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SHORT FORM ORDER

INDEX
NO.: 10569/11

SUPREME COURT - STATE OF NEW YORK
IAS PART 37 - SUFFOLK COUNTY

PRESENT: Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 4/12/13
ADJ. DATE 12/5/13
Mot. Seq. #001-MotD

GREEN TREE SERVICING, LLC,

Plaintiff,

-against-

FRANCIS E. BRENNAN, JR. AND REGINA BRENNAN,

"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 described in the complaint,

Defendants.

BERKMAN, HENOCH, PETERSON, PEDDY & FENCHEL, P.C.
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Upon the following papers numbered 1 to 7 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 7; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers _____; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this unopposed motion by the plaintiff for, inter alia, an order: (1) pursuant to CPLR 3212, awarding summary judgment in its favor and against the defendant Francis E. Brennan, Jr., striking his answer and dismissing the affirmative defenses therein; (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; (4) amending the caption; and (5) awarding the plaintiff the costs of this motion is determined as indicated below; and it is

ORDERED that the plaintiff's request for the costs of this motion is denied without prejudice, with leave to renew upon proper documentation for costs at the time of submission of the judgment; and it is further

ORDERED that the plaintiff is directed to serve a copy of this Order with notice of entry 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 42 Horton Street, West Islip, New York 11795. On October 22, 2008, the defendant Francis E. Brennan, Jr. and Regina Brennan ("defendant mortgagors") executed a fixed-rate note in favor of BankUnited, FSB ("BankUnited") in the principal sum of $417,000.00. To secure said note, the defendant mortgagors gave BankUnited a mortgage also dated October 22, 2008 on the property. By way of physical delivery of the note, subsequently memorialized by an assignment of the mortgage, the note and mortgage were allegedly transferred to the plaintiff prior to commencement.

The defendant mortgagors allegedly defaulted on the note and mortgage by failing to make their monthly payment of principal and interest due on December 1, 2010, and each month thereafter. After the defendant mortgagors allegedly failed to cure their default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on March 29, 2011.

Issue was joined by the interposition of the defendant Francis E. Brennan, Jr.'s verified answer sworn to on May 13, 2011. By his answer, Brennan generally denies all of the allegations set forth in the complaint and asserts eleven affirmative defenses, alleging, *inter alia*, failure to comply with the notice requirements of RPAPL 1304; lack of standing (alleged as a second and third affirmative defense); failure to comply with the applicable Federal Home Affordable Modification Program (HAMP) guidelines (*see*12 USC § 5219[a]); failure to demonstrate that it is entitled to legal fees and costs of this action; failure to comply with the requirements of the Truth In Lending Act (TILA) (15 USC 1601, *et seq*.) as well as Federal Reserve Board Regulation Z (Regulation Z) (12 CFR part 226); failure to act in good faith by not providing a loan modification; failure to properly credit payments; violation of Banking Law §§ 6-l and 6-m; and the lack of personal jurisdiction over him. The remaining defendants have not answered the complaint.

In compliance with CPLR 3408, settlement conferences were held in this Court's foreclosure conference part on March 16, May 16, and August 29, 2012. On the last scheduled date, 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.

The plaintiff now moves for, *inter alia*, an order: (1) pursuant to CPLR 3212, awarding summary judgment in its favor and against the defendant Francis E. Brennan, Jr., striking his answer and dismissing the affirmative defenses therein; (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; (4) amending the caption; and (5) awarding the plaintiff the costs of this motion. No opposition has been filed in response to this 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, the assignment 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]). The plaintiff also submitted, *inter alia*, an affidavit from one of its officers, whereby it is alleged that the note was physically delivered to the plaintiff on April 1, 2009, and that it is the holder and is in possession of the note and mortgage since commencement of this action (*see* ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]; ***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]). The officer also alleges that the transfer of the note to the plaintiff was memorialized by an assignment of the mortgage dated February 11, 2011, and subsequently recorded on April 8, 2011. 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 set forth in Brennan'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] [holding unsupported affirmative defenses are lacking in merit]; *see also* ***Wells Fargo Bank, N.A. v Cherot***, 102 AD3d 768, 957 NYS2d 886 [2d Dept 2013] [holding that the "due diligence" requirement of CPLR 308 (4) is satisfied by three attempts at residence at different times on different days, including a Saturday]; ***Wells Fargo Bank, N.A. v Van Dyke***, 101 AD3d 638, 958 NYS2d 331 [1st Dept 2012]; ***EMC Mtge. Corp. v Stewart***, 2 AD3d 772, 769 NYS2d 408 [2d Dept 2003] [finding foreclosing plaintiff has no obligation to modify loan before or after a default]; ***Shufelt v Bulfamante***, 92 AD3d 936, 940 NYS2d 108 [2d Dept 2012]; ***Long Is. Sav. Bank of Centereach, F.S.B. v Denkensohn***, 222 AD2d 659, 635 NYS2d 683 [2d Dept 1995] [holding a dispute as to amount owed by the mortgagor is not a defense to a foreclosure action]).

As the plaintiff duly demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted to Brennan (*see* ***HSBC Bank USA v Merrill***, 37 AD3d 899, 830 NYS2d 598 [3d Dept

2007]). Accordingly, it was incumbent upon Brennan 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]).

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, 915 NYS2d 591 [2d Dept 2010]). 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]).

Brennan's answer is insufficient, as a matter of law, to defeat the plaintiff's unopposed motion (*see*, ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, *supra*). In this case, the affirmative defenses asserted by Brennan are factually unsupported and without apparent merit (*see*, ***Becher v Feller***, 64 AD3d 672, *supra*). The eleventh affirmative defense, in which Brennan alleges that the Court lacks jurisdiction over him, is stricken as he does not allege that he was not properly served with process herein (*see*, ***Associates First Capital Corp. v Wiggins***, 75 AD3d 614, 904 NYS2d 668 [2d Dept 2010]). This defense was also waived as Brennan failed to move to dismiss the complaint against him on this ground within 60 days after serving the answer (*see* CPLR 3211 [e]; ***Reyes v Albertson***, 62 AD3d 855, 878 NYS2d 623 [2d Dept 2009]; ***Dimond v Verdon***, 5 AD3d 718, 773 NYS2d 603 [2d Dept 2004]). In any event, the failure by the Brennan to raise and/or assert each of his pleaded defenses in opposition to the plaintiff's motion warrants the dismissal of the 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*).

Under these circumstances, the Court finds that Brennan failed to rebut the plaintiff's *prima facie* showing of its entitlement to summary judgment requested by it (*see* ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, *supra*; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, *supra*; ***Rossrock Fund II, L.P. v Commack Inv. Group, Inc.***, 78 AD3d 920, 912 NYS2d 71 [2d Dept 2010]; ***Wells Fargo Bank Minn., N.A. v Perez***, 41 AD3d 590, *supra*; *see generally* ***Hermitage Ins. Co. v Trance Nite Club, Inc.***, 40 AD3d 1032, 834 NYS2d 870 [2d Dept 2007]). The plaintiff, therefore, is awarded summary judgment in its favor against Brennan (*see*, ***Federal Home Loan Mtge. Corp. v Karastathis***, 237 AD2d 558, *supra*; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Accordingly, Brennan's answer is stricken, and affirmative defenses set forth therein are dismissed in their entirety.

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 Doe #1 through John Doe #12, is granted (*see* ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, *supra*; ***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.

By its moving papers, the plaintiff further established the default in answering on the part of Regina Brennan (*see* RPAPL 1321; ***HSBC Bank USA, N.A. v Roldan***, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the default of Regina Brennan is fixed and determined. Since the plaintiff has been awarded summary judgment against Francis E. Brennan, Jr., and has established the default in answering by Regina Brennan, the plaintiff 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*, 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: March 18, 2014

Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION __x__ NON-FINAL DISPOSITION