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SHORT FORM ORDER

INDEX No. 11-36854

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 45 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 9/20/12
ADJ. DATES 10/12/12
Mot. Seq. #002 - MG
SETTLE ORDER
CDISP Y____ N X

PEOPLE'S UNITED BANK, successor by merger To BANK OF SMITHTOWN,

Plaintiff,

-against-

WESTHAMPTON GROUP, LLC, WESTHAMPTON GROUP B, LLC, NEW YORK STATE DEPT. OF TAXATION & FINANCE, ANTHONY F. CATANZARO, WALTER STASHIN, "JOHN DOE ONE" to and including "JOHN DOE TEN" the last ten names being fictitious and unknown to the plaintiff, the persons Or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises described in the complaint, known as 17, 21, 23, 24, 27, 28, 29, 32 WILLOWOOD COURT, WESTHAMPTON, NEW YORK, NO# (TAX LOT 43.013) WILLOWOOD COURT, WESTHAMPTON, NEW YORK and 150 MONTAUK HIGHWAY, WESTHAMPTON, NEW YORK,

Defendants.

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Upon the following papers numbered 1 to 9 read on this motion by the plaintiff for summary judgment, the appointment of referee to compute and other relief; Notice of Motion/Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 5-7; Replying Affidavits and supporting papers 8-9; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that those portions of this motion (#002) by the plaintiff for an order discontinuing the SECOND Cause of action set forth in the complaint wherein the plaintiff seeks foreclosure of a subsequent, second mortgage to that of the plaintiff's first consolidated mortgage is granted, without opposition; and it is further

ORDERED that those portions of this motion wherein the plaintiff seeks summary judgment on its FIRST cause of action for foreclosure of its first consolidated mortgage together with a deficiency judgment against all obligors under the consolidated note and the written guarantees is considered under CPLR 3212 and RPAPL 1321 and is granted; and it is further

ORDERED that the remaining portions of the instant motion wherein the plaintiff seeks an order dropping as party defendants the unknowns listed in the caption and appointing a referee to compute amounts due under the first consolidated mortgage is considered under CPLR 1321 and is granted.

In December of 2011, the plaintiff commenced this action to foreclose two mortgages owned by it by virtue of its merger with original mortgagee, the Bank of Smithtown. In the FIRST cause of action set forth in its complaint, the plaintiff seeks foreclosure of a consolidated mortgage dated June 11, 2007 which secures a consolidated mortgage note of the same date executed by the defendants, Westhampton Group LLC and Westhampton Group B, LLC [hereinafter Westhampton or LLC defendants] in the amount of $3,087,500.00. The plaintiff also seeks deficiency judgments against the Westhampton LLCs and against individual defendants, Cantanzaro and Stashin, who guaranteed the obligations of Westhampton under the note. In a second cause of action set forth in the complaint, the plaintiff sought foreclosure of a second, subordinate mortgage given by the LLC defendants on December 26, 2007 that secured a note in the amount of $212,500.00, payment of which was likewise guaranteed by the individual defendants.

Issue was allegedly joined by service of a joint answer of all four of the obligor defendants dated February 7, 2008. The answer advances no affirmative defenses nor counterclaims. An appearance without answering was made by the Attorney General of the State of New York on behalf of the New York State Department of Taxation & Finance. The unknown defendants listed in the caption were never joined herein by service of process or otherwise.

By the instant motion (#002), the plaintiff seeks, among other things, an order discontinuing the plaintiff's SECOND cause of action for foreclosure of the second mortgage that is the subject of the plaintiff's SECOND cause of action. That application is granted as there is no opposition thereto and the plaintiff is entitled to withdraw its demands for foreclosure of its subordinate, second mortgage, without leave of court (*see* CPLR 3217(a)). The plaintiff's SECOND cause of action is thus deemed withdrawn and is dismissed, without prejudice.

The plaintiff's demands for summary judgment dismissing the answer of the obligor defendants and for summary judgment on the remaining causes of action set forth in its complaint, namely, the FIRST (foreclosure of the first mortgage, sale and a deficiency judgment against the LLC defendants), and the THIRD (deficiency judgments against the guarantor defendants, Catanzaro and Stashin) is granted for the reasons stated below.

It is now well settled that a prima facie case for foreclosure and sale is established by the plaintiff's production of the mortgage, the unpaid note and due evidence of a default under the terms thereof (*see* CPLR 3212; RPAPL § 1321; ***HSBC Bank v Shwartz,*** 88 AD3d 961, 931 NYS2d 528 [2d Dept 2011]; ***Countrywide Home Loans v Delphonse***, 64 AD3d 624, 883 NYS2d 135 [2d Dept 2009];

J.P. Morgan Chase Bank v Agnello, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; ***Wells Fargo Bank Minnesota v Perez***, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]; ***Household Fin. Realty Corp. of New York v Winn***, 19 AD3d 545, 796 NYS2d 533 [2d Dept 2005]; ***Ocwen Fed. Bank FSB v Miller***, 18 AD3d 527, 794 NYS2d 650 [2d Dept 2005]). To establish prima facie entitlement to judgment as a matter of law on the issue of liability with respect to a guaranty, a plaintiff must submit proof of the underlying note, a guaranty, and the failure of the defendant to make payment in accordance with the terms of those instruments (*see* ***Griffon V, LLC v 11 East 36th, LLC***, 90 AD3d 705, 934 NYS2d 472 [2d Dept 2011]; ***Baron Assoc., LLC v Garcia Group Enter., Inc.***, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]). Here, the moving papers included copies of the loan documents that are subject of the plaintiff's FIRST and THIRD causes of action including the consolidated note and mortgage of June 11, 2007 and the written guarantees of the obligations of the mortgagor thereunder. The moving papers also included due proof that the LLC defendants failed to pay the amounts due on August 1, 2011 and that neither the LLC defendants nor the guarantor defendants have cured the defaults in payment. The plaintiff thus established its entitlement to summary judgment on its FIRST and THIRD causes of action.

It was thus incumbent upon the answering defendants to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's prima facie showing or in support of affirmative defenses asserted in their answer, if any or otherwise possessed by them (*see* ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***Grogg Assocs. v South Rd. Assocs.***, 74 AD3d 1021 907 NYS2d 22 [2d Dept 2010]; ***Washington Mut. Bank v O'Connor***, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]; ***J.P. Morgan Chase Bank, NA v Agnello,*** 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; ***Household Fin. Realty Corp. of New York v Winn***, 19 AD3d 545, *supra*). A review of the opposing papers submitted by the defendants reveals, however, that they are insufficient to raise any genuine question of fact requiring a trial on the merits of the plaintiff's claims for foreclosure and sale.

The defendants' challenges to the plaintiff's demands for summary judgment rest upon two procedural grounds. The first of such challenges is premised upon claims that the plaintiff failed to satisfy the general burdens of proof imposed upon any litigant seeking the drastic remedy of summary judgment by the provisions of CPLR 3212 and the case authorities interpreting same. While the defendants point to a multitude of such case authorities in string citations that span several pages of counsel's affirmation in opposition, the defendants' reliance thereon is misplaced. The standards for a prima facie case in a foreclosure action against the borrower and its guarantors are measured by those imposed by the case authorities cited above and the plaintiff clearly satisfied those standards for the reasons indicated.

The defendants' second challenge is premised upon claims that the plaintiff's failure to serve a bill of particulars in response to the defendants' February 9, 2012 demand for such bill warrants a denial of the plaintiff's motion. The plaintiff counters this argument by contending that the defendants' bill of particulars demand is actually one for the production of documents. Continuing, the plaintiff contends that neither the absence of response to the improper bill of particulars demand nor the absence of discovery warrants a denial of this motion. With these contentions the court agrees for the reasons stated below.

The distinctions between bills of particulars, which are governed by Article 30 of the CPLR, and the discovery devices that are the subject of Article 31 of the CPLR, are well established. The purpose

of a bill of particulars is to amplify the pleadings, limit the proof and prevent surprise at trial (*see* ***Jones v LeFrance Leasing L.P.***, 81 AD3d 900, 902, 917 NYS2d 261 [2d Dept 2011]). "A bill of particulars may not be used to obtain evidentiary material" (***Fremont Inv. & Loan v Gentile***, 94 AD3d 1046, 943 NYS2d 182 [2d Dept 2012] quoting, ***Nuss v Pettibone Mercury Corp***., 112 AD2d 744, 492 NYS2d 240 [2d Dept 1985]). In contrast, the statutory disclosure devices that are the subject of Article 31 of the CPLR are aimed at uncovering evidence or information that may lead to evidence material and relevant to the prosecution of claims or defenses (*see* ***Friel v Papa***, 87 AD3d 1108, 930 NYS2d 39 [2d Dept 2011]). A review of the defendants' demand for a bill of particulars reveal that it calls for the production of documents and other materials that are evidentiary in nature rather than calling for an elucidation of the allegations in the complaint. The demand is thus not one for a bill of particulars, but instead, is one for the production of documents as is the case when a Notice for Discovery and Inspection is served pursuant to CPLR 3120. The defendants' demands for a denial of this motion due to the absence of service of the bill demanded are thus rejected as unmeritorious.

To the extent that the defendants' opposition may be read as a request for a denial of this motion so as to afford the defendants the opportunity to engage in discovery as contemplated by CPLR 3212 (f), it is denied. The rule at CPLR 3212(f) provides that "should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just". Appellate case authorities have long instructed that to avail oneself of the safe harbor this rule affords, the claimant must "offer an evidentiary basis to show that discovery may lead to relevant evidence and that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff" (***Martinez v Kreychmar***, 84 AD3d 1037, 923 NYS2d 648 [2d Dept 2011]; *see* ***Seaway Capital Corp. v 500 Sterling Realty Corp.***, 94 AD3d 856, 941 NYS2d 871[2d Dept 2012]). The "'mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered' by further discovery is an insufficient basis for denying the motion" (***Woodard v Thomas***, 77 AD3d 738 at 740, 913 N.Y.S.2d 103 [2d Dept 2010], quoting, ***Lopez v WS Distrib., Inc***., 34 AD3d 759, 760, 825 NYS2d 516; *see* ***Friedlander Organization, LLC v Ayorinde***, 94 AD3d 693, 943 NYS2d 538 [2d Dept 2012]).

Here, the defendants failed to meet this standard. Their participation in the transactions by which the mortgage loan documents were executed, coupled with their failure to advance any material and relevant defenses to the claims on which summary judgment have been demanded, warrant the rejection of any claim of prematurity in the plaintiff's motion (*see* ***Lambert v Bracco***, 18 AD3d 619, 795 NYS2d 662 [2d Dept 2005]). Moreover, the defendants' failure to move for sanctions or for any of the other remedies afforded by the provisions of CPLR 3042 following the plaintiff's failure to respond to the defendants' bill demand lends support to those portions of the record which evidence the absence of any viable legal defenses to the plaintiff's claims.

To the extent that the defendants' opposition may fairly be considered as resting upon claims that the statutory requirement that issue be joined prior to the interposition of a summary judgment motion has not been met due to the plaintiff's failure to serve a bill of particulars, such claims are rejected as unmeritorious (*see* CPLR 3212[b]). Issue was joined by service of the joint answer of the obligor defendants. A bill of particulars is not a pleading, but instead, an amplification of the pleading and service thereof is not required for the joinder of issue.

Finally, and for purposes of clarifying the record, the court notes that the opposing papers submitted by the defendants refer to a third ground for the denial of the plaintiff's motion. However, no such third ground is advanced in the opposing papers, including the affirmation of defendants' counsel. A review thereof reveals that there are only two topic headings set forth in such affirmation. Although they are numbered 1, then 3, counsel's affirmation contains no topic heading numbered 2. There are no missing pages, as the paragraphs set forth in counsel's affirmation in opposition are sequenced consecutively, without any omissions. None of the other submissions of the defendants include a third ground for the denial of the plaintiff's motion.

In light of the foregoing, the court finds that the plaintiff is entitled to summary judgment on its complaint and the dismissal of the answer served by the answering defendants. Those portions of this motion wherein the plaintiff seeks such relief are thus granted.

Those portions of the instant motion wherein the plaintiff seeks a discontinuance of the claims against the unknown defendants are granted to the extent that such unknown defendants are dropped as party defendants. The plaintiff's further demands for an order amending the caption to reflect same is also granted.

The moving papers further established a default in answering on the part of the remaining defendant who appeared without answering in response to the plaintiff's service of its complaint. Accordingly, the default in answering of defendant, New York State Department of Taxation and Finance, is hereby fixed and determined. Since the plaintiff has been awarded summary judgment against the sole answering defendant and has established a default in answering by the remaining defendant, the plaintiff is entitled to the appointment of a referee to compute amounts due under the consolidated note and mortgage that is the subject of the plaintiff's FIRST cause of action (*see* RPAPL § 1321; ***Bank of East Asia, Ltd. v Smith***, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994];***Vermont Fed. Bank v Chase***, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; ***Perla v Real Prop. Holdings, LLC***, 23 Misc3d 697, 874 NYS2d 873 [Sup Ct. Kings County 2009]).

The plaintiff is directed to settle, on not less than fifteen (15) days notice to all appearing counsel, a proposed order of reference providing in blank for the court's designation of a referee to compute a ll such other matters necessarily attendant with such appointment and order or reference. It shall also reflect the court's dismissal of the plaintiff's SECOND cause of action pursuant to the terms of this order. The proposed order of reference *must be accompanied by copy of this order*.

Dated: 11/7/12

THOMAS P. WHELAN, J.S.C.