Short Form Order **Index No. 2004-2010**

SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 49 - SUFFOLK COUNTY

PRESENT: Hon. C. RANDALL HINRICHS
Justice of the Supreme Court

Motion Date: 003: 8-8-2017; 004: 10-4-2017
Adjourned Dated: 10-5-2017
Motion Sequence: 003: MotD; 004: MD

---x

HSBC BANK USA, NATIONAL ASSOCIATION AS TRUSTEE FOR WELLS FARGO ASSET SECURITIES CORPORATION, MORTGAGE ASSET-BACKED PASS-THROUGH CERTIFICATES, SERIES 2007-PA5
3476 Stateview Boulevard, Ft. Mill, SC 29715

Plaintiff,

-against-

NICKOLAS F. SARABELLA, SHERRY A. SARABELLA, CONSOLIDATED ENERGY INC., NATIONAL CITY BANK,

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.),

Defendants.

---x

GROSS POLOWY, LLC
By Alexandra R. Heaney, Esq. Attorneys for Plaintiff
1775 Wehrle Drive, Suite 100
Williamsville, NY 14221

MAGGIO & MEYER, PLLC
By Holly C. Meyer, Esq.
Attorneys for Defendants SARABELLA
3100 Veterans Memorial Highway
Bohemia, NY 11716

Upon consideration of the notice of motion on behalf of the plaintiff HSBC BANK USA, NATIONAL ASSOCIATION AS TRUSTEE FOR WELLS FARGO ASSET SECURITIES CORPORATION, MORTGAGE ASSET-BACKED PASS-THROUGH CERTIFICATES, SERIES 2007-PA5 ["the plaintiff"], for an order 1) granting summary judgment in its favor against the answering defendant Nickolas F. Sarabella ["the defendant"], 2) dismissing defenses asserted in the defendant's answer, 3) appointing a referee to determine and compute the amount due and to ascertain whether the premises may be sold in parcels, 4) amending the caption, and 5) deeming the non–appearing and non–answering defendants in default and that their defaults be fixed and determined, the supporting affirmations, affidavits, and exhibits (003), the defendant's notice of cross-motion for an order granting leave to reargue the decision of this Court dated March 20, 2017 pursuant to CPLR 2221 (a), denying the plaintiff's application for summary judgment and the defendant's cross-motion to dismiss the complaint, respectively, defense counsel's affirmation opposing the plaintiff's motion and supporting the cross motion, the defendant's affidavit, and supporting exhibits (004), and the plaintiff's affirmation in opposition to the cross-motion and supporting exhibits, it is

ORDERED that the plaintiff's motion for summary judgment, an order of reference, and related relief is granted; and it is further

ORDERED that the defendant's cross-motion for an order granting leave to reargue the order of the court dated March 20, 2017, is denied; and it is further

ORDERED that the plaintiff shall serve a copy of the order amending the caption upon the Calendar Clerk of this Court within 30 days of the date of the order; and it is further

ORDERED that the moving and cross moving parties shall serve a copy of this order with notice of entry by first-class mail upon opposing counsel and upon all appearing defendants that have not waived further notice within 30 days of the date herein, and shall promptly file the affidavits of service with the Clerk of the Court.

The underlying facts in this residential foreclosure action have been set forth in the order denying summary judgment and an order of reference in the plaintiff's favor and denying the defendant's cross motion to dismiss the complaint, both motions with leave to renew, dated March 20, 2017 ["the prior order"]. On this application, the plaintiff renews its motion for summary judgment, an order of reference, and related relief. The defendant seeks leave to reargue the prior order denying both the motion and cross-motion and opposes the plaintiff's renewed summary judgment application. The underlying facts will not be repeated here except to the extent necessary to inform the instant decision.

The complaint makes the following allegations. On May 30, 2007, the defendant executed a note in the amount of $775,000.00 with lender First Magnus Financial Corp. To secure the note, both the defendant and defendant Sherry A. Sarabella executed a mortgage encumbering real property located at 246 Pine Acres Boulevard in Dix Hills, New York ["the subject premises"]. The defendants defaulted under the conditions of the note and mortgage by failing to pay principal and interest and other charges that came due and payable on the first day of November, 2008. *If applicable*, the mortgage originated in compliance with Banking Law Sections 595-a and 6-l or 6-m and the Plaintiff has complied with all of the provisions of Section 595-a of the Banking Law and any rules and regulations promulgated thereunder, Section 6-l and 6-m of the Banking Law, and Section 1304 of the Real Property Actions and Proceedings Law [*emphasis supplied*].

On the prior motion for summary judgment, the appointment of a referee, and related relief, as well as on this renewal for that relief, the plaintiff asserts that Wells Fargo Home Mortgage, then the servicer of the subject loan, sent the defendants a notice of the default in accordance with the terms of the note and mortgage on December 21, 2008. Notably, no allegation regarding service of the default notice was pled in the complaint. Rather, the complaint alleges that upon the defendants' default the plaintiff "elect[ed]" to call due the entire amount secured by the mortgage.

The plaintiff commenced the action on January 13, 2010. The defendant, then self represented, served an answer to the complaint dated February 8, 2010, denying "all allegations in this matter" and asserting no affirmative defenses. Defendant Sherry A. Sarabella defaulted in the action. Three years later, Oliver Hull, Esq. filed a Notice of Appearance on behalf of defendant Nickolas F. Sarabella dated January 25, 2013. Although substituted defense counsel opposed both the plaintiff's previous and pending applications for summary judgment (001, 003), and cross moved to dismiss the complaint and for reargument of the prior order, respectively (002, 004), the defendant has never moved to amend his answer to add affirmative defenses. Therefore, so much of the plaintiff's present motion seeking an order dismissing defenses asserted in the answer is denied as academic.

With respect to the original application for summary judgment in the plaintiff's favor, the Court determined that the defenses presented for the first time in opposition to the plaintiff's motion, i.e., lack of standing to commence the action and the failure to comply with contractual default notice provisions, had been waived by the defendant relying on ***Citigroup v. Kopelowitz*** and ***First N. Mortgagee Corp. v. Yatrakis*** (***Citigroup v. Kopelowitz***, 147 AD3d 1014, 1015, 48 NYS2d 223 [2d Dept 2017]; *see also* ***Bank of Am., N.A. v. Cudjoe***, ---AD3d---, 2018 WL 343849, at *1 [2d Dept, *decided* Jan. 10, 2018]; ***First N. Mortgagee Corp. v. Yatrakis***, 154 AD2d 433, 433, 546 NYS2d 9, 10 [2d Dept 1989]).

The prior order distinguished its treatment of the defendant's arguments concerning lack of standing and the failure of a condition precedent vis-à-vis the default notice, and the plaintiff's alleged failure to comply with RPAPL 1304, noncompliance with which may be raised at any time before the entry of the judgment of foreclosure (*see* ***U.S. Bank Nat. Ass'n v. Carey***, 137 AD3d 894, 896, 28 NYS3d 68, 70 [2d Dept 2016]). Indeed, RPAPL 1304 has been dubbed a "super" defense by at least one erudite jurist (***Citimortgage, Inc. v. Pembelton***, 39 Misc 3d 454, 462, 960 NYS2d 867, 874 [NY Sup Ct 2013] [Whelan, J.]; ***Pennymac, Corp. v. DiPrima***, 54 Misc 3d 990, 995, 42 NYS3d 755, 759 [NY Sup Ct 2016] [Whelan, J.]).

On both the prior motion for summary judgment (001), and on renewal (003), the plaintiff maintains that before it commenced the instant action it was not required to, and therefore did not, serve a 90-day pre-foreclosure notice upon the defendants. The plaintiff maintains that the defendants' loan was not a "home loan" as that term was previously defined in the original version of RPAPL §1304 for actions commenced before January 14, 2010, this action having been commenced on January 13, 2010. On its prior summary judgment application, the plaintiff asserted that since the subject loan exceeded Fannie Mae's conforming loan amount, it was not a "home loan" as that term was previously defined in the original version of RPAPL 1304. The plaintiff relied solely upon an otherwise unauthenticated, one-page document entitled "Fannie Mae Historical Conventional Loan Limits". According to the plaintiff, the subject note and mortgage of $775,000.00 exceeded Fannie Mae's conventional loan limit of $417,000.00 for a one-unit house in 2007 when the loan originated, and therefore, was not a "home loan" requiring the service of a pre-foreclosure notice upon the borrowers.

First addressing the defendant's cross-motion for leave to reargue the order dated March 20, 2017, the cross motion is denied. The defendant was not aggrieved by the prior order to the extent that the prior order denied summary judgment in the plaintiff's favor. In any event, a motion for leave to reargue is directed to the trial court's discretion and, to warrant reargument, the moving party must demonstrate that the court overlooked or misapprehended the relevant facts or misapplied law (*see* CPLR 2221[d]; ***Barnett v. Smith***, 64 AD3d 669, 883 NYS2d 573 [2d Dept 2009]). Here, contrary to the defendant's contentions, the Court, in its initial determination, did not overlook or misapprehend relevant facts or misapply the law in deciding that the defendant waived the affirmative defenses of lack of standing and the failure to comply with contractual notice requirements by failing to raise them as an affirmative defense in the answer, thus requiring denial of the defendant's cross motion (*cf.* ***U.S. Bank Nat. Ass'n v. Sabloff***, 153 AD3d 879, 879, 60 NYS3d 343, 344 [2d Dept 2017]; ***Emigrant Bank v. Myers***, 147 AD3d 1027, 1027, 47 NYS3d 446, 446 [2d Dept 2017]). The complaint did not allege that the plaintiff complied with any default notice provisions of the subject note and mortgage and the defendant did not assert noncompliance with those provisions as an affirmative defense in his answer. Assuming, for the sake of argument only, that the defendant is aggrieved by the prior order and may properly seek to reargue it, the prior decision correctly concluded that the issues of standing and noncompliance with contractual notice requirement(s) were waived by the defendant.

"[P]roper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition" (***Citimortgage, Inc. v. Banks***, 155 AD3d 936, 936–37, 64 NYS3d 121, 122–23 [2d Dept 2017], *citing* ***Aurora Loan Servs., LLC v. Weisblum***, 85 AD3d 95, 106, 923 NYS2d 609 [2d Dept 2011]). Alternatively, the plaintiff has the burden of establishing, prima facie, that RPAPL 1304 was inapplicable because the subject loan was not a "home loan" within the meaning of RPAPL 1304 (5) (*see* ***U.S. Bank Nat. Ass'n v. Richard***, 151 AD3d 1001, 1003, 57 NYS3d 509, 511 [2d Dept 2017], *citing* ***Flushing Sav. Bank v. Latham***, 139 AD3d 663, 665, 32 NYS3d 206 [2d Dept 2016]).

The subject loan in the principal amount of $775,000.00 originated on May 30, 2007, had a thirty year term with interest-only payments for the first 120 months, and a 6.875% interest rate. When initially enacted, RPAPL 1304 applied only to "high-cost," "subprime," and "non-traditional" home loans (***Aurora Loan Servs., LLC v. Weisblum***, 85 AD3d 95, 104, 923 NYS2d 609, 615 [2d Dept 2011]). Subprime home loans and non-traditional home loans were defined in RPAPL 1304, subdivision (5) (L. 2008, ch. 472, § 2). A high-cost home loan was defined in section 6-l of the Banking Law. The original enactment of RPAPL 1304 applied to actions, as here, that were commenced between September 1, 2008, and January 13, 2010, (L. 2008, ch. 472, §2). Thus, when this action was commenced, RPAPL 1304 (5) (b) defined a home loan as including an open-end credit plan, other than a reverse mortgage transaction, in which:

> (i) The principal amount of the loan at origination did not exceed the conforming loan size that was in existence at the time of origination for a comparable dwelling as established by the federal national mortgage association;
> (ii) The borrower is a natural person;
> (iii) The debt is incurred by the borrower primarily for personal, family, or household purposes;
> (iv) The loan is secured by a mortgage or deed of trust on real estate upon which there is located or there is to be located a structure or structures intended principally for occupancy of from one to four families which is or will be occupied by the borrower as the borrower's principal dwelling; and
> (v) The property is located in this state.

As of the date of the subject loan's origination, the then applicable definition of a home loan under Banking Law §6-1 (e) was a home loan, including an open-end credit plan, other than a reverse mortgage transaction, in which:

> (i) The principal amount of the loan does not exceed the lesser of: (A) conforming loan size limit for a comparable dwelling as established from time to time by the federal national mortgage association; or (B) three hundred thousand dollars;
> (ii) The borrower is a natural person;
> (iii) The debt is incurred by the borrower primarily for personal, family, or household purposes;
> (iv) The loan is secured by a mortgage or deed of trust on real estate upon which there is located or there is to be located a structure or structures intended principally for occupancy of from one to four families which is or will be occupied by the borrower as the borrower's principal dwelling; and
> (v) The property is located in this state.

Prior to the amendment (effective October 14, 2007 [L 2007, ch 552, § 2]) to former Banking Law § 6–l (e)(i) (L 2007, ch 552, § 1), mortgage loans in principal amounts exceeding $300,000.00, like the subject loan, did not qualify as "home loans" entitled to protection against "high-cost home loans" (*see*, L 2002, ch 626, § 4; Banking Law § 6–1; ***Lewis v. Wells Fargo Bank, N.A.***, 134 AD3d 777, 22 NYS3d 461 [2d Dept 2015]; ***Endeavor Funding Corp. v. Allen***, 102 AD3d 593, 594, 958 NYS2d 300, 301 [1st Dept 2013]; ***Deutsche Bank Nat. Tr. Co. v. Holler***, 56 Misc3d 1214(A), 65 NYS3d 491 [N.Y. Sup. Ct. 2017]). Similarly, under RPAPL 1304 (5) (b)'s then applicable definition of "home loan", loans that exceeded the conforming loan size that was in existence at the time of origination for a comparable dwelling as established by the federal national mortgage association ("Fannie Mae"), likewise did not qualify as "home loans" triggering 1304's pre-foreclosure notice requirements.

On renewal, the plaintiff has requested that the court take judicial notice that the conforming loan size limit at the time of the loan's origination was $417,000.00 for a comparable dwelling (CPLR 4511 [b], [d]). The court has independently verified that information on the Fannie Mae internet site, and has determined that it is accurate. (*See* https://www.fanniemae.com/content/fact_sheet/historical-loan-limits.pdf). Because the Court is capable of ready determination by resort to a source whose accuracy cannot reasonably be questioned, upon the plaintiff's request, it is appropriate to take judicial notice of the fact that when the subject loan originated, the conforming loan limit as referenced in RPAPL 1304 (5)(b)(i) was $417,000.00 (***Ng v. HSBC Mortg. Corp.***, 2010 WL 889256, at *17 [EDDCNY 2010]). In opposition, the defendant has failed to raise a triable issue of fact. Thus, the Court concludes that the plaintiff was not required to comply with RPAPL 1304 since the subject loan was not a "home loan" under either definition for "home loan" codified in the RPAPL or the Banking Law. The plaintiff has otherwise established, prima facie, its entitlement to judgment with proof of the note, the mortgage, and evidence of nonpayment (***Deutsche Bank Nat. Tr. Co. v. Abdan***, 131 AD3d 1001, 1002, 16 NYS3d 459 [2d Dept 2015]). Hence, the plaintiff is entitled to the relief sought in the notice of motion with the exception of striking affirmative defenses in the answer which was previously addressed.

In light of the foregoing, the proposed order granting summary judgment and appointing a referee that was submitted with the moving papers has been signed, as modified, concurrently herewith.

Dated: March 2, 2018

C. RANDALL HINRICHS, J.S.C.

____ FINAL DISPOSITION _X_ NON-FINAL DISPOSITION