Short Form Order

SUPREME COURT - STATE OF NEW YORK
IAS PART 18 - SUFFOLK COUNTY

PRESENT:
HON. HOWARD H. HECKMAN JR., J.S.C.

INDEX NO.: 037882/2011
MOTION DATE: 4/3/2018
MOTION SEQ. NO.: #002 MG
#003 MD

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BANK OF AMERICA, NA

Plaintiff,

-against-

KATHLEEN O. NOCELLA A/K/A KATHLEEN NOCELLA

Defendants.

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PLAINTIFF'S ATTORNEY:
FRENKEL, LAMBERT, WEISS, WEISMAN, & GORDEN, LLP
53 GIBSON STREET
BAY SHORE, NY 11706

PROPOSED INTERVENOR'S ATTORNEY:
PETER K. KAMRAN, ESQ.
600 OLD COUNTRY ROAD, SUITE 229
GARDEN CITY, NY 11530

Upon the following papers numbered 1 to 44 read on this motion : Notice of Motion/ Order to Show Cause and supporting papers 1-17 (#002) ; Notice of Cross Motion and supporting papers 18-26 (#003) ; Answering Affidavits and supporting papers 27-41 ; Replying Affidavits and supporting papers 42-44 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff Bank of America, N.A., not in its Individual Capacity but solely as Trustee, seeking an order: 1) granting a default judgment; 2) substituting U.S. ROF III Legal Title Trust 2015-1, by U.S. Bank National Association, as Legal Title Trustee, as the named party plaintiff in place and stead of plaintiff Bank of America, N.A.; 3) discontinuing the action against remaining defendants identified as "John Doe #1" through"John Doe #10"; 4) reforming the legal description of the mortgaged premises nunc pro tunc; 5) deeming all appearing and non-appearing defendants in default; 6) amending the caption; and 7) appointing a referee to compute the sums due and owing to the plaintiff in this mortgage foreclosure action is granted; and it is further

ORDERED that the cross motion by proposed non-party intervenor Henry Irving LLC (HI) for an order pursuant to CPLR 1012 & 3215 (c) granting the proposed non-party intervenor leave to intervene in this action as a named party defendant and dismissing plaintiff's complaint as abandoned, is denied; and it is further

ORDERED that plaintiff is directed to serve a copy of this order amending the caption upon the Calendar Clerk of the Court; and it is further

ORDERED that plaintiff is directed to serve a copy of this order with notice of entry upon all parties who have appeared and not waived further notice pursuant to CPLR 2103(b)(1),(2) or (3) within thirty days of the date of this order and to promptly file the affidavits of service with the Clerk of the Court.

Plaintiff's action seeks to foreclose a mortgage in the original sum of $342,475.00 executed by defendant Kathleen O. Nocella and Melanie Artoglou on January 3, 2007 in favor of Concord

Mortgage Corporation. On the same date defendant Nocella executed a promissory note promising to repay the entire amount of the indebtedness. By assignment dated July 8, 2011 the mortgage and note were assigned to plaintiff. By assignment dated February 10, 2017 the mortgage and note were assigned to U.S. ROF III Legal Title Trust 2015-1, by U.S. Bank, N.A. , as Legal Title Trustee. Plaintiff claims that the mortgagors defaulted in making timely monthly mortgage payments under the terms of the original note and mortgage beginning September 1, 2009. Plaintiff commenced this action by filing a summons, complaint and notice of pendency in the Suffolk County Clerk's Office on December 12, 2011. Defendant/mortgagor Nocella's attorney filed a notice of appearance dated February 15, 2012; defendant Harry Bienenfeld Profit Sharing Plan's counsel filed a notice of appearance and claim to surplus monies dated January 5, 2012. By Order (Gazzillo) dated July 24, 2012 defendant Tiberius Angel Realty LLC (TAR) was granted leave to serve a late answer. By Stipulation of Discontinuance signed by plaintiff's and TAR's respective counsel dated July 19, 2017 TAR's answer was withdrawn.

Plaintiff's motion seeks an order granting a default judgment and for the appointment of a referee to compute the sums due and owing to the mortgagee. The proposed non-party intervenor's (HI's) cross motion seeks an order granting HI leave to intervene in this action as a named party defendant together with an order dismissing plaintiff's complaint claiming the action has been abandoned.

By bargain and sale deed with covenants against grantor's acts dated September 29, 2008 both mortgagors Nocella and Artoglou conveyed title to the mortgaged premises to defendant Tiberius Angel Realty LLC. County records indicate that there was no consideration for the conveyance. On February 23, 2009 defendant/mortgagor Nocella and mortgagor Artoglou executed a second balloon mortgage and promissory note in the sum of $175,000.00 in favor of defendant Harry Bienefeld Profit Sharing Plan promising to repay the entire amount borrowed within three years. Both mortgagors defaulted in making payments due under the terms of that agreement and defendant Harry Bienefeld Profit Sharing Plan commenced a foreclosure action by filing a summons, complaint and notice of pendency in the Suffolk County Clerk's Office on January 6, 2011. Thereafter by short form Order (Gazzillo, J.) dated March 1, 2013 Bienefeld was granted summary judgment. A Judgment of Foreclosure and Sale (Gazzillo, J.) dated March 18, 2015 was granted and a foreclosure sale was conducted in October, 2015.

The proposed intervenor Henry Irving, LLC (HI) claims that Bienefeld obtained title as the successful bidder at the auction and that by bargain and sale deed with covenants against grantor's acts dated April 7, 2017, Bienefeld conveyed title to the premises to Henry Irving LLC. The county clerk's "recording and endorsement page" lists the consideration for the conveyance as the sum of $98,062.00. HI's cross motion seeks leave to intervene in this action claiming that HI, as the current title owner, will be adversely affected by a judgment in this foreclosure action. HI also claims once it is permitted leave to intervene as a defendant, HI can assert numerous affirmative defenses in opposition to plaintiff's motion which could have been asserted by the mortgagors had they elected to contest plaintiff's action, including claims of plaintiff's lack of standing, plaintiff's failure to prove service of a pre-foreclosure notice of default required to be served upon the mortgagors under the terms of the mortgage, and plaintiff's failure to provide sufficient, admissible evidence to prove the mortgagors' default. HI also claims that plaintiff has "abandoned" prosecution of this action and therefore the mortgage must ultimately be discharged and HI awarded a windfall.

With respect to the non-party's right to intervene in this action, HI as the current title owner of the mortgaged premises will be adversely affected by a judgment in this foreclosure action. However the record speaks for itself that when HI purchased the mortgaged premises from Bienefeld the purchase was made with notice that plaintiff's mortgage was an encumbrance upon the premises. HI clearly had, or should have had, knowledge of Bank of America's mortgage when it purchased title to the residential premises located in Smithtown for the sum of $98,062.00. In this respect there would be no "adverse affect" upon HI's title to the premises resulting from a foreclosure judgment since HI was wholly aware of plaintiff's encumbrance and took title subject to the mortgage.

Moreover, the substantive defenses HI now seeks to assert are defenses personal to the parties who executed the mortgage (i.e. defendant Nocella & mortgagor Artoglou) since the mortgage agreement was entered into by plaintiff's predecessor in interest and the mortgagors, not a third party purchaser who obtained title more than ten (10) years after agreement was signed. In this regard even were HI granted leave to intervene it would have no right to assert any defense related to plaintiff's claimed failure to timely serve a notice of default upon the mortgagor, since such a defense is personal to defendant Nocella (and Artoglou) and cannot be asserted by HI (*see Wells Fargo Bank, N.A.v . Bowie,* 89 AD3d 931, 932 NYS2d 702 (2nd Dept., 2011); *NY CTL 1996-1 Trust v. King,* 13 AD3d 429, 787 NYS2d 61 (2nd Dept., 2004)). And any claim of lack of standing has been waived as a result of all of the named defendants having waived this defense as a result of merely filing notices of appearances and withdrawing their answers (*see HSBC Bank USA v. Angeles,* 143 AD3d 671, 38 NYS3d 580 (2nd Dept., 2016); *Nationstar Mortgage LLC v. Avella,* 142 AD3d 594, 36 NYS3d 679 (2nd Dept., 2016); *Bank of New York Trust Co., N.A. v. Chiejina,* 142 AD3d 570, 36 NYS3d 512 (2nd Dept., 2016); *Chase Home Finance, LLC v. Garcia,* 140 AD3d 820, 31 NYS3d 894 (2nd Dept., 2016)).

With respect to the non-party's claim that the action has been "abandoned", the record shows that CPLR 3215(c) has no relevance to the prosecution of this foreclosure action. CPLR 3215(c) requires dismissal of an action if a plaintiff "fails to take proceedings for the entry of judgment within one year after the (defendant(s)) default. In this case there was no default by the defendants which would trigger the one year period. Court records show that defendants Nocella and Bienefeld had attorneys submit notices of appearance on each defendant's behalf. CPLR 320(b) provides that "a defendant appears by serving an answer or a notice of appearance..." and the law is clear that by filing a notice of appearance a defendant waives its right to seek dismissal of a complaint pursuant to CPLR 3215(c) since the filing of a notice of appearance is the equivalent of serving an answer (*see Bank of America, N.A. v. Rice,* 155 AD3d 593, 63 NYS3d 486 (2nd Dept., 2017); *American Home Mortgage Servicing, Inc. v. Arklis,* 150 AD3d 1180, 56 NYS3d 332 (2nd Dept., 2017); *Myers v. Slutsky,* 139 AD3d 709, 527 NYS2d 464 (2nd Dept., 1988); *U.S. Bank, N.A. v. Gustavia Home, LLC,* 156 AD3d 843, 67 NYS3d 242 (2nd Dept., 2017); *U.S. Bank, N.A. v. Gulley,* 137 AD3d 1008, 27 NYS3d 601 (2nd Dept., 2016); *HSBC Bank USA v. Lugo,* 127 AD3d 502, 9 NYS3d 6 (1st Dept., 2015); *Hodson v. Vinnie's Farm Market,* 103 AD3d 549, 959 NYS2d 440 (1st Dept., 2013)). Accordingly, since three of the main defendants (the third defendant TAR was granted leave to serve an answer and subsequently served and withdrew its answer) actually appeared in this action, there was no "default" requiring that plaintiff seek judgment within one year of the defendant's failure to serve a timely answer. The non-party's claim that plaintiff "abandoned" prosecution of this action is therefore inapposite.

In addition, the non-party takes issue with plaintiff's assertion that HI "stands in the shoes" of

the junior lienholder defendant Bienefeld, and HI is therefore entitled to assert defenses as if it were a named party defendant (or on behalf of other then named party defendants) seemingly from the inception of this action. However, such claim is illogical since plaintiff has never had any reason to serve this non-party since HI took title to the mortgaged premises nearly five and one-half years after the action was commenced. If the non-party does not "stand in the shoes" of Bienefeld, then the question becomes: on behalf of whose rights is HI asserting his CPLR 3215(c) argument since quite clearly three of the main defendants submitted the equivalent of an answer in response to service of the complaint. And if it is the non-party's additional claim that even if one defendant has defaulted (while three others have answered), that the one year limitation period applies to plaintiff's action to deem it "abandoned" under CPLR 3215(c), then the majority of foreclosure actions pending in the state would be required to be dismissed as "abandoned" since in nearly every case there are defaulting defendants (in addition to defendants who serve timely answers). Based upon these considerations the non-party's motion must be denied in its entirety.

With respect to plaintiff's motion seeking to foreclose the mortgage, 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 question of fact from the case. The grant of summary judgment is appropriate only when it is clear that no material and triable issues of fact have been presented (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957)). The moving party bears the initial burden of proving entitlement to summary judgment (*Winegrad v. NYU Medical Center*, 64 NY2d 851 (1985)). Once such proof has been proffered, the burden shifts to the opposing party who, to defeat the motion, must offer evidence in admissible form, and must set forth facts sufficient to require a trial of any issue of fact (CPLR 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557 (1980)). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v. Associated Fur Manufacturers*, 46 NY2d 1065 (1979)).

Entitlement to summary judgment in favor of the foreclosing plaintiff is established, prima facie by the plaintiff's production of the mortgage and the unpaid note, and evidence of default in payment (*see Property Asset Management, Inc. v. Souffrant,* 2018 NY Slip Op 04582 (2nd Dept., 6/20/2018);*Wells Fargo Bank N.A. v. Erobobo*, 127 AD3d 1176, 9 NYS3d 312 (2nd Dept., 2015); *Wells Fargo Bank, N.A. v. Ali*, 122 AD3d 726, 995 NYS2d 735 (2nd Dept., 2014)).

Plaintiff has provided sufficient evidence in the form of a copy of the promissory note and mortgage, together with an affidavit from a foreclosure specialist III, employed by the current mortgage servicer/attorney-in-fact, which is admissible pursuant to CPLR 4518, and which confirms that the mortgagors defaulted under the terms of the January 3, 2007 mortgage by failing to make timely monthly mortgage payments beginning September 1, 2009 and continuing to date. The bank, having proven entitlement to summary judgment, it is incumbent upon an opposing party to submit relevant, evidentiary proof sufficiently substantive to raise genuine issues of fact concerning why the lender is not entitled to foreclose the mortgage. There is no relevant, admissible evidence submitted by any party to this action to defeat plaintiff's default judgment motion.

Accordingly the non-party's cross motion is denied in its entirety and plaintiff's motion seeking an order granting a default judgment and for the appointment of a referee must be granted. The proposed order for the appointment of a referee has been signed simultaneously with the execution of this order.

HON. HOWARD H. HECKMAN, JR.

Dated: June 21, 2018

J.S.C.