

**Licalzi v Wells Fargo Bank, N.A.**

2012 NY Slip Op 33763(U)

December 28, 2012

Supreme Court, Suffolk County

Docket Number: 38302/2010

Judge: Joseph Farneti

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**ORIGINAL**

SHORT FORM ORDER

INDEX NO. 38302/2010

SUPREME COURT - STATE OF NEW YORK  
**I.A.S. TERM, PART 37 - SUFFOLK COUNTY**

**PRESENT:**

**HON. JOSEPH FARNETI**  
**Acting Justice Supreme Court**

\_\_\_\_\_  
EDWARD A. LICALZI,

Plaintiff,

-against-

WELLS FARGO BANK, N.A. AS TRUSTEE  
FOR OPTION ONE MORTGAGE LOAN  
TRUST 2007-4 ASSET BACKED  
CERTIFICATES, SERIES 2007-4, ALAN  
WEINREB, PLLC, ALAN H. WEINREB, ESQ.,  
and LISA NORTON, ESQ.,

Defendants.  
\_\_\_\_\_

ORIG. RETURN DATE: JULY 28, 2011  
FINAL SUBMISSION DATE: MARCH 22, 2012  
MTN. SEQ. #: 001  
MOTION: MD

ORIG. RETURN DATE: MARCH 21, 2012  
FINAL SUBMISSION DATE: MARCH 22, 2012  
MTN. SEQ. #: 002  
MOTION: MG

**SELF-REPRESENTED PLAINTIFF:**

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**ATTORNEY FOR DEFENDANTS  
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WEINREB, ESQ. AND LISA NORTON, ESQ.:**

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**ATTORNEY FOR DEFENDANTS  
WELLS FARGO BANK, N.A. AS  
TRUSTEE FOR OPTION ONE MORTGAGE  
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CERTIFICATES, SERIES 2007-4:  
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NEW YORK, NEW YORK 10017  
212-471-6200**

Upon the following papers numbered 1 to 14 read on these motions \_\_\_\_\_  
**TO STRIKE COMPLAINT AND FOR SUMMARY JUDGMENT** \_\_\_\_\_

Notice of Motion and supporting papers 1-3; Affidavit in Opposition and supporting papers 4, 5; Affirmation in Further Support and supporting papers 6, 7; Notice of Motion and supporting papers 8-10; Memorandum of Law in Support 11; Affidavit in Opposition and supporting papers 12, 13; Reply Affirmation 14; it is,

**ORDERED** that this motion (seq. #001) by defendants, ALAN WEINREB, PLLC, ALAN H. WEINREB, ESQ. and LISA NORTON, ESQ. ("Attorney Defendants"), for an Order: (1) pursuant to CPLR 3126, striking plaintiff's complaint and awarding costs for plaintiff's failure to provide discovery pursuant to two prior Court Orders; or, in the alternative (2) pursuant to CPLR 3124, compelling the production of plaintiff's outstanding written discovery, is hereby **DENIED** as moot, in light of the Court's ruling on the co-defendant's instant motion for summary judgment; and it is further

**ORDERED** that this motion (seq. #002) by defendant, WELLS FARGO BANK, N.A. AS TRUSTEE FOR OPTION ONE MORTGAGE LOAN TRUST 2007-4 ASSET BACKED CERTIFICATES, SERIES 2007-4 ("Wells Fargo"), for an Order, pursuant to CPLR 3212, dismissing plaintiff's complaint in its entirety, is hereby **GRANTED**, and plaintiff's complaint is dismissed.

The Court has received opposition to both applications at bar from plaintiff. The Court has also received an unauthorized sur-reply from plaintiff in connection with Wells Fargo's motion for summary judgment, which has not been considered by the Court in rendering the within decision and Order (see CPLR 2214).

This action arises from a prior foreclosure action commenced against plaintiff on or about August 24, 2009, in which the Attorney Defendants represented Wells Fargo as plaintiff ("foreclosure action"). In the foreclosure action, Wells Fargo alleged that as of April 1, 2009, plaintiff failed to pay the mortgage in connection with his investment property located at 103 Old Field Road, East Setauket, New York ("Property"). According to the foreclosure complaint, on February 23, 2007, in consideration for a loan in the amount of \$560,000, plaintiff executed a note and mortgage relative to the Property in favor of Option One Mortgage Corporation ("Option One"). Wells Fargo informs the Court that on or about April 1, 2007, the subject loan was pooled and securitized pursuant to a Pooling and Servicing Agreement ("PSA") for the Option One Mortgage Loan Trust 2007-4 Asset Backed Certificates, Series 2007-4, entered by and between Option One as servicer, Option One Mortgage Acceptance Corporation as depositor, and Wells Fargo as trustee and custodian. Thereafter, plaintiff's loan was modified by Loan Modification Agreement dated March 1, 2009. By Order dated October 27, 2010 (Rebolini, J.), the foreclosure action was discontinued upon motion of Wells Fargo and the lis pendens was cancelled.

On October 19, 2010, plaintiff filed the instant action by summons with notice and verified complaint. Plaintiff alleges three causes of action herein:

(1) that the foreclosure action was fraudulent; (2) that the foreclosure action was frivolous; and (3) for relief from the entire mortgage debt. Plaintiff claims that Wells Fargo failed to demonstrate that it held the note and mortgage at commencement of the foreclosure action, or that plaintiff owed the debt Wells Fargo was trying to enforce. Plaintiff also challenges Wells Fargo's proffered reason for seeking a discontinuance, to wit: "due to an error in documents relating to title."

The Attorney Defendants have now filed the instant application to strike plaintiff's complaint or to compel, and Wells Fargo has filed the instant application for summary judgment. The Court will initially address Wells Fargo's motion.

Wells Fargo alleges that pursuant to the PSA, it held the subject note and mortgage as of April 19, 2007. As such, Wells Fargo argues that it had standing to commence the foreclosure action, and was legally within its rights to bring such an action based upon plaintiff's default in or about April of 2009. Consequently, Wells Fargo seeks summary judgment herein dismissing plaintiff's complaint.

On a motion for summary judgment, the test to be applied is whether or not triable issues of fact exist or whether on the proof submitted a court may grant judgment to a party as a matter of law (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Akseizer v Kramer*, 265 AD2d 356 [1999]). It is well-settled that a proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*Dempster v Overview Equities, Inc.*, 4 AD3d 495 [2004]; *Washington v Community Mut. Sav. Bank*, 308 AD2d 444 [2003]; *Tessier v N.Y. City Health and Hosps. Corp.*, 177 AD2d 626 [1991]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Gong v Joni*, 294 AD2d 648 [2002]; *Romano v St. Vincent's Med. Ctr.*, 178 AD2d 467 [1991]; *Commrs. of the State Ins. Fund v Photocircuits Corp.*, 2 Misc 3d 300 [Sup Ct, NY County 2003]).

In the case at bar, the Court finds that Wells Fargo has made an initial *prima facie* showing of entitlement to judgment as a matter of law dismissing plaintiff's complaint (see e.g. *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Andre v Pomeroy*, 35 NY2d 361, *supra*; *Rodriguez v N.Y. City Transit*

*Auth.*, 286 AD2d 680 [2001]). Wells Fargo has produced, among other things, copies of the subject note with allonge, mortgage, and relevant pages of the PSA, and has indicated that its counsel is in possession of the originals. In order to prove standing a plaintiff must demonstrate that it was the owner of the note and mortgage at the time it commenced the foreclosure action (see e.g. *Fannie Mae v Youkelsone*, 303 AD2d 546 [2003]). Although plaintiff argues that there are irregularities in the assignments recorded with respect to his loan, it is well-settled that “[t]here is no legal need of a recording of the assignment of a mortgage, nor any for an assignment in writing. A good assignment of a mortgage is made by delivery only” (*Fryer v Rockefeller*, 63 NY 268 [1875]; see *Flyer v Sullivan*, 284 AD 697 [1954]). Therefore, the Court concludes that Wells Fargo had standing to initiate the foreclosure action when it physically received the note and mortgage in or around the time that the PSA was executed. Based upon the foregoing, it cannot be said that the foreclosure action was frivolous within the meaning of 22 NYCRR § 130-1.1 (c).

The burden then shifted to plaintiff to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v Prospect Hosp.*, 68 NY2d 320, *supra*). The Court finds that plaintiff has failed to meet his burden. Plaintiff has not produced admissible evidence showing that Wells Fargo was not the owner of the note and mortgage at commencement of the foreclosure action, or that he was not in default under the loan.

Accordingly, this motion by Wells Fargo for summary judgment is **GRANTED**, and plaintiff’s complaint is hereby dismissed in its entirety. Thus, the Attorney Defendant’s motion to strike plaintiff’s complaint or to compel is **DENIED** as moot.

The foregoing constitutes the decision and Order of the Court.

Dated: December 28, 2012

  
HON. JOSEPH FARNETI  
Acting Justice Supreme Court

FINAL DISPOSITION

NON-FINAL DISPOSITION