SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS KAHN, III **PART** 32

Justice

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HOME LOAN INVESTMENT BANK, F.S.B. F/K/A OCEAN BANK, F.S.B.,

Plaintiff,

- v -

JOCELY PADILHA, JONICE PADILHA, SPECIALIZED LOAN SERVICING, LLC,35 WEST REALTY CO., LLC,ANGELA PEREIRA, JUCIELE AMARAL, ML FACTORS LIMITED LIABILITY COMPANY, UNITED STATES OF AMERICA, JOHN DOE, JANE DOE

Defendant.

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INDEX NO. 850158/2019

MOTION DATE

MOTION SEQ. NO. 001

Amended

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 49, 50, 51, 52, 53, 54, 55, 58, 59

were read on this motion to/for JUDGMENT - SUMMARY.

The Court *sua sponte* vacates its decision and order dated October 12, 2021 and substitutes the following in its place and stead:

Upon the foregoing documents, the motion and cross-motion are determined as follows:

In this action, Plaintiff seeks to foreclose on a mortgage on residential real property located at 210 East 47th Street, Unit 2C, New York, New York. This mortgage was given by Defendant Jocely Maria Padilha and Jonice Padilha ("Padilhas") to secure a loan which was memorialized by a note dated January 24, 2007. At the time Plaintiff's mortgage was given, it was subordinate to a first mortgage the Padilhas had given to the assignor of Defendant Specialized Loan Servicing ("SLS"). After commencement of this action and service of the summons and complaint, the Padilhas defaulted in appearing. Issue was joined by SLS who raised numerous affirmative defenses in their answer as well as a counterclaim for a judgment declaring its mortgage has priority over Plaintiff's lien. SLS pleads that its mortgage was originally given by the Padilhas to SLS's assignor on October 27, 1998 and that after defaulting on same, the Padilhas and SLS entered into a loan modification agreement dated June 22, 2016.

Now, Plaintiff moves for summary judgment against Defendant SLS, for a default judgment against the non-appearing Defendants and for an order of reference. Defendant SLS opposes the motion and cross-moves for summary judgment on its counterclaim for declaratory judgment on the issue of priority of the liens.

In moving for summary judgment, Plaintiff was required to establish *prima facie* entitlement to judgment as a matter of law though proof of the mortgage, the note, and evidence of Padilhas' default in repayment (*see U.S. Bank, N.A., v James,* 180 AD3d 594 [1st Dept 2020]; *Bank of NY v Knowles*, 151 AD3d 596 [1st Dept 2017]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1st Dept 2010]). Proof supporting a *prima facie* case on a motion for summary judgment must be in admissible form (*see* CPLR §3212[b]; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780 [1st Dept 2019]).

Plaintiff's motion was supported with an affidavit of facts from Brian J. Murphy ("Murphy"), an officer of Plaintiff. Murphy's affidavit established the mortgage, note, and evidence of mortgagor's default and was sufficiently supported by admissible business records (*see eg Bank of NY v Knowles*, supra; *Fortress Credit Corp. v Hudson Yards, LLC*, supra). With respect to the branch of Plaintiff's motion for summary judgment dismissing SLS's affirmative defenses and counterclaim alleging its lien has priority over Plaintiff's lien, Plaintiff posits that its lien has priority over the amount added to SLS's lien as it was prior in time to the modification agreement and prejudiced its rights as a junior lienholder.

"It is well established that while a senior mortgagee can enter into an agreement with the mortgagor modifying the terms of the underlying note or mortgage without first having to notify any junior lienors or to obtain their consent, if the modification is such that it prejudices the rights of the junior lienors or impairs the security, their consent is required" (*Shultis v Woodstock Land Dev. Assoc.*, 188 AD2d 234, 236 [3d Dept 1993]). "If the senior lienor enters into such an agreement without obtaining that consent, and the agreement substantially impairs the security interest of the junior lienors or effectively destroys their equity, courts have divested the senior lienor of its priority and elevated the junior lienors to a position of superiority" (*Fleet Bank v County of Monroe Indus. Dev. Agency*, 224 AD2d 964, 965 [4th Dept 1996]). "Where, however, the actions of the senior lienor prejudice the junior lienors but do not substantially impair their security interest or destroy their equity, the senior lienor will be required to relinquish to the junior lienors its priority with respect to the modified terms only" (*id.*).

As such, to be entitled to summary judgment dismissing SLS's priority claim, Plaintiff was required to demonstrate *prima facie* that the modification prejudiced their rights or impaired its security interest partially or entirely (*see Commodore Factors Corp. v Deutsche Bank Natl. Trust Co.*, 189 AD3d 766, 769 [2d Dept 2020]). Here, Plaintiff has not established its entitlement to elevation of its entire junior interest to superiority as a matter of law. There is absolutely no proof that the modification substantially impaired or destroyed their equity. Plaintiff does not even posit, much less prove, that the aggregated liens exceed the market value of the property. Moreover, contrary to Plaintiff's assertion, the modification decreased the interest rate of the SLS loan. The 1998 note contained a fixed interest rate of 6.750%, not 2% as Plaintiff claims. The modified loan contains a variable interest rate on a fixed schedule which has a maximum rate of 3.625%. It should also be noted that the Padilhas were in default under the SLS mortgage and the modification was in lieu of SLS's right to foreclosure which, at the time, would have extinguished Plaintiff's junior mortgage entirely.

Nevertheless, the modification did increase the principal amount on loan by $81,228.46 when compared with the principal balance at the time of the modification. On that issue, the

modification agreement expressly states that $81,228.46 in "New Money" was being added to create a "New Principal Balance". By "bringing the additional interest [and other] charges within the lien of the mortgage does work prejudice inasmuch as the change increases the total amount of indebtedness placed prior to the subordinate lien", but only with respect to the increase (*see Shultis v Woodstock Land Dev. Assoc.*, supra at 237; *cf. Commodore Factors Corp. v Deutsche Bank Natl. Trust Co.*, supra [No subordination at all where there was not increase to principal *and* interest]; Andreadis Capital, LLC v Segura, _____Misc3d____, 2014 NY Slip Op 33143[U][Sup Ct Queens Cty 2014]).

SLS's reliance on Real Property Law §291 to support its assertion that the new money did not affect its priority is misplaced. Real Property Law §291 provides, in pertinent part, that:

> Notwithstanding the foregoing, any increase in the principal balance of a mortgage lien by virtue of the addition thereto of unpaid interest in accordance with the terms of the mortgage shall retain the priority of the original mortgage lien as so increased provided that any such mortgage instrument sets forth its terms of repayment.

That section is inapplicable here as it expressly refers to increases in principal to "a mortgage", singular, and makes no reference to subsequent agreements. Most significantly, that section is limited to instruments where the "terms of the mortgage" provide for addition to principal and that the mortgage contains the repayment terms. The 1998 mortgage contains neither provision. Even if the Court were to find the provision applicable, it only references increases in principal for "unpaid interest", not escrow advances and attorney's fees that are also claimed here.

SLS's argument, without actual proof, that equity will remain in the mortgaged property upon satisfaction of both liens does not preclude a finding of prejudice to a junior lien holder (*see Shultis v Woodstock Land Dev. Assoc.*, supra at 237 [Finding of prejudice affirmed even though "when the two debts [were] aggregated, there remain[ed] close to $ 200,000 of equity in the mortgaged property."]).

Accordingly, the branch of Plaintiff's motion for summary judgment dismissing SLS's affirmative defenses and counterclaims regarding priority of the mortgages is denied and SLS's cross motion for summary judgment and a declaratory judgment are granted as specified infra.

In opposition to the branches of the motion for foreclosure, SLS failed to raise an issue of fact. As to SLS's remaining affirmative defenses and counterclaims, since it failed to adduce any evidence or otherwise address same in its opposition, those affirmative defenses and counterclaims were abandoned and are dismissed (*see U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 1275 [2d Dept 2019]; *Flagstar Bank v Bellafiore*, 94 AD3d 1044 [2d Dept 2012]; *Wells Fargo Bank Minnesota, N.A v Perez*, 41 AD3d 590 [2d Dept 2007]).

The branch of Plaintiff's motion for a default judgment against the non-appearing parties is granted without opposition (*see* CPLR §3215; *SRMOF II 2012-I Trust v Tella*, 139 AD3d 599, 600 [1st Dept 2016]).

The branch of Plaintiff's motion to amend the caption to remove Defendants Angela Pereira and Juciele Amaral is granted without opposition (*see generally* CPLR §3025; *JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]).

The branch of Plaintiff's motion to sever Defendant SLS's crossclaims against the Padilhas is denied as that relief was not demanded in the notice of motion.

Parenthetically, the Court notes that although the existence of a possible, even likely, surplus does not preclude a finding of prejudice to Plaintiff by SLS's nonconsensual modification, as an equitable issue, the above dispute appears to be unnecessary posturing at the expense of the mortgagors. Such behavior will be considered by the Court when reviewing any application for attorney's fees.

Accordingly, it is

ORDERED that the branches of Plaintiff's motion for summary judgment on its cause of action for foreclosure, a default judgment against the non-appearing parties, appointment of a referee and to amend the caption are granted, but the branch of the motion for summary judgment dismissing Defendant Specialized Loan Servicing' counterclaim for a declaratory judgment is denied, and it is

ORDERED that Defendant Specialized Loan Servicing's motion for summary judgment on its claim for a declaratory judgment is granted in part, and it is

ORDERED and ADJUDGED that $81,228.46 in added principal under the loan modification agreement dated June 22, 2016 between Defendant Specialized Loan Servicing and Maria Padilha and Jonice Padilha is subordinated to Plaintiff's mortgage dated January 24, 2007, and it is

ORDERED and ADJUDGED that all other principal and interest under the loan modification agreement dated June 22, 2016 between Defendant Specialized Loan Servicing and Maria Padilha and Jonice Padilha retains its priority over the Plaintiff's mortgage dated January 24, 2007, and it is

ORDERED that **Bruce Lederman Esq., 747 3rd Avenue Floor 23, New York, New York 10071-2844 (917) 612-9298** is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due Plaintiff and to examine whether the tax parcel can be sold in parcels; and it is further

ORDERED that in the discretion of the Referee, a hearing may be held, and testimony taken; and it is further

ORDERED that by accepting this appointment the Referee certifies that he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2 (c) ("Disqualifications from appointment"), and §36.2 (d) ("Limitations on appointments based upon compensation"), and, if the Referee is disqualified from receiving an

appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

ORDERED that, pursuant to CPLR 8003(a), and in the discretion of the court, a fee of $350 shall be paid to the Referee for the computation of the amount due and upon the filing of his report and the Referee shall not request or accept additional compensation for the computation unless it has been fixed by the court in accordance with CPLR 8003(b); and it is further;

ORDERED that the Referee is prohibited from accepting or retaining any funds for himself or paying funds to himself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that if the Referee holds a hearing, the Referee may seek additional compensation at the Referee's usual and customary hourly rate; and it is further

ORDERED that Plaintiff shall forward all necessary documents to the Referee and to Defendants who have appeared in this case within 30 days of the date of this order and shall *promptly* respond to every inquiry made by the referee (promptly means within two business days); and it is further

ORDERED that if Defendant(s) have objections, they must submit them to the referee within 14 days of the mailing of plaintiff's submissions; and include these objections to the Court if opposing the motion for a judgment of foreclosure and sale; and it is further

ORDERED that failure to submit objections to the referee may be deemed a waiver of objections before the Court on an application for a judgment of foreclosure and sale; and it is further

ORDERED the caption is amended as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK

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HOME LOAN INVESTMENT BANK, F.S.B. F/K/A OCEAN BANK, F.S.B.,

Plaintiff, Index No. 850158/2019

-against-

JOCELY PADILHA, JONICE PADILHA, SPECIALIZED LOAN SERVICING, LLC,35 WEST REALTY CO., LLC, ML FACTORS LIMITED LIABILITY COMPANY, UNITED STATES OF AMERICA, JOHN DOE, JANE DOE

Defendants.

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and it is further,

ORDERED that Plaintiff must bring a motion for a judgment of foreclosure and sale

within 45 days of receipt of the referee's report; and it is further

ORDERED that if Plaintiff fails to meet these deadlines, then the Court may *sua sponte* vacate this order and direct Plaintiff to move again for an order of reference and the Court may *sua sponte* toll interest depending on whether the delays are due to Plaintiff's failure to move this litigation forward; and it further

ORDERED that counsel for Plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being removed pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address (www.nycourts.gov/supctmanh)]; and it is further

ORDERED that Plaintiff shall serve a copy of this Order with notice of entry on all parties and persons entitled to notice, including the Referee appointed herein.

All parties are to appear for a virtual conference via Microsoft Teams on **February 3, 2022 at 12:20 p.m.** If a motion for judgment of foreclosure and sale has been filed Plaintiff may contact the Part Clerk Tamika Wright (tswright@nycourt.gov) in writing to request that the conference be cancelled. If a motion has not been made, then a conference is required to explore the reasons for the delay.

11/5/2021
DATE

FRANCIS A. KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			X	FIDUCIARY APPOINTMENT	REFERENCE