

U.S. Bank N.A. v Elhag
2022 NY Slip Op 32353(U)
July 1, 2022
Supreme Court, Kings County
Docket Number: Index No. 500993/2020
Judge: Lawrence Knipel
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part Comm 6 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 1st day of July, 2022.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X
U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE
FOR VELOCITY COMMERCIAL CAPITAL LOAN
TRUST 2019-1,

Plaintiff,

- against -

Index No. 500993/2020

ABDELAZIZ ELHAG a/k/a ABDELAZIZ B. ELHAG
a/k/a ABDELAZIZ ELHAAG; CAPITAL ADVANCE
SERIES, LLC; NEW YORK PARKING VIOLATIONS
BUREAU; "JOHN DOE #1 - #50" and "MARY ROE
#1 - #50", the last two names being fictitious, it
being intended to name all other parties who may
have some interest in or lien upon the premises
described in the complaint,

(Mot. Seqs. 1, 2)

Defendants.

-----X
The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

32-42 49-63
50-63 67-73
67-74 75

Upon the foregoing papers in this action to foreclose a mortgage encumbering the property at 1249 Saint Johns Place in Brooklyn (Block 1376, Lot 58) (Property), plaintiff U.S. Bank National Association, as Trustee for Velocity Commercial Capital Loan Trust

2019-1 (U.S. Bank or plaintiff) moves (in motion sequence [mot. seq.] one), "pursuant to RPAPL § 1321, CPLR Rule, and CPLR §§ 1003 and 3215," for an order:

- "1. Striking the answer and each affirmative defense asserted by defendant Abdelaziz Elhag, on the merits and with prejudice, and directing that the stricken answer be treated as a notice of appearance;
- "2. Directing entry of summary judgment in favor of the plaintiff and against Abdelaziz Elhag for the relief demanded in the complaint;
- "3. Granting a default judgment in favor of the plaintiff against each non-answering defendant;
- "4. Striking the names of defendants "John Doe #1 - #50" and "Mary Roe #1-#50" from the caption; and substituting in their place the names "Shihab Gomaa," "Shabo Gomaa," "Kev Gomaa," "Anthony Smith (Last Name Refused)," "John Smith (Last Name Refused)," and "Jane Smith (Name Refused)," in their capacities as tenants or occupants of the subject property;
- "5. Appointing a Referee to compute the amounts due on the subject mortgage; and
- "6. Granting plaintiff such other and further relief as this Court deems appropriate."

Defendant Abdelaziz Elhag a/k/a Abdelaziz B. Elhag a/k/a Abdelaziz Elhaag (Elhag or defendant) cross-moves (in mot. seq. two), for an order:

- "a. pursuant to CPLR § 3212, granting Defendant Summary Judgment on the grounds that the Plaintiff failed to serve the pre-foreclosure notice(s) pursuant to RPAPL § 1304 as a condition precedent to commencing this action;
- "b. pursuant to CPLR § 3212, further granting Defendant Summary Judgment on the grounds that Plaintiff failed to comply with RPAPL § 1306;

‘c. pursuant to CPLR § 3025 (b), and in the interest of justice, granting Defendant leave to file an Amended Answer; and/or

‘d. for all other relief that the Court deems just and proper.”

Background

U.S. Bank’s Complaint

On January 14, 2020, U.S. Bank commenced this foreclosure action by filing a summons, an unverified complaint and a notice of pendency against the Property. The complaint alleges that Elhag executed and acknowledged a note,¹ “for the purpose of securing payment of \$805,000.000 to plaintiff’s predecessor in interest[,]” and promising to pay back the loan according to the note’s terms (*see* complaint ¶ 5). The complaint alleges that as security for the debt, Elhag delivered to U.S. Bank’s predecessor in interest a mortgage and loan agreement², that the mortgage was recorded in the Office of the City Register for the City of New York, and that the mortgage was subsequently assigned to U.S. Bank³ (*id.* ¶¶ 6-8). The complaint also alleges that Elhag defaulted by failing to comply with the terms of the note and mortgage in that he failed to make the payments due under those documents, as forth in Schedule “G”, annexed to the complaint, and that U.S. Bank “has previously elected and hereby elects to call due the entire amount secured by the mortgage” (*id.* ¶ 9). Schedule “G” states that principal and interest in the amount of

¹ The note, annexed to the complaint as Schedule “C” was executed on November 7, 2018.

² The mortgage and loan agreement are annexed to the complaint as Schedule “D” and Schedule “E,” respectively.

³ The mortgage assignment is annexed to the complaint as Schedule “F.”

\$6,184.05 was due to be paid by September 1, 2019, and that at that time, there was an outstanding principal balance of \$800,992.42. The complaint further alleges that “RPAPL § 1304 and § 1306 are not applicable because the loan, which is the subject of this action, is a commercial loan” (*id.* ¶ 18).

Elhag’s Answer

On January 27, 2020, Elhag, proceeding *pro se*, filed an answer denying the allegations, as follows:

“1- Denies all allegations including, but not limited to paragraphs 9, 10, 11, 13

“2- 17 and 20 of the complaint.”

The answer also states the following five affirmative defenses:

“2- Pursuant to paragraph 22 of the mortgage, the plaintiff failed to serve proper notice upon the defendant of a) disclosure b) assignment c) 30-day notice period to cure the default, and that

“3- Upon belief and information such actions by the plaintiff are very deceptive and meritless.

“4- The defendant was not properly served pursuant to CPLR and that

“5- The defendant was in the process of loan modification with plaintiff’s loss mitigation office.”

Finally, the answer contains a “Wherefore” clause requesting dismissal of this action.

Service Of Process on Defendants

In January and February of 2020, U.S. Bank filed affidavits of service of the summons, complaint, and RPAPL 1303 notice on defendants Elhag, Shihab Gomaa, s/h/i John Doe # 1 (Shihab), Shabo Gomaa, s/h/i John Doe # 2 (Shabo), Kev Gomaa, s/h/i John Doe # 3 (Kev), New York City Parking Violations Bureau, Capital Advance Services, LLC, Jane Smith (Name Refused) sued herein as Mary Roe #2, John Smith (Name Refused) s/h/i John Doe #5, Carmen Smith (Last Name Refused) s/h/i Mary Roe, and Anthony Smith (Last Name Refused) s/h/i John Doe #4. U.S. Bank also filed affidavits of service of notice pursuant to RPAPL 1303 on "Occupant," residing at the Property.

To date, no other defendant has appeared in the action.

U.S. Bank's Motion to Strike the Answer, for Summary Judgment, and For an Order of Reference

On March 4, 2021, U.S. Bank filed the instant motion contending that it is entitled to summary judgment against Elhag because there are no genuine issues of material fact requiring a trial. In that regard, U.S. Bank argues that it has made its prima facie case by submitting an affidavit from Mickie Byron (Byron), an authorized officer of Velocity Commercial Capital, LLC, the attorney in fact and servicer for U.S. Bank, and by submitting proof, annexed to Byron's affidavit, of the existence of the unpaid note, the mortgage, and Elhag's default in payment. U.S. Bank contends that Elhag cannot meet his burden to oppose summary judgment because the general denials in his answer are disposed of by Byron's affidavit and are conclusory and insufficient to raise a triable issue of fact.

U.S. Bank also contends that the affirmative defenses in Elhag's answer are not supported by factual allegations, evidence or legal authority. With respect to the first affirmative defense, U.S. Bank argues that Elhag is not entitled to any notice of default pursuant to the terms of the mortgage, because the mortgage states that Elhag specifically waived notice. With respect to the second affirmative defense, U.S. Bank contends that Elhag does not specify the way in which this action is "deceptive and meritless." As for the third affirmative defense, U.S. Bank argues that Elhag waived his right to challenge service of process on him when he failed to move to dismiss on that ground within 30 days of serving his answer. As for Elhag's fourth affirmative defense that he was in the process of modifying his loan, U.S. Bank contends that this is not a defense to foreclosure and does not raise a triable issue of fact.

While U.S. Bank seeks a default judgment against the non-answering defendants in its notice of motion and substitution of names in the caption, it does not advance any arguments in support in its affirmation, other than pointing to proof of service of the summons and complaint on them.

***Elhag's Opposition to U.S. Bank's Motion, Cross Motion
for Summary Judgment and to Amend***

On April 5, 2021, counsel for Elhag filed a notice of appearance. On June 24, 2021, Elhag, by counsel, opposed U.S. Bank's motion, cross-moved for summary judgment and for leave to file an amended answer.

In his opposition, Elhag contends that a genuine issue of material fact precluding summary judgment in favor of U.S. Bank exists as to whether the loan on the Property is a commercial loan or residential loan. Elhag denies executing a commercial loan, contends that the loan is residential and that U.S. Bank incorrectly labeled the loan as a commercial loan, thereby allowing U.S. Bank to circumvent the pre-foreclosure notice requirements. In support, Elhag attaches a photograph of the Property, and asserts, in his affidavit, that he “used or occupied or intend to occupy the property as my principal residence” (aff of Elhag ¶ 7). Elhag also attaches the deed to the Property, executed on July 13, 2006, and notes that the registration and recording document states that the Property is a two-family dwelling. Elhag denies executing any commercial loan. Elhag notes that the loan was made directly to him, in his name, rather than to some commercial entity, which would be typical for a commercial loan. He contends that it would be odd for a residential property to qualify for a commercial loan as these types of loans have stringent documentary requirements, and states that he did not have the required documents to qualify for a commercial loan.

Elhag also contends that a genuine issue of material fact exists as to U.S. Bank’s standing, which pursuant to RPAPL 1302-a he has not waived, and whether there was a valid assignment of the note and mortgage. In that regard, Elhag points out that in the note, Elhag promised to pay “Velocity Mortgage Capital,” which is apparently a distinct entity from “Velocity Commercial Capital, LLC.” Elhag contends that “the record is barren of any evidence that the Note and Mortgage were transferred from Velocity Mortgage Capital

to Velocity Commercial Capital, LLC, and subsequently, from Velocity Commercial Capital, LLC to [U.S. Bank]" (Elhag attorney aff ¶ 67). Elhag argues that U.S. Bank has not met its burden of proving that it was the "holder or assignee" of the note prior to commencing the action.

Elhag further contends that a genuine issue of material fact exists as to whether a valid power of attorney and/or corporate documents exist which granted Byron authority to act or make affirmations on U.S. Bank's behalf. Elhag argues that absent corporate documents or servicing agreements, Byron's affidavit concerning the note, mortgage, and the documents submitted therewith, may not be used to support U.S. Bank's claim.

In addition, Elhag cross-moves for summary judgment dismissing the complaint on the ground that U.S. Bank did not serve the requisite pre-foreclosure notices pursuant to RPAPL 1304 and 1306. Elhag contends that pre-foreclosure notices are a condition precedent to commencing a residential foreclosure action, that U.S. Bank bears the burden of demonstrating that it complied with the notice requirements, and that U.S. Bank's failure to comply with the notice requirements is a defense to this action. Elhag notes that U.S. Bank admitted in its complaint that it did not serve the pre-foreclosure notices.

In the alternative, Elhag cross-moves for leave to file an amended answer. In support of his motion, Elhag annexes a copy of the proposed amended answer. Elhag states that after he was served with the complaint, he retained the services of someone who he believed was an attorney who assisted in preparing his answer, but later learned that the affirmative defenses asserted did not adequately protect his interests. Elhag contends that

he was denied effective representation and assistance of competent counsel, and that leave to file an amendment should be freely given, even if belatedly sought. Elhag further argues that U.S. Bank would not be prejudiced or surprised by any delay in amendment and contends that amendment would further the strong public policy of resolving this case on the merits.

***U.S. Bank's Opposition to Elhag's Cross Motion
and Reply in Support of its Summary Judgment Motion***

In opposition to Elhag's motion, filed on September 16, 2021, U.S. Bank contends that the commercial mortgage, loan agreement and numerous disclosures, acknowledgements and certifications signed by Elhag expressly provide that the loan is commercial rather than residential. U.S. Bank argues that the mortgage is not a "home loan" as defined by RPAPL 1304 (6) [a] (1) because Elhag signed documents stating that the funds would be used for business purposes and that he did not occupy or intend to occupy the Property. U.S. Bank contends that since the mortgage was commercial and not a "home loan," Elhag was not entitled to receive RPAPL 1304 and 1306 pre-foreclosure notices.

In support of this contention, U.S. Bank submits an affidavit from Sandie Lawrence (Lawrence), department manager at Velocity Commercial Capital, LLC, U.S. Bank's "attorney in fact and servicer" as evidenced by an annexed limited power of attorney. Annexed to Lawrence's affidavit is a "Business Purpose Loan Certification," signed by Elhag, which states:

“3. Borrower has previously represented to Lender, and hereby represents again in this certification to Lender, its successors and assigns, that ALL of the purposes of the Loan, exclusive of commissions and loan expenses incurred to obtain the Loan are for business purposes.

“4. No part of the Loan proceeds are intended to be used for a non-business (i.e., consumer) purpose.”

Also annexed to Lawrence’s affidavit is a “Disclosure Statement and Acknowledgement for Business Purpose Loans,” signed by Elhag, in which he acknowledges that the loan is made “exclusively for business purposes.” Lawrence further annexes a “Certificate of Occupancy and Indemnity Form,” signed by Elhag, which states:

“3. Borrower certifies and represents to Lender that:

‘A. Borrower has his or her true and only principal residence located at: 1025 Atlantic Avenue, 2nd Floor, Brooklyn, NY 11238

‘B. The Property that will secure this Loan is not the principal residence of the Borrower; and

‘C. Borrower has no intention of ever making the Property securing the Loan his or her principal residence.”

Lawrence also attaches a handwritten letter from Elhag, dated October 5, 2018, “Re: 1249 St. John’s Place, Brooklyn, NY 11213” stating: “Please be advised that I will not be occupying above mentioned property now or in the near future. The cash from the property will be used to upgrade house including repairs and buy additional investment.” Lawrence further annexes leases, submitted by Elhag to establish that the Property was a rental

property for which he received monthly rental payments, as part of his mortgage application.

U.S. Bank further points to paragraph 2.1 (e) of the mortgage executed by Elhag, which states: “[e]ach Obligation is a commercial obligation and does not represent a loan used for personal, family or household purposes and is not a transaction.” U.S. Bank further points to the paragraph 2.9 loan agreement, which states: “[n]o portion of any loan is to be used for . . . primarily personal, family or household purposes.”

With regard to Elhag’s contention that he did not waive a standing defense, U.S. Bank contends that RPAPL 1302-a does not apply to the instant loan because, by its terms, the statute only applies to a “home loan” as defined by RPAPL 1304 (6) [a] (1). U.S. Bank further argues that, notwithstanding Elhag’s explicit waiver of a standing defense, it has established standing by demonstrating that it was expressly assigned the mortgage, together with the note, in the assignment of mortgage attached to the complaint. U.S. Bank points to Lawrence’s affidavit, which attaches a limited power of attorney signed by U.S. Bank. Lawrence asserts that U.S. Bank is the holder of the note and the owner of the subject mortgage. Lawrence also states that “Velocity Mortgage Capital” is an alternative name or “d/b/a” for Velocity Commercial Capital, LLC. In support of this contention, Lawrence attaches a Fictitious Business Name Statement, filed with the Los Angeles County Registrar which demonstrates this. Lawrence further asserts that the use of “Velocity Mortgage Capital” on the subject note was an inadvertent scrivener’s error that was corrected via express assignment of the mortgage, together with the note, in the assignment

of the mortgage dated November 20, 2010 attached to the complaint as Schedule "F." U.S. Bank contends that as the same entity as Velocity Mortgage Capital, Velocity commercial Capital had both the right and the authority to assign the mortgage and note to U.S. Bank.

In opposition to Elhag's motion for leave to amend, U.S. Bank contends leave to amend should be denied because proposed answer is "entirely devoid of merit." U.S. Bank also argues that: (1) the defenses asserted in the proposed answer are inapplicable to the instant commercial mortgage because it was used for business purposes, (2) the defense regarding amount due is not a defense to a foreclosure action, and (3) the defenses not previously asserted in the answer are waived and cannot be alleged in an amended answer. U.S. Bank further argues that Elhag has not provided a reasonable excuse for his delay in seeking amendment in that he does not provide the name of the person who prepared his answer or how long he was aware that the answer was deficient. Finally, U.S. Bank contends that it is prejudiced by delay because it is "burdened" with covering the carrying costs for the property while Elhag did nothing until faced with having to defend against a summary judgment motion.

Elhag's Reply in Support of his Cross Motion

Elhag contends that U.S. Bank has not established that Velocity Mortgage Capital is the alternative name for Velocity Capital Commercial, LLC because the limited power of attorney attached to Lawrence's affidavit was submitted for the first time on reply. Elhag also contends that Lawrence is not an authorized officer acting on behalf of U.S. Bank

because Lawrence's affidavit did not attach corporate documents or the service agreement. Elhag further contends that U.S. Bank has not established standing.

In addition, Elhag argues that documents attached to Lawrence's affidavit regarding the commercial nature of the loan should be disregarded, since U.S. Bank has not established a relationship with Velocity Commercial Capital, and therefore U.S. Bank has not established that they are business records.

Elhag queries that if U.S. Bank believes that the loan is commercial and had knowledge that his principal residence was 1025 Atlantic Avenue and not the Property, then why did U.S. Bank serve Elhag with process at the Property? Elhag contends that is because U.S. Bank was aware that the loan was residential and that Elhag resided at the Property.

Discussion

U.S. Bank moves for summary judgment and to strike Elhag's answer. Elhag opposes the motion, cross-moves for summary judgment, and in the alternative, for leave to amend his answer.

(I)

Elhag's Motion for Leave to Amend the Answer

Turning first to Elhag's motion for leave to file an amended answer, a party may amend its pleading by setting forth additional or subsequent transactions or occurrences, at any time by leave of the court or by stipulation of the parties (*see* CPLR 3025 [b]; *Cullen v Torsiello*, 156 AD3d 680, 681 [2017]). "Leave shall be freely given upon such terms as

may be just” (CPLR 3025 [b]; *see also Cullen*, 156 AD3d at 681). As a general rule, “a court hearing a motion for leave to amend will not examine the merits of the proposed amendment” (*Ricca v Valenti*, 24 AD3d 647, 648 [2005]). A court has broad discretion to grant a motion to amend the pleadings . . . when there is no actual prejudice or surprise to the opposing party (*see Kimso Apartments, LLC v Gandhi*, 24 NY3d 403, 411 [2014]; *Murray v City of New York*, 43 NY2d 400, 405 [1977], *rearg dismissed* 45 NY2d 966 [1978]; *Cullen*, 156 AD3d at 681). “Courts should grant leave to amend ‘[i]n the absence of prejudice or surprise resulting directly from the delay in seeking leave . . . unless the proposed amendment is palpably insufficient or patently devoid of merit’” (*National Recruiting Group, LLC v Bern Ripka LLP*, 183 AD3d 831, 832 [2020], quoting *Lucido v Mancuso*, 49 AD3d 220, 222 [2008]). “The passage of time alone, without a further showing of prejudice, is insufficient to deny leave to amend a pleading” (*see Eng v DiCarlo*, 79 AD2d 1018 [1981]; *see also JBGR, LLC v Chicago Title Insurance Company*, 195 AD3d 604, 606 [2021]). “The burden of demonstrating prejudice or surprise, or that a proposed amendment is palpably insufficient or patently devoid of merit, falls upon the party opposing the motion” (*National Recruiting Group*, 183 AD3d at 832).

A motion to amend must be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions made to the pleading (CPLR 3025 [b]; *Drice v Queens County District Attorney*, 136 AD3d 665, 666 [2016]; *Codrington v Wendell Terrace Owners Corp.*, 118 AD3d 844, 845-846 [2014]). Here, Elhag has complied with this mandate by submitting a proposed amended answer with counterclaims,

which the court has compared with the original answer. The proposed amended answer asserts a standing defense as well as twenty-one other defenses and contains counterclaims for attorney's fees and for damages for a violation of the Fair Debt Collection Practices Act.

The court finds that U.S. Bank has failed to demonstrate that the proposed amended answer with counterclaims is palpably insufficient or devoid of merit, or that it was prejudiced or surprised by the proposed amendment (*see National Recruiting Group*, 183 AD3d at 832). The affirmative defenses and counterclaims relate to underlying facts. In addition, party depositions have apparently not yet been taken, and U.S. Bank still has the opportunity to examine Elhag regarding the counterclaims. Moreover, the fact that the amendment is sought several years after the filing of the amended complaint, absent a showing of prejudice, does not render the amendment untimely (*see JBGR*, 195 AD3d at 606). Further, the court does not examine the legal sufficiency or merits of the counterclaims, because U.S. Bank has failed to establish that the amended pleading's insufficiency or lack of merit is clear and free from doubt (*see Lucido*, 49 AD3d at 222 [2008]). Under these circumstances, U.S. Bank has not demonstrated surprise or prejudice by the proposed amendment. Accordingly, Elhag's motion for leave to file an amended answer is granted.

(2)

***U.S. Bank's Motion to Strike the Answer,
for Summary Judgment and for an Order of Reference***

Since the court has granted Elhag leave to file an amended answer, U.S. Bank's motion to strike Elhag's original answer is denied. For the same reason, U.S. Bank's motion for summary judgment is denied without prejudice to renew upon Elhag's filing of the amended answer.

(3)

U.S. Bank's Motion for Default Judgment Against the Non-Answering Defendants

U.S. Bank's motion for a default judgment against each non-answering defendant is denied, as U.S. Bank has not filed affidavits of service of its motion for default on the non-answering defendants.

(4)

U.S. Bank's Motion to Substitute Defendants' Names

U.S. Bank's motion to strike the names of defendants "John Doe #1 - #50" and "Mary Roe #1-#50" from the caption and to substitute in their place the names "Shihab Gomaa," "Shabo Gomaa," "Kev Gomaa," "Anthony Smith (Last Name Refused)," "John Smith (Last Name Refused)," and "Jane Smith (Name Refused)," in their capacities as tenants or occupants of the Property is granted. U.S. Bank has submitted affidavits of service of the summons and complaint upon these purported defendants and neither raises objection.

(5)

Elhag's Motion for Summary Judgment

Turning to Elhag's cross motion for summary judgment on the ground that U.S. Bank did not serve the requisite pre-foreclosure notices pursuant to RPAPL 1304 and 1306, a party moving for summary judgment bears the burden of making a prima facie showing of entitlement to judgment as a matter of law and must tender sufficient evidence in admissible form to demonstrate the absence of any material factual issues (*see* CPLR 3212 [b]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Korn v Korn*, 135 AD3d 1023, 1024 [3d Dept 2016]). Failure to make this prima facie showing requires denial of the motion (*see Alvarez*, 68 NY2d at 324; *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidence in admissible form sufficient to establish an issue of material fact requiring a trial (*see* CPLR 3212; *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562).

Here, Elhag failed to meet his burden of establishing that U.S. Bank was required to serve pre-foreclosure notices. While Elhag states in his affidavit that he "used or occupied or intend to occupy the property as [his] principal residence" (Elhag aff ¶ 7) and attaches a photo of the Property, deed, and registration to support his contention (that the Property is a two-family dwelling) such allegations are lacking as the language of the mortgage and loan suggest that the loan was taken out on a commercial property. RPAPL

1304 and 1306 only require that pre-foreclosure notices be sent prior to foreclosure on a “home loan,” which is defined in RPAPL 1304 (6) (a) (1) as a loan in which:

- “(i) The borrower is a natural person;
- “(ii) The debt is incurred by the borrower primarily for personal, family or household purposes; [and]
- “(iii) The loan is secured by a mortgage or deed of trust on real estate improved by a one to four family dwelling, or a condominium unit, in either case, used or occupied wholly or partly, as the home or residence of one or more persons and which is or will be occupied by the borrower as the borrower’s principal residence.”

The mortgage, attached to the complaint, which Elhag does not deny is the mortgage that he signed, states that it is a “commercial mortgage” and that the loan is a “commercial obligation and does not represent a loan used for personal, family or household purposes and is not a consumer transaction” (mortgage ¶ 2.1 [e]). Elhag also signed the loan agreement, attached to the complaint, acknowledging that “[n]o portion of any loan is to be used for . . . primarily personal, family or household purposes” (loan agreement ¶ 2.9).

The court notes that U.S. Bank has submitted an affidavit of service of the summons and notice mandated by RPAPL 1303 involving foreclosures on residential property on Elhag at the Property’s location. The affidavit of service states that “[s]aid mailing(s) was made to the Defendant(s)’s place of residence.” This suggests that U.S. Bank was aware that Elhag resided at the Property and was treating the subject mortgage and loan as a residential “home” loan, rather than a commercial loan. Nevertheless, this notice, while supporting Elhag’s argument, is insufficient to meet his burden of establishing that pre-

foreclosure notices are required in light of the language regarding the commercial nature of the loan in the mortgage and the loan documents.

Even if Elhag had met his burden, U.S. Bank has raised a question of fact precluding summary judgment in favor of Elhag. To that end, U.S. Bank has submitted, through its attorney in fact, documents signed by Elhag in connection with the loan, and kept in the regular course of business, stating that: (1) the loan was made for business purposes, (2) Elhag resides at 1025 Atlantic Avenue, (3) the loan does not secure Elhag's principal residence, (4) that Elhag will not be occupying the Property in the near future, and (5) that Elhag has no intention of ever making the Property his principal residence.

For these reasons, Elhag's cross motion for summary judgment is denied.

Conclusion

The court has considered the parties' remaining contentions and finds them to be without merit. Accordingly, it is hereby

ORDERED that U.S. Bank's motion (mot. seq. one) for summary judgment against Elhag, for a default judgment against the non-answering defendants, and for an order of reference, is denied in accordance with this decision; and it is further

ORDERED that U.S. Bank's motion (mot. seq. one) for an order striking the names of defendants "John Doe #1 - #50" and "Mary Roe #1-#50" from the caption; and substituting in their place the names "Shihab Gomaa," "Shabo Gomaa," "Kev Gomaa," "Anthony Smith (Last Name Refused)," "John Smith (Last Name Refused)," and "Jane

Smith (Name Refused),” in their capacities as tenants or occupants of the Property is granted; and it is further

ORDERED that Elhag’s motion (mot. seq. two) for an order granting him summary judgment dismissing the complaint is denied; and it is further

ORDERED that Elhag’s motion (mot. seq. two) for an order granting him leave to file an amended answer is granted and that Elhag shall file his amended answer (in the same form annexed to its motion) upon all parties within 30 days of service of this decision and order with notice of entry thereof.

All relief not expressly granted herein is denied.

This constitutes the decision and order of the court.

E N T E R



J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE