[* 1]

SHORT FORM ORDER

COPY

INDEX
NO.: 12993-09

SUPREME COURT - STATE OF NEW YORK
IAS PART 39 - SUFFOLK COUNTY

PRESENT: Hon. DENISE F. MOLIA
Acting Justice Supreme Court

x

WELLS FARGO BANK NA,

Plaintiff,

-against-

RANDOLPH A. VIECCO, BOARD OF MANAGERS OF COVENTRY TOWN HOUSES, INC., and "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.)

Defendants.

x

MOTION DATE: 2-26-13 (001)
3-22-13 (002)
ADJ. DATE: 3-22-13
Mot. Seq. #:001-MotD
#:002-XMotD

KOZENY, McCUBBIN & KATZ, LLP
Attorneys for Plaintiff
395 North Service Rd.
Suite 401
Melville, N. Y. 11747

MARTIN SILVER, P.C.
Attorney for Defendant
Randolph A. Viecco
330 Motor Parkway, Suite 201
Hauppauge, N. Y. 11788

Upon the following papers numbered 1 to 20 read on this motion for summary judgment and cross motion to dismiss; Notice of Motion/Order to Show Cause and supporting papers 1 - 7; Notice of Cross Motion and supporting papers 8 - 12; Answering Affidavits and supporting papers 13 - 16; Replying Affidavits and supporting papers 17 - 19; Other Letter 20; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by the plaintiff for, inter alia, an order: (1) pursuant to CPLR 3212 awarding partial summary judgment in its favor and against the defendant Randolph A. Viecco, striking his answer and dismissing his affirmative defenses; (2) 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; (3) amending the caption; and (4) awarding it the costs of this motion is determined as indicated below; and it is

ORDERED that this cross motion (002) by the defendant Randolph A. Viecco for, inter alia, an order: (1) pursuant to CPLR 3212 for reverse summary judgment dismissing the plaintiff's complaint insofar as asserted against him on the grounds that it failed to state a cause of action and that it lacks standing; or, (2) in the alternative, pursuant to CPLR 3025(b) for leave permitting him to serve an amended answer is granted solely to the extent indicated below, otherwise denied; and it is

RST

ORDERED that the defendant Randolph A. Viecco is directed to serve the plaintiff with an amended answer asserting as a first affirmative defense the plaintiff's alleged lack of standing within twenty (20) days of the date of service of a copy of this Order with notice of entry, and thereafter shall promptly file proof of service of same with the Clerk of the Court, and it is further

ORDERED that the moving parties are directed to serve a copy of this Order with notice of entry upon opposing counsel and 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 90 Drexelgate Court, Middle Island, New York 11953. On October 11, 2007, the defendant Randolph A. Viecco (the defendant mortgagor) executed a fixed-rate note in favor of Professional Mortgage Bankers Corp. (Professional) in the principal sum of $278,650.00. To secure said note, the defendant mortgagor gave Professional a mortgage also dated October 11, 2007 on the property. The mortgage indicates that Mortgage Electronic Registration Systems, Inc. (MERS) was acting solely as a nominee for Professional and its successors and assigns and that, for the purposes of recording the mortgage, MERS was the mortgagee of record.

The note contains an undated endorsement by an officer of Professional to Wells Fargo Bank, NA (the plaintiff), as well as a second undated, blank endorsement by an officer of the plaintiff. Also attached to the note is a letter agreement dated October 17, 2007 (the agreement) between Washington Mutual Bank and Wells Fargo Funding. The agreement purports to memorialize the delivery of "an original promissory note," and contains certain ABA, credit, account and reference numbers, the significance of which are not apparent. By way of an assignment dated March 26, 2009 and subsequently recorded on April 16, 2009, the mortgage, "together with the beneficial interest under the [m]ortgage," was allegedly transferred to the plaintiff.

The defendant mortgagor allegedly defaulted on the note and mortgage by failing to make his monthly payment of principal and interest due on or about October 1, 2008, and each month thereafter. After the defendant mortgagor allegedly failed to cure his default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on April 3, 2009. Parenthetically, the plaintiff subsequently re-filed the lis pendens on August 28, 2012.

Issue was joined by the interposition of the defendant mortgagor's answer dated June 16, 2009. By his answer, the defendant mortgagor generally denies all of the allegations set forth in the complaint, except admits that he "executed various documents." In the answer, the defendant mortgagor also asserts ten affirmative defenses whereby he alleges, inter alia, certain improprieties by the plaintiff and/or Professional and/or certain deficiencies in this action by failing to properly credit his payments, obtain jurisdiction over him, and give him notice prior to commencing this action; charging an excessive interest rate beyond that allowed in the note and beyond that allowed

by law; failing to state a cause of action; violations of Banking Law § 6-l; extending a mortgage loan in excess of the value of the property and beyond his ability to pay; and violating an alleged fiduciary duty. While the answer purports to be verified, the jurat is missing the day and month of the notarization and otherwise contains the year preceding the date of commencement.

In compliance with CPLR 3408, a series of foreclosure settlement conferences were held in this Court's foreclosure settlement conference part on October 12 and November 17, 2010, as well as on February 10, March 10 and April 14, 2011. At the last conference, this case was dismissed from the conference program as 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 Randolph A. Viecco, striking his answer and dismissing his affirmative defenses; (2) 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; (3) amending the caption; and (4) awarding it the costs of this motion.

The defendant mortgagor opposes the plaintiff's motion and cross moves for, inter alia, an order: (1) pursuant to CPLR 3212 for reverse summary judgment dismissing the plaintiff's complaint insofar as asserted against him on the grounds that it failed to state a cause of action and that it lacks standing; or, (2) in the alternative, pursuant to CPLR 3025(b) for leave permitting him to serve an amended answer. In response, the plaintiff has filed opposition papers, and the defendant mortgagor has filed a reply.

The Court will first address the branch of the defendant mortgagor's cross motion seeking leave to amend her answer. Motions for leave to amend pleadings pursuant to CPLR 3025(b) are to be liberally granted, absent prejudice or surprise resulting from the delay (***U.S. Bank, N.A. v Sharif***, 89 AD3d 723, 724, 933 NYS2d 293 [2d Dept 2011]; ***Lucido v Mancuso***, 49 AD3d 220, 222, 851 NYS2d 238 [2d Dept 2008]). "Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine" (***Edenwald Contr. Co. v City of New York***, 60 NY2d 957, 959, 471 NYS2d 55 [1983] [internal quotation marks omitted]; *see*, ***Abrahamian v Tak Chan***, 33 AD3d 947, 949, 824 NYS2d 117 [2d Dept 2006]). The movant, however, must make some evidentiary showing that the proposed amendment has merit; otherwise it will not be permitted (***Buckholz v Maple Garden Apts., LLC***, 38 AD3d 584, 585, 832 NYS2d 255 [2d Dept 2007]; ***Curran v Auto Lab Serv. Ctr.***, 280 AD2d 636, 637, 721 NYS2d 662 [2d Dept 2001]).

In keeping with these principles, it is apparent that the plaintiff has failed to demonstrate any prejudice that would result from the defendant mortgagor's delay in seeking leave, or that the proposed amendment is palpably insufficient or patently devoid of merit (*see*, ***Aurora Loan Servs. LLC v Dimura***, 104 AD3d 796, 962 NYS2d 304 [2d Dept 2013]; ***Aurora Loan Servs., LLC v Thomas***, 70 AD3d 986, 987, 897 NYS2d 140 [2d Dept 2010]). Further, while a defense of lack of

standing is waived unless asserted in either a verified answer or pre-answer motion to dismiss (*see*, CPLR 3211[e]), "defenses waived under [that subdivision] can nevertheless be interposed by leave of court pursuant to CPLR 3025(b) so long as the amendment does not cause the other party prejudice or surprise directly resulting from the delay" (***Aurora Loan Servs. LLC v Dimura***, 104 AD3d 796, *supra* at 797; ***U.S. Bank, N.A. v Sharif***, 89 AD3d 723, *supra* at 724). In opposition to this branch of the cross motion, the plaintiff failed to demonstrate the existence of any prejudice or surprise that would result from the amendment, or that the proposed amended answer was palpably insufficient or patently devoid of merit (*see*, ***Aurora Loan Servs., LLC v Thomas***, 70 AD3d 986, *supra*). Accordingly, the branch of the defendant mortgagor's cross motion requesting, in the alternative, leave to interpose an amended answer is granted solely to the extent indicated herein. The affirmative defense of lack of standing shall be properly set forth as a first affirmative defense in an amended answer and shall be served upon the plaintiff within twenty (20) days of the date of service of a copy of this Order with notice of entry, for the reasons set forth below.

Inasmuch as the standing of the plaintiff has now been drawn into question, it was incumbent upon the plaintiff to prove such standing before being entitled to any relief (*see*, ***CitiMortgage, Inc. v Rosenthal***, 88 AD3d 759, 931 NYS2d 638 [2d Dept 2011]). The standing of a plaintiff in a mortgage foreclosure action is measured by its ownership, holder status or possession of the note and mortgage at the time of the commencement of the action (*see*, ***Bank of N.Y. v Silverberg***, 86 AD3d 274, 926 NYS2d 532 [2d Dept 2011]; ***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]). A mortgage "is merely security for a debt or other obligation, and cannot exist independently of the debt or obligation" (***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, 911, 961 NYS2d 200 [2d Dept 2013] [internal quotation marks and citations omitted]). Holder status is established where the plaintiff is the special indorsee of the note or takes possession of a mortgage note that contains an endorsement in blank on its face or attached thereto, as the mortgage follows an incident thereto (*see*, ***Mortgage Elec. Registration Sys., Inc. v Coakley***, 41 AD3d 674, 838 NYS2d 622 [2d Dept 2007]; ***First Trust Natl. Assn. v Meisels***, 234 AD2d 414, 651 NYS2d 121 [2d Dept 1996]). "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident" (***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, *supra* at 754 [internal quotation marks and citations omitted]).

In the instant case, the plaintiff failed to establish, prima facie, that it had standing as its evidence did not adequately demonstrate that the note was physically delivered to it prior to the commencement of the action (*see*, ***Deutsche Bank Natl. Trust Co. v Rivas***, 95 AD3d 1061, 945 NYS2d 328 [2d Dept 2012]; ***HSBC Bank USA v Hernandez***, 92 AD3d 843, 939 NYS2d 120 [2d Dept 2012]). In support of the motion, the plaintiff submitted, inter alia, the affidavit of Bradley Richard, a Vice President of Loan Documentation from the plaintiff. In his affidavit, Bradley alleges, among other things, that the promissory note was endorsed in blank and is in the plaintiff's possession. The plaintiff's representative, however, did not provide any factual details concerning when the plaintiff received physical possession of the note, and, thus, the plaintiff failed to establish that it had physical possession of the note prior to commencing this action (*see*, ***Deutsche Bank Natl. Trust Co. v Barnett***, 88 AD3d 636, 931 NYS2d 630 [2d Dept 2011]). Furthermore, in

this case, the note contains two endorsements, the second of which was purportedly made by the plaintiff. Additionally, the plaintiff's officer neither addressed the relevance of the agreement between Washington Mutual Bank and Wells Fargo Funding, nor the relationship, if any, between these entities and the plaintiff. Moreover, if MERS, as nominee of Professional was not the owner of the note, as it appears, it would have lacked the authority to assign the note to plaintiff, and absent an effective transfer of the note, the assignment of the mortgage to plaintiff would be a nullity (*see*, ***Bank of N.Y. v Silverberg***, 86 AD3d 274, *supra*; ***Kluge v Fugazy***, 145 AD2d 537, 536 NYS2d 92 [2d Dept 1988]). Thus, the issue of standing cannot be determined as a matter of law on this record. In view of the plaintiff's incomplete and conflicting evidentiary submissions, an issue of fact remains as to whether it had standing to commence this action. The Court now turns to the ten affirmative defenses set forth in the defendant mortgagor's original answer.

The plaintiff submitted sufficient proof to establish, prima facie, that the first through fifth affirmative defenses and the seventh through tenth affirmative defenses set forth in the defendant mortgagor's original answer asserted therein, 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*, ***Mandarin Trading Ltd. v Wildenstein***, 16 NY3d 173, 178, 919 NYS2d 465 [2011]; ***Morales v AMS Mtge. Servs., Inc.***, 69 AD3d 691, 692, 897 NYS2d 103 [2d Dept 2010] [*CPLR 3016(b) requires that the circumstances of fraud be "stated in detail," including specific dates and items*]; ***Albertina Realty Co. v Rosbro Realty Corp.***, 258 NY 472, 475-76, 180 NE 176 [1932] ["*acceleration clause does not constitute a forfeiture or penalty" and "the filing of the summons and verified complaint and lis pendens constitutes a valid election" to accelerate*]; ***Bank of N.Y. Mellon v Scura***, 102 AD3d 714, 961 NYS2d 185 [2d Dept 2013] [*process server's sworn affidavit of service is prima facie evidence of proper service pursuant to CPLR 308(2)*]; ***Patterson v Somerset Invs. Corp.***, 96 AD3d 817, 817, 946 NYS2d 217 [2d Dept 2012] ["*a party who signs a document without any valid excuse for having failed to read it is 'conclusively bound' by its terms*"]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010] [*unaffordability of loan will not support damages claim against lender and is not a defense to a foreclosure action*]; ***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*]).

As the plaintiff duly demonstrated its entitlement to judgment as a matter of law with respect to all defenses asserted in the original answer, other than the sixth affirmative defense alleging failure to state a cause of action, the burden of proof shifted to the defendant mortgagor (*see*, ***HSBC Bank USA v Merrill***, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]). Accordingly, it was incumbent upon the defendant mortgagor to produce evidentiary proof in admissible form sufficient to demonstrate the existence of a triable issue of fact as to the aforementioned affirmative defenses to the action (*see*, ***Baron Assoc., LLC v Garcia Group Enters. Inc.***, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; ***Grogg v South Rd. Assoc., LP***, 74 AD3d 1021, *supra*).

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, Inc. 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, *supra*). 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]).

A review of the opposing papers shows that the defendant mortgagor's opposing and moving papers are insufficient to raise any genuine issue of fact requiring a trial on the merits of the first through fifth affirmative defenses or the seventh through tenth affirmative defenses set forth in the defendant mortgagor's answer (*see*, CPLR 3211[e]). In opposition to the motion, the defendant mortgagor has offered no proof or arguments in support of any of his pleaded defenses, except as to the failure to state a cause of action asserted as a sixth affirmative defense. The failure by the defendant mortgagor to raise and/or assert each of the remaining 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, Inc. v Baiden***, 36 NY2d 539, *supra*; *see also*, ***Madeline D'Anthony Enters., Inc. v Sokolowsky***, 101 AD3d 606, *supra*). Accordingly, the first through fifth affirmative defenses and the seventh through tenth affirmative defenses, not asserted by the defendant mortgagor are thus dismissed.

The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by excising the fictitious named defendant, John Doe, is granted (*see*, ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***Neighborhood Hous. Servs. of N.Y. City, Inc. v Meltzer***, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]). By its submissions, the plaintiff established the basis for this relief. All future proceedings shall be captioned accordingly.

By its submissions, the plaintiff demonstrated that the error in the "FIRST" enumerated paragraph of the complaint, with respect to the plaintiff's principal place of business was inadvertent, and that the substantial right of any party to this action has not been prejudiced (*see*, CPLR 2001; ***Household Fin. Realty Corp. of N.Y. v Emanuel***, 2 AD3d 192, 769 NYS2d 511 [1st Dept 2003]; ***Rennert Diana & Co. v Kin Chevrolet, Inc.***, 137 AD2d 589, 524 NYS2d 481 [2d Dept 1988], *see also*, ***Serena Constr. Corp. v Valley Drywall Serv.***, 45 AD2d 896, 357 NYS2d 214 [3d Dept 1974]). Accordingly, pursuant to CPLR 2001 and 3025(c), paragraph "FIRST" of the complaint is amended nunc pro tunc to April 3, 2009 to reflect that the plaintiff's principal place of business is Sioux Falls, SD.

The branch of the instant motion wherein the plaintiff seeks the appointment of a referee to compute amounts due under the mortgage is denied, without prejudice, as premature as all issues

material to the plaintiff's claim for foreclosure and sale have not been resolved (*see*, RPAPL 1321: ***Vermont Fed. Bank v Chase***, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]). As demonstrated above, the request for summary judgment on the plaintiff's claim for foreclosure and sale has not been resolved in favor of the plaintiff as contemplated by RPAPL § 1321. Furthermore, the plaintiff's motion does not include a demand that the default in answering of the non-answering defendant, Board of Managers of Coventry Town Houses, Inc., be fixed and determined (*see*, CPLR 3215[f]; RPAPL 1321).

Accordingly, plaintiff's motion and the cross motion are determined as indicated above. In view of the foregoing, the proposed order submitted by the plaintiff has been marked "not signed."

Dated: 11-25-13

Hon. Denise F. Molia

Hon. DENISE F. MOLIA, A.J.S.C

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