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SHORT FORM ORDER

COPY

INDEX
NO.: 33262-11

SUPREME COURT - STATE OF NEW YORK
IAS PART 21 - SUFFOLK COUNTY

PRESENT: Hon. JOHN H. ROUSE
Acting Justice of the Supreme Court

x

J.P. Morgan Mortgage Acquisition Corp.

Plaintiff,

-against-

Barbara Toich, Matthew A. Toich, Clerk of Suffolk County District Court, CitiFinancial, Inc. and "JOHN DOE #1" through "JOHN DOE #12", the last twelve names being fictitious and unknown to plaintiff, the person or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises being foreclosed herein,

Defendants.

x

MOTION DATE: 6-26-13
ADJ. DATE: 6/17/15
Mot. Seq. # 001-MG

ECKERT SEAMANS CHERIN & MELLOTT, LLC
Attorneys for Plaintiff
10 Bank Street, Suite 700
White Plains, N. Y. 10606

RAYMOND LANG & ASSOCIATES
Attorney for Defendants
Barbara Toich
Matthew Toich
380 Townline Road, Suite 150
Hauppauge, N. Y. 11788

Upon the following papers numbered 1 to 18 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 18; 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,

ORDERED that this motion by the plaintiff for, inter alia, an order awarding summary judgment in its favor and against the defendants Barbara Toich and Matthew A. Toich, striking their answer and dismissing the affirmative defenses set forth therein; fixing the defaults of the non-answering defendants; appointing a referee to compute and ascertain; and amending the caption is granted; and it is

ORDERED that James Gaughran, Esq. with an office at 191 New York Ave. Huntington N.Y. is appointed Referee to ascertain and compute the amount due upon the note and mortgage documents which this action was brought to foreclose, except as to attorneys' fees, and to examine and report whether the mortgaged property can be sold in parcels; and it is

ORDERED that pursuant to CPLR 8003 (a) the Referee be paid the fee of $250.00 for the computation of the amount due the plaintiff; and it is

ORDERED that by accepting this appointment the Referee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including but not limited to, section 36.2 (c) ("Disqualifications from appointment") and section 36.2 (d) ("Limitations on appointments based upon compensation"); and it is

ORDERED that the Referee is prohibited from accepting or retaining any funds for him/herself or paying funds to him/herself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is

ORDERED that the caption is amended by substituting "Janet Smith" for the fictitious defendant John Doe #1, and excising remaining the fictitious named defendants, John Doe 2-12; and it is

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; 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 caption of this action shall hereinafter appear as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

J.P. Morgan Mortgage Acquisition Corp.

Plaintiff,

-against-

Barbara Toich, Matthew A. Toich, "Janet Smith",
Clerk of Suffolk County District Court, and
CitiFinancial, Inc.

Defendants.

This is an action to foreclose a mortgage on residential property known as 2 Harmon Drive, Huntington, New York 11743. On May 4, 2005, the defendant Barbara Toich executed an adjustable-rate note (the 2005 note) in favor of Option One Mortgage Corporation (the lender) in the principal sum of $547,500.00. To secure said note, Mrs. Toich and her husband, Matthew Toich (the defendant mortgagors) gave the lender a mortgage also dated May 4, 2005 (the 2005 mortgage) on the property.

Thereafter, on July 25, 2007, Mrs. Toich executed a GAP adjustable-rate note (the GAP note), pursuant to which she agreed to repay the lender the principal sum of $100,500.00, with interest accruing. In order to secure the GAP note, the defendant mortgagors gave the lender a GAP mortgage (the GAP mortgage) which encumbered the property. Additionally, on July 25, 2007, the defendant mortgagors executed a consolidation, extension and modification agreement (the CEM) which consolidated the 2005 note/mortgage and the GAP note/mortgage to form a single lien in the amount of $648,000,00. In connection with the CEM, Mrs. Toich executed a consolidated adjustable rate note (the consolidated note) dated July 25, 2007, which, among other things, consolidated the indebtedness due under the 2005 note and the GAP note for a total principal amount of $648,000,00, with interest.

On January 26, 2010, Mrs. Toich executed and delivered to the lender a loan modification agreement (the modification agreement), whereby the note and the mortgage were modified to reflect a new unpaid principal balance of $745,270.61. The lender allegedly transferred the aforesaid notes, mortgages, CEM, and modification agreement to J.P. Morgan Mortgage Acquisition Corp. (the plaintiff) by physical delivery prior to commencement, memorialized by, inter alia, assignments of the mortgages, notes and modification agreement prior to commencement.

Mrs. Toich allegedly defaulted on the loan modification agreement by failing to make the monthly payment of principal and interest due on or about April 1, 2010, and each month thereafter. After the defendant mortgagors allegedly failed to cure Mrs. Toich's default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on October 26, 2011.

Issue was joined by the interposition of the defendant mortgagors' verified answer sworn to on December 1, 2011. By their answer, the defendant mortgagors deny all of the allegations set forth in the complaint, and assert two affirmative defenses, alleging, among other things, the following: the plaintiff did not act fairly in negotiating a loan modification with them as they were promised more favorable terms; and the defendant mortgagors are working with a housing counselor to pursue an affordable modification. The remaining defendants have neither appeared nor answered the complaint.

In compliance with CPLR 3408, settlement conferences were scheduled for and/or held before this court's specialized mortgage foreclosure part on February 24 and April 26, 2012. On the last date, 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.

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 2005 note/mortgage, the GAP note/mortgage, the consolidated note/CEM, the modification agreement 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, *supra*). Thus, the plaintiff demonstrated its prima facie burden as to the merits of this foreclosure action.

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 v Lucido***, 2014 NY App Div LEXIS 942, 2014 WL 552996, 2014 NY Slip Op 00956 [2d Dept, Feb. 13, 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]; ***EMC Mtge. Corp. v Stewart***, 2 AD3d 772, 769 NYS2d 408 [2d Dept 2003]; ***United Cos. Lending Corp. v Hingos***, 283 AD2d 764, 724 NYS2d 134 [3d Dept 2001]; ***First Fed. Sav. Bank v Midura***, 264 AD2d 407, 694 NYS2d 121 [2d Dept 1999]; ***JP Morgan Chase Bank, N.A. v Ilardo***, 36 Misc 3d 359, 940 NYS2d 829 [Sup Ct, Suffolk County 2012] [plaintiff not obligated to modify a loan or accept a tender of less than full repayment as demanded]).

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, Inc. 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*). In any event, the failure by the defendant mortgagors to raise and/or assert 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 substituting "Janet Smith" for the fictitious defendant John Doe #1, and excising remaining the fictitious named defendants, John Doe # 2-12, 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 "Janet Smith," Clerk of the Suffolk County District Court and CitiFinancial, Inc. (*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 non-answering 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, partial summary judgment and an order of reference is granted as set forth above.

Dated: June 25, 2015

JOHN H. ROUSE AJSC

____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**