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SHORT FORM ORDER

INDEX No. 09-37317

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 12-17-12
ADJ. DATE 6-6-13
Mot. Seq. # 002 - MotD

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U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE HOLDER OF BEAR STEARNS ASSET-BACKED SECURITIES 1 TRUST 2006 Im1
3476 Stateview Boulevard
Ft. Mill, SC 29715,

Plaintiff,

- against -

VICTOR DE LOS RIOS a/k/a VICTOR M. DE LOS RIOS, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR IMPAC FUNDING CORPORATION D/B/A IMPAC LENDING GROUP,

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.

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HOGAN LOVELLS US LLP
Attorney for Plaintiff
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New York, New York 10022

CABANILLAS & ASSOCIATES, P.C.
Attorney for Defendant De Los Rios
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Upon the following papers numbered 1 to 13 read on this motion for the appointment of a referee ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 7 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 9 - 11 ; Replying Affidavits and supporting papers ___; Other Plf's Memos of Law 7 - 8, 12 - 13 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by plaintiff for an order fixing the defaults of the non-appearing defendants, granting summary judgment on its complaint, striking the affirmative defenses and

counterclaims in the answer of defendant Victor De Los Rios, an order of reference appointing a referee to compute is granted to the extent of severing and dismissing all of the affirmative defenses and counterclaims except for the third affirmative defense alleging lack of standing. The motion is otherwise denied and the remainder of the action shall continue.

On December 23, 2005, defendant Victor De Los Rios ("De Los Rios") borrowed $368,000 from non-party Impac Funding Corporation d/b/a Impac Lending Group ("Impac"), executing a note secured by a mortgage on the property known as 1147 Reilly Street in Bay Shore, New York (the "Property"). The mortgage names Mortgage Electronic Registration Systems, Inc. ("MERS") as Impac's nominee and the mortgagee of record for purposes of recording, and confers upon it the right to take any action required of Impac. The mortgage was recorded by MERS on January 10, 2006 in the Suffolk County Clerk's Office. MERS assigned the mortgage to the plaintiff by an assignment of mortgage dated December 31, 2008 (the "Assignment").

De Los Rios defaulted on the note by failing to make the monthly installments due November 1, 2008 and thereafter. The plaintiff commenced this action in September 2009 to, *inter alia*, foreclose the mortgage on the Property. All of the defendants were timely served with the summons and complaint. De Los Rios interposed an answer raising affirmative defenses, including lack of standing, and asserted several counterclaims. The remaining defendants have failed to answer or otherwise appear in the action and remain in default.

The plaintiff now moves for summary judgment on its complaint, to strike the answer of De Los Rios, and for an order of reference pursuant to RPAPL 1321 fixing the defaults of the non-answering defendants and for the appointment of a referee to compute. In support of its motion, the plaintiff relies upon the affidavit of Angela Frye ("Frye"), a vice president for Wells Fargo Bank, N.A., successor by merger with Wells Fargo Home Mortgage, Inc. d/b/a America's Servicing Company ("Wells/ASC"), the servicer and custodian of records for plaintiff. Frye asserts that she reviewed the books and records maintained by Wells/ASC in its regular course of business as servicer and custodian of the subject loan, the sources from which she derived her knowledge of the facts. Frye asserts that based on the records, De Los Rios received and signed a Truth-In-Lending Disclosure Statement ("TILA") and the HUD-1 Form. Frye asserts that the Wells/ASC business records reflect that after De Los Rios failed to make the November 1, 2008 payment, ASC sent a notice of default on or about February 15, 2009 which indicated the amount past due and provided him with the opportunity to cure the default. Frye asserts that also on February 17, 2008, ASC sent De Los Rio a 90-day notice. Frye states that as of the date the complaint was filed, De Los Rios had not cured his default.

It is well settled that a mortgagee establishes a prima facie case entitling it to summary judgment to foreclose a mortgage by presenting the subject mortgage, the unpaid note and due evidence of a default under the terms thereof (*see* CPLR 3212; RPAPL § 1321; ***Baron Assoc., LLC v Garcia Group Enter.***, 96 AD3d 793, 946 NHYS2d 611 [2d Dept 2012]; ***Citibank, NA v Van Brunt Prop., LLC***, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]; ***Campaign v Barba***, 23 AD3d 827, 805 NYS2d 86 [2d Dept 2005]; ***Ocwen Federal Bank FSB v Miller***, 18 AD3d 527, 794 NYS2d 650 [2d Dept 2005]). Here, the plaintiff has attached to its moving papers a copy of the note, mortgage and evidence of De Los Rios' default in making payments as agreed, thereby establishing its entitlement to summary judgment

on the complaint. It is thus incumbent upon De Los Rios to submit proof sufficient to raise a genuine question of fact as to a bona fide defense to his default (***Citibank, NA v Van Brunt Prop., LLC***, *supra*; ***Grogg Assocs. v South Rd. Assocs.***, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]).

The opposition submitted by De Los Rios challenges whether personal jurisdiction has been obtained over him (first affirmative defense) as well as the plaintiff's standing to prosecute this action (third affirmative defense). De Los Rios did not move to dismiss the complaint based on lack of personal jurisdiction within 60 days of service of his answer, and thus has waived this defense (*see* CPLR 3211[e]; ***JP Morgan Chase Bank v Munoz***, 85 AD3d 1124, 927 NYS2d 364 [2d Dept 2011]).

With respect to the third affirmative defense, De Los Rios maintains that the copy of the note previously produced by the plaintiff did not contain an indorsement, and no proof has been submitted to demonstrate that Impac delivered the note to plaintiff. De Los Rios also argues that the purported Assignment is insufficient to confer standing as there is no evidence that MERS as the assignor, ever had possession of the note.

In response, and in further support of its motion, plaintiff has submitted a memorandum of law without a sworn statement. In the memorandum, plaintiff does not address the lack of an indorsement but stands by the attestations made by Frye in her affidavit in support that the note containing a special indorsement by Impac to plaintiff was delivered to Wells/ASC on or about August 24, 2006.

Standing is not an element of a mortgagee's claim for foreclosure and sale, but when challenged in a pre-answer motion or by an affirmative defense set forth in an answer, must be established by the plaintiff to be entitled to any relief requested in the complaint (*see* ***Bank of New York v Silverberg***, 86 AD3d 280, 926 NYS2d 532 [2d Dept 2011]; ***Wells Fargo Bank Minnesota v Mastropaolo***, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). A plaintiff establishes that it has a legal or equitable interest in the mortgage, i.e., standing, by demonstrating that it is the holder or assignee of both the subject mortgage and the underlying note, "either by physical delivery or execution of a written assignment prior to the commencement of the action" (***Deutsche Bank Nat. Trust Co. v Rivas***, 95 AD3d 1061, 1061-1062, 945 NYS2d 328 [2d Dept 2012], quoting ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 108, 923 NYS2d 609 [2d Dept 2011]; *see* ***HSBC Bank USA v Hernandez***, 92 AD3d 843, 939 NYS2d 120 [2d Dept 2012]; ***Deutsche Bank Natl. Trust Co. v Barnett***, 88 AD3d 636, 93 NYS2d 630 [2d Dept 2011]). "An assignment of the mortgage without an assignment of the underlying note or bond is a nullity, and no interest is acquired by it" (***HSBC Bank USA v Hernandez***, *supra* at 843; *see* ***Bank of New York v Silverberg***, *supra*). However, a written assignment of the underlying note or the physical delivery of the note prior to commencement of the foreclosure action is sufficient to transfer the obligation and vest standing in the plaintiff, since the mortgage passes with the debt that is evidenced by the note as an inseparable incident thereto (*see* ***U.S. Bank, NA v Sharif***, 89 AD3d 723, 933 NYS2d 293 [2d Dept 2011]; ***Bank of New York v Silverberg***, *supra*; ***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, 753, 890 NYS2d 578 [2d Dept 2009]).

Where a note is payable to order, it is negotiated by delivery with any necessary indorsement (McKinney's Cons Laws of NY, Book 62½, UCC § 3-202[1]). The indorsement must be written on the note "or on a paper so firmly affixed thereto as to become a part thereof" (*id.* at § 3-202[2]). As

explained in the Official Comment following UCC § 3-202, when the indorsement is affixed to an instrument, it is called an allonge (*id.* at 102). "[A] purported indorsement on a mortgage or other separate paper pinned or clipped to an instrument is not sufficient for negotiation" (*id.*).

Contrary to the plaintiff's argument in its memorandum of law, Frye's affidavit in support of the motion does not establish when the note was physically delivered to Wells/ASC. Although in the memorandum of law it is claimed that delivery of the note was made on August 24, 2006, there is no statement to that effect in Frye's affidavit. Frye asserts at paragraph 5 of her affidavit that Impac endorsed the note to the plaintiff and that it and the mortgage "were subsequently transferred and physically delivered to Wells/ASC, as custodian under the Pooling and Servicing Agreement dated as of August 24, 2006 (the "PSA") for the Trust prior to commencement of this action in 2009."

The date of the PSA does not effectuate a transfer of the note or satisfy the requirement of a proper indorsement and physical delivery of the note. Morever, the explicit language of the PSA demonstrates that delivery of the note is anticipated, but was not yet accomplished. Indeed, Frye points out that "[t]he PSA identifies Wells/ASC as the custodian and section 2.01 of the PSA provides that the loan documents for each mortgage loan in the Trust will be delivered to the custodian for the benefit of the Trust, which is the plaintiff here." Section 2.01 is not attached to the plaintiff's papers, however, section 2.02 of the PSA, which has been provided, reads:

> On the Closing Date[1], the Trustee or the Custodian on its behalf will deliver to the Sponsor and the Trustee an Initial Certification...confirming whether or not it has received the Mortgage File for each Mortgage Loan, but without review of such Mortgage File, except to the extent necessary to confirm whether such Mortgage File contains the original Mortgage Note or a lost note affidavit and indemnity in lieu thereof. No later than 90 days after the Closing Date, the Trustee or the Custodian on its behalf shall, for the benefit of the Certificateholders, review each Mortgage File delivered to it and execute and deliver to the Sponsor and the Trustee and, if reviewed by the Custodian or the Trustee, an Interim Certifications [*sic*].... In conducting such review, the Trustee or the Custodian on its behalf will ascertain whether all required documents have been executed and received and whether those documents relate, determined on the basis of the Mortgagor name, original principal balance and loan number, to the Mortgage Loans identified in Exhibit B to this Agreement....

This anticipatory language confirms that delivery of the mortgage note had not occurred as of the date the PSA was executed. Moreover, the language indicates that the trustee or custodian, upon such delivery, was to ascertain whether the notes relating to the mortgages identified in Exhibit B to the PSA had actually been received. No one with knowledge of these facts has stated that the note and mortgage

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[1]The cover page of the PSA before the court indicates that it an "Amended and Restated Pooling and Servicing Agreement Dated as of August 24, 2006." However the portion of the PSA proffered by the plaintiff defines the Closing Date as April 25, 2006.

which are the subject of the instant action were actually received and listed in Exhibit B. Notably, Exhibit B to the PSA is not included in the papers submitted herein.

Further, the alleged indorsement is on a separate page from the note. There is no explanation as to why the indorsement was not placed on the actual note. The plaintiff does not indicate that a copy of the purported indorsement was actually affixed to the subject note so as to become an allonge. Moreover, the allonge does not contain any identifying information to relate it to the subject note as it simply contains a stamp on an otherwise blank sheet of paper that reads:

> Pay To The Order Of:
>
> Without Recourse
> Impact Funding Corporation
> d/b/a Impact Lending Group
> A California Corp.
>
> By: _____
> Dellela Madonado, Authorized Signatory[2]

Next to this information is stamped the plaintiff's name. The indorsement is undated and the papers before the court do not contain any proof as to when the note was negotiated. Additionally, "[t]he affidavit from the plaintiff's servicing agent did not give any factual details of a physical delivery of the note" (***HSBC Bank USA v Hernandez***, *supra* at 844). Furthermore, the plaintiff has not provided an explanation as to why a different version of the note without the allonge was produced by it. Moreover, although the Assignment indicates that MERS assigned the mortgage together with the note to the plaintiff, there is nothing in the papers before the court to indicate that the note was transferred to MERS or that MERS ever had possession of the note. Thus, the Assignment even if valid, standing alone is insufficient to establish that plaintiff had standing to commence this action (*see* ***Bank of New York v Silverberg***, *supra*). Hence, De Los Rios has raised questions of fact as to whether a valid transfer of the note was made to the plaintiff by an indorsement with physical possession thereof effectuated prior to commencement of this action (*see* ***Deutsche Bank Nat. Trust Co. v Haller***, 100 AD3d 680, 954 NYS2d 551 [2d Dept 2012]); ***HSBC Bank USA v Hernandez***, *supra*; ***Deutsche Bank Nat. Trust Co. v Barnett***, 88 AD3d 636, 931 NYS2d 630 [2d Dept 2011]).

The remainder of the plaintiff's motion is decided as follows. It is noted that other than the personal jurisdiction issue (first affirmative defense) and the standing issue (third affirmative defense), De Los Rios has not submitted any opposition to the plaintiff's argument to dismiss the remaining affirmative defenses and the counterclaims. Instead, De Los Rios, in essence, argues that summary judgment should be denied in order for him to conduct discovery (CPLR 3212[f]).

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[2]It is signed "Dellela Maldonado".

Addressing De Los Rios' discovery argument, pursuant to CPLR 3212(f), if it appears from affidavits submitted in opposition to the motion for summary judgment "that facts essential to justify opposition may exist but cannot be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just." However, "[a] determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence" (***Wyllie v District Attorney of Count of Kings***, 2 AD3d 714, 770 NYS2d 110 [2d Dept 2003]). Mere hope based on speculation and surmise that discovery will reveal the existence of triable issues of fact is insufficient to forestall the grant of summary judgment in a defendant's favor (*see id.*). Here, De Los Rios has failed to offer any evidentiary basis to suggest that discovery may lead to relevant evidence to support his affirmative defenses and counterclaims. Consequently, there is no need to delay the determination of the remainder of the plaintiff's motion by virtue of CPLR 3212(f) (*see* ***Freiman v JM Motor Holdings NR 125-139, LLC***, 82 AD3d 1154, 920 NYS2d 189 [2d Dept 2011]).

The Court's computerized records indicate that several foreclosure settlement conferences were held, thus, there has been compliance with CPLR 3408. There has also been compliance with the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11), as before the court is the affirmation of Nicole E. Schiavo, Esq. Additionally, the summonses served upon De Los Rios contain the language required by RPAPL § 1320, and the affidavits of service proffered indicate that he was served with the notice pursuant to RPAPL § 1303. The papers before the court also include the 90-day foreclosure notice required by RPAPL § 1304. Thus, the foreclosure notice requirements have been satisfied. Plaintiff's request for a settlement conference and the second affirmative defense alleging non-compliance with RPAPL § 1303 are, therefore, without merit and hereby severed and summarily dismissed.

The TILA executed by De Los Rios is annexed to the plaintiff's moving papers. Therefore, the fourth affirmative defense alleging that the plaintiff failed to deliver the TILA disclosure is baseless, and hereby severed and summarily dismissed.

The fifth affirmative defense for violation of the Deceptive Practices Act, General Business Law ("GBL") § 349 is also severed and dismissed. To establish a cause of action under GBL § 349, De Los Rios was required to allege a deceptive consumer-oriented act or practice which is misleading in a material respect, and injury resulting from such act (*see* ***Stutman v Chemical Bank***, 95 NY2d 24, 709 NYS2d 892 [2000]; ***Andre Strishak & Assoc., P.C. v Hewlett Packard Co.***, 300 AD2d 608, 752 NYS2d 400 [2nd Dept 2002]). De Los Rios alleges that the plaintiff extended him credit with the knowledge that he could not afford to make the payments, and that upon information and belief, the plaintiff routinely made unaffordable loans to borrowers. De Los Rios has not submitted any evidence to support these allegations. Additionally, he has failed to allege specific misrepresentations that caused him to be misled and suffer damages (*see* ***Gale v IBM Corp.***, 9 AD3d 446, 781 NYS2d 45 [2nd Dept 2004]).

In the sixth affirmative defense and first counterclaim De Los Rios seeks rescission of the mortgage for alleged predatory lending in violation of the Home Ownership and Equity Protection Act ("HOEPA"), 15 USC § 1639, an amendment to the Truth in Lending Act (15 USC § 1601 et seq.). De Los Rios, however, has failed to offer any proof that the subject mortgage loan is governed by HOEPA.

The subject mortgage may be considered a "consumer credit transaction" (*see* 15 USC § 1602[h]) with a "creditor" (see 15 USC § 1602 [f]), secured by the "consumer's principal dwelling" (*see* 15 USC § 1602 [v]). Nevertheless, De Los Rios has failed to demonstrate the annual percentage rate of interest (the "APR") at consummation for the loan transaction exceeded the statutory threshold level (*see* 15 USC § 1602[aa][1][A]) or that "the total points and fees" he paid at or before closing exceeded 8 percent of the total loan amount (*see* 15 USC § 1602[aa][1][B]). On the other hand, the plaintiff has established that the APR and the point and fees did not exceed the threshold levels. Thus, the sixth affirmative defense and first counterclaim are dismissed.

The plaintiff has also established its entitlement to summary judgment dismissing the seventh affirmative defense and second counterclaim for fraudulent inducement. Critical to a fraud claim is that basic facts are alleged to establish the elements of the cause of action. CPLR 3016(b) requires that the circumstances constituting the alleged wrong be stated in detail (*see* ***Lanzi v Brooks***, 54 AD2d 1057, 388 NYS2d 946 [1976], *affd* 43 NY2d 778, 402 NYS2d 384 [1977]). Here, De Los Rios has failed to specifically plead the acts or conduct allegedly engaged in to support this defense. The allegation of an oral promise to never exercise the right to foreclose fails to meet the "threshold of believability" (***Chemical Bank v Broadway 55-56th Street Associates***, 220 AD2d 308, 309, 632 NYS2d 553 [1st Dept 1995]), and any such promise would have to be in writing as required by the mortgage and the statute of frauds (***North Bright Capital, LLC v 705 Flatbush Realty, LLC***, 66 AD3d 977, 889 NYS2d596 [2d Dept 2009]). Furthermore, "although it is well settled that an assignee of a mortgage takes it subject to the equities attending the original transaction (internal quotation marks and citation omitted), [the plaintiff] cannot be required to answer in damages for alleged misrepresentations committed by [Impac] in connection with the making of the [original] mortgage loan" (***US Bank National Assn v McPhearson***, 33 Misc 3d 1219[A], 2012 NY Slip Op 50742[U], 2012 WL 1521862 [Sup Ct Queens County]). The tenth affirmative defense and fifth counterclaim alleging breach of contract based upon the plaintiff's failure to fulfill the oral promise made by its mortgage broker to refinance the loan are, thus, also dismissed.

The remaining affirmative defenses and counterclaims alleging overcharges, statutory damages, and negligence have been reviewed and deemed to be without merit.

Dated: Jan. 9, 2014

W. Gerard Asher
J.S.C.

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