M E M O R A N D U M

SUPREME COURT - QUEENS COUNTY
I.A.S. PART 14

YOLANDA BETANCOURT,
Plaintiff,

-against-

LIGIA GUAMAN, et al.,
Defendants.

Index No. 27222/2006

By: **ELLIOT, J.**

Date: December 7, 2012

Motion Cal. No. 3

Motion Seq. No. 5

Motion Date: August 7, 2012

Plaintiff commenced this action to foreclose a mortgage in the principal amount of $36,000, dated November 20, 2000, which secured a purchase money note bearing the same date. In a prior action, defendant Dario Betanacourt, plaintiff's brother and the mortgagor in the subject mortgage, sought to cancel the mortgage on the ground of fraud. In that action, the Honorable Sydney Leviss, J.H.O., determined that the mortgage is valid. Furthermore, by order dated September 15, 2010, this court determined that the Guaman defendants were collaterally estopped from challenging the mortgage. It appears that the validity of the mortgage lien is now no longer in dispute. Additionally, in an order dated July 26, 2011, this court held that a determination of whether to preclude and/or limit the recovery of interest and penalties was premature, since plaintiff had not yet, among other things,

moved for summary judgment (*see Dayan v York*, 51 AD3d 964 [2008]).

Plaintiff now moves pursuant to CPLR 3212 for summary judgment, striking the answer and dismissing the affirmative defenses of the defendants Dario Betancourt a/k/a Ruben D. Betancourt a/k/a Reuben D. Betancourt a/k/a Ruben Dario Betancourt, striking the answer and dismissing the affirmative defenses of the defendant HSBC Mortgage Corporation (USA), striking the answer and dismissing the affirmative defenses of the defendants Ligia Guaman, Milton Guaman, and Benjamin Guaman, for the appointment of a referee to compute, and for leave to amend the caption adding Blanca Penaloza and to delete reference to defendants sued herein as "John Doe #1" through "John Doe # 10."

As a preliminary matter, to the extent that plaintiff seeks substitution and default against Blanca Penaloza, plaintiff is not entitled to that relief. The affirmation does not mention Blanca Penaloza's relationship with respect to the subject premises (i.e., occupant or tenant), nor does it appear from the submission of the affidavits of service annexed to the motion that Blanca Penaloza was ever served with process herein.

Turning to the remaining branches of the motion, plaintiff has made a prima facie showing of entitlement to judgment as a matter of law by submission of the mortgage, 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]). In opposition, the defendants have failed to demonstrate the existence of a triable issue of fact with respect to plaintiff's right to foreclose

(*see Capstone Business Credit, LLC*, 70 AD3d at 884; *EMC Mtge. Corp.*, 291 AD2d at 370).

Defendants assert that inconsistencies between the mortgage and note create a material issue of fact warranting denial of summary judgment. It has long been held that once a party's entitlement to foreclosure has been established, a discrepancy amongst the figures does not warrant an invalidation of the entire proceeding (*see Crest/Good Manufacturing Co., Inc. v Baumann*, 160 AD2d 831 [1990]). A dispute as to the exact amount owed, therefore, does not preclude the granting of summary judgment as to liability. That having been said, however, the court finds it appropriate at this juncture to address those sums entitled to be collected prior to the submission of this matter to a referee (*see e.g. Citibank, N.A. v Van Brunt Props., LLC*, 34 Misc 3d 1240 [A][Sup Ct, Kings County 2012]), so that the referee may compute the accurate amount owed pursuant to the controlling documents. As the Guaman defendants correctly point out, the mortgage document does not provide for a default rate of interest or late payment premiums. As such, these sums are not secured by the mortgage and are not recoverable by plaintiff. Further, the parties explicitly agreed, and the note provides, that "[i]n the event of conflict between the terms of this Note and the terms of the Mortgage, the terms of the Mortgage shall be paramount and shall govern." As such, according to the terms of the mortgage, plaintiff is entitled to the recovery of "the whole of said principal sum and interest [at the rate of 9% per annum] shall become due at the option of the mortgagee" due to defendant Betancourt's default in payment. Further, as the court held in its earlier order of September 15, 2010, late charges imposed

after commencement of this action are improper and, thus, should not be included in the calculation of the amount due and owing to plaintiff.

To the extent that defendants have asserted the doctrine of laches (both as a defense to this action and as a bar to the recovery of interest), this defense is not available in a mortgage foreclosure suit commenced within the applicable limitations period (*see First Federal Sav. and Loan Ass'n of Rochester v. Capalongo*, 152 AD2d 833 [1989]). Moreover, a review of the court file indicates that the parties were engaged in active litigation since the commencement of this action, and that plaintiff did not wait an unreasonable amount of time in moving for summary judgment.[1] To the extent that defendants argue that plaintiff provided inaccurate payoff letters, those figures were calculated prior to this court having made rulings regarding, inter alia, whether late charges or default interest rates are recoverable herein. As noted in this court's July 26, 2011 decision, this action is only at the summary judgment stage, so the court does not have the opportunity to assess whether plaintiff will or will not move with deliberate speed in: (1) confirming a referee's report; (2) moving for judgment of foreclosure and sale; (3) enforcing the judgment.

Finally, with respect to amounts to be collected, it is noted that, contrary to plaintiff's assertions on the motion, she is not entitled to all sums paid by the mortgagee for the expense of any litigation to prosecute or defense the rights and lien created by the

1. It is noted that, generally, the parties are permitted 120 days after the filing of the note of issue to make motions for summary judgment, and plaintiff did so here prior to the filing of the note of issue.

mortgage. Paragraph 12 of the mortgage (upon which plaintiff ostensibly relies in support of her request for attorneys fees), specifically excludes actions to foreclose the instant mortgage or to collect the debt secured thereby (*see Preferred Group of Manhattan, Inc. v Fabius Maximus, Inc.*, 51 AD3d 889 [2008]).

Accordingly, the branch of the motion for summary judgment and strike the answer and dismiss affirmative defenses of the appearing defendants is granted, except to the extent that plaintiff seeks the imposition of late payments, default interest, or attorneys fees. A referee to compute shall be named in the order to be entered hereon, who shall compute the amount owed based upon the terms of the mortgage and not the note, in accordance with the above.

Settle order.

J.S.C.