Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

U.S.BANK, N.A.
.
Plaintiff

- against -

BRIAN ARIAS, et al.

Defendants

Index Number 18642 2009

Motion Date April 25, 2012

Motion Cal. Number 23

Motion Seq. No. 1

The following papers numbered 1 to 28 read on this motion by plaintiff pursuant to CPLR 3212 for summary judgment against defendant Brian Arias, to strike the answer of defendant Arias, for leave to amend the caption substituting Tommy Dolan as defendant in place and stead of defendant "John Doe #1" and deleting defendants "Richard Roe," "Jane Doe," "Cora Coe," "Dick Moe" and "Ruby Poe, for leave to enter a default judgment against defendants Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for Fairmont Funding, LTD, Criminal Court of the City of New York, City of New York Transit Adjudication Bureau and Tommy Dolan, for leave to appoint a referee to compute the sums due and owing it and to ascertain and report whether the mortgaged premises can be sold in more than one parcel; this cross motion by defendant Arias pursuant to CPLR 3211(a)(3) and (7) to dismiss the complaint asserted against him, for leave to amend the answer pursuant to CPLR 3025 to assert counterclaims and cross claims.

Papers Numbered

Notice of Motion - Affidavits - Exhibits 1-5
Notice of Cross Motion - Affidavits - Exhibits 6-9
Answering Affidavits - Exhibits 10-20
Reply Affidavits 21-27
Affirmation of Gerald Roth, Esq. dated November 22, 2011.....28

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

On April 4, 2008, defendant Arias executed a note and, in return for a loan he received, promised to pay the sum of $533,850.00 plus interest to the lender, Fairmont Funding, LTD (Fairmont). The note was secured by a mortgage on the subject real property known as 66-19 Clinton Avenue, Maspeth, New York. The mortgage stated, among other things that MERS was a nominee for the lender and that, for purposes of recording the mortgage, MERS was the mortgagee of record. On July 8, 2009, the mortgage was assigned by MERS, "together with the bond or obligation described" in the mortgage, to plaintiff, as assignee.

Plaintiff commenced this action on July 14, 2009, seeking to foreclose the subject mortgage. In its complaint, plaintiff alleged it is the owner and holder of the mortgage and underlying note, pursuant to an assignment. Plaintiff also alleged that defendant Arias defaulted under the terms of the mortgage and note by failing to make the monthly installment payment of interest due on March 1, 2009 and thereafter, and as a consequence, it elected to accelerate the entire mortgage debt.

The Plaintiff served the defendant, Arias, Tommy Dolan, as "John Doe" an alleged tenant at the subject premises, MERS, Criminal Court of the City of New York and City of New York Transit Adjudication Bureau. The defendants "Richard Roe," "Jane Doe," "Cora Coe," "Dick Moe" and "Ruby Poe" were not served having determined that they are unnecessary party defendants to the action.

Defendant Arias, appeared pro se, and served an answer denying certain allegations of the complaint, and asserting an affirmative defense based upon his claims that plaintiff engaged in unconscionable conduct and oppressive and "bad faith" lending practices, and should be precluded from seeking any deficiency judgment against him. Defendants MERS, Criminal Court of the City of New York and City of New York Transit Adjudication Bureau, and Tommy Dolan failed to appear or answer the complaint.

Defendant Arias opposes the motion by plaintiff. Plaintiff opposes the cross motion by defendant Arias. Defendants MERS, Criminal Court of the City of New York, and City of New York Transit Adjudication Bureau, and Tommy Dolan do not appear in relation to the motion or cross motion.

At the outset, the court notes that plaintiff offers proper proof of service of the notice of motion and supporting papers upon defendant Arias. That plaintiff did not serve the other defendants with a copy of this motion is of no moment, because they have not appeared in

the action (see CPLR 2103[e]). Defendants MERS, Criminal Court of the City of New York, and City of New York Transit Adjudication Bureau and Dolan were served with a notice pursuant to CPLR 3215(g)(iii).

In addition, to the extent defendant Arias asserts that counsel for plaintiff improperly represents both plaintiff and defendant MERS, Jonathan M. Cohen, Esq., a member of Stein, Weiner & Roth, LLP, plaintiff's counsel, affirms that the law firm does not represent defendant MERS in this action. Mr. Cohen also affirms that the law firm lacks any knowledge not taken from public records, that would put MERS at a disadvantage in this action. Defendant Arias also has failed to demonstrate plaintiff's counsel has breached, or is in danger of breaching, any duty of undivided loyalty to plaintiff.

That branch of the motion by plaintiff for leave to amend the caption as proposed is granted.

A motion made pursuant to CPLR 3211(a)(3) to dismiss the complaint based upon lack of standing, must be made before the service of the responsive pleading is required (CPLR 3211[e]; *see Burns v Binghamton Housing Authority*, 36 AD2d 1004 [1941]; *cf. Barol v Barol*, 95 AD2d 942 [1983]). A motion for dismissal based upon failure to state a cause of action (CPLR 3211[a][7]), however, may be brought at any time (CPLR 3211[e]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:38). That branch of the cross motion by defendant Arias, now appearing by counsel, pursuant to CPLR 3211(a)(3) to dismiss the complaint based upon lack of standing is untimely, having been made post-joinder of issue. Under such circumstances, it is denied.

That branch of the cross motion by defendant Arias pursuant to CPLR 3211(a)(7) to dismiss the complaint based upon failure to state a cause of action is also denied. On the merits of a motion to dismiss the complaint pursuant to CPLR 3211(a)(7), the court must determine whether, assuming that the allegations in the complaint are true, they state a cause of action upon which relief may be granted (*see Leon v Martinez*, 84 NY2d 83, 87–88 [1994]). The complaint states a cause of action for foreclosure (*see generally Baron Associates, LLC v Garcia Group Enterprises, Inc.*, 96 AD3d 793 [2012]; *Saxon Mortg. Services, Inc. v Coakley*, 83 AD3d 1038 [2011]; *see Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674 [2007]).

With respect to that branch of the cross motion by defendant Arias for leave to amend his answer, defendant Arias offers a proposed amended answer, asserting additional responses to the allegations of the complaint and substituting the original affirmative defenses with forty-nine affirmative defenses, including lack of standing and failure to state a cause of action. Defendant Arias also seeks to interpose proposed counterclaims based

upon fraud and misrepresentation, conspiracy, "wrongful foreclosure," unjust enrichment, and a cross claim against defendant MERS for tortious interference with his rights under the subject mortgage. In the proposed amended answer, defendant Arias alleges, among other things, that plaintiff "conned" him into believing he should stop payment of the subject mortgage and note so as to qualify for refinancing, but once he defaulted, refused to permit him to obtain refinancing. He also alleges that plaintiff and Fairmont received the balance due on the note "as proceeds of sale through securitization to private investors."

The Appellate Division, Second Judicial Department, in *U.S. Bank, Nat. Assn. v Sharif* (89 AD3d 723, 724 [2011]) has explained:

> " 'Motions for leave to amend pleadings should be freely granted, absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit' (*Aurora Loan Servs., LLC v Thomas*, 70 AD3d [986, 987] [2010]; *see* CPLR 3025[b]; *Lucido v Mancuso*, 49 AD3d 220, 222 [2008]). ' "Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine" ' (*Public Adm'r of Kings County v Hossain Constr. Corp.*, 27 AD3d 714, 716 [2006], quoting *Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]; *see Abrahamian v Tak Chan*, 33 AD3d 947, 949 [2006])."

With respect to that branch of the cross motion by defendant Arias for leave to amend his answer to assert an affirmative defense based upon lack of standing, a plaintiff has standing in a foreclosure action where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced (*see Bank of N.Y. v Silverberg*, 86 AD3d 274, 279 [2011]; *see Countrywide Home Loans, Inc. v Gress*, 68 AD3d 709). Furthermore, the Appellate Division, Second Department has warned:

> "while assignment of a promissory note also effectuates assignment of the mortgage (*see Bank of N.Y. v. Silverberg*, 86 AD3d [274, 280] [2011]; *U.S. Bank, N.A. v Collymore*, 68 A.D.3d [752, 753–754] [2009]; *Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674 [2007]), the converse is not true: since a mortgage is merely security for a debt, it cannot exist independently of the debt, and thus, a transfer or assignment of only the mortgage without the debt is a nullity and no interest is acquired by it (*see Deutsche Bank Natl. Trust Co. v Barnett*, 88 AD3d 636 [2011]; *Bank of N.Y.*

v Silverberg, 86 AD3d at 280)" (*U.S. Bank Nat. Assn. v Dellarmo*, 94 AD3d 746 [2012]).

Defendant Arias asserts, among other things, that plaintiff lacks standing to bring this action, because MERS lacked authority to assign the mortgage to plaintiff, and plaintiff has failed to allege when it "purchased" the note from Fairmont.

Plaintiff asserts defendant Arias should not be permitted to amend his answer to assert an affirmative defense based upon lack of standing, arguing he has waived such proposed defense. Contrary to such argument, defendant Arias has not waived the defense (*see Aurora Loan Services, LLC v Thomas*, 70 AD3d 986 [2010]; *cf. Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239 [2007]).

Plaintiff also asserts that the proposed affirmative defense based upon lack of standing is patently devoid of merit. Plaintiff claims that MERS transferred and assigned the mortgage and note to it effective April 14, 2008, as memorialized by the assignment dated July 8, 2009, and that it physically possessed the original note and mortgage at the time of the commencement of this action. It offers the affidavit of Rebecca Armstrong, an officer of plaintiff, indicating, among other things, that the note and mortgage were delivered by MERS to plaintiff on April 14, 2008 with the "full intention of surrendering all rights therein and thereto, and to [sic] [plaintiff] accepted all rights, title and interest in and thereto."

The affidavit of Ms. Armstrong does not indicate whether the note was endorsed over to plaintiff or in blank at the time plaintiff came into physical possession of the note (*see Mortgage Electronic Registration Systems, Inc. v Coakley*, 41 AD3d 674 [2007], *supra*; *cf. First Trust Nat. Assn. v Meisels*, 234 AD2d 414 [1996]; *see generally Slutsky v Blooming Grove Inn, Inc.*, 147 AD2d 208 [1989]), and plaintiff has failed to present any other evidence with respect to the issue of whether it was a holder of the note at the time the action was commenced (*see* UCC 1-201[21], 3-203[a], 3-301). Furthermore, to the extent plaintiff claims to have possessed the note at the time of commencement of this action as a nonholder with the rights of a holder (*see* UCC 3-301), the affidavit of Ms. Armstrong is insufficient to establish the intention of MERS in delivering the note (*see* UCC 3-203[a]).

To the extent plaintiff contends it is the assignee of the note, plaintiff has failed to show MERS had been given an interest in the underlying note by the lender *(see Bank of N.Y. v Silverberg*, 86 AD3d 274, 283 [2011], *supra*).

Thus, the proposed affirmative defense based upon lack of standing is not palpably insufficient or patently devoid of merit (*see* UCC 1-201[21], 3-203[a], 3-301). To the extent plaintiff asserts defendant Arias delayed in making a motion for leave to amend, the

foreclosure settlement conference pursuant to CPLR 3408 was not held until February 10, 2011. Under such circumstances, there is no showing of prejudice or surprise resulting directly from the delay by defendant Arias in seeking leave (*see Aurora Loan Services, LLC v Thomas*, 70 AD3d 986 [2010], *supra*).

That branch of defendant Arias's cross motion for leave to amend his answer as proposed is granted solely to the extent of granting defendant Arias leave to serve and file, within 20 days of service of a copy of this order with notice of entry, an amended answer to assert the affirmative defense of lack of standing of plaintiff. In all other respects, that branch of defendant Arias's cross motion for leave to amend his answer is denied. The forty-eight proposed affirmative defenses (other than the one based upon lack of standing), and the proposed counterclaims and cross claim against defendant MERS, are palpably insufficient or patently devoid of merit (*see generally Scott v Fields*, 85 AD3d 756 [2011]; *Lucido v Mancuso*, 49 AD3d 220, 225–229 [2008]).

That branch of the motion by plaintiff for summary judgment in its favor as against defendant Arias is denied. Those branches of the motion by plaintiff for leave to fix the defaults of defendants MERS, Criminal Court of the City of New York, City of New York Transit Adjudication Bureau and Dolan, and for leave to appoint a referee, are denied at this juncture.

Dated: July 25, 2012

J.S.C.