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SHORT FORM ORDER

INDEX
NO.: 17642-11

SUPREME COURT - STATE OF NEW YORK
IAS PART 51 - SUFFOLK COUNTY

PRESENT: Hon. JOHN J. LEO
Justice of the Supreme Court

MOTION DATE 11-26-13
ADJ. DATE
Mot. Seq. #001-MotD

LOANCARE, A DIVISION OF FNF SERVICING, INC.,

Plaintiff,

-against-

DONNA KOULLIAS; PETER KOULLIAS; "JOHN DOES" and "JANE DOES", said names being fictitious, parties intended being possible tenants or occupants of premises, and corporations, other entities or persons who claim, or may claim, a lien against the premises,

Defendants.

ROSICKI, ROSICKI & ASSOCIATES, P.C.
Attorneys for Plaintiff
51 East Bethpage Road
Plainview, N. Y. 11803

DONNA KOULLIAS
Defendant Pro Se
33 Carriage Drive
Kings Park, N. Y. 11754

PETER KOULLIAS
Defendant Pro Se
33 Carriage Drive
Kings Park, N. Y. 11754

Upon the following papers numbered 1 to 24 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 12 - 21; Replying Affidavits and supporting papers 22 - 24; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the plaintiff for, inter alia, an order awarding summary judgment in its favor and against the defendants Donna Koullias and Peter Koullias, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption is granted solely to the extent indicated below, otherwise denied; and it is

ORDERED that the branches of the motion wherein the plaintiff requests an order amending the caption by excising and/or substituting certain fictitious defendants, fixing the defaults of the non-answering defendants and appointing a referee are denied, for the reasons stated below, without prejudice to renewal within one hundred and twenty (120) days of the date of this order; and it is

ORDERED that the plaintiff is directed to file proof of filing of an additional or a successive notice of pendency with any renewed motion made pursuant to this order (*see*, CPLR 6513; 6516[a]; ***Aames Funding Corp. v Houston***, 57 AD3d 808, 872 NYS2d 134 [2d Dept 2008]; ***EMC Mtge. Corp. v Stewart***, 2 AD3d 772, 769 NYS2d 408 [2d Dept 2003]; ***Horowitz v Griggs***, 2 AD3d 404, 767 NYS2d 860 [2d Dept 2003]); and it is

ORDERED that any motion resubmitted pursuant to this order shall include a corrected proposed long form order appointing a referee consistent with the relief sought in the plaintiff's notice of motion and attorney affirmation; and it is further

ORDERED that the plaintiff is directed to serve a copy of this order with notice of entry upon all parties who have appeared herein and not waived further notice pursuant to CPLR 2103(b)(1), (2) or (3) within thirty (30) days of the date herein, and to promptly file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on residential real property known as 33 Carriage Drive, Kings Park, New York 11754. On May 28, 2009, the defendants Donna Koullias and Peter Koullias (the defendant mortgagors) executed a fixed-rate note in favor of Lend America (the lender) in the principal sum of $445,410.00. To secure said note, the defendant mortgagors gave the lender a mortgage also dated May 28, 2009 on the property. The mortgage indicates that Mortgage Electronic Registration Systems, Inc. (MERS) was acting solely as a nominee for the lender and its successors and assigns and that, for the purposes of recording the mortgage, MERS was the mortgagee of record. By way of an endorsed allonge with physical delivery, the note was allegedly transferred to the plaintiff, LoanCare, a Division of FNF Servicing, Inc. prior to commencement. Thereafter, the transfer of the note to the plaintiff was memorialized by an assignment of the mortgage dated December 13, 2010, and subsequently duly recorded in the Suffolk County Clerk's Office on February 1, 2011.

The defendant mortgagors allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on or about January 1, 2010, and each month thereafter. After the defendant mortgagors allegedly failed to cure their default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on July 11, 2011. Parenthetically, the lis pendens has now expired.

Issue was joined by the interposition of the defendant mortgagors' joint verified answer sworn to on August 2, 2011. By their answer, the defendant mortgagors admit some of the allegations in the complaint, and deny the remaining allegations set forth therein. In the answer, the defendant mortgagors also assert ten affirmative defenses, alleging, inter alia, the following: the lack of personal jurisdiction, standing and legal capacity to sue; the doctrines of estoppel, waiver and laches; and the failure to: mitigate damages; furnish defendant mortgagors with notices pursuant to RPAPL §§ 1303, 1304 and 1306; and comply with the requirements of RPAPL §§ 1302 and 1304 as well as Banking Law §§ 595-a, 6-l and 6-m. The remaining defendants have neither answered the complaint, nor appeared herein.

In compliance with CPLR 3408, the parties began a prolonged period of negotiations in an attempt to agree on a loan modification, and a series of foreclosure settlement conferences were conducted or adjourned beginning on November 16, 2012, and lasting until August 28, 2013. A representative of the plaintiff attended and participated in all settlement conferences. At the last

conference, this action was marked to indicate that the parties could not reach an agreement to modify the loan or otherwise settle this action. Accordingly, no further conference is required under any statute, law or rule.

The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the defendant mortgagors, striking their answer and dismissing the affirmative defenses set forth therein; (2) pursuant to CPLR 3215 fixing the defaults of the non-answering defendants; (3) pursuant to RPAPL § 1321 appointing a referee to (a) compute amounts due under the subject mortgage; and (b) examine and report whether the subject premises should be sold in one parcel or multiple parcels; and (4) amending the caption. Opposition and reply papers have been filed herein.

A plaintiff in a mortgage foreclosure action establishes a prima facie case for summary judgment by submission of the mortgage, the note, bond or obligation, and evidence of default (*see*, ***Valley Natl. Bank v Deutsch***, 88 AD3d 691, 930 NYS2d 477 [2d Dept 2011]; ***Wells Fargo Bank v Das Karla***, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; ***Washington Mut. Bank, F.A. v O'Connor***, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]). The burden then shifts to the defendant to demonstrate "the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff" (***Capstone Bus. Credit, LLC v Imperia Family Realty, LLC***, 70 AD3d 882, 883, 895 NYS2d 199 [2d Dept 2010], *quoting* ***Mahopac Natl. Bank v Baisley***, 244 AD2d 466, 467, 644 NYS2d 345 [2d Dept 1997]).

By its submissions, the plaintiff established its prima facie entitlement to summary judgment on the complaint (*see*, CPLR 3212; RPAPL § 1321; ***Wachovia Bank, N.A. v Carcano***, 106 AD3d 724, 965 NYS2d 516 [2d Dept 2013]; ***U.S. Bank, N.A. v Denaro***, 98 AD3d 964, 950 NYS2d 581 [2d Dept 2012]; ***Capital One, N.A. v Knollwood Props. II, LLC***, 98 AD3d 707, 950 NYS2d 482 [2d Dept 2012]). In the instant case, the plaintiff produced, inter alia, the note with an affixed allonge, the mortgage, the assignment and evidence of nonpayment (*see*, ***Federal Home Loan Mtge. Corp. v Karastathis***, 237 AD2d 558, 655 NYS2d 631 [2d Dept 1997]; ***First Trust Natl. Assn. v Meisels***, 234 AD2d 414, 651 NYS2d 121 [2d Dept 1996]). The plaintiff also submitted proof of compliance with the notice requirements of sections 1303 and 1304 of the Real Property Actions and Proceedings Law (*see*, ***U.S. Bank N.A. v Tate***, 102 AD3d 859, 958 NYS2d 722 [2d Dept 2013]; ***Castle Peak 2012-I Trust v Choudhury***, 2013 NY Misc LEXIS 5510, 2013 WL 6229919, 2013 NY Slip Op 32971 [U] [Sup Ct, Queens County 2013]; ***M & T Bank v Romero***, 40 Misc3d 1210 [A], 977 NYS2d 667 [Sup Ct, Suffolk County 2013]; *see also*, ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]). Furthermore, the plaintiff submitted an affidavit from its officer wherein it is alleged that it was in possession of the note on December 23, 2009, a date being prior to commencement, and that it has maintained possession of the same since that time (*see*, ***Kondaur Capital Corp. v McCary***, 115 AD3d 649, 981 NYS2d 547 [2d Dept 2014]; ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]). Additionally, the documentary evidence submitted includes, among other things, the note transferred via an endorsement in blank (*cf.*, ***Slutsky v Blooming Grove Inn, Inc.***, 147 AD2d 208, 542 NYS2d 721 [2d Dept 1989]). Moreover,

the documentary evidence includes an assignment of the mortgage, which was subsequently duly recorded, whereby the transfer of the note to the plaintiff was memorialized (*see*, ***GRP Loan, LLC v Taylor,*** 95 AD3d 1172, 945 NYS2d 336 [2d Dept 2012]). Therefore, it appears that the plaintiff is the transferee and holder of the original note and the assignee of the mortgage by virtue of the written assignment. Thus, the plaintiff demonstrated its prima facie burden as to the merits of this foreclosure action and as to its standing.

The plaintiff also submitted sufficient proof to establish, prima facie, that the affirmative defenses set forth in the defendant mortgagors' answer are subject to dismissal due to their unmeritorious nature (*see*, ***Becher v Feller***, 64 AD3d 672, 884 NYS2d 83 [2d Dept 2009]; ***Wells Fargo Bank Minn., N.A. v Perez***, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]; ***Coppa v Fabozzi***, 5 AD3d 718, 773 NYS2d 604 [2d Dept 2004] [unsupported affirmative defenses are lacking in merit]; *see also*, ***Bank of America, N.A. v Lucido***, 114 AD3d 714, 981 NYS2d 433 [2d Dept 2014] [plaintiff's refusal to consider a reduction in principal does not establish a failure to negotiate in good faith]; ***Washington Mut. Bank v Schenk***, 112 AD3d 615, 975 NYS2d 902 [2d Dept 2013]; ***JP Morgan Chase Bank, N.A. v Ilardo***, 36 Misc3d 359, 940 NYS2d 829 [Sup Ct, Suffolk County 2012] [plaintiff not obligated to accept a tender of less than full repayment as demanded]; ***Bank of N.Y. Mellon v Scura***, 102 AD3d 714, 961 NYS2d 185 [2d Dept 2013]; ***Scarano v Scarano***, 63 AD3d 716, 880 NYS2d 682 [2d Dept 2009] [process server's sworn affidavit of service is prima facie evidence of proper service]; ***Grogg v South Rd. Assoc., L.P.***, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010] [the mere denial of receipt of the notice of default is insufficient to rebut the presumption of delivery]; ***La Salle Bank N.A. v Kosarovich***, 31 AD3d 904, 820 NYS2d 144 [3d Dept 2006]; ***CFSC Capital Corp. XXVII v Bachman Mech. Sheet Metal Co.***, 247 AD2d 502, 669 NYS2d 329 [2d Dept 1998] [an affirmative defense based upon the notion of culpable conduct is unavailable in a foreclosure action]; ***First Wis. Trust Co. v Hakimian***, 237 AD2d 249, 654 NYS2d 808 [2d Dept 1997]; ***Banque Arabe Et Internationale D'Investissement v One Times Square Assoc. Ltd. Partnership***, 193 AD2d 387, 597 NYS2d 48 [1st Dept 1993] [Banking Law § 200 authorizes foreign banks to loan money secured by mortgages on property in New York and to commence actions to enforce obligations under those mortgages]; ***FGH Realty Credit Corp. v VRD Realty Corp.***, 231 AD2d 489, 647 NYS2d 229 [2d Dept 1996] [no valid defense or claim of estoppel where mortgage provision bars oral modification]; ***Schmidt's Wholesale, Inc. v Miller & Lehman Constr., Inc.***, 173 AD2d 1004, 569 NYS2d 836 [3d Dept 1991] [where a foreclosure action is commenced within the applicable limitations period, the doctrine of laches is no defense]).

Since the plaintiff duly demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted to the defendant mortgagors (*see*, ***HSBC Bank USA v Merrill***, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]). Accordingly, it was incumbent upon the defendant mortgagors to produce evidentiary proof in admissible form sufficient to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action (*see*, ***Baron Assoc., LLC v Garcia Group Enters., Inc.***, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; ***Washington Mut. Bank v Valencia***, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]).

Self-serving and conclusory allegations do not raise issues of fact, and do not require the

plaintiff to respond to alleged affirmative defenses which are based on such allegations (*see*, ***Charter One Bank, FSB v Leone***, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007]; ***Rosen Auto Leasing, Inc. v Jacobs***, 9 AD3d 798, 780 NYS2d 438 [3d Dept 2004]). In instances where a defendant fails to oppose a motion for summary judgment, the facts, as alleged in the moving papers, may be deemed admitted and there is, in effect, a concession that no question of fact exists (*see*, ***Kuehne & Nagel v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; *see also*, ***Madeline D'Anthony Enters., Inc. v Sokolowsky***, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Additionally, "uncontradicted facts are deemed admitted" (***Tortorello v Carlin,*** 260 AD2d 201, 206, 688 NYS2d 64 [1st Dept 1999] [internal quotation marks and citations omitted]).

In opposition to the motion, the defendant mortgagors have submitted, inter alia, an affidavit from Mrs. Koullias. By her affidavit, Mrs. Koullias alleges, among other things, that the defendant mortgagors did not qualify for a loan modification due to a change in rules by the plaintiff and/or the Federal Housing Administration. Mrs. Koullias also alleges the property is now listed for a possible short sale pending the plaintiff's approval.

A review of the opposing papers shows that the same are insufficient to raise any genuine issue of fact requiring a trial on the merits of the plaintiff's claims for foreclosure and sale, and insufficient to demonstrate any bona fide defense to such claim (*see*, CPLR 3211[e]; ***U.S. Bank Trust N.A. Trustee v Butti***, 16 AD3d 408, 792 NYS2d 505 [2d Dept 2005]; *see also*, ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, *supra*). In opposition to the motion, the defendant mortgagors have offered no proof or arguments in support of any of their pleaded defenses. The failure by the defendant mortgagors to raise and/or assert each of their pleaded defenses in opposition to the plaintiff's motion warrants the dismissal of same as abandoned under the case authorities cited above (*see*, ***Kuehne & Nagel v Baiden***, 36 NY2d 539, *supra*; *see also*, ***Madeline D'Anthony Enters., Inc. v Sokolowsky***, 101 AD3d 606, *supra*). All of the affirmative defenses, which are unsupported, are thus dismissed.

The contentions by Mrs. Koullias concerning the defendant mortgagors's attempts to obtain a loan modification and their subsequent efforts to sell the property by way of short sale are unavailing. A foreclosing plaintiff has no obligation to modify the terms of its loan before or after a default in payment (*see*, ***Wells Fargo Bank, N.A. v Van Dyke***, 101 AD3d 638, 958 NYS2d 331 [1st Dept 2012]; ***EMC Mtge. Corp. v Stewart***, 2 AD3d 772, 769 NYS2d 408 [2d Dept 2003]; ***United Cos. Lending Corp. v Hingos***, 283 AD2d 764, 724 NYS2d 134 [3d Dept 2001]; ***First Fed. Sav. Bank v Midura***, 264 AD2d 407, 694 NYS2d 121 [2d Dept 1999]). Further, there is ample authority emanating from the Appellate Division holding that "[n]othing in CPLR 3408 requires plaintiff to make the exact offer desired by [the] defendant[ ], and the plaintiff's failure to make that offer cannot be interpreted as a lack of good faith" (***Bank of America, N.A. v Lucido***, 114 AD3d 714, *supra* at 715-16, quoting ***Wells Fargo Bank, N.A. v Van Dyke***, 101 AD3d 638, *supra* at 638). In the event, however, that the property is sold by way of short sale or otherwise, it is incumbent on the parties to notify the court of any such event. The remaining contentions advanced by Mrs. Koullias in opposition to the plaintiff's motion are similarly without merit.

Notably, absent from the opposing papers are any allegations by the defendant mortgagors that they did not receive the proceeds of the loan transaction, or any allegations by them denying their default in payment. Thus, even when viewed in the light most favorable to the defendant mortgagors, Mrs. Koullias' submissions in opposition to the motion are insufficient to raise any genuine question of fact requiring a trial on the merits of the plaintiff's claims for foreclosure and sale, and insufficient to demonstrate any bona fide defenses (*see*, CPLR 3211[e]; *see*, ***Bank of Smithtown v 219 Sagg Main, LLC***, 107 AD3d 654, 968 NYS2d 95 [2d Dept 2013]; ***Emigrant Mtge. Co., Inc. v Beckerman***, 105 AD3d 895, 964 NYS2d 548 [2d Dept 2013]; ***Rossrock Fund II, L.P. v Commack Inv. Group, Inc.***, 78 AD3d 920, 912 NYS2d 71 [2d Dept 2010]; ***Cochran Inv. Co., Inc. v Jackson***, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007]). The plaintiff, therefore, is awarded summary judgment in its favor against the defendant mortgagors (*see*, ***Federal Home Loan Mtge. Corp. v Karastathis***, 237 AD2d 558, *supra*; *see generally*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Accordingly, the defendant mortgagors' answer is stricken, and the affirmative defenses set forth therein are dismissed in their entirety.

The branches of the motion for an order amending the caption by excising and/or substituting certain fictitious defendants, fixing the defaults of the non-answering defendants and appointing a referee are denied without prejudice to renewal, because the plaintiff failed to demonstrate its prima facie burden with respect to the same (*see generally*, CPLR 3215 [a]; RPAPL § 1321; ***Joosten v Gale***, 129 AD2d 531, 514 NYS2d 729 [1st Dept 1987]; *cf.*, ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, *supra*; ***Neighborhood Hous. Servs. of N.Y. City, Inc. v Meltzer***, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]). More specifically, the branch of the motion wherein the plaintiff requests that the fictitious defendants be excised from the caption is supported by neither an affirmation of counsel, nor an affidavit from one with personal knowledge that there are no "John Doe and Jane Doe" defendants/occupants at the residence. Since the fictitious defendants were allegedly served by substitute service upon Mrs. Koullias pursuant to CPLR 308(4), the branch of the motion for an order excising the fictitious defendants is inconsistent, and leaves the Court in the untenable position of having to guess whether or not there are additional occupants at the property. Under these circumstances, the court may not grant an order of reference at this juncture.

Accordingly, this motion for, inter alia, summary judgment and to appoint a referee to compute is determined as indicated above.

Dated: NOV 17, 2014
Central Islip, NY

Hon. JOHN J. LEO, J.S.C.

HON. JOHN J. LEO

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**