MEMORANDUM

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24
Justice

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D.T. FUNDING INC.,

Plaintiff,

-against-

RADHIKA RAMLAKHAN; 120-23 REALTY LLC; STATE OF NEW YORK; ET AL.,

Defendants.

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Index No.: 15917/09

Motion Dated: January 12, 2010

Cal. No.: 11 & 12

M# 3 & 4

This is a motion by the plaintiff to strike the Answer of the defendant, for summary judgment, the appointment of a Referee to compute and other relief (No. 11). Defendant cross moves for leave to amend the Answer to interpose a sixth affirmative defense, and upon granting such leave, for summary judgment on the sixth affirmative defense. By separate notice of motion, plaintiff seeks to appoint a Receiver for the subject property (No. 12). These two motions and this cross motion are jointly decided as follows:

This is an action to foreclose a mortgage on real property located at 120-23 Liberty Avenue in Queens County. The mortgage was assigned by Flushing Savings Bank, FSB to the plaintiff on June 15, 2009. The moving papers allege that defendant failed to make the monthly mortgage payments beginning on March 1, 2009. Defendant concedes that she stopped making the mortgage payments

but asserts that she paid $3500 to a "Credit Repair Agency" to help her refinance the property, and it advised her to stop making the mortgage payments.

The court will first address the branch of the cross motion by defendant to amend the Answer. It is well settled that leave to amend a pleading is freely granted, absent prejudice or surprise, unless the proposed pleading is palpably insufficient or patently devoid of merit. (CPLR 3025[b]; Aurora Loan Servs., LLC v Grant, 70 AD3d 986 [2010]; Gitlin v Chirinkin, 60 AD3d 901, 902 [2009]; Zorn v Gilbert, 60 AD3d 850 [2009]; Shovak v Long Is. Commercial Bank, 50 AD3d 1118, 1120 [2008].) In the matter at hand, defendant is not prejudiced by the addition of the sixth affirmative defense to the Answer. Thus, the amended Answer, in the form annexed to the cross moving papers as Exhibit F, is deemed timely and validly served.

The court next finds that the plaintiff demonstrated its entitlement to summary judgment in this foreclosure action. The plaintiff submitted the mortgage documents as well proof of defendant's default herein. Indeed, defendant does not deny that she is in default in making her monthly mortgage payments. Thus, the burden shifts to defendant to raise a triable issue of fact. Defendant attempts to do so via the sixth affirmative defense and also seeks summary judgment based on this affirmative defense of a violation of Judiciary Law § 489.

The ancient doctrine of champerty has been codified in Judiciary Law § 489, which provides, in pertinent part, that "no corporation or association ... shall solicit, buy or take an assignment of a bond, promissory note, bill of exchange, book debt or other thing in action ... with the intent and for the purpose of bringing an action or proceeding thereon..." The doctrine of champerty developed to prevent the commercialization of or trading in litigation. (Trust for the Certificate Holders of Merrill Lynch Mtg. Investors, Inc. v Love Funding Corp., 13 NY3d 190, 198 [2009].) The champerty statutes were never meant to prevent the purchase or an assignment of a claim for the honest purpose of protecting an important right of the assignee. (Moses v McDivitt, 88 NY 62, 65 [1882].) The statute applies where the assignment is obtained "for the very purpose ... of bringing suit." (Bluebird Partners, L.P. v First Fidelity Bank, N.A., 94 NY2d 726, 734 [2000][quoting Moses v McDivitt, 88 NY at 65.) Indeed, the prohibition set forth in Judiciary Law § 489 applies to cases where the pursuit of litigation is "at least ... the primary purpose for ... entering into the transaction." (Bluebird Partners, L.P. v First Fidelity Bank, N.A., 94 NY2d at 734.)

In the case at bar, the court finds that there is no merit to defendant's claim of champerty. The mortgage loan had fallen into default on March 1, 2009, prior to the date of the assignment, and the mortgage was accelerated prior to the assignment to the

plaintiff. (BF Holdings I, Inc. v South Oak Holding, Inc., 251 AD2d 1, 1 [1998]; Limpar Realty Corp. v Uswiss Realty Holding, Inc., 112 AD2d 834, 836 [1985].) The evidence submitted demonstrates that the mortgage was accelerated by letter from plaintiff's assignor on April 6, 2009. Plaintiff submits an affidavit from Tricia Brock, the mortgage servicing agent for plaintiff's assignor, who avers that she sent a notice of default letter and acceleration letter to defendant via first class mail and certified mail. Although defendant denies receiving such notices, there is a rebuttable presumption that an item properly mailed was received by the addressee. (Dune Deck Owners Corp. v JJ & P Assocs. Corp., ___ AD3d ___, ___ NYS2d ___, 2010 NY Slip Op 02739 [Mar. 30, 2010].) Thus, the defendant cannot raise an issue of fact sufficient to defeat plaintiff's motion for summary judgment and is not entitled to summary judgment on its sixth affirmative defense.

The court has considered the other arguments raised by the defendant and finds them to be without merit.

With respect to the separate motion by the plaintiff for the appointment of a receiver, paragraph 38 of the Consolidation, Modification and Extension Agreement between plaintiff's assignor and the defendant provides that the mortgagee, "in any action to foreclose this mortgage, shall be entitled to the appointment of a receiver..." Thus, pursuant to the express terms of the agreement

set forth herein, a receiver shall be appointed.

Accordingly, the branch of the cross motion by the defendant for leave to amend the Answer to assert a sixth affirmative defense is granted.

The branch of the cross motion by the defendant for summary judgment on the sixth affirmative defense is denied.

The motion by the plaintiff to strike the Answer, for summary judgment and the appointment of a Referee to compute is granted.

The motion by the plaintiff to appoint a Receiver for the subject property is granted.

Settle Order.

Dated: April 7, 2010

AUGUSTUS C. AGATE, J.S.C.