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M E M O R A N D U M

SUPREME COURT QUEENS COUNTY
CIVIL TERM PART 2

HON. ALLAN B. WEISS

FEDERAL NATIONAL MORTGAGE ASSOCIATION ("FANNIE MAE") a Corporation Organized and Existing Under the Laws of the United States of America

Plaintiff,

-against-

LEE A. THOMAS JR., LAVY THOMAS a/k/a KUMAR AHRJAANTHAKA THOMAS a/k/a KUMAR A. THOMAS, ET AL.

Defendants.

Index No.:1139/15

Motion Date:11/17/16

Motion Seq. No.: 1

Plaintiff commenced this action to foreclose a mortgage given by defendants Lavy Thomas and Lee A. Thomas, Jr. hereinafter Lee), to the Citibank, N.A., to secure the repayment of a note evidencing a loan in the original principal amount of $342,900.00, plus interest. In the complaint, plaintiff alleges it is the owner and holder of the note and mortgage, defendants defaulted under the note and mortgage by nonpayment commencing in 2009 and it elected to accelerate the entire mortgage debt.

The defendant, Lee A. Thomas, Jr., appeared in the action by service of a Verified Answer, verified by his attorney, containing fifty affirmative defenses and eight counter claims.

The plaintiff now moves for an Order striking the defendant's, Lee A. Thomas, Jr.'s, affirmative defenses and counterclaims and granting summary judgment in its favor and

against said defendant, amending paragraph 21 of the complaint, nunc pro tunc, to reflect that the correct amount of the unpaid principal balance is $311,086.53, granting a default judgment as against the non-appearing defendants, appointing a referee to ascertain and compute the amount due to the plaintiff and amending the caption by deleting reference to the defendants s/h/a "John Doe" and/or "Jane Doe" #1-10.

A mortgagee establishes its prima facie entitlement to summary judgment in a foreclosure action where it produces both the mortgage and unpaid note, together with evidence of the mortgagor's default (see Citibank, N.A. v Van Brunt Properties, LLC, 95 AD3d 1158 [2012]; Capstone Bus. Credit, LLC v Imperia Family Realty, LLC, 70 AD3d 882 [2010]; U.S. Bank Natl. Assn. TR U/S 6/01/98 [Home Equity Loan Trust 1998-2] v Alvarez, 49 AD3d 711, 712 [2008]). Where a plaintiff's standing is placed in issue by the defendant, it is incumbent upon the plaintiff to prove its standing to be entitled to relief (see U.S. Bank N.A. v Sharif, 89 AD3d 723 [2011]). A plaintiff establishes that it has standing where it demonstrates that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note (see JP Morgan Chase Bank, N.A. v Schott, 130 AD3d 875 [2015]; Flagstar Bank, FSB v Anderson, 129 AD3d 665 [2015]; Bank of N.Y. v Silverberg, 86 AD3d 274 [2011]; Aurora Loan Servs., LLC v Weisblum, 85 AD3d 95 [2011]). "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, and the mortgage passes with the debt as an inseparable incident" (U.S. Bank, N.A. v Collymore, 68 AD3d 752, 754 [2009]; see US Bank N. Assn. v Faruque, 120 AD3d 575, 577 [2014]).

The plaintiff established its prima facie entitlement to judgment as a matter of law by submitting the mortgage, the underlying note, and evidence of the defendants' default, and by demonstrating the lack of merit of the defendant, Lee A. Thomas, Jr.'s, affirmative defenses and counterclaims (see Bank of New York Mellon Trust Co. v McCall, 116 AD3d 993 [2014]; Countrywide Home Loans, Inc. v Delphonse, 64 AD3d 624, 625 [2009]; Wells Fargo Bank Minnesota, Nat. Ass'n v Mastropaolo, 42 AD3d 239 [2007]). Thus, the burden shifts to the defendant to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action (see Solomon v Burden, 104 AD3d 839 [2013]; Citibank, N.A. v. Van Brunt Properties, LLC, 95 AD3d 1158 [2012]; Nassau Trust Co. v. Montrose Concrete Prods. Corp., 56 NY2d 175, 183 [1982]).

In opposition, the defendant failed to raise a triable issue of fact rebutting the plaintiff's showing or as to the merit of his affirmative defenses or counterclaim (see Wells Fargo Bank Minn., N.A. v Perez, 41 AD3d 590 [2007]; Trans World Grocers v

Sultana Crackers, 257 AD2d 616, 617 [1999]; Home Sav. of Am. v Isaacson, 240 AD2d 633 [1997]).

The defendant's affirmative personal jurisdictional defense was deemed waived pursuant to CPLR 3211(e).

The affirmation of defense counsel, who has no personal knowledge of the facts, is insufficient to raise a triable issue of fact. To the extent that counsel claims outstanding discovery, he has failed to demonstrate what, if any, demands for discovery were served upon the plaintiff or that he moved to compel compliance therewith or that facts essential to opposing plaintiff's motion are within the exclusive knowledge and control of the plaintiff (see KeyBank Nat. Ass'n v Chapman Steamer Collective, LLC, 117 AD3d 991, 992 [2014]). With respect to the defendant's conclusory claim that the note included in the plaintiff's motion papers is not the note he signed, it is insufficient to raise a triable issue of fact since he failed to set forth in what way the note presented by the plaintiff differs from the one he admits signing nor deny that he has a copy of the note he signed (see Aurora Loan Servs., LLC v. Taylor, 25 NY3d 355, 362 [2015]; KeyBank Nat. Ass'n v. Chapman Steamer Collective, LLCsupra; Swedbank, AB v Hale Ave. Borrower, LLC, 89 AD3d 922, 924 [2011]).

Defendant's claim that plaintiff failed to establish compliance with RPAPL §1304 since plaintiff did not submit an

affidavit of service is also without merit. Evidence of a proper service by mailing is not limited to an affidavit of service (see Nassau Ins. Co. v Murray, 46 NY2d 828, 829-30 [1978]; Nocella v Fort Dearborn Life Ins. Co. of New York, 99 AD3d 877, 878 [2012]; Residential Holding Corp. v Scottsdale Ins. Co., 286 AD2d 679, 680 [2001]). Generally, 'proof that an item was properly mailed gives rise to a rebuttable presumption that the item was received by the addressee' " (New York & Presbyt. Hosp. v. Allstate Ins. Co., 29 AD3d 547, 547 [2006], quoting Matter of Rodriguez v. Wing, 251 AD2d 335, 336 [1998]; see Engel v Lichterman, 62 NY2d 943 [1984]). "The presumption 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., supra). Here, the plaintiff has submitted sufficient and competent evidence of proper mailing to demonstrate its compliance with RPAPL §1304. The defendant's conclusory denial of receipt is insufficient to rebut the plaintiff's proof of proper mailing (see Kihl v Pfeffer, 94 NY2d 118, 122 [1999]; Mei Yun Li v Qing He Xu, 38 AD3d 731, 732 [2007]).

Accordingly the motion is granted and the defendant's affirmative defenses and counterclaims are dismissed.

Settle Order.

Dated: February 6, 2017
D# 55

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J. S. C.