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(RA)

At an IAS Term, Part 69, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 141 Livingston Street, Brooklyn, New York, on the 1st day of July 2014.

P R E S E N T:

HON. NOACH DEAR,

A.J.S.C.

Index No.: 16840/10

_____ x

CITIMORTGAGE INC,

Plaintiff,

DECISION AND ORDER

-against-

BETTY ESPINAL,

Defendant,

_____ x

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

Papers	Numbered
Moving Papers and Affidavits Annexed	<u>1, 2</u>
Answering Papers and Supplement	<u>3</u>
Reply	<u>4</u>

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

In this hotly litigated action, Plaintiff moves for summary judgment and an order of reference. Defendant opposes alleging that various issues of fact remain. The parties appeared on June 27, 2014 and the motion was taken on submission.

Defendant makes a variety of arguments against the grant of summary judgment. To start with, she notes that Plaintiff's documents provide different dates of default. Further, according to Defendant, Plaintiff failed to prove that the notice letter required by paragraph 22 of the mortgage was properly sent to her. A similar argument is made as to the RPAPL 1304 notice. Defendant also alleges that Plaintiff lacks standing for multiple reasons. Finally, despite the "bad faith" hearing held

by this Court and the resultant opinions, Defendant alleges that issues of fact remain as to whether Plaintiff complied with CPLR 3408.

This Court rejects Defendant's arguments and grants Plaintiff's motion for the reasons set forth below.

I. Inconsistent Default Dates

The parties agree that the supporting affidavit proffered by Plaintiff alleges a default on December 1, 2009 and that the date on the 90 day notice is earlier, October 9, 2009, said notice claiming that the loan was already 38 days in default. However, Plaintiff's explanation – that there was already a default in August leading to the mailing of a 90-day notice, but subsequent payments were made and applied moving the final default date to December – appears supported by the evidence. This is also consistent with Defendant's claim that in 2009 she fell behind on her mortgage and started to make her payments late.

II. Mailing of Pre-Foreclosure Notices

Defendant alleges that Plaintiff has not proven that the notice letter required by paragraph 22 of the mortgage¹ and the statutory 90-day notice were both timely and properly sent to her. Notably, however, Defendant does not deny that she received the notices by means (and at times) consistent with Plaintiff's contention that it complied with its obligations (nor does she admit receipt).

Plaintiff's instant motion for summary judgment is supported by a reasonably formulaic affidavit from Heather Polly, an employee of Citimortgage, stating that Plaintiff's business records show that the notices were properly sent and referencing attached copies(see, ¶¶ 9-13). Were Plaintiff

¹ The Court notes that lack of compliance with a condition precedent is an affirmative defense and can be waived if not timely asserted (see, *Signature Bank v Epstein*, 95 AD3d 1199, 1200-1201 [2d Dept 2012]). The Court need not reach that issue, however.

on notice that Defendant was disputing the propriety of the alleged service of the notices, such an affidavit would have been insufficient(see, *HSBC Mortg Corp v Gerber*, 100 AD3d 966,967 [2d Dept 2012]) and the Court would not have considered additional evidence offered by Plaintiff in reply². However, prior to Defendant raising these issues in her opposition³, Plaintiff had no notice that there was any dispute relating to the notices and that, consequently, something more than a conclusory statement would be necessary. Having considered the correspondence log and supporting affidavit appended to Plaintiff's reply, the Court finds that the notices were timely and properly sent to Defendant.

III. Standing

A. Existence of ABN AMRO

The parties agree that the mortgage was executed in favor of ABN Amro after that company was subsumed by Citimortgage. Defendant argues that this should make the agreement invalid. Plaintiff counters by citing BCL 1005 and 1006 which allow dissolving corporations to wind up their affairs. Plaintiff does not explain how issuance of a new mortgage falls within that allowance. The

² “The function of reply papers is to address arguments made in opposition to the position taken by the movant, not to permit the movant to introduce new arguments or new grounds for the requested relief” (*Allstate Ins. Co. v Dawkins*, 52 AD3d 826, 827 [2d Dept. 2008]). However, a court may consider the newly introduced material when the other party had an opportunity to respond (*Zernitsky v Shurka*, 94 AD3d 875 [2d Dept. 2012]; *Hoffman v Kessler*, 28 AD3d 718, 719 [2d Dept 2006]; *Guarneri v St. John*, 18 AD3d 813 [2d Dept. 2005]).

Herein, Plaintiff is responding to arguments raised for the first time in Defendant's opposition by bolstering its previously made argument that its business records demonstrate that the notices were timely sent, now attaching said business records. While evidence is being presented for the first time, no new arguments or grounds are being introduced. Defendant's counsel objected to the Court considering the log and was given the option of either submitting a sur-reply or allowing the Court to determine whether it would consider the new affidavit and exhibits. Counsel chose the latter option and the Court has elected to consider the submission.

³ Defendant did not raise these issues in her answer or previous motion papers.

Court supposes that it is possible that the loan was previously applied for and was ongoing corporate business at the time of the merger. No evidence has been provided to substantiate this. Equity, however, requires the Court to uphold the validity of the original mortgage – the funds were advanced at Defendant’s behest and for her benefit. Whether she was dealing with an independent ABN Amro or an arm of Citimortgage (to whom she made her payments) is irrelevant.

B. Citi’s Ownership of the Mortgage

An issue throughout this case has been the Pooling and Servicing Agreement between Plaintiff and Hudson City, an investor. Defendant now argues that, as a result of the agreement, Hudson City (not Plaintiff) is the owner of the mortgage while Plaintiff maintains an interest in the note. This, according to Defendant, is problematic and deprives Plaintiff of standing to bring this action. The Court disagrees. Plaintiff is the servicer of the mortgage pursuant to the PSA. Nmore importantly, Plaintiff is and was at the relevant times the holder of the note and, thus, has standing.

IV. Bad Faith

Having held a hearing to address Defendant’s allegations of lack of good faith negotiations on the part of Plaintiff, the Court will not consider address purported violations of CPLR 3408.

Based on the above it is hereby

ORDERED that Plaintiff’s Motion for an Summary Judgment and an Order of Reference is **GRANTED**.

The foregoing constitutes the decision and order of the Court.

ENTER:



Hon. Noach Dear, A.J.S.C.

At an IAS Part 69 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof, at 360 Adams Street, Brooklyn, New York on the 1st day of July, 2014

P R E S E N T :

HON. NOACH DEAR, J.S.C.

CITIMORTGAGE, INC., SUCCESSOR BY MERGER TO ABN AMRO MORTGAGE GROUP, INC.
1000 Technology Drive
O Fallon, MO 63368-2240

Plaintiff,

vs.

BETTY M. ESPINAL, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK TRANSIT ADJUDICATION BUREAU,

JOHN DOE (Said name being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises.)

Defendant(s).

INDEX NO. 16840/10

ORDER GRANTING SUMMARY JUDGMENT APPOINTING A REFEREE TO ASCERTAIN AND COMPUTE PURSUANT TO RPAPL 1321 AND OTHER RELIEF

Plaintiff, CITIMORTGAGE, INC., SUCCESSOR BY MERGER TO ABN AMRO MORTGAGE GROUP, INC. ("CitiMortgage") by SWEENEY, GALLO, REICH & BOLZ, LLP, its attorneys, having made a motion on or about December 26, 2013, (I) pursuant to CPLR §3212 for summary judgment against Defendant, BETTY M. ESPINAL (the "Defendant") and an Order (i) striking her Answer and Affirmative Defenses; (ii) granting the Plaintiff summary judgment against

indebtedness; (iv) granting default judgment against the non-appearing defendants; (v) amending the caption accordingly; and (vi) such other and further relief as may be just and proper.

Upon reading and filing the notice of motion dated December 26, 2013, the Affidavit of Heather Polly, sworn to on the 24th day of July, 2013, the Affirmation of RENEE J. ARAGONA, ESQ., affirmed to on the 26 day of December, 2013, together with the exhibits annexed thereto, and upon all of the pleadings and prior proceedings heretofore had herein; and it appearing that the defendants having been duly served with the Summons and Complaint and pursuant to RPAPL §1303, proof of service of the Notice of Assistance to Mortgagors in Foreclosure having been served on the Defendant, BETTY M. ESPINAL, the mortgagor having served an Answer herein, and

FURTHER, it appearing that since the filing of the Notice of Pendency on July 8, 2010, and a Second Notice of Pendency on September 17, 2013, the complaint has not been amended in any manner whatsoever, and

FURTHER, it appearing that none of the defendants herein is an infant, incompetent or absentee, and no one is entitled to notice of this application, except the Defendant, BETTY M. ESPINAL.

NOW, upon motion of SWEENEY, GALLO, REICH & BOLZ, LLP, attorneys for the plaintiff, and due deliberation having been had thereon, it is

ORDERED, that the plaintiff's motion for summary judgment is granted in all respects, and the Answer and Affirmative Defenses filed by the Defendant, BETTY M. ESPINAL. is hereby stricken; and it is further

ORDERED, that the plaintiff be granted pursuant to CPLR §3215, a default judgment for the relief demanded in the complaint upon the non-appearing defendants; and it is further

ORDERED, that this action be and the same is hereby referred

D/BGC

Steven Z. Nana

Esq. of

485 Madison Ave NY, NY 10022, telephone number 212 840 7188

ascertain and compute the amount due to the plaintiff herein for principal, interest, water and sewer rents, taxes, insurance premiums and all other charges on the mortgage and mortgage loan note mentioned in the complaint including the cost of preserving and/or protecting the mortgaged premises, and to examine and report whether the mortgaged premises can be sold in parcels, and that the referee make his/her report no later than 60 days of the date of this Order, and that except for good cause shown, the plaintiff shall move for judgment no later than 30 days of the date of the referee's report; and it is further

ORDERED, that the caption of the action be amended by substituting "MIRIAM DELVALLE" and "JUDITH FABRE" for "JOHN DOE" and by striking the remaining defendants sued herein as "JOHN DOE" without prejudice to the proceedings heretofore had herein; and it is further

ORDERED, that the caption amended shall read as follows:

_____ X

CITIMORTGAGE, INC., SUCCESSOR BY MERGER TO
ABN AMRO MORTGAGE GROUP, INC.
1000 Technology Drive
O Fallon, MO 63368-2240

Index No. 16840/10

Plaintiff,

-against-

BETTY M. ESPINAL, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK TRANSIT ADJUDICATION BUREAU, MIRIAM DELVALLE AND JUDITH FABRE.

Defendants.

; and it is further

ORDERED, that the referee appointed herein is subject to the requirements of Rule 36.2(c) of the Chief Judge, and if the referee is disqualified from receiving an appointment pursuant to the provisions of the Rule, the referee shall notify the Appointing Judge forthwith, and it is further

ORDERED that, by accepting this appointment the Referee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22NYCRR Part 36), including but not limited to, Section 36.2(c) ("Disqualifications from appointment"), and Section 36.2(d) ("Limitations on appointments based on compensation").

ORDERED that, pursuant to CPLR 8003(a) (~~the statutory fee of \$50.00~~) (in the discretion of the Court, a fee of \$ 250.00), shall be paid to the Referee for the computation stage and upon filing of his/her report; and it is further

ORDERED that, the Referee is prohibited from accepting or retaining any funds for him/herself or paying funds to him/herself, without compliance with Part 36 of the Rules of the Chief Administrative Judge.

ORDERED, that default judgment against the non-appearing Defendants is granted;

ORDERED, that a copy of this Order with notice of entry shall be served upon the owner of the equity of redemption, any tenants named in this action and any other party entitled to notice.

ENTER,



J.S.C.