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MEMO DECISION & ORDER

ORIGINAL

INDEX No. 29774-09

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 5/31/13
ADJ. DATES 8/16/13
Mot. Seq. # 001- MOT D
Order Signed;
Case Disp; Y__ N ✔

US BANK NATIONAL ASSOCIATION, as Trustee for the Specialty Underwriting and Residential Finance Trust, Mortgage Loan Asset backed Certificates, Series 2007-AB1,

Plaintiff,

-against-

GERARD W. GENTILE, ANTHONY GENTILE, EDWIN MILLER d/b/a CAMPBELL & MILLER, ESQS., JOHN T. MATHER MEMORIAL HOSPITAL OF PORT JEFFERSON, INC., LANDMARK PLAZA PROPERTIES, CORP., MICHELLE STRUZZIERI, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, PEOPLE OF THE STATE OF NEW YORK, ROBINSONS INDUSTRIAL GAS & EQUIPMENT CORP., "JOHN DOE" and "MARY DOE" said names being fictitious, it being the intention of the plaintiff to designate any and all occupants, tenants, persons or corporations, if any, having or claiming an interest in or lien upon the premises being foreclosed herein,

Defendants.

DAVIDSON FINK LLP
Attys. For Plaintiff
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Rochester, NY 14614

DOMINIC S. RIZZO, ESQ.
Atty. For Defendant Gerard Gentile
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Upon the following papers numbered 1 to 8 read on this motion for accelerated judgments, deletion and/or substitution of parties and caption amendments to reflect same, and the appointment of a referee to compute ; Notice

of Motion/Order to Show Cause and supporting papers 1 - 3; 4 ; Notice of Cross Motion and supporting papers _____ _____; Answering Affidavits and supporting papers 5-6 ; Replying Affidavits and supporting papers 7-8 ; Other _____; (~~and after hearing counsel in support and opposed to the motion~~, it is

ORDERED that this motion (#001) by the plaintiff for accelerated judgments against the defendants, substitution and deletion of parties, the appointment of a referee to compute and other incidental relief is considered under CPLR 3212, 3215, 1024 and RPAPL 1321 and is granted only with respect to the plaintiff's First cause of action sounding in foreclosure and sale; and it is further

ORDERED that the plaintiff's Second cause of action wherein it seeks a declaration that the prior and superior judgment lien and/or like interests of defendants, Anthony Gentile, LandMark Plaza Properties, Corp., John T. Mather Memorial Hospital, Robinson Industrial Gas Equipment Corp, the People of the State of New York and the New York State Department of Taxation and Finance, is hereby severed.

The plaintiff commenced this action to foreclose a mortgage given by the mortgagor defendant Gerard W. Gentile on June 27, 2006 to secure a note executed on that same date to the plaintiff's predecessor-in-interest. The plaintiff alleges that the mortgagor defendant defaulted in his payment obligations more than five years ago on June 1, 2008 and that such default continues to date. Defendants, Michelle Struzzieri and Edwin Miller, d/b/a as Campbell & Miller, Esqs., were joined herein as party defendants since the interests under the subsequent and subordinate judgments are subject to extinguishment upon the sale of the mortgaged premises. The other known defendants, namely, Anthony Gentile, LandMark Plaza Properties, Corp., John T. Mather Memorial Hospital, Robinson Industrial Gas Equipment Corp, the People of the State of New York and the New York State Department of Taxation and Finance, are the holders of judgments and other liens or interests that are prior and superior to the mortgage of the plaintiff. In a Second cause of action for declaratory relief under RPAPL § 1501, the plaintiff asks the court to declare these prior and superior liens and interests to be "extinguished" (*see* ¶ TWENTIETH" of the complaint).

Following service of the summons and complaint, the mortgagor defendant, Gerard W. Gentile, appeared herein by service of an answer dated September 21, 2009. The answer contains denials but no affirmative defenses and no counterclaims. It does, however, include demands for a stay or denial of any judgment of foreclosure pending the defendant's examination of certain documents and the payment of surplus monies to him if any be derived from the public sale of the mortgaged premises.

The plaintiff now moves for summary judgment dismissing the answer served by the mortgagor defendant and for accelerated judgments on its complaint against all those joined herein as party defendants by service of process. The plaintiff also seeks an order pursuant to CPLR 1024 deleting the unknown defendants named in the caption as party defendants and one of the other known

defendants, Anthony Gentile. For the reasons stated the motion is granted only as the First cause of action in the complaint, as the Second cause of action is dismissed as abandoned.

Entitlement to a judgment of foreclosure is established as a matter of law where the plaintiff produces both the mortgage and unpaid note, together with evidence of the mortgagor's default, thereby shifting the burden to the mortgagor to demonstrate, through both competent and admissible evidence, any defense which could raise a question of fact (*see* ***Emigrant Mtge. Co., Inc. v Beckerman***, 105 AD3d 895, 964 NYS2d 548 [2d Dept 2013]; ***Solomon v Burden***, 104 AD3d 839, 961 NYS2d 535 [2d Dept 2013]; ***US Bank Natl. Ass'n. v Denaro,*** 98 AD3d 964, 950 NYS2d 581 [2d Dept 2012]; ***Citibank, N.A. v Van Brunt Prop., LLC***, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]; ***HSBC Bank v Shwartz,*** 88 AD3d 961, 931 NYS2d 528 [2d Dept 2011]; ***US Bank N.A. v Eaddy***, 79 AD3d 1022, 1022, 914 NYS2d 901 [2010]). This standard is enlarged to include a demonstration that the plaintiff is possessed of the requisite standing to pursue its claims (*see* ***U.S. Bank, N.A. v Adrian Collymore***, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]), where, and only where, the defense of standing is due and timely asserted by the defendant (*see* ***Capital One, N.A. v Knollwood Prop. II, LLC***, 98 AD3d 707, 950 NYS2d 482 [2d Dept 2012]; ***U.S. Bank Natl. Ass'n v Eaddy***, 79 AD3d 1022, *supra*; ***Wells Fargo Bank Minn., N.A. v Mastropaolo***, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]).

That the plaintiff's standing is not an element of its claim for foreclosure and sale is clear as appellate case authorities have repeatedly held that a lack of standing is merely an affirmative defense which must be timely raised by a defendant possessed of such defense or it is waived (*see* CPLR 3018[b]; CPLR 3211[e]; ***U.S. Bank Natl. Ass'n v Denaro***, 98 AD3d 964, *supra*; ***Capital One, N.A. v Knollwood Prop. II, LLC***, 98 AD3d 707, *supra*; ***Countrywide Home Loans, Inc. v Delphonse***, 64 AD3d 624, 883 NYS2d 135 [2d Dept 2009]; ***Wells Fargo Bank Minn., N.A. v Mastropaolo***, 42 AD3d 239, *supra*). The defense of standing is thus not jurisdictional in nature (*see* ***HSBC Bank USA, N.A. v Taher***, 104 AD3d 815, 962 NYS2d 301 [2d Dept 2013]; ***Deutsche Bank Natl. Trust Co. v Pietranico***, 102 AD3d 724, 957 NYS2d 868 [2d Dept 2013]; ***US Bank Natl. Ass'n v Tate***, 102 AD3d 859, 958 NYS2d 722 [2d Dept.2013]; ***Deutsche Bank Natl. Trust Co. v Hunter***, 100 AD3d 810, 954 NYS2d 181 [2d Dept 2012]; ***Bank of New York v Alderazi***, 99 AD3d 837, 951 NYS2d 900 [2d Dept 2012]; ***U.S. Bank Natl. Ass'n. v Denaro***, 98 AD3d 964, *supra*; ***U.S. Bank v Emmanuel***, 83 AD3d 1047, 921 NYS2d 320 [2d Dept 2011]; ***Wells Fargo Bank Minn., N.A. v Mastropaolo***, 42 AD3d 239, 242-244, *supra*). Once waived, it may not be resurrected by its assertion in opposition to a motion for summary judgment or on an untimely motion to dismiss or to vacate a default (*see* ***Capital One, N.A. v Knollwood Prop. II, LLC***, 98 AD3d 707, *supra*; ***U.S. Bank Natl. Ass'n v Eaddy***, 79 AD3d 1022, *supra;* ***Countrywide Home Loans, Inc. v Delphonse***, 64 AD3d 624, *supra*; ***HSBC Bank, USA v. Dammond***, 59 AD3d 679, 875 NYS2d 490 [2d Dept 2009]).

As indicated above, the answer served by the sole answering defendant contained no affirmative defenses. The plaintiff's production of the mortgage and the unpaid note executed by

defendant, Gerard W. Gentile, together with due evidence of a default in payment under the terms thereof, was thus sufficient to establish a prima facie case of foreclosure and sale as demanded by the plaintiff in the First cause of action set forth in the complaint (*see* CPLR 3212; RPAPL § 1321; ***Emigrant Mtge. Co., Inc. v Beckerman***, 105 AD3d 895, *supra*; ***Solomon v Burden***, 104 AD3d 839, *supra*; ***US Bank Natl. Ass'n v Denaro,*** 98 AD3d 964, *supra*; ***Baron Assoc., LLC v Garcia Group Enter.***, 96 AD3d 793, *supra*). It was thus incumbent upon the answering defendant to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's prima facie showing or in support of the affirmative defenses asserted in his answer or otherwise possessed by him (*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]; ***Wells Fargo Bank v Karla,*** 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; ***Washington Mut. Bank v O'Connor***, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]; ***Aames Funding Corp. v Houston***, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]). A review of the opposing papers submitted by the mortgagor defendant revels that no such question of fact was raised.

The papers submitted in opposition by the answering defendant consist of an affirmation of the his newly retained counsel and copies of the answer, an assignment of the note and mortgage, the note itself and decision issued by the trial court in Kings County. Upon these documents, counsel argues that the motion should be denied, outright, due to the plaintiff's lack of standing. However, the defendant's waiver of the defense of standing by his failure to advance it in either a timely asserted pre-answer motion or in the answer served by him warrants the rejection of counsel's contentions regarding the purported lack of standing that is the principal subject of counsel's affirmation in opposition (*see* ***Citimortgage, Inc. v Friedman***, ___ AD3d___, 2013 WL 4437086 [2d Dept 2013]; ***Capital One, N.A. v Knollwood Prop. II, LLC***, 98 AD3d 707, *supra*; ***U.S. Bank Natl. Ass'n v Eaddy***, 79 AD3d 1022, *supra*; ***Countrywide Home Loans, Inc. v Delphonse***, 64 AD3d 624, *supra*; ***HSBC Bank, USA v Dammond***, 59 AD3d 679, *supra*).

Alternatively, counsel contends that the motion is premature inasmuch as the defendant did not receive the document demanded in his answer. This claim is also rejected. 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]). In addition, the party asserting the rule must demonstrate that he or she made reasonable attempts to discover the facts which would give rise to a triable issue of fact (*see* ***Swedbank, AB v Hale Ave. Borrower, LLC*** ,89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]). 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" (***JP Morgan Chase Bank, N.A. v Agnello***, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; *see* ***Friedlander Org., LLC v Ayorinde***, 94 AD3d 693, 943 NYS2d 538 [2d Dept 2012]).

Here, the answering failed to meet this standard as there was no showing that facts essential to justify opposition exclusively in the knowledge of the plaintiff and what attempts were made to discover facts relevant to defenses were shown (*see* ***Swedbank, AB v Hale Ave. Borrower, LLC***, 89 AD3d 922, *supra*; ***JP Morgan Chase Bank, N.A. v Agnello***, 62 AD3d 662, *supra*). In addition, defendant Gentile's participation in the transactions in which the mortgage loan documents were executed and the loan consummated, coupled with his 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]).

The court thus finds that the plaintiff is entitled to summary judgment on the First Cause of action set forth in its complaint against the answering defendant. Those portions of this motion wherein the plaintiff seeks such relief are granted.

Those portions of the instant motion wherein the plaintiff seeks an order deleting all of the unknown defendants listed in the caption is granted, as none were joined herein as party defendants by service of the summons and complaint. The plaintiff's demands for an order deleting defendant, Anthony Gentile, is also granted as is an amendment of the caption the deletion of the unknown defendants and Anthony Gentile as party defendants. All future proceedings shall be captioned accordingly.

The moving papers further established the default in answering on the part of the remaining defendants, Michelle Struzzieri and Edwin Miller d/b/a Campbell & Miller, Esqs., neither of whom served answers to the plaintiff's complaint. As indicated above, these defendants are the holders of judgments and/or other like interests that are subsequent and subordinate to the lien of the plaintiff's mortgage and are thus subject to extinguishment upon the public sale of the premises. Accordingly, the defaults of all such defendants in answering the plaintiff's First cause of action for foreclosure and sale are hereby fixed and determined. Since the plaintiff has been awarded summary judgment against the sole answering defendant on its First Cause of action for foreclosure and sale, and has established a default in answering with respect to such cause of action by defendants, Struzzieri and Miller, the plaintiff is entitled to an order appointing a referee to compute amounts due under the subject note and mortgage (*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]; ***LaSalle Bank, NA v Pace,*** 31 Misc3d 627, 919 NYS2d 794 [Sup. Ct. Suffolk County 2011], *aff'd,* 100 AD3d 970, 955 NYS2d 161 [2d Dept 2012]).

The record reflects that conferences of the type mandated by the Laws of Laws of 2008, Ch. 472 § 3-a as amended by the Laws of 2009 Ch. 507 § 10 or by CPLR 3408 were previously conducted on May 24, 2011 in the specialized mortgage foreclosure part of this court and that no further conference is required under any statute, law or rule. Under these circumstances, the plaintiff is entitled to the issuance of an order of reference due to the accelerated judgments granted to the plaintiff on its First cause of action for foreclosure and sale on this motion.

The plaintiff is not, however, entitled to accelerated judgments against any of the defendants joined herein to the plaintiff's Second cause of action for declaratory relief. As indicated above, this claim is aimed at extinguishing, by judicial declaration, the superior and prior liens of defendants, Anthony Gentile, LandMark Plaza Properties, Corp., John T. Mather Memorial Hospital, Robinson Industrial Gas Equipment Corp, the People of the State of New York and the New York State Department of Taxation and Finance. The moving papers failed to address, let alone establish, the plaintiff's possession of cognizable claims for relief pursuant to RPAPL Article § 1501 declaring the invalidity and extinguishment of the liens and interests of any of these defendants (*see* CPLR 3215[f]; RPAPL §§ 1515; 1519). No basis for such relief is advanced in either the complaint or the moving papers. No cognizable claims for the declaratory relief was shown to exist as required by CPLR 3215(f) (see ***Resnick v Lebovitz***, 28 AD3d 53, *supra*). Since the plaintiff failed to demonstrate its entitlement to judgment on it Second cause of action for declaratory relief judicially extinguishing the targeted prior liens and interests of the above named defendants, the court hereby severs such cause of action. The judgment of foreclosure and sale to be entered on the plaintiff's First cause of action shall reflect the dismissal of this second cause of action and the application therefor shall include a copy of this memo decision/order as well as the order appointing the referee separately issued hereon.

The proposed order appointing a referee to compute, as modified by the court, has been signed simultaneously herewith.

DATED: 8/26/13

THOMAS F. WHELAN, J.S.C.