Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

FCDB NCPL 2008-1 TRUST,
.
Plaintiff,

-against-

IVAN PELAEZ, MARIA ESPINOZA a/k/a MARIA ANGELA ESPINOZA, DISCOVER BANK, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD,

"JOHN DOE #1" through "JOHN DOE #12", the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest, in or lien upon the premises being foreclosed, herein,

Defendants,

Index Number 16045/2011

Motion Date July 22, 2013

Motion Seq. Nos. 1 & 2

The following papers numbered 1 to 18 read on this motion by plaintiff for summary judgment against defendants Ivan Pelaez and Maria Espinoza a/k/a Maria Angela Espinoza, to strike the answer of defendants Ivan Pelaez and Maria Espinoza, for leave to amend the caption substituting Julio Espinoza in place and stead of defendant "John Doe #1" and deleting reference to defendants "John Doe #2" through "John Doe #12," for leave to enter a default judgment against the non-appearing defendants, and for leave to appoint a referee to ascertain and compute the amounts due and owing plaintiff; and this motion by defendants Ivan Pelaez and Maria Espinoza to dismiss the complaint asserted against them.

		Papers Numbered
Mot.Seq.#1	Notice of Motion - Affidavits - Exhibits	1 - 11
Mot.Seq.#2	Notice of Motion - Affidavits - Exhibits	12 - 15
	Answering Affidavits - Exhibits	16 - 18

Upon the foregoing papers it is ordered that the motions numbered 45 (Mot. Seq.#2) and 46 (Mot. Seq.#1) on the motion calendar for July 22, 2013 are determined together as follows:

Plaintiff commenced this action on July 7, 2011 to foreclose a mortgage encumbering the real property known as 37-58 Warren Street, Jackson Heights, New York given by defendants Ivan Pelaez and Maria Espinoza to the New York Mortgage Company, LLC, as security for the payment of a note executed and delivered by defendant Ivan Pelaez, evidencing an obligation in the principal amount of $350,000.00 plus interest. In the complaint, plaintiff alleges it is the owner and holder of the note and mortgage, defendants defaulted under the note and mortgage by nonpayment of monthly installment of principal and interest on October 1, 2010 and it elected to accelerate the entire mortgage debt.

Plaintiff caused defendants Ivan Pelaez, Maria Espinoza, Discover Bank, New York State Department of Taxation and Finance, New York City Environmental Control Board and Julio Espinoza, as "John Doe #1," to be served with process. Plaintiff did not cause defendants "John Doe #2" through "John Doe #12" to be served with process because plaintiff determined that they are unnecessary party defendants.

Defendants Ivan Pelaez and Maria Espinoza served an answer, asserting various affirmative defenses including ones based upon lack of standing, and interposing counterclaims seeking declaratory, injunctive relief, and monetary relief. Defendant Discover Bank served a notice of appearance with waiver. The remaining defendants are in default in appearing or answering the complaint. Plaintiff has served a reply to the counterclaims of defendants Ivan Pelaez and Maria Espinoza.

Plaintiff served its motion by regular mail on May 31, 2013. The notice of plaintiff's motion set the return date of June 20, 2013, but made no demand pursuant to CPLR 2214(b) that defendants serve their answering papers on plaintiff at least seven days prior to the return date. Defendants Ivan Pelaez and Maria Espinoza did not serve opposition papers to plaintiff's motion, but rather, served a notice of motion and supporting papers by regular mail on June 15, 2013. Plaintiff served opposition papers to the motion of defendants Ivan Pelaez and Maria Espinoza by regular mail on July 19, 2013. Both motions were marked fully submitted on July 22, 2013.

Defendants Ivan Pelaez and Maria Espinoza opposed plaintiff's motion in their own motion papers, but failed to submit separate opposition papers to plaintiff's motion. Plaintiff makes no objection to this procedural irregularity, and instead has treated the motion of defendants Ivan Pelaez and Maria Espinoza as if it was a cross motion and addressed their arguments in its opposition papers. Under these circumstances, it is appropriate to consider the motions together for determination and reach their merits.

That branch of the motion by plaintiff for leave to amend the caption substituting Julio Espinoza in place and stead of defendant "John Doe #1," and deleting reference to defendants "John Doe #2" through "John Doe #12" is granted.

At the outset, defendants Ivan Pelaez and Maria Espinoza assert plaintiff has failed to comply with the Administrative Order of the Chief Administrative Judge (A/O No. 431/2011) and therefore, the complaint against them should be dismissed. Contrary to such assertion, plaintiff has filed an affirmation of its counsel dated May 31, 2013, which fully satisfies the requirements of the Administrative Order. To the extent defendants Ivan Pelaez and Maria Espinoza contend the affidavit dated April 4, 2013, of Lynne Roberto, a representative of AMS Servicing, LLC, the servicing agent and attorney in fact for plaintiff, fails to comply with the form affidavit supplied by the court (*see* A/O 431/2011, Form "B"), the Administrative Order does not require the filing of any affidavit of a representative of a plaintiff in support of the affirmation by a plaintiff's attorney. Rather, it provides for the discretionary filing of a supporting affidavit in conjunction with the filing of an attorney's affirmation (*see* A/O No. 431/2011 [a representative of the plaintiff "*may* file a supporting affidavit as set forth in Form B attached hereto..."] [emphasis added]). Defendants Ivan Pelaez and Maria Espinoza have failed to demonstrate that plaintiff failed to comply with A/O No. 431/2011.

On a motion for summary judgment in a foreclosure action, a plaintiff must make a prima facie showing by producing the mortgage, the unpaid note, and evidence of default (*see Wachovia Bank, Natl. Assn. v Carcano*, 106 AD3d 724, 725 [2d Dept 2013]; *Capital One, N.A. v Knollwood Props. NEWMAN, LLC*, 98 AD3d 707, 707-708 [2d Dept 2012]; *Swedbank, AB, N.Y. Branch v Hale Ave. Borrower, LLC*, 89 AD3d 922 [2d Dept 2011]; *Rossrock Fund NEWMAN, L.P. v Osborne*, 82 AD3d 737 [2d Dept 2011]). Here, plaintiff submits, among other things, a copy of the pleadings, the note, the mortgage, notices, an affidavit of regularity of its counsel, and affidavit of Lynne Roberto, a representative of AMS Servicing, LLC, the servicing agent and attorney in fact for plaintiff an officer of plaintiff, attesting to the default by defendants Ivan Pelaez and Maria Espinoza in the payment of the monthly mortgage installment which became due on December 1, 2009. These submissions establish plaintiff's prima facie case to summary judgment as against defendants Ivan Pelaez and Maria Espinoza. The burden shifts to defendants Ivan Pelaez and Maria Espinoza to raise a triable issue of fact regarding the merits of plaintiff's claim or with respect to their affirmative defenses (*see EMC Mtge. Corp. v Riverdale Assoc.*, 291 AD2d 370 [2d Dept 2002]; *First Nationwide Bank, FSB v Goodman*, 272 AD2d 433 [2d Dept 2000]; *see also Barcov Holding Corp. v Bexin Realty Corp.*, 16 AD3d 282 [1st Dept 2005]).

Defendants Ivan Pelaez and Maria Espinoza assert plaintiff has failed to establish it complied with RPAPL 1304 because the notice was sent by plaintiff's servicer and lacks identification of the owner of the loan. Under RPAPL 1304, an assignee or mortgage loan servicer is permitted, along with the lender, to provide notice to the borrower (RPAPL 1304[1]). In addition, the statute does not require the notice to identify the owner of the loan. The notice herein meets the requirements set forth in RPAPL 1304(1) for the notice contents. To the extent defendants Ivan Pelaez and Maria Espinoza contend the 90-day notice was not sent to defendant Maria Espinoza, the statute requires it be sent to the "borrower" as opposed to the mortgagor (*see* RPAPL 1304[1]). Defendant Maria Espinoza is not entitled to notice under RPAPL 1304.

Defendants Ivan Pelaez and Maria Espinoza claim that plaintiff has failed to establish it complied with RPAPL 1303. Plaintiff offers a copy of the notice required pursuant to RPAPL 1303 in support of their motion (*see* Plaintiff's Exhibit "D"), and affidavits of service of the notice dated

July 15, 2011, of a licensed process server, indicating that service of a copy of the summons and complaint, and the notice pursuant to RPAPL 1303, was made upon defendants Ivan Pelaez and Maria Espinoza by substituted service (*see* CPLR 308[2]), and that the RPAPL 1303 notice was printed on blue colored paper. Defendants Ivan Pelaez and Maria Espinoza have failed to swear to specific facts to rebut the statements in the process server's affidavits. Defendants Ivan Pelaez and Maria Espinoza have failed to show plaintiff did not comply with RPAPL 1303 and 1304.

Defendants Ivan Pelaez and Maria Espinoza assert the loan is champertous under Judiciary Law § 489(1). A "champerty defense" in a mortgage foreclosure action is "construed narrowly," and will not apply unless the mortgage was acquired "for the very purpose of bringing ... suit" on it, to the "exclusion of any other purpose" (Judiciary Law § 489; *see Red Tulip LLC v Neiva*, 44 AD3d 204, 213 [1st Dept 2007] [quoting *Bluebird Partners v First Fed. Bank*, 94 NY2d 726, 735 [2000]), quoting *Moses v McDivitt*, 88 NY 62, 65 [1882]). In this instance, the defense does not arise on the allegations of the complaint, and defendants Ivan Pelaez and Maria Espinoza have not presented any affidavit of their own.

With respect to the claim by defendants Ivan Pelaez and Maria Espinoza that plaintiff lacks standing to bring this action, " '[e]ntitlement to a judgment of foreclosure may be established, as a matter of law, where a mortgagee produces both the mortgage and unpaid note, together with evidence of the mortgagor's default, thereby shifting the burden to the mortgagor to demonstrate, through both competent and admissible evidence, any defense which could raise a question of fact' " (*Zanfini v Chandler*, 79 AD3d 1031, 1031–1032 [2d Dept 2010], quoting *HSBC Bank USA v Merrill*, 37 AD3d 899, 900 [3d Dept 2007]; *see U.S. Bank, Nat. Assn. v Sharif*, 89 AD3d 723 [2d Dept 2011]). Foreclosure of a mortgage, however, may not be brought by one who has no title to it (*see Kluge v Fugazy*, 145 AD2d 537, 538 [2d Dept 1988]). Where standing is raised as a defense by the defendant, the plaintiff is required to prove its standing before it may be determined whether the plaintiff is entitled to relief (*see U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 753 [2d Dept 2009]; *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 242 [2d Dept 2007]).

Plaintiff, in bringing this action, relies upon an assignment dated June 16, 2011 whereby Mortgage Electronic Registration Systems, Inc. (MERS), as the nominee for New York Mortgage Company, LLC purportedly assigned the mortgage, together with note to plaintiff. New York Mortgage Company, LLC is not a party to the assignment, and the mortgage itself does not specifically give MERS the right, as the nominee or agent of New York Mortgage Company, LLC, to assign the underlying note (*see Bank of N.Y. v Silverberg*, 86 AD3d 274, 279 [2d Dept 2011]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 108 [2d Dept 2011]). Nor has plaintiff shown that MERS had been given an interest in the underlying note by the lender (*see Bank of N.Y. v Silverberg*, 86 AD3d at 283). Insofar as plaintiff also relies upon the physical possession of the original note by its agent at the time of the commencement of the action (*see e.g. U.S. Bank Natl. Assn. v Cange*, 96 AD3d 825, 827 [2d Dept 2012]), the note is made payable to New York Mortgage Company, LLC and has an allonge with an endorsement by Laurel A. Garvey, as "Director, Operations (Wholesale)" of New York Mortgage Company, LLC to American Home Mortgage Corp., without recourse, and another blank endorsement, without recourse, by Jodi Lynch, as assistant secretary for American Home Mortgage Corp. The affidavit of Lynne Roberto does not indicate when the blank endorsement on the allonge was executed. The affirmation of plaintiff's

counsel likewise does not address the issue. Plaintiff additionally has failed to establish that the allonge is "so firmly affixed" to the note "as to become part thereof" (UCC 3-202[2]; *Slutsky v Blooming Grove Inn*, 147 AD2d 208 [1989]). Under such circumstances, that branch of the motion by plaintiff for summary judgment against defendants Ivan Pelaez and Maria Espinoza is denied (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851; *see Deutsche Bank Nat. Trust Co. v Haller*, 100 AD3d 680, 682 [2d Dept 2012]).

That branch of the motion by defendants Ivan Pelaez and Maria Espinoza to dismiss the complaint insofar as asserted against them is denied. Questions of fact exist as to when the allonge was endorsed in blank and whether it is firmly affixed to the note (*see Deutsche Bank Nat. Trust Co. v Haller*, 100 AD3d at 683; *Deutsche Bank Natl. Trust Co. v Rivas*, 95 AD3d 1061 [2d Dept 2012]; *HSBC Bank USA v Hernandez*, 92 AD3d 843, 844 [2d Dept 2012]). That branch of the motion by plaintiff to dismiss the second affirmative defense asserted by defendants Ivan Pelaez and Maria Espinoza based upon lack of standing is denied.

Defendants Ivan Pelaez and Maria Espinoza claim that plaintiff's predecessor in interest engaged in deceptive business practices in violation of General Business Law § 349. To assert a viable claim under General Business Law § 349(a), a party must plead that (1) the challenged conduct was consumer-oriented, (2) the conduct or statement was materially misleading, and (3) [he or she sustained] damages' (*Lum v New Century Mtge. Corp.*, 19 AD3d 558, 559 [2d Dept 2005]; *see Blue Cross & Blue Shield of N.J., Inc. v Philip Morris USA Inc.*, 3 NY3d 200, 205 [2004]; *Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]; *Gaidon v Guardian Life Ins. Am.*, 94 NY2d 330, 344 [1999])" (*Emigrant Mortg. Co., Inc. v Fitzpatrick*, 95 AD3d 1169 [2d Dept 2012]). Defendants Ivan Pelaez and Maria Espinoza have failed to allege these elements, and insofar as they assert they were fraudulently induced to enter into the mortgage transaction by plaintiff's predecessor in interest does not "amount to conduct affecting the consuming public at large" and "is outside the ambit of [the] statute" *(Brooks v Key Trust Co. Nat. Assn.*, 26 AD3d 628 [3d Dept 2006]). That branch of the motion by plaintiff to strike the third affirmative defense and first counterclaim based upon violation of General Business Law § 349 is granted.

Defendants Ivan Pelaez and Maria Espinoza assert an affirmative defense and counterclaim based upon fraud, the elements of a claim for fraud are: (1) misrepresentation or a material omission of fact which was false and known to be false by the defendant; (2) that the misrepresentation was made for the purpose of inducing the other party to rely upon it; (3) justifiable reliance of the other party on the misrepresentation or material omission; and (4) injury (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; *Cash v Titan Financial Services, Inc.*, 58 AD3d 785, 788 [2d Dept 2009]). To the extent defendants Ivan Pelaez and Maria Espinoza assert they were fraudulently induced to enter into the mortgage loan transaction by plaintiff's predecessor in interest, they fail to reference any specific misrepresentation or omission made by plaintiff's predecessor in interest or plaintiff, or allege any justifiable reliance thereon. To the degree defendants Ivan Pelaez and Maria Espinoza assert plaintiff's predecessor in interest deceived them because it never intended to enter into a permanent loan modification, they have failed to point to any specific promise of modification or allege that breach of such promise led to their default in payment. Defendants Ivan Pelaez and Maria Espinoza also assert the assignment of the mortgage to plaintiff is fraudulent. They, however, have failed to demonstrate any fraudulent misrepresentation by plaintiff or justifiable

reliance thereon. That branch of the motion by plaintiff to dismiss the fourth affirmative defense and second counterclaim asserted by defendants Ivan Pelaez and Maria Espinoza based upon fraud is granted.

Defendants Ivan Pelaez and Maria Espinoza claim that the subject mortgage loan is unconscionable. They, however, have failed to show an absence of meaningful choice on their part together with mortgage terms which are unreasonably favorable to plaintiff (*see Matter of State of New York v Avco Fin. Serv. of N.Y.*, 50 NY2d 383, 389 [1980]; *Baron Associates, LLC v Garcia Group Enterprises, Inc.*, 96 AD3d 793 [2d Dept 2012]; *see generally Matter of Friedman*, 64 AD2d 70, 84 [2d Dept 1978]). Defendants Ivan Pelaez and Maria Espinoza also have failed to demonstrate the terms of the mortgage and note were unconscionable, or that plaintiff's predecessor in interest acted unconscionably in the transaction (*see Zuckerman v City of New York*, 49 NY2d 557, 562; *Argent Mtge. Co., LLC v Mentesana*, 79 AD3d 1079, 1081 [2d Dept 2010]; *Quest Commercial, LLC v Rovner*, 35 AD3d 576, 577 [2d Dept 2006]; *FGH Contr. Co. v Weiss*, 185 AD2d 969, 971 [2d Dept 1992]). That branch of the motion by plaintiff to strike the sixth affirmative defense asserted by defendants Ivan Pelaez and Maria Espinoza based upon unconscionability is granted.

Defendants Ivan Pelaez and Maria Espinoza assert they are the victims of "reverse redlining[1]" in violation of the Federal Equal Credit Opportunity Act (15 USC § 1691) (ECOA), and the Federal Fair Housing Act (42 USC § 3605) (FHA). Even if an FHA violation may be considered to constitute an affirmative defense to foreclosure, or is viewed as a defense by way of recoupment, defendants Ivan Pelaez and Maria Espinoza have failed to make any evidentiary showing that plaintiff's predecessor in interest negotiated a mortgage loan with a rate and terms which significantly deviated from industry-wide standards, or which was otherwise unconscionable based upon the income, credit score and history or defendants Ivan Pelaez and Maria Espinoza.

Furthermore, defendants Ivan Pelaez and Maria Espinoza make no claim that they qualified for the loan in question, but were denied it due to unlawful discrimination. Rather, they claims defendant Ivan Pelaez did not qualify for the loan but was granted it anyway (*see Equicredit Corp. of NY v Turcios*, 300 AD2d 344 [2d Dept 2002]). Thus, defendants Ivan Pelaez and Maria Espinoza have failed to state a cause of action for a counterclaim based upon a violation of the ECOA or FHA (*id.*; *LaSalle Bank Natl. Assn. v Johnson* [Sup Ct, Queens County, March 7, 2008, Kitzes, J. Index No. 26807/2006]).

That branch of the motion by plaintiff to dismiss the third counterclaim based upon violation of the EOCA, and the fifth affirmative defense and fourth counterclaim based upon violation of the FHA, of defendants Ivan Pelaez and Maria Espinoza is granted.

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[1] "Reverse redlining" is known as "a lending scheme that targets low-income minorities, offering them exorbitantly high interest rate loans in large amounts, even though they do not have the ability to repay, thereby approving a loan designed to fail, and resulting in loss of the home through foreclosure" (*EquiCredit Corp. of N.Y. v Turcios*, 300 AD2d 344, 346 [2d Dept 2002).

That branch of the motion by plaintiff to dismiss the sixth counterclaim asserted by defendants Ivan Pelaez and Maria Espinoza based upon a violation of Banking Law § 598 is granted. Banking Law § 598 (5) relates to civil penalties for making a mortgage loan without a license, and Banking Law § 598(3) provides for the availability of liquidated damages upon a finding of breach of a "contract or an agreement to make a mortgage loan" (Banking Law § 598 [3]). Defendants Ivan Pelaez and Maria Espinoza, however, make no claim that plaintiff or its predecessor-in-interest was unlicensed or unregistered (Banking Law § 598[5]), and have failed to present sufficient facts to establish they have a cause of action to recover damages for violations of Banking Law § 598(3) (*see Glassman v Zoref*, 291 AD2d 430 [2d Dept 2002]; *Mullins v New Haven Funding, LLC*, 2008 WL 4961674 [New York County, Sup Ct 2008]).

The counterclaim of defendants Ivan Pelaez and Maria Espinoza alleging a violation of Federal Fair Debt Collection Practices Act (*see* 15 USC § 1692 *et seq.*) (FDCPA) does not state a claim against plaintiff or its predecessor in interest. The FDCPA does not generally apply to a creditor seeking to enforce a contract (*see* 15 USC § 1692a [6] [F] [iii]; *United Cos. Lending Corp. v Candela*, 292 AD2d 800 [4th Dept 2002]; *see also Maguire v Citicorp Retail Servs.*, 147 F3d 232, 235 [2d Cir 1998]; *Wadlington v Credit Acceptance Corp.*, 76 F3d 103, 106 [6th Cir 1996]). That branch of the motion by plaintiff to dismiss the seventh counterclaim interposed by defendants Ivan Pelaez and Maria Espinoza alleging a violation of the FDCPA is granted.

The affirmative defense and counterclaim asserted by defendants Ivan Pelaez and Maria Espinoza are based upon promissory estoppel. "The elements of a cause of action based upon promissory estoppel are a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on that promise" (*Williams v Eason*, 49 AD3d 866, 868 [2d Dept 2008])" (*Agress v Clarkstown Cent. School Dist.*, 69 AD3d 769, 771 [2d Dept 2010]). Defendants Ivan Pelaez and Maria Espinoza allege that "by way of ... modification negotiations ..., [plaintiff] made a representation to [them] that while they were negotiating with plaintiff, their Home would not be foreclosed upon." Such allegation does not constitute a clear and unambiguous promise on the part of plaintiff to forbear from exercising its right to foreclosure. That branch of the motion by plaintiff to dismiss the seventh affirmative defense and fifth counterclaim asserted by defendants Ivan Pelaez and Maria Espinoza based upon promissory estoppel is granted.

Those branches of the motion by plaintiff for leave to enter a default judgment against defendants Discover Bank, New York State Department of Taxation and Finance, New York City Environmental Control Board and Julio Espinoza and for leave to appoint a referee are denied at this juncture.

Dated: November 26 , 2013

J.S.C.