

Ittayem v U.S. Bank N.A.
2020 NY Slip Op 32876(U)
August 27, 2020
Supreme Court, Kings County
Docket Number: 522448/2019
Judge: Dawn M. Jimenez-Salta
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At an IAS Term, Part 88 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 27th day of August, 2020.

P R E S E N T:

HON. DAWN JIMENEZ-SALTA,
Justice.

-----X

ABDALLAH ITTAYEM,

Plaintiff,

Index No. 522448/2019
Mot. Seq. No. 1-2

- against -

U.S. BANK NATIONAL ASSOCIATION, AS LEGAL
TRUSTEE FOR TRUMAN 2016 SC6,

Defendant.

-----X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of:

- 1) Plaintiff Abdallah Ittayem’s (Plaintiff) motion for an order pursuant to CPLR 3212 granting summary judgment on Plaintiff’s complaint seeking to cancel and discharge the mortgage on the subject property pursuant to RPAPL 1501(4) and awarding Plaintiff attorneys’ fees and disbursements, dated December 25, 2019;
- 2) Defendant U.S. Bank National Association as Legal Trustee for Truman 2016 SC6’s (Defendant) motion for an order pursuant to CPLR 3211(a)(1), (a)(4), and (a)(7) dismissing the complaint, awarding Defendant sanctions, costs and fees pursuant to 22 NYCRR 130-1.1, and for summary judgment on Defendant’s counterclaims, and affirmation in opposition to Plaintiff’s motion with accompanying memorandum of law, dated March 19, 2020;
- 3) Plaintiff’s affirmation in opposition to Defendant’s cross motion, dated March 21, 2020;
- 4) Defendant’s memorandum of law in further support of its cross motion, dated May 6, 2020;
- 5) Plaintiff’s reply affirmation, dated July 2, 2020, all of which submitted on July 8, 2020.

Papers Considered:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed

Papers Numbered:

Plaintiff 1, 2, 3 [Exh. 1-10];
Defendant 4, 5 [Exh. A-L], 6
[Exh. 1-7];

Opposing Affidavits (Affirmations)	Plaintiff 8 [Exh. 1-5];
Reply Affidavits (Affirmations)	Plaintiff 10;
Other (Memoranda of Law)	Defendant 7, 9.

Upon the foregoing cited papers, the Decision/Order is as follows: Plaintiff’s motion for summary judgment on the complaint is denied (motion sequence number 1). Defendant’s cross motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7) is granted to the extent that the complaint is dismissed without prejudice to Plaintiff re-commencing the action following a proper disposition of any prior, timely foreclosure action on the subject mortgage (motion sequence number 2). The motion is otherwise denied without prejudice to renewal as to that branch of the motion which is for summary judgment on Defendant’s counterclaims.

BACKGROUND

On October 25, 2004, Plaintiff purchased the property located at 1594 East 58 Street in Brooklyn, New York (Property). The transfer of title was memorialized by deed dated October 25, 2004 and recorded in the City Register of the Office of the City of New York (City Register) on November 10, 2004. On November 11, 2005, Plaintiff obtained a loan in the principal amount of \$516,000.00 from Defendant’s predecessor-in-interest, Downey Savings and Loan Association, F.A. (Downey), which was evidenced by a note executed by Plaintiff on the same date. The loan was secured by a mortgage on the Property dated November 11, 2005 and recorded in the City Register on November 29, 2005 under CRFN 2005000658969. The proceeds of the loan were used to pay off two existing mortgages encumbering the Property in the amount of \$504,195.00 at the time of closing. The Mortgage was then assigned by Federal Deposit Insurance Corporation as Receiver of Downey to U.S. Bank National Association (U.S. Bank), and then by U.S. Bank to Defendant via assignment of mortgage, dated April 10, 2019 and recorded in the City Register on May 20, 2019 under CRFN 2019000149526 (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. 1-10]; Defendant 4; Defendant 5 [Exh. A-L]; Defendant 6 [Exh. 1-7]; Defendant 7; Plaintiff 8 [Exh. 1-5]; Defendant 9; Plaintiff 10).

On March 23, 2009, Downey commenced an action to foreclose the Mortgage in Supreme Court, Kings County captioned *Downey Savings and Loan Association, F.A. v Abdallah Ittayem, et al.*, index No. 6949/2009 (2009 Foreclosure Action). In the complaint, Downey alleged that Plaintiff failed to comply with the terms and conditions of the Mortgage by failing to pay an installment payment that became due and payable on October 1, 2008. Upon expiration of Ittayem’s time to answer, Downey moved for an order of reference. On May 3, 2011, Downey made a request to withdraw the application purportedly due to an error in the affidavit of fact. Thereafter, the court issued a decision and order dated September 14, 2011 granting Downey’s application to withdraw the application and sua sponte dismissing the action without prejudice (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. 1-10]; Defendant 4; Defendant 5 [Exh. A-L]; Defendant 6 [Exh. 1-7]; Defendant 7; Plaintiff 8 [Exh. 1-5]; Defendant 9; Plaintiff 10).

On November 4, 2011, U.S. Bank commenced a second action to foreclose the Mortgage in Supreme Court, Kings County captioned *U.S. Bank National Association, Successor in Interest to the Federal Deposit Insurance Corporation as Receiver for Downey Savings and Loan Association, F.A. v*

Abdallah Ittayem, et al., index No. 25039/2011 (2011 Foreclosure Action). On April 18, 2017, U.S. Bank moved for an order of reference and Ittayem cross-moved to dismiss the action on the ground that U.S. Bank lacked standing to maintain the action. By order dated November 30, 2017, the court denied the motion for an order of reference due to several deficiencies in the 90-day notice required by RPAPL 1304 and denied Ittayem's cross motion, but nevertheless dismissed the action without prejudice on the basis of the defective notice (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. 1-10]; Defendant 4; Defendant 5 [Exh. A-L]; Defendant 6 [Exh. 1-7]; Defendant 7; Plaintiff 8 [Exh. 1-5]; Defendant 9; Plaintiff 10).

On October 11, 2019, counsel for Downey moved to vacate the order dismissing the 2009 Foreclosure Action and restore the matter to the active calendar. By order dated January 17, 2020, the court granted the motion to vacate the dismissal and restored the matter to active status (Restoration Order) (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. 1-10]; Defendant 4; Defendant 5 [Exh. A-L]; Defendant 6 [Exh. 1-7]; Defendant 7; Plaintiff 8 [Exh. 1-5]; Defendant 9; Plaintiff 10).

On October 13, 2019, Plaintiff commenced the instant action pursuant to RPAPL 1501(4) seeking to cancel and discharge the Mortgage. In the complaint, Plaintiff alleges that Defendant accelerated the underlying mortgage debt in November 2011, that an action by Defendant's predecessor-in-interest to foreclose the subject mortgage was dismissed by order dated November 30, 2017, and that Defendant failed to commence a new foreclosure action within six years after the acceleration of the mortgage debt. Defendant filed an answer to the complaint on November 7, 2019 denying the allegations of the complaint and asserting various affirmative defenses and four counterclaims sounding in unjust enrichment, equitable lien, quantum meruit, and equitable mortgage. Plaintiff failed to file a reply or otherwise respond to Defendant's counterclaims (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. 1-10]; Defendant 4; Defendant 5 [Exh. A-L]; Defendant 6 [Exh. 1-7]; Defendant 7; Plaintiff 8 [Exh. 1-5]; Defendant 9; Plaintiff 10).

Plaintiff now moves for summary judgment on the complaint pursuant to CPLR 3212 to cancel and discharge the mortgage lien on the Property and to quiet title thereto due to the expiration of the statute of limitations pursuant to RPAPL 1501(4). Plaintiff submits, inter alia, the mortgage documents along with the pleadings and dismissal orders from both the 2009 Foreclosure Action and 2011 Foreclosure Action in support, which he contends demonstrate that there are no triable issues of fact as to the expiration of the applicable statute of limitations and unenforceability of the Mortgage. Plaintiff argues that the applicable statute of limitations has expired regardless of whether the limitations period is calculated from the commencement of the 2009 Foreclosure Action on March 23, 2009 or 2011 Foreclosure Action on November 4, 2011. Plaintiff also seeks to recover attorneys' fees, costs, and disbursements (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. 1-10]; Defendant 4; Defendant 5 [Exh. A-L]; Defendant 6 [Exh. 1-7]; Defendant 7; Plaintiff 8 [Exh. 1-5]; Defendant 9; Plaintiff 10).

Defendant argues that Plaintiff's summary judgment motion must be denied because Plaintiff failed to demonstrate that there was no ongoing, timely foreclosure action. In support, Defendant cites the Restoration Order which vacated the previous dismissal of the 2009 Foreclosure Action. Defendant also argues that Ittayem's affidavit, in which he avers that he purchased the Property and obtained the Mortgage, fails to attest to any facts regarding the expiration of the statute of limitations or absence of a pending foreclosure proceeding (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. 1-10]; Defendant 4; Defendant 5 [Exh. A-L]; Defendant 6 [Exh. 1-7]; Defendant 7; Plaintiff 8 [Exh. 1-5]; Defendant 9; Plaintiff 10).

In reply, Plaintiff reiterates his arguments that the statute of limitations to commence a foreclosure action expired, at latest, on November 5, 2017, that both foreclosure actions were dismissed prior to the commencement of the instant action, and that Defendant is now precluded from commencing a new foreclosure proceeding (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. 1-10]; Defendant 4; Defendant 5 [Exh. A-L]; Defendant 6 [Exh. 1-7]; Defendant 7; Plaintiff 8 [Exh. 1-5]; Defendant 9; Plaintiff 10).

Defendant cross-moves for an order dismissing the complaint pursuant to CPLR 3211(a)(1), (a)(4), and (a)(7), awarding Defendant sanctions, costs, and fees pursuant to 22 NYCRR 130-1.1, and granting summary judgment on Defendant's counterclaims. Defendant argues that the complaint must be dismissed pursuant to CPLR 3211(a)(1) on the ground that the Restoration Order constitutes documentary evidence which utterly refutes the allegations in the complaint. Defendant further argues that the complaint must be dismissed pursuant to CPLR 3211(a)(4) because there is another action pending, the 2009 Foreclosure Action, between the same parties seeking substantially similar relief. Defendant contends that the complaint must be dismissed pursuant to CPLR 3211(a)(7) for failure to state a cause of action because there is an active and pending foreclosure proceeding commenced prior to the expiration of the statute of limitations, thus negating an essential element of Plaintiff's RPAPL 1501(4) cause of action (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. 1-10]; Defendant 4; Defendant 5 [Exh. A-L]; Defendant 6 [Exh. 1-7]; Defendant 7; Plaintiff 8 [Exh. 1-5]; Defendant 9; Plaintiff 10).

In addition to the grounds set forth above, Defendant contends that Plaintiff should be precluded from asserting that the Mortgage is unenforceable due to the expiration of the statute of limitations based on the doctrine of unclean hands, which was asserted as an affirmative defense in its answer (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. 1-10]; Defendant 4; Defendant 5 [Exh. A-L]; Defendant 6 [Exh. 1-7]; Defendant 7; Plaintiff 8 [Exh. 1-5]; Defendant 9; Plaintiff 10).

Defendant also moves for summary judgment on its counterclaims seeking to recover \$111,056.75 representing the reasonable value of Defendant's disbursements and other expenses along with carrying costs since the time of Plaintiff's default. Defendant also argues that it is entitled to an equitable mortgage for the unpaid amount of the loan in the amount of \$504,195.00. In support, Defendant relies upon the affidavit of Ben A. Coleman, assistant secretary of Fay Services LLC, attorney-in-fact and servicing agent for Defendant, in which he avers that he reviewed the pertinent loan records of the transactions and account activity kept in the normal course of business. Defendant also cites the Mortgage itself, which states that "Lender may charge [borrower] fees for services performed in connection with the default, for the purpose of protecting Lender's interest in the Property and rights under [the Mortgage]." In its memorandum of law, Defendant further contends that it is entitled to a default judgment on the counterclaims because Plaintiff failed to serve a reply (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. 1-10]; Defendant 4; Defendant 5 [Exh. A-L]; Defendant 6 [Exh. 1-7]; Defendant 7; Plaintiff 8 [Exh. 1-5]; Defendant 9; Plaintiff 10).

In his opposition to the cross motion, Plaintiff contends that the vacatur of the dismissal and restoration of the 2009 Foreclosure Action commenced by Downey, a defunct financial institution, does not prohibit Plaintiff from maintaining the instant action to discharge the Mortgage. Plaintiff contends that RPAPL 1501(4) does not require him to plead or prove that there is no pending foreclosure proceeding. With respect to the 2011 Foreclosure Action, though U.S. Bank filed a notice of appeal from the order dismissing the action, Plaintiff alleges that U.S. Bank failed to timely perfect the appeal

(Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. 1-10]; Defendant 4; Defendant 5 [Exh. A-L]; Defendant 6 [Exh. 1-7]; Defendant 7; Plaintiff 8 [Exh. 1-5]; Defendant 9; Plaintiff 10).

In reply, Defendant characterizes Plaintiff's arguments regarding the now-defunct Downey as an impermissible collateral attack on the restored 2009 Foreclosure Action, noting that standing is an affirmative defense that must be litigated in the foreclosure proceeding. Defendant further argues that Plaintiff's motion is frivolous in light of the conclusive documentary evidence indicating that there is an active and pending foreclosure proceeding (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. 1-10]; Defendant 4; Defendant 5 [Exh. A-L]; Defendant 6 [Exh. 1-7]; Defendant 7; Plaintiff 8 [Exh. 1-5]; Defendant 9; Plaintiff 10).

STANDARD OF REVIEW

A motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party" (CPLR 3212[b]; *see Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Once a prima facie showing has been made, 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'" (*Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 201 [2d Dept 2019], quoting *Rosenblatt v St. George Health & Racquetball Assoc., LLC*, 119 AD3d 45, 50 [2d Dept 2014]). Mere speculation or unsubstantiated allegations are insufficient to raise a triable issue of fact (*see Kwang Bok Yi v Open Karaoke Corp.*, 161 AD3d 971, 972 [2d Dept 2018], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

A motion pursuant to CPLR 3211(a)(1) to dismiss the complaint on the basis of documentary evidence may be appropriately granted where the documentary evidence utterly refutes the plaintiff's allegations, conclusively establishing a defense as a matter of law (*see Cassese v SVJ Joralemon, LLC*, 168 AD3d 667, 668 [2d Dept 2019]; *Xia-Ping Wang v Diamond Hill Realty, LLC*, 116 AD3d 767, 767-768 [2d Dept 2014], citing *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Schiller v Bender, Burrows and Rosenthal LLP*, 116 AD3d 756, 757 [2d Dept 2014]). Materials that qualify as documentary evidence include judicial records and "documents reflecting out-of-court transactions such as mortgages, deeds [and] contracts" (*S & J Serv. Ctr., Inc. v Commerce Commercial Group, Inc.*, 178 AD3d 977, 978 [2d Dept 2019]; *Fontanetta v John Doe 1*, 73 AD3d 78, 84-85 [2d Dept 2010]; *Xia-Ping Wang v Diamond Hill Realty, LLC*, at 768).

In considering a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, "the pleadings must be liberally construed" and "[t]he sole criterion is whether from [the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Bank of N.Y. Mellon Trust Co., N.A. v Universal Dev., LLC*, 136 AD3d 850, 850 [2d Dept 2016], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Lee Dodge, Inc. v Sovereign Bank, N.A.*, 148 AD3d 1007, 1008 [2d Dept 2017]). Nevertheless, "bare legal conclusions and factual claims which are flatly contradicted by the record are not presumed to be true" (*Gawrych v Astoria Fed. Sav. & Loan*, 148 AD3d 681, 683 [2d Dept 2017], quoting *Gershner v Eljamal*, 111 AD3d 664, 665 [2d Dept 2013] [internal quotation marks omitted]).

DISCUSSION

RPAPL 1501 provides that “[w]here the period allowed by the applicable statute of limitation for the commencement of an action to foreclose a mortgage ... has expired,” any person with an estate or interest in the property may maintain an action “to secure the cancellation and discharge of record of such encumbrance, and to adjudge the estate or interest of the plaintiff in such real property to be free therefrom” (RPAPL 1501[4]; *see Vitolo v U.S. Bank, N.A.*, 182 AD3d 630, 631 [2d Dept 2020]; *Mizrahi v U.S. Bank, N.A.*, 156 AD3d 617, 618 [2d Dept 2017]). An action to foreclose a mortgage is subject to a six-year statute of limitations (CPLR 213[4]; *see Vitolo v U.S. Bank, N.A.*, at 631; *21st Mtge. Corp. v Nweke*, 165 AD3d 616, 618 [2d Dept 2018]). “[E]ven if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt” (*21st Mtge. Corp. v Nweke*, at 618, quoting *Kashipour v Wilmington Sav. Fund Socy., FSB*, 144 AD3d 985, 986 [2d Dept 2016]).

Here, in support of his motion for summary judgment, Plaintiff submitted, inter alia, a copy of the verified complaint from the 2009 Foreclosure Action in which Downey specifically stated that it had “elected and does hereby elect to declare the entire balance of the principal sum secured by said Note and Mortgage to become immediately due and payable.” This established that the mortgage debt was accelerated on or about March 23, 2009, the date on which the earlier foreclosure action was commenced, and thus, that the applicable six-year statute of limitations had expired by the time the Plaintiff commenced the instant action on October 13, 2019 (*see 21st Mtge. Corp. v Osorio*, 167 AD3d 823, 825 [2d Dept 2018]; *NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d 1068, 1070 [2d Dept 2017]). Plaintiff demonstrated that the applicable statute of limitations has expired even if the limitations period is calculated from the date of the commencement of the 2011 Foreclosure Proceeding on November 4, 2011 (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. 1-10]; Defendant 4; Defendant 5 [Exh. A-L]; Defendant 6 [Exh. 1-7]; Defendant 7; Plaintiff 8 [Exh. 1-5]; Defendant 9; Plaintiff 10).

However, in opposition, Defendant submitted evidence demonstrating that it had moved to vacate the dismissal and restore the 2009 Foreclosure Action prior to the commencement of the instant action and that the proceeding was thereafter restored to active status. This evidence demonstrated that the 2009 Foreclosure Action was still pending and unresolved, thus precluding the commencement of an RPAPL 1501(4) action to cancel and discharge the Mortgage (*see, e.g., Mizrahi v U.S. Bank, N.A.*, 156 AD3d at 618 [foreclosure action was “pending and unresolved” where defendant submitted evidence that it had appealed from an order denying its motion to vacate dismissal order; action to cancel and discharge mortgage pursuant to RPAPL 1501(4) dismissed]; *Pena v Deutsch Bank Nat. Trust Co.*, 2017 WL 4358287, *2 [Sup Ct, Kings County 2018] [granting defendant’s motion to dismiss action to cancel and discharge mortgage where prior foreclosure was pending]; *Todd v Macko*, 2015 NY Slip Op 31865[U] [Sup Ct, Wyo County 2015] [granting defendant’s motion to dismiss where prior foreclosure action was timely when filed and pending]; *Yavne v Statman*, 2004 WL 6035004, *2 [Sup Ct, Queens County 2004] [denying plaintiff’s motion for summary judgment on RPAPL 1501(4) cause of action where there was a pending foreclosure action]; *see also Gustavia Home LLC v VVSI Corp.*, 2019 WL 2527291, *4 [ED NY 2019] [interpreting New York law] [commencement of action to cancel and discharge mortgage premature where state foreclosure proceeding was pending because of appeal following dismissal]; *cf. 53 PL Realty, LLC v U.S. Bank, N.A.*, 153 AD3d 894, 895 [2d Dept 2017] [granting plaintiff’s motion for leave to enter judgment against defendant canceling and discharging the mortgage where plaintiff “demonstrated that the mortgage was accelerated in 2008 more than six years before the commencement

of this action *and* that there was no longer a pending mortgage foreclosure action” (emphasis added)] (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. 1-10]; Defendant 4; Defendant 5 [Exh. A-L]; Defendant 6 [Exh. 1-7]; Defendant 7; Plaintiff 8 [Exh. 1-5]; Defendant 9; Plaintiff 10).

The Appellate Division recognized that a pending foreclosure proceeding precludes commencement of an action to cancel and discharge a mortgage pursuant to RPAPL 1501(4) in *Mizrahi v. U.S. Bank, N.A.* In *Mizrahi*, U.S. Bank initiated a foreclosure proceeding within the applicable six-year limitations period (156 AD3d at 618). The proceeding was thereafter dismissed, and U.S. Bank did not commence a new proceeding before the statute of limitations expired (*id.*). When *Mizrahi* commenced an action pursuant to RPAPL 1501(4) to cancel and discharge the mortgage, U.S. Bank argued that it was premature as it had appealed from an order denying its motion to vacate the order dismissing the foreclosure action (*id.*). The Second Department held that the pending appeal “demonstrated that ... the foreclosure action was still pending and unresolved,” contrary to the allegations of the complaint (*id.*). The Second Department therefore determined that the lower court should have granted U.S. Bank’s motion to dismiss the complaint pursuant to CPLR 3211(a)(7) (*id.*).

For this reason, Defendant’s motion to dismiss the complaint pursuant to CPLR 3211(a)(1) must be granted. Defendant demonstrated by submission of documentary evidence, including, inter alia, the Restoration Order in the 2009 Foreclosure Action, that the 2009 Foreclosure Action was “pending and unresolved” at the time of the commencement of this action (*see Mizrahi*, 156 AD3d at 618). A review of the submissions of the parties and official court records reveals that the 2009 Foreclosure Action remains active and pending. There is no dispute that the 2009 Foreclosure Action was timely when it was filed. This evidence utterly refutes the factual allegations of the complaint regarding the dismissal of the foreclosure proceedings and pendency of a foreclosure proceeding on the mortgage debt, and conclusively establishes a defense to Plaintiff’s claims as a matter of law. The complaint must also be dismissed pursuant to CPLR 3211(a)(7) as the allegations in the complaint necessary to state an RPAPL 1501(4) cause of action are “flatly contradicted by the record” (*Gawrych v Astoria Fed. Sav. & Loan*, 148 AD3d at 683) (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. 1-10]; Defendant 4; Defendant 5 [Exh. A-L]; Defendant 6 [Exh. 1-7]; Defendant 7; Plaintiff 8 [Exh. 1-5]; Defendant 9; Plaintiff 10).

Because the complaint is dismissed on the basis that there is a pending and unresolved foreclosure proceeding, it is not necessary to reach the additional grounds advanced by Defendant in support of its motion to dismiss (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. 1-10]; Defendant 4; Defendant 5 [Exh. A-L]; Defendant 6 [Exh. 1-7]; Defendant 7; Plaintiff 8 [Exh. 1-5]; Defendant 9; Plaintiff 10).

To the extent that Plaintiff, in effect, challenges the standing of Downey to maintain the 2009 Foreclosure Action, that contention is misplaced, as this defense must be asserted in the foreclosure proceeding (*see Jahan v. U.S. Bank, N.A.*, 127 AD3d 926, 927 [2d Dept 2015]; *Acocella v Bank of N.Y. Mellon*, 127 AD3d 891, 893 [2d Dept 2015]) (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. 1-10]; Defendant 4; Defendant 5 [Exh. A-L]; Defendant 6 [Exh. 1-7]; Defendant 7; Plaintiff 8 [Exh. 1-5]; Defendant 9; Plaintiff 10).

Under the circumstances presented, the complaint must be dismissed without prejudice to Plaintiff re-commencing the action following a proper disposition of any prior, timely foreclosure action on the Mortgage (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. 1-10]; Defendant 4; Defendant 5 [Exh. A-L]; Defendant 6 [Exh. 1-7]; Defendant 7; Plaintiff 8 [Exh. 1-5]; Defendant 9; Plaintiff 10).

With respect to the branch of Defendant's cross-motion seeking summary judgment on the counterclaims, since Plaintiff has not replied to the counterclaims, Defendant's motion for summary judgment is procedurally improper and must be denied on that ground without prejudice to renew (*see* CPLR 3212[a]; *Union Turnpike Assoc., LLC v Getty Realty Corp.*, 27 AD3d 725, 728 [2d Dept 2006] [affirming lower court's denial of cross motion for summary judgment as issue had not been joined even where the opposition papers failed to raise a triable issue of fact; "the Supreme Court was powerless to grant summary judgment on the complaint prior to joinder of issue"]; 4 N.Y. Prac., Com. Litig. in New York State Courts § 32:17 [4th ed.] ["a motion for summary judgment may only be made after issue has been joined"]; *see also* CPLR 3019[d] ["A cause of action contained in a counterclaim ... shall be treated, as far as practicable, as if it were contained in a complaint"; issue joined by service of a reply]). A motion for default judgment, which Defendant did not seek in the notice of motion and affirmation in support, rather than a motion for summary judgment, is the proper method for Defendant to obtain judgment against Plaintiff at this stage (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. 1-10]; Defendant 4; Defendant 5 [Exh. A-L]; Defendant 6 [Exh. 1-7]; Defendant 7; Plaintiff 8 [Exh. 1-5]; Defendant 9; Plaintiff 10).

Defendant's motion for sanctions, attorneys' fees, and costs is denied as Defendant has not demonstrated that Plaintiff's commencement of this action was frivolous or that counsel's arguments were without reasonable basis in law within the meaning of 22 NYCRR 130-1.1. The later refusal to withdraw the summary judgment motion was also not frivolous or in bad faith due to the paucity of case law involving factual situations similar to the instant case (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. 1-10]; Defendant 4; Defendant 5 [Exh. A-L]; Defendant 6 [Exh. 1-7]; Defendant 7; Plaintiff 8 [Exh. 1-5]; Defendant 9; Plaintiff 10).

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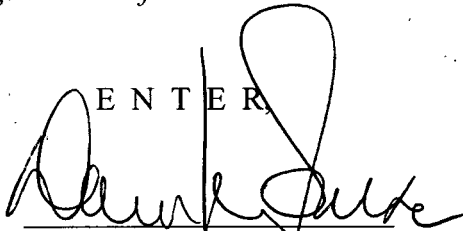
CONCLUSION

Plaintiff's motion for summary judgment pursuant to CPLR 3212 is denied. Defendant's cross motion to dismiss is granted to the extent that the complaint is dismissed pursuant to CPLR 3211(a)(1) and (a)(7) without prejudice to any appropriate action to discharge and cancel the subject mortgage. The motion is otherwise denied without prejudice to renewal as to that branch of the motion which is for summary judgment on Defendant's counterclaims. The counterclaims are severed and stayed pending the disposition of the prior foreclosure proceeding under index No. 6949/2009, and the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: August 27, 2020
Brooklyn, New York

Abdallah Ittayem v U.S. Bank National Association as Legal Trustee for Truman 2016 SC6
Index No. 522448/2019

E N T E R

Dawn Jimenez-Salta, J.S.C.
Hon. Dawn Jimenez-Salta
Justice of the Supreme Court

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