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SHORT FORM ORDER

INDEX
NO.: 01929-12

SUPREME COURT - STATE OF NEW YORK
IAS PART 39 - SUFFOLK COUNTY

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

MOTION DATE: 3-21-13 (001)
4-15-13 (002)
ADJ. DATE: 5-31-13
Mot. Seq. # 001-MG
 # 002-XMD

CONTINENTAL HOME LOANS, INC.,

Plaintiff,

-against-

ABEL MALDONADO; "JOHN DOES" and "JANE DOES", said names being fictitious, parties intended being possible tenants or occupants of premises, and corporations, other entities or persons who claim, or may claim, a lien against the premises,

Defendants.

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Upon the following papers numbered 1 to 20 read on this motion for summary judgment and cross motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8; Notice of Cross Motion and supporting papers 9 - 13; Answering Affidavits and supporting papers 14 - 17; Replying Affidavits and supporting papers ____; Other Stipulations 18 - 20; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by the plaintiff/counterclaim-defendant for, inter alia, an order: (1) pursuant to CPLR 3212 awarding partial summary judgment in its favor and against the defendant Abel Maldonado, striking his answer and dismissing his affirmative defenses, counterclaims and set-offs; (2) pursuant to CPLR 3215 fixing the defaults of the non-answering defendants; (3) 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 (4) amending the caption is granted; and it is

ORDERED that this cross motion (002) by the defendant Abel Maldonado for, inter alia, an order: (1) denying the plaintiff's motion for summary judgment; and (2) dismissing the plaintiff's complaint insofar as asserted against him on the grounds that the plaintiff failed to provide sufficient proof of compliance with Real Property Actions and Proceedings Law §§ 1304 and 1306; or, (3) in the alternative, restoring this action to the foreclosure conference settlement program is denied in its entirety; and it is further

ORDERED that the moving parties are directed to serve a copy of this Order with notice of entry upon opposing counsel and upon all 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 promptly 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 4098 Express Drive South, Ronkonkoma, New York 11779. On December 28, 2009, the defendant Abel Maldonado (the defendant mortgagor) executed a fixed-rate note in favor of Continental Home Loans, Inc. (the plaintiff) in the principal sum of $351,000.00. To secure said note, the defendant mortgagor gave the plaintiff a mortgage also dated December 28, 2009 on the property. The mortgage indicates that Mortgage Electronic Registration Systems, Inc. (MERS) was acting solely as a nominee for the plaintiff and its successors and assigns and that, for the purposes of recording the mortgage, MERS was the mortgagee of record. By way of an assignment, which was subsequently corrected, the mortgage was allegedly transferred from MERS to the plaintiff prior to commencement.

The defendant mortgagor allegedly defaulted on the note and mortgage by failing to make his monthly payment of principal and interest due on or about April 1, 2011, 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 January 13, 2012. Issue was joined by the interposition of the defendant mortgagor's answer dated February 10, 2012.

By his answer, the defendant mortgagor generally denies all of the allegations in the complaint and asserts eight affirmative defenses, counterclaims and set-offs, alleging the following: the lack of personal jurisdiction; standing; failure to state a cause of action; failure to properly accelerate the mortgage; failure to comply with Real Property Actions and Proceedings Law §§ 1303, 1304 and 1306; failure to provide sufficient evidence of compliance with Real Property Actions and Proceedings Law §§ 1304 and 1306; violations of the Fair Debt Collection Practices Act (15 USC § 1692) and the Deceptive Practices Act (General Business Law § 349); and failure to mitigate damages. None of the affirmative defenses have been specifically denominated as counterclaims or set-offs and no affirmative relief is sought therein, however, in the wherefore clause of the answer the defendant mortgagor demands, inter alia, punitive damages for the "fraudulent deeds of the [p]laintiff, together with the costs and disbursements of this action."

In response to the counterclaims, the plaintiff filed a reply. In its reply, the plaintiff denies the material allegations in the counterclaims and asserts seven affirmative defenses, alleging the following: failure to state a cause of action; culpable conduct, negligence and unclean hands; estoppel, waiver and ratification; the statute of limitations; participation in the transaction; enjoyment, use and occupancy of the property with lack of payment; and the statute of frauds.

The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the defendant Abel Maldonado, striking his answer and dismissing his affirmative defenses, counterclaims and set-offs; (2) pursuant to CPLR 3215 fixing the defaults of the non-answering defendants; (3) 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.

The defendant Abel Maldonado opposes the plaintiff's motion and cross moves for, inter alia, an order: (1) denying the plaintiff's motion for summary judgment; and (2) dismissing the plaintiff's complaint insofar as asserted against him on the grounds that the plaintiff failed to provide sufficient proof of compliance with Real Property Actions and Proceedings Law §§ 1304 and 1306; or, (3) in the alternative, restoring this action to the foreclosure conference settlement program.

In support of the motion, the plaintiff submits, inter alia, the note and mortgage; the assignments; the pleadings; an affidavit from Richard G. Fike, a Vice President of the plaintiff; an affidavit from Paula Borshell, another Vice President of the plaintiff; an affirmation from counsel; a default notice dated July 8, 2011; a 90-day pre-foreclosure notice dated July 8, 2011; and a "Proof of Filing Statement" on New York State Banking Department (the Banking Department) letterhead. In the complaint, the plaintiff alleges, among other things, that it is the owner and holder of the note and mortgage. The plaintiff also alleges compliance with the 90-day notice requirement in RPAPL § 1304 as well as the filing requirements imposed by RPAPL §1306. In his affidavit, Fike alleges, inter alia, that the original note was delivered to the plaintiff on December 28, 2009, and that it has remained in its possession since that day. He also alleges that the plaintiff was the holder of the note and the proper party to maintain this action. In her affidavit, Borshell alleges, inter alia, that the plaintiff sent the defendant mortgagor a demand letter on July 8, 2011 in response to his failure to tender to the plaintiff the installment due on April 1, 2011, as well as subsequent installments. The plaintiff also sent the defendant mortgagor a 90-day pre-foreclosure notice by certified and first-class mail. Borshell further alleges that her knowledge herein is based upon her review of the plaintiff's business records and her review of the complaint, which she asserts is factually true. In his affirmation, counsel argues that the plaintiff, as originating lender, has standing to maintain this action.

In opposition to the plaintiff's motion and in support of the cross motion, the defendant mortgagor submits, among other things, an affirmation from counsel. In his affirmation, counsel argues that the compliant should be dismissed as the plaintiff did not demonstrate strict compliance with RPAPL §§ 1304 and 1306. More specifically, counsel asserts that the Borshell affidavit does not include any allegations of personal knowledge of mailing and actual delivery of the 90-day pre-foreclosure notice.

In response, the plaintiff has filed opposition and reply papers consisting of, inter alia, an affidavit from Michael Nenning, a Vice President of the plaintiff and an affirmation from counsel. In his affidavit, Nenning alleges the plaintiff mailed a 90-day pre-foreclosure notice addressed to

the defendant mortgagor at the property by both regular and certified mail on July 8, 2011. The 90-day notice was in at least fourteen (14) point-type and contained the required list of housing counseling agencies. Negging further alleges that the notice was registered with the Banking Department on July 12, 2011, under tracking number NYS2394731.

At the outset, the cross motion is procedurally defective to the extent that the notice of cross motion recites neither the grounds for the relief sought, nor the relevant provisions of the civil practice law and rules pursuant to which relief is sought (*see*, CPLR 2214[a]). To the extent that the defendant mortgagor moves for an order dismissing the complaint against him based upon the alleged failure of a condition precedent, the cross motion is denied as procedurally defective since it was made after joinder of issue and service of the answer cut off the defendant mortgagor's right to make a CPLR 3211 motion to dismiss (*see generally*, CPLR 3211[e]; ***Mihlovan v Grozavu***, 72 NY2d 506, 534 NYS2d 656 [1988]; ***Moutafis v Osborne***, 18 AD3d 723, 795 NYS2d 716 [2d Dept 2005]; *see also*, ***Allfour v Bono***, 2012 NY Misc LEXIS 3708, 2012 WL 3230701, 2012 NY Slip Op 32038 [U] [Sup Ct, Suffolk County 2012]). Even though CPLR 3211(c) empowers the court to treat a motion to dismiss as a motion for summary judgment, in this case, conversion is inappropriate since this action does not exclusively involve issues of law, and, thus, adequate notice has not been provided to the parties (*see*, ***Moutafis v Osborne***, 18 AD3d 723, *supra*; ***Matter of Weiss v N. Shore Towers Apts., Inc.***, 300 AD2d 596, 751 NYS2d 868 [2d Dept 2002]). In any event, the cross motion, which is unsupported by an affidavit from the defendant mortgagor, lacks merit for the reasons set forth below (*see, 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]).

The defendant mortgagor's unsupported request for this case to be referred to the foreclosure settlement conference part is denied. In compliance with CPLR 3408, a series of foreclosure settlement conferences were held in this Court's foreclosure settlement conference part on May 1, July 10, September 18 and November 29, 2012. At the last conference, this case was dismissed from the conference program as the parties could not reach an agreement to modify the loan or otherwise settle this action. Accordingly, no further conference is required under any statute, law or rule. Furthermore, the defendant mortgagor is not entitled to any other court conference for the purpose of having the plaintiff present the note, since the plaintiff has already provided a copy in accordance with CPLR 4518(a).

Turning to the motion, 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 Deutsch***, 88 AD3d 691, 930 NYS2d 477 [2d Dept 2011]; ***Wells Fargo Bank v Das Karla***, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; ***Washington 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], *quoting* ***Mahopac Natl. Bank v***

Baisley, 244 AD2d 466, 467, 644 NYS2d 345 [2d Dept 1997]).

By its submissions, the plaintiff established its prima facie entitlement to summary judgment on the complaint (*see*, CPLR 3212; RPAPL § 1321; ***Wachovia Bank, N.A. v Carcano***, 106 AD3d 724, 965 NYS2d 516 [2d Dept 2013]; ***U.S. Bank, N.A. 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]). In the instant case, the plaintiff produced the note, the mortgage and evidence of nonpayment (*see*, ***Federal 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]). By its submissions, the plaintiff also demonstrated compliance with the notice requirements of RPAPL §§ 1303, 1304 and 1306 (*cf.*, ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]). Furthermore, the plaintiff demonstrated that, as the originating lender and the holder of the note, it has standing to commence this action (*see*, ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]). Under these circumstances, the plaintiff demonstrated its prima facie burden as to the merits of this foreclosure action and as to its standing to maintain the same.

The plaintiff also submitted sufficient proof to establish, prima facie, that the affirmative defenses, counterclaims and set-offs 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., N.A. 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*, ***Mandarin Trading Ltd. v Wildenstein***, 16 NY3d 173, 178, 919 NYS2d 465 [2011]; ***Morales v AMS Mtge. Servs., Inc***., 69 AD3d 691, 692, 897 NYS2d 103 [2d Dept 2010] [*CPLR 3016(b) requires that the circumstances of fraud be "stated in detail," including specific dates and items*]; ***Albertina Realty Co. v Rosbro Realty Corp.***, 258 NY 472, 475-76, 180 NE 176 [1932] ["*acceleration clause does not constitute a forfeiture or penalty" and "the filing of the summons and verified complaint and lis pendens constitutes a valid election" to accelerate*]; ***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*]; ***Grogg v South Rd. Assoc., L.P.***, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010] [*the mere denial of receipt of the notice of default is insufficient to rebut the presumption of delivery*]; ***La Salle Bank N.A. v Kosarovich***, 31 AD3d 904, 820 NYS2d 144 [3d Dept 2006] [*counterclaims asserting violations of the Truth In Lending Act do not constitute affirmative defenses to a default in payment in a foreclosure action*]).

As the plaintiff duly demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted to the defendant mortgagor (*see*, ***HSBC Bank USA v Merrill***, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]). Accordingly, it was incumbent upon the defendant mortgagor to produce evidentiary proof in admissible form sufficient to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action (*see*, ***Baron Assoc., LLC v Garcia Group Enters., Inc.***, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; ***Washington Mut. Bank v Valencia***, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]; ***Grogg v South Rd. Assoc., L.P.***, 74 AD3d 1021, *supra*).

Self-serving and conclusory allegations do not raise issues of fact, and do not require the plaintiff to respond to alleged affirmative defenses which are based on such allegations (*see*, ***Charter One Bank, FSB v Leone***, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007]; ***Rosen Auto Leasing, Inc. v Jacobs***, 9 AD3d 798, 780 NYS2d 438 [3d Dept 2004]). In instances where a defendant fails to oppose 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*, ***Kuehne & Nagel, Inc. v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; *see also*, ***Madeline D'Anthony Enters., Inc. v Sokolowsky***, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, *supra*). Additionally, "uncontradicted facts are deemed admitted" (***Tortorello v Carlin,*** 260 AD2d 201, 206, 688 NYS2d 64 [1st Dept 1999] [internal quotation marks and citations omitted]).

A review of the opposing papers shows that the defendant mortgagor's opposing and moving papers are insufficient to raise any genuine issue of fact requiring a trial on the merits of the plaintiff's claims for foreclosure and sale, and insufficient to demonstrate any bona fide defense to such claim (*see*, CPLR 3211[e]). In opposition to the motion, the defendant mortgagor has offered no proof or arguments in support of any of his pleaded defenses, counterclaims and set-offs, except as to RPAPL §§ 1304 and 1306, asserted in the fifth and sixth affirmative defenses. As shown above, the plaintiff demonstrated its prima facie case of compliance with the notice and filing requirements RPAPL §§ 1304 and 1306; the defendant mortgagor's submission of an attorney affirmation failed to raise a triable issue of fact with respect to the same (*see*, ***Wachovia Bank, N.A. v Carcano***, 106 AD3d 724, *supra*; ***Grogg v South Rd. Assoc., L.P.***, 74 AD3d 1021, *supra*). Accordingly, the fifth and sixth affirmative defenses are dismissed. Further, the failure by the defendant mortgagor to raise and/or assert each of the remaining pleaded defenses, counterclaims and set-offs in opposition to the plaintiff's motion warrants the dismissal of same as abandoned under the case authorities cited above (*see*, ***Kuehne & Nagel, Inc. v Baiden***, 36 NY2d 539, *supra*; *see also*, ***Madeline D'Anthony Enters., Inc. v Sokolowsky***, 101 AD3d 606, *supra*). All remaining affirmative defenses, counterclaims and set-offs not asserted by the defendant mortgagor are thus dismissed.

The defendant mortgagor, therefore, failed to establish that his defenses are sufficiently meritorious to defeat the plaintiff's motion for summary judgment. Notwithstanding the general denials as to the execution of the note and mortgage, notably absent from the defendant mortgagor's opposition and moving papers are any allegations by him denying his continuous

default in payment. Thus, even when viewed in the light most favorable to the defendant mortgagor, his submissions are 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, counterclaims or set-offs (*see*, CPLR 3211[e]; *see*, ***Valley Natl. Bank v Deutsch***, 88 AD3d 691, *supra*; ***Rossrock Fund II, L.P. v Commack Inv. Group, Inc.***, 78 AD3d 920, 912 NYS2d 71 [2d Dept 2010]; ***Neighborhood Hous. Servs. of N.Y. City, Inc. v Meltzer***, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]; ***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*; *see generally*, ***Zuckerman v City of New York***, 49 NY2d 557, *supra*). Accordingly, the defendant mortgagor's answer is stricken, and all of the affirmative defenses, counterclaims and set-offs set forth therein are dismissed.

The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by excising the fictitious named defendants, John Does and Jane Does, is granted (*see*, ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***Neighborhood Hous. Servs. of N.Y. City, Inc. v Meltzer***, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]). By its submissions, the plaintiff established the basis for this relief. All future proceedings shall be captioned accordingly.

The plaintiff's request to fix the defaults of "the remaining, non-answering and non-appearing defendants" is denied. In his affirmation, the plaintiff's counsel avers that there are no other necessary parties other than the defendant mortgagor, therefore, it failed to establish its request for this relief.

Since the plaintiff has been awarded summary judgment against the defendant mortgagor, it is entitled to an order appointing a referee to compute amounts due under the subject note and mortgage (*see*, RPAPL § 1321; ***Ocwen Fed. Bank FSB v Miller***, 18 AD3d 527, 794 NYS2d 650 [2d Dept 2005]; ***Vermont Fed. Bank v Chase***, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; ***Bank of E. Asia v Smith***, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]). Accordingly, this motion for, inter alia, an order awarding it summary judgment and appointing a referee to compute is granted, and the cross motion is denied. 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: March 3, 2014

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

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION