

<b>SRMOF II 2012-1 Trust US Bank Trust N.A. v Rivera</b>
2018 NY Slip Op 30961(U)
May 11, 2018
Supreme Court, Queens County
Docket Number: 703558/17
Judge: Timothy J. Dufficy
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**ORIGINAL**

**MEMORANDUM**

**NEW YORK SUPREME COURT - QUEENS COUNTY**

**PRESENT: HON. TIMOTHY J. DUFFICY**

**PART 35**

**Justice**

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**SRMOF II 2012-1 TRUST US BANK TRUST  
NATIONAL ASSOCIATION,**

**Plaintiff,**

**Index No.: 703558/17**

**Mot. Date: 3/1/18**

**-against-**

**Mot. Seq. 1**

**ALBERT RIVERA, BRAULIO RVERA, JR.,  
COMMISSIONER OF SOCIAL SERVICES  
OF THE CITY OF NEW YORK SOCIAL  
SERVICES DISTRICT, UNITED STATES OF  
AMERICA O/B/O INTERNAL REVENUE  
SERVICE, NEW YORK STATE DEPARTMENT  
OF TAXATION, PORTFOLIO RECOVERY  
ASSOCIATES LLC, UNIFUND CCR LLC, NYC  
DEPARTMENT OF FINANCE-PARKING  
VIOLATIONS BUREAU, PAYMENT AND  
ADJUDICATION CENTER OF QUEENS, NEW  
YORK CITY ENVIRONMENTAL CONTROL  
BOARD, MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC., MERS  
ACTING SOLEY AS NOMINEE FOR FIRST  
MAGNUS FINANCIAL CORPORATION,  
MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC., AS NOMINEE FOR  
RESIDENTIAL FUNDING COMPNAY, LLC,  
LEND AMERICA, "JOHN DOE" and "MARY  
DOE," et al,**

**Defendants.**

**Dated: May 11, 2018**

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Plaintiff moves for an order, *inter alia*, extending its time to reply to defendant Albert Rivera's counterclaim(s) and compelling defendant Albert Rivera to accept plaintiff's reply to counterclaims, dated September 22, 2017, *nunc pro tunc*, and for an

granting summary judgment in its favor and the appointment of a referee to compute. Defendant Albert Rivera cross-moves for an order cancelling the notice of pendency and the cancellation of the mortgage, pursuant to RPAPL 1501(4), and dismissing the action

The motion and cross-motion are determined, as follows:

Initially, that branch of plaintiff's motion for an order extending the plaintiff's time to reply to defendant Albert Rivera's counterclaim(s) and compelling defendant Albert Rivera to accept plaintiff's Reply to Counterclaims, dated September 22, 2017, *nunc pro tunc*, is hereby granted. It is undisputed that movant served an untimely Reply to Counterclaims on September 22, 2017. Pursuant to CPLR 2004, courts can extend the time imposed by statute upon good cause shown. Pursuant to CPLR 3012(d), "Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." It is well-established law that: "[a] defendant who has failed to timely appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action, when . . . moving . . . to compel the acceptance of an untimely answer." (*Lipp v. Port Authority of New York and New Jersey*, 34 AD3d 649 [2d Dept 2006]). The record reflects that the delay was minimal. The Court finds that there is no evidence of prejudice and that plaintiff has provided a reasonable excuse for the delay in providing a Reply to Counterclaims in that: once the case was released from the settlement conference part, the plaintiff immediately drafted and served a Reply to Counterclaims.

*Thus, defendant Albert Rivera is compelled to accept the plaintiff's Reply to Counterclaims, dated September 22, 2017, nunc pro tunc.*

Defendant Albert Rivera cross-moves for an order canceling the subject mortgage pursuant to RPAPL 1501(4) and dismissing the plaintiff's foreclosure action. The cross-motion is denied in all respects. Defendant Albert Rivera's first affirmative defense and counterclaim which asserts that the action is time-barred by the statute of limitations is dismissed. Plaintiff argues that the statute of limitations is not applicable to federal agents or their assignees, citing, *inter alia*, *RCR Services, Inc. v Herbil Holding Co.*, 229 AD2d 379 [2d Dept 1996]). Plaintiff further maintains that the loan is immune from any statute of limitations because the loan being foreclosed on is a Federal Housing

Administration Loan and the plaintiff is an assignee of the Secretary of the Housing and Urban Development. This Court agrees. Thus, as the plaintiff has established that the statute of limitations has not run in the instant action, the first affirmative defense and the counterclaim shall be dismissed.

Defendant Albert Rivera's second affirmative defense of non compliance with RPAPL §1303, third affirmative defense of non-compliance with RPAPL §1304, and fourth affirmative defense of non-compliance with RPAPL §1306 provisions are also dismissed.

Plaintiff has established a *prima facie* case by submitting evidence that demonstrates that it has complied with each of the provisions of the Real Property Actions and Proceedings Law cited herein. The plaintiff has established, *inter alia*, via the affidavit of Dawn Berry, Assistant Vice President of Selene Finance LP, attorney-in-fact/servicer for the named plaintiff, a *prima facie* case that it mailed defendant Albert Rivera a 90-day pre-foreclosure notices in compliance with Section §1304, and Certified Mailing Receipts the Proof of Filing statements establish compliance with RPAPL §1306. Plaintiff established proper notice, pursuant to RPAPL §1303, via the summons and complaint were served along with notices on colored paper, in compliance with RPAPL § 1303 via the affidavit of process servers, Steve F. Louis, Anthony J. Tortorelli.

Thus, the defendant Albert Rivera failed to raise any triable issues of fact. Accordingly, the second, third, and fourth affirmative defenses shall be dismissed.


In light of the foregoing, the branch of the plaintiff's motion seeking summary judgment in its favor and the appointment of a referee to compute is granted. Plaintiff established its *prima facie* entitlement to foreclose on a mortgage by demonstrating the existence of the mortgage and note, ownership of the mortgage, and the defendant's default in payment (*see Campaign v Barbra*, 23 AD3d 327 [2d Dept 2005]; *First Trust National Association v Pinter*, 264 AD2d 464 [2d Dept 1999]). Plaintiff presented sufficient evidence to warrant the requested relief, pursuant to RPAPL §1321 and CPLR § 3215.

Thus, summary judgment, pursuant to CPLR 3212, is granted in favor of the plaintiff and against the defendant Albert Rivera and the Answer of defendant Albert Rivera is stricken. Plaintiff is granted an Order of Reference and the appointment a

referee to determine the amount due to the plaintiff and to determine whether the mortgaged premises can be sold in parcels. Plaintiff is awarded a default judgment deeming all non-appearing and non-answering defendants in default. The caption shall be amended by substituting “Baldramina Rivera s/h/a John Doe,” “Robert Rivera s/h/a John Doe,” “Migdalie Hernandez s/h/a John Doe,” Cynthia Rivera s/h/a John Doe,” and “Alfred Rivera s/h/a John Doe,” as party defendants, in place and stead of the defendants sued herein as of “John Doe” and “Mary Doe.

Any applications not specifically addressed above are denied.

**Submit Order/Judgment.**

  
TIMOTHY J. DUFFICY, J.S.C.

FILED  
MAY 22 2018  
COUNTY CLERK  
QUEENS COUNTY