SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANCIS KAHN, III** **PART** **32**

Justice

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INDEX NO. 850126/2020

WILMINGTON SAVINGS FUND SOCIETY, FSB, D/B/A CHRISTIANA TRUST, NOT INDIVIDUALLY BUT AS TRUSTEE FOR PRETIUM MORTGAGE ACQUISITION TRUST,

MOTION DATE

MOTION SEQ. NO. 001

Plaintiff,

- v -

OKRYUN MARRERO, JUAN MARRERO, CRIMINAL COURT OF THE CITY OF NEW YORK, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, NEW YORK SUPREME COURT, COMMISSIONER OF SOCIAL SERVICES OF NEW YORK CITY, JOHN DOE

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 58, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89

were read on this motion to/for JUDGMENT - SUMMARY .

Upon the foregoing documents, the motion and cross-motion are determined as follows:

In this action, Plaintiff seeks to foreclose on a mortgage encumbering real property located at 225 West 131st Street, New York, New York. It is undisputed that at the time this action was commenced, the borrower, Defendant Okrynn Marrero, was deceased. At the time of her death, the property was titled in the names of "Juan Marrero and Okrynn Marrero, his wife". Issue was joined by Defendants Kory Marrero as Administrator for the Estate of Okrynn Marrero and Juan Marrero, who raised nineteen affirmative defenses in their answer, including failure to serve notices in accordance with RPAPL §§1303, 1304 and 1306 as well as Plaintiff's lack of standing.

Now, Plaintiff moves for summary judgment against the appearing Defendants, striking their answer, for a default judgment against the non-appearing Defendants and for an order of reference. Defendants Administrator for the Estate of Okrynn Marrero and Juan Marrero oppose the motion and cross-move for an order dismissing the action as a nullity, referring the matter to the Residential Mortgage Foreclosure Settlement Part, granting leave to file an amended answer and denying Plaintiff's motion. Plaintiff opposes the cross-motion.

In moving for summary judgment, Plaintiff was required to establish *prima facie* entitlement to judgment as a matter of law though proof of the mortgage, the note, and evidence of Mortgagors' default in repayment (*see U.S. Bank, N.A. v James,* 180 AD3d 594 [1st Dept 2020]; *Bank of NY v Knowles*, 151

AD3d 596 [1st Dept 2017]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1st Dept 2010]). Proof supporting a *prima facie* case on a motion for summary judgment must be in admissible form (*see* CPLR §3212[b]; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780 [1st Dept 2019]). As Defendants raised lack of standing in their answer, Plaintiff was required to demonstrate same (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd Dept 2020]). Plaintiff was also required to show that it substantially complied with the notice requirement under paragraph 22 of the mortgage as well as conformed with RPAPL §1303, §1304 and §1306 as these affirmative defenses were also raised (*see Wells Fargo Bank, N.A. v Tricario,* supra at 850; *U.S. Bank, NA v Nathan*, 173 AD3d 1112 [2d Dept 2019]; *HSBC Bank USA, N.A. v Bermudez*, 175 AD3d 667, 669 [2d Dept 2019]).

Plaintiff's motion was supported with an affidavit of facts from Michael N. Zerulik ("Zerulik"), a Litigation Specialist for Selene Finance ("Selene"), the alleged servicing agent and attorney-in-fact for Plaintiff. Zerulik sufficiently established a foundation under CPLR §4518 for admission of his employer's documents as business records via his personal knowledge of the record-keeping procedures of Selene (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). The records of other entities were also admissible since Zerulik sufficiently established that those records were received from the makers and incorporated into the records his employer kept which Selene routinely relied upon such documents in its business (*see U.S. Bank N.A. v Kropp-Somoza,* 191 AD3d 918 [2d Dept 2021]). Further, the records reviewed and referenced by Zerulik were annexed to his affidavit (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]).

Zerulik's affidavit and the referenced documents sufficiently evidenced the note and mortgage. As to Defendants' default, it "is established by (1) an admission made in response to a notice to admit, (2) an affidavit from a person having personal knowledge of the facts, or (3) other evidence in admissible form" (*Deutsche Bank Natl. Trust Co. v McGann*, 183 AD3d 700, 702 [2d Dept 2020]). Here, Zerulik review of the attached account records demonstrated that Defendants defaulted when the loan matured (*see eg ING Real Estate Fin. (USA) LLC v Park Ave. Hotel Acquisition, LLC*, 89 AD3d 506 [1st Dept 2011]; *Fortress Credit Corp. v Hudson Yards, LLC*, supra).

Plaintiff established its standing to prosecute this action as a copy of the note, endorsed in blank on its face was annexed to the complaint (*see eg Bank of NY v Knowles,* supra; *JPMorgan Chase Bank, N.A. v Weinberger,* 142 AD3d 643 [2d Dept 2016]).

Plaintiff also demonstrated RPAPL §1304 is inapplicable to this action. Compliance with this section is limited to "home loans" where, *inter alia*, the "debt is incurred by the borrower primarily for personal, family, or household purposes" and "[t]he loan is secured by a mortgage [on] . . . a one to four family dwelling . . . which is or will be occupied by the borrower as the borrower's principal dwelling" (*see* RPAPL § 1304[6][a][1][ii] and [iii]). At the outset, Decedent's estate was not required to be served with an RPAPL §1304 notice (*see HSBC Bank USA, NA v Shah*, 185 AD3d 794 [2d Dept 2020]). Plaintiff established service of an RPAPL §1304 notice was not required with the loan application executed by Okrynn Marrero which stated the property would be used for "investment" purposes and that she resided at a premises she owned at 453 New Hempstead Road, New City, New York (*see Bernstein v Dubrovsky,* 169 AD3d 410 [1st Dept 2019]; *Independence Bank v Valentine,* 113 AD3d 62 [2d Dept 2013]). As RPAPL §1304 is inapplicable, Plaintiff demonstrated compliance with RPAPL §1306 was also not necessary (*see* RPAPL §1306[1]). As to RPAPL §1303, the affidavits of service submitted by plaintiff showed notices in the appropriate form were served in accordance with the statutory requisites (*see eg US Bank v Nathan*, 173 AD3d 1112 [2nd Dept 2019]).

Paragraph 22 of the mortgage, a ubiquitous provision in residential mortgages, provides that as a precondition to acceleration of the note, the lender must send a notice containing the information specified in paragraph 22[b][1] – [6] in the manner described in paragraph 15 of the mortgage. That section provides that all notices must be in writing and "is considered given to [Mortgagor] when mailed by first class mail or when actually delivered to my notice address if sent by other means . . . The notice address is the address of the Property unless I give notice to Lender of a different address". This notice was not required to served upon Decedent's estate (*see HSBC Bank USA, NA v Shah*, supra), but Plaintiff was required to provide this notice to Juan Marrero, a mortgagor.

The Court of Appeals has "has long recognized a party can establish that a notice or other document was sent through evidence of actual mailing or—as relevant here—by proof of a sender's routine business practice with respect to the creation, addressing, and mailing of documents of that nature" (*Cit Bank N.A. v Schiffman*, 36 NY3d 550, 556 [2020][internal citations omitted]). Fulfillment of this requirement can raise a presumption that the required notice was sent and received by the projected addressee (*id.*). A satisfactory office practice giving rise to the presumption "must be geared so as to ensure the likelihood that [the] notice . . . is always properly addressed and mailed" (*Nassau Ins. Co. v Murray*, 46 NY2d 828, 830 [1978]) and can be demonstrated via an affiant who explains "among other things, how the notices and envelopes were generated, posted and sealed, as well as how the mail was transmitted to the postal service" (*Cit Bank N.A. v Schiffman*, supra). An affidavit from the person who performed the actual mailing is not necessary (*see Bossuk v Steinberg*, 58 NY2d 916, 919 [1983]). Proof from a person with "personal knowledge of the practices utilized by the [sender] at the time of the alleged mailing" is sufficient (*Preferred Mut. Ins. Co. v Donnelly*, 22 NY3d 1169, 1170 [2014]).

Here, although Zerulik claims personal familiarity with Selene's mailing practices and procedures, he failed to describe that procedure in any detail (*cf. Citimortgage, Inc. v Ustick*, 188 AD3d 793, 794 [2d Dept 2020]). Zerulik did not claim to have personal knowledge of the mailing and did not annex any records reviewed to support his claimed knowledge that Selene complied with its standard practice (*cf. United States Bank Trust, N.A. v. Mehl,* 195 AD3d 1054 [2d Dept 2021]). Mere annexation of the notices with a bar code and 10-digit code number does not constitute proof the notice was actually mailed (*see U.S. Bank N.A. v Hammer,* 192 AD3d 846 [2d Dept 2021]; *U.S. Bank, N.A. v Zientek*, 192 AD3d 1189 [2d Dept 2021]). Accordingly, Plaintiff failed to establish *prima facie* that it sent a pre-foreclosure notice pursuant to paragraph 22 of the mortgage.

The branch of Plaintiff's motion for a default judgment against the non-appearing parties is granted without opposition (*see* CPLR §3215; *SRMOF II 2012-I Trust v Tella*, 139 AD3d 599, 600 [1st Dept 2016]).

The branch of Plaintiff's motion to amend the caption is granted without opposition (*see generally* CPLR §3025; *JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]).

The branch of Defendants' cross-motion to dismiss the complaint as a nullity is denied. Defendants are correct that the commencement of an action against a deceased person is a nullity (*see Federal Natl. Mtge. Assn. v Tudor*, 185 AD3d 905 [2d Dept 2020]), but starting this action after Okrynn Marrero died was not fatal. The deed proffered by Defendants established that at the time of her death, Okrynn Marrero and Juan Marrero held the property as tenants by the entirety (*see eg Mizuno v Fischoff & Assoc.*, 82 AD3d 849, 850 [2d Dept 2011]). When Okrynn Marrero died, Juan Marrero became the sole owner of the property by operation of law (*see Kahn v Kahn*, 43 NY2d 203, 207 [1977]). As Juan

Marrero, the sole owner and only indispensable party, has been a party to this action since its inception, including Okrynn Marrero was immaterial.

Defendants' argument that a settlement conference pursuant to CPLR §3408 must be conducted is also unavailing. "CPLR §3408 only mandates a settlement conference in a residential foreclosure action involving a 'home loan' as defined by RPAPL §1304, and when the 'defendant is a resident of the property subject to foreclosure'" as defined in CPLR §3408[a][1] (*Richlew Real Estate Venture v Grant* 131 AD3d 1223 [2d Dept 2015]; *see also* CPLR §3408; *JP Morgan Chase Bank, N.A. v Venture*, 148 AD3d 1269 [3d Dept 2017]). "When CPLR §3408 and RPAPL §1304[6] are read together, it appears that a settlement conference is mandated where two 'residency' requirements are met, one [RPAPL §1304] considered as of the time of the subject mortgage is given, and one [CPLR §3408] considered as of the time of the foreclosure action is commenced" (*see HSBC Bank United States v McKenna,* 37 Misc 3d 885 [Sup. Ct. Kings County 2012]).

In his affidavit in opposition, Juan Marrero claims the subject premises "is my long-time family and home [sic] and primary residence since my late wife, Okryun Marrero, and I purchased it in 1983." He also avers the purpose of the mortgage loan was to renovate "the Property for my family". Juan Marrero's claim of residence at the mortgaged premises is conclusory, uncorroborated, and entirely belied by the documentary evidence (*cf. Ocwen Loan Servicing, LLC v Ali,* 180 AD3d 591 [1st Dept 2020]; *U.S. Bank N.A. v Martinez*, 139 AD3d 548, 549 [1st Dept 2016]). The mortgage at issue, signed by both Okryun and Juan Marrero, states their address is 453 New Hempstead Road, New City, New York. Defendants' reliance on the "principal residence" clause in section 6 of the mortgage is unavailing as that section was "deleted" by paragraph F of the assignment of rents rider. Further, in the death certificate for Okryun Marrero proffered by Defendants, the Decedent's usual residence is listed as 1022 Boulevard, Apt 199, Hartford, Connecticut. Juan Marrero supplied this information as the informant on that official document. He also admitted in that document his address was 1145 Boynton Avenue, Apt 2B, Bronx, New York. This address is the location Plaintiff's process server avers he made personal delivery of the summons and complaint on Juan Marrero. Juan Marrero's assertion that the Decedent was unaware of what she was signing or misled into same is patent hearsay and unavailing (*see Landmark Capital Invs., Inc. v Li-Shan Wang,* 94 AD3d 418 [1st Dept 2012]; *Norstar Bank of Long Island v Prompt Process Service, Inc.*, 117 AD2d 589 [2d Dept 1986]).

As such, Defendants failed to raise an issue of fact that, at the time the loan was given, the mortgaged premises was intended to be or actually used by Okryun and Juan Marrero as their principal dwelling or that, when the action was commenced, they were residents of the premises (*see JP Morgan Chase Bank, N.A. v Venture,* supra; *HSBC Bank USA, N.A. v Ozcan*, 154 AD3d 822, 825 [2d Dept 2017]).

As to the affirmative defenses, Defendants withdrew twelve of the nineteen affirmative defenses pled in the original answer in their opposition. In the proposed amended answer, Defendants seek to assert eight affirmative defenses as follows: [1] failure to meet a condition precedent in the mortgage, [2] failure to comply with RPAPL §1304, [3] failure to comply with RPAPL §1303, [4] lack of standing, [5] failure to comply with RPAPL §1306, [6] violation of Banking Law §6-l, [7] violation of Banking Law §6-m, and [8] violation of the Equal Credit Opportunity Act, 15 USC § 1691. Only the eighth affirmative defense is newly pled.

CPLR §3211[b] provides that "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit". For example, affirmative defenses

that are without factual foundation, conclusory or duplicative cannot stand (*see Countrywide Home Loans Servicing, L.P. v Vorobyov,* 188 AD3d 803, 805 [2d Dept 2020]; *Emigrant Bank v Myers*, 147 AD3d 1027, 1028 [2d Dept 2017]). When evaluating such a motion, a "defendant is entitled to the benefit of every reasonable intendment of its pleading, which is to be liberally construed. If there is any doubt as to the availability of a defense, it should not be dismissed" (*Federici v Metropolis Night Club, Inc.*, 48 AD3d 741, 743 [2d Dept 2008]).

Based upon the Court's finding supra, the first affirmative defense in the amended answer is viable, but the second, third, fourth and fifth affirmative defenses fail.

The sixth proposed affirmative defense based on Banking Law §6-l is without merit. The version of Banking Law §6-l in effect when the note was executed applied only to "high-cost home loans". A "home loan" was defined as one "in which . . . [t]he 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" (*see Lewis v Wells Fargo Bank, N.A.,* 134 AD3d 777, 779 [2d Dept 2015]). Here, since the principal amount of the note was $750,000.00, this statute is inapplicable (*id.*).

The seventh affirmative defense alleging a violation of Banking Law §6-m also fails to state a claim as the note and mortgage herein were executed on July 17, 2007, but the statute was not effective until September 1, 2008 (*see United States Bank N.A. v Jeffrey*, 193 AD3d 905 [2d Dept 2021]).

As to the newly proposed eighth affirmative defense, leave to amend a pleading under CPLR §3025[b] is to be freely given "absent prejudice or surprise resulting directly from the delay" (*see e.g. O'Halloran v Metropolitan Transp. Auth.*, 154 AD3d 83 [1st Dept 2017]; *Anoun v City of New York*, 85 AD3d 694 [1st Dept 2011]; *see also Fahey v County of Ontario*, 44 NY2d 934, 935 [1978]). All that need be shown is that "the proffered amendment is not palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010]).

Defendants' attempt to assert Equal Credit Opportunity Act, 15 USC § 1691 as a defense to foreclosure is unavailing as a violation by the original lender does not void the underlying credit transaction (*see Citibank, N.A. v Silverman,* 85 AD3d 463, 464 [1st Dept 2011]). Even if this section could be considered a defense to foreclosure, it is conclusory and pled without facts to support that the original lender negotiated a mortgage loan with a rate and terms which significantly deviated from industry-wide standards, or which was otherwise unconscionable based upon the income, credit score and history of Defendants (*see generally Countrywide Home Loans Servicing, L.P. v Vorobyov*, supra).

Accordingly, it is

ORDERED that the branches of Plaintiff's motion for summary judgment on its causes of action for foreclosure and the appointment of a referee to compute are denied based upon its failure to demonstrate *prima facie* that a pre-foreclosure notice pursuant to paragraph 22 of the mortgage was sent, and it is

ORDERED that all the affirmative defenses in answer of Defendants Administrator for the Estate of Okrynn Marrero and Juan Marrero are dismissed, except the first, and it is

ORDERED that the branch of Plaintiff's motion for a default judgment is granted as against all non-appearing Defendants, and it is

ORDERED, that the caption of this action be amended by substituting Korey Marrero, Tomoki "Doe" and Mei Lee in the place and stead of defendant "John Doe" and striking therefrom defendant Okryun Marrero, and it is

ORDERED the caption is amended as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK

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WILMINGTON SAVINGS FUND SOCIETY, FSB, D/B/A CHRISTIANA TRUST, NOT INDIVIDUALLY BUT AS TRUSTEE FOR PRETIUM MORTGAGE ACQUISITION TRUST,

Plaintiff, Index No. 850126/2020

-against-

JUAN MARRERO, CRIMINAL COURT OF THE CITY OF NEW YORK, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, NEW YORK SUPREME COURT, COMMISSIONER OF SOCIAL SERVICES OF NEW YORK CITY, TOMOKI "DOE", MEI LEE, KOREY MARRERO,

Defendants.

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and it is

ORDERED that Defendants' cross-motion is denied in its entirety.

This matter is set down for a status conference on **July 20, 2022 @ 11:00 am** via Microsoft Teams.

5/2/2022
DATE

FRANCIS A. KAHN III, A.J.S.C.
HON. FRANCIS A. KAHN III J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE