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SHORT FORM ORDER

INDEX No. 09-34089

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq. # 001 - MD

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CITIBANK, N.A., as trustee for CERTIFICATE HOLDERS OF STRUCTURED ASSET MORTGAGE INVESTMENTS II TRUST 2007-AR6, PASS-THROUGH CERTIFICATES, SERIES 2007-AR6
800 State Highway
121 Bypass
Lewisville, TX 75067

Plaintiffs,

- against -

THOMAS HERMAN, BARBARA HERMAN, PEOPLE OF THE STATE OF NEW YORK, JOHN DOE (Said name being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises,

Defendants.

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STINE & ASSOCIATES, P.C.
Attorney for Plaintiff
187 East Main Street
Huntington, New York 11743

WESTERMAN BALL EDERER MILLER & SHARFSTEIN, LLP
Attorney for Defendants Herman
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Uniondale, New York 11556

Upon the following papers numbered 1 to 10 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 5 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 6 - 8 ; Replying Affidavits and supporting papers 9 - 10 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Thomas Herman and Barbara Herman for summary judgment dismissing the complaint pursuant to CPLR 3212, canceling the notice of pendency pursuant to CPLR 6514, and striking the plaintiff's complaint with prejudice pursuant to CPLR 3126 is denied in its entirety.

On May 24, 2007, defendants Thomas Herman and Barbara Herman (collectively the "Hermans"), borrowed $910,000 from American Brokers Conduit ("ABC") executing a note secured by a mortgage on the property located at 408 River Avenue in Patchogue, New York (the "Property"). The mortgage, recorded on June 29, 2007 in the Suffolk County Clerk's office, reflects that Mortgage Electronic Registration Systems, Inc. ("MERS") is the nominee for ABC.

The Hermans defaulted on the note by failing to make the monthly installments due on March 1, 2009 and thereafter. On August 25, 2009, MERS assigned the mortgage to the plaintiff, and on August 27, 2009, the plaintiff filed a notice of pendency and commenced the instant foreclosure action. The Hermans interposed a verified answer denying that they defaulted in making payments, and asserted affirmative defenses, including lack of standing. On October 22, 2009, the Request for Judicial Intervention was filed, and the case was referred to the foreclosure part where settlement conferences were held from December 14, 2009 through March 17, 2011. Thus, there has been compliance with CPLR 3408. Thereafter, on November 11, 2009 the Hermans served plaintiff with interrogatories and document demands to which the plaintiff has not responded.

The Hermans now move for summary dismissal of the complaint based on their seventh affirmative defense that the plaintiff lacks standing to bring this action. The Hermans also move to cancel the notice of pendency pursuant to CPLR 6514 on the grounds that the plaintiff lacks standing, and to strike the complaint pursuant to CPLR 3126 on the grounds that the plaintiff has failed, and refuses to respond to their discovery demands.

Where, as here, standing is challenged by the defendants, the plaintiff must establish that it has standing to be entitled to any relief requested in the complaint (*see* ***U.S. Bank Nat. Assn. v Dellarmo***, 94 AD3d 746, 942 NYS2d 122 [2d Dept 2012]; ***Bank of New York v Silverberg***, 86 AD3d 280, 926 NYS2d 532 [2d Dept 2011]; ***Wells Fargo Bank Minnesota v Mastropaolo***, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). "A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note, "either by physical delivery or execution of a written assignment prior to the commencement of the action" (***Deutsche Bank Nat. Trust Co. v Rivas***, 95 AD3d 1061, 1061-1062, 945 NYS2d 328 [2d Dept 2012], quoting ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 108, 923 NYS2d 609 [2d Dept 2011]; *see* ***HSBC Bank USA v Hernandez***, 92 AD3d 843, 939 NYS2d 120 [2d Dept 2012]). "An assignment of the mortgage without an assignment of the underlying note or bond is a nullity, and no interest is acquired by it" (***HSBC Bank USA v Hernandez***, *supra* at 843; *see* ***Bank of New York v Silverberg***, *supra*). However, a written assignment of the underlying note or the physical delivery of the note prior to commencement of the foreclosure action is sufficient to transfer the obligation and vest standing in the plaintiff, since the mortgage passes with the debt that is evidenced by the note as an inseparable incident thereto (*see* ***U.S. Bank, NA v Sharif***, 89 AD3d 723, 933 NYS2d 293

[2d Dept 2011]; ***Bank of New York v Silverberg***, *supra*; ***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, 753, 890 NYS2d 578 [2d Dept 2009]).

Where a note is payable to order, it is negotiated by delivery with any necessary indorsement (McKinney's Cons Laws of NY, Book 62½, UCC § 3-202[1]). The indorsement must be written on the note "or on a paper so firmly affixed thereto as to become a part thereof" (*id.* at § 3-202[2]). "An indorsement in blank specifies no particular indorsee and may consist of a mere signature...and becomes payable to bearer and may be negotiated by delivery alone until specifically indorsed" (McKinney's Cons Laws of NY, Book 62½, UCC § 3-204[2]).

In support of their motion, the Hermans have submitted, *inter alia*, an affidavit from Barbara Herman wherein she acknowledges that she and her husband defendant Thomas Herman executed, in favor of ABC, a note secured by a mortgage on their Property, but asserts that although she has the mortgage document, she is unable to locate the note. Nevertheless, counsel for the Hermans has attached to the motion papers a copy of the note[1] and the mortgage, as well as the Assignment of Mortgage from MERS to the plaintiff which was recorded in the Suffolk County Clerk's office on September 28, 2009 (the "Assignment"). The Hermans argue, although the Assignment provides that MERS, as nominee for ABC, assigns to plaintiff "TO HAVE AND TO HOLD the said Mortgage and Note..." MERS was never the holder, in possession of, or the assignee of the underlying note. Thus, the Hermans maintain, MERS assigned the mortgage to plaintiff but not the note, which is insufficient to confer standing upon the plaintiff to bring this action.

It is well-settled that to grant a motion for summary judgment, there must be no issues of material fact, and if such an issue exists, "or where the issue is arguable" then the motion must be denied (***Sillman v Twentieth Century-Fox Film Corp.*** 3 NY2d 395, 404, 165 NYS2d 498 [1957]; ***Rivers v Birnbaum***,102 AD3d 26, 953 NYS2d 232 [2d Dept 2012]; ***Celardo v Bell***, 222 AD2d 647, 635 NYS2d 85 [2d Dept 1995]). Here, affording plaintiff as the non-movant the benefit of every favorable inference as required on a motion for summary judgment, the branch of the motion to dismiss based on standing must be denied.

In opposition, the plaintiff has proffered the pleadings, the affidavits of service for the summons and complaint and the requisite foreclosure notices required by RPAPL §§ 1303, 1304 and 1320. The plaintiff has also proffered a copy of the note indorsed in blank by ABC. However, the indorsement in blank is undated, and the plaintiff has failed to establish that the note was physically delivered to it prior to the commencement of the action. Nevertheless, it is not clear whether the indorsement was effectuated prior to the commencement of this action, as the copy of the note submitted by the Hermans does not contain the indorsement (*see* ***Deutsche Bank National Trust Co. v Haller***, 100 AD3d 680, 954 NYS2d 551 [2d Dept 2012]; ***Deutsche Bank National Trust Co. v Barnett***, 88 AD3d 636, 931 NYS2d 630[2d Dept 2011]). Therefore, the Hermans have failed to establish, prima facie, "that the plaintiff lacked standing to commence this action inasmuch as there are issues of fact as to whether the plaintiff

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[1]There is no indication in the moving papers as to whether the note proffered by the Hermans was served upon them by the plaintiff.

had standing by virtue of 'physical delivery of the note prior to the commencement of the foreclosure action'" (***U.S Bank National Assn. v Pia***, 73 AD3d 752, 753, 901 NYS2d 104 [2d Dept 2010], quoting ***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, 754, 890 NYS2d 578 [2d Dept 2009]).

The branch of the motion to strike the plaintiff's complaint is also denied. A court has the discretion to strike a pleading against a party who "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds should have been disclosed" (CPLR 3126; *see* ***Tos v Jackson Heights Care Ctr., LLC***, 91 AD3d 943, 937 NYS2d 629 [2d Dept 2012]; ***Dank v Sears Holding Mgt. Corp.***, 69 AD3d 557, 892 NYS2d 510 [2d Dept 2010]). A party seeking the drastic sanction of striking a pleading has the initial burden of coming forward with evidence clearly showing that the failure to comply with disclosure orders or discovery demands was willful, contumacious or in bad faith (*see* ***Conciatori v Port Auth. of N.Y. & N.J.***, 46 AD3d 501, 846 NYS2d 659 [2d Dept 2007]; ***Shapiro v Kurtzman***, 32 AD3d 508, 820 NYS2d 311 [2d Dept 2006]). Willful and contumacious conduct may be inferred from a party's repeated failure to respond to discovery demands or to comply with disclosure orders, coupled with inadequate excuses for such default (*see* ***Tos v Jackson HeightsCare Ctr., LLC***, *supra*; ***Dank v Sears Holding Mgt. Corp.***, *supra*).

Here, counsel for the Hermans sets forth the good faith efforts made to resolve the discovery issues with plaintiff's predecessor counsel, the law firm of Steven J. Baum, P.C. (the "Baum firm"), and plaintiff's current counsel, all of which it is claimed were futile. Specifically, the Hermans' counsel asserts that a letter dated January 23, 2012 mailed to the Baum firm, and letters dated March 5 and March 26, 2012 mailed to the plaintiff's current counsel, advised that responses had not been received to the November 1, 2011 interrogatories and document demands; the letters went unanswered and as of the filing of the instant motion, no response had been received.

In opposition, the plaintiff's counsel points out that on November 20, 2011, the Baum firm announced its dissolution, effective February 20, 2012, and the case was not transferred to current counsel until February 2, 2012 as evidenced by the Consent to Change Attorney notification filed with the Suffolk County Clerk's office. Moreover, plaintiff's counsel asserts, the Baum firm did correspond with Hermans' counsel on October 27, 2011 in response to a Notice to Take Deposition Upon Oral Examination dated October 24, 2011. The Baum firm advised the Hermans' counsel that it and the plaintiff were unavailable to attend a deposition that had been scheduled for January 24, 2012, and requested Hermans' counsel to contact the Baum firm to discuss available dates.

Additionally, plaintiff's counsel cites to NYCRR § 202.12-a (c)(7) which provides that motions shall be held in abeyance while foreclosure settlement conferences are being held. Thus, counsel asserts, the decision was made not to make a motion during the 15-month period the case was in the foreclosure part.

The explanation of plaintiff's counsel, which in essence amounts to "law office failure" as documents have not been produced since the case was transferred to the current firm in February 2012 and the instant motion was originally made returnable in September 2012, under the circumstances, is accepted as a reasonable excuse. There is no evidence that plaintiff's conduct was willful, contumacious or a result of bad faith (*see* ***Smyth v Getty Petroleum Marketing, Inc.***, 103 AD3d 790, 959 NYS2d 543

[2d Dept 2013; ***Wagner v 119 Metro, LLC***, 59 AD3d 531, 873 NYS2d 117 [2d Dept 2009]; ***Halikiopoulos v New York Hosp. Med. Ctr. of Queens***, 284 AD2d 373, 725 NYS2d 895 [2d Dept 2001]). Moreover, in light of the strong public policy of resolving cases on the merits and the lack of any demonstration of prejudice to the Hermans caused by the delay, the drastic remedy of striking the complaint is not warranted (*see* ***Smyth v Getty Petroleum Marketing, Inc.***, *supra*; ***Halikiopoulos v New York Hosp. Med. Ctr. of Queens***, *supra*).

Accordingly, the motion is denied.

As a preliminary conference has not been held in this action, the parties' counsel are directed to appear at 9:30 a.m. on June 19, 2013, for such a conference.

Dated: April 23, 2013

HON. JOSEPH C. PASTORESSA, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION