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SHORT FORM ORDER

INDEX
NO.: 11-34305

SUPREME COURT - STATE OF NEW YORK
IAS PART 32 - SUFFOLK COUNTY

PRESENT: HON. W. GERARD ASHER
Justice of the Supreme Court

x

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP., HOME EQUITY ASSET TRUST 2004-4, HOME EQUITY PASS-THROUGH CERTIFICATES, SERIES 2004-4

Plaintiff,

-against-

DEBRA ANN OLIVERI and "JOHN DOE #1" to "JOHN DOE #10", the last 10 names being fictitious and unknown to plaintiff the persons or parties intended being the person or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the verified complaint,

Defendants.

x

MOTION DATE 1-21-14
ADJ. DATE
Mot. Seq. #001 - MG
#002 - XMD

McCABE, WEISBERG & CONWAY, P.C.
Attorneys for Plaintiff
145 Huguenot Street, Suite 499
New Rochelle, NY 10801

WOLINSKY, PARNELL & MONTGOMERY, LLP
Attorneys for Defendant
Debra Ann Olivieri
329 Hawkins Avenue
Lake Ronkonkoma, NY 11779

Upon the following papers numbered 1 to 29 read on this motion summary judgment and an order of reference; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers 13 - 25; Reply Affirmation and supporting papers 26 - 29; ~~Replying Affidavits and supporting papers ____; Other ____; (and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (001) by plaintiff, U.S. Bank National Association, as Trustee for Credit Suisse First Boston Mortgage Securities Corp., Home Equity Asset Trust 2004-4, Home Equity Pass-Through Certificates, Series 2004-4 (US Bank), for, *inter alia*, an order pursuant to CPLR 3212 granting summary judgment in its favor against defendant Debra Ann Olivieri (defendant), 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 cross motion (002) by defendant for an order pursuant to CPLR 3212

granting summary judgment in her favor against plaintiff and vacating a discovery stay, is denied; and it is further

ORDERED that the caption is hereby amended by striking therefrom defendants "John Doe #1" through "John Doe #10"; and it is further

ORDERED that plaintiff is directed to serve a copy of this order 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

_____x

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP., HOME EQUITY ASSET TRUST 2004-4, HOME EQUITY PASS-THROUGH CERTIFICATES, SERIES 2004-4

Plaintiff,

-against-

DEBRA ANN OLIVERI

Defendant.

_____x

This is an action to foreclose a mortgage on property known as 9 Keswick Drive, East Islip, New York. On March 24, 2004, defendant executed a fixed rate note in favor of Lend America agreeing to pay the sum of $317,000.00 at the yearly interest rate of 5.8750 percent. On said date, defendant also executed a mortgage in the principal sum of $317,000.00 on the subject property. The mortgage indicated Lend America to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of Lend America as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on May 11, 2004 in the Suffolk County Clerk's Office. Thereafter, on October 13, 2011, the mortgage was transferred by assignment of mortgage from MERS, as nominee for Lend America, to plaintiff US Bank.

America's Servicing Company sent a notice of default dated March 21, 2010 to defendant

stating that she had defaulted on the note and mortgage and that the amount past due was $6,567.02. As a result of her continuing default, plaintiff commenced this foreclosure action on November 7, 2011. In its complaint, plaintiff alleges in pertinent part that defendant breached her obligations under the terms of the note and mortgage by failing to pay the installment due on February 1, 2010. Defendant interposed an answer with affirmative defenses.

The Court's computerized records indicate that a foreclosure settlement conference was held on June 26, 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 conference is required.

Plaintiff now moves for summary judgment on its complaint. In support of its motion, plaintiff submits among other things, the affirmation of Mark Golab, Esq. in support of the motion; the affirmation of Peter Dinsmore, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the affidavit of Alejandro E. Roedel, vice president loan documentation of Wells Fargo Bank, N.A., the servicer of the mortgage loan; the pleadings; the note, mortgage and an assignment of mortgage; proof of notices pursuant to RPAPL 1320, 1303 and 1304; affidavits of service of the summons and complaint; an affidavit of service of the instant summary judgment motion upon the defendant's counsel; and, a proposed order appointing a referee to compute. Defendant has submitted a cross motion opposing plaintiff's motion and seeking an order dismissing the complaint on the ground that plaintiff does not have standing.

"[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, 764 NYS2d 635 [2d Dept 2003]; *see* ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]; ***Wells Fargo Bank, N.A. v Webster***, 61 AD3d 856, 877 NYS2d 200 [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' " (***U.S. Bank Natl. Assn. TR U/S 6/01/98 [Home Equity Loan Trust 1998–2] v Alvarez***, 49 AD3d 711, 711, 854 NYS2d 171 [2d Dept 2008], *quoting* ***Mahopac Natl. Bank v Baisley***, 244 AD2d 466, 664 NYS2d 345 [2d Dept 1997], *lv to appeal dismissed* 91 NY2d 1003, 676 NYS2d 129 [1998]; *see also* ***Emigrant Mtge. Co., Inc. v Beckerman***, 105 AD3d 895, 895, 964 NYS2d 548 [2d Dept 2013]).

Here, plaintiff has established its *prima facie* entitlement to summary judgment against the answering defendant as such papers included a copy of the mortgage and the unpaid note together with due evidence of defendant's default in payment under the terms of the loan documents (*see* ***Jessabell Realty Corp. v Gonzales***, 117 AD3d 908, 985 NYS2d 897 [2d Dept 2014]; ***Bank of New York Mellon Trust Co. v McCall***, 116 AD3d 993, 985 NYS2d 255 [2d Dept 2014]; ***North Bright Capital, LLC v 705 Flatbush Realty, LLC***, 66 AD3d 977, 889 NYS2d 596 [2d Dept 2009]; ***Countrywide Home Loans, Inc. v Delphonse***, 64 AD3d 624, 883 NYS2d 135 [2d Dept 2009]).

The standing of a plaintiff in a mortgage foreclosure action is measured by its ownership, holder status or possession of the note and mortgage at the time of the commencement of the action

(*see* ***U.S. Bank of N.Y. v Silverberg***, 86 AD3d 274, 279, 926 NYS2d 532 [2d Dept 2011]; ***U.S. Bank, N.A. v Adrian Collymore,*** 68 AD3d 752; ***Wells Fargo Bank, N.A. v Marchione***, 69 AD3d 204, 887 NYS2d 615 [2d Dept 2009]). Because "a mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation" (***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, 961 NYS2d 200 [2d Dept 2013] [internal citations omitted]), a mortgage passes as an incident of the note upon its physical delivery to the plaintiff. Holder status is established where the plaintiff is the special indorsee of the note or takes possession of a mortgage note that contains an indorsement in blank on the face thereof as the mortgage follows as incident thereto (*see* UCC § 3–202; § 3–204; § 9–203[g]). Here, Alejandro E. Roedel avers that as of November 7, 2011, the time of foreclosure commencement, plaintiff has been in possession of the note and mortgage (*see* ***Mortgage Elec. Registration Sys., Inc. v Coakley***, 41 AD3d 674, 838 NYS2d 622 [2d Dept 2007]). The plaintiff thus has established, *prima facie*, it has standing to prosecute this action.

It was thus incumbent upon the answering defendant to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's *prima facie* showing or in support of the affirmative defenses asserted in her answer or otherwise available to her (*see* ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***Grogg Assocs. v South Rd. Assocs.***, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; ***Wells Fargo Bank v Karla***, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; ***Washington Mut. Bank v O'Connor***, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]; ***J.P. Morgan Chase Bank, N.A. v Agnello***, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; ***Aames Funding Corp. v Houston***, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]).

In her opposing papers, defendant re-asserted her pleaded affirmative defense that the plaintiff lacks standing to prosecute its claims for foreclosure and sale. The defendant contends that a question of fact exists with respect to the plaintiff's standing as plaintiff failed to submit admissible evidence of the assignment of the note; that MERS as nominee of the Lend America had no connection to the note and was given no authority in relation to the note; and, that the note and mortgage were held by different entities at some point since execution. Counsel also indicates that the allonge attached to the note contains blank spaces and no date.

The court finds that none of defendant's allegations give rise to questions of fact that implicate a lack of standing on the part of the plaintiff. Here, the uncontroverted facts establish that plaintiff physically possessed the promissory note, which was indorsed in blank, prior to the commencement of the action. Here, neither the defenses raised in her answer nor, those asserted on this motion rebut the plaintiff's *prima facie* showing of its entitlement to summary judgment.

Defendant also cross-moves for summary judgment dismissing the complaint on the grounds that plaintiff failed to comply with the default notice requirements contained in the mortgage and the notice requirements pursuant to RPAPL 1304, conditions precedent to the commencement of this foreclosure action. Specifically, defendant asserts by affidavit that "[she] does not recall having received the letters submitted by plaintiff as part of his motion as exhibit F"[1]. Plaintiff contends that it

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[1] Plaintiff's exhibit "F", which is annexed to its motion in chief, consists of a 30 day notice of default dated 3/21/2010 and a 90 day pre-foreclosure notice pursuant to RPAPL 1304.

complied with the mandatory conditions precedent by properly serving defendant with the RPAPL 1304 notice and notice of default. Plaintiff further notes that defendant did not deny having received the foregoing notices but rather, that she did not recall having received such notices. The Court notes that defendant also does not deny having received the loan proceeds or having defaulted on her mortgage loan payments in her affidavit (*see* ***Citibank, N.A. v Souto Geffen Co.***, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]). Instead, she relies on the alleged failure of plaintiff to provide the requisite notices pursuant to RPAPL 1303, 1304 and the 30-day notice of default.

Here, the plaintiff satisfied its burden that service of the RPAPL 1304 notice and notice of default were properly made. The affidavit of Alejandro E. Roedel evidences that at least 90 days prior to the commencement of the instant action, plaintiff sent the 90 day pre-foreclosure RPAPL 1304 notice to defendant by first class and certified mail to her last known address. Roedel further avers that on March 21, 2010 a 30-day demand letter was sent to defendant. Defendant's bald and unsupported assertion that she does not recall having received the foregoing notices is without merit. The affidavit of plaintiff's servicer along with the annexed documentary evidence sufficiently established to this Court's satisfaction proper service of the foregoing documents.

Also unavailing is the branch of defendant's cross motion for an order dismissing the complaint on the ground that plaintiff failed to comply with the requirements of RPAPL 1303. Proper service of the notice required by RPAPL 1303 is a condition precedent to the commencement of a residential foreclosure action, and is the plaintiff's burden to establish (*see* ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, 961 NYS2d 200 [2d Dept 2013]; ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]; ***First Natl. Bank of Chicago v Silver***, 73 AD3d 162, 899 NYS2d 256 [2d Dept 2010]). Here, plaintiff contends that it has complied with the mandatory condition precedent by properly serving defendant with the RPAPL 1303 notice. It offers an affidavit of service dated November 11, 2011, by a process server, indicating that service of a copy of the summons and complaint and the notice pursuant to RPAPL 1303, was made on defendant Debra Ann Olivieri pursuant to CPLR 308 (1) on November 9, 2011 at 3:08 PM.

A process server's sworn affidavit of service constitutes prima facie evidence of proper service (*see* ***ACT Prop., LLC v Ana Garcia***, 102 AD3d 712, 957 NYS2d 884 [2d Dept 2013]; ***Deutsche Bank Natl. Trust Co. v Pietranico***, 102 AD3d 724, 957 NYS2d 868 [2d Dept 2013]; ***Bank of N.Y. v Espejo***, 92 AD3d 707, 939 NYS2d 105 [2d Dept 2012]). A defendant can rebut the process server's affidavit by an affidavit containing specific and detailed contradictions of the allegations in the process server's affidavit (*see* ***Bank of N.Y. v Espejo***, 92 AD3d 707; ***Bankers Trust Co. of California, NA v Tsoukas***, 303 AD2d 343, 756 NYS2d 92 [2d Dept 2003]). However, where as here, there is only the unsubstantiated denial of receipt of a proper RPAPL 1303 notice by defendant's counsel alone, such is insufficient to rebut the presumption of proper service created by the affidavit of the plaintiff's process server (*see* ***U.S. Bank Natl. Assn. v Tate***, 102 AD3d 859, 958 NYS2d 722 [2d Dept 2013]; ***Stevens v Charles***, 102 AD3d 763, 958 NYS2d 443 [2d Dept 2013]).

Likewise unavailing is defendant's contention that plaintiff's summary judgment motion should be denied in order to afford defendant an opportunity to obtain discovery. CPLR 3212 (f)

provides that "should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just". Appellate case authorities have long instructed that to avail oneself of the safe harbor this rule affords, the claimant must "offer an evidentiary basis to show that discovery may lead to relevant evidence and that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff" (***Martinez v Kreychmar***, 84 AD3d 1037, 923 NYS2d 648 [2d Dept 2011]; *see* ***Garcia v Lenox Hill Florist III, Inc.***, 120 AD3d 1296, 993 NYS2d 86 [2d Dept 2104]; ***Seaway Capital Corp. v 500 Sterling Realty Corp.***, 94 AD3d 856, 941 NYS2d 871 [2d Dept 2012]). In addition, the party asserting the rule must demonstrate that he or she made reasonable attempts to discover facts which would give rise to a genuine triable issue of fact on matters material to those at issue (*see* ***Swedbank, AB v Hale Ave. Borrower, LLC***, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]). The opposing papers submitted by defendant were insufficient to satisfy the aforementioned statutory burden. Thus, defendant failed to sufficiently demonstrate that she made reasonable attempts to discover the facts which would give rise to a triable issue of fact or that further discovery might lead to relevant evidence (*see* CPLR 3212 [f]; ***Anzel v Pisotino***, 105 AD3d 784, 962 NYS2d 700 [2d Dept 2013]; ***Cortes v Whelan***, 83 AD3d 763, 922 NYS2d 419 [2d Dept 2011]; ***Sasson v Setina Mfg. Co., Inc.***, 26 AD3d 487, 810 NYS2d 500 [2d Dept 2006]). Defendant's claim is thus rejected as unmeritorious.

With respect to any of her remaining affirmative defenses, defendant has failed to raise any triable issues 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 (*see* ***Cochran Inv. Co., Inc. v Jackson***, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007] *quoting* ***Mahopac Natl. Bank v Baisley***, 244 AD2d 466, 664 NYS2d 345 [2d Dept 1997]). Here, answering defendant has failed to demonstrate, through the production of competent and admissible evidence, a viable defense which could raise a triable issue of fact (*see* ***Deutsche Bank Natl. Trust Co. v Posner***, 89 AD3d 674, 933 NYS2d 52 [2d Dept 2011]). "Motions for summary judgment may not be defeated merely by surmise, conjecture or suspicion" (***Shaw v Time-Life Records***, 38 NY2d 201, 379 NYS2d 390 [1975]).

Accordingly, the motion for summary judgment is granted against the answering defendant. Plaintiff's request for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is granted (*see* ***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 defendant's cross-motion is denied in its entirety.

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

Dated: March 10, 2015

W. Gerard Asher
J.S.C.
HON. W. GERARD ASHER

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