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SHORT FORM ORDER

INDEX
NO.: 37897-11

SUPREME COURT - STATE OF NEW YORK
IAS PART 6 - SUFFOLK COUNTY

PRESENT: Hon. RALPH T. GAZZILLO
Acting Justice Supreme Court

MOTION DATE 4-26-13
ADJ. DATE_____
Mot. Seq. #001-MG

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PE-NC LLC,

Plaintiff,

-against-

ALBERT M. PIRRO JR.; TRACY E. PIRRO; BROOKHAVEN MEMORIAL HOSPITAL; VMS SECURITY SERVICES CORP.; THOMAS TANYA BENEFICIAL NEW YORK: and JOHN DOE "1" to "10", the last ten names being fictitious and unknown to plaintiff, the persons or parties intended being persons, corporations or others, having an interest in or lien upon, or tenants, occupants or persons in possession of, the mortgaged property, or any part thereof, described in the Complaint,

Defendants.

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Upon the following papers numbered 1 to 22 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 9; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 10 - 15; Replying Affidavits and supporting papers 16 - 22; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the plaintiff for, inter alia, an order awarding summary judgment in its favor and against the defendants Albert M. Pirro Jr and Tracy E. Pirro, appointing a referee to ascertain and compute, and amending the caption is granted; 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 28 Naragansett Avenue, Medford, New York 11763. On December 28, 2006, the defendants Albert M. Pirro Jr and Tracy E. Pirro (the defendant mortgagors) executed an adjustable-rate note in favor of Argent Mortgage Company, LLC (Argent) in the principal sum of $290,000.00. To secure said note, the defendant mortgagors gave the plaintiff a mortgage also dated December 28, 2006 on the property. By way of an endorsed note and by way of a series of assignments, the note and mortgage were allegedly transferred to PE-NC LLC (the plaintiff).

After the defendant mortgagors allegedly defaulted and then failed to cure their default, Woodfield Ten, LLC (Woodfield), a predecessor-in-interest to the plaintiff, and the defendant mortgagors entered into a Forbearance and Suspense Agreement (the Forbearance Agreement) "effective October 1, 2009." Thereafter, Woodfield and the defendant mortgagors entered into a Modification to Existing Forbearance and Suspense Agreement dated April 1, 2010 (the Modification Agreement), whereby the parties thereto agreed, inter alia, for the continuation of certain monthly payments pursuant to the Forbearance Agreement, and for the continuation of the plaintiff's remedy of foreclosure. After the defendant mortgagors allegedly failed to make all required payments pursuant to the Forbearance and the Modification Agreement, the plaintiff commenced the instant action by the filing of a summons and verified complaint on December 12, 2011.

Issue was joined by the interposition of the defendant mortgagors' joint answer dated December 26, 2011. By their answer, the defendant mortgagors generally deny some of the material allegations set forth in the complaint and admit other allegations, including the execution of the note and mortgage. The answer does not contain any affirmative defenses. The remaining defendants have neither appeared nor answered the complaint.

A review of the records maintained by the Court's computerized database shows that a series of settlement conferences were scheduled for and/or held in this Court's specialized mortgage foreclosure part on March 20, May 15, June 21, August 14, October 16 and December 18, 2012 as well as on February 26, 2013. 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.

The plaintiff now moves for, inter alia, an order: awarding summary judgment in its favor and against the defendants Albert M. Pirro Jr and Tracy E. Pirro, and striking their joint answer; appointing a referee to ascertain and compute; and amending the caption. Opposition and reply papers have been filed herein.

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, inter alia, the endorsed 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]). The plaintiff also submitted, inter alia, an affidavit from an officer of the plaintiff whereby it is alleged that the defendant mortgagors were sent a default notice in compliance with the provisions of the mortgage as well as a notice in compliance with RPAPL § 1304 (*cf.*, ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]). Under these circumstances, the plaintiff demonstrated its prima facie burden as to the merits of this foreclosure action.

As the plaintiff duly demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted to the defendant mortgagors (*see*, ***HSBC Bank USA v Merrill***, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]). Accordingly, it was incumbent upon the defendant mortgagors 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]). 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 mortgagors' opposing 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]; ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Initially, the defendant mortgagors waived any defense based upon the plaintiff's lack of standing as they failed to interpose that defense in their joint answer, or in a pre-answer motion to dismiss the complaint (*see*, CPLR 3211[e]; ***U.S. Bank N.A. v Denaro***, 98 AD3d 964, *supra*; ***Wells Fargo Bank Minn., N.A. v Mastropaolo***, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]; *see also*, ***Mishal v Fiduciary Holdings, LLC***, 109 AD3d 885, 971 NYS2d 334 [2d Dept 2013]). Furthermore, the defendant mortgagors' mere denials of receipt of the 30-day and 90-day notices of default are insufficient to raise a triable issue of fact (*see*, ***Grogg v South Rd. Assoc., L.P.***, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; *see also,* ***Wachovia Bank, N.A. v Carcano***, 106 AD3d 724, *supra*). Notwithstanding the general denials in the

answer, the defendant mortgagors have admitted the execution and delivery of the note and mortgage. Additionally, notably absent from the defendant mortgagors' opposition papers are any allegations by them denying their continuous default in payment subsequent to the execution of the Forbearance Agreement and the Modification Agreement. In any event, any potential dispute as to the exact amount owned to the plaintiff is not a defense to this foreclosure action (*see*, ***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]).

The defendant mortgagors' arguments regarding the purported irregularities with the acknowledgments associated with the assignments, rife with speculation and innuendo, which appear to aimed at obscuring the issue of nonpayment, are also without merit (*see*, ***Chase Home Fin., LLC v Miciotta***, 101 AD3d 1307, 956 NYS2d 271 [3d Dept 2012]; ***Hypo Holdings, Inc. v Chalasani***, 280 AD2d 386, 721 NYS2d 35 [1st Dept 2001]). The defendants mortgagors' remaining contentions are without merit.

Thus, even when viewed in the light most favorable to the defendant mortgagors, their opposition is 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 (*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]; ***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 mortgagors (*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, the defendant mortgagors' answer is stricken.

The branches of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by substituting Tanya Thomas (Thomas) also known as Thomas Tanya for Thomas Tanya, and by excising the fictitious named defendants, John Doe #1-10, 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 the remaining non-answering defendants Brookhaven Memorial Hospital, VMS Security Services Corp., Thomas and Beneficial New York (*see*, RPAPL § 1321; ***HSBC Bank USA, N.A. v Roldan***, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the defaults of the above-noted remaining defendants are fixed and determined. Since the plaintiff has been awarded summary judgment against the defendant mortgagors, and has established the default in answering by the remaining defendants, 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 granted. 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: 4/4/14

Hon. RALPH T. GAZZILLO, A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**