Amended Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:
WILLIAM B. REBOLINI
Justice

Chase Home Finance, LLC,

Plaintiff,

-against-

Andrew Iglio, Capital One Bank USA NA, Chase Bank USA NA, Clerk of the Suffolk County District Court, JPMorgan Chase Bank, N.A., Target National Bank,

Defendant.

Index No.: 19688/2010

Motion Sequence No.: 001; MD
Motion Date: 6/5/13
Submitted: 3/12/14

Motion Sequence No.: 002; MD
Motion Date: 6/5/13
Submitted: 3/12/14

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Clerk of the Court

Upon the following papers numbered 1 to 31 read upon this motion for summary judgment and order of reference: Notice of Motion and supporting papers, 1 - 15; Notice of Cross Motion and supporting papers, 16 - 20; Answering Affidavits and supporting papers, 21 - 31; it is

ORDERED that this motion (#001) by plaintiff Chase Home Finance LLC (Chase) pursuant to CPLR 3212 for summary judgment on its complaint against defendants Andrew Iglio (Iglio) and JP Morgan Chase Bank, N.A., to strike the answer and defenses of the answering defendant Iglio, to fix the defaults of the non-answering, non-appearing defendants, and, for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is granted; and it is further

ORDERED that plaintiff's application for leave to amend the caption of this action pursuant to CPLR 3025 (b), is granted; and it is further

ORDERED that the caption is hereby amended by striking therefrom the names of defendants "John Doe "; and it is further

ORDERED that plaintiff is directed to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court; and it is further

ORDERED that the caption of this action hereinafter appear as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

_____x

CHASE HOME FINANCE LLC

Plaintiff,

- against -

ANDREW IGLIO, CAPITAL ONE BANK USA NA, CHASE BANK USA NA, CLERK OF THE SUFFOLK COUNTY DISTRICT COURT, JPMORGAN CHASE BANK, N.A., TARGET NATIONAL BANK,

Defendants.

_____x

ORDERED that defendant's cross-motion (#002) seeking denial of plaintiff's motion or dismissal of the complaint is denied in its entirety.

This is an action to foreclose a mortgage on premises known as 8 Mapleview Place, Kings Park, New York. On November 7, 2003, defendant Iglio executed a note in favor of JPMorgan

Chase Bank agreeing to pay the sum of $100,000.00 at the yearly rate of 5.750 percent. On November 7, 2003, defendant Iglio also executed a first mortgage in the principal sum of $100,000.00 on the subject property. The mortgage was recorded on January 2, 2004 in the Suffolk County Clerk's Office. Thereafter, on May 20, 2010, the mortgage and note were transferred by assignment of mortgage from JPMorgan Chase Bank to Chase and recorded on June 7, 2010 with the Suffolk County Clerk's Office.

Chase sent a notice of default dated March 4, 2010 to defendant Iglio stating that he had defaulted on his mortgage loan and that the amount past due was $3,824.65. As a result of defendant's continuing default, plaintiff commenced this foreclosure action on May 28, 2010. In its complaint, plaintiff alleges in pertinent part that the defendant breached his obligations under the terms of the note and mortgage by failing to make his monthly payments commencing on January 1, 2010. Defendant interposed an answer with two affirmative defenses.

The Court's computerized records indicate that a foreclosure settlement conference was held on October 13, 2011 at which time this matter was referred as an IAS case since a resolution or settlement had not been achieved. Thus, there has been compliance with CPLR 3408 and no further settlement conference is required.

Plaintiff now moves for summary judgment on its complaint contending that defendant Iglio breached his obligations under the terms of the loan agreement and mortgage by failing to tender monthly payments. In support of its motion, plaintiff submits among other things: the sworn affidavit of James Ogundare, vice president of JPMorgan Chase Bank, National Association; the affirmation of Mark Golab, Esq. in support of the motion; the affirmation of Mark Golab, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the pleadings; the note, mortgage, and assignment of mortgage; a notice of default; notices pursuant to RPAPL §§ 1320, 1304 and 1303; affidavits of service for the summons and complaint; an affidavit of service for the instant summary judgment motion upon defendant's counsel; and a proposed order appointing a referee to compute. Defendant Iglio through his attorney opposes the summary judgment motion asserting, among other things, that plaintiff lacks standing. Plaintiff has submitted a reply affirmation.

It is well settled that "in an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default" (*see* CPLR 3212; RPAPL § 1321; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 1080, 915 NYS2d 591 [2d Dept 2010]; ***North Bright Capital, LLC v 705 Flatbush Realty, LLC***, 66 AD3d 977, 889 NYS2d 596 [2d Dept 2009]; ***Wells Fargo Bank Minnesota v Perez***, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]; ***Republic Natl. Bank of N.Y. v O'Kane***, 308 AD2d 482, 764 NYS2d 635 [2d Dept 2003]; *see also* ***Village Bank v Wild Oaks Holding***, 196 AD2d 812, 601 NYS2d 940 [2d Dept 1993]). Where, as here, standing is put into issue by the defendant, the plaintiff is required to prove it has standing in order to be entitled to the relief requested (*see* ***Deutsche Bank Natl. Trust Co. v Haller***, 100 AD3d 680, 954 NYS2d 551 [2d Dept 2011]; ***US Bank, NA v Collymore***, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; ***Wells Fargo Bank Minn., NA v Mastropaolo***, 42 AD3d 239,

837 NYS2d 247 [2d Dept 2007]). In a mortgage foreclosure action "[a] plaintiff has standing where it is the holder or assignee of both the subject mortgage and of the underlying note at the time the action is commenced" (***HSBC Bank USA v Hernandez***, 92 AD3d 843, 939 NYS2d 120 [2d Dept 2012]; ***US Bank, NA v Collymore***, 68 AD3d 752; ***Countrywide Home Loans, Inc. v Gress***, 68 AD3d 709, 888 NYS2d 914 [2d Dept 2009]). "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation" (***HSBC Bank USA v Hernandez***, 92 AD3d 843).

In the matter at hand, plaintiff has established, *prima facie*, that it had standing to commence this action. The uncontroverted evidence submitted by the plaintiff in support of its motion demonstrated that the note and mortgage were assigned to it prior to the commencement of the action by an assignment dated May 20, 2010. Plaintiff produced the note and mortgage executed by defendant Iglio, the assignment of mortgage, as well as evidence of defendant's nonpayment, thereby establishing a *prima facie* case as a matter of law (*see* ***Wells Fargo Bank Minnesota, Natl. Assn. v Mastropaolo***, 42 AD3d 239). James Ogundare, vice president of JPMorgan Chase Bank, National Association, averred that defendant Iglio defaulted on paying his monthly payment due January 1, 2010; that on March 4, 2010, plaintiff sent a notice of default to defendant Iglio at his last known address; that on July 15, 2009 plaintiff sent defendant Iglio a 90 day pre-foreclosure notice by registered or certified mail and by first class mail; that defendant failed to cure his default; and, that Chase is the holder of the note.

Once plaintiff has made a prima facie showing, it is incumbent upon defendant to submit proof that factually rebuts the plaintiff's prima facie showing or demonstrates that one or more of the affirmative defenses asserted in his answer requires a trial (*see* ***Nieghborhood Hous. Serv. of New York City Inc. v Meltzer***, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]; ***Washington Mut. Bank v O'Connor***, 63 AD2d 832, 880 NYS2d 696 [2d Dept 2009]). In further opposition to plaintiff's motion, defendant Iglio asserts that plaintiff has not satisfied the statutory conditions as required under RPAPL §1304. Appellate case authorities have determined that service of the statutory notices required by RPAPL § 1303 and § 1304 are conditions precedent to a mortgage foreclosure action (*see* ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]; ***First Natl. Bank of Chicago v Silver***, 73 AD3d 162, 899 NYS2d 256 [2d Dept 2010]). It has further been established that, unlike the affirmative defenses contemplated by CPLR 3015(a), 3018(b) and 3211(a)(5), which are waived if not timely raised, the failure to comply with these statutory conditions precedent may be raised at any time during the action (***Silver***, 73 AD3d 162). In any event, RPAPL 1304 requires that at least 90 days before a lender or mortgage loan servicer commences legal action against the borrower, including a mortgage foreclosure action, the lender or mortgage loan servicer must give the borrower a specific, statutorily prescribed notice. In essence, the notice warns the borrower that he or she may lose his or her home because of the loan default, and provides information regarding assistance for homeowners who are facing financial difficulty. The specific language and type-size requirements of the notice are set forth in RPAPL 1304(1). The foreclosing party has the burden of showing compliance with the notice requirements.

Here, contrary to the defendant's contentions, plaintiff has tendered sufficient evidence

demonstrating the absence of material issues as to its strict compliance with RPAPL 1304 (*see* ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95). Plaintiff in reply asserts that its RPAPL 1304 notice dated July 14, 2009, which pre-dates the stated default date of January 1, 2010 set forth in plaintiff's affidavit of merit, was sent to defendant as a result of a previous default which occurred in June 2009. RPAPL 1304 (4) provides in pertinent part that "[t]he notice and the ninety day period ... need only be provided once in a twelve month period to the same borrower in connection with the same loan." Since the instant action was commenced on May 28, 2010, within the aforementioned twelve month period and involving the same loan, plaintiff's notice dated July 14, 2009, was sufficient so as to make a prima facie showing of strict compliance with RPAPL 1304.

As to his remaining assertions, defendant has failed to demonstrate, through the production of competent and admissible evidence, a viable defense which could raise a triable issue of fact (*see* ***Deutsche Bank Natl. Trust Co. v Posner***, 89 AD3d 674, 933 NYS2d 52 [2d Dept 2011]). Defendant Iglio's asserted defense that plaintiff's affidavit of merit is insufficient, is refuted by the record before the court. "Motions for summary judgment may not be defeated merely by surmise, conjecture or suspicion" (***Shaw v Time-Life Records***, 38 NY2d 201, 379 NYS2d 390 [1975]). Notably, the defendant did not submit an affidavit and did not deny having received the loan proceeds and having defaulted on his loan payments in his opposition papers (*see* ***Citibank, N.A. v Souto Geffen Co.***, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]). The remaining contentions of defendant are rejected by the court as being without merit.

The proposed order appointing a referee to compute pursuant to RPAPL §1321 is signed simultaneously herewith as modified by the court.

Dated: May 12, 2014

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**