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SHORT FORM ORDER

INDEX No. 10-45879

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 12-21-11
ADJ. DATE 12-5-12
Mot. Seq. # 001 - MotD

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WILLIAM FLYNN,

Plaintiff,

- against -

KAREN FLYNN, KAREN FLYNN, as Administrator of the Estate of ROBERT H. FLYNN, deceased, CLERK OF THE SUFFOLK COUNTY DISTRICT COURT, WORKERS COMPENSATION BOARD OF THE STATE OF NEW YORK, PEOPLE OF THE STATE OF NEW YORK, COMMISSIONER OF TAXATION AND FINANCE, CAPITAL ONE BANK, FORD MOTOR CREDIT COMPANY, LLC, JENNIFER LEE REIDEL, UNITED STATES OF AMERICA AND "JOHN DOE", "JANE DOE", said last two names being fictitious and unknown to Plaintiff, the persons or parties having a claim in or an interest in, or lien upon the mortgaged premises described in the Complaint,

Defendants.

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Upon the following papers numbered 1 to 13 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 4 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers with Memorandum of Law 5 - 10 ; Replying Affidavits and supporting papers 11 - 13 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by plaintiff for summary judgment on his complaint, striking the affirmative defenses in the answer of defendants Karen Flynn and Karen Flynn as Administrator of the Estate of Robert H. Flynn, deceased, and for an order of reference appointing a referee to compute, is granted

to the extent of striking the first, second, fourth, sixth, eighth and ninth affirmative defenses in the aforementioned answer of the defendants; and it is further

ORDERED that the branch of the motion to strike the "John Doe" and "Jane Doe" defendants is granted and the caption amended to reflect same; and it is further

ORDERED that the motion is other otherwise denied and the remainder of the action shall continue.

On July 17, 1997, the plaintiff loaned his son and daughter-in-law, Robert H. Flynn and Karen Flynn (hereinafter the "Flynns" when referred to collectively), $285,000 to purchase the house located at 40 Overlook Drive in Southampton, New York (the "Property"). On the same date, Robert H. Flynn executed a promissory note for $285,000 with an interest rate of 6.5% , compounded quarterly as of July 17, 1997 (the "Note"). The principal payment of $40,000 plus interest was due once a year on December 31. As security for payment of the Note, the Flynns executed a mortgage on the Property in favor of the plaintiff (the "Mortgage") which was recorded on July 24, 1997 in the Suffolk County Clerk's Office.

On March 8, 2005, Robert H. Flynn died intestate and Karen Flynn was appointed the administrator of his estate. She continues to reside at the Property with their children.

On December 21, 2010, the plaintiff commenced the instant mortgage foreclosure action against Karen Flynn, individually, and in her capacity as administrator of the estate of Robert H. Flynn (hereinafter the "Flynn Defendants" when referred to collectively). In his complaint, the plaintiff alleges that the Flynns defaulted in making the Mortgage payment due on July 17, 1997, "and all subsequent monthly payments owed" and, for the first time notified Karen Flynn that he was exercising his option to accelerate the debt. As of the date of the complaint, plaintiff alleges that the total balance due was $805,727.73. Issue was joined by the Flynn Defendants and a notice of appearance filed by defendant New York State Workers' Compensation Board in which it waived service of all but certain notices. In their answer, the Flynn Defendants admit that Karen Flynn lives at the Property, that Robert H. Flynn died intestate on March 8, 2005 and that Karen Flynn was appointed the administrator of his estate, but deny the remainder of the allegations in the complaint, and interpose several affirmative defenses.

Plaintiff now moves to strike the answer of the Flynn Defendants, for summary judgment on his complaint seeking to foreclose the Mortgage (first cause of action) and for attorneys fees (second cause of action), to discontinue the action against the "John Doe" defendants, and for the appointment of a referee to compute the amount due on the Note and Mortgage. In opposition, the Flynn Defendants argue that the court should search the record and grant summary judgment in their favor based on the affirmative defenses that the action is barred by the Statute of Limitations, laches, usury, waiver, estoppel, unclean hands, gift, predatory lending, accord and satisfaction, and failure to state a cause of action. Alternatively, the Flynn Defendants argue that the motion should be denied as premature as no discovery has been conducted.

The foreclosure settlement conference was held on September 13, 2011, thus, there has been compliance with CPLR 3408. Plaintiff's counsel has also proffered the affirmation required by Administrative Order 431/11 of the Chief Administrative Judge of the Courts and the requisite foreclosure notices required by RPAPL §§ 1303, 1304 and 1320.

In support of his motion for summary judgment, plaintiff has submitted the Note and Mortgage, and asserts in his affirmation that he is the owner and holder of both instruments. Plaintiff also asserts that the Flynns were required to make annual payments of principal and accrued interest beginning December 31, 1997 through the maturity date of December 31, 2005. Plaintiff maintains that the Flynns never made any payments, and as a result on December 21, 2010, he commenced the instant foreclosure action and elected to accelerate the debt.

It is well settled that a mortgagee establishes a prima facie case entitling it to summary judgment to foreclose a mortgage by presenting the subject mortgage, the unpaid note and due evidence of a default under the terms thereof (*see* CPLR 3212; RPAPL § 1321; ***Baron Assoc., LLC v Garcia Group Enter.***, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; ***Citibank, NA v Van Brunt Prop., LLC***, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]; ***Campaign v Barba***, 23 AD3d 827, 805 NYS2d 86 [2d Dept 2005]; ***Ocwen Federal Bank FSB v Miller***, 18 AD3d 527, 794 NYS2d 650 [2d Dept 2005]). Here, the plaintiff has demonstrated entitlement to summary judgment on his complaint as the moving papers include a copy of the note, mortgage and evidence of the Flynns' default in making payments as agreed. It is thus incumbent upon the Flynn Defendants to submit proof sufficient to raise a genuine question of fact as to a bona fide defense to their default (***Citibank, NA v Van Brunt Prop., LLC***, *supra*; ***Grogg Assocs. v South Rd. Assocs.***, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]).

In opposition, the Flynn Defendants rely on the affidavit of Karen Flynn wherein she asserts that prior to her husband's death she did not deal with any aspects of the subject loan, but believed that the loan was a gift and that the debt would be forgiven over time. Karen Flynn asserts that plaintiff did not demand repayment of the $285,000 until approximately August 2007 vis-a-vis a letter from his attorney, which was ten years after the Property was purchased and several years after her husband had died. Karen Flynn states that she did not receive any other written demand for payment until 2011 when she received the instant foreclosure notice.

Karen Flynn also asserts that after her husband's death she found a cancelled check dated January 7, 2000 for $100,000 which was made out to the plaintiff. Karen Flynn asserts, and has submitted a copy of the cancelled check as confirmation; although there is no indication that the check was tendered for payment of the Mortgage, in his reply the plaintiff states that the check was for such payment.

The Flynn Defendants' counsel asserts in his affirmation that the plaintiff's claims are barred by the six-year Statute of Limitations and that the 14-year delay in enforcing the terms of the Note and Mortgage amount to a waiver of the principal and interest and an estoppel from seeking to now collect any amounts. Further, counsel asserts that the Note's effective interest rate is in excess of the usury rate, thus plaintiff's claims for relief are barred by the doctrine of unclean hands.

The Flynn Defendants have not opposed that part of the plaintiff's motion which seeks to amend the caption. Therefore, granted is the branch of the motion to strike the "John Doe" and "Jane Doe" defendants.

The branch of the plaintiff's motion to strike the affirmative defenses is decided as follows. The first affirmative defense asserts that the plaintiff fails to state a cause of action upon which relief may be granted.

As discussed above, the plaintiff sufficiently set forth a claim to foreclose the mortgage. Therefore, this affirmative defense is stricken.

The second affirmative defense that plaintiff has unclean hands is also stricken. It is well-settled that the doctrine of unclean hands is not a defense to a mortgage foreclosure action (*see* ***Jo-Ann Homes v Dwortetz***, 25 NY2d 112, 302 NYS 599 [1969]). In any event, the Flynn Defendants have failed to come forward with any evidence that the plaintiff's conduct was immoral or unconscionable (*see* ***CFSC Capital Corp. XXVII v W.J. Bachman Mechanical Sheet Metal Co.***, 247 AD2d 502, 669 NYS2d 329 [2d Dept 1998]).

The Flynn Defendants assert estoppel as their third affirmative defense and explain in their opposition papers that the plaintiff should be barred from enforcing the terms of the Note and Mortgage because the loan was a gift. In the seventh affirmative defense it is claimed that the loan to the Flynn Defendants was intended to be a gift from the plaintiff. A valid inter vivos gift requires "intent on the part of the donor to make a present transfer; delivery of the gift, either actual or constructive to the donee; and acceptance by the donee" (***Gruen v Gruen***, 68 NY2d 48, 53, 505 NYS2d 849 [1986]). The proponent of a gift bears the burden of proving each of these elements by clear and convincing evidence (***id.***).

Here, the letter produced by the plaintiff from the Flynn Defendants' then counsel, acknowledging the debt, indicating that Karen Flynn would put the Property on the market and use the sale proceeds to pay off the debt, and requesting a new pay-off letter reflecting the $100,000 payment tendered in January 2000, negates the allegation that the loan was a gift (*see* ***Burnside v Foglia***, 208 AD2d 1085, 617 NYS2d 921 [3d Dept 1994]). Nevertheless, it is the intent of the plaintiff that is dispositive. Other than what is in essence the plaintiff's self-serving concession that a payment towards the Mortgage was received, no evidence in support thereof has been produced. The Flynn Defendants contend that evidence of how the plaintiff treated the loan and whether his intent was to make the loan a gift can be found on his Federal tax returns. However, it is asserted that as no discovery has yet been conducted, such documents cannot be produced. The Flynn Defendants' assertions are sufficient to raise a question of fact, especially in light of the familial relationship and that plaintiff did not attempt to foreclose on the Mortgage or otherwise attempt to enforce the terms of the Note while his son was alive. Thus, it is premature to strike the third and seventh affirmative defenses. The Flynn Defendants will be afforded a reasonable time to conduct discovery on the issue of whether the loan was a gift. After discovery is completed, the parties, if they are so advised, may make a motion on this issue.

The Flynn Defendants' fourth affirmative defense of waiver fails because the Note and Mortgage expressly preclude waiver of the terms therein.

As a fifth affirmative defense, the Flynn Defendants allege that the action is barred by the Statute of Limitations. The Statute of Limitations period applicable to an action on a note, the payment of which is secured by a mortgage upon real property, is six years (CPLR 213[4]). With respect to a mortgage payable in installments, there are separate causes of action for each payment due, with the Statute of Limitations beginning to run on the due date of each installment unless the mortgage debt is accelerated (***Wells Fargo Bank, N.A. v Cohen***, 80 AD3d 753, 915 NYS2d 569 [2d Dept 2010]; ***Loiacono v Goldberg***, 240 AD2d 476, 658 NYS2d 138 [2d Dept 1997]; ***Pagano v Smith***, 201 AD2d 632, 608 NYS2d 268 [2d Dept 1994]).

In the instant case, the Mortgage included an optional acceleration clause which the plaintiff did not exercise until this action was commenced. Where a mortgage is payable in installments, the Statute of Limitations is not tolled or postponed until the maturity of the mortgage (*see* 78 NY Jur 2d, Mortgages § 458 [2013]). "Consequently, separate causes of action for each installment accrued, and the Statute of Limitations began to run on the date each installment became due" (***Pagano v Smith***, *supra* at 634). Plaintiff contends that the only payment received was in January 2000 for $100,000, none of which, according to his attorney's June 21, 2007 letter and payment, schedule have been applied to principal. Here, the commencement of this foreclosure action was December 21, 2010. Since there are separate causes of action for each installment payment due, with the SOL beginning to run on the due date of each installment, it is likely that at least several causes of action may be time barred. Therefore, the motion to strike the fifth affirmative defense is denied.

The Flynn Defendants' sixth affirmative defense of predatory lending also cannot be sustained. The plaintiff is not a "lender" as defined in Banking Law § 6-l. Furthermore, the Banking Law section relied upon by the Flynn Defendants requiring that a lender consider the borrowers ability to repay a high-cost loan was not in effect in 1997 when the subject loan was consummated. Thus, the sixth affirmative defense is stricken.

Stricken is the eighth affirmative defense alleging that the effective interest rate of the Note is usurious. Since December 1, 1980, under New York law the interest rate ceiling for loans has been 16% per annum (General Obligations Law § 5-501; Banking Law 14-a; *see e.g.* ***Cohen v Eisenberg***, 265 AD2d 365, 697 NYS2d 625 [2d Dept 1999]). The Note herein calls for a rate of interest of 6.5% compounded quarterly, and a default rate of interest of 3%. Therefore, the Note on its face is not usurious. Although "'agreements to pay compound interest have not found favor with the courts'" (***Steinberg v Williams***, 163 AD2d 516, 558 NYS2d 188 [2d Dept 1990], quoting ***Giventer v Arnow***, 37 NY2d 305, 308, 372 NYS2d 63 [1975]), such interest is not, by itself usurious, and will be awarded, where as here, the Note specifically provides therefor (*see* ***Giventer v Arnow***, *supra*; ***Steinberg v Williams***, *supra*).

Also stricken is the ninth affirmative defense alleging that the claims are barred by the doctrine of accord and satisfaction. The Flynn Defendants as the party asserting the affirmative defense must establish that any dispute over the amount owed has been resolved and that there was an acceptance of payment by the plaintiff of a lessor amount in full satisfaction of the debt (*see* ***NYCTL 1998-2 Trustee v 2388 Nostrand Corp.***, 69 AD3d 594, 892 NYS2d 188 [2d Dept 2010]; ***Trans World Grocers, Inc. v Sultana Crackers, Inc.***, 257 AD2d 616, 684 NYS2d 284 [2d Dept 1999]). In the instant case, the parties clearly have not resolved their dispute and there is no evidence of an agreement discharging the obligations of the Flynns.

The court will not entertain the Flynn Defendants' request to amend their answer to assert laches as an affirmative defense. Such request, in a footnote in the memorandum of law, is procedurally defective.

The branch of the motion seeking attorneys' fees is denied at this time. Attorneys' fees and disbursements are incidents of litigation which the prevailing party may not collect from the loser unless such an award is authorized by an agreement, by statute, or by court rule (***RAD Ventures v Artukmac***, 31 AD3d 412, 818 NYS2d 527 [2d Dept 2006]). Although recovery of attorneys fees is available to the plaintiff herein pursuant to terms of the Note and Mortgage, the branch of the motion for same is premature,

and thus denied (***Fried v Tucker***, 22 Misc 3d 1122[A], 880 NYS2d 872 [Sup Ct, Kings County 2008]). "Said fees may be awarded, subject to the court's discretion, in the event of, and upon submission of, an appropriate judgment" (***id.*** at *6).

Inasmuch as the striking of the Flynn Defendants' third and seventh affirmative defenses relating to whether the loan was a gift is premature, the plaintiff's motion for summary judgment on his complaint is also premature pursuant to CPLR 3212(f). Furthermore, plaintiff's application for a referee to compute pursuant to RPAPL 1321 must also be denied as premature.

Finally, as a preliminary conference has not been held in this action, the parties' counsel are directed to appear at 9:30 a.m. on May 21, 2013, for such a conference.

Dated: April 12, 2013

W. Gerard Asher
J.S.C.

____ FINAL DISPOSITION ___X__ NON-FINAL DISPOSITION