SHORT FORM ORDER

INDEX No. 14-67691

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 1-28-16
ADJ. DATE
Mot. Seq. # 001 -MotD

HUDSON CITY SAVINGS BANK,

Plaintiff,

- against -

SCOTT MAIMAN, NANCY MAIMAN, and JOHN DOE #1" through "JOHN DOE #10", the last 10 names being fictitious and unknown to the Plaintiff, the persons or parties intended being the persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the verified complaint,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the plaintiff, dated December 29, 2015, and supporting papers (including Memorandum of Law dated December 29, 2015); (2) Affirmation in Opposition by the defendants Maiman, dated February 18, 2016, and supporting papers (including Memorandum of Law dated February 18, 2016); (3) Reply Affirmation by the plaintiff, dated February 22, 2016, and supporting papers; (4) Other: stipulations to adjourn motion (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

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

ORDERED that this motion (001) by the plaintiff for, inter alia, an order awarding summary judgment in its favor and against the defendants Scott Maiman and Nancy Maiman, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption is granted solely to the extent indicated below, otherwise denied with leave to renew within 120 days of the date herein, or, in the alternative, the filing of a note of issue within 120 days of the date herein; and it is

ORDERED that the caption is amended by excising the fictitious defendants, "John Doe #1" through "John Doe #10"; and it is

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

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon all parties who have appeared herein and not waived further notice within thirty (30) days of the date herein, and shall promptly file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on real property known as 21 B Hart Place, Dix Hills, New York 11746. On October 29, 2008, the defendants Scott Maiman and Nancy Maiman ("the defendant mortgagors") executed an adjustable-rate note in favor of Hudson City Savings Bank ("the plaintiff") in the principal sum of $700,000.00. To secure said note, the defendant mortgagors gave the lender a mortgage also dated October 29, 2008 on the property. Thereafter, the defendant mortgagors executed an InterestFirst adjustable-rate note in favor of the plaintiff in the sum of $10,178.65, which was secured by a mortgage of the same date. Concurrently, on April 5, 2010, the defendant mortgagors executed and delivered a Consolidation, Extension and Modification Agreement ("CEMA") including a consolidated note and mortgage, consolidating all sums previously advanced by the plaintiff into a single lien. The CEMA was duly recorded in the Office of the Suffolk County Clerk on May 4, 2010.

The defendant mortgagors allegedly defaulted on the mortgage, as modified, by failing to make the monthly payment of principal and interest due on or about December 1, 2013, and each month thereafter. After the defendant mortgagors allegedly failed to cure the default in payment, the plaintiff commenced the instant action by the filing of a lis pendens, summons and complaint on September 22, 2014.

Issue was joined by the interposition of the defendant mortgagors' answer dated November 14, 2014, which has an attached verification by counsel. By their answer, the defendant mortgagors deny all of the allegations in the complaint, and assert fourteen affirmative defenses, alleging, among other things, the failure to comply with the notice provisions of the mortgage and RPAPL § 1304 as well as the failure to comply with the filing requirements of RPAPL § 1306. The remaining defendants have not answered the complaint and, thus, all are in default.

The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor against the defendant mortgagors, and striking their answer; (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. In opposition to the motion, the defendant mortgagors have submitted the affirmation of their counsel and the affidavit of Mr. Maiman. In their opposing papers, the defendant mortgagors re-assert their previously pleaded affirmative defenses of the plaintiff's failure to comply with the notice provisions of the mortgage and RPAPL § 1304 as well as the failure to comply with the filing requirements of RPAPL § 1306. In response, the plaintiff has filed reply papers.

By written stipulations, these motions were adjourned to February 11 and 25, 2016. In the interest of judicial economy, the court has considered the affidavit in opposition of the defendant Scott Maiman (NYSCEF Doc. No. 20), and the defendant mortgagors' memorandum of law in opposition to the motion

(NYSCEF Doc. No. 21), which were e-filed, but not included with the working copies sent to the court.

The court turns first to the issue of the plaintiff's compliance with 30-day default and the 90-day pre-foreclosure notice requirements of RPAPL § 1304. When moving to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is "without merit as a matter of law" (*see*, CPLR 3211 [b]; ***Vita v New York Waste Servs., LLC***, 34 AD3d 559, 559, 824 NYS2d 177 [2d Dept 2006]). In reviewing a motion to dismiss an affirmative defense, this court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference (*see*, ***Fireman's Fund Ins. Co. v Farrell***, 57 AD3d 721, 869 NYS2d 597 [2d Dept 2008]). Moreover, if there is any doubt as to the availability of a defense, it should not be dismissed (*see, id.*). "A defense not properly stated or one that has no merit, however, is subject to dismissal pursuant to CPLR 3211(b). It, thus, may be the target of a motion for summary judgment by the plaintiff seeking dismissal of any affirmative defense after the joinder of issue" (***Carver Fed. Sav. Bank v Redeemed Christian Church of God, Intl. Chapel, HHH Parish, Long Is., NY, Inc.***, 35 Misc3d 1228 [A], 954 NYS2d 758 [Sup Ct, Suffolk County 2012, slip op, at 3]). In order for a defendant to successfully oppose such a motion, the defendant must show his or her possession of a bona fide defense, *i.e.*, one having "a plausible ground or basis which is fairly arguable and of substantial character" (***Feinstein v Levy***, 121 AD2d 499, 500, 503 NYS2d 821 [2d Dept 1986]). Self-serving and conclusory allegations do not raise issues of fact (*see*, ***Rosen Auto Leasing, Inc. v Jacobs***, 9 AD3d 798, 799-800, 780 NYS2d 438 [3d Dept 2004]), and do not require the plaintiff to respond to alleged affirmative defenses which are based on such allegations (***Charter One Bank, FSB v Leone***, 45 AD3d 958, 959, 845 NYS2d 513 [3d Dept 2007]).

In its present form, RPAPL § 1304 provides that in a legal action, including a residential mortgage foreclosure action, at least 90 days before the lender commences an action against the borrower, the lender must send a notice to the borrower including certain language and the notice must be in 14-point type. The notice must be sent by registered or certified mail and also by first-class mail to the last known address of the borrower, and if different, to the residence that is the subject of the mortgage (*see*, RPAPL § 1304). Such notice shall be sent by the lender, assignee or mortgage loan servicer in a separate envelope from any other mailing or notice (*id.*). The statute further provides that the notice shall contain a list of at least five housing counseling agencies that serve the region where the borrower resides (*id.*). RPAPL § 1304 provides that the notice must be sent to the "borrower," a term not defined in the statute (***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 105, 923 NYS2d 609 [2d Dept 2011]).

Proper service of the RPAPL § 1304 notice containing the statutorily-mandated content on the "borrower" or "borrowers" is a condition precedent to the commencement of a foreclosure action, and the plaintiff's failure to show strict compliance requires dismissal (***Hudson City Sav. Bank v DePasquale***, 113 AD3d 595, 596, 977 NYS2d 895 [2d Dept 2014]; ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, 910, 961 NYS2d 200 [2d Dept 2013]; ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, *supra* at 103; *see also*, ***Pritchard v Curtis***, 101 AD3d 1502, 1504, 957 NYS2d 440 [3d Dept 2012]). Since this action was commenced on or after January 14, 2010, the 90-day notice requirement set forth in the statute is applicable (*see*, RPAPL §1304; Laws 2008, ch 472, § 2, eff Sept 1, 2008, as amended by Laws 2009, ch 507, § 1-a, eff Jan 14, 2010). Thus, in support of its motion for summary judgment on the complaint, the plaintiff was required to prove its allegations by tendering sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL 1304, and failure to make this showing requires denial of the

motion, regardless of the opposing papers (***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d at 106 [citation omitted]).

In meeting this burden, the plaintiff benefits from the long-standing doctrine of presumption of regularity: generally, a letter or notice that is properly stamped, addressed, and mailed is presumed to be delivered by that addressee (***Trusts & Guar. Co. v Barnhardt***, 270 NY 350, 352 [1936]; ***News Syndicate Co. v Gatti Paper Stock Corp.***, 256 NY 211, 214-216 [1931]; ***Connolly v Allstate Ins. Co.***, 213 AD2d 787, 787, 623 NYS2d 373 [3d Dept 1995]; ***Kearney v Kearney***, 42 Misc3d 360, 369, 979 NYS2d 226 [Sup Ct, Monroe County 2013]). The presumption of receipt by the addressee "may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed" (***Residential Holding Corp. v Scottsdale Ins. Co.***, 286 AD2d 679, 680, 729 NYS2d 776 [2d Dept 2001]). CPLR 2103 (f) (1) defines mailing as "the deposit of a paper enclosed in a first class postpaid wrapper, addressed to the address designated by a person for that purpose or, if none is designated, at that person's last known address, in a post office or official depository under the exclusive care and custody of the United States Postal Service within the state" (*see*, ***Lindsay v Pasternack Tilker Ziegler Walsh Stanton & Romano LLP***, 129 AD3d 790, 12 NYS3d 124 [2d Dept 2015]). "If that proof is established, the burden shifts to the borrower," and "the final legal truism prevails: once the presumption of proper service has been established, mere denial of receipt is insufficient to rebut the presumption" (***Kearney v Kearney***, 42 Misc3d 360, *supra* at 370; *see*, ***Matter of ATM One v Landaverde***, 2 NY3d 472, 478, 779 NYS2d 808 [2004]).

The plaintiff's submissions are insufficient to demonstrate evidentiary proof of compliance with the 30-day and the 90-day pre-foreclosure default notices (*see*, ***Cenlar, FSB v Weisz***, 136 AD3d 855, 25 NYS3d 308 [2d Dept 2016]; ***Bank of N.Y. Mellon v Aquino***, 131 AD3d 1186, 16 NYS3d 770 [2d Dept 2015]; ***Wells Fargo Bank, NA v Burke***, 125 AD3d 765, 5 NYS3d 107 [2d Dept 2015]; ***Hudson City Sav. Bank v DePasquale***, 113 AD3d 595, 977 NYS2d 895 [2d Dept 2014]). The plaintiff submitted neither an affidavit of service of the 30-day and 90-day notices upon the defendant mortgagors, nor an affidavit from one with personal knowledge of the mailings, along with copies of the certified mailing receipts stamped by the United States Post Office on the date of the alleged mailings of the 90-day notices (*see*, ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, *supra*).

Under the facts presented, the statements set forth in the affidavit of Lorenzo Aperocho regarding the 30-day and 90-day pre-foreclosure notices, even when combined with copies of certain submitted documentation, are insufficient to meet the requirements of the statute (*see*, ***Hudson City Sav. Bank v DePasquale***, 113 AD3d 595, *supra*; ***US Bank N.A. v Lampley***, 46 Misc3d 630, 996 NYS2d 499 [Sup Ct, Kings County 2014]). Although Mr. Aperocho alleges that the subject notices were mailed to the defendant mortgagors, he did not set forth sufficient facts as to how or when compliance was accomplished. He also did not state that he served the notices; nor did he identify the individuals who allegedly did so. Further, it is noted that Mr. Aperochor's affidavit does not constitute sufficient proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed by certified mail and by first class mail (*see*, ***Nocella v Fort Dearborn Life Ins. Co. of N.Y.***, 99 AD3d 877, 955 NYS2d 70 [2d Dept 2012]; *cf.*, ***Preferred Mut. Ins. Co. v Donnelly***, 111 AD3d 1242, 974 NYS2d 682 [4th Dept 2013]; ***Residential Holding Corp. v Scottsdale Ins. Co.***, 286 AD2d 679, *supra*).

The plaintiff's submissions are also insufficient to demonstrate compliance with the filing requirements set forth in RPAPL §§ 1304 and 1306 for the same reasons articulated above, and the court notes that the "Proof of Filing Statement" was not submitted with the plaintiff's initial moving papers. While the complaint contains allegations of compliance with the filing requirements imposed by RPAPL §§ 1304 and 1306, these allegations are insufficient to demonstrate compliance with these statutes. To the extent that the plaintiff attempts to demonstrate by its reply papers that it complied with the filing requirements of RPAPL §§ 1304 and1306, the same may not be used to introduce new arguments in support of the motion (*see*, ***Matter of Harleysville Ins. Co. v Rosario***, 17 AD3d 677, 792 NYS2d 912 [2d Dept 2005]).

The court reaches a different conclusion with respect to the remaining affirmative defenses asserted in the answer. In this regard, the plaintiff submitted sufficient proof to establish, prima facie, that the remaining affirmative defenses set forth in the 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 N.Y. Mellon v Scura***, 102 AD3d 714, 961 NYS2d 185 [2d Dept 2013]; ***Scarano v Scarano***, 63 AD3d 716, 880 NYS2d 682 [2d Dept 2009] [process server's sworn affidavit of service is prima facie evidence of proper service]; ***CFSC Capital Corp. XXVII v Bachman Mech. Sheet Metal Co.***, 247 AD2d 502, 669 NYS2d 329 [2d Dept 1998] [an affirmative defense based upon the notion of culpable conduct is unavailable in a foreclosure action]; ***Connecticut Natl. Bank v Peach Lake Plaza***, 204 AD2d 909, 612 NYS2d 494 [3d Dept 1994] [defense based upon the doctrine of unclean hands lacks merit where a defendant fails to come forward with admissible evidence of showing immoral or unconscionable behavior]). Furthermore, the plaintiff submitted proof of compliance with section 1303 of the Real Property Actions and Proceedings Law (*see*, ***PHH Mtge. Corp. v Israel***, 120 AD3d 1329, 992 NYS2d 355 [2d Dept 2014]; ***U.S. Bank N.A. v Tate***, 102 AD3d 859, 958 NYS2d 722 [2d Dept 2013]; ***Wachovia Bank, N.A. v Carcano***, 106 AD3d 724, 965 NYS2d 516 [2d Dept 2013]).

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]).

In opposition to the motion, the defendant mortgagors have offered no proof or arguments in support of any of the pleaded defenses in the answer, except those noted above. The failure by the defendant mortgagors to raise and/or assert each of the remaining pleaded defenses in the answer in opposition to the motion warrants the dismissal of same as abandoned under the case authorities cited above (*see*, ***Kuehne & Nagel v Baiden***, 36 NY2d 539, *supra*; *see also*, ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, *supra*; ***Madeline D'Anthony Enters., Inc. v Sokolowsky***, 101 AD3d 606, *supra*). All of the unsupported affirmative defenses set forth in the answer are thus dismissed. Accordingly, the first, second, third, fifth, sixth and ninth through fourteenth affirmative defenses are stricken. The affirmative defense relating to

RPAPL § 1303, which was improperly included in the combined seventh affirmative defense, is also stricken.

The court next turns to the ancillary relief requested by the plaintiff. By its submissions, the plaintiff demonstrated that the mortgage inadvertently did not include the submitted legal description, and that the substantial right of any party to this action has not been prejudiced (*see*, ***Wells Fargo Bank, NA v Ambrosov***, 120 AD3d 1225, 993 NYS2d 322 [2d Dept 2014]; ***Baiting Hollow Props., LLC v Knolls of Baiting Hollow, LLC***, 89 AD3d 776, 932 NYS2d 160 [2d Dept 2001]; ***Resource Fin. v Pece***, 195 AD2d 840, 600 NYS2d 782 [3d Dept 1993]; *see also*, ***Household Fin. Realty Corp. of N.Y. v Emanuel***, 2 AD3d 192, 769 NYS2d 511 [1st Dept 2003]; ***Rennert Diana & Co. v Kin Chevrolet***, 137 AD2d 589, 524 NYS2d 481 [2d Dept 1988]; ***Serena Constr. Corp. v Valley Drywall Serv.***, 45 AD2d 896, 357 NYS2d 214 [3d Dept 1974]). Accordingly, pursuant to CPLR 2001 and 3025 (c), the second cause of action is granted; the mortgage recorded on November 20, 2008 and the two mortgages May 4, 2010 are amended to include the submitted "SCHEDULE A" as the legal description, nunc pro tunc to date of the filing of the complaint.

The branch of the instant motion for an order pursuant to CPLR 1024, amending the caption by excising the fictitious defendants, "John Doe #1" through "John Doe #10," is granted (*see*, ***PHH Mtge. Corp. v Davis***, 111 AD3d 1110, 975 NYS2d 480 [3d Dept 2013]; ***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.

In view of the foregoing, and pursuant to CPLR 3212 (g), the court finds that the sole remaining issues of fact relate to proper service of the 30-day and 90-day pre-foreclosure notices and proof of filing with the New York State Department of Financial Services pursuant to RPAPL §§ 1304 and 1306. The branch of the plaintiff's motion for an order striking the affirmative defenses asserting lack of compliance with certain conditions precedent relating to service of the 30-day and 90-day pre-foreclosure notices as well as the corresponding filing requirements of RPAPL §§ 1304 and 1306 are denied with leave to renew within 120 days of the date herein, or, in the alternative, the filing of a note of issue within 120 days of the date herein. The plaintiff's renewed motion, if any, shall include proof by way of affidavits of service or affidavits from one with personal knowledge, together with business records, that detail a standard of office practice or procedure with respect to the 30-day and 90-day pre-foreclosure notices as well as the corresponding filing requirements of RPAPL §§ 1304 and 1306.

In view of the above determination, the proposed order submitted by the plaintiff has been marked "not signed."

Dated: May 18, 2017

Hon. PETER H. MAYER, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION