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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN PART 7
Justice

FTBK INVESTOR II, AS TRUSTEE FOR
NY BROOKLYN INVESTOR II TRUST 1,

Plaintiff,

-against-

JOSHUA MANAGEMENT LLC, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, CASTLE OIL CORP., NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT,

Defendants.

INDEX NO. 810164/11

MOTION SEQ. NO. 005

The following papers were read on this motion by plaintiff for summary judgment pursuant to CPLR 3212.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Reply Affidavits — Exhibits (Memo)	

Cross-Motion: ■ Yes ☐ No

In this mortgage foreclosure action, FTBK Investor II, As Trustee for NY Brooklyn Investor II Trust 1 (plaintiff) moves for summary judgment pursuant to CPLR 3212, dismissal of the answer of defendant Joshua Management LLC (JM), and for the appointment of a referee to compute the sums due and owing to plaintiff. Also before the Court is a cross-motion by JM for leave to amend its answer, for summary judgment dismissing the complaint for lack of standing, and for costs and disbursements incurred in connection with this litigation.

BACKGROUND

The property on which plaintiff seeks to foreclose is owned by JM and was proffered by it as security for a promissory note and mortgage executed by JM in favor of Washington Mutual Bank (WaMu). Upon WaMu's closure, the Federal Deposit Insurance Corporation (FDIC) was appointed its receiver and in that capacity transferred the bulk of WaMu's assets, including loans and mortgages, to JP Morgan Chase (Chase). Plaintiff is the eventual successor holder of JM's indebtedness and security. The alleged default by JM occurred in 2010, when the note and mortgage were held by Chase, which commenced this foreclosure action in 2011. The underlying facts of this case are fully set forth in this Court's decision dated February 1, 2013 (the prior decision), which is incorporated by reference, and will be reiterated only as necessary.

This is not the parties' first application for the relief sought herein. In motion seq. no. 003, plaintiff, *inter alia*, moved for summary judgment, to strike JM's answer, and for the appointment of a referee to compute. In motion seq. no. 004, plaintiff moved for a temporary receiver. In opposition to both motions, JM argued that plaintiff lacked standing to foreclose on the mortgage and that it had not demonstrated that JM was in default.

In the prior decision, this Court held that plaintiff had standing to foreclose on the mortgage (a holding that is now law of the case), but agreed with JM that plaintiff had not adequately demonstrated JM's default, and denied both of plaintiff's motions[1] without prejudice, with leave to renew.

DISCUSSION

A *prima facie* case for foreclosure is established through plaintiff's production of the mortgage documents and evidence of defendant's nonpayment (see *Waterfall Victoria Master*

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[1] Motion seq. no. 003 was granted to the extent that plaintiff sought dismissal of the complaint against the John Does, and a default judgment against various non-appearing governmental agencies.

Fund, Ltd. v Dingilian, 92 AD3d 593, 593-594 [1st Dept 2012]; *2010-1 SFG Venture LLC v 34-10 Development, LLC*, 106 AD3d 455 [1st Dept 2013]). If defendant then fails to raise a triable issue of fact through admissible evidence based on its affirmative defenses, plaintiff shall be entitled to summary judgment (see *Fortress Credit Corp. v Hudson Yards, LLC.*, 78 AD3d 577 [1st Dept 2010]).

In its instant motion for summary judgment, plaintiff has cured the evidentiary infirmities which led to the denial of its earlier motion. The affidavits of Josh Zegen, a managing member of plaintiff, Lowell Bacchus, Special Credits Asset Manager II for Chase, and Jake Bade, Special Credits Senior Asset Manager and Head of Commercial Term Lending Note Sales for the Commercial Bank Division of Chase. establish plaintiff's default as well as the transfer of the mortgage and loan by FDIC (*see similarly*, *FTBK Investors v Megan Holding LLC*, n.o.r., 2013 WL 6922007, *2 [Sup Ct, NY County, Rakower, J., 2013]; *FTBK Investor II LLC v Mercy Holding LLC*, n.o.r., 2014 WL 1612373 [Sup Ct, Kings County, Demarest, J., April 22, 2014]). Plaintiff has also submitted the mortgage documents as exhibits to these affidavits. JM argues that it is not in default, but does not dispute the fact that it has not made a payment since 2010. Based on the foregoing, the Court finds that plaintiff has made out a *prima facie* case. It is thus incumbent on JM "to raise viable defenses or triable issues of material fact" (*Bank of India v Sanghvi*, 224 AD2d 347 [1st Dept 1996] [citation omitted]; *Fortress Credit Corp. v Hudson Yards, LLC., supra*).

In opposition to plaintiff's motion and in support of its cross-motion, JM renews its contention that plaintiff lacks standing to foreclose on the property because it is not a holder in due course. Now, as in opposition to plaintiff's earlier motion, JM's challenge to plaintiff's standing is grounded on FDIC's 2008 transfer of the loan to Chase. Relying almost exclusively on Second Department decisions, JM argues that despite being permitted by federal law, under New York law, for FDIC's transfer to Chase to be valid it must have been effected through

either a written assignment or allonge or physical delivery of the assets. Since it appears that Chase never had physical possession of the original documents, and the written assignment and allonge were not executed until 2012, after JM's alleged default and Chase's commencement of this action, Chase did not have standing at that time and could not have transferred to plaintiff what it did not have. JM further argues that although retroactive assignments are allowed under New York law, the assignment at issue could not be enforced retroactively because it was executed by Chase pursuant to a limited power of attorney granted by the FDIC which did not authorize Chase to sign documents retroactively.

These arguments ignore the fact that this Court has already ruled that plaintiff has standing to maintain this foreclosure action, and that holding in the prior decision, which JM never moved to reargue, is now law of the case. Other Justices of this Court have similarly ruled that plaintiff has standing to foreclose on other WaMu mortgages it acquired from Chase (*see FTBK v Megan Holding, supra*; *FTBK Investor II LLC v Maryanne Holding LLC*, n.o.r., [Sup Ct, NY County, Kenney, J., 2012], at plaintiff's exhibit L). In addition, several trial courts in the Second Department have held that "the loan documents were not required to be individually negotiated or assigned since the FDIC had the authority to transfer any and all of WaMu's loans with or without formal assignment pursuant to 12 USC § 1821(d)(2)(G)(i)(II) and federal law and regulations preempt state law" (*Beka Realty LLC v JPmorgan Chase Bank, N.A.*, 41 Misc 3d 1213[A], *4 [Sup Ct, Kings County, Schmidt, J., 2013], and cases cited therein). Furthermore, the First Department has held that Chase is the successor in interest to all of WaMu's loans and commitments, and as such has standing to foreclose on those mortgages (*see JP Morgan Chase Bank, N.A. v Shapiro*, 104 AD3d 411, 412 [1st Dept 2013], citing *Haynes v JPMorgan Chase Bank, NA*, n.o.r., 2011 WL 2581956 [MD Ga 2011], affd 466 Fed Appx 763 [11th Cir. 2012]). Finally, the one court that agreed with JM and denied plaintiff summary judgment because it had not submitted proof that WaMu still owned the mortgage at the time of FDIC's

bulk transfer to Chase (*see FTBK Investor II LLC v Mercy Holding LLC*, 36 Misc 3d 1219(A) [Sup Ct, Kings County, Demarest, J., 2012]), when presented by the same evidence and arguments now before this Court readily recognized plaintiff's standing to foreclose on the mortgage and granted it summary judgment (*see FTBK v Mercy Holding, supra*, 2014 WL 1612373). Given the foregoing, the Court finds that JM cannot state any defenses to foreclosure based on Chase's acquisition of the note and mortgage or plaintiff's lack of standing.

JM moves to, *inter alia*, amend its answer so as to augment its affirmative defenses (*see* proposed amended answer at JM's exhibit 11). Generally, leave to amend should be freely given (see CPLR 3025[b]; *Viacom International, Inc. v Midtown Realty Co.*, 193 AD2d 45, 52 [1st Dept 1993]; *Ancrum v St. Barnabas Hosp.*, 301 AD2d 474, 475 [1st Dept 2003]; *Crimmins Constr. Co. v City of New York*, 74 NY2d 166, 170 [1989] ["Leave to amend pleadings should, of course, be freely given"]). "The decision of whether to do so, however, is in the discretion of the trial court" (*Nasuf Construction Corp. v State of New York*, 185 AD2d 305, 306 [2d Dept 1992]), and "where the proposed amendments are patently lacking in merit so as to be wasteful of judicial resources, leave to amend should be denied" (*Scavo v Allstate Insurance Company*, 238 AD2d 571, 572 [2d Dept 1997] [citation omitted]; *see Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005] ["[l]eave will be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law"]; *Ancrum*, 301 AD2d at 475; *Davis & Davis v Morson*, 286 AD2d 584, 585 [1st Dept 2001]).

The bulk of JM's memorandum of law in support of its cross-motion is devoted to the various aspects of the challenge to plaintiff's standing – a challenge which, although aimed at Chase's acquisition of the note and mortgage, JM never directed at Chase in this action. Of the eleven affirmative defenses in JM's proposed amended answer, four (the first, sixth, seventh and eighth) are based on Chase's and plaintiff's purported lack of standing and cannot be

sustained.

The second and third affirmative defenses allege that JM did not default on its payment obligations but rather stopped making the payments because Chase induced it to do so by offering participation in its loan modification process. In support of this 'unclean hands' defense, JM proffers the affidavit of its managing member, Emmanuel Ku, who avers that after inveigling JM into the loan modification process Chase denied the loan modification without giving JM an adequate reason and instead brought the instant foreclosure action less than a month later, and three months after that, sold the loan. The only documentary evidence submitted in support of these averments is Chase's denial letter (exhibit 1 to Ku affidavit), which in contravention of Ku's version of the facts, states that Ku requested the loan modification. "Moreover, paragraph 18.3 of the mortgage expressly provided that the Loan Documents may not be amended or modified except by means of a written document executed by the party sought to be charged with such amendment or modification. Thus, [JM] could not have reasonably relied on any oral statement by someone at Chase not to make payments since the requirement to make mortgage payments could not be modified without a writing" *(FTBK v Mercy Holding, supra*, 2014 WL 1612373 at *8, citations omitted).

JM's proposed fourth affirmative defense is not a defense at all; rather it is the mere statement "There is no current non-monetary default with respect to the loan transaction between the Plaintiff and [JM]." This assertion, even if true, is totally immaterial to the controversy at hand, since the foreclosure action is based on JM's payment default.

The fifth proposed affirmative defense alleges that JM was not given any notice of default nor provided with the opportunity to cure such default. However, JM has failed to cite any provision in either the note or the mortgage which gives it the right to receive a notice of default or a grace period to cure it. Furthermore, such an allegation "does not preclude summary judgment in plaintiff's favor because it fails to raise a *material* issue of fact .... [since

t]o establish [JM]'s default, plaintiff [is] not required to prove that it had sent a notice of default" (*71 Clinton St. Apartments. LLC v 71 Clinton Inc.*, 114 AD3d 583, 584-585 [1st Dept 2014] [emphasis in original] [citations omitted]).

The ninth affirmative defense in JM's proposed amended answer (champerty in violation of Judiciary Law § 489) also lacks merit. The champerty defense, which is to be narrowly construed by the courts, is available only where the purchaser or assignee obtains the claim solely to bring suit, excluding all other purposes including collecting on that claim (see *Red Tulip, LLC v Neiva*, 44 AD3d 204, 213 [1st Dept 2007], *app dism* 10 NY3d 741 [2008] [citations omitted]). "New York cases agree that if a party acquires a debt instrument for the purpose of enforcing it, that is not champerty simply because the party intends to do so by litigation. . . Plaintiff acquired the loan for the purpose of enforcing a legitimate claim, namely to obtain a judgment of foreclosure on a defaulted mortgage in a proceeding that was already under way" (*71 Clinton St. Apts v 71 Clinton Inc.*, 114 AD3d at 585 [citation omitted]).

The tenth and eleventh affirmative defenses in the proposed amended answer, like the fourth, are mere declarations, not defenses. In the tenth affirmative defense, JM gives notice that it intends to use "any other defense that may have become available." In the eleventh, JM iterates that it is not waiving any defenses that may turn up through discovery. These reservations of rights do not state any cognizable defense to foreclosure. Indeed, they do not even serve to confer the rights they purport to preserve.

Since plaintiff has "made out a *prima facie* entitlement to a judgment of foreclosure and [JM] did not in response come forward with evidence demonstrating the existence of material issues of fact respecting [its] liability upon the subject mortgage, plaintiff['s] motion for summary judgment [should be] granted" (*GMS Capital Corp. v Shafran.* 249 AD2d 14 [1st Dept 1998], [citations omitted]).

CONCLUSION

Based upon the foregoing, it is hereby

ORDERED that plaintiff's motion is granted to the extent that plaintiff shall have summary judgment on the question of liability; and it is further,

ORDERED that the attached order granting summary judgment and appointing a referee to compute is signed; and it is further,

ORDERED that plaintiff and JM are both directed to cooperate with the referee and furnish him with all documents necessary to perform the computations. Upon a motion to confirm the referee's report, plaintiff may move for summary judgment on damages and a final judgment of foreclosure; and it is further,

ORDERED that JM's cross-motion is denied in its entirety; and it is further,

ORDERED that plaintiff is directed to serve a copy of this Order with Notice of Entry upon the defendants.

This decision constitutes the order of the Court.

Dated: 5-15-14 **Enter:**

PAUL WOOTEN, J.S.C

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE