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| BAC Home Loans Servicing, LP v Douglin |
| 2013 NY Slip Op 31398(U) |
| June 28, 2013 |
| Supreme Court, Queens County |
| Docket Number: 18002/2010 |
| Judge: Sidney F. Strauss |
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE SIDNEY F. STRAUSS
Justice

IA PART 11

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BAC Home Loans Servicing, LP fka
Countrywide Home Loans Servicing LP,

Index No.: 18002/2010

Plaintiff,

Motion Date: May 9, 2013

-against-

Seq. No.: 1

Fayola Douglin, Et. Al.,

Defendants.

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The following papers numbered 1 to 4 read on this motion of the plaintiff BAC Home Loan Servicing, LP fka Countrywide Home Loan Servicing LP FKA (BAC) an order consolidating under Index No. 18002 2010 the within action with the action entitled *Bank of America, NA sbm [successor by merger] BAC Home Loans Servicing, LP fka Countrywide Home Loan Servicing LP FKA v Fayola Douglin*, Index No. 701728/2012, and substitute Kondaur Capital Corporation as separate trustee of the Matawin Ventures Trust Series 2012-3 as the plaintiff in the consolidated action; substituting Jay Bead for defendant John Doe #1, and amending the caption of the consolidated action accordingly; granting a default judgment against the defendants; and appointing a referee to ascertain and compute the amount due to plaintiff and to report whether the mortgage real property can be sold in one single parcel.

Papers
Numbered

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| Notice of Motion-Affirmations-Affidavits-Exhibits-..... | 1- 3 |
| Additional Affirmation..... | 4 |

Upon the foregoing papers the motion is determined as follows:

Plaintiff BAC commenced the within action on July 16, 2010 to foreclose a mortgage against real property known as 141-36 219th Street, Springfield Gardens, New York given

by Fayola Douglin to secure a note evidencing a loan in the principal amount of \$368,100.00. Plaintiff filed a notice of pendency against the subject property on July 16, 2010.

Plaintiff alleges that the subject note was executed by Fayola Douglin on August 23, 2007, and delivered to Professional Mortgage Bankers Corp., and that the subject mortgage was executed on August 23, 2007, in favor of Mortgage Electronic Registration Systems, Inc. acting solely as nominee for Professional Mortgage Bankers Corp. (MERS). Said the mortgage was recorded on September 17, 2007 in the Office of the Registrar of the City of New York. MERS assigned the mortgage to BAC on April 12, 2010. The note was endorsed by Countrywide, by Bank of America, N.A. and then endorsed in blank. BAC alleges that it was in possession of the note and mortgage prior to the commencement of this action.

Subsequent to the commencement of this action, the mortgage was assigned to the Secretary of Housing and Urban Development on February 15, 2013, and the mortgage and note were thereafter assigned to Kondaur Capital Corporation as trustee of the Matawin Ventures Trust Series 2012-13 on February 15, 2013.

Plaintiff alleges that defendant Fayola Douglin defaulted under the terms of the mortgage by failing to make the monthly installment payment due on July 1, 2008, and by failing to tender subsequent installments. Plaintiff, therefore, elected to accelerate the entire mortgage debt.

Defendants New York City Environmental Control Board, New York City Parking Violations Bureau and New York City Transit Adjudication Bureau were served with process on July 23, 2010. These defendants have neither appeared, answered, or otherwise moved, and their time in which to do so expired in 2010.

Plaintiff was unable to serve defendant Fayola Douglin within 120 days of the commencement of this action. The process server stated in an affidavit that when he attempted to serve Ms. Douglin on July 24, 2010, the premises were vacant and that a neighbor confirmed that the property was unoccupied. None of the John Doe defendants were served with process in the within action.

Bank of America, NA sbm [successor by merger] BAC Home Loans Servicing, LP fka Countrywide Home Loan Servicing LP FKA (BOA) commenced a second action against Fayola Douglin to foreclose on the same mortgage on August 23, 2012, under Index No. 701728/2012, and filed a notice of pendency on that date. BOA served Fayola Douglin with process, and with RPAPL 1303 and 1320 notices on September 4, 2012, pursuant to CPLR 308(2), by serving "Jay Bead Cousin", a person of suitable age and discretion, at the mortgaged premises, and mailing a copy of the same to Fayola Douglin at the mortgaged

premises. The affidavit of service was filed with the court on September 21, 2012. Fayola Douglin has not appeared or served an answer in the action commenced under Index No. 701728/2012.

BOA also served Jay Bead with a copy of the summons and complaint bearing Index No. 701728/2012, and the RAPAL notices on September 4, 2012. On September 11, 2012, a RAPAL 1303 and a RAPAL 1320 notice were served on Jay Bead.

On October 25, 2012, plaintiff filed an RJI in the within action requesting a mortgage foreclosure settlement conference, along with an affirmation conforms to Administrative Order 431/11. It is noted that issue was never joined as to the borrower, Fayola Douglin, and that the court does not have jurisdiction over her in the 2010 action. An examination of the court's file establishes that the defendants failed to appear at the residential foreclosure counsel on January 3, 2013, and the court directed plaintiff to appear at a status conference on April 18, 2013 and to file an application for an order of reference within 90 days from the date of the January 3, 2013 order. The court, in an order dated April 18, 2013 determined that as the order of January 3, 2013 was not complied with, directed the plaintiff to appear for a final status conference on August 8, 2012, and to file an application for an Order of Reference by said conference date.

In the action commenced under Index No. 701728/2012, plaintiff engaged in no motion practice and did not file an RJI seeking a foreclosure settlement conference. Plaintiff submits an affirmation conforming to Administrative Order 431/11, bearing Index No. 701728/2012, in connection with the within motion.

That branch of plaintiff's motion which seeks to consolidate the within action with the action commenced under Index No. 701728/2012, is granted as the actions seek to foreclose the same mortgage, and involve common issues of law and fact (CPLR 602). Plaintiff's request to substitute Kondaur Capital Corporation as trustee of the Matawin Ventures Trust Series 2012-13, the current holder of the note and mortgage, as the plaintiff in the consolidated action is denied. Plaintiff's counsel has failed to demonstrate that it represents Kondaur Capital Corporation, or that it consents to such substitution, and has failed to demonstrate that substitution is necessary (CPLR 1018). Plaintiff's request to substitute Jay Bead for John Doe #1 is denied. Plaintiff has failed to demonstrate that Jay Bead, or any John Doe defendant, was served with process in the 2010 action. Although Mr. Bead was served with process in the 2012 action, he is not named as a defendant in the summons filed in that action, and therefore is not a party to that action.

Therefore, the new caption of the action shall read as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF QUEENS

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BANK OF AMERICA, NA SBM BAC HOME
LOANS SERVICING, LP fka COUNTRYWIDE
HOME LOAN SERVICING LP FKA ,

Index No.: 18002/2010

Plaintiff,

-against-

FAYOLA DOUGLIN, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD,
NEW YORK CITY PARKING VIOLATIONS
BUREAU AND NEW YORK CITY TRANSIT
ADJUDICATION BUREAU, and “JOHN DOE #1”
through JOHN DOE #2, the last ten names being
fictitious and unknown to the plaintiff, the person
or parties intended being the person or parties, if
any, having or claiming an interest in or lien upon
the Mortgage premises described in the Compliant,

Defendants.

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Plaintiff has made a prima facie showing of entitlement to a default judgment against Fayola Douglin as a matter of law by submission of a copy of the pleadings, affidavits of service, the mortgage, the assignment, the note, and proof of default (*See GRP Loan, LLC v Taylor*, 95 AD3d 1172 [2012]; *Capstone Business Credit, LLC v Imperia Family Realty, LLC*, 70 AD3d 882 [2010]; *EMC Mtge. Corp. v Riverdale Assoc.*, 291 AD2d 370 [2002]). Plaintiff has also submitted an affirmation of regularity by its counsel (*see GRP Loan, LLC*, 95 AD3d at 1174), and an affirmation which complies with Administrative Order 431/11 . That branch of the motion which seeks a default judgment, therefore, is granted as to defendant Fayola Douglin.

CPLR 3215(c) provides that “if the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned... unless sufficient cause is shown why the complaint should not be dismissed”. Defendants Environmental Control Board, New York City Parking

Violations Bureau and New York City Transit Adjudication Bureau defaulted in appearing and answering in 2010. Plaintiff concedes that it failed to take proceedings within one year after these defendants defaulted, and asserts that its delay was due to the need to review and verify all documents and information for all of its foreclosure actions following the issuance of Administrative Order 548/10 on October 20, 2010.

Plaintiff's need to review all foreclosure filings following the issuance of Administrative Order 548/10 does not constitute a reasonable excuse for its failure to comply with CPLR 3215 (c). Administrative Order 548/10 went into effect on October 20, 2010, and has since been replaced by Administrative Order 431/11. The Administrative Order requires a plaintiff's counsel in a residential foreclosure action to file with the court an affirmation confirming the accuracy of plaintiff's pleadings (*see Wells Fargo Bank, N.A. v Hudson*, 98 AD3d 576 [2d Dept 2012]; *U.S. Bank, NA v Boyce*, 93 AD3d 782 [2d Dept 2012]). In cases pending on the effective date of the Administrative Order, where no judgment of foreclosure has been entered, the attorney affirmation must be filed at the time of the filing of either the proposed order of reference or the proposed judgment of foreclosure (*Id.*). In the 2010 action, plaintiff did not file an affirmation conforming to Administrative Order 431/11 until October 25, 2012, and thereafter took no steps to obtain a default judgment against the municipal defendants until it served the within motion on April 15, 2013. Plaintiff's request for a default judgment against the municipal defendants therefore is denied, and the action is dismissed as to these defendants.

Plaintiff's request for a default judgment against Jay Bead is denied, as he was served with process in the 2010 action, and was not a named defendant in the 2012 action.

Plaintiff's request for an order of reference is denied, as a mandatory foreclosure settlement conference has not been held with respect to Fayola Douglin. At the time the January 3, 2013 conference was held, Fayola Douglin had not been served with process. Plaintiff is directed to file an RJI requesting a mandatory foreclosure conference within 10 days after the service of this order, together with notice of entry.

Dated: June 28, 2013

SIDNEY F. STRAUSS, J.S.C.