SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9
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LISA NEWMAN,

Plaintiff,

-against-

FEDERAL NATIONAL MORTGAGE ASSOCIATION A/K/A FANNIE MAE,

Defendant.
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DECISION/ORDER

Index No. 505778/14

Submitted 10/30/14
Mot. Seq. # 1

HON. DEBRA SILBER, A.J.S.C.:

Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiff's motion to consolidate the defendant's Landlord/Tenant proceeding against plaintiff with this declaratory judgment action against defendant and related relief.

Papers	**Numbered**
Order to Show Cause, Summons and Complaint and Exhibits	1-8
Affirmation In Opposition and Exhibits Annexed	9-16
Reply	17

Upon the foregoing cited papers, the decision/order on this motion is as follows:

Plaintiff has brought this declaratory judgment action simultaneously with an order to show cause dated June 25, 2014 which seeks an order consolidating the eviction action pending against her in landlord/tenant court with this action. On August 13, 2014, defendant e-filed an answer to the complaint, which does not include any affirmative defenses or counterclaims. On September 17, 2014, defendant's opposition to the order to show cause was mailed to plaintiff's attorney and was not e-filed, despite defendant's filed consent to proceed with electronic filing which accompanied its answer. Courtesy copies of all papers were provided to the court at oral argument. Pending the court's determination of this motion, an interim order was issued on consent on the date of oral argument, continuing the temporary stay of the eviction

proceeding (Landlord/Tenant 63065/14) pending the determination of this motion. For the reasons below, the motion is granted.

Background

Plaintiff herein, hereinafter "Newman," claims her coop apartment was improperly foreclosed on, and that therefore the foreclosure should be declared void and set aside. The complaint also seeks an injunction staying the eviction proceeding filed against her and attorney's fees. Plaintiff purchased the 339 shares allocated to apartment 6F at 1200 East 53rd Street, Brooklyn, New York 11234 (known as Kings Village) on March 7, 2006 and simultaneous with her acquisition of the shares, she executed a proprietary lease and the documents proffered by JPMorgan Chase Bank NA in connection with a "coop loan" of $181,185 for the apartment. These documents included the standard documents utilized to securitize a loan against a cooperative apartment, in particular, a promissory note, a security agreement, an assignment of the proprietary lease, and a UCC-1 Financing Statement, copies of which are included in Exhibit B to defendant's opposition, and also presumably an "AZTECH" form recognition agreement, a copy of which was not provided.

Plaintiff claims the non-judicial foreclosure was improper because she was not given a proper 90 day notice and she was not given notice of the sale as is required by the applicable NY laws. In addition, she claims the sale was not conducted in a commercially reasonable manner, as the advertisement of the sale was in "The Tablet," a paper which is not authorized by NYC Administrative Code § 20-282, which references § 2-122(1) of the Rules of the City of New York. Plaintiff also claims the ads were placed too far in time before the auction took place.

Plaintiff provides an affidavit in support of the motion. She does not dispute her default under the terms of the Note she signed with J.P. Morgan Chase Bank. She

acknowledges she stopped paying the coop loan in 2010. She claims she has paid the coop maintenance monthly and has never defaulted on that obligation. Plaintiff also claims she has tried to obtain a loan modification, but defendant was unresponsive. She asserts she still resides in the apartment, which is her primary residence.

Exhibit 2 to plaintiff's motion contains copies of various relevant documents, which were apparently annexed to the defendant's first landlord/tenant petition. The first is a Certificate of Sale, dated February 10, 2011, signed by Victor Rawner, Licensed Auctioneer, which states that Chase Home Finance LLC, the secured party, purchased the collateral at the public auction held that date on the steps of the courthouse, and that no money changed hands, other than the auctioneer's fees and expenses, as the high bidder was the secured party.

The next document is an assignment of bid, dated April 15, 2011, from the "high bidder" to Federal National Mortgage Association ("Fannie Mae" or "FNMA").

The next document is a Notice of Sale, which describes the public auction scheduled, but which is undated.

The next document is an affidavit of publication, which was notarized on June 14, 2011, four months after the auction, which recites that publication of the Notice of Sale was made in The Tablet, a newspaper published in Kings County, on January 15, 22 and 29 of 2010. It is noted that FNMA provides a corrected affidavit (Exhibit F to defendant's opposition) which states that the publication was made in 2011, not 2010, and copies of the pages of the newspaper with the ads are annexed.

It is not disputed that the first eviction proceeding (in 2011) was, on March 6, 2012, discontinued, (plaintiff's Exhibit 3) perhaps because the stock and lease had not, as of the commencement date, been issued to the named petitioner, so ownership could not be established. Newman answered and then moved to dismiss the proceeding.

Her motion was withdrawn when the proceeding was discontinued.

The second proceeding was commenced on April 4, 2014. This order to show cause was issued by the ex parte judge of the day on June 25, 2014. It stays the landlord/tenant proceeding pending argument on the motion. Annexed to the second petition is a copy the stock certificate issued to FNMA dated January 26, 2012, and a copy of the proprietary lease, also issued to FNMA on January 26, 2012 by the coop, but which was not executed by FNMA until October 22, 2013.

Newman answered the petition on May 16, 2014, which answer is located at Exhibit 5 to the moving papers. Her answer includes six affirmative defenses and no counterclaims. It is noted that both plaintiff and defendant are represented by the same attorneys in the landlord/tenant matter as represent them in this matter.

Defendant FNMA opposes the motion. It is noted that the same firm represented the secured party in conducting the non-judicial foreclosure as is representing FNMA herein. Defendant's counsel claims, in a conclusory fashion, that all required notices were given and all required procedures followed. He also alleges that the sale was conducted in a commercially reasonable manner. He also notes that the affidavit of publication originally submitted clearly included a typo, as they publish only once a week, and the 2010 dates are not publication dates. Moreover, counsel avers that his firm was not retained until September of 2010, so publication could not have been made in January of 2010. Annexed to his affirmation in opposition at Exhibit F is a corrected affidavit of publication. Counsel annexes in Exhibits A & B a copy of the note, security agreement, first and last page of Newman's proprietary lease, assignment of lease, stock certificate issued to FNMA, UCC-1, HUD-1 (RESPA) from Newman's closing, a notice of default dated November 22, 2010 and addressed to Newman, on counsel's stationary, along with an affidavit of mailing, as well as documents related to FNMA's

efforts to regain possession of the apartment.

Exhibit C includes a cover letter from FNMA's counsel to Newman, dated January 27, 2011, transmitting the Notice of Sale, which, as stated above, is itself undated. At the top, it states it was sent by certified mail, return receipt requested and by regular mail. It is signed by Daniel B. Wade, Esq. An affidavit of service is included, signed by someone named Alison Dunn, and notarized by Daniel B. Wade on January 27, 2011. There are no certified mail receipts or green return cards, nor are there any certified mail tracking numbers provided.

Exhibit D includes the Terms of Sale, Certificate of Sale, Bill of Sale, Assignment of Bid dated February 5, 2013 and other documents which appear to have been requested by the coop corporation in connection with their transfer of ownership of the stock and lease to FNMA.

Exhibit E includes documents pertaining to the landlord/tenant action.

Exhibit F, as previously mentioned, contains the corrected Affidavit of Publication.

Plaintiff's attorney submitted a reply affirmation, which reiterates that FNMA has not complied with UCC 9-611 and further argues for consolidation with the landlord/tenant matter.

Conclusions of Law

In order to determine whether to stay and consolidate the landlord and tenant proceeding with the instant action, the court must first be satisfied that this action has merit. A party seeking the drastic remedy of a preliminary injunction has the burden of demonstrating, by clear and convincing evidence: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balancing of the equities in the movant's favor. CPLR 6301. See *Hairman v Jhawarer*, 2014 NY Slip Op 07471 (2d Dept).

Newman claims that the complaint, which seeks to set aside the non-judicial sale of her cooperative apartment, has merit because the lender failed to advertise the auction in a permissible newspaper, because the lender failed to give her the requisite notice, and because the publication was untimely, as the affidavit of publication reflects.

According to Bergman's on New York Mortgage Foreclosures, which devotes an entire chapter (Chapter 37) to co-op foreclosures, lenders have the option of proceeding with either a judicial or a non-judicial foreclosure as regards cooperative apartment loans. UCC Article 9 governs non judicial foreclosure sales in New York State. *LI Equity Network, LLC v Village in the Woods Owners Corp*., 79 AD3d 26, 910 N.Y.S.2d 97 [2nd Dept 2010]. As the sale herein was a non-judicial foreclosure, the procedures employed by FNMA and its predecessor in interest must be analyzed through the lens of the UCC.

As regards the advertisement of the auction, as discussed above, the affidavit of publication has been corrected. The newspaper where the notice was published, The Tablet, is published by the Archdiocese of Brooklyn and Queens, and has been in continuous publication for over 100 years, according to their website. Cases which have addressed arguments that an improper newspaper was utilized have generally held that the error was a "mere irregularity". For example, when *Newsday* was used for a property in Manhattan, the First Department held "the choice of paper would not, by itself, make the sale commercially unreasonable, and plaintiff has not otherwise shown that any other claimed defect precluded prospective bidders from attending the sale." *DeRosa v Chase Manhattan Mortg. Corp*., 10 AD3d 317 [1st Dept 2004]. Herein, Newman claims that The Tablet is not listed in the Rules of the City of New York, at Section 2-221, which lists newspapers which auctioneers must use for auctions of

personal property[1]. The court finds that publication in a newspaper published in Kings County but which is not included in this list is not grounds to set aside a non-judicial foreclosure sale. The standard to be applied is whether "a substantial right of a party is prejudiced", which is not established herein. See *Amresco New England II v Denino,* 283 AD2d 599 [2d Dept 2001]. The corrected affidavit of publication, with annexed copies of the newspaper pages with the correct dates of publication, makes the claim about the timing of the ads academic.

Plaintiff also alleges that the notice of default sent by Chase did not conform to the ninety-day advance notice requirement set forth in UCC 9-611(f)(1), which provides that

> In addition to such other notification as may be required pursuant to subsection (b) of this section and section 9-613 of this article, a secured party whose collateral consists of a residential cooperative interest used by the debtor and whose security interest in such collateral secures an obligation incurred in connection with financing or refinancing of the acquisition of such cooperative interest and who proposes to dispose of such collateral after a default with respect to such obligation, shall send to the debtor, not less than ninety days prior to the date of the disposition of the cooperative interest, an additional pre-disposition notice as provided herein.

The plaintiff alleges that the notice sent by Chase on November 22, 2010 is deficient because it was sent less than ninety days prior to the February 11, 2011 sale. The purpose of the ninety-day notice is to afford owners of cooperative shares protections similar to those provided to the owners of real property under RPAPL 1303, *Stern-Obstfeld v Bank of Am.*, 30 Misc 3d 901, 905, 915 NYS2d 456 (Sup Ct NY County 2011).

The statute clearly states that the required notice is in addition to any other notices required in the UCC or in the agreement between the parties. UCC 9-611(f)(1). The 90 day notice is designed to warn owners that they could be in danger of losing

1Shares in an apartment corporation are personal property.

their homes and it must contain very specific information about counseling services and other resources available to assist cooperative apartment homeowners in obtaining help. In particular UCC 9-611 (f)(2) requires that the notice:

> "shall be in bold, fourteen-point type and shall be printed on colored paper that is other than the color of the notice required by subsection (b) of this section, and the title of the notice shall be in bold, twenty-point type. The notice shall be on its own page.
>
> UCC 9-611(f)(3) provides:
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> The notice required by this subsection shall appear as follows:

Help for Homeowners at Risk of Foreclosure

> New York State Law requires that we send you this information about the foreclosure process. Please read it carefully.

Notice

> You are in danger of losing your home. You are in default of your obligations under the loan secured by your rights to your cooperative apartment. It is important that you take action, if you wish to avoid losing your home.

Sources of Information and Assistance

> The State encourages you to become informed about your options, by seeking assistance from an attorney, a legal aid office, or a government agency or non-profit organization that provides counseling with respect to home foreclosures. To locate a housing counselor near you, . . ."

It is noted that this language parallels the language in RPAPL §1303. However, the 1303 notice is required to be delivered to the homeowner along with the summons and complaint, while the UCC 9-611(f) notice is required to be sent to the homeowner of a cooperative apartment 90 days prior to the auction of the apartment.[2] RPAPL §1304

2As is noted in Justice Schmidt's decision in *Waithe v Citigroup, Inc.*, "curiously, UCC 9-611(f) has no analogous subsection concerning manner and mode of service of the required notice. Considering that cooperative apartment owners will not get a CPLR 3408 conference in a non-judicial sale, this notice becomes more important to them than a 1304 notice is to a real property owner. Therefore, the court hopes that the legislature will review and remedy this oversight".

provides for a 90 day notice in mortgage foreclosure actions, which requires different language, the gist of which is that if the homeowner does not “resolve the matter” within 90 days, the lender “may commence legal action.” Thus, confusing as this is, the cases that discuss RPAPL 1304 have been interpreted as applicable to the 90 day notice required by UCC 9-611(f), however, the language in the UCC is the language of 1303 albeit modified for a coop apartment. The UCC has no provision for the manner of service of the notice required by UCC 9-611(f), it must be noted.

The notice sent to plaintiff was simply a default and acceleration notice, with notice that if she did not cure her default in 30 days, the lender would accelerate the loan and be entitled to the full balance due. This notice is required prior to an auction of a coop under the UCC, but it is clearly not the notice contemplated by the amendment to the UCC, which became effective on January 14, 2010, and thus applies to this matter. *See Stern-Obstfeld v Bank of Am*., 30 Misc 3d at 905, 906 [Sup Ct NY Co 2011]. In that decision, the court notes at page 915 that "In late 2009, Governor Patterson signed a bill into law requiring certain notice to residential homeowners of cooperative apartments, intended for the homeowner's protection, prior to disposition of collateral shares (L. 2009, Ch. 507). The purpose of the notice is to afford protection to homeowners similar to that provided to the owners of real property under the Home Equity Theft Prevention Act."

FNMA’s attorney does not allege in his opposition papers that either Chase or FNMA complied with the 90 day notice requirement contained in UCC 9-611(f).

If the lender herein had provided copies of the requisite notices without sufficient evidence of mailing, and the borrower claimed that she did not receive them, the court could set the matter down for a hearing on the issue of service,[3] but that is not the issue

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3See *Waithe v Citigroup, Inc.*, 42 Misc3d 1205(A) [Supreme Ct Kings 2013].

herein. It is clear from the face of the default notice that if sent, it was not sent ninety days before the date of the sale, and thus failed to comply with the timing requirements of the statute, and it is also clear from the face of the notice that the notice, if sent, also failed to comply with the substantive requirements of the statute.

Turning to the effect of the lender's failure to comply with the notice requirement, the court notes that *Aurora Loan Servs., LLC v Weisblum, 85 AD3d 95* [2d Dept 2011] held that the notice requirement under RPAPL 1304 is a condition precedent to filing a foreclosure action. *Stern-Obstfeld*, *supra* and *Millien v Citigroup Inc.,* 37 Misc3d 1229A, [Sup Ct Kings Co 2012], found that the notice requirement of UCC 9-611 (f) is also a condition precedent to a non-judicial foreclosure of a cooperative apartment since the notices in these statutes were "enacted for the purpose of avoiding similar evils and affording similar remedies [and therefore] should have uniformity of application and construction" (*Matthews v Matthews*, 240 NY 28, 35 [1925]).

Bergman instructs "It may be expected that the mandate to send the ninety-day notice for a coop default will be strictly constructed [sic] based upon case law interpreting the requirement for the notice in a home loan case," citing *Stern-Obstfeld, supra. Bergman*, supra, at 37.03 [1A].

The court in *Aurora Loan Services, supra*, held "Aurora's substantial failure to comply with RPAPL 1304 [90 day notice requirement in a mortgage foreclosure action] cannot be deemed a minor irregularity which can be overlooked. While clearly this is a case which does not warrant invocation of the court's discretionary authority pursuant to CPLR 2001, we decline to express an opinion when, if ever, a defect or irregularity in the content of an RPAPL 1304 notice might be so minimal as to warrant the exercise of the court's discretion under CPLR 2001 to avoid dismissal of the action." Subsequent to the *Aurora* decision, the appellate divisions have stated unequivocally that the notice

required by RPAPL 1304 is a condition precedent to a judicial foreclosure. See *Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909 [2d Dept 2013]; *TD Bank, N.A. v Leroy*, 121 AD3d 1256 [3d Dept 2014].

It is noted that in *Stern-Obstfeld,* the borrower was seeking a stay of the auction due to the lender's failure to serve the 90 day notice. The court therein granted the motion and stayed the auction, directing the lender to "comply with the provisions of UCC Article 9."

Herein, the borrower is seeking to stay the eviction action against her until the court determines her declaratory judgment action on the issue of whether the judicial foreclosure was properly conducted. In light of the lender's inability to demonstrate that a 90 day notice was sent to the borrower (plaintiff) which complied with UCC 9-611(f), and it must be pointed out that in counsel's affirmation in opposition, he does not even claim that the notice was prepared, never mind sent, the court finds it appropriate to grant the motion and stay Newman's eviction until this action is resolved.

It is noted that, as it appears that the notice required by UCC 9-611(f) was not sent to Newman, there is no need to address in this decision Newman's claims with regard to FNMA's alleged failure to serve other notices which she claims are required by the UCC and/or the Note and Security Agreement. Newman has established that there is sufficient merit to this declaratory judgment action to obtain the injunctive relief requested. In addition, as the shares and lease have already been issued to FNMA, the court finds that plaintiff is entitled to additional injunctive relief to maintain the status quo, which she has not specifically requested in her motion, but has requested in her complaint.

Conclusion

As to plaintiff's motion, due deliberation having been had, and it appearing to this

Court that a cause of action exists in favor of the plaintiff and against the defendant and that the plaintiff is entitled to a preliminary injunction on the ground that the subject of the action is unique and that the defendant threatens to do an act in violation of the plaintiff's rights by attempting to evict her before the propriety of their non-judicial foreclosure has been determined, as is set forth in the aforesaid decision, it is

ORDERED that, it appearing that the Civil Court of the City of New York does not have jurisdiction to grant the full relief which the plaintiff herein is requesting, the motion of plaintiff herein to remove the action pending in the Kings County Housing Court, “Federal National Mortgage Association v Lisa Newman”, bearing index number L&T 063065/2014, to this Court, is granted; and it is further

ORDERED that movant is directed to serve a certified copy of this Order on the Clerk of the Civil Court of Kings County, who shall, upon such service, transfer to this Court all the papers heretofore filed in said proceeding; and it is further

ORDERED that the said Civil Court proceeding shall be consolidated with this action under the index number of this action; and it is further

ORDERED that a copy of this Order with notice of entry shall be served on the County Clerk of Kings County, who shall mark their records accordingly; and it is further

ORDERED that defendant, its agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of defendant, are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of defendant or otherwise: transferring; selling; pledging; assigning; or otherwise encumbering or disposing of the shares or proprietary lease appurtenant to the subject cooperative apartment; and it is further

ORDERED that pending the determination of the within action, defendant shall

not interfere with plaintiff's right to the use and quiet enjoyment of the apartment; and it is further

ORDERED that in lieu of the posting of an undertaking by plaintiff for the term of the injunction granted herein, should it be finally determined that she was not entitled to an injunction, plaintiff shall pay to her attorney, to be held by him in his IOLA account or in an interest bearing escrow account, at his option, the sum of $1,115 per month by the first of each month commencing January 1, 2015, the amount of the monthly payments which were to be paid under the Note[4], as security for any damages and/or costs which may be awarded to defendant by the court by reason of this injunction and plaintiff's counsel shall keep defendant's counsel apprised of such payments; and it is further

ORDERED that the parties shall appear in the Intake Part, 2nd floor, for a Preliminary Conference, on February 4, 2015.

This constitutes the decision and order of this court.

Dated: Brooklyn, New York
December 23, 2014

Hon. Debra Silber, A.J.S.C.

4As it is an adjustable note, the payment amount would have changed on April 1, 2013, but as the funds will be held in escrow, the court declines to attempt to calculate the payment which would be applicable were it not for the borrower's default. Further, as defendant purchased the bid and not the right to collect the debt, the court makes no determination as to the ultimate recipient of the payments.