SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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NEWPORT BEACH HOLDINGS, LLC,

Plaintiff,

- v -

OLLIE BROWN, JENNIFER M. FINLEY, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, JOHN DOE I THROUGH JOHN DOE X

Defendant.

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INDEX NO. 850078/2017

MOTION DATE

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 65, 66, 67, 68, 69, 70, 71, 72

were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing documents, the motion is determined as follows:

The within action is to foreclose on a mortgage encumbering a parcel of real property located at 507 West 150th Street, New York, New York (Block 2082; Lot 25). The mortgage, given by Defendant Ollie Brown ("Brown"), secures a loan with an original principal amount of $350,000.00 and is memorialized by a note dated August 20, 2007. Plaintiff commenced this action alleging Defendant defaulted in making installment payments under the note. Defendant Brown answered and pled nine affirmative defenses and six counterclaims.

Now, Plaintiff moves for summary judgment against Defendant Brown, striking his answer and dismissing his affirmative defenses and counterclaims, for a default judgment against all non-appearing parties, to appoint a Referee to compute and to amend the caption. Defendant Brown opposes the 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 Defendants' 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]).

In support of a motion for summary judgment on a cause of action for foreclosure, a plaintiff may rely on evidence from persons with personal knowledge of the facts, documents in admissible form and/or persons with knowledge derived from produced admissible records (*see eg U.S. Bank N.A. v Moulton*, 179 AD3d 734, 738 [2d Dept 2020]). No particular set of business records must be proffered, as long as the admissibility requirements of CPLR 4518[a] are fulfilled and the records evince the facts for which they are relied upon (*see eg Citigroup v Kopelowitz*, 147 AD3d 1014, 1015 [2d Dept 2017]).

Plaintiff's motion was supported with an affidavit from Charles John Briseno ("Briseno"), Vice President of Aspen Properties ("Aspen"). Briseno described Aspen's relationship to Plaintiff as: "Administrator and attorney-in-fact for Wilmington Savings Fund Society, FSB, not in its individual capacity but solely as Owner Trustee of the Aspen Growth IV Trust, a Delaware Statutory Trust (hereinafter "Successor Plaintiff" or "Wilmington") the ultimate assignee of Plaintiff, Newport Beach Holdings, LLC." Annexed to Briseno's affidavit is a limited power of attorney which purports to allow Aspen to act as Wilmington's agent.

However, the claim Wilmington is the "successor in interest" to Plaintiff is entirely conclusory. If Briseno's assertion that Wilmington is the successor Newport is accurate, it could, conceivably, continue to prosecute this action in the name of Newport pursuant to CPLR §1018 (*see Wells Fargo Bank, NA v McKenzie*, 183 AD3d 574 [2d Dept 2020]; *B & H Fla. Notes LLC v Ashkenazi*, 149 AD3d 401 [1st Dept 2017]). However, Briseno failed to explain how this succession in interest occurred and did not proffer any documentation, admissible or otherwise, to corroborate that claim (*cf. U.S. Bank, N.A. v Duran*, 174 AD3d 768, 769 [2d Dept 2019]).

Also absent is proof evidencing the Mortgagor's default. "A default 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, annexed to Briseno's affidavit as Exhibit E were two documents from an entity FCI Lender Services, Inc. ("FCI") both dated June 22, 2022. One is titled "Demand Loan Payoff" and the other "Loan Reinstatement Calculation". These submissions failed to establish proof of Brown's default. In the complaint, Plaintiff pleads Brown defaulted on October 20, 2013, and made no further payments thereafter. However, the FCI records were created in 2022 and Briseno does not attest that FCI was the servicer of the loan on the day of the default. Further, if FCI was not the servicer when Brown defaulted, the statements therein are hearsay unless the records it relied on to generate these documents are produced in admissible form (*see Bank of Am., N.A. v Huertas,* 195 AD3d 891 [2d Dept 2021; *U.S. Bank N.A. v Moulton*, 179 AD3d 734, 739 [2d Dept 2020]).

Accordingly, the branches of Plaintiff's motion for summary judgment and an order of reference are denied.

As to the branch of Plaintiff's motion to dismiss all Defendants' affirmative defenses, 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]). Defendant's assertion that the relief is not requested in the notice of motion is factually incorrect. Plaintiff expressly sought "striking the . . . affirmative defenses". That the precise section of the Civil Practice Law and Rules was not cited in the notice of motion is immaterial.

The first affirmative defense of unclean hands, assuming it is even applicable in a mortgage foreclosure action (*see Jo Ann Homes at Bellmore, Inc. v Dworetz*, 25 NY2d 112 [1969]), fails in this case. "The doctrine of unclean hands applies when the complaining party shows that the offending party is guilty of immoral, unconscionable conduct and even then only when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct" (*Kopsidas v Krokos*, 294 AD2d 406, 407 [2d Dept 2002][internal quotation marks omitted]). Here, Defendant's affirmative defense is based upon Plaintiff's conduct during this action. This does not support a claim of unclean hands as there is no nexus between same and the formation of the mortgage or Brown's default (*see see Phh Mtge. Corp. v Davis*, 111 AD3d 1110 [3rd Dept 2013]; *see also National Distillers & Chemical Corp. v Seyopp Corp.*, 17 NY2d 12, 15-16 [1996]; *Trustco Bank, N.A. v. Allison Assocs.*, 249 AD2d 911 [4th Dept 1998]). Likewise, since Plaintiff was under no obligation to modify the loan, it does not substantiate a claim of unclean hands (*see Bank of Smithtown v 264 W. 124 LLC*, 105 AD3d 468 [1st Dept 2013]).

Defendant's claim the loan contains a usurious rate of interest is conclusory and not established. "To successfully raise the defense of usury, a debtor must allege and prove by clear and convincing evidence that a loan or forbearance of money, requiring interest in violation of a usury statute, was charged by the holder or payee with the intent to take interest in excess of the legal rate" (*Blue Wolf Capital Fund II, L.P. v American Stevedoring Inc.*, 105 AD3d 178, 183 [1st Dept 2013]). The note contains a variable interest rate of 8.5%, but Plaintiff provides no explanation or calculation demonstrating that the interest rate charged by the lender was usurious. Further, the claim that the lender was required to more thoroughly investigate Brown's ability to pay before making the loan does not constitute a basis for unclean hands (*see Bosco Credit V Trust Series 2012-1 v. Johnson,* 177 AD3d 561, 562 [1st Dept 2019]; *see also Filan v Dellaria*, 144 AD3d 967, 973 [2d Dept 2016]).

The second affirmative defense claims the action is barred because the notes are subject to recission based upon purported violations of the Truth In Lending Act (15 USC §1601) and various implementing regulations (12 CFR §266.01, *et seq.*). This defense fails as the right of recission in a residential mortgage loan transaction is unavailable (*see Jessabell Realty Corp. v Gonzales*, 117 AD3d 908, 909 [2d Dept 2014]).

The third affirmative defense relates to the amount due and owing under the mortgage note. Even a mortgagor that has defaulted in appearing in a foreclosure action can appear and contest the amount due and owing under the mortgage (*see Wilmington Sav. Fund Socy., FSB v Moriarty-Gentile*, 190 AD3d 890, 892-893 [2d Dept 2021]). Hence, such a defense is unnecessary and without merit.

The fourth affirmative defense, which is directed to the legal sufficiency of Plaintiff's complaint, is unnecessary as a general matter since dismissal cannot be effectuated without a motion pursuant to CPLR 3211[a][7] (*see Riland v Frederick S. Todman & Co.*, 56 AD2d 350 [1st Dept 1977]). Normally, this defense is nothing more than "'harmless surplusage,' and . . . a motion by the plaintiff to strike the same should be denied" (*Butler v Catinella*, 58 AD3d 145 [2d Dept 2008]). However, where all other affirmative defenses fail as a matter of law, it may be dismissed (*Raine v Allied Artists Productions, Inc.*, 63 AD2d 914, 915 [1st Dept 1978]).

The fifth and sixth affirmative defenses, claiming waiver, ratification, latches, estoppel and usury are entirely conclusory and unsupported by any facts in the answer. As such, these affirmative defenses are nothing more than unsubstantiated legal conclusions which are insufficiently pled as a matter of law (*see Board of Mgrs. of Ruppert Yorkville Towers Condominium v Hayden,* 169 AD3d 569 [1st Dept 2019]; *see also Bosco Credit V Trust Series 2012-1 v. Johnson,* 177 AD3d 561 [1st Dept 2020]; *170 W. Vil. Assoc. v. G & E Realty, Inc.*, 56 AD3d 372 [1st Dept 2008]; *see also Becher v Feller*, 64 AD3d 672 [2d Dept 2009]; *Cohen Fashion Opt., Inc. v V & M Opt., Inc.*, 51 AD3d 619 [2d Dept 2008]).

The seventh and ninth affirmative defenses, that Plaintiff's claims are barred because of the unavailability of witnesses and Plaintiff's failure to respond to the Mortgagor's request to validate the debt, are incomprehensible and, therefore, insufficiently pled.

The eighth affirmative defense that the Mortgagor never agreed to pay attorneys' fees is entirely belied by the documentary evidence and therefore, insufficiently pled.

The first and second counterclaims, based in Executive Law §63[12], fail as a matter of law as the edict provides enforcement by the attorney general and does not specify a private right of action thereunder. Likewise, as to General Business Law §340, Defendant fails to plead facts to support that the original lender had a monopoly or restrained trade when the loan was made (*see Bayside Fuel Oil Depot Corp. v Savino Oil & Heating Co.,* 133 AD2d 658 [2d Dept 1987]).

The third counterclaim asserts that the present Plaintiff has engaged in deceptive business practices pursuant to General Business Law §349. This claim is inadequately pled as it is specific to the subject mortgage and does not constitute "consumer-oriented" conduct (*see Wells Fargo Bank, N.A. v Farfan*, 203 AD3d 1107, 1110 [2d Dept 2022]). Plaintiff was required, but failed, to allege that Plaintiff's acts or practices have a broader impact on consumers at large since private contract disputes, unique to the parties, do not fall within the ambit of the statute (*see New York Univ v Continental Ins. Co.,* 87 NY2d 308, 320 [1995]; *Scarola v Verizon Communications, Inc.*, 146 AD3d 692, 693 [1st Dept 2017]). "[C]onclusory allegations about defendant's practices with other clients are insufficient to save the claim" (*Golub v Tanenbaum-Harber Co. Inc.*, 88 AD3d 622, 623 [1st Dept 2011]). Indeed, Plaintiff was not the original lender and Defendant failed to explain what specific actions by Plaintiff are the foundation of this claim.

The fourth counterclaim seeks rescission of the note and mortgage as well as monetary damages based upon alleged violations of the Truth In Lending Act (15 USC §1601) and various

implementing regulations (12 CFR §266.1, *et seq*. [Regulation Z]). As noted supra, the remedy of rescission is not available here. The claim for monetary damages is time-barred under 16 USC §1640[e]. Also, Defendant fails to plead precisely what violations were 'apparent on the face of the disclosure statement'" (*U.S. Bank Natl. Assn. v Pia*, 73 AD3d 752, 754 [2d Dept 2010]).

The fifth counterclaim asserts, based on Banking Law §6-l[1], that the transaction at issue was a "high-cost home loan". This claim fails as it is without factual foundation and conclusory (*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]). This section is applicable to a "high-cost home loan" and no facts to support the thresholds for applicability of the statute to the loan were pled.

The sixth counterclaim alleges Plaintiff violated General Business Law §350, et seq. Again, this claim is entirely conclusory. Unexplained in any manner is the false statement, who made it and how it impacted this transaction. Moreover, this statute does not provide for a private right of action and is expressly subject to enforcement by the attorney general (GBL §350-d).

In opposition, Defendant Brown did not proffer any additional facts to support these claims. Although he submitted as affidavit, it was not notarized.

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]).

Accordingly, it is

ORDERED that the branch of Plaintiff's motion for summary judgment on its causes of action for foreclosure and an order of reference are denied, and it is

ORDERED that the branch of the motion for a default judgment against the non-appearing parties is granted, and it is

ORDERED that all the affirmative defenses counterclaims in Defendants' answer are dismissed, and it is

ORDERED, that the caption is further amended to strike the names JOHN DOE #1 through JOHN DOE #12, who have not been served with copies of the summons and complaint and are not necessary defendants, without prejudice to any of the proceedings heretofore had herein, and it is further

[1] Defendant incorrectly cited the section as being Banking Law 6-**I**.

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, NOT IN ITS INDIVIDUAL CAPACITY BUT SOLELY AS OWNER TRUSTEE TO THE ASPEN GROWTH IV TRUST, A DELAWARE STATUTORY TRUST

Plaintiff,

Index No. 850078/2017

-against-

OLLIE BROWN, JENNIFER M. FINLEY, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE,

Defendants.

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This matter is set down for a status conference on **December 7, 2022 @ 11:00 am** via Microsoft Teams.

10/3/2022
DATE

FRANCIS 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