is granted to the extent that: plaintiff is awarded summary judgment against defendants Shan and Harry; their answer and affirmative defenses are stricken and deemed a Notice of Appearance; the remaining defendants herein are in default; plaintiff is granted leave to submit an order of reference; the caption is amended by

striking reference to the "John Does."

Submit order on notice to counsel for answering defendants.

J.S.C.