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SHORT FORM ORDER

INDEX
NO.: 24666-10

SUPREME COURT - STATE OF NEW YORK
IAS PART 49 - SUFFOLK COUNTY

PRESENT: Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

x

PNC BANK, NATIONAL ASSOCIATION

Plaintiff,

-against-

WILLIAM F. NIERODA, JR. and "JOHN DOE #1" through "JOHN DOE #12", the last twelve names being fictitious and unknown to 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 being foreclosed herein,

Defendants.

x

MOTION DATE: 12-12-12
ADJ. DATE: _____
Mot. Seq. #001-MotD

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WILLIAM F. NIERODA, JR.
11 Piper Court
West Islip, N. Y. 11795

Upon the following papers numbered 1 to 25 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 19; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 20 - 22; Replying Affidavits and supporting papers 23 - 25; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the plaintiff for, inter alia, an order pursuant to CPLR 3212 awarding summary judgment in its favor against the defendant William F. Nieroda, Jr., and striking his answer and affirmative defenses; appointing a referee to compute amounts due under the subject mortgage; and amending the caption, is determined as indicated below; and it is

ORDERED that the plaintiff shall submit with the proposed judgment of foreclosure, proof of filing of a new or successive notice of pendency (*see*, CPLR 6513; 6516[a]; ***Aames Funding Corp. v Houston***, 57 AD3d 808, 872 NYS2d 134 [2d Dept 2008]; ***EMC Mtge. Corp. v Stewart***, 2 AD3d 772, 769 NYS2d 408 [2d Dept 2003]; ***Horowitz v Griggs***, 2 AD3d 404, 767 NYS2d 860 [2d Dept 2003]), and an affidavit or affirmation of non-military status of the defendant William F. Nieroda, Jr., pursuant to 50 USC 521 *et seq.* (*see*, ***Central Mtge. Co. v Acevedo***, 34 Misc3d 213, 934 NYS2d 285 [Sup Ct, Kings County 2011]); and it is further

ORDERED that the plaintiff is directed to serve a copy of this Order with notice of entry upon opposing counsel and upon all other parties who have appeared herein and not waived further notice, pursuant to CPLR 2103(b)(1), (2) or (3) within thirty (30) days of the date herein, and to file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on residential real property known as 11 Piper Court, West Islip, New York 11795. On July 30, 2007, the defendant William F. Nieroda, Jr., (the defendant mortgagor) executed a fixed-rate note in favor of National City Mortgage, a division of National City Bank (National City) in the principal sum of $625,500.00. To secure said note, the defendant mortgagor gave the plaintiff a mortgage also dated July 30, 2007 on the property. By an undated endorsement, PNC Bank, National Association, successor by merger to National CityMortgage (PNC), transferred the note without recourse to PNC Bank, National Association (the plaintiff). By undated allonge, the plaintiff thereafter transferred the note without recourse to Wells Fargo Bank, N.A, not in its individual capacity, but solely as Trustee for the RMAC Trust, Series 2010-7T (Wells Fargo). PNC subsequently memorialized the transfer of its interest in the mortgage and the note to the plaintiff by an assignment dated June 9, 2010 and recorded on July 19, 2010. Thereafter, the plaintiff memorialized the transfer of its interest in the note and mortgage to Wells Fargo by assignment dated August 23, 2010 and recorded on December 6, 2010.

The defendant mortgagor allegedly defaulted on his monthly payments due on October 1, 2009, and each month thereafter. After the defendant mortgagor allegedly failed to cure his default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on July 9, 2010. Parenthetically, the original notice of pendency expires on July 9, 2013. Issue was joined by the service of the defendant mortgagor's answer dated August 10, 2010. By his answer, the defendant mortgagor admits some of the allegations in the complaint, generally denies other allegations and asserts six affirmative defenses alleging, among other things, the failure to state a cause of action; the complaint is barred due to insufficiency of process and the doctrines of waiver, estoppel, equitable estoppel, laches and unclean hands; contributory and comparative negligence; an unenforceable contract of adhesion; and a reservation of rights to assert additional defenses.

In compliance with CPLR 3408, a series of settlement conferences were held in this Court's specialized mortgage foreclosure part on August 24 and October 28, 2010 as well as on January 18, 2011. At the last conference, this action was dismissed from the conference program as a settlement or other resolution had not been achieved. Accordingly, the conference requirement imposed upon the Court by CPLR 3408 and/or the Laws of 2008, Ch. 472 § 3-a as amended by Laws of 2009 Ch. 507 § 10 has been satisfied. No further conference is required under any statute, law or rule.

The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor against the defendant mortgagor, and striking his answer and affirmative defenses; (2) pursuant to RPAPL § 1321 appointing a referee to (a) compute amounts due under the subject mortgage; and (b) examine and report whether the subject premises should be sold in one parcel or multiple parcels; and (3) amending the caption. Opposition and reply papers have been filed herein.

In support of this motion, the plaintiff proffers, inter alia, the pleadings, the endorsed note, an allonge, the mortgage, the assignments, an affidavit in support by a vice president of the plaintiff's servicing agent and attorney-in-fact, Rushmore Loan Management Services, LLC (Rushmore's), and the affirmation of counsel. In the affidavit of facts, Rushmore's representative alleges, inter alia, that the defendant mortgagor has failed to comply with the conditions set forth in the note and mortgage by omitting to pay installments of principal and interest each of which became due on October 1, 2009, and subsequent thereto, and that the plaintiff has declared the entire amount due. According to the officer, the plaintiff has provided notices of default to the defendant mortgagor and is, therefore, in compliance with all conditions precedent to the commencement of this action. The officer further alleges that the note and mortgage were assigned by the plaintiff to Wells Fargo on August 23, 2010. The officer requests, among other things, that the Court grant summary judgment to the plaintiff, and substitute Wells Fargo as the new plaintiff in this action. In his affirmation, counsel avers that the plaintiff assigned the mortgage and the note to Wells Fargo by way of an assignment which was recorded on December 6, 2010. Counsel requests that summary judgment in favor of the plaintiff be granted, asserting that the general denials set forth in the defendant mortgagor's answer are without merit.

In opposition to this motion, the defendant mortgagor submits, among other things, the affirmation of counsel. Counsel avers, inter alia, that the defendant mortgagor has been working to secure a loan modification by way of in-house negotiations as well as by way of the Federal Home Affordable Modification Program. Counsel argues, among other things, that the motion should be denied because the plaintiff allegedly failed to respond to certain portions of the defendant mortgagor's alleged demands for discovery. Counsel also requests that the defendant mortgagor be allowed to continue to pursue a loan modification.

In its reply, which is mislabeled a sur-reply, the plaintiff submits, inter alia, the affirmation of counsel. Counsel avers, among other things, that his office never received any discovery demands from opposing counsel. He further avers that his office has not received any requests for loan modification since the last foreclosure settlement conference in January, 2011, and that the defendant mortgagor conceded, during that conference, that he had not submitted the required financial documents to the plaintiff's office.

A plaintiff in a mortgage foreclosure action establishes a prima facie case for summary judgment by submission of the mortgage, the note, bond or obligation, and evidence of default (*see*, ***Valley Natl. Bank v Deutsche***, 88 AD3d 691, 930 NYS2d 477 [2d Dept 2011]; ***Wells Fargo Bank v Karla***, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; ***Wash. Mut. Bank, F.A. v O'Connor***, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]). The burden then shifts to the defendant to demonstrate "the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff" (***Capstone Bus. Credit, LLC v Imperia Family Realty, LLC***, 70 AD3d 882, 883, 895 NYS2d 199 [2d Dept 2010]).

By its submissions, the plaintiff established its prima facie entitlement to summary judgment on the complaint (*see*, CPLR 3212; RPAPL § 1321; ***U.S. Bank Natl. Assn. v Denaro***, 98 AD3d 964, 950 NYS2d 581 [2d Dept 2012]; ***Capital One, N.A. v Knollwood Props. II, LLC***, 98 AD3d 707, 950 NYS2d 482 [2d Dept 2012]; ***HSBC Bank USA, N.A. v Schwartz***, 88 AD3d 961, 931 NYS2d 528 [2d Dept 2011]). In the instant case, the plaintiff produced the endorsed note, the allonge, the assignments, and the mortgage

executed by the defendant mortgagor as well as evidence of nonpayment (*see*, ***Fed. Home Loan Mtge. Corp. v Karastathis***, 237 AD2d 558, 655 NYS2d 631 [2d Dept 1997]; ***First Trust Natl. Assn. v Meisels***, 234 AD2d 414, 651 NYS2d 121 [2d Dept 1996]). The plaintiff also submitted, inter alia, an affidavit from a representative of the plaintiff, whereby it is alleged, inter alia, that the plaintiff is the holder and is in possession of the note and mortgage (*see*, ***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]). Additionally, the plaintiff submitted sufficient proof to establish, prima facie, that the affirmative defenses set forth in the defendant mortgagor's answer are subject to dismissal due to their unmeritorious nature (*see*, ***Becher v Feller***, 64 AD3d 672, 884 NYS2d 83 [2d Dept 2009]; ***Wells Fargo Bank Minn., Natl. Assn. v Perez***, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]; ***Coppa v Fabozzi***, 5 AD3d 718, 773 NYS2d 604 [2d Dept 2004] [*unsupported affirmative defenses are lacking in merit*]; *see also*, ***Molino v Sagamore***, 105 AD3d 922, 963 NYS2d 355 [2d Dept 2013] [*a party claiming the defense of a contract of adhesion must show that the contract is unreasonable or unjust, or would contravene public policy, or that the contract is invalid because of fraud or overreaching*]; ***Wachovia Bank, Natl. Assn. v Carcano***, ___AD3d___, 964 NYS2d 246 [2d Dept 2013]; ***Bank of N.Y. Mellon v Scura***, 102 AD3d 714, 961 NYS2d 185 [2d Dept 2013] [*process server's sworn affidavit of service is prima facie evidence of proper service pursuant to CPLR 308(2)*]; ***Patterson v Somerset Invs. Corp.***, 96 AD3d 817, 817, 946 NYS2d 217 [2d Dept 2012] ["*a party who signs a document without any valid excuse for having failed to read it is 'conclusively bound' by its terms*"]; ***Emigrant Mtge. Co, Inc. v Fitzpatrick***, 95 AD3d 1169, 945 NYS2d 697 [2d Dept 2012] [*claimed violations of General Business Law § 349 and/or engagement in deceptive business practices do not generally give rise to claims against a lender*]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010] [*unaffordability of loan will not support damages claim against lender and is not a defense to a foreclosure action*]; ***La Salle Bank Nat. Assn. v Kosarovich***, 31 AD3d 904, 820 NYS2d 144 [3d Dept 2006]; ***CFSC Capital Corp. XXVII v W. J. Bachman Mech. Sheet Metal Co.***, 247 AD2d 502, 669 NYS2d 329 [2d Dept 1998]; ***Pilewski v Solymosy***, 266 AD2d 83, 698 NYS2d 660 [1st Dept 1999] [*an affirmative defense based upon the notion of culpable conduct is unavailable in a foreclosure action*]; ***Manufacturers and Traders Trust Co. v David G. Schlosser & Assocs.***, 242 AD2d 943, 665 NYS2d 949 [4th Dept 1997] [*conclusory allegations of the conduct constituting alleged waiver are insufficient to raise a triable issue of fact*]; ***FGH Realty Credit Corp. v VRD Realty Corp.***, 231 AD2d 489, 647 NYS2d 229 [2d Dept 1996]; ***Prudential Home Mtge. Co. v Cermele***, 226 AD2d 357, 640 NYS2d 254 [2d Dept 1996] [*no valid defense or claim of estoppel where mortgage provision bars oral modification*]; ***Naugatuck Sav. Bank v Gross***, 214 AD2d 549, 625 NYS2d 572 [2d Dept 1995] [*unsubstantiated allegations of facts are insufficient to raise a triable issue of fact with respect to an estoppel defense*]; ***Connecticut Natl. Bank v Peach Lake Plaza***, 204 AD2d 909, 612 NYS2d 494 [3d Dept 1994] [*defense based upon the doctrine of unclean hands lacks merit where a defendant fails to come forward with admissible evidence of showing immoral or unconscionable behavior*]).

In opposition to the motion, the defendant mortgagor has offered no arguments or proof in support of any of his pleaded defenses (*see*, ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, *supra*; ***Citibank, N.A. v Souto Geffen Co.***, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]; *see generally*, ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]). In instances where a defendant fails to oppose some or all matters advanced on a motion for summary judgment, the facts, as alleged in the moving papers, may be deemed admitted and there is, in effect, a concession that no question of fact exists (*see generally*, ***Kuehne & Nagel, Inc. v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, *supra*; ***Madison Park Invs., LLC v Atlantic Lofts Corp.***, 33 Misc3d 1215A, 941 NYS2d 538

[Sup Ct, Kings County 2011]). Further, the affirmative defenses set forth in the answer, which are factually unsupported by an affidavit from the defendant mortgagor, are without apparent merit (*see*, ***Neighborhood Hous. Servs. N.Y. City, Inc. v Meltzer***, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]). Moreover, the affirmation of the defendant mortgagor's attorney, who has no personal knowledge of the operative facts, is without probative value and insufficient to defeat the motion (*e.g.*, ***Zuckerman v City of New York***, 49 NY2d 557, 563, 427 NYS2d 595 [1980]; ***2 N. St. Corp. v Getty Saugerties Corp.***, 68 AD3d 1392, 1395, 892 NYS2d 217 [3d Dept 2009]).

By his first affirmative defense, the defendant mortgagor asserts that the complaint fails to state a cause of action, however, he has not cross moved to dismiss the complaint on this ground (*see*, ***Butler v Catinella***, 58 AD3d 145, 868 NYS2d 101 [2d Dept 2008]), and, in any event, the plaintiff has established its prima facie entitlement to summary judgment as indicated above. Therefore, the first affirmative defense is surplusage, and the branch of the motion to strike such defense is denied as moot (*see,* ***Old Williamsburg Candle Corp. v Seneca Ins. Co.***, 66 AD3d 656, 886 NYS2d 480 [2d Dept 2009]; ***Schmidt's Wholesale, Inc. v Miller & Lehman Const., Inc.***, 173 AD2d 1004, 569 NYS2d 836 [3d Dept 1991]).

Contrary to the defendant mortgagor's contentions, he has failed to demonstrate that discovery, which they could have sought by way of motion practice and an order, is necessary with respect to any defense asserted by him in his answer (*see generally*, ***Swedebank, AB, N.Y. Branch v Hale Ave. Borrower, LLC***, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]; ***JP Morgan Chase Bank v Agnello***, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]). Further, "[t]he mere hope that discovery would yield evidence of a triable issue of fact is not a basis for denying summary judgment" (***Lee v T.F. DeMilo Corp.***, 29 AD3d 867, 868, 815 NYS2d 700 [2d Dept 2006]).

Even when viewed in the light most favorable to defendant mortgagor, his submission is insufficient to raise any genuine question of fact requiring a trial on the merits of the plaintiff's claims for foreclosure and sale and insufficient to demonstrate any bona fide defenses (*see*, CPLR 3211[e]; *see*, ***Rossrock Fund II, L.P. v Commack Inv. Group, Inc.***, 78 AD3d 920, 912 NYS2d 71 [2d Dept 2010]; ***Neighborhood Hous. Servs. N.Y. City, Inc. v Meltzer***, 67 AD3d 872, *supra*; ***Wells Fargo Bank Minn., N.A. v Perez***, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]; ***Cochran Inv. Co. Inc. v Jackson***, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007]). The plaintiff, therefore, is awarded summary judgment in its favor against the defendant mortgagor (*see*, ***Fed. Home Loan Mtge. Corp. v Karastathis***, 237 AD2d 558, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, *supra*; ***2 N. St. Corp. v Getty Saugerties Corp.***, 68 AD3d 1392, *supra*). Accordingly, the defendant mortgagor's answer, and the affirmative defenses enumerated second through sixth contained therein, are stricken.

The branch of the motion whereby the plaintiff requests that Wells Fargo be substituted as the new plaintiff in this action is granted (*see* CPLR 1018; 3025[b]; ***Citibank, N.A. v Van Brunt Props., LLC***, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]; *see also*, ***IndyMac Bank F.S.B. v Thompson***, 99 AD3d 669, 952 NYS2d 86 [2d Dept 2012]; ***Greenpoint Mtge. Corp. v Lamberti***, 94 AD3d 815, 941 NYS2d 864 [2d Dept 2012]; ***Maspeth Fed. Sav. & Loan Assn. v Simon-Erdan***, 67 AD3d 750, 888 NYS2d 599 [2d Dept 2009]). As discussed above, the plaintiff established that the note and the mortgage herein were validly assigned to Wells Fargo after the commencement of this action, and that Wells Fargo is now the real party in interest.

The branch of the instant motion wherein the plaintiff seeks an order amending the caption by excising the names of the fictitious defendants, John Doe #1 to 12, is granted pursuant to CPLR 1024. By its submissions, the plaintiff established the basis for this relief (*see*, ***U.S. Bank, N.A. v Boyce***, 93 AD3d 782, 940 NYS2d 656 [2d Dept 2012]; ***Neighborhood Hous. Servs. N.Y. City, Inc. v Meltzer***, 67 AD3d 872, *supra*). All future proceedings shall be captioned accordingly.

Accordingly, this motion for, inter alia, summary judgment and to appoint a referee to compute is determined as indicated above. The proposed long form order appointing a referee to compute pursuant to RPAPL § 1321, as modified by the Court, has been signed concurrently herewith.

Dated: July 17, 2013

Hon. DENISE F. MOLIA, A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**