

ScAm

**SHORT FORM ORDER
SUPREME COURT OF THE STATE OF NEW YORK**

**PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice**

MUNICIPAL CREDIT UNION.

**TRIAL/IAS, PART 35
NASSAU COUNTY**

Plaintiff.

**Sequence No.: 001 & 002
Index No.: 013781/05**

- against -

**WALTER KUSS and JANE KUSS.
"JOHN DOE NO. 1" to "JOHN DOE NO. XX", inclusive,
the last twenty names being fictitious and unknown to
plaintiff, the persons or parties intended being the
tenants, occupants, persons or corporations, if any,
having or claiming an interest in or lien upon the
premises described in the complaint.**

Defendants.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Notice of Cross-Motion and Affidavits Annexed	X
Answering Affidavits	X
Replying Affidavits	X

Upon reading the papers submitted and due deliberation having been had herein, plaintiff's motion for, *inter alia*, summary judgment in its favor and for the appointment of a referee to compute the amount due plaintiff and to determine whether the subject property herein may be sold in parcels is granted as set forth below. Defendants' cross-motion for an order dismissing the complaint herein pursuant to CPLR 3126 for plaintiff's failure to comply with discovery demands and for sanctions and attorneys fees is denied as set forth below.

Plaintiff in the instant action alleges that defendants delivered a note and mortgage dated December 15, 2003 to plaintiff in the sum of \$105,000 encumberancing the property located at 48 Swan Lane, Levittown, New York. Defendants allegedly defaulted in making their monthly payments pursuant to the note's terms and plaintiff commenced the instant action, asserting claims for breach of contract in the principal sum of \$33,588.84, or the amount allegedly outstanding on the note, and for foreclosure and sale pursuant to the terms of the mortgage. Defendants have answered and the parties move and cross-move for the relief set forth above.

Plaintiff's motion for summary judgment in its favor is granted. In moving for summary judgment plaintiff must demonstrate that there are no issues of fact which preclude summary judgment by the tender of evidence in admissible form. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). In opposing the motion defendants must demonstrate a triable issue of fact through admissible evidence. Zuckerman v. City of New York, supra.

In support of its motion plaintiff annexes the affidavit of MacArthur Pope, an assistant manager employed by plaintiff who avers that 1) the mortgage dated December 15, 1993 of which defendants are borrowers in the sum of \$105,000 pertains to property located at 48 Swan Lane, Levittown, New York; and 2) due to defendants' default in payment of the amount due pursuant to the loan's terms on June 1, 2005, the mortgage debt was accelerated by plaintiff; and 3) said mortgage debt remains "in default".

Where, as here, plaintiff proves the existence of the note and mortgage and defendants' failure to make payments pursuant to its terms, plaintiff has met its *prima facie* burden of demonstrating entitlement to summary judgment. See, e.g., Bank of New York v. Realty Group Consultants, 186 A.D.2d 618 (2nd Dep't 1992); Bosio v. Selig, 165 A.D.2d 822 (2nd Dep't 1990); Marshall v. Colvin Motor Parts of Long Island, Inc., 140 A.D.2d 822 (2nd Dep't 1988). Plaintiff having met its *prima facie* burden, the burden shifts to defendants to demonstrate a triable issue of fact. Zuckerman v. City of New York, supra.

In opposition to the motion and in support of its cross-motion defendant Walter Kuss asserts that 1) plaintiff has failed to respond to defendant Kuss' discovery demands or appear for deposition; and 2) pursuant to the note and mortgage's terms, plaintiff has not provided defendants with a notice of default and that a condition precedent to the commencement of this action has therefore not been fulfilled.

Defendant Walter Kuss raises a triable issue of fact on the grounds that plaintiff may have failed to provide a notice of default to defendants. The relevant provisions of the note and mortgage conflict and create an ambiguity as to whether defendants were entitled to such notice. At paragraph 6(c) the note provides that in the event of default, plaintiff "may" provide notice of same to defendants. Such is not an absolute requirement.

Paragraph 21 of the mortgage provides that:

"Except as provided in Paragraph 17 above, if all of the conditions stated in subparagraphs (A), (B) and (C) of this Paragraph 21 are met, Lender may require that I pay immediately the entire amount then remaining unpaid under the Note and under this Security Instrument. Lender may do this without making any further demand for payment. This requirement is called immediate payment in full."

Subparagraph "B" of paragraph 21 which, as set forth above must be satisfied before the plaintiff may seek satisfaction of the outstanding balance without notice, provides that the plaintiff must provide the borrowers with a notice that states:

- “(i) the promise or agreement that I failed to keep;
- (ii) the action that I must take to correct that default;
- (iii) a date by which I must correct the default. That date must be at least thirty (30) days from the date on which the notice is given.
- (iv) that if I do not correct the default by the date stated in the notice, Lender may require immediate payment in full, and Lender or another person may acquire the Property by means of foreclosure and sale;
- (v) that if I meet the conditions stated in Paragraph 18 above, I will have the right to have Lender’s enforcement of this Security Instrument discontinued and to have the Note and this Security Instrument remain fully effective as if immediate payment in full had never been required; and
- (vi) that I have the right in any lawsuit for foreclosure and sale to argue that I did keep my promises and agreements under the Note and under this Security Instrument, and to present any other defenses that I may have.”

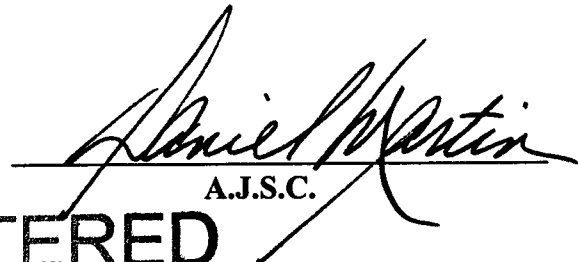
Within paragraph 21 of the mortgage alone, it appears that there are two inconsistent provisions as to whether defendants are entitled to notice prior to plaintiff’s seeking the entire outstanding balance. The apparent requirement in subsection “B” also conflicts with paragraph 6 of the note. The court concludes that these provisions conflict and therefore create an ambiguity in the parties’ agreements. An ambiguity in a contract is to be construed against the debtor. See, e.g., Sievert v. Morlef Holding Co., 241 A.D.2d 445 (2nd Dep’t 1997).

In reply, plaintiff attempts to demonstrate that a notice was, in fact, served to defendants by annexing a copy of same as an exhibit. Same is not in admissible form, however, as there is no affidavit from a party with knowledge as to the purported notice’s contents or service upon defendants. See, Zuckerman v. City of New York, supra.

The court also denies defendant Walter Kuss’ cross-motion for dismissal of the complaint pursuant to CPLR 3126 based upon plaintiff’s alleged failure to respond to defendant Kuss’ discovery demands. Any failure on plaintiff’s part to so respond is not so contumacious as to merit dismissal given plaintiff’s explanation that same were never received by plaintiff’s attorneys. Compare, Sindebrand v. Mcleod, 226 A.D.2d 623 (2nd Dep’t 1996).

Accordingly, based upon the foregoing, the motion and cross-motion are both denied. The matter is hereby set down for a preliminary conference to be held before the Differentiated Case Management Part on November 28, 2006 at 2:30 p.m.

So Ordered.


A.J.S.C.

Dated: October 25, 2006

ENTERED

NOV 17 2006

NASSAU COUNTY
COUNTY CLERK'S OFFICE