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| US Bank N.A. v Winter |
| 2014 NY Slip Op 32829(U) |
| October 24, 2014 |
| Supreme Court, Suffolk County |
| Docket Number: 10-36444 |
| Judge: Jerry Garguilo |
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 12-4-13
ADJ. DATE 10/29/14
Mot. Seq. # 001 - MG

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US BANK NATIONAL ASSOCIATION, AS
TRUSTEE FOR BAFC 2007-2
3476 Stateview Boulevard
Ft. Mill, SC 29715

GROSS POLOWY ORLANS, LLC
Attorneys for Plaintiff
25 Northpointe Parkway, Suite 25
Amherst, New York 14228

Plaintiff,

MICHAEL V. DEVINE, ESQ.
Attorneys for Defendant - Winter
1000 Main Street
Port Jefferson, New York 11777

- against -

RONALD WINTER A/K/A RONALD A.
WINTER, CCU LLC, CHRISTINE WAUGH,
M&T CREDIT SERVICES A/A/O L&B
LINCOLN MERCURY, INC., MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS,
INC. AS NOMINEE FOR CITIBANK, N.A.,
NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE,
JOHN DOE (Said name being fictitious, it being
the intention of Plaintiff to designate any and all
occupants of premises being foreclosed herein,
and any parties, corporations or entities, if any,
having or claiming an interest or lien upon the
mortgaged premises.)

Defendant.

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Upon the following papers numbered 1 to 21 read on this motion for summary judgment and an order of reference; Notice of Motion/ Order to Show Cause and supporting papers 1 - 21; ~~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,

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US Bank v Winter
 Index No. 10-36444
 Page 2

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that this unopposed motion by plaintiff US Bank National Association, as Trustee for BAFC 2007-2 (US Bank) pursuant to CPLR 3212 for summary judgment on its complaint as against defendant Ronald Winter a/k/a Ronald A. Winter, fixing the defaults as against the non-appearing, non-answering defendants, for leave to amend the caption of this action pursuant to CPLR 3025 (b) and, for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is granted; and it is further

ORDERED that the caption is hereby amended by deleting therefrom plaintiff's address, by substituting "Jane Doe" #1 in place of "John Doe" and, by substituting "John Doe" #1 in place of "John Doe"; and it is further

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

ORDERED that the caption of this action hereinafter appear as follows:

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF SUFFOLK

 US BANK NATIONAL ASSOCIATION, AS TRUSTEE
 FOR BAFC 2007-2

Plaintiff,

- against -

RONALD WINTER A/K/A RONALD A. WINTER,
 CCU LLC, CHRISTINE WAUGH, M&T CREDIT
 SERVICES A/A/O L&B LINCOLN MERCURY, INC.,
 MORTGAGE ELECTRONIC REGISTRATION
 SYSTEMS, INC. AS NOMINEE FOR CITIBANK, N.A.,
 NEW YORK STATE DEPARTMENT OF TAXATION
 AND FINANCE, "JANE DOE" #1, "JOHN DOE" #1

Defendants.

 This is an action to foreclose a mortgage on premises known as 1541 1st Street, West Babylon, New York. On October 6, 2006, defendant Ronald A. Winter executed a fixed rate note in favor of American Brokers Conduit agreeing to pay the sum of \$496,000.00 at the yearly rate of 6.625 percent.

On the same date, defendants Ronald A. Winter and Nancy V. Winter executed a mortgage in the principal sum of \$496,000.00 on the subject property. The mortgage indicated American Brokers Conduit to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of American Brokers Conduit as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on November 20, 2006 in the Suffolk County Clerk's Office. Thereafter, on September 21, 2010, the mortgage was transferred by assignment of mortgage from MERS, as nominee for American Brokers Conduit to plaintiff US Bank. The assignment of mortgage was recorded on November 1, 2010 with the Suffolk County Clerk's Office.

America's Servicing Company sent a notice of default dated April 18, 2010 to defendant Ronald A. Winter (defendant Winter) stating that he had defaulted on his note and mortgage and that the amount past due was \$6,635.96. As a result of defendant's continuing default, plaintiff commenced this foreclosure action. In its complaint, plaintiff alleges in pertinent part that defendant Winter breached his obligations under the terms of the note and mortgage by failing to make his monthly payments commencing with the March 1, 2010 installment. Defendant Winter interposed an answer consisting of a general denial.

The Court's computerized records indicate that a foreclosure settlement conference was held on March 29, 2012 at which time this matter was referred as an IAS case since a resolution or settlement had not been achieved. Thus, there has been compliance with CPLR 3408 and no further settlement conferences are required.

Plaintiff now moves for summary judgment on its complaint contending that defendant Winter breached his obligations under the terms of the note and mortgage by failing to tender payments commencing with the installment due on the March 1, 2010. In support of its motion, plaintiff submits among other things: the sworn affidavit of Rodolfo Arias, vice president loan documentation of Wells Fargo Bank, N.A., plaintiff's servicer; the affirmation of Kelly A. Consentino, Esq. in support of the instant motion; the affirmation of Michael W. Nardolillo, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the pleadings; the note, mortgage and an assignment of mortgage; notices pursuant to RPAPL 1320, 1304 and 1303; affidavits of service for the summons and complaint; an affidavit of service for the instant summary judgment motion upon defendant Winter's counsel; and a proposed order appointing a referee to compute.

"[I]n an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default" (*Republic Natl. Bank of N.Y. v O'Kane*, 308 AD2d 482, 482, 764 NYS2d 635 [2d Dept 2003]; see *Argent Mtge. Co., LLC v Mentosana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Once a plaintiff has made this showing, the burden then shifts to defendant to establish by admissible evidence the existence of a triable issue of fact as to a defense (see *Washington Mut. Bank v Valencia*, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]).

Here, plaintiff produced the note executed by defendant Winter and the mortgage executed by defendants Ronald A. Winter and Nancy V. Winter, as well as evidence of defendant's nonpayment, thereby establishing a prima facie case as a matter of law (see *Wells Fargo Bank Minnesota, Natl.*

US Bank v Winter
 Index No. 10-36444
 Page 4

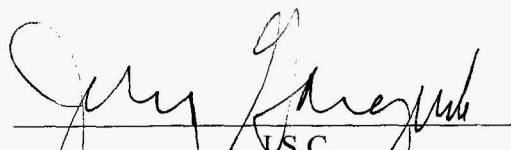
Assn. v Mastropaolo, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). Rodolfo Arias avers that defendant Winter defaulted under the terms and conditions of the note and mortgage by failing to tender payment for the monthly installment due for March 1, 2010 and subsequent payments thereafter; that a notice of default was sent to defendant White; that a 90 day pre-foreclosure notice was sent to defendant White; and, that the default has not been cured.

Defendant Winter has not submitted opposition to the motion. Defendant's answer is insufficient, as a matter of law, to defeat plaintiff's unopposed motion (*see Argent Mtge. Co., LLC v Montesana*, 79 AD3d 1079, 915 NYS2d 591; *Citibank, N.A. v Souto Geffen Co.*, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]; *Greater N.Y. Sav. Bank v 2120 Realty Inc.*, 202 AD2d 248, 608 NYS2d 463 [1st Dept 1994]). Since no opposition to the instant motion was filed by defendant, no triable issue of fact was raised in response to plaintiff's prima facie showing (*see Flagstar Bank v Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Wells Fargo Bank Minnesota v Perez*, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]; *see also Zanfini v Chandler*, 79 AD3d 1031, 912 NYS2d 911 [2d Dept 2010]).

Based upon the foregoing, the motion for summary judgment is granted against defendant Winter. Plaintiff's request for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is also granted (*see Green Tree Serv. v Cary*, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]; *Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *Bank of East Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

The proposed order appointing a referee to compute pursuant to RPAPL 1321 is signed simultaneously herewith as modified by the court.

Dated: 10/29/14


 J.S.C.
HON. JERRY GARGUILO

FINAL DISPOSITION NON-FINAL DISPOSITION