SUPREME COURT - STATE OF NEW YORK
TRIAL/IAS TERM, PART 21 NASSAU COUNTY

PRESENT:

Honorable James P. McCormack
Justice of the Supreme Court

Index No. 604255/17

Motion Seq. No.: 002 & 003
Motions Submitted: 11/30/18

EDWARD GARDNER, MARILYN GARDNER, BRIAN MCCAFFREY, DANIEL HARRIS SR.,

Plaintiff(s),

-against-

WELLS FARGO BANK NATIONAL ASSOCIATION AS TRUSTEE FOR STRUCTURED ASSET SECURITIES CORPORATION, MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2007-BC1, TMS MORTGAGE INC d/b/a The Money Store, ROSARIO ROMANO, and JOHN DOE 1-5 and JANE DOE 1-5, the last names being fictitious , said parties intended being undisclosed, unnamed and unknown investors, participants, corporate or other entities, conduits, trustees, servicers, custodians and others, if any, having or claiming an interest in, or lien upon the premises described in the complaint,

Defendant(s),

The following papers read on this motion:

Notice of Motion/Supporting Exhibits/Memorandum of Law.....X
Notice of Cross Motion/Opposition/Supporting Exhibits/
Memorandum of Law.....X
Affirmation in Opposition.....X
Reply Affirmations.....X1

Plaintiffs, Edward Gardner (Edward), Marilyn Gardner (Marilyn), Brian McCaffrey (McCaffrey), and Daniel Harris (Harris), move this court (Motion Seq. 002) for an order, pursuant to CPLR 3212, granting them summary judgment expunging a mortgage based upon the statute of limitations for foreclosure having run, declaring a mechanic's lien expired and expunged, barring Defendants from "all claim(s)" regarding the subject property and awarding them counsel fees, costs and disbursements. Defendants, Wells Fargo Bank National Association as Trustee for Structured Asset Securities Corporation, Mortgage Pass-through Certificates Series 2007-BC1 (Wells Fargo), opposes the motion and cross move Notion Seq. 003) for summary judgment and for leave to amend their answer. Plaintiffs oppose the cross motion. Co-Defendants, TMS Mortgage Inc d/b/a The Money Store and Rosario Romano, do not submit papers in support of, or opposition to, either motion.

Plaintiffs commenced this action by service of a Summons and Complaint dated May 12, 2017. Issue was joined by the service of an answer dated June 23, 2017. The

1Defendants argue that Plaintiffs submitted a sur-reply, and request that the court not consider it. The court agrees a sur-reply was served, and that prior permission was not sought from the court. As that violates this Part's rules, the court will not consider the sur-reply. Regardless, even if the court allowed the sur-reply, the court could not consider the affirmation. As is discussed at greater length in the body of this order, the affirmation violates CPLR 2106.

case certified ready for trial on July 9, 2018 and a note of issue was filed on August 24, 2018.

This matter involves real property originally owned by the Gardners. In 2006, the Gardners borrowed $314,000.00 to refinance a mortgage loan on the property. In 2008, the Gardners stopped making payments on the loan, and have never made one since. However, they did continue to rent out the property and collect rent. Further, the reason they stopped paying the mortgage was because they could not get a second mortgage on their primary residence. Foreclosure proceedings were commenced and were ongoing from 2008 until 2016 when the matter was discontinued. At some point, the Gardners gave their attorneys, co-Plaintiffs McCaffrey and Harris, each a 10% interest in the subject property. Plaintiffs now argue that the statute of limitations has run on any foreclosure action and that they should be granted summary judgment on their complaint to quiet title. Defendants oppose the motion and argue the statute of limitations has not run, and cross move seeking summary judgment and to amend their answer.

It is well settled that in a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]; *Alvarez V. Prospect Hospital,* 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegard v. New York University Medical Center,* 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v. City of New York,* 49 NY2d 5557 [1980], *supra*).

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (MOTIONS SEQ. 002)

Though Mr. McCaffrey submits a number of affirmations in support of the motion, the opposition to the cross motion, the reply and the sur-reply, the court cannot consider any of them because none of the affirmations are notarized. When an attorney is a party to an action, the attorney may not rely upon an unnotarized affirmation instead of an affidavit. (CPLR §2106; *Law Offices of Neal D. Frishberg v. Toman*, 105 A.D.3d 712 [2nd Dept. 2013] citing *Schwartz v. Sayah*, 83 A.D.3d 926 [2d Dept. 2011]; *Warshaw Burstein Cohen Schlesinger & Kuh, LLP v. Longmire*, 82 A.D.3d 586 [1st Dept. 2011]; *Lessoff v. 26 Ct. St. Assoc., LLC.*, 58 A.D.3d 610 [2nd Dept. 2009]; *Muniz v. Katlowitz*, 49 A.D.3d 511 [2nd Dept. 2008]. The court will therefore consider the exhibits to the motion to determine whether they alone make out the *prima facie* case.

The law is clear that when a mortgagee accelerates the mortgage, the six year statute of limitations for mortgage foreclosure begins to run. *(DLJ Mtge Capital, Inc. v.*

Hirsch, 161 AD3d 944 [2d Dept 2018]). Herein, Wells Fargo had the right to accelerate as per the terms mortgage. Based upon the allegations contained in the complaint, and the admission in the answer, the mortgage was accelerated and a foreclosure action was commenced. By short form order of the Hon. Thomas A. Adams of this court, dated September 29, 2016, that foreclosure action was discontinued. As it has been in excess of six years since the mortgage was accelerated, the court finds Plaintiffs have established entitlement to summary judgment as a matter of law based about the action now being time-barred. Further, Plaintiffs have established entitlement to summary judgment on the TMS Mortgage Inc d/b/a The Money Store (TMS) mortgage and the lien. The burden shifts to Defendants to raise a material issue of fact requiring a trial of the action. As neither TMS nor Romano oppose the motion, they are unable to raise an issue of fact. Therefore, the TMS mortgage and the lien will be expunged and canceled.

In opposition, Wells Fargo argues that while the mortgage was accelerated, they revoked acceleration once they agreed to accept installment payments when the parties were negotiating a modification. A revocation of an acceleration must be done by an affirmative act. (*NNMT Realty Corp. v. Knoxville 2012 Trust*, 151 AD3d 1068 [2d Dept 2017]. Herein, the court finds that Plaintiffs' multiple loan modification applications, and Wells Fargo's willingness to enter into such modification was such an affirmative act. Further, the fact that Wells Fargo was the party who moved to discontinue the foreclosure action and cancel the *lis pendens* is further proof of an affirmative act to revoke the acceleration. *Id.* As such, Wells Fargo has raised an issue of fact requiring a trial of the

action.

As for Plaintiffs' motion to dismiss Wells Fargo's affirmative defenses, the court will deny that motion regardless of the sufficiency of the opposition papers. In their memorandum of law, Plaintiffs state: "Based on the documentary evidence provided herein and the validity of the arguments made by Plaintiffs, each of Wells Fargo's affirmative defenses fail and must be found to be without merit." Wells Fargo asserts 15 affirmative defenses. The court is not in a position to guess which arguments Plaintiffs wish to apply to which defense. As Plaintiff moves to dismiss the defenses *en masse*, without making a specific argument in favor of dismissing a specific defense, the court will deny the motion. Further, the court sees no basis to award attorney's fees, costs and disbursements under any theory.

WELLS FARGO'S MOTION FOR SUMMARY JUDGMENT AND TO AMEND (MOTION SEQ. 003)

Though Wells Fargo's motion is stated to be one for summary judgment and to amend, there are no summary judgment arguments made. Other than opposing Plaintiffs' motion for summary judgment, the only affirmative relief sought by Wells Fargo is for leave to amend their answer.

" 'Leave to amend pleadings should be freely given provided that the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit' " (*Bloom v. Lugli*, 102 AD3d 715 [2d Dept 2013]; quoting

Greco v. Christoffersen, 70 AD3d 769, 770 [2d Dept 2010], quoting *Gitlin v. Chirinkin*, 60 AD3d 901, 901–902 [2d Dept 2009]; see CPLR 3025[b];). "A determination whether to grant such leave is within the Supreme Court's broad discretion, and the exercise of that discretion will not be lightly disturbed" (*Gitlin*, 60 AD3d at 902; see *Greco*, 70 A.D.3d at 770). "The granting of such leave is committed to the sound discretion of the trial court and must be determined on a case-by-case basis" (*Biaggi & Biaggi v. 175 Medical Vision Properties, LLC*, 105 AD3d 790, 791 [2d Dept. 2013]; quoting *Skinner v. Scobbo*, 221 A.D.2d 334, 335 [2d Dept 1995]).

Herein, Wells Fargo seeks to amend its answer to add a counterclaim for unjust enrichment. The basis of the counterclaim, contained only in a memorandum of law, is that Wells Fargo has been paying insurance and taxes on the home while Plaintiffs have been both not paying the mortgage and collecting rent. Wells Fargo neglected to include a proposed amended answer in their moving papers, but then did provide one in their reply. In general the court would have been inclined to allow the amendment under these circumstances, and overlook the failure to include the proposed answer in the moving papers. However, the proposed counterclaim itself is palpably insufficient. In its entirety, it states: "The Defendant asserts a counterclaim against Plaintiffs for unjust enrichment." The answer and counterclaim are devoid of facts that make up the claim, and even applying the most liberal standard, the counterclaim is palpably insufficient. (*Strunk v. Paterson*, 145 AD3d 700 [2d Dept. 2016]). As such, the cross motion will be denied.

Accordingly, it is hereby

ORDERED, that Plaintiffs' motion for summary judgment (Motion Seq. 002) is GRANTED as to the Second and Third Causes of Action in the complaint. The TMS mortgage and the lien are canceled and expunged; and it is further

ORDERED, that Plaintiffs' motion for summary judgment is DENIED as to the First Cause of Action; and it is further

ORDERED, that Wells Fargo's cross motion (Motion Seq. 003) is DENIED in its entirety.

This constitutes the decision and order of the court.

Dated: January 22, 2019
Mineola, New York

JAMES P. McCORMACK, J.S.C.

ENTERED
JAN 28 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE