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SHORT FORM ORDER

INDEX No. 11-4452

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL M. MARTIN
Justice of the Supreme Court

MOTION DATE 6-17-11 (#001)
MOTION DATE 7-19-11 (#002)
ADJ. DATE 12-13-11
Mot. Seq. # 001 - MG
002 - XMD

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NEW YORK COMMUNITY BANK,

Plaintiff,

- against -

CARMELLA MARIA HOLLAND, ROMAZ PROPERTIES LTD., ROBERT ROMEO, JOHN DOE No. 1 through JOHN DOE No. 10, the last ten (10) names being fictitious and unknown to the plaintiff, the persons or parties intended being the tenants, occupants, persons or parties, if any, having or claiming an interest in or lien upon the premises described in the Verified Complaint,

Defendants.

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LYNCH & ASSOCIATES
Attorney for Plaintiff
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New York, New York 10018

GATHMAN & BENNETT, L.L.P.
Attorney for Defendants
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Upon the following papers numbered 1 to 19 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13 ; Notice of Cross Motion and supporting papers 14 - 16 ; Answering Affidavits and supporting papers 17 - 19 ; Replying Affidavits and supporting papers ___; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff for an order granting summary judgment on its complaint; striking the answer of defendants Carmella Maria Holland, Romaz Properties, Ltd. and Robert Romeo and dismissing their affirmative defenses; an order of reference appointing a referee to compute the amount due and owing to plaintiff; and an amendment of the caption of this action is granted; and it is further

ORDERED that the cross motion by defendants for an order granting summary judgment dismissing the complaint based on plaintiff's lack of capacity to sue; dismissing the complaint and

notice of pendency as against defendants Romaz Properties Ltd. and Robert Romeo pursuant to RPAPL § 1301 (3); and dismissing the action or staying its prosecution until compliance with, or the inapplicability of, CPLR 3408 has been demonstrated, is denied; and it is further

ORDERED that PAUL G. COSTELLO with an office at 1 SPRUCE ST., SMITHTOWN, N.Y. is hereby appointed Referee to ascertain and compute the amount due upon the note and mortgage documents which this action was brought to foreclose, and to examine and report whether the mortgaged premises can be sold in parcels; and it is further

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ORDERED that pursuant to CPLR 8003 (a) the Referee be paid $250.00 WITHIN 30 DAY HEREOF ~~the statutory fee~~ for the computation of the amount due plaintiff; and it is further

ORDERED that by accepting this appointment the Referee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including but not limited to, section 36.2 (c) ("Disqualifications from appointment") and section 36.2 (d) ("Limitations on appointments based upon compensation"); and it is further

ORDERED that the pleadings and papers served and filed in this action be amended by deleting defendants "John Doe No. 1" through "John Doe No. 10" and it is further

ORDERED that the caption of this action hereinafter appear as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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NEW YORK COMMUNITY BANK, :

Plaintiff, :

- against - :

CARMELLA MARIA HOLLAND, ROMAZ PROPERTIES, LTD., and ROBERT ROMEO, :

Defendants. :

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This is an action to foreclose a mortgage on property known as 20 Dover Court, Bay Shore, New York. The property is owned by defendant Carmella Maria Holland (Holland).

Defendant Holland, in her capacity as president of defendant Romaz Properties, Ltd. (Romaz), executed a Business Line Revolving Credit Note (note) dated August 19, 2005 in which defendant Romaz, as borrower, promised to pay non-party Long Island Commercial Bank the principal loan

amount of $2,015,000.00. The note indicates that "[t]his note substitutes, restates and consolidates that certain note dated March 24, 2003 made by Romaz Properties, Ltd. to Long Island Commercial Bank in the original principal sum of $1,380,000.00, and that certain note dated August 19, 2005 made by Romaz Properties, Ltd. to Long Island Commercial Bank in the original principal sum of $640,000.00, upon which notes there is now due and owing the total principal sum of $2,015,000.00."

Defendant Holland also executed in her personal capacity a consolidation agreement (mortgage) dated August 19, 2005 with Long Island Commercial Bank consolidating prior notes and mortgages on the subject property to form a consolidated lien on the subject property in the bank's favor in the sum of $2, 015,000.00. The mortgage provides that "the party of the first part (Long Island Commercial Bank), the holder of said bonds or notes and mortgages, and the party of the second part (Holland), the owner in fee simple of the property hereinafter described, have mutually agreed to consolidate and co-ordinate the liens of said mortgages and to modify the terms thereof and of the bonds or notes secured thereby in the manner hereinafter appearing."

Defendant Holland and defendant Robert Romeo (Romeo) had executed personal guaranties dated June 17, 2005 guaranteeing loans and lien or security instruments made to or "for account of" defendant Romaz. Defendants subsequently defaulted on the monthly loan payment due on July 1, 2010 and on the payments due thereafter.

Plaintiff New York Community Bank, as successor in interest to Long Island Commercial Bank, commenced the instant action on February 10, 2011 seeking a judgment of foreclosure and sale of the subject property. Defendants Holland, Romaz and Romeo answered asserting affirmative defenses that the complaint fails to state a cause of action and that plaintiff lacks the capacity necessary to prosecute this action.

Plaintiff now moves for summary judgment on its complaint, an order of reference appointing a referee to compute the amount due and owing to plaintiff, and an amendment of the caption of this action to strike the names of the defendants "John Doe No. 1" through "John Doe No. 10" as there are no tenants on the property. In support of the motion, the plaintiff submits, among other things, copies of the consolidation agreement and revolving line of credit agreement dated August 19, 2005; the guarantees dated June 17, 2005; and the summons and complaint, and defendants' answer. The submissions also include an affidavit of merit dated May 23, 2011 of Andrew Baltz (Mr. Baltz), a First Vice President of plaintiff, indicating that the plaintiff is the owner and holder of the note and mortgage, that defendants Romaz and Holland defaulted on their obligations under the terms of the note and mortgage by failing to make the payment due on July 1, 2010 and thereafter, and that plaintiff accelerated the loan by letter to defendants Romaz and Holland on or about December 30, 2010. Mr. Baltz also states that there is now due and owing to plaintiff the principal sum of $2,009,935.20 plus interest at the rates contained in the note and mortgage, late charges, attorney's fees, escrow advances, and any other fees to protect and preserve the property as permitted by the mortgage.

Defendants cross-move for an order granting summary judgment dismissing the complaint based on plaintiff's lack of capacity to sue; dismissing the complaint and notice of pendency as against defendants Romaz and Romeo pursuant to RPAPL § 1301 (3); and dismissing the action or staying its prosecution until compliance with, or the inapplicability of, CPLR 3408 has been demonstrated. In

support of the cross motion, defendants submit the affirmation of their attorney arguing that plaintiff has failed to prove ownership as no assignment of the note and mortgage from Long Island Commercial Bank to plaintiff has been submitted with the motion nor has plaintiff shown that there was a purchase of or merger with the predecessor bank. In addition, defendants contend that the action must be dismissed as against defendants Romaz and Romero pursuant to RPAPL § 1301 (3) since they were not parties to the mortgage and neither has title to the subject property. Defendants also contend that the conclusory statement of plaintiff's attorney that the subject action does not meet the criteria for inclusion in the Residential Foreclosure Program is insufficient under CPLR 3408. Notably, no affidavits have been submitted from defendant Holland or defendant Romeo.

In opposition to the cross motion, plaintiff submits the affirmation of its attorney indicating that Long Island Commercial Bank is a subsidiary of Long Island Financial Corp. and that plaintiff is a subsidiary of New York Community Bancorp., Inc. and that on or about August 1, 2005, Long Island Financial Corp. and its subsidiaries entered into a merger agreement with New York Community Bancorp., Inc. pursuant to which Long Island Commercial Bank and Long Island Financial Corp. ceased to exist and the surviving corporation, New York Community Bancorp., Inc., assumed all of the assets and liabilities of Long Island Financial Corp., including the subject mortgage. Plaintiff submits a copy of the merger agreement. In addition, plaintiff contends that it has named the guarantors as parties to this foreclosure action to preserve its right to recover a deficiency judgment against the guarantors if there is a deficiency after the foreclosure sale. Plaintiff argues that inasmuch as it has not brought suit seeking to enforce the guarantees, defendants' claim of a violation of RPAPL § 1301 lacks merit. Moreover, plaintiff contends that there has been no violation of CPLR 3408 inasmuch as the borrower, Romaz, is not a natural person and thus, is not entitled to a settlement conference pursuant to CPLR 3408.

To establish a prima facie showing of entitlement to judgment as a matter of law in a foreclosure action, a plaintiff must submit evidence of the mortgage and note, and the defendant's default thereunder (*see* ***Levitin v Boardwalk Capital, LLC***, 78 AD3d 1019, 912 NYS2d 101 [2d Dept 2010]). Here, plaintiff demonstrated its prima facie entitlement to judgment as a matter of law by submitting the mortgage, the unpaid note, the guaranties, and evidence of defendants' default (*see* ***Swedbank, AB v Hale Ave. Borrower, LLC***, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]; ***Garrison Special Opportunities Fund, L.P. v Arthur Kill Hillside Dev.***, 82 AD3d 1042, 918 NYS2d 894 [2d Dept 2011]; ***Inland Mtge. Capital Corp. v Realty Equities NM, LLC***, 71 AD3d 1089, 900 NYS2d 79 [2d Dept 2010]; ***Wells Fargo Bank v Karla***, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]).

The burden then shifted to defendants to raise a triable issue of fact regarding their defenses (*see* ***Household Fin. Realty Corp. of New York v Winn***, 19 AD3d 545, 796 NYS2d 533 [2d Dept 2005]). Defendants must produce evidentiary proof in admissible form sufficient to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action (*see* ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Such defenses include waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct by the plaintiff (*see* ***Capstone Business Credit, LLC v Imperia Family Realty, LLC***, 70 AD3d 882, 895 NYS2d 199 [2d Dept 2010]; ***Cochran Inv. Co., Inc. v Jackson***, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007]).

Defendants failed to raise a triable issue of fact regarding their defenses (*see* ***Swedbank, AB v***

Hale Ave. Borrower, LLC, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]). Defendants' answer to the plaintiff's allegations in the complaint contains general denials, which are insufficient to raise any triable issues (*see* ***Duban v Platt***, 23 AD2d 660, 257 NYS2d 109 [2d Dept 1965]), *appeal dismissed* 16 NY2d 612, 261 NYS2d 63 [1965], *affd* 17 NY2d 526, 267 NYS2d 907 [1966]). Their first affirmative defense of failure to state a cause of action is boilerplate in nature and lacks merit (*see* ***LaSalle Bank Natl. Assn. v Kosarovich***, 31 AD3d 904, 820 NYS2d 144 [3d Dept 2006]). In addition, defendants do not deny that they have not made payments of interest or principal on the note (*see* ***Citibank, N.A. v Souto Geffen Co.***, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]).

With respect to their second affirmative defense of lack of capacity to sue, standing and capacity to sue are related, but distinguishable, legal concepts (*see* ***Wells Fargo Bank Minnesota, Natl. Assn. v Mastropaolo***, 42 AD3d 239, 242, 837 NYS2d 247 [2d Dept 2007]). Although both are components of a party's authority to sue, capacity requires an inquiry into the litigant's status, such as, its power to appear and bring its grievance before the court, whereas standing requires an inquiry into whether the litigant has an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request (*see id.* [internal quotations and citations omitted]). It appears that defendants are seeking dismissal based on plaintiff's lack of standing.

A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note, either by physical delivery or by execution of a written assignment before commencement of the action (*see* ***Citimortgage, Inc. v Stosel***, 89 AD3d 887, 934 NYS2d 182 [2d Dept 2011]). Here, plaintiff proved it had standing to sue by tendering sufficient documentary evidence of its merger with the previous note and mortgage holder and that it is the current owner and holder of the note and mortgage (*see* ***Capital One, N.A. v Brooklyn Flatiron, LLC***, 85 AD3d 837, 925 NYS2d 350 [2d Dept 2011]).

Next, the Court addresses defendants' argument that including the borrower Romaz and the guarantor Romeo, both of whom have no ownership interest in the subject property and are not parties to the mortgage, in this foreclosure action violates RPAPL § 1301 (3). RPAPL § 1301 (3) provides that while a foreclosure action is pending "no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought." Inasmuch as defendants have failed to demonstrate that there is another action pending to recover the mortgage debt, RPAPL § 1301 (3) is inapplicable and unavailable as a defense (*compare* ***Aurora Loan Services, LLC v Spearman***, 68 AD3d 796, 890 NYS2d 124 [2d Dept 2009]). Also, it is immaterial that neither Romaz nor Romeo have title to the subject property or are parties to the mortgage. RPAPL § 1313 provides that "[a]ny person who is liable to the plaintiff for payment of the debt secured by the mortgage may be made a defendant in the action" to foreclose a mortgage. Romaz is a proper party to the subject action because it is the borrower under the note. The legal relationship between a borrower and a lending bank is normally one of debtor and creditor (*see* ***Trustco Bank, Natl. Assn. v Cannon Bldg. of Troy Assocs.***, 246 AD2d 797, 668 NYS2d 251 [3d Dept 1998]). Romeo is a party as a guarantor of Romaz's debts to plaintiff. Plaintiff properly joined Romaz, a guarantor, in the foreclosure action as a permissible defendant (*see* RPAPL § 1313; ***Trustco Bank, Natl. Assn. v Cannon Bldg. of Troy Assocs.***, *supra*).

Regarding defendants' contention that plaintiff failed to demonstrate that a mandatory settlement

conference was not required for this foreclosure action, CPLR 3408 mandates a settlement conference in residential foreclosure actions involving a home loan as defined in RPAPL § 1304 where the defendant is a resident of the property subject to foreclosure (*see* CPLR 3408). RPAPL § 1304 (5) defines a home loan as "a loan, including an open-end credit plan, other than a reverse mortgage transaction, in which: (i) The borrower is a natural person; (ii) The debt is incurred by the borrower primarily for personal, family, or household purposes ..." (*see* RPAPL § 1304 [5], [a], [i],[ii]). Where, as here, the residential property subject to foreclosure was pledged as collateral to secure a commercial loan (Business Line Revolving Credit Note), and the borrower on the note (Romaz) is not a natural person, the parties are not bound by CPLR § 3408 (*see* CPLR 3408; RPAPL § 1304 [5], [a], [i],[ii]; ***Home Loan Inv. Bank, F.S.B. v Goodness and Mercy, Inc.***, US Dist Ct, ED NY, 10 CV 4677, Spatt, J., 2011; ***Eastern Sav. Bank, FSB v Aguirre***, 30 Misc 3d 1230 (A), 924 NYS2d 308, 2011 NY Slip Op 50285 (U) [Sup Ct, Queens County, 2011]).

Therefore, plaintiff is granted summary judgment and defendants' answer is stricken and their affirmative defenses are dismissed. In addition, plaintiff's request for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is granted (*see generally* ***Bank of E. Asia v Smith***, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

Dated: FEBRUARY 15, 2012

J.S.C.

____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION