SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN J.S.C. PART _____
Justice

Index Number : 654549/2012
BLOTT, PATRICK
vs.
COUNTRYWIDE HOME LOANS, INC.
SEQUENCE NUMBER : 002
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____ , were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 6/5/13

CYNTHIA S. KERN, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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PATRICK BLOTT,

Plaintiff,

Index No. 654549/2012

-against-

DECISION/ORDER

COUNTRYWIDE HOME LOANS, INC., BANK OF AMERICA CORP., BAC HOME LOANS SERVICING, LP, COUNTRYWIDE HOME LOANS SERVICING, LP, FRENKEL LAMBERT WEISS WIESMAN & GORDON, LLP, MANHATTAN NETWORK INC. and KENNETH L. LAINO,

Defendants.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Cross-Motion and Affidavits Annexed.....	3
Answering Affidavits to Cross-Motion.....	4
Replying Affidavits.....	5
Exhibits.....	6

This action arises out of the termination of plaintiff's proprietary lease and subsequent foreclosure and sale of his shares in the cooperative corporation 3095 Owners Corp.. Defendants Countrywide Home Loans, Inc., Bank of America Corp. and Bank of America, N.A. ("BANA"), successor by merger to BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing LP (collectively referred to hereinafter as the "Bank Defendants" or the "moving defendants"), now move for an order pursuant to CPLR § 3211(a)(7) dismissing plaintiffs'

complaint on the ground that it fails to state a cause of action. Defendant Frenkel Lambert Weiss Weisman & Gordan, LLP ("Frenkel") have cross-moved for the same relief. For the reasons set forth below, the Bank Defendants' motion and Frenkel's cross-motion are granted.

The relevant facts are as follows. On or about January 11, 2007, plaintiff purchased 410 shares in the cooperative corporation 3095 Owners Corp. and became the proprietary lessee of Apartment 3F at 30 East 95th Street, New York, New York 10128 (the "Unit"). In connection with that transaction, plaintiff obtained a loan in the original principal amount of $369,000.00 from defendant Countrywide Home Loans, Inc. (the "Loan"). As security for the Loan, plaintiff executed an Adjustable Rate Note and Addendum to the Note (the "Note") and a Loan Security Agreement and Fixed/Adjustable Rate Rider thereto (the "Loan Security Agreement"). Subsequent to the closing of the Unit, plaintiff occupied the Unit as his residence. However, plaintiff alleges that prior to the foreclosure and sale of the Unit, he moved to his current address: 57 East 95th Street, Apartment 5, New York, NY 10128 (the "current address"). Plaintiff attests that he "advised Bank of America representatives of that address in telephone calls with their representatives on numerous occasions prior to July 2012."

Starting on or about June 1, 2009, plaintiff defaulted under the Note and Loan Security Agreement by failing to make the required payments and on February 29, 2012, BANA sent plaintiff a pre-foreclosure notice to the Unit by first-class mail and certified mail, return receipt requested, which stated that his Loan was in default. In addition, BANA sent a pre-foreclosure notice to plaintiff at his current address, which it also had on file. Plaintiff admits to receiving the pre-foreclosure notice that was sent to his current address. Thereafter, BANA referred the matter to its foreclosure counsel Frenkel.

On June 8, 2012, Frenkel sent plaintiff a document entitled "Public Auction Notice of Sale of Cooperative Apartment Security" (the "Notice of Sale") to plaintiff at the Unit address and to 57 East 84th Street, Apt 5, New York, NY 10128. Frenkel asserts that the substitution of 84th Street for 95th Street in the second address was a clerical error. Plaintiff claims he never received the Notice of Sale.

On July 11, 2012, plaintiff's interest in the Unit, including his shares and the proprietary lease, were sold at public auction. Thereafter, on or about August 22, 2012, plaintiff attempted to gain entrance to the Unit but was unable to do so because the locks had been changed. Plaintiff was subsequently restored to possession of the Unit and the parties have stipulated that the defendants will not disturb plaintiff's claimed possession or enjoyment of the apartment until a decision on this motion is made.

Plaintiff commenced this action against defendants to annul the aforementioned sale and for a declaratory order stating that he is the rightful owner of the Unit. Specifically, plaintiff's complaint asserts the following causes of action against defendants: (1) wrongful eviction; (2) trespass; (3) negligent failure to administer the Loan Security Agreement; (4) rescission of the Auction; (5) a judgment declaring the Auction void; and (6) a permanent injunction prohibiting defendants from claiming that anyone other than plaintiff owns the Unit. A close reading of the complaint reveals that plaintiff's causes of action are all based upon defendants' alleged failure to give proper notice prior to the foreclosure and sale of the Unit. The Bank Defendants and Frenkel have now moved pursuant to CPRL § 3211(a)(7) to dismiss the action in its entirety on the ground that the documentary evidence shows that plaintiff was given proper notice as a matter of law. Specifically, the Bank Defendants and Frenkel argue that the pre-foreclosure

notice and Notice of Sale were sent pursuant to the Note and Loan Security Agreement provisions pertinent to notice and as such are sufficient as a matter of law. Plaintiff, on the other hand, contends that the Notice of Sale was improperly sent as it was only sent to the Unit, which defendants knew was not plaintiff's current address and plaintiff never actually received the Notice of Sale.

On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). "[A] complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept 1990). However, "'[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence they are not presumed to be true or accorded every favorable inference.'" *Morgenthow & Latham v. Bank of New York Company, Inc.*, 305 A.D.2d 74, 78 (1st Dept 2003) *(quoting Biondi v. Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 81 (1st Dept 1999), *aff'd*, N.Y.2d 659 (2000)). In such cases, "the criterion becomes whether the proponent has a cause of action, not whether he has stated one." *Id.* (internal quotations removed).

The First Department has specifically held that in actions seeking to annul a foreclosure sale, like the one at issue here, a motion to dismiss will be granted when it is demonstrated that the sale was conducted in accordance with the relevant UCC provisions. *See DeRosa v. Chase Manhattan Mortg. Corp.*, 10 A.D.3d 317 (1st Dept 2004). Pursuant to the New York Uniform Commercial Code Section 9-611(b), "a secured party that disposes of collateral under Section 9-610 shall send to the [debtor] a reasonable authenticated notification of disposition." Additionally,

> a secured party whose collateral consists of a residential cooperative interest used by the debtor and whose security interest in such collateral secures an obligation incurred in connection with financing or refinancing of the acquisition of such cooperative interest and who proposes to dispose of such collateral after a default with respect to such obligation, shall send to the debtor, not less than ninety days prior to the date of the disposition of the cooperative interest, an additional pre-disposition notice. N.Y. U.C.C. § 9-611(f)(1).

Pursuant to Section 1-201(26), "[a] person 'notifies' or 'gives' a notice or notification to another by taking such steps as may be reasonablely required to inform the other in ordinary course whether or not such other actually comes to know of it." When the loan agreements between the parties specify how notice should be given, courts have held that providing notice pursuant to said agreement terms is reasonable, whether or not the secured creditor also knew of another address for the debtor. *See Dougherty v. 425 Dev. Assoc.*, 93 A.D.2d 438, 442-43 (1st Dept 1983); *see also Thornton v. Citibank*, 226 A.D.2d 162 (1st Dept 1996) (finding that where plaintiff failed to provide a change of address, notice of the foreclosure and sale to debtor at the subject apartment by both certified mail, return receipt requests, as well as by regular mail was commercially reasonable). Indeed, a secured creditor "is not obligated to use every possible avenue of communication known to him to insure that notice is actually received." *Dougherty*, 93 A.D.2d at 444.

In the present case, the Bank Defendants and Frenkel acted reasonably by sending the pre-foreclosure notice and Notice of Sale to plaintiff at the Unit's address pursuant to the terms of the Note and Loan Security Agreement. Both the Note and the Loan Security Agreement have specific provisions regarding notices sent by one party to the other. Section 8 of the Note states:

> Unless applicable law requires a different method, any notice that must be given to [plaintiff] under this Note will be given by delivering it or mailing it by first class mail to [plaintiff] at the Property Address above [i.e. the Unit] or at a different address if

> [plaintiff] give[s] the Note Holder [i.e. BANA] a notice of [his] different address. Unless the Note Holder requires a different method, any notice that must be given to the Note Holder under this Note will be given by mailing it by first class mail to the Note Holder at the address stated in Section 3(A) above or at a different address if [plaintiff is] given notice of that different address.

Similarly, paragraph XI of the Loan Security Agreement states:

> Any notice to Debtor [i.e. plaintiff] provided for in this Agreement shall be in writing and shall be given by delivering it or by mailing it by first class mailing unless applicable law requires use of another method. The notice shall be to the Security Address [i.e. the Unit's address] or any other address Debtor designates by notice to Lender [i.e. BANA]. Any notice to Lender shall be given by first class mail to Lender's address stated herein or any other address Lender designates to Debtor. Any notice provided for in this Agreement shall be deemed to have been given to Debtor or Lender when given as provided in this paragraph.

BANA and Frenkel have demonstrated they sent the UCC required pre-foreclosure notice and Notice of Sale to plaintiff pursuant to said provisions by providing affidavits of service that such documents were mailed to plaintiff at the Unit's address. Plaintiff's contention that his change of residence imposed an additional duty on BANA to send notice to his current address is without merit as he never informed BANA in writing of this change in address. Plaintiff's assertion that he advised BANA during telephone calls of his change of address is insufficient under the explicit terms of the Note and Loan Security Agreement to require BANA to send notices to plaintiff's current address. Thus, BANA and Frenkel acted reasonably in sending the pre-foreclosure notice and Note of Sale to the address specified in the Note and Loan Service Agreement - i.e. the Unit– regardless of whether it also had plaintiff's current address on file.

Based on the foregoing, the foreclosure and sale of the Unit was conducted in accordance with the relevant UCC provisions and the Bank Defendants' motion and Frenkel's cross-motion to dismiss plaintiff's complaint are granted. Accordingly, plaintiff's complaint is hereby

dismissed in its entirety and the Clerk is directed to enter judgment accordingly. This constitutes the decision and order of the court.

Dated: 6/5/13

Enter: OK
J.S.C.
CYNTHIA S. KERN
J.S.C.