SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32
Justice

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DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR AMERICAN HOME MORTGAGE ASSETS TRUST 2007-1, MORTGAGE-BACKED PASS-THROUGH CERTIFICATES SERIES 2007-1,

Plaintiff,

- v -

UNKNOWN HEIRS TO THE ESTATE OF SERGE SOUTO A/K/A SERGE J. SOUTO, ROYAL BLUE REALTY HOLDINGS, INC.,JOHN SOUTO, AS VICE PRESIDENT OF ROYAL BLUE REALTY HOLDINGS, INC.,JOHN SOUTO, AS HEIR TO THE ESTATE OF SERGE SOUTO A/K/A SERGE J. SOUTO AND AS SOLE TRUSTEE OF THE SERGE SOUTO, IRREVOCABLE INTERVIVOS TRUST, THE BOARD OF MANAGERS OF 130 BARROW STREET CONDOMINIUM, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, UNITED STATES OF AMERICA, KATZ EQUITIES, INC.,CORNICELLO TENDLER & BAUMEL-CORNICELLO, GILBERT DILUCIA, VICTORIA DILUCIA, PETER WEISS, SING YU INTERNATIONAL INC.,SY MARBLE & GRANITE IMPORTERS, THOMAS G. HASKINS, JORDAN BUTTROFF, LESLIE BUTTROFF, JOHN DOE

Defendant.

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INDEX NO. 850071/2016

MOTION DATE

MOTION SEQ. NO. 004

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 004) 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 183, 187

were read on this motion to/for DISMISSAL.

The motion to dismiss the amended complaint by defendant Royal Blue Realty Holdings, Inc. ("Royal Blue") is denied.

Background

This foreclosure action relates to a property located at 130 Barrow Street, Unit 166 in Manhattan. Plaintiff seeks to recover on the outstanding debt, which purportedly amounts to $729,792.84 (the amount secured by the premises). Royal Blue claims that plaintiff's amended complaint violates a previous Court order, plaintiff's RPAPL 1304 notice was defective, Royal Blue never signed the Consolidation, Extension and/or Modification Agreement ("CEMA"),

plaintiff lacks standing, plaintiff's claims are time-barred and plaintiff's amended complaint violates applicable statutes, including the Martin Act.

As an initial matter, the Court observes that plaintiff previously moved to amend its complaint. In response to that motion, Royal Blue filed a cross-motion to dismiss in which it argued that plaintiff's claims were time-barred, plaintiff could not state a claim for unjust enrichment and plaintiff's claims violate the Martin Act. The judge assigned to the matter granted plaintiff's motion and denied Royal Blue's cross-motion (NSYCEF Doc. No. 118). Justice McMahon allowed plaintiff to "add 2 causes of action in the alternative for an equitable mortgage lien and unjust enrichment" (NSYCEF Doc. No. 118). The Court also denied the branch of plaintiff's motion to add new parties and denied Royal Blue's cross-motion to dismiss (*id.*).

Therefore, the Court denies Royal Blue's motion to the extent it seeks to relitigate the arguments that were already rejected. This includes Royal Blue's claims about the Martin Act, whether the action is time-barred and Royal Blue's claim that plaintiff may not proceed on its unjust enrichment claim.

Purported Violation of this Court's Decision

The Court also denies Royal Blue's motion to the extent that it claims that plaintiff violated the Court's decision (*see id.*). Royal Blue takes issue with the fact that plaintiff's original complaint had two causes of action (foreclosure and reformation of mortgage) and the amended complaint now has five causes of action. But a closer look at the amended complaint reveals that the additional cause of action is a declaratory judgment claim based on the equitable mortgage lien (a cause of action the decision specifically allowed plaintiff to add). And these

allegations were included in plaintiff's proposed amended complaint (*see* NYSCEF Doc. No. 49).

There is no doubt that the previous decision, NYSCEF Doc. No. 118, was a bit contradictory. It allowed plaintiff to add *two* causes of action for equitable mortgage lien and for unjust enrichment, but plaintiff's proposed amended complaint contained *two separate* causes of action relating to its equitable mortgage lien claim. Despite this apparent confusion, this Court finds that there is no basis to find that plaintiff violated the Court's prior directives. It makes sense to allow plaintiff to keep a cause of action that is part of its equitable mortgage lien claim and one that was part of its proposed amended complaint attached to the prior motion.

1304

To the extent that Royal Blue claims that plaintiff violated RPAPL 1304, that claim is denied. The notice required by RPAPL 1304 is applicable only where the property is occupied by the borrower (RPAPL 1304 [6][a][iii]). Here, Royal Blue is a corporate entity and, therefore, the notice was not required. The fact that plaintiff purportedly sent a 1304 notice anyway does not impose additional requirements. In any event, it is not clear at the motion to dismiss stage that a 1304 notice was required or that plaintiff failed to comply with this statute.

CEMA

Royal Blue's claim that it is not bound by the purported 2006 CEMA upon which plaintiff seeks to foreclose is denied. Plaintiff alleges in its amended complaint that Royal Blue is bound by the 2006 CEMA and, in opposition to Royal Blue's motion, attaches a copy of a CEMA signed by Royal Blue (*see* NYSCEF Doc. No. 155). That is enough at the motion to dismiss stage to deny this branch of Royal Blue's motion.

Standing

Royal Blue contends that plaintiff lacks standing and points to issues with the chain of title for the note. Royal Blue contends that there were no assignments from American Home Mortgage Acceptance, Inc. or from American Home Mortgage. However, the affidavit of Shannon Childs (Senior Loan Analyst for plaintiff's servicer) establishes that plaintiff had possession of the note prior to the commencement of this action (NSYCEF Doc. No. 150, ¶¶ 4-10). This affidavit is sufficient to defeat this branch of Royal Blue's motion at this stage of the litigation (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 366, 12 NYS3d 612 [2015]).

Remaining Claims

Royal Blue also moves to dismiss plaintiff's equitable mortgage lien claim on the ground that it is time-barred and to dismiss the unjust enrichment claim because it fails to state a cause of action. Both of these claims are denied because the Court already granted plaintiff leave to add these two causes of action under Motion Sequence 001, a motion that Royal Blue opposed. The Court has already ruled that adding these two causes of action was permissible; Royal Blue's remedy is to appeal or make a motion to reargue. It is not to make another motion to dismiss causes of action that the Court already allowed plaintiff to add.

Accordingly, it is hereby

ORDERED that the motion to dismiss by defendant Royal Blue Realty Holdings, Inc. is denied. Next Conference: July 11, 2019 at 10 a.m.

4.29.19
DATE

ARLENE P. BLUTH, J.S.C.
HON. ARLENE P. BLUTH

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE