

**BAC Home Loans Serv. v Sach**

2013 NY Slip Op 32692(U)

October 24, 2013

Sup Ct, Richmond County

Docket Number: 131687/09

Judge: Thomas P. Aliotta

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND**

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BAC Home Loans Servicing, LP fka Countrywide Home  
Loans Servicing, LP,

Plaintiff,

TP-12  
Present:  
Hon. Thomas P. Aliotta

-against-

MARY ELLEN SACH, ROBERT SACH,  
NEW YORK CITY ENVIRONMENTAL CONTROL  
BOARD, NEW YORK CITY PARKING VIOLATIONS  
BUREAU, and

**DECISION**

Index No. 131687/09  
Motion No. 1727-002  
3030-003

“JOHN DOE #1”, through “JOHN DOE” #10”,  
the last ten names being fictitious and unknown to  
plaintiff, the persons or parties intended being  
the persons or parties, if any, having or claiming an  
an interest in or lien upon the Mortgage premises  
described in the Complaint,

Defendants.

-----x  
The following papers numbered 1 to 4 were fully submitted on the 11<sup>th</sup> day of September, 2013:

Pages  
Numbered

Notice of Motion for Summary Judgment and Related Relief  
by Plaintiff, with Supporting Papers, Exhibits and Memorandum of Law  
(dated May 17, 2013).....1

Notice of Cross Motion for Summary Judgment  
by Defendants Mary Ellen Sach<sup>1</sup> and Robert Sach,  
with Supporting Papers and Exhibits  
(dated August 12, 2013).....2

Reply Affidavit in Further Support of Plaintiff’s Motion  
for Summary Judgment and in Opposition to Cross Motion,  
with Supporting Papers, Exhibits and Memorandum of Law  
(dated September 4, 2013).....3

Reply Affirmation in Support of Cross Motion  
by Defendants Mary Ellen Sach and Robert Sach  
(dated September 10, 2013).....4

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Upon the foregoing papers, the motion for, inter alia, summary judgment and an order of  
reference is granted; the cross motion is denied.

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<sup>1</sup> Defendant Mary Ellen Sach, Esq. represents herself and her husband in this action.

This is an action to foreclose a mortgage in which plaintiff claims that defendants Mary Ellen Sach and Robert Sach (hereinafter “defendants”) are in default as a result of their having failed to make the required payments since October 1, 2008. The action was commenced by the filing and service of a Summons, Complaint and Notice of Pendency on or about October 15, 2009 (*see* Plaintiff’s Exhibit “1”). A Verified Answer with Counterclaims was interposed by defendants on or about October 29, 2009 (*see* Plaintiff’s Exhibit “5”) in response to which plaintiff interposed a “Verified Reply” dated November 11, 2009 (*see* Plaintiff’s Exhibit “6”). The Notice of Pendency was subsequently extended to September 23, 2015 in an Order entered on February 8, 2013 (*see* Plaintiff’s Exhibit “4”). Various discovery demands have been served by defendants over the course of the last three years with which plaintiff has substantially complied. In addition, defendants have been afforded several opportunities to modify their loan, but no agreement has been reached. The case was conferenced unsuccessfully in this Court’s Foreclosure Settlement Part on May 26, 2010. Thereafter, on or about March 9, 2012, defendants were mailed an application to be considered for an internal loan modification, which they failed to complete and return (*see* Affirmation of Suzanne M. Berger, Esq., paras 14-15). Subsequent to the filing of this motion, defendants served an additional discovery demand: for depositions.

It is alleged in the complaint that on July 28, 2007, defendants executed a note in the principal amount of \$345,100.00 to Homebridge Mortgage Bankers Corp d/b/a Reinance.com (hereinafter “Homebridge”) (*see* Plaintiff’s Exhibit “1”), which was secured by a mortgage on the premises known as 124 Keegans Lane, Staten Island, New York. The mortgage was executed and delivered to Mortgage Electronic Registration Systems, Inc as Nominee for Homebridge on July 28, 2007 (*see* Plaintiff’s Exhibit “2”), and was assigned to plaintiff BAC Home Loans Servicing, L.P. (hereinafter “BAC”) on September 16, 2009 (*see* Plaintiff’s Exhibit “3”; *see also* Affidavit of Michele C. Sexton, para 6).

In support of the motion, Michele C. Sexton, Assistant Vice President of Bank of America,

N.A., the successor by merger to BAC, attests on the basis of the records maintained in the ordinary course of her employer's business that the subject "[n]ote was indorsed by Homebridge to Countrywide Bank, FSB... and then... to Countrywide Home Loans, Inc., and then... to Countrywide Home loans Servicing, LP, [the] predecessor to [p]laintiff herein, and finally... [was endorsed] "in blank" (see Affidavit of Michele C. Sexton, para 5). On or about April 27, 2009, the last named assignee of the note, Countrywide Home Loans Servicing LP changed its name to BAC (*id.* at 7; *see also* Plaintiff's Exhibit "4").<sup>2</sup> Thereafter, effective July 1, 2011, BAC merged into Bank of America, N.A. (*id.*).

In addition, Ms. Sexton attests that a counseling notice was sent to defendants on May 7, 2008, and on October 14, 2008, defendants entered into a Special Forbearance Agreement with plaintiff (*id.* at 8-9; *see also* Plaintiff's Exhibit "6"). Later, *i.e.*, in December of 2008, defendants sought a loan modification, but in March of 2009, it was determined that they were ineligible (*id.* at 11). Plaintiff mailed a "notice of intent to accelerate" the loan to defendants at the mortgaged premises on May 21, 2009 (*id.* at 12; *see also* Plaintiff's Exhibit "8").

In further support of the motion, Danielle Burnette, another Assistant Vice President of Bank of America, N.A., has submitted an affidavit to which she has attached copies of defendants' loan payment history, as well as a copy of a letter from defendants addressed to "Countrywide Home Loans" on March 30, 2009 regarding a cancelled check. Although the substance of the letter is immaterial to this motion, plaintiff contends that the fact of this correspondence demonstrates defendants' acknowledgment of "Countrywide Home Loans" as the mortgagee prior to its name change to BAC, and prior to the merger with Bank of America, N.A. (*see* Plaintiff's Exhibits "A", "B" annexed to Burnette Affidavit).

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<sup>2</sup>As was previously indicated, this action was commenced by filing on or about October 29, 2009, after plaintiff's name change and prior to its merger with Bank of America, N.A. Hence, at the time of commencement, plaintiff was the assignee of both the note and mortgage.

In the present application, dated May 17, 2013, plaintiff moves pursuant to CPLR 3212 for an order (1) directing the entry of summary judgment in its favor; (2) appointing a referee to compute the amount due; (3) striking the answer and dismissing the affirmative defenses and counterclaims of the answering defendants; and (4) amending the caption to (a) substitute Bank of America, N.A. in the place and stead of BAC to properly reflect the name of the current holder/owner of the subject note and mortgage and (b) amending the caption to strike out the names "John Doe #1" through "John Doe #10", who are not necessary parties to the action. Additionally, plaintiff requests the entry of a default judgment against defendants New York City Environmental Control Board, New York City Parking Violations Bureau, and New York City Transit Adjudication Bureau.

The motion is granted and the cross motion is denied.

Entitlement to a judgment of foreclosure and sale may be established, as a matter of law, where the mortgagee produces both the mortgage and the unpaid note, together with evidence of the mortgagor's default (*see Mishal v. Fiduciary Holdings, LLC*, \_\_AD3d\_\_, 2013 NY Slip Op 5884 [2<sup>nd</sup> Dept]; *Soloman v. Burden*, 104 AD3d 839 [2<sup>nd</sup> Dept 2013]; *Citibank, NA v. Van Brunt Props, LLC*, 95 AD3d 1158, 1159 [2<sup>nd</sup> Dept 2012]). However, where, as here, the answer includes a challenge to plaintiff's standing to bring the action, the latter must also be established in order to succeed (*see Homecomings Fin, LLC v. Guldi*, 108 AD3d 506, 508 [2<sup>nd</sup> Dept 2013]; *Deutsche Bank Natl Trust Co v. Haller*, 100 AD3d 680, 682 [2<sup>nd</sup> Dept 2012]; *US Bank NA v. Collymore*, 68 AD3d 752, 753 [2<sup>nd</sup> Dept 2009]).

In this case, plaintiff's moving papers are sufficient to establish its prima facie right to summary judgment through the submission of copies of the mortgage, the unpaid note and an affidavit attesting to defendants' default in payment. In addition, plaintiff has demonstrated its standing to prosecute the action by submitting an affidavit from an assistant vice president detailing the mechanics of the assignment of the note and mortgage to plaintiff prior to the commencement

of this action (*cf. Homecomings Fin, LLC v. Guldi*, 108 AD3d at 508; *HSBC Bank USA v. Hernandez*, 92 AD3d 843 [2<sup>nd</sup> Dept 2012]). It is well established that a plaintiff has standing to commence a foreclosure action where it is the holder or assignee of both the note and mortgage at the time the action is commenced (*see Deutsche Bank Natl Trust Co v. Spanos*, 102 AD3d 909, 911 [2<sup>nd</sup> Dept 2013]; *HSBC Bank USA v. Hernandez*, 92 AD3d at 843-844).

In their cross motion for summary judgment, defendants have failed to produce any competent evidence sufficient to either to show their entitlement to judgment as a matter of law, or raise a triable issue of fact as to any bona fide defense (*see Soloman v. Burden*, 104 AD3d at 839; *Citibank, NA v. Van Brunt Props, LLC*, 95 AD3d at 1159; *cf. Valiotis v. Bekas*, 106 AD3d 992 [2<sup>nd</sup> Dept 2013]). In any event, the affirmations submitted by defendant Mary Ellen Sach, Esq. in opposition to plaintiff's motion and in support of defendants' cross motion are of no probative value, since she is a party to the action and therefore barred from proceeding by way of an affirmation (*see CPLR 2106; Jackson v. Bader*, 74 AD2d 621, 622 [2<sup>nd</sup> Dept 1980]).

Finally, the affidavits and documents submitted by plaintiff establish that it has merged with the Bank of America, N.A., which is now the real plaintiff-in-interest. Under these circumstances, the caption should be amended to substitute the Bank of America, N.A. as plaintiff in the place and stead of BAC (*see CPLR 1018, 3025[b]; Citibank, NA v. Van Brunt Props, LLC*, 95 AD3d at 1160).

Lastly, plaintiff moves for a default judgment against the remaining defendants. In this regard, the affidavits of service reflect that the New York City Environmental Control Board and New York City Parking Violations Bureau were served with process on October 6, 2009, and that the New York City Transit Adjudication Bureau was served with process on October 7, 2009 (*see Plaintiff's Exhibit "2"*). Each of these defendants has yet to answer, and their time to do so has expired (*see CPLR 320[a]*).

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment should be granted and the cross motion by defendants Mary Ellen Sach and Robert Sach denied.

Order signed herewith.

ENTER,

/s/

Hon. Thomas P .Aliotta

J.S.C.

DATED: October 24, 2013