

<b>Ventures Trust 2013-I-H-R v Tsimmer</b>
2017 NY Slip Op 30570(U)
March 23, 2017
Supreme Court, New York County
Docket Number: 850230/15
Judge: jaffe
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 12

-----X  
VENTURES TRUST 2013-I-H-R BY MCM CAPITAL  
PARTNERS, LLC, ITS TRUSTEE,

Index No. 850230/15

Mot. seq. no. 001

Plaintiff,

**DECISION AND ORDER**

-against-

LEO TSIMMER a/k/a LEO E. TSIMMER, *et al.*,

Defendants.

-----X  
BARBARA JAFFE, J.:

**For movant:**  
Matthew Lizotte, Esq.  
Friedman Vartolo LLP  
950 Third Ave., 11<sup>th</sup> Fl.  
New York, NY 10022  
212-471-5100

**For defendant Tsimmer:**  
Jack L. Lester, Esq.  
99 Park Ave., Ste. 1100  
New York, NY 10016  
212-832-5357

By notice of motion, the named plaintiff's assignee/successor-in-interest HMC Assets, LLC, solely in its capacity as Separate Trustee of CAM XV Trust, moves for orders:

- (1) striking and dismissing defendant Tsimmer's answer, (2) granting it summary judgment, (3) granting it a default judgment against non-answering defendants, (4) appointing a referee to compute the amount due movant, (5) dismissing Tsimmer's counterclaim, and (6) amending the caption. Tsimmer opposes.

**I. PERTINENT BACKGROUND**

In this mortgage foreclosure action, movant seeks a judgment permitting it to foreclose on a mortgage executed by defendant Tsimmer to purchase the premises known as 200 East 58<sup>th</sup> Street, unit 16F, in Manhattan. By affidavit dated May 5, 2016, an assistant vice president of BSI Services (assistant) identifies BSI Services as movant's attorney-in-fact, and states that any

reference to “plaintiff” in her affidavit references movant. The assistant attests that she is responsible for maintaining and reviewing internal foreclosure and loan-specific documents and original collateral documents, such as original promissory notes. She is fully familiar with the facts and circumstances set forth in her affidavit, and states that movant maintains loan documents and related business records in the course of its regularly-conducted business activities, including data compilations, such as the date and time that certain original promissory notes and allonges were received, and electronic images of documents, and that such records are made at or near the time of the occurrences related therein and from information provided by persons with knowledge of the activity and transactions reflected in the records. (NYSCEF 28).

The assistant also maintains, based on her personal knowledge of how movant’s business records are kept and maintained and the knowledge she acquired by personally reviewing Tsimmer’s records, the following:

- (1) Tsimmer executed and delivered a note dated August 22, 2007, to Bank of America, N.A. for \$420,000 in monthly installments commencing on October 1, 2007;
- (2) Tsimmer executed and delivered to Bank of America a mortgage dated August 22, 2007, which was recorded in the New York County Clerk’s Office on September 19, 2007, and was secured by the premises;
- (3) by assignment dated November 19, 2014, Bank of America assigned the mortgage to Ventures Trust 2013-I-H-R by MCM Capital Partners, LLC, its Trustee, which assignment was recorded on February 26, 2015;
- (4) by assignment dated November 11, 2015, Ventures Trust assigned the mortgage to OHA Newbury Ventures, LP, which assignment was recorded thereafter; and
- (5) by assignment dated November 11, 2015, OHA Newbury Ventures assigned the mortgage to HMC Assets, LLC, in its capacity as Separate Trustee of CAM XV Trust, which mortgage was thereafter recorded.

(*Id.*).

Moreover, the business records reviewed by the assistant reflect that:

- (1) the original note was delivered to “plaintiff and/or its custodian/agent” on or before November 1, 2014;
- (2) the mortgagors defaulted on the mortgage by failing to make monthly payments beginning on August 1, 2011, and continuing to the present;
- (3) a 90-day notice pursuant to RPAPL 1304 was served by certified and first-class mail to the mortgagor at the premises; and
- (4) there is now due and owing the principal sum of approximately \$420,000.

(*Id.*).

Annexed to movant’s papers are the following documents:

- (1) a note dated August 22, 2007, allegedly signed by Tsimmer but not notarized;
- (2) a mortgage dated August 22, 2007, between Tsimmer and Bank of America, initialed and signed by Tsimmer, notarized, and endorsed in blank by Bank of America;
- (3) an assignment dated November 19, 2014, of Tsimmer’s mortgage from Bank of America to Ventures Trust, and recording dated February 26, 2015, reflecting both Ventures Trust and MCM Capital Partners LLC as the assignees and new lenders;
- (4) an assignment of the mortgage from Ventures Trust to OHA Newbury Ventures, dated November 11, 2015, and recorded on April 27, 2016; and
- (5) an assignment of the mortgage from OHA to CAM XV Trust, dated November 11, 2015 and recorded on April 27, 2016. (NYSCEF 35).

On or about July 29, 2015, Ventures Trust commenced this action. In the complaint, verified by counsel alone, Ventures Trust alleges that it or its custodian/agent is in possession of

the original note with a proper endorsement and/or allonge and is therefore the holder of both the note and mortgage. Annexed to the summons and complaint is the note and mortgage, a default notice dated January 6, 2015, addressed to Tsimmer and allegedly sent by certified and first-class mail, and a statement certifying that the default notice was sent to Tsimmer on January 14, 2015. (NYSCEF 36).

On or about September 21, 2015, Tsimmer served his answer, asserting as affirmative defenses: (1) laches, (2) failure to state a claim, (3) improper assignment, (4) lack of standing, (5) failure to disclose the terms of the mortgage loan in accordance with the Trust in Lending Act, (6) failure to plead the performance or occurrence of conditions precedent, (7) failure to comply with 12 CFR 226.9, (8) the mortgage transaction is void for fraud, (9) the mortgage transaction is void for unconscionability, inadequate disclosure, interest rate manipulation and/or predatory lending, (10) the documents annexed to the complaint are incomplete, defective, and/or inadmissible and thus incompetent, (11) unjust enrichment, (12) misrepresentation, (13) plaintiff sold the mortgage without authority, and the sale was contrary to law and express and implied agreements, (14) plaintiff lacks lawful authority to commence the proceeding, (15) failure to comply with RPAPL 1304, and (16) lack of personal jurisdiction/improper service. As a counterclaim, Tsimmer alleges that he is entitled to monetary damages due to plaintiff's fraud, unjust enrichment, violation of the Fair Debt Collection Act, misrepresentation, and illegal acts. (NYSCEF 38).

By order dated May 19, 2016, after fruitless settlement negotiation, the Mortgage Foreclosure Part released this matter for the filing of the instant motion. (NYSCEF 22).

## II. CONTENTIONS

Movant contends that it has established, *prima facie*, its entitlement to a judgment of foreclosure based on the note and mortgage and evidence of Tsimmer's default in payment. It also asserts that Tsimmer's answer should be stricken and/or disregarded absent evidence of triable facts or a meritorious defense, and as his affirmative defenses are conclusory and insufficient, and argues that Ventures Trust has standing to commence the action based on proof that it came into possession of the note before it commenced the action, per the note endorsed in blank and annexed to the complaint, and as it is alleged in the complaint that it possesses the note, along with proof of that it was assigned the mortgage by the Bank of America. Movant adds that its standing to maintain the action is reflected by the assignment to it of the note and mortgage, and the assistant's assertion that movant currently possesses the note. (NYSCEF 27).

In opposition, Tsimmer alleges that the note and mortgage submitted by movant have not been authenticated by anyone with personal knowledge related to the contemporaneous maintenance of the relevant business records and are thus inadmissible. He observes that the assistant did not state that she personally reviewed the note or mortgage and that there is no affidavit from someone with personal knowledge related to the original assignment of the note. Tsimmer also denies that the signatures and initials on the mortgage and note are his, and alleges that plaintiff did not negotiate with him in good faith as is required by CPLR 3408. (NYSCEF 45).

In reply, movant maintains that the assistant's affidavit is sufficient as it is based on her review of the books and records maintained in movant's ordinary course of business, and that the submitted documents are thus admissible. It moreover observes that Tsimmer has never raised

the challenged the authenticity of his signatures in his answer, even though the documents are annexed to the complaint, and that in any event, his denials are self-serving and conclusory. Movant also asserts that it complied with CPLR 3408 and offered to modify the terms of the mortgage. (NYSCEF 46).

### III. ANALYSIS

#### A. Applicable law

A plaintiff in a foreclosure action establishes its entitlement to a judgment of foreclosure by producing the mortgage documents at issue and evidence of the mortgagee's nonpayment. (*Red Tulip, LLC v Neiva*, 44 AD3d 204 [1<sup>st</sup> Dept 2007], *lv dismiss* 10 NY3d 741 [2008]). Where a defendant challenges a plaintiff's standing to commence an action to foreclose a mortgage, the plaintiff must also prove its standing as part of its *prima facie* burden. (*U.S. Bank Natl. Assn. v Cox*, AD3d , 2017 NY Slip Op 01909 [2d Dept 2017]).

To prove standing to commence a mortgage foreclosure action, a plaintiff must show that 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 was commenced." (*Wells Fargo Bank, N.A. v Jones*, 139 AD3d 520, 520 [1<sup>st</sup> Dept 2016]). Conclusory statements are insufficient if the issue of plaintiff's standing is raised as a defense. (*Id.*).

Thus, in *Wells Fargo Bank, N.A.*, the plaintiff's "bare claim" that it was in possession of the promissory note before the commencement of the foreclosure action was found insufficient to establish standing. (*Id.* at 523-4). And, in *HSBC Bank USA v Hernandez*, where the affidavit of the plaintiff's servicing agent was bereft of facts related to the physical delivery of the note, the plaintiff was found to have failed to establish standing. (92 AD3d 843 [2d Dept 2012]).

Even if a plaintiff's affidavit adequately provides a foundation for the admission of the note as a business record, standing remains an issue absent any factual basis for the plaintiff's employee's sworn statement that upon review of business records, he knew that the note was delivered before commencement of the action. (*Bank of Am., N.A. v Thomas*, 138 AD3d 523 [1<sup>st</sup> Dept 2016]).

Moreover, if a third party is assigned the mortgage and note after the action is commenced, that party must establish its standing to maintain the action through proof that the note was delivered to it and is in its possession. (*U.S. Bank Natl. Assn. v Akande*, 136 AD3d 887 [2d Dept 2016]). To satisfy its *prima facie* burden of establishing its entitlement to a judgment of foreclosure, the third party must also establish that the party commencing the action had standing to do so at the time of the commencement. (*Id.*).

## B. Discussion

### 1. Standing of Ventures Trust

As Ventures Trust annexed a copy of the note to its complaint, along with a copy of the mortgage and assignment when it commenced this action, movant has established, *prima facie*, that Ventures Trust has standing to commence the action. (*See Nationstar Mortg., LLC v Catizone*, 127 AD3d 1151 [2d Dept 2015] [plaintiff established standing as evidenced by attaching note, mortgage, and mortgage assignment to summons and complaint when action commenced]).

### 2. Movant's standing

The assistant's affidavit is not only conclusory but also confusing. While she states that plaintiff, referencing movant, possesses the note, and that the original note was delivered to "the



plaintiff or its custodian/agent” on or before November 1, 2014, movant was not the plaintiff at the time the action was commenced. Moreover, as movant was not assigned the mortgage until November 11, 2015, there is no reason for the note to have been delivered to it a year earlier, when it had no involvement in this matter. Moreover, assuming THAT the assistant was referencing Ventures Trust as the plaintiff, and not movant, Ventures Trust was not assigned the mortgage until November 19, 2014, thereby raising the same question as to Ventures Trust which was not assigned the mortgage until several weeks later. Thus, the assistant’s statement does not establish definitively that either movant or Ventures Trust had possession of the note before the action was commenced.

If the assistant intended to state that movant had possession of the note on or before November 1, 2014, the statement contradicts her assertion that Ventures Trust had possession of the note in July 2015 when it commenced the action. As it may be inferred from Ventures Trust’s production of the note with its complaint in July 2015 that it then possessed the note, it is also reasonably inferred that the assistant’s statement is inaccurate or erroneous.

While the assistant states that her knowledge of the possession of the note was derived from a review of “plaintiff’s” business records, presumably those of movant and not Ventures Trust, the records are neither identified nor produced. (*See Bank of Am., N.A.*, 138 AD3d at 523-4 [while plaintiff’s assistant stated that upon review of business records, he knew that note was delivered to plaintiff before action commenced, records were neither provided nor identified]). The lack of detail supporting her statement is significant given the history of the note and mortgage and assignments, as within a year, the mortgage was assigned three times to three different companies, and as this action was commenced in the middle of that year. Thus, which

company possessed the note and when remains in issue. Moreover, the assistant is employed by neither movant nor Ventures Trust, but by movant's attorney-in-fact, which is a trustee of another company. Thus, the records reviewed, by either the assistant or the attorney-in-fact, by whom and when they were created and produced, and when they were received by the attorney-in-fact, are all relevant and unknown.

If the assistant meant that Ventures Trust had possession of the note as of November 2014, she fails to state that she has any personal knowledge of Venture Trust's business practices or how its business records are kept and maintained. Thus, to the extent that she alleges that the note had been delivered to Ventures Trust in November 2014, which date is not set forth in the complaint, she provides no basis for it and does not lay a foundation for the note's admission in evidence, thereby also failing to set forth a sufficient basis for her allegations based on the records. (*See Arch Bay Holdings, LLC v Albanese*, 146 AD3d 849 [2d Dept 2017] [where note was assigned to third party after action was commenced, affidavit of loan servicer for third party wherein assistant stated that based on review of loan servicer's records, note was in named-plaintiff's possession when action commenced, held insufficient as assistant did not state she was familiar with plaintiff's record-keeping and thus did not demonstrate admissibility of business records relied on by assistant]; *U.S. Bank Natl. Assn. v Handler*, 140 AD3d 948 [2d Dept 2016] [plaintiff did not demonstrate that note was delivered to it before commencing action, as assistant of plaintiff's servicing agent did not attest that he was personally familiar with plaintiff's record-keeping practices related to note]; *Aurora Loan Servs., LLC v Mercius*, 138 AD3d 650 [2d Dept 2016] [assistant did not state he was personally familiar with plaintiff's business practices and procedures]; compare *Bank of New York Mellon v Rutkowski*, AD3d , 2017 NY Slip Op

01749 [3d Dept 2017] [plaintiff satisfied *prima facie* burden of proving standing based on physical possession of note based on affidavit of assistant who stated that her employer physically possessed note until it was sent to plaintiff's counsel to commence litigation, and affirmations of two attorneys confirming that note was received by counsel and was currently in firm's possession]).

In any event, if the assistant was referencing Ventures Trust and not movant, then movant submits no evidence that the note was delivered to it after the commencement of the action, and she does not state that the note is currently in movant's possession. Her statement is thus insufficient to establish, *prima facie*, that movant is currently in possession of the note and that it has standing to maintain this action.

Movant has thus failed to meet its *prima facie* burden, and is thus not entitled to the requested relief other than amending the caption to substitute it as the named plaintiff. In light of this result, I need not address Tsimmer's defenses or counterclaim.

#### IV. CONCLUSION

Accordingly, it is hereby

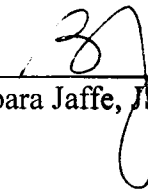
ORDERED, that the motion is granted solely to the extent of granting the motion to amend the caption to substitute itself for the named plaintiff; and it is further

ORDERED, that HMC Assets, LLC solely in its capacity as Separate Trustee of CAM XV Trust be substituted as plaintiff in the above-entitled action in the place and stead of the plaintiff, Ventures Trust 2013-I-H-R by MCM Capital Partners, LLC, Its Trustee, without prejudice to any proceedings heretofore had herein; it is further

ORDERED, that all papers, pleadings, and proceedings in the above-entitled action be amended by substituting the name of HMC Assets, LLC solely in its capacity as Separate Trustee of CAM XV Trust as plaintiff in the place and stead of said plaintiff, without prejudice to the proceedings heretofore had herein; it is further

ORDERED, that counsel for movant shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to amend their records to reflect such change in the caption herein

ENTER:

  
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Barbara Jaffe, JSC

DATED: March 23, 2017  
New York, New York