SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 10

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U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE FOR CMLAT REMIC 2007-A4 PRAA-REMIC PASS-THROUGH CERTIFICATES, SERIES 2007 A4,

Index № 850037/2015
Motion Seq. № 001, 002

DECISION & ORDER

Plaintiffs,

-against-

MINDY N. CHAIT AKA MINDY CHAIT, *et al.*,

Defendants

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GEORGE J. SILVER, J.S.C.:

This is an action to foreclose on a mortgage, dated February 22, 2007, in the amount of $602,000.00 on a building located at 400 Central Park West in the City and County of New York. Plaintiff mortgagee U.S. Bank National Association ("plaintiff") moves (Seq. № 001) for: 1) an order pursuant to CPLR § 3211(b) striking the answer of defendant Mindy N. Chait ("defendant"); 2) an order pursuant to CPLR § 3212 granting plaintiff summary judgment; 3) an order amending the caption to remove "John Doe" from the title of this action; and 4) an order pursuant to CPLR §§ 4301 and 4311 appointing a Referee to compute.

Defendant opposes plaintiff's application and cross-moves, by motion filed under a separate sequence (Seq. № 002), for: 1) an order dismissing this action pursuant to CPLR § 3211(a)(4) and RPAPL § 1301(3); 2.) an order awarding defendant costs, disbursements, and attorney's fees; and 3.) any other relief this court may deem just and proper.

For the reasons discussed herein, plaintiff's motion (Seq. № 001) is granted, and defendant's cross-motion (Seq. № 002) denied.

In moving for summary judgment in a mortgage foreclosure action, plaintiff establishes a *prima facie* right to foreclose by producing the mortgage, the assignment, if any, the unpaid note and evidence of default (*see CitiFinancial Co. (DE) v. McKinney*, 27 AD3d 224 [1st Dept. 2006]; *LPP Mortgage, Ltd v. Card Corp.*, 17 AD3d 103 [1st Dept], *lv app den*, 6 NY3d 702 [2005]); *Hypo Holdings, Inc v. Chalasani*, 280 AD2d 386 [1st Dept], *lv app den* 96 NY2d 717 [2001]). Once plaintiff satisfies that burden, it is incumbent on the party opposing foreclosure to come forward with evidence sufficient to raise a triable issue of fact as to a bona fide defense such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff (*see Nassau Trust Co. v. Montrose Concrete Products Corp.*, 56 NY2d 175, *reargmt den* 57 NY2d 674 [1982]; *CitiFinancial Co. (DE) v. McKinney, supra*; *Mahopac National Bank v. Baisley*, 244 AD2d 466 [2nd Dept 1997], *lv app dism* 91 NY2d 1003 [1998]).

Here, plaintiff has established its prima facie entitlement to judgment as a matter of law by uncontested proof of the note, the mortgage, and the default by defendant (*see CitiFinancial Co. (DE) v. McKinney, supra*; *LPP Mortgage, Ltd v. Card Corp, supra*; *Hypo Holdings. Inc v. Chalasani, supra*. Nowhere in her opposition does defendant deny executing the note and mortgage or her default thereunder. In fact, there is no affidavit from defendant in support of her opposition. Indeed, in opposing the motion and cross-moving to dismiss the complaint, defendant does not deny that money is owed or that defendant, as mortgagor, defaulted on the mortgage by not making any of the payments that became due and owing commencing August 1, 2011.

Rather, defendant argues that there is a prior action pending seeking to foreclose on the same mortgage debt commenced by CitiMortgage Inc., plaintiff's predecessor-in-interest. In its cross-motion, defendant contends that the prior action, captioned *CitiMortgage, Inc. v. Mindy H.*

Chait, et al, Index No. 810086/2012, has not been discontinued or abandoned by CitiMortgage, and seeks to foreclose on the same premises, based upon the same purported default.

Citing RPAPL § 1301(3), defendant contends that the instant action cannot proceed while a companion action seeking to foreclose on the same mortgage debt is pending. RPAPL § 1301(3) "prohibits a party from commencing an action at law to recover any part of the mortgage debt while the foreclosure proceeding is pending or has not reached final judgment, without leave of the court" (*First Nationwide Bank v. Brookhaven Realty Assoc.,* 223 A.D.2d 618, 622, 637 N.Y.S.2d 418 [2d Dept.1996]). Thus, under this election of remedies principle, a plaintiff who has commenced an action to foreclose on a mortgage is not permitted to commence a second simultaneous action attempting to recover the same debt without obtaining leave of court in the foreclosure action *(see Aurora Loan Services, LLC v. Reid*, 132 AD3d 788, 788 [2d Dept.2015]; *Shaw Funding, L.P. v. Grauer*, 98 AD3d 660, 660 [2d Dept.2012]; *Aurora Loan Servs., LLC v. Spearman*, 68 AD3d 796, 797 [2d Dept. 2009]). This election of remedies principle fully applies to an action to recover under the guarantee of a note (*see TBS Enterprises, Inc. v. Grobe*, 114 AD2d 445, 446 [2d Dept.1985]).

Here, defendant mischaracterizes the law under RPAPL § 1301(3). RPAPL § 1301(3) was enacted prevent a mortgagee from maintaining a separate action to foreclose upon the note during the pendency of a foreclosure action under the mortgage. Thus, RPAPL § 1301(3) is inapplicable in this case, as there is no separate action being maintained by plaintiff to recover any part of the debt. Defendant alleges that the prior action referenced in its cross-motion has not been discontinued or abandoned by plaintiff. However, defendant concedes that the prior action was "marked off the court's calendar." Even so, defendant maintains that "such a notation does not trigger the 'automatic dismissal of 'abandoned' cases...." While that assertion is technically

correct, defendant ignores the fact that the prior action was not only " marked off the court's calendar," but was also marked disposed by the court by an order dated March 5, 2013 and filed on March 8, 2013 with the Office of the County Clerk. Indeed, the court disposed the prior action because plaintiff's predecessor-in-interest failed to take any prosecutorial action in that case. After entry of the order disposing of the case, plaintiff's predecessor-in-interest did not file a note of issue or take any action to return the matter to the court's active calendar.

While defendant claims that plaintiff "made an affirmative act in further prosecution of the 2012 Action," by defendant's own admission, plaintiff's predecessor-in-interest was solely "interposing a reply to Defendant Chait's counterclaims" raised in defendant's answer. As such, any action taken by plaintiff's predecessor-in-interest after the matter had been marked disposed by the court was solely to respond to defendant's counterclaims, and clearly not prosecutorial in nature. As such, it is evident that plaintiff's predecessor-in-interest, CitiMortgage, Inc. abandoned the prior action. Consequently, RPAPL § 1301(3) is inapplicable where there is no active second action simultaneously attempting to recover on the same debt.

None of defendant's remaining arguments are sufficient to raise genuine issues of material fact as to a bona fide defense. For instance, defendant alleges, in a conclusory fashion, that plaintiff's Assignment of Mortgage "only purports to convey the underlying Mortgage, and not the Note." That argument is belied by the Court of Appeals' ruling in *Aurora Loan Services, LLC v. Taylor*, 25 NY3d 355 (2015). Indeed, the court held in Aurora that " it is not necessary to have possession of the mortgage at the time the action is commenced. This conclusion follows from the fact that the note, and not the mortgage, is the dispositive instrument that conveys standing to foreclose under New York law." Here, plaintiff has provided more than adequate proof that it possessed the note prior to the commencement of this action through the Hodges Affidavit

submitted in support of its application. While defendant takes issue with the affidavit, notably arguing that it requires a certificate of conformity, defendant's argument is without merit since the absence of the certificate of conformity is not a fatal defect, especially where the out-of-state acknowledgement contains language that substantially conforms to New York Law (*Midfirst Bank v. Agho*, 121 AD3d 343 [2d Dept. 2014]); *see also* CPLR 2309[c]).

Defendant relies on *Bank of America. N.A. v. Paulsen*, 125 AD3d 909 (2d Dept 2015), to allege that the Hodges Affidavit does not provide sufficient details of physical delivery of the note to plaintiff. However, contrary to the defendant' s allegations, unlike the affiant in *Paulsen*, here Hodges attests that the NLS Screen, a business record of plaintiff pursuant to CPLR § 4518, shows that CitiMortgage, Inc. logged the note into its possession as of March 22, 2007 and continues to hold the original note as servicer and attorney-in-fact for plaintiff. Moreover, the Hodges affidavit contains a specific date on which plaintiff obtained possession of the note, and therefore "[i]t can reasonably be inferred from these averments that physical delivery of the note was made to the plaintiff by [prior lender], and since the exact delivery date was provided, there is no further detail necessary for the plaintiff to establish standing" (*see Aurora*, 25 NY3d 355, *supra*). As such, defendant's challenges to plaintiff's standing and the Hodges affidavit are without merit.

The court has considered defendant's remaining arguments in opposition to plaintiff's motion and in support of its cross-motion, and finds them unpersuasive. As such, based on the foregoing, plaintiff's motion is granted, and plaintiff is entitled to summary judgment, amendment of the caption, dismissal of the answer and the appointment of a Referee to compute. In light of this conclusion, defendant's cross-motion is denied in its entirety as without merit.

Accordingly, it is hereby,

ORDERED, that the plaintiff's motion for summary judgment (Seq. № 001) is granted in all respects, and the Answer and Affirmative Defenses asserted by Defendant Chait and Defendant Board are hereby dismissed with prejudice, and the Answers are deemed to be Notices of Appearance; and it is further,

ORDERED, that this action be and the same is hereby referred to CHARLES GORDON BERRY, Esq., having an office at 1100 PARK AVE # 8C, NEW YORK, NY 10128 telephone number (646) 549-1821, e-mail CHASBERRYSTER@GMAIL.COM to ascertain and compute the amount due to plaintiff herein for principal, interest, water and sewer rents, taxes, insurance premiums and all other charges on the mortgage and mortgage loan note mentioned in the complaint including the cost of preserving and/or protecting the mortgaged premises, and to examine and report whether the mortgaged premises can be sold in parcels, and that the referee make his/her report no later than 60 days of the date of this Order, and that except for good cause shown, the plaintiff shall move for judgment no later than 30 days of the date of the referee's report; and it is further

ORDERED that the caption of the action should be amended by setting forth the true and correct name of the defendants sued herein as: Jane Doe #1 to be MS. LEVINE (FIRST NAME REFUSED) and by striking therefrom the remaining defendants sued herein as "John Doe" #1-10 and "Jane Doe" #2-10, all without prejudice to the proceedings heretofore had herein; and it is further

ORDERED, that the caption amended shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE
FOR CMALT REMIC 2007-A4 PRAA-REMIC PASS-

THROUGH CERTIFICATES, SERIES 2007 A4,

INDEX № 850037/2015

Plaintiff,

-against-

MINDY N. CHAIT AKA MINDY CHAIT, JOSHUA KIRSCHENBAUM, BOARD OF MANAGERS OF THE 400 CENTRAL PARK WEST CONDOMINIUM, THE UNITED STATES OF AMERICA, SETH WINSLOW, A ABADIAM B V BA AND ANDRE Y ABADJIAN, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY TRANSIT ADJUDICATION BUREAU and MS. LEVINE (FIRST NAME REFUSED),

Defendants.

; and it is further

ORDERED, that the Referee appointed herein is subject to the requirements of Rule 36.2(c) of the Chief Judge, and if the referee is disqualified from receiving an appointment pursuant to the provisions of the Rule, the referee shall notify the Appointing Judge forthwith, and it is further

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

ORDERED that, pursuant to CPLR § 8003(a), the fee of $250.00, shall be paid to the Referee for the computation stage and upon filing of the report; and it is further

ORDERED that the Referee is prohibited from accepting or retaining any funds or paying funds, without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED, that default judgment against the non-appearing defendant is granted; and it is further

ORDERED, that a copy of this order with notice of entry shall be served upon the owner of the equity of redemption, any tenants named in this action and any other party entitled to notice; and it is further

ORDERED that defendant's cross-motion, by motion filed under a separate sequence (Seq. № 002), is denied in its entirety; and it is further

ORDERED that the parties are directed to appear for a status conference on August 14, 2018 in Part 10 located at 111 Centre Street, Room 1227, at 9:30 AM to report the status of compliance with this order.

This constitutes the decision and order of the court.

Dated: July 10, 2018

George J. Silver

HON. GEORGE J. SILVER