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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE FOR THE HOLDERS GSAA HOME EQUITY TRUST,

INDEX NO. 107437/09

Plaintiff,

-against-

JACQUELINE MORROW A/K/A JACQUELINE CREIGHTNEY, TYRONE JOHN MORROW A/K/A TJ MORROW, THE BOARD OF MANAGERS OF THE TOWERS ON THE PARK CONDOMINIUM, and "JOHN DOE #1" THROUGH "JOHN DOE #10," the last 10 names being fictitious and unknown to plaintiff, the persons or parties intended being the persons or parties, if any having or claiming an interest in or lien upon the mortgaged premises described in the verified complaint,

Defendants.

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JOAN A. MADDEN, J.:

In this mortgage foreclosure action, defendants Jacqueline Morrow and TJ Morrow, pro se[1] (collectively "defendants") move for an order pursuant to CPLR 3211 dismissing the action on grounds of res judicata, a defense founded on documentary evidence, lack of subject matter jurisdiction, failure to state a cause of action, and lack of standing. Plaintiff opposes the motion.

First, as to the issue of res judicata, defendants waived the defense of res judicata by not raising it in their answer. CPLR 3211(e); Giacomazzo v. Moreno, 94 AD2d 369 (1st Dept), app den 60 NY2d 558 (1983). However, even if the res judicata defense were not waived, res

[1]Defendant TJ Morrow states that he is the "attorney" for himself and co-defendant Jacqueline Morrow.

judicata is not applicable. Defendants contend that the instant action is barred by the stipulation of discontinuance with prejudice in a prior action to foreclose on the identical mortgage under Index No. 105269/08.[2] The prior action was commenced on January 7, 2008 and alleged that defendants defaulted "by failing to pay principal and interest and/or taxes, insurance premiums, escrow and/or other charges commencing with the July 1, 2007 payments." The prior action was settled pursuant to a Loan Modification Agreement dated May 9, 2008 and executed by defendant Tyrone John Morrow on September 23, 2008.[3] As a result of the settlement, plaintiff filed a stipulation of discontinuance with prejudice dated January 30, 2009, and on February 6, 2009, the Hon. Emily Jane Goodman issued an order that plaintiff's "motion to appoint a referee is moot because the action has settled."

On May 26, 2009, plaintiff commenced the instant action alleging that defendants breached their obligations under the Loan Modification Agreement executed on September 23, 2008, by failing to make the monthly payments commencing on October 1, 2008. Contrary to defendants' assertion, the instant action does not involve the same issues as the prior action that was discontinued with prejudice. Rather, the instant action is based on the parties' subsequent

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[2]The prior action is entitled Deutsche Bank National Trust Company as Trustee for the Holders of the GSAA Home Equity Trust 2004-10 Asset-Backed Certificates, Series 2004-10 v. Jacqueline Morrow a/k/a Jacqueline Creightney, Tyrone John Morrow a/k/a TJ Morrow, The Board of Managers of Towers on the Park Condominium, and "John Doe No. 1" through "John Doe #10," the last 10 names being fictitious and unknown to plaintiff, the persons or parties intended being the persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the complaint, Index No. 105269/08 (Supreme Court, New York County).

[3]Defendants had an earlier Loan Modification Agreement dated April 20, 2007 and executed by Tyrone John Morrow on June 4, 2007.

agreement to modify the loan and defendants' later breach of their obligations under that new agreement, and, as such, does not arise from the same facts as the prior action and is not barred by the discontinuance of the prior action with prejudice. See Fifty CPW Tenants Corp v. Epstein, 16 AD3d 292 (1sts Dept 2005).

To the extent defendants argue that the March 27, 2013 decision of the Hon. Alice Schlesinger denying plaintiff's prior motion for summary judgment, is res judicata, it is well settled that a denial of summary judgment is not an adjudication on the merits and has no preclusive effect. See Metropolitan Steel Industries, Inc v. Perini, Corp, 36 AD3d 568 (1st Dept 2007).

Second, as to the issue of standing,[4] a plaintiff in a mortgage foreclosure action has standing when it is the holder or assignee of the underlying note at the time the action is commenced. See One West Bank, FSB v. Albanese, 139 AD3d 831 (2nd Dept 2016); Emigrant Mortgage Co, Inc v. Persad, 117 AD3d 676 (2nd Dept 2014); OneWest Bank FSB v. Carey, 104 AD3d 444 (1st Dept 2013); HSBC Bank USA v. Hernandez, 92 AD3d 843 (2nd Dept 2012). Although an assignment of a mortgage without the effective assignment of the underlying note is a nullity, see U.S. Bank, N.A. v. Collymore, 68 AD3d 752, 754 (2nd Dept 2009), since a mortgage is "merely security for a debt or other obligation and cannot exist independently of the debt or obligation," when a note is transferred or assigned, "the mortgage securing the debt passes as an incident to the note." Deutche Bank National Trust Co v. Spanos, 102 AD3d 909, 911 (2nd Dept), lv app dism, 21 NY3d 1068 (2013) (internal citations omitted); accord Aurora Loan

[4]Defendants have not waived standing, as it is included as a defense in their answer.

Services, LLC v. Taylor, 25 NY3d 355 (2015). Thus, "[e]ither a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident." U.S. Bank, N.A. v. Collymore, supra at 754.

Here, plaintiff has produced the note and the allonge which clearly establish that the note was indorsed by the original lender First National Bank of Arizona over to the First National Bank of Nevada, and then indorsed in blank by First National Bank of Nevada See Mortgage Electronic Registration Systems, Inc v. Coakley, 41 AD3d 674 (1st Dept 2007). When a note, like the one at issue, is endorsed in blank, it qualifies as negotiable instrument within the meaning of the Uniform Commercial Code and as such can be negotiated by transfer of possession alone, without an actual assignment. See One West Bank, FSB v. Albanese, supra; Wells Fargo Bank, NA v. Ostiguy, 127 AD3d 669 (3rd Dept 2015); Mortgage Electronic Registration Systems, Inc v. Coakley, supra. Contrary to defendants' objections, neither the note nor the allonge are defective, and even if, as defendants allege, plaintiff failed to produce the note and/or the allonge in the prior action, plaintiff is not precluded from producing and relying on those documents in this or any future action to foreclose on the mortgage.

Plaintiff, therefore, is seeking to enforce the note as the holder, and for plaintiff to have standing to do so, it must have had actual physical possession of the note prior to the May 26, 2009 commencement of this action. See Aurora Loan Services, LLC v. Taylor, supra; One West Bank, FSB v. Albanese, supra; U.S. Bank, N.A. v. Collymore, supra at 754. A review of plaintiff's papers in support of its two prior motions for summary judgment (one of which was

denied and the other withdrawn) and in opposition to the instant motion to dismiss, reveals that plaintiff has failed to provide any competent proof or documentation demonstrating that the note was in its actual possession prior to May 26, 2009. The record contains only conclusory and unsubstantiated assertions by counsel that the note was plaintiff's "continuous possession . . . since prior to the commencement of this action" and that "[i]t is Plaintiff's contention that it obtained physical possession of the endorsed note prior to the commencement of the action." The record does include an affidavit of Rachel Yoo, an employee of the mortgage servicer, which is dated November 24, 2014, but she merely states that "Nationstar as servicer for plaintiff, *has* physical possession of the original Note endorsed in blank [emphasis added]." At best, Ms. Yoo's affidavit speaks of Nationstar's present possession of the note in 2014, without identifying the entity that originally delivered the note to Nationstar nor the date of such delivery, so as to ascertain that it did, indeed, have possession of the note prior to May 26, 2009. See Aurora Loan Services, LLC v. Taylor, supra; U.S. Bank, N.A. v. Collymore, supra.

Under these circumstances, no basis exists for concluding that plaintiff had physical possession of the note at the commencement of this action in May 2009. Plaintiff therefore lacks standing to maintain this action and the complaint must be dismissed, but such dismissal is without prejudice to the commencement of a new action.[5] While defendants seek dismissal with prejudice, such relief is not warranted, as a dismissal for lack of standing is not on the merits. See

[5]The court notes that plaintiff offers no explanation as to the status of Countrywide Home Loans, Inc. as the "lender" on the two loan modification agreements. Also, while defendant Tyrone Morrow appears to assert that he did not sign either the 2008 or 2008 loan modification agreement, his signature appears on both documents.

Landau, PC v. LaRossa Mitchell & Ross, 11 NY3d 8 (2008); Ricatto v. Mapliedi, 133 AD3d 737 (1st Dept 2015).

In view of the dismissal for lack of standing, the court need not consider defendants' remaining grounds for dismissal.

Accordingly, it is

ORDERED that defendants' motion to dismiss the complaint is granted based on plaintiff's lack of standing, and the complaint is dismissed without prejudice, and the Clerk is directed to enter judgment accordingly.

DATED: July 22, 2016

ENTER:

J.S.C.