SCAN

MEMORANDUM
SUPREME COURT, COUNTY OF NASSAU, IAS PART 8

BY: **HON. BRUCE D. ALPERT**

THE CHASE MANHATTAN BANK, AS TRUSTEE FOR THE REGISTERED HOLDER OF GOLDEN NATIONAL MORTGAGE LOAN ASSET BACKED CERTIFICATES SERIES 1998-GN1,

Plaintiff,

- against -

MILAGROS CABRERA, BELARMINIO PERALTA, TRAVELERS BANK AND TRUST, FSB, and "JOHN DOE", "RICHARD ROE", "DICK MOE", "JANE DOE", "CORA COE" and "RUBY POE", the last six names being fictitious and unknown to the plaintiff, they being intended for tenants or other persons having an interest in the premises described in the complaint,

Defendants.

INDEX NO: 11863/00

Motion Date: March 18, 2002

MOTION SEQUENCE # 3

DATED: July 12, 2002

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Heretofore defendant, Milagros Cabrera, moved for the dismissal of the plaintiff's mortgage foreclosure action pursuant to CPLR 3211 (a) (7 & 8).

The movant contended, inter alia, that the plaintiff improperly refused her tender of funds and failed to afford proper notice of an intention to accelerate the

underlying mortgage debt. These allegation served as the cornerstone for that aspect of her application brought pursuant to CPLR 3211 (a) (7).

The gravamen of the movant's prayer for relief under CPLR 3211 (a) (8) was the assertion that neither she nor co-defendant, Belarminio Peralta, were properly served with process.

Determination of that aspect of the movant's application brought under CPLR 3211 (a) (7) was deferred pending resolution of the defendant's jurisdictional challenge, which was referred for a traverse hearing. By Order dated May 9, 2001, the referee to whom the jurisdictional challenge was referred found that defendants Cabrera and Peralta, were properly served with process pursuant to CPLR 308 (2 & 4), respectively.

Disposition of the remaining aspect of the Cabrera application was deferred, once again, as the parties strove to arrive at an amicable resolution of their dispute. When the efforts to do so were unfruitful, the plaintiff moved, inter alia, for the issuance of an order or reference, and it, together with the remnant of the Cabrera motion, were ultimately submitted for determination.

By memorandum decision dated September, 26, 2001, Ms. Cabrera's prayer for dismissal under CPLR 3211 (a) (7) was denied. In addition, the plaintiff was afforded: (1) leave to substitute various individuals as party defendants in place

and stead of the defendants identified as fictitious; (2) leave to amend the action's caption to reflect the corresponding substitution; (3) relief under CPLR 3215 and RPAPL 1321 against the subject defendants, as well as defendants Peralta and Travelers Bank and Trust, FSB, based on their respective failures to interpose an answer to the plaintiff's complaint; (4) summary judgment against defendant Cabrera; and (5) leave to appoint a referee to compute the sum to which the plaintiff was entitled and to determine whether the premises should be sold in parcels.

By Order dated February 27, 2002, the Court, in response to the defendant's motion for relief under CPLR 2221, recalled those aspects of its decision of September 26, 2001 in which the Court had denied the relief sought under CPLR 3211 (a) (7) and had awarded plaintiff summary judgment, afforded notice of its intention to convert the surviving remnant of the defendant's application into an application for summary judgment and adjourned the matter for the submission of additional papers. In all other respects the underlying decision stood undisturbed, though the necessity to settle an order thereon was expressly deferred pending the ultimate disposition of the converted motion.

Though afforded leave to do so, neither party made a further submission, each electing to rely on the papers previously exchanged.

The plaintiff established its entitlement to a summary determination through the production of the mortgage and unpaid note and proof of the mortgagors' failure to make payments in accordance with the terms thereof. (see, EMC Mortgage Corporation v Riverdale Associates, 290 AD2d 370)

"It is well established that a mortgagor is bound by the terms of the mortgage and cannot be relieved from a default in the absence of waiver by the mortgagee, estoppel, bad faith, fraud, or oppressive or unconscionable conduct by the mortgagee (see, Nassau Trust Co. v Montrose Concrete Prods. Corp., 56 NY2d 175, 183)." (River Bank America v Daniel Equities Corporation, 213 AD2d 929, 930 [3d Dept.])

Ms. Cabrera failed to make the requisite evidentiary showing sufficient to overcome the plaintiff's prima facie demonstration of entitlement.

The plaintiff was not obliged to accept less than the full arrears due and owing on July 7, 2002 ($3,805.32). (see, Home Savings of America, FSB v Isaacson, 240 AD2d 633) Thus, plaintiff refusal to accept the defendant's tender of funds insufficient to cover the arrears then due, while less than generous, can be characterized as neither oppressive nor unconscionable.

"Where a default is fairly enforced by a mortgagee, mere improvidence or neglect or poverty or illness is not sufficient basis for relief in equity from

foreclosure under a mortgage acceleration clause. A mortgagee may be ungenerous, perhaps even uncharitable, but generosity and charity are voluntary attributes and cannot be enforced by the court." (Verna v O'Brien, 78 Misc2d 288, 291)

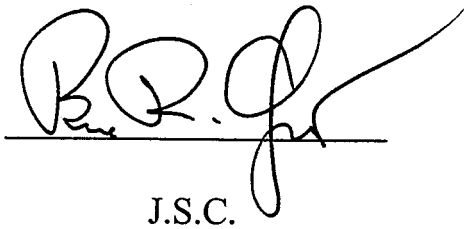
Moreover, the Court finds the notice of acceleration dated June 7, 2000, sufficient, inasmuch as the plaintiff did not initiate proceedings to foreclose the underlying mortgage until July 13, 2000. The argument to the effect that the subject notice was tainted by a failure to set forth on its face a specific expiration date is less than persuasive.

Ms. Cabrera's apparent inability to tender the full arrears before expiration of the thirty day period, coupled with her failure to tender the balance due subsequent to acceleration is preclusive.

Based on the foregoing, that branch of the defendant's application under CPLR 3211 (a) (7), converted by this Court under CPLR 3211(c) is denied, and upon a search of the record (see, Matter of Knickerbocker Field Club v Site Selection Board of the City of New York, 41 AD2d 539, 540; see also, Berzin v W.P. Carey & Co., Inc., 293 AD2d 320 [1st Dept.]; Four Seasons Hotels Ltd. v Vinnik, 127 AD2d 310, 319-320 [1st Dept.]), the Court awards summary judgment to the plaintiff.

An order, encompassing the relief granted by the Court in its memorandum decision of September 26, 2001, to the extent same was not effected by the Order of this Court dated February 27, 2002, together with the relief herein afforded, shall be settled on notice.

DATED: July 12, 2002



J.S.C.

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