

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 51 NASSAU COUNTY**

PRESENT:

Honorable James P. McCormack
Acting Justice of the Supreme Court

x

**WELLS FARGO BANK, NATIONAL ASSOCIATION AS
TRUSTEE FOR SECURITIZED ASSET BACKED
RECEIVABLE LLC 2005-FR3 MORTGAGE PASS-
THROUGH CERTIFICATES, SERIES 2005-FR3,**

Plaintiff,

-against-

**VERONE McLEAN, MAXINE GORDON, ASSET
ACCEPTANCE LLC a/a/o PROVIDIAN BANK, AND
"JOHN DOE #10", THE LAST TEN NAMES BEING
FICTITIOUS AND UNKNOWN TO THE PLAINTIFF,
THE PERSON OR PARTIES, IF ANY, HAVING OR
CLAIMING AN INTEREST IN OR LIEN UPON THE
MORTGAGE PREMISES DESCRIBED IN THE
COMPLAINT,**

Index No. 9664/06

Defendants.

**Motion Sequence: 004, 005 & 006
Motion Submitted: 3/29/07**

x

VERONE McLEAN,

Third-Party Plaintiff,

-against-

**MAXINE GORDON, MICHAEL G. FEURTADO, ESQ.,
MILTON GRUNWALD, ESQ., GRUNWALD & SEMAN,
P.C., BANK OF AMERICA, N.A., MOORE
INTERNATIONAL CLAIMS ADJUSTORS, INC. MIKE
MOORE, NADAYON DEAL, AND ALLSTATE
INSURANCE COMPANY, CIPCO BOARDING CO.,
INC., "JOHN DOE" AND "JANE DOE," d/b/a
"SERVPRO OF GARDALE/N.BAY SHORE,"**

Third-Party Defendants.

x

The following papers read on this motion:

Notice of Motion and Cross motion.....	X
Answering Papers.....	X
Reply.....	X

Motion by plaintiff Wells Fargo Bank for summary judgment striking the answer of defendant Verone McLean, severing all of her cross-claims, appointing a referee to compute, and amending the caption as set forth below, is granted.

Settle Judgment.

Plaintiff's further request for an order (1) directing that the remaining insurance proceeds in the amount of \$97,024.75 currently being held by Countrywide Home Loans, Inc. be deposited into court, and (2) dismissing or severing the third-party action, is also granted as set forth below.

Cross-motion by defendant Maxine Gordon for an order directing that the insurance proceeds be paid to Firestone Construction Company ("Firestone"), or in the alternative, directing plaintiff to "cure the default of Verone McLean defendant/mortgagor and after payment of all such sums, that the balance be paid to Firestone," is denied.

Cross-motion by defendant Verone McLean for an order permitting her to amend her answer to assert counter-claims against plaintiff is denied. Defendant McLean's further request for an order permitting her to amend her third-party complaint, and further, amending the caption of the third-party action to delete all

third-party defendants other than Ms. Gordon and Mr. Feurtado is granted. Defendant McLean's additional request for an order directing third-party defendants Gordon and Feurtado to serve responsive bills of particulars and responses to discovery demands within 30 days shall be set down for a discovery conference .

Defendant McLean's additional request for an order directing plaintiff to reinstate the mortgage, and compelling defendant Gordon to pay mortgage loan interest and principal until she obtains a final judgment restoring title of the subject premises to herself is denied as moot.

The property at issue is 45 Audrey Avenue in Elmont, New York. On February 18, 2005, defendant Verone McLean purchased this property, when she executed a note and mortgage to Freemont Investment & Loan in the amount of \$226,400.

Documentary evidence in the record establishes that there was a fire at the premises on April 21, 2005. The premises was insured by Allstate. Several checks were issued by Allstate in 2006 as compensation for the fire damage.

Defendant McLean describes defendant Gordon as the tenant on the premises. Ms. McLean and Ms. Gordon vigorously dispute who is entitled to those checks from Allstate. The record also contains a deed (Exhibit C to defendant Gordon's cross-moving papers), dated February 1, 2006, purporting to transfer title to the property from Ms. McLean to Ms. Gordon, who argues that she paid all the mortgage payments until the default. However, Ms. McLean alleges that the signature on the deed is a forgery, as is a power of attorney(part of Exhibit A to defendant Gordon's cross-moving

papers) used by Ms. Gordon to deposit one of the fire insurance proceeds checks in her bank account.

Plaintiff alleges, without refutation, that Mortgage Electronic Registration Systems, Inc. was acting as the nominee for Freemont Investment & Loan, who then assigned the loan to plaintiff herein in June, 2006. Countrywide Home Loans Servicing LP ("Countrywide") serviced the loan to defendant McLean. By letter dated April 3, 2006, and addressed to 45 Audrey Avenue in Elmont, Countrywide advised Ms. McLean that she was in default due to the failure to make the payment due on March 1, 2006. The letter offered her the opportunity to cure the default on or before May 8, 2006, and advised that upon the failure to cure, the mortgage would be accelerated. This mortgage foreclosure action was commenced in June, 2006.

Defendant McLean served her answer with three cross-claims against defendant Gordon. Defendant McLean also commenced the third-party action against eleven different parties. Defendant Gordon answered the third-action and alleged counterclaims against McLean. Defendants Feurtado, Bank of America, and Allstate Insurance Co, Inc. also answered the third-party complaint.

By order dated January 17, 2007, this Court granted summary judgment dismissing the third-party complaint against third-party defendants Milton Grunwald, Esq., and Grunwald & Seman, P.C., without opposition . The record contains a copy of an executed stipulation discontinuing the third-party action against third-party defendant Bank of America. Annexed to McLean's cross-moving papers is a copy of a

stipulation discontinuing the action against third-party defendant Bank of America.

By submission of a copy of the pleadings, the note and mortgage, and unrebutted evidence of the default in payment commencing March 1, 2006 (Whitworth affidavit), plaintiff has presented a *prima facie* case entitling it to the relief of foreclosure [*Household Finance Realty Corp of New York v Winn*, 19 AD3d 545 (2nd Dept. 2005); *Coppa v Fabozzi*, 5 AD3d 718 (2nd Dept. 2004); *Federal Home Loan Mortg. Corp. v Karastathis*, 237 AD2d 558 (2nd Dept. 1997)].

Plaintiff has also established that pursuant to the mortgage, it is entitled to collect all costs and disbursements allowed by law, including reasonable attorneys' fees (Mortgage, par. 22). Where, as here, the parties provide for attorneys' fees by agreement, the prevailing party is entitled to them [*Hooper Associates, Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491 (1989)], although the reasonableness of such fees is always a matter to be determined by the Court [*Friend v Regina*, 189 AD2d 853 (2nd Dept. 1993); *Manufacturers Hanover Trust Co v Green*, 95 AD2d 737 (1st Dept. 1983), app dsmd 61 NY2d 760 (1984)].

Defendant McLean's answer contains an affirmative defense of lack of personal jurisdiction. A conclusory denial of receipt of pleadings is insufficient to raise an issue of fact in opposition to plaintiff's *prima facie* evidence of proper service (Exhibit E to plaintiff's moving papers)[*American Business Credit, Inc. v Sanabria*, 19 AD3d 624 (2nd Dept. 2005), lv app dsmd 6 NY3d 806 (2006)]. Furthermore, the failure to move for judgment on the basis of her lack of jurisdiction defense within 60 days after serving her

answer constitutes a waiver of the objection pursuant to CPLR 3211(e) [*Jacobowitz v Leak*, 19 AD3d 453, 455 (2nd Dept. 2005)]. Based on the foregoing, this affirmative defense is hereby stricken.

Defendant McLean alleges three cross-claims against defendant Gordon, all of which concern Ms. Gordon's conduct with respect to the fire insurance proceeds. The availability of fire insurance proceeds is not a defense to a foreclosure action [see *Crossland Mortgage Corp. v Douglas*, 271 AD2d 933 (3rd Dept. 2000)]. Resolution of these cross-claims has no impact on plaintiff's mortgage foreclosure, and cannot be used for the purposes of delay. Consequently, defendant McLean's cross-claims are hereby severed and continued.

In her cross-moving papers defendant McLean requests leave to amend her answer in the foreclosure action to allege four counterclaims against plaintiff. Leave to amend a pleading shall be freely granted absent prejudice to the opposing party [see CPLR 3025(b)]. However leave to amend shall be denied where the proponent fails to make the requisite evidentiary showing that a valid claim exists [*Ortiz v Cormier*, 10 AD3d 389 (2nd Dept. 2004); *Butt v New York Medical College*, 7 AD3d 744 (2nd Dept. 2004)].

The first and third proposed counterclaims, respectively, allege claims for breach of contract based upon the ordering of repairs that were allegedly not economically feasible, and the failure to give proper notice of inspection of the property and receipt of the insurance check. No evidentiary support for either of these claims is presented. Furthermore, the evidence in the record regarding repairs (the Adjuster Summary,

Exhibit 12 to the McLean cross-moving papers, and the contract with Firestone, Exhibit B to plaintiff's affirmation in opposition), supports the economic feasibility of repairs. On this record, defendant McLean has failed to establish an evidentiary basis for the amendment to add the first proposed counterclaim.

Likewise, defendant McLean has submitted no evidence of any breach of contract based upon notice provisions in the mortgage. The Court notes that the notice address for Ms. McLean was the address of the property (Mortgage, par. 15), but Ms. McLean did not reside at the property. Furthermore it was Ms. McLean's duty to provide written notice of any change of her address (Id.), and Ms. McLean's compliance has not been shown. Under these circumstances Ms. McLean cannot succeed on the proposed third counterclaim for breach of contract based upon the failure to give proper notice.

The second proposed counterclaim is for spoliation of the fire damage in connection with the repairs allegedly ordered for the premises. Such a cause of action is only available when litigation is pending or the alleged spoliator is on notice of a potential lawsuit [see *Curran v Auto Lab Service Center, Inc.*, 280 AD2d 636 (2nd Dept. 2001) and *Greater New York Mut. Ins. Co. v Curbeon*, 300 AD2d 182 (1st Dept. 2002)]. Here no litigation was pending or threatened at the time of commencement of the repairs in March, 2006. The Court notes for the record that Ms. McLean had ample opportunity to inspect the property and record its condition in the eleven-month interim between the fire and the commencement of repairs. Finally, the Court rejects the notion that the repair of fire-damaged property precisely as authorized by contract, may be construed

as spoliation. Denial of leave to amend to add the proposed third counterclaim is warranted.

The theory of the fourth proposed counterclaim is unclear. Ms. McLean alleges that plaintiff's conduct in failing to verify the authenticity of Ms. Gordon's power of attorney renders it jointly liable for any damages caused to her by Ms. Gordon. Ms. McLean then goes on to accuse plaintiff, *inter alia*, of collusion with Ms. Gordon's conversion, and unclean hands.

The Court looks to the mortgage for guidance. In the event of a fire at the premises, unless agreed otherwise in writing and unless it is economically not feasible, the lender will use insurance proceeds to repair and restore the damaged property (Mortgage par.5). Here no writing is presented and there is no evidentiary support for the claim that repairs were not economically feasible. Indeed, there is no evidence in the record that Countrywide knew how to reach Ms. McLean as she did not reside at the property address.

Under these circumstances, where Ms. Gordon did exactly what the mortgagor was obligated to do under the mortgage, even if Countrywide was negligent in failing to verify the authenticity of the allegedly fraudulent power of attorney, the result was precisely that provided in the mortgage itself. Countrywide deposited the check in the amount of \$145,537.13 (Exhibit O to plaintiff's moving papers) representing the insurance proceeds for dwelling damage into its account. Later it issued its check in the amount of \$48,512.38 (Exhibit P) to Firestone for repairs, and retained the remainder

which it now seeks to deposit into court. Such conduct simply establishes compliance with contractual obligations, not unclean hands or collusion with conversion.

Consequently, leave to amend to allege the proposed fourth cause of action is denied.

Based on the foregoing, plaintiff is entitled to summary judgment on its causes of action for foreclosure and reasonable attorneys' fees, and the appointment of a referee to compute. All cross-claims and the third-party action are severed and continued. In addition, plaintiff's request to deposit the remainder of the fire proceeds check into court pursuant to CPLR 2601 is granted, and plaintiff's further request that this action be discontinued against defendants John Doe #1 through John Doe #10, with the caption amended accordingly, is also granted.

Settle judgment.

Defendant Gordon seeks an order directing plaintiff to cure the default and defendant McLean directs plaintiff to reinstate the mortgage. Such relief is not available. Once a default has been declared, the mortgagee may exercise its right to accelerate the entire balance due; after acceleration, the mortgagee is not required to accept a tender of less than the full payment demanded [*Albertina Realty Co v Rosbro Realty Corp.*, 258 NY 472 (1932); *First Federal Sav. Bank v Midura*, 264 AD2d 407 (2nd Dept. 1999); *Home Savings of America, FSB v Isaacson*, 240 AD2d 633 (2nd Dept. 1997)]. Consequently, defendant Gordon's motion for an order directing plaintiff to cure the default of Verone McLean, and defendant McLean's request for an order directing plaintiff to reinstate the mortgage are both summarily denied.

Until the dispute between defendants Gordon and McLean as to ownership of the property is resolved, or until the parties reach some agreement with respect thereto, further repairs must wait. For this reason, defendant Gordon's request for an order directing that the insurance proceeds be paid to Firestone, must also be denied.

Defendant McLean seeks leave to amend the caption of her third-party complaint to delete all third-party defendants except defendants Gordon and Feurtado, and to delete all causes of action in the third-party complaint, except those against defendants Gordon and Feurtado. The record contains copies of the stipulations discontinuing the third party action against defendants All State Insurance Co and Bank of America. In addition the record contains copies of the disputed power of attorney and the disputed deed, each of which were notarized and/or acknowledged by Mr. Feurtado, respectively. In view of the evidentiary basis for the amendment, it is freely granted. Defendant McLean is directed to serve a copy of the amended third-party complaint against the defendants Gordon and Feurtado within 10 days of service of receipt of a copy of this decision.

Finally, the issue of bills of particulars and responses to discovery demands shall be set down for a discovery conference to be held on May 30, 2007 at 9:30 A.M..

The foregoing constitutes the Decision and Order of this court.

Dated: May 9, 2007
Mineola, N.Y.

ENTERED

MAY 16 2007


Hon. James P. McCormack, A. J. S. C.

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**