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INDEX NO. 32841/2009

SUPREME COURT Of THE STATE OF NEW YORK
COUNTY OF SUFFOLK
I.A.S. Part 21

PRESENT: Hon. Jeffrey Arlen Spinnner
Justice of the Supreme Court

MOTION DATE: October 10, 2010
ADJ. DATE: April 10, 2013

MOTION SEQUENCE: #001
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MOTION SEQUENCE # 003-MD
RETURN DATE 10-11-2012
FINAL SUBMITTED DATE 11-20-2013

MOTION SEQUENCE # 004-MG
RETURN DATE 11-14-2012
FINAL SUBMITTED DATE 11-20-2013

KONDAUR CAPITAL CORPORATION,
Plaintiff,

vs.

JOHN E. REILLY; KELLY A. REILLY; GOOD SAMARITAN HOSPITAL; PALISADES ACQUISITION XVI, LLC ASSIGNEE OF HOUSEHOLD BANK (SB), N.A.; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; CACH LLC; CHASE BANK (USA) N.A.; "JOHN DOES" and "JANE DOES,' said names being fictitious, parties intended being possible tenants or occupants of premises, and corporations, other entities or persons who claim, or may claim, a lien against the premises,

Upon the Notice of Motion by Macco & Stern LLP, by Charles Wallshein , Attorney for Defendant dated October 10, 2012 and upon the pleadings, together with the Attorney Affirmation of Charles Wallshein dated September 25, 2012, the affidavit of Defendant John Reilly and all exhibits annexed thereto, and;

Upon the Affirmation in Opposition of Alan H. Weinreb Attorney for Plainntiff dated February 26, 2013; and all the exhibits annexed thereto and the Defendant's Reply Affirmation dated March 18, 2013 and Reply Memorandum of

Charles Wallshein Esq. dated March 14, 2013 and the following as appears in the record of these proceedings;

The transactional history as appears in the record of these proceedings is as follows:

1. Mortgage Note dated November 30, 2006, made and executed by John E. Reilly and Kelly Reilly to Fremont Investment & Loan in the sum of $720,000..

2. Mortgage dated November 30, 2006 executed by John E. Reilly and Kelly Reilly to Mortgage Electronic Registration Systems as nominee for Fremont Investment & Loan as security for the payment of the said Note and recorded in the Office of the Clerk of the County of Suffolk, on November 30, 2006 in Liber M00021427 Page 308.

3. Assignment of mortgage made and executed by Mortgage Electronic Registration Systems Inc. (MERS) as nominee for Fremont Investment & Loan to GRP Loan LLC by instrument dated December 17, 2007 , and recorded in the Office of the Clerk of the County of Suffolk on June 10, 2010 in Liber 21955 at page 450.

4. Assignment of mortgage made and executed by GRP Loan LLC to DLJ Mortgage Capital Inc. by instrument dated December October 26, 2009 and recorded in the Office of the Clerk of the County of Suffolk on June 10, 2010 in Liber 21955 at page 451.

5. Assignment of mortgage made and executed by DLJ Mortgage Capital Inc. to Plaintiff Kondaur Capital Corporation GRP Loan LLC to DLJ Mortgage Capital Inc. by instrument dated December April 14, 2010 and recorded in the Office of the Clerk of the County of Suffolk on July 7, 2010 in Liber 21962 at page 4938.

The procedural history as appears in the record of these proceedings is as follows: Plaintiff commenced this residential foreclosure action on August 18, 2009 in connection with the premises known as 11 Apricot Road, Mount Sinai, NY. Plaintiff and Defendant joined issue on September 15, 2009 by Defendant's service of his answer Plaintiff's former counsel Frenkel, Lambert Weiss, Weissman & Gordon September 15, 2009. The Answer contained a general denial of all the allegations in the Complaint. Defendant did not raise standing as an affirmative defense.

Plaintiff moved for summary judgment by its former counsel Rosicki & Rosicki by notice of motion dated December 1, 2011. Defendant denies having received notice of the motion. This Court granted the order for summary judgment and to appoint a referee on May 18, 2012 without opposition. Plaintiff moved to

confirm the referee's report by motion returnable to this Court on October 11, 2011. Defendant retained counsel to vacate this Court's prior order.

On the 10th day of October, 2012, Defendant moved by Order to Show Cause for a temporary restraining order staying the proceedings pending a determination of the motion to vacate the order granting summary judgment and appointing a referee, to deny the confirmation of the referee's report, to amend his Answer pursuant to CPLR §3025(b) and for the Court to hold a bad faith hearing pursuant to CPLR §3408. The Court ordered the proceedings temporarily stayed. The following is the Decision and Order of the Court:

ORDERED, that Defendant's motion to vacate the judgment for summary judgment and to appoint a referee dated May 18, 2012 is granted. Defendant is given leave to amend his Answer pursuant to CPLR §3025(b); The Court declines to hold a bad faith hearing.

Defendant was entitled to receive notice of the motion for summary judgment and to appoint a referee. Defendant claims that he did not receive notice of the motion by mail. Upon receipt of the notice of motion to confirm the referee's report Defendant took immediate actions to vacate the prior order. The record does not reflect an objection by Plaintiff or an allegation that the default by Defendant in opposing the motion was willful. Vacating the default in appearance by Defendant is within the discretion of the Court. In this case Defendant claims that he never received notice of the motion. The record reflects that Defendant answered the complaint and appeared at settlement conferences. There is no indication that Defendant had any intention of abandoning his defense of this action. Defendant's excuse for defaulting is reasonable pursuant to CPLR §5015(a)(1).

The Court then turns to the merits of the case. Pursuant to CPLR §3025(b) Defendant requires to establish that the amendment to its answer is not palpably insufficient. Defendant's amendment includes the affirmative defense is that Plaintiff is an improper party to the action and lacks standing to foreclose. "Further, the Supreme Court properly granted those branches of Thomas's motion which were for leave to amend his answer to assert the defenses of lack of standing and lack of capacity to sue. 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 (*see* CPLR 3025[b]; *Lucido v. Mancuso,* 49 A.D.3d 220, 222, 851 N.Y.S.2d 238).. *Aurora Loan Services v. Thomas,* 70 A.D.3d 986 (2d. Dept. 2010)."

It is well settled that a mortgagee establishes a prima facie case entitling it to summary judgment to foreclose a mortgage by presenting the subject mortgage, the unpaid note and due evidence of a default under the terms thereof (CPLR 3212;

RPAPL §1321); (*see Hoffman v. Kraus,* 260 A.D.2d 435, 436, 688 N.Y.S.2d 575; *Mahopac Natl. Bank v. Baisley,* 244 A.D.2d 466, 467, 664 N.Y.S.2d 345). The burden then shifts to the defendant to demonstrate "the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff" (*id.* at 467,; *see Nassau Trust Co. v. Montrose Concrete Prods. Corp.,* 56 N.Y.2d 175, 183, 451 N.Y.S.2d 663).

The Court finds that the Defendant demonstrates with particularity that the Plaintiff has not made a prima facie case that it is the aggrieved party in this action. It is on the basis of the erroneous factual content in Plaintiff's moving papers and severe documentary deficiencies in the exhibits annexed thereto that this Court vacates its prior order. Defendant's proposed Answer contains the affirmative defense that Plaintiff lacks standing. The proposed Answer also contains counterclaims seeking a declaratory judgment to determine the identity of the entity that is entitled to enforce the note and mortgage in foreclosure.

Plaintiff affirms that the allonge on the Fremont mortgage note is valid such that it lawfully transfers Defendant's obligation from Fremont to GRP. The allonge is unsigned, undated and carries no evidentiary value without a supporting affidavit from the person who has personal knowledge of the date of the transfer. As per the Second Department's holding in *Deutsche Bank v. Haller*, 100 A.D.3d 680 (2d Dept. 2102). The date the mortgage note was allegedly transferred from Fremont to GRP is material to this case. Plaintiff also affirms that the allonge on the Fremont mortgage note is valid such that it lawfully transfers Defendant's obligation from GRP to DLJ. The allonge is endorsed in blank, is dated and carries no probative value without a supporting affidavit from the person who has personal knowledge of the transfer (*Homecomings Financial, LLC v. Guldi*, 108 A.D.3d 506, [2d Dept. 2013]; *Bank of N.Y. v. Silverberg*, 86 A.D.3d at 279,; *Wells Fargo Bank Minn., N.A. v. Mastropaolo*, 42 A.D.3d 239, *Deutsche Bank Natl. Trust Co. v. Barnett,* 88 A.D.3d 636.

The record does not contain evidence of the time, manner or method of delivery of the original note to Plaintiff and therefore, plaintiff's mere possession of the note without establishing its valid delivery, is insufficient. The supporting affirmation of Plaintiff's Counsel, Alan Weinreb, statements are inadmissible without the supporting affidavits of parties to the loan transaction who have personal knowledge of the transfer of the note and mortgage from Fremont to GRP to DLJ to Kondaur.

"In a mortgage foreclosure action, a plaintiff has standing 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" (*Bank of N.Y. v. Silverberg*, 86 A.D.3d 274, 279, 926 N.Y.S.2d 532). By contrast, "a transfer of the mortgage

without the debt is a nullity, and no interest is acquired by it" (*Merritt v. Bartholick*, 36 N.Y. 44, 45; *Kluge v. Fugazy*, 145 A.D.2d 537, 538, 536 N.Y.S.2d 92 [plaintiff, the assignee of a mortgage without the underlying note, could not bring a foreclosure action]).

Plaintiff "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986].) Plaintiff must tender "evidentiary proof in admissible form." (See *Zuckerman v. New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, Here, the issue of standing was raised by a defendant and in response, the plaintiff has the burden to demonstrate its standing to be entitled to relief, *(Homecomings Financial, LLC v. Guldi*, 108 A.D.3d 506, [2d Dept. 2013]; *Bank of N.Y. v. Silverberg*, 86 A.D.3d at 279,; *Wells Fargo Bank Minn., N.A. v. Mastropaolo*, (42 A.D.3d 239).

The Court has grounds to exercise its discretion to vacate the judgment of foreclosure and sale if it finds that it relied upon documents falsely entered into evidence to substantiate Plaintiff's prima facie case of its right to foreclose.

The Court relied upon the statements contained in Plaintiff's Affidavits and Affirmations and Defendant alleges sufficient circumstances substantiated by evidence in admissible form that Plaintiff's supporting affidavit and supporting exhibits misrepresent material issues of fact.

A question of fact exists as to the authenticity of the assignment of mortgage dated April 14, 2010, Notarized by Shirley Tuitupou on June 10, 2010 reciting an assignment of mortgage from DLJ Mortgage Capital to Plaintiff, Kondaur Capital. At the very least the document itself may be a nullity due to the discrepancy of the dates of the notary, the date of the assignment and the date of the "prior" conveyance which allegedly occurred in June, 2010, two months in the future.

DLJ's predecessor in interest to Defendant's mortgage (GRP) did not assign the mortgage to DLJ until June 10, 2010. DLJ could not assign to Plaintiff a mortgage that it did not own. This raises a triable issue of material fact to wit, the identity of the entity that had rights in the note and mortgage at the time of assignment to Plaintiff. *Nemo Dat Quod Non Habet*, you cannot give what you do not have. Here, Plaintiff cannot or would not be able to enforce rights in a note and mortgage its assignor no longer had, or may have never had, at the time of the assignment. *Barnard v. Campbell,* 55 N.Y. 456 (NY Ct. App 1873). "But good faith, and a parting of value by the one, will not alone determine who should have the loss, or fix the ownership of the property fraudulently purchased from the one and sold to the other. The general rule is that a purchaser of property takes only such title as his seller has, and is authorized to transfer; that he acquires precisely the interest which the seller owns, and no other or greater. *Nemo plus juris ad*

alium transferre potest quam ipse habet. (Broom's Leg. Max., 452.) The general rule of law is undoubted that no one can transfer a better title than he himself possesses. *Nemo dat quod non habet.* (Per WILLES, J., *Whistler v. Forster,* 14 C. B. [N. S.], 248.).

Under normal circumstances this type of mistake could be dismissed as a simple oversight by an attorney's office, or a mistake by the bank or a title company. Under normal circumstances this could be a characterized as a forgivable error where the Court might exercise its discretion to accept a document into evidence containing incorrect dates, nunc pro tunc. However, the Court sees no evidence or explanation that the error sought to being corrected is one contemplated by statute. The judgment says what it says and the court declines to ratify that which it would not find in the first instance.

The signatory on the April 14, 2010 assignment of mortgage is "Bill Koch, Document Control Officer" for Select Portfolio Servicing, Inc., the alleged attorney in fact for the assignor, DLJ Capital. The record indicates that there is no recorded power of attorney appointing Bill Koch, or Select Portfolio Services "attorney in fact" for DLJ Capital. There is no evidence in the record that Plaintiff complied with General Obligations Laws Sections 5-1501(2), 5-1502A and §5-1507.

The alleged Power of Attorney likewise fails to confer authority upon the signatory because the relationship between the principal and agent is not disclosed. There is nothing in the record indicating that the signatory has actual authority from the principal as an employee with that express power to execute an assignment on behalf of its employer. The record also does not indicate that the corporate agent disclosed its relationship with the corporate principal. A question of fact exists as to the authenticity and enforceability of the loan transfer documents relating to Plaintiff's authority as an alleged "attorney in fact" pursuant to General Obligations Laws §5-1507.

The record contains numerous contradictions as to the dates the alleged transfers of the note and assignments of the mortgage occurred. The record indicates that Plaintiff has not made a prima facie case of an unbroken chain of possession of the note and an unbroken chain of assignments to the mortgage by person with actual or apparent authority to do make those assignments. If the Court was to allow the judgment to stand the Court would be sanctioning the devolution in title to the mortgage to the detriment of future bona fide purchasers of the property.

Triable issues of material fact exist as to whether Plaintiff is the entity entitled to enforce the note and mortgage in foreclosure. Plaintiff's attorneys had a responsibility to ensure that the facts contained in its affirmations and supporting affidavits are true and accurate. The documentary deficiencies and contradictions

in this case are overwhelming. The Court believes that the proceedings in this case were flawed long before Plaintiff's most recent counsel, Pitnick & Margolin, appeared in this case. The Court believes that as a matter of law and in the interests of equity, this action cannot be determined with the facts presented as they appear in Plaintiff's papers. **

J.S.C.

Dated: DEC 03 2013

J.S.C.

HON. JEFFREY ARLEN SPINNER

____ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

** It is therefore

ORDERED that Plaintiff's Motion to Confirm Referee's Report and Judgment of Foreclosure and Sale (seq. 003) is hereby denied in its entirety; and it is further

ORDERED that the Order of Reference dated May 15, 2012 is hereby vacated; and it is further

ORDERED that Defendants' Motion for Leave To Amend Answer (seq. 004) is hereby granted; and it is further

ORDERED that any relief not expressly granted herein is hereby denied; and it is further

ORDERED that Defendants' counsel shall serve a copy of this Order together with the Amended Answer, within 15 days of the date of entry hereof.

J.S.C.