MEMORANDUM

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24
Justice

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ONE WEST BANK, FSB.,

Plaintiff,

Index No: 2900/11

Motion
Dated: October 7, 2013

-against-

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HECTOR MOORE, MAXINE MOORE, ET AL.,

Defendants.

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This is a motion by defendants Hector Moore and Maxine Moore for an order dismissing the action for failure to prosecute, or in the alternative, striking the complaint and counterclaims as a result of plaintiff's failure to comply with discovery, and other related relief. Plaintiff cross moves for summary judgment, the appointment of a Referee to compute and other related relief.

This is an action by plaintiff to foreclose on a mortgage on residential property located at 221 Beach 29th Street, Far Rockaway, New York. Plaintiff alleges that it is the holder of the subject mortgage and note. Plaintiff further alleges that defendants defaulted under the terms of the mortgage and note by failing to make the payments due beginning on June 1, 2010. Plaintiff subsequently commenced this foreclosure action, and defendant thereafter, served an Answer with affirmative defenses and counterclaims. Defendants now seek to dismiss the action on

the ground, *inter alia*, that plaintiff has failed to prosecute the action and has not complied with discovery requests. Plaintiff cross moves for summary judgment and the appointment of a Referee to compute.

The court will first address the cross motion by plaintiff for summary judgment.

On a motion for summary judgment in a foreclosure action, a plaintiff makes a prima facie showing by producing the mortgage, the unpaid note and proof of the default by the defendant. (*Redrock Kings, LLC v Kings Hotel, Inc.*, 109 AD3d 602, 602 [2d Dept 2013]; *Wachovia Bank, N.A. v Carcano*, 106 AD3d 724, 725 [2d Dept 2013]; *Wells Fargo Bank, N.A. v Webster*, 61 AD3d 856, 856 [2d Dept 2009]; *Household Fin. Realty Corp. of New York v Winn*, 19 AD3d 545, 546 [2d Dept 2005].) In the case at bar, plaintiff satisfied its initial burden demonstrating its entitlement to summary judgment. Plaintiff submits the mortgage, the unpaid note and evidence of the default by the defendants. Plaintiff submits the affidavit of Rebecca Marks, the Manager for the plaintiff bank. Ms. Marks avers that in the regular performance of her job functions, she is familiar with the business records maintained by the plaintiff and further avers that the records are made and kept in the regular course of plaintiff's business activity. Ms. Marks states that she acquired personal knowledge of the matters regarding this case by personally examining the

business records. Ms. Marks avers that defendants have been in default on their mortgage since June 1, 2010, and the default has not been cured.

In opposition, defendant has failed to assert any valid defenses which could raise a triable issue of fact. (*Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753, 755 [2d Dept 2010].) As a first affirmative defense, defendants assert that the summons and complaint were not properly served. However, defendants have waived this affirmative defense by having failed to move to dismiss the complaint on that ground within 60 days after service of the Answer. (CPLR 3211[e]; *Putnam County Sav. Bank v Mastrantone*, 111 AD3d 914, 914 [2d Dept 2013].)

The second affirmative defense, which asserts bad faith denial of a loan modification, is without merit. Defendants have not provided any evidence of bad faith by the plaintiff. Indeed, plaintiff submits numerous pages of correspondence with the defendants, which indicate that the plaintiff thoroughly reviewed defendants' requests for a loan modification. Moreover, following foreclosure settlement conferences in this court, Court Attorney/Referee Lance Evans noted that the defendants were unable to demonstrate their financial viability to qualify for a loan modification. In any event, a bank is under no obligation to modify a loan, and such refusal to grant a loan modification does not constitute bad faith. (*JP Morgan Chase Bank, N.A. v*

Ilardo, 36 Misc 3d 359, 380 [Sup Ct, Suffolk County 2012].)

The third affirmative defense that plaintiff lacks standing to maintain this action and fourth affirmative defense that plaintiff has failed to include a necessary party are without merit. In a foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced. (*Bank of N.Y. v Silverberg*, 86 AD3d 274, 279 [2d Dept 2011]; *Countrywide Home Loans, Inc. v Gress*, 68 AD3d 709, 709 [2d Dept 2009].) "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident." (*U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 754 2d Dept 2009]; *see HSBC Bank USA v Hernandez*, 92 AD3d 843, 844 [2d Dept 2012].) In addition, an instrument payable to order and indorsed in blank becomes payable to the bearer and may be negotiated by delivery alone. (*see* UCC § 3-204[2]; *Mortgage Elec. Registration Sys. v Coakley*, 41 AD3d 674, 674 [2d Dept 2007].) Where standing is raised a defense by the defendant, the plaintiff is required to prove its standing before it may be determined whether the plaintiff is entitled to relief. (*U.S. Bank, N.A. v Sharif*, 89 AD3d 723, 724 [2d Dept 2011]; *U.S. Bank, N.A. v Collymore*, 68 AD3d at 753.)

In the case at bar, plaintiff established its standing as the holder of the note and mortgage by demonstrating that the note was physically delivered to it prior to the commencement of this action. In her affidavit, Ms. Marks states that plaintiff was the holder and was in possession of the note at the time this action was commenced. (*see Deutsche Bank Natl. Trust Co. v Whalen*, 107 AD3d 931, 932 [2d Dept 2013].) Furthermore, plaintiff submits the Loan Agreement between The Federal Deposit Insurance Corporation (FDIC) as Receiver for Indymac Federal Bank, FSB and the plaintiff, dated March 19, 2009, whereby the plaintiff acquired various assets, including the loans of the original lender, IndyMac Bank.

The fifth affirmative defense asserts predatory lending by the plaintiff. However, this defense merely pleads conclusions of law without any supporting facts, and, thus, is insufficient and fatally deficient. (*see Becher v Feller*, 64 AD3d 672, 677 [2d Dept 2009]; *Fireman's Fund Ins. Co. v Farrell*, 57 AD3d 721, 723 [2d Dept 2008].)

The sixth affirmative defense asserts plaintiff's failure to elect its remedies under RPAPL § 1301. The complaint, however, alleges that there are no pending proceedings at law or otherwise to collect or enforce the note and mortgage. Further, defendants never raise this affirmative defense in their opposition to the plaintiff's cross motion. (*see First*

Nationwide Bank v Brookhaven Realty Assocs., 223 AD2d 618, 621 [2d Dept 1996].) Thus, this affirmative defense lacks merit.

The seventh affirmative defense alleges that plaintiff has violated Section 8 of the Real Estate Settlement Procedures Act ("RESPA"). Again, this defense merely pleads conclusions of law without any supporting facts, and, thus, is invalid.

Defendant's eighth affirmative defense alleges failure to state a claim for which relief can be granted. As noted above, though, plaintiff has produced the unpaid note, the mortgage and proof of default by the defendants. Thus, this affirmative defense, too, lacks merit.

With respect to the counterclaims, the first counterclaim, which alleges bad faith denial of the loan modification and breach of contract is without merit. As noted above, the Court Attorney/Referee found that defendants lacked financial viability to qualify for a loan modification.

For similar reasons, the second counterclaim, which alleges that plaintiff maintains a deceptive loan modification program, must be dismissed.

The third counterclaim asserts predatory lending practices by the plaintiff. As noted above, such allegation is conclusory and lacks any factual support.

Defendants' fourth counterclaim that plaintiff engaged in deceptive business practices in violation of General Business Law

§ 349 is without merit. To assert a claim under General Business Law § 349(a), a party must plead that (i) the challenged conduct was consumer oriented, (ii) the conduct was materially misleading and (iii) he sustained damages. (*Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]; *Emigrant Mtge. Co., Inc. v Fitzpatrick*, 95 AD3d 1169, 1172 [2d Dept 2012]; *Lum v New Century Mtge. Corp.*, 19 AD3d 558, 559 [2d Dept 2005].) Here, defendants have failed to allege any of these elements, and, thus, cannot maintain a claim pursuant to this statute.

As a fifth counterclaim, defendants allege fraudulent loan modification agreement practices. Again, the evidence before the court, including the order from the Court Attorney/Referee, establishes that plaintiff has not engaged in any fraudulent conduct.

The sixth counterclaim alleges that "securitization of the note and mortgage caused a destruction of the mortgagor-mortgagee relationship ... by imposing other entities in the relationship which had no interest in bringing the mortgage back to a performing status..." This claim lacks any factual basis and fails to state a cause of action.

In the affirmation and affidavits in opposition to the cross motion, defendants aver that plaintiff has failed to strictly comply with the notice requirements of RPAPL § 1303. RPAPL § 1303 requires the plaintiff in a residential foreclosure action

provide a specific foreclosure notice to the homeowners at the time the summons and complaint is served. The notice must be in bold, 14-point type and printed on colored paper that is different from the color of the summons and complaint. Here, the process server alleges in his affidavit of service that he served the summons and complaint along with a copy of the Homeowners Foreclosure Notice as required by RPAPL 1303, which notice was printed on a colored pieces of paper, which color differed from that of the color of the summons and complaint, and the notice was in bold, 14-point type. The defendants aver that all the documents in the complaint were printed on white paper, and there were no color pages in any of the documents comprising the complaint. Such conclusory assertion is insufficient to raise any factual issue as to whether plaintiff failed to strictly comply with RPAPL § 1303 and defeat the presumption of proper service raised by the process server's affidavit. (*see Deutsche Bank Natl. Trust Co. v DaCosta*, 97 AD3d 630, 631 [2d Dept 2012]; *Wassertheil v Elburg, LLC*, 94 AD3d 753, 753 [2d Dept 2012].)

Defendants' argument that plaintiff has not furnished responses to interrogatories and has not complied with discovery is not a basis to deny the plaintiff's cross motion for summary judgment. Defendants have not established how further discovery would lead to additional relevant evidence. (*see Swedbank, AB v*

Hale Ave. Borrower, LLC, 89 AD3d 922, 924 [2d Dept 2011].)

Accordingly, the motion by defendants Hector Moore and Maxine Moore is denied in its entirety.

The cross motion by the plaintiff for summary judgment on the complaint, striking the affirmative defenses and counterclaims, the appointment of a Referee to compute and amendment of the caption is granted.

Settle Order.

Dated: February 27, 2014

AUGUSTUS C. AGATE, J.S.C.