

<b>GMAC Mtge., LLC v Paez</b>
2013 NY Slip Op 31003(U)
May 2, 2013
Supreme Court, Queens County
Docket Number: 14363/11
Judge: Howard G. Lane
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**MEMORANDUM**

SUPREME COURT - QUEENS COUNTY  
IA PART 6

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GMAC MORTGAGE, LLC,

Plaintiff,

-against-

FAUSTO PAEZ, et al.,

Defendants.  
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BY: **LANE, J.**

DATED: May 2, 2013

INDEX NO.: 14363/11

MOTION DATE: March 8, 2013

MOTION CAL. NO.: 36

MOTION SEQUENCE NO.: 1

The motion by plaintiff for an order (i) pursuant to CPLR 3212 awarding GMAC summary judgment on its foreclosure cause of action against defendant Fausto Paez ("Borrower"); (ii) dismissing Borrower's affirmative defenses and counterclaims; (iii) granting default judgment against defendants Mortgage Electronic Registration Systems, Inc. as nominee for GreenPoint Mortgage Funding, Inc., New York City Environmental Control Board, New York City Parking Violations Bureau and New York City Transit Adjudication Bureau, Maria Vargas, Rose Vargas, Romulo Vargas, Joel Duran, Manny Duran, Marta Duran, Maite Morillo and Maria Paez, sued herein as "John Doe No. 1" through "John Doe No. 8"; (iv) amending the caption to delete the remaining Joe Doe and Jane Doe defendants and to add Maria Vargas, Rose Vargas, Romulo Vargas, Joel Duran, Manny Duran, Marta Duran, Maite Morillo and Maria Paez as defendants; (v) appointing a referee to compute the

amount due to GMAC and cross motion by defendant Fausto Paez to dismiss the action in its entirety are hereby decided as follows:

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (Andre v. Pomeroy, 32 NY2d 361 [1974]; Kwong On Bank, Ltd. v. Montrose Knitwear Corp., 74 AD2d 768 [2d Dept 1980]; Crowley Milk Co. v. Klein, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (Newin Corp. v. Hartford Acc & Indem. Co., 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (Bennicasa v. Garrubo, 141 AD2d 636 [2d Dept 1988]; Weiss v. Gaifield, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]; Pizzi by Pizzi v. Bradley's Div. of Stop & Shop, Inc., 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (Gervasio v. DiNapoli, 134 AD2d 235 [2d Dept 1987]). The role of

the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (Knepka v. Tallman, 278 AD2d 811 [4<sup>th</sup> Dept 2000]).

Plaintiff established a prima facie entitlement to foreclose on a mortgage, by demonstrating the existence of the mortgage and note, ownership of the mortgage, and the defendant, Fausto Paez's default in payment (see, Campaign v. Barbra, 23 AD3d 327 [2d Dept 2005]; First Trust National Association v. Pinter, 264 AD2d 464 [2d Dept 1999]).

Plaintiff established a prima facie case that the first affirmative defense of lack of jurisdiction should be dismissed. The first affirmative defense is that plaintiff failed to properly serve defendant, Paez. Plaintiff presented prima facie proof that said defendant was properly served via affidavits of service. A properly executed affidavit of service created a presumption of mailing by plaintiff and of receipt by defendant (see, Kihl v. Pfeffer, 94 NY2d 118 [NY 1999] [stating that a mere denial of receipt is not enough to rebut the presumption]). As defendant Paez does not present any opposition on this point, this defense shall be dismissed.

Plaintiff established a prima facie case that the second affirmative defense of failure to state a cause of action should be dismissed. The second affirmative defense is failure to state a cause of action upon which relief may be granted. This defense fails to satisfy the requirements of CPLR 3013 in that no facts

are pled at all and defendant Paez presents no opposition on this point. As such, the defense shall be dismissed.

Plaintiff established a prima facie case that the third affirmative defense of non compliance with RPAPL 1303, 1304 and 1306 Notice provisions should be dismissed. Plaintiff submitted evidence which demonstrates that it has complied with each of the provisions of the Real Property Actions and Proceedings Law cited herein. The plaintiff has established that it mailed defendant Fausto Paez 90-day pre-foreclosure notices in compliance with section 1304, the summons and complaint were served along with notices on colored paper in compliance with 1303, and the Proof of Filing statements establish compliance with 1306. As defendant Paez does not present any opposition on this point, this defense shall be dismissed.

Plaintiff established a prima facie case that the fourth affirmative defense of lack of standing should be dismissed. Defendant's fourth affirmative defense is that the plaintiff "has failed to properly and adequately set forth the means and timing by which the plaintiff allegedly acquired proper corporative possessive rights in and to the mortgage and note herein". Plaintiff presents prima facie evidence via the affidavit of Candace Williams, a Senior Litigation Analyst with plaintiff wherein she avers that GMAC was in possession of the Note at the time the action was commenced. With the blank endorsement and ultimate transfer to plaintiff, plaintiff became the proper holder

of the promissory note (MERS, Inc. v. Coakley, 41 AD3d 674 [2d Dept 2007]). Therefore, plaintiff possesses a security interest and may maintain the foreclosure action.

Defendant Paez fails to raise any triable issues of fact on this point. As such, this defense shall be dismissed.

Plaintiff established a prima facie case that the fifth affirmative defense of violation of state banking law should be dismissed. Defendant's fifth affirmative defense is that the plaintiff failed to adequately comply with RPAPL 1304 and 1306 and the NYS banking Department requirements, by failing to attach copies of the necessary documents. As stated previously, plaintiff established a prima facie case in support of these provisions. As defendant Paez does not present any opposition on this point, this defense shall be dismissed.

Via the cross motion, defendant Paez fails to raise any triable issues of fact or present a prima facie case that the plaintiff does not have standing. The Court finds defendant Paez's argument that there is nothing in the record to establish ownership of the Note prior to the commencement of the action to be unavailing, as the Affidavit and Supplemental Affidavits of Candace Williams establish that: GreenPoint endorsed the Note in blank and physically delivered it to GMAC's custodian, U.S. Bank Global Trust Services on July 10, 2006 and the Note has remained in possession of Global Trust Services, as custodian for GMAC from July 10, 2006 to present (see, MERS, Inc. v. Coakley, 41 AD3d 674

[2d Dept 2007]).

Plaintiff established a prima facie case that the counterclaim of overcharges should be dismissed. A challenge to the amount due on a mortgage loan is not a defense to summary judgment in a foreclosure action (Long Island Savings Bank of Centereach, F.S.B. v. Denskensohn, 222 AD2d 659 [2d Dept 1995]).

Defendant Paez fails to raise a triable issue of fact on this point, and as such, this defense shall be dismissed. A challenge to the amount due on a mortgage loan is not a defense to summary judgment in a foreclosure action (Long Island Savings Bank of Centereach, F.S.B. v. Denskensohn, 222 AD2d 659 [2d Dept 1995])

That branch of the motion seeking to amend the caption is granted. Plaintiff demonstrated that the amendment of the caption is warranted and that defendants would not be prejudiced (see, Alaska Seaboard Partners, LP v. Low, 294 AD2d 318 [2d Dept 2002]).

The amended caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS

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GMAC MORTGAGE, LLC,  
Plaintiff,

Index No. 14363/11

-against-

FAUSTO PAEZ, MORTGAGE ELECTRONIC

REGISTRATION SYSTEMS, INC., as Nominee  
for GREENPOINT MORTGAGE FUNDING, INC.,  
NEW YORK CITY ENVIRONMENTAL CONTROL  
BOARD, NEW YORK CITY PARKING VIOLATIONS  
BUREAU and NEW YORK CITY TRANSIT  
ADJUDICATION BUREAU,  
Defendants.

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That branch of plaintiff's motion granting default judgment against defendants Mortgage Electronic Registration Systems, Inc. as nominee for GreenPoint Mortgage Funding, Inc., New York City Environmental Control Board, New York City Parking Violations Bureau, New York City Transit Adjudication Bureau, Maria Vargas, Rose Vargas, Romulo Vargas, Joel Duran, Manny Duran, Marta Duran, Maite Morillo and Maria Paez, sued herein as "John Doe No. 1" through "John Doe No. 8" is hereby granted on default. Said defendants have failed to appear or answer at the calendar call of this matter. Plaintiff established a prima facie entitlement to foreclose on a mortgage by demonstrating the existence of the mortgage and note, ownership of the mortgage, and the defendants' default in payment (see, Campaign v. Barbra, 23 AD3d 327 [2d Dept 2005]).

Settle order.

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Howard G. Lane, J.S.C.