

**FILED
AND
ENTERED**
12-20-16
NEW YORK
WESTCHESTER
COUNTY CLERK

SUPREME COURT : STATE OF NEW YORK
IAS PART WESTCHESTER COUNTY
PRESENT: HON. JOAN B. LEFKOWITZ

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

CITIMORTGAGE, INC.,

Plaintiff,

DECISION & ORDER

-against-

Index No. [REDACTED] 2010

[REDACTED] et al.,

Motion Return Date:
July 29, 2016
Motion Seq. #1

Defendants.

The following papers numbered 1 through 35 were read on the motion by plaintiff for an order striking the affirmative defenses, granting summary judgment against the defendants, [REDACTED] granting a default judgment against the remaining defendants, amending the caption, appointing a referee to compute, expunging a satisfaction of mortgage from the record, directing the county clerk to accept for filing a consolidation, extension and modification agreement dated June 28, 2006, and reforming gap mortgages and the consolidation, extension and modification agreement.

Notice of Motion, Affirmation, Affidavit (Exhibits A-R).....1-21
Affirmation, Affidavits in Opposition (Exhibits 1-2).....22-26
Memorandum of Law.....27
Reply Affirmation (Exhibits A-G).....28-35

Upon reading the foregoing papers it is

ORDERED the branch of the motion which seeks an order striking affirmative defenses is granted to the extent that the third, fourth, fifth, sixth, seventh, eighth and ninth affirmative defenses are stricken; and it is further

ORDERED the branch of the motion which seeks an order granting summary judgment is denied without prejudice; and it is further

ORDERED the branch of the motion which seeks an order granting a default judgment against the remaining defendants is denied without prejudice; and it is further

ORDERED the branch of the motion which seeks an order amending the caption is denied without prejudice; and it is further

ORDERED the branch of the motion which seeks an order appointing a referee to compute is denied without prejudice; and it is further

ORDERED the branch of the motion which seeks an order expunging the satisfaction of mortgage is denied without prejudice; and it is further

ORDERED the branch of the motion which seeks an order directing the county clerk to accept an agreement for recording is denied without prejudice; and it is further

ORDERED the branch of the motion which seeks an order reforming gap mortgages and the consolidation, extension and modification agreement is denied; and it is further

ORDERED the parties are directed to appear on January 30, 2017, at 9:30 a.m. in the Preliminary Conference Part, Courtroom 800, Westchester County Supreme Court, 111 Martin Luther King Boulevard, White Plains, New York, prepared to conduct a preliminary conference.

Plaintiff sues to foreclose a consolidation, extension and modification agreement, executed by the defendants on June 27, 2006. The CEMA consolidated three prior notes and mortgages and represented defendants' agreement to repay a total of \$600,000.00 they borrowed from plaintiff's predecessor in interest and to grant a mortgage interest in premises to secure repayment of the note.

Plaintiff commenced the action by filing the summons and complaint on September 7, 2010. The defendants served an answer setting forth nine affirmative defenses. Foreclosure settlement conferences were conducted in 2015 and 2016. The papers do not describe what, if anything, the parties did to litigate the matter between 2010 and 2015.

Plaintiff now moves for various forms of relief.

Strike Affirmative Defenses

The third (statue of limitations), sixth (lack of personal jurisdiction), seventh (lack of subject matter jurisdiction) and eighth (failure to name necessary parties) affirmative defenses are stricken without opposition.

The fourth, fifth and ninth affirmative defenses alleging lack of proper notices of default pursuant the CEMA and RPAPL 1304 are stricken. Plaintiff established it sent the requisite notices by submitting admissible business records, the affidavit of its employee and the submission of the plaintiff's correspondence log which demonstrated that both the notice required by the CEMA and the notice required by RPAPL 1304 were timely sent. Defendants conclusory and unsubstantiated denial of service of the notices does not rebut the presumption of proper service established by the plaintiff's affidavit.

Summary Judgment

Plaintiff failed to establish its entitlement to judgment as a matter of law. Plaintiff failed to demonstrate it had standing to commence the action. The complaint states plaintiff is foreclosing due to the nonpayment of a \$600,000.00 note, presumably the CEMA referred to in the moving papers. The affidavit of plaintiff's employee failed to state that the plaintiff had possession of the \$600,000.00 note or CEMA at the time of commencement of the action. Rather, the employee states plaintiff "had the right to possess the note but that the note has been lost." The affidavit fails to state when plaintiff obtained possession of the note and it fails to state whether plaintiff gained possession of the note before it was lost. The affidavit of lost note does not indicate whether the plaintiff obtained possession of the note before it commenced the action.

Default Judgment and Amend Caption

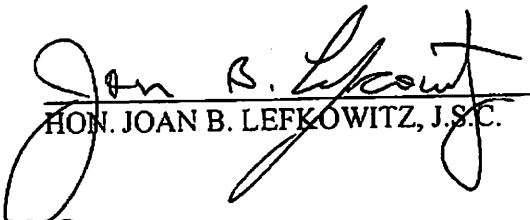
The notice of motion requests this relief but the affirmation submitted in support does not address the issue.

Expunging Record, Recording CEMA and Reformation of Mortgages

The complaint does not seek such relief.

ENTER,

Dated: White Plains, New York
December 20, 2016


HON. JOAN B. LEFKOWITZ, J.S.C.

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