SHORT FORM ORDER

INDEX NUMBER: 35129-11

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 23, SUFFOLK COUNTY

Present: **Hon. EMILY PINES**
J. S. C.

Original Motion Date: 10-4-13
Motion Submit Date:
Motion Sequence No.: 001-MotD

[ ] FINAL
[x] NON FINAL

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The Bank of New York Mellon Trust Company National Association as grantor trustee of the Protium Master Grantor Trust,

Plaintiff,

- against -

Silvio Torres, Ana E. Torres, National City Bank, People of the State of New York, Excel Acquisitions LLC and "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 of corporations, if any, having or claiming an interest, in or lien upon the premises being foreclosed herein,

Defendants.
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Attorney for Plaintiff

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ORDERED that this unopposed motion by the plaintiff for, inter alia, an order awarding summary judgment in its favor against the answering defendants, appointing a referee and amending the caption is determined as set forth below; and it is

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

The plaintiff, The Bank of New York Mellon Trust Company, National Association as grantor trustee of the Protium Master Grantor Trust, commenced this action to foreclose a mortgage on the property known as 122 Columbia Street, Huntington Station, New York 11746. On June 6, 2007, the defendant Silvio Torres executed a payment option adjustable-rate note in favor of American Brokers Conduit (the lender) in the principal sum of $332,000.00. To secure said note, Mr. Torres and Ana E. Torres (the defendant mortgagors) gave the lender a mortgage also dated June 6, 2006 on the property.

The mortgage indicates that Mortgage Electronic Registration Systems, Inc. (MERS) was acting solely as a nominee for the lender and its successors and assigns and that, for the purposes of recording the mortgage, MERS was the mortgagee of record. By way of an undated endorsement, the note was transferred to the plaintiff, memorialized by an assignment of the mortgage dated October 28, 2011. Thereafter, the assignment was subsequently duly recorded in the Office of the Suffolk County Clerk on November 21, 2011.

Mr. Torres allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on or about June 1, 2010, and each month thereafter. After the defendant mortgagors allegedly failed to cure Mr. Torres' default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on November 14, 2011.

Issue was joined by the interposition of the defendant mortgagors' answer dated December 2, 2011. By their answer, the defendant mortgagors generally deny all of the allegations contained in the complaint, and assert nine affirmative defenses alleging, among other things, the following: the plaintiff's alleged lack of standing; violations of General Business Law § 349; violations of Banking Law §§ 6-l and 6-m; the failure to comply with the acceleration clause of the mortgage as well as the implied covenant of good faith/fair dealing; and the failure to furnish the defendant mortgagors with a loan modification pursuant to the applicable Federal National Mortgage Association, Home Affordable Loan Modification Program (HAMP) (*see*,12 USC § 5219a), and "in

house" modification guidelines. The remaining defendants have neither answered nor appeared.

According to the records maintained by the court's computerized database, a settlement conference was conducted before the specialized mortgage foreclosure part on September 4, 2012. On that date, the parties were unable to reach a settlement and, as a result, this action was referred as an IAS case. Accordingly, no further conference is required.

This action was also stayed by virtue of an intervening petition filed by Mr. Torres for "Chapter 7" relief pursuant to 11 USC § 727 on September 13, 2013 in the United States Bankruptcy Court, Eastern District of New York (*see*, 11 USC § 362[a]). The plaintiff subsequently notified this court, by its counsel's letter dated January 13, 2014, that Mr. Torres was discharged as of December 27, 2013, and that the stay imposed by the Bankruptcy Court under File No, 8-13-74718-ast was subsequently lifted.

The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the defendant mortgagors, striking their answer and dismissing the affirmative defenses set forth 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; and (4) amending the caption. 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, inter alia, the endorsed 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 proof of compliance with the notice provisions of the mortgage prior to commencement (*see*, ***Wachovia Bank, N.A. v Carcano***, 106 AD3d 724, *supra*). Further, the plaintiff submitted an affidavit from its representative wherein it is alleged that the endorsed note was negotiated to it on January 24, 2011, a date prior to commencement, and that it has maintained possession of the same since that time (*see*, ***Kondaur Capital Corp. v McCary***, 115 AD3d 649, 981 NYS2d 547 [2d Dept 2014]; ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]). The documentary evidence submitted also includes, among other things, the note transferred via an endorsement in blank (*cf.*, ***Slutsky v Blooming Grove Inn, Inc.***, 147 AD2d 208, 542 NYS2d 721 [2d Dept 1989]). Moreover, the plaintiff submitted the assignment of the mortgage dated October 28, 2011, and subsequently duly recorded on November 21, 2011 (*see*, ***GRP Loan, LLC v Taylor,*** 95 AD3d 1172, 945 NYS2d 336 [2d Dept 2012]). Therefore, it appears that the plaintiff is also the transferee and holder of the original note and the assignee of the mortgage by virtue of the written assignment. Thus, the plaintiff demonstrated its prima facie burden as to the merits of this foreclosure action and as to its standing.

The plaintiff also submitted sufficient proof to establish, prima facie, that the affirmative defenses set forth in the defendant mortgagors' 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*, ***Bank of America, N.A. v Lucido***, 114 AD3d 714, 981 NYS2d 433 [2d Dept 2014] [plaintiff's refusal to consider a reduction in principal does not establish a failure to negotiate in good faith]; ***Washington Mut. Bank v Schenk***, 112 AD3d 615, 975 NYS2d 902 [2d Dept 2013] [plaintiff not obligated to accept a tender of less than full repayment as demanded]; ***Emigrant Mtge. Co, Inc. v Fitzpatrick***, 95 AD3d 1169, 945 NYS2d 697 [2d Dept 2012] [an affirmative defense asserting violations of General Business Law § 349 and/or engagement in deceptive business practices lacks merit where, inter alia, clearly written loan documents describe the terms of the loan]; ***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]). Furthermore, with respect to the assertion set forth in the seventh, eighth and ninth affirmative defenses that the defendant mortgagors were improperly refused a loan modification, "[n]othing in CPLR 3408 requires plaintiff to make the exact offer desired by [the] defendant[ ] [mortgagors], and the

plaintiff's failure to make that offer cannot be interpreted as a lack of good faith" (***Bank of America, N.A. v Lucido***, 114 AD3d 714, *supra* at 715-16, quoting ***Wells Fargo Bank, N.A. v Van Dyke***, 101 AD3d 638, 638, 958 NYS2d 331 [1st Dept 2012]).

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 [2d 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 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]).

The defendant mortgagors' 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 the defendant mortgagors are factually unsupported and without apparent merit (*see*, ***Becher v Feller***, 64 AD3d 672, *supra;* ***U.S. Bank N. A. v Slavinski***, 78 AD3d 1167, 912 NYS2d 285 [2d Dept 2010]). In any event, the failure by the defendant mortgagors to raise and/or assert each of their 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 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 the defendant mortgagors 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]; *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 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 and the affirmative defenses 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 defendants, John Doe #1-12, is granted (*see*, ***PHH Mtge. Corp. v Davis***, 111 AD3d 1110, 975 NYS2d 480 [3d Dept 2013]; ***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 the above-noted 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 defendants National City Bank, People of the State of New York and Excel Acquisitions LLC (*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 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 all of 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; ***Green Tree Servicing, LLC v Cary,*** 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]; ***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 is determined as set forth 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: 8-26-14
Riverhead, New York

Emily Pines
EMILY PINES
J. S. C.