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SHORT FORM ORDER

INDEX NO. 2009-22839

SUPREME COURT : STATE OF NEW YORK
I.A.S. PART XXI : SUFFOLK COUNTY

COPY

PRESENT:

HON. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

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AUROA LOAN SERVICES LLC,

Plaintiff

-against-

MANFRED SCHELLER, CHERYL MENDENHALL, et. al.,

Defendants

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Motion Sequence: 002-MG
Original Return Date: February 26, 2014
Final Submission Date: April 30, 2014

Motion Sequence: 003-XMD
Original Return Date: April 30, 2014
Final Submission Date: April 30, 2014

ORDER

Before the Court is a written application by Defendants MANFRED SCHELLER and CHERYL MENDENHALL wherein they seek an Order, pursuant to CPLR § 602(a), consolidating the within matter with that filed under Suffolk County Index Number 2013-61765, on the basis that both actions claim foreclosure of the same mortgage lien, albeit by different named plaintiffs. Defendants also seek an Order of this Court, pursuant to CPLR § 3025(b) compelling Plaintiff to accept service of their Second Amended Answer. For the reasons which follow, the relief sought by Defendants must be granted and Plaintiff's cross-motion must be denied.

In the present action, Plaintiff claims foreclosure of first mortgage in the original principal amount of $ 999,000.00 dated April 28, 2006 and recorded with the Clerk of Suffolk County, New York in Liber 21298 of Mortgages, Page 40. Said mortgage was given to secure an Adjustable Rate Note of the same date and it encumbers real property known as 12 Bay Colony Court, East Hampton, New York. This action was filed with the Clerk of Suffolk County on June 11, 2009 by Plaintiff's predecessor counsel. Defendants seasonably appeared through predecessor counsel and the matter appeared on the foreclosure settlement conference calendar on not less than eleven occasions.

The second action, entitled *"Nationstar Mortgage LLC vs. Manfred Scheller, Cheryl Mendenhall et. al."* was filed under Suffolk County Index Number 2013-61675 on July 11, 2013. In that action, Plaintiff claims foreclosure of the same mortgage lien upon the same real property. Defendants have appeared and interposed an Answer. Plaintiff's successor counsel has cross-moved to discontinue the first action without prejudice, which is vehemently opposed by Defendants.

In order for joinder to properly lie, there must be common questions of law and fact in both actions, such that it would be fair and equitable to address the matters in a single proceeding. Part and parcel of such consideration includes both the avoidance of unnecessary expense as well as the delay that might be engendered by reason of separate proceedings and trials. The court must also determine whether or not the actions are at dissimilar stages as well as whether or not substantial prejudice would be sustained by the adverse party were the application granted. That having been said, where the Court is faced with a joinder application, the burden is placed upon the party opposing such a motion to demonstrate the likelihood of substantial prejudice that would ensue if the relief were granted, *Vigo S.S. Corp. v. Marship Corp. 26 NY 2d 157 (1970)*. Where the actions sought to be joined are at disparate or dissimilar stages of the litigation, joinder is improper, *Shelly v. Sachem Central School District 309 AD 2d 917 (2nd Dept. 2003)*. The provisions of CPLR § 602 are not mandatory but instead vest the trial court with a fair degree of discretion in determining whether or not such a motion should be granted, *Woods v. County of Westchester 112 AD 2d 1037 (2nd Dept. 1985)*. It is only where the party opposing such an application demonstrates the likelihood of substantial prejudice that joinder will be denied, *Johnson v. Berger 171 AD 2d 728 (2nd Dept. 1991)*.

In the matter that is *sub judice*, counsel for Defendants correctly and adeptly points out that while the two actions were commenced more than four years apart, they share identical (rather than similar) questions of both law and fact and that they are at not at different stages of the legal process. The failure to join these actions together, it is asserted, would engender substantial prejudice to the detriment of Defendants. Inasmuch as the issues of law fact herein have not been resolved, it is hard to imagine that any prejudice at all would befall Plaintiff. It is clear beyond cavil that these matters should be properly joined and adjudicated as one.

Defendants further seek leave to interpose a Second Amended Answer, based in part, upon substantial questions of fact, not the least of which are who the real party in interest is respecting the mortgage and which party, if any, is vested with the legal right to enforce the note and mortgage. Defendants' counsel has raised genuine and substantial issues as to just who the real party Plaintiff might be (and it may well not be either of the named Plaintiffs in these two actions). Defendants have raised serious and substantial questions as to the identity of the party that is entitled to enforce the note and mortgage.

The Court is constrained to note, from an examination of all of the papers filed herein, that the plain and express language of the instrument dated June 28, 2012 which purports to assign the mortgage at issue from Aurora Loan Services LLC to Nationstar Mortgage LLC transfers only the mortgage but does not convey the underlying obligation. Moreover, a plaintiff, in order to establish standing, must come forward with proof sufficient to demonstrate that it was actually in possession of both the mortgage and the underlying obligation that it secures at the time of the commencement of the suit,

HSBC Bank USA v. Hernandez *92 AD 3d 843 (2nd Dept. 2012)*. In New York, it has long been settled law that the assignment of a mortgage without a concomitant transfer of the underlying obligation that it secures is a nullity, *Merritt v. Bartholick* *36 NY 44 (1867)*; hence, this assignment is absolutely void on its face. This is particularly so where, as here, Plaintiff has failed to adduce any proof that the mortgage and note were delivered to it prior to the commencement of this action.

In addition to the foregoing, Defendants' proposed Second Amended Answer asserts that, contrary to the allegations contained within the complaints in both actions, that the loan at issue herein was actually owned by a common law trust known as a Real Estate Mortgage Investment Conduit or REMIC, prior to its purported transfer to Plaintiff Aurora Loan Services LLC. Defendants further assert that the entity that possesses the loan herein has been structured in a manner calculated to ensure that the assets that comprise the pool be wholly insulated from creditors who may seek to reclaim or "claw back" REMIC assets that may have been obtained from transferors who were insolvent as well as to legally avoid taxation at the level of the investor therein. The proposed Second Amended Answer also contains counterclaims demanding, in essence, annulment of the Assignments together with a declaratory judgment pursuant to RPAPL § 1501 et. seq. quieting title to the property in Defendants. These claims are based upon the premise that the acts of the Trustee of the REMIC were *ultra vires* pursuant to the provisions of EPTL § 7-2.4 and hence were void.

It has not been determined as to whether or not Defendants' loan is or was held by a trust, by Aurora Loan Services LLC, by Nationstar Mortgage LLC, by a combination of them or by none of them. This is clearly a triable issue of fact which cannot be disposed of summarily but instead requires further searching examination. As a consequence, the Court must, at this juncture, necessarily limit its inquiry to the sufficiency of the allegations in the proposed Second Amended Answer, particularly when the same is juxtaposed with the complaints that have been filed in both matters.

Plaintiff counters Defendants' claims by asserting that the proposed Second Amended Answer is palpably insufficient. This Court strongly disagrees with that posture. Defendants allege, *inter alia*, that the acceptance of the asset, viz. the note and mortgage at issue, by the Trustee was actually accomplished in a manner other than that either prescribed or permitted by the Pooling & Servicing Agreement or PSA, which is the controlling instrument for the REMIC. If the allegations of the foregoing counterclaim by Defendants is borne out by the facts, then it inexorably follows that the acts taken by the Trustee were clearly *ultra vires* and therefore would necessarily be void *ab initio*. For well over one hundred years, it has been the law in New York that where the transfer of a mortgage to a third party is effectuated in a manner that contravenes the express terms of a governing trust, the transfer is *ultra vires* and is void, *Kirsch v. Tozier* *143 NY 390 (1894)*. Indeed, it follows logically that where the Trustee's acts are *ultra vires*, all successors and subsequent assignees are charged with constructive knowledge of the express terms of the trust and hence

cannot claim to be bona fide purchasers thereafter inasmuch as they would either know or would have reason to know that any interest transferred would be subject to the operative terms of the trust, *Smith v. Kidd 68 NY 130 (1877)*, *McPherson v. Rollins 107 NY 316 (1887)*.

Plaintiff further claims that Defendants have no standing to challenge or otherwise attack the assignment. This argument, while superficially correct, is likewise untenable. While it is true that third parties do not, under ordinary circumstances, enjoy standing to challenge the assignment of an indebtedness from one obligee to another, *Bank of New York Mellon v. Gales 116 AD 3d 723 (2nd Dept. 2014)*, in the present matter that assertion is decidedly misplaced. A fair reading of Defendants' proposed Second Amended Answer discloses that Defendants are attempting to challenge the validity of the initial assignment which, it is claimed, has caused them to incur damages respecting the marketability of title to the property herein. Defendants mount their challenge only to the particular transactions respecting the mortgage for which foreclosure is claimed, asserting that the REMIC is a common law trust and that it falls within the narrow purview of EPTL § 7-2.4.

If Defendants' allegations are proven to be factually correct, it is entirely within the realm of reasonable probability that neither Aurora Loan Services LLC, Nationstar Mortgage LLC nor the REMIC have any interest whatsoever in the mortgage sought to be foreclosed. At this juncture, it is the opinion of this Court that based upon all of the foregoing, the true identity of the party in interest with the power to enforce the terms of the mortgage and note is clearly unknown. This level of uncertainty creates a situation where the marketability of Defendants' title is likely to be adversely impacted. Even assuming *arguendo* that fee title to Defendants' property is insurable, any cloud on title would serve to effectively diminish the value of the fee simple absolute interest. Standards for marketable title and insurable title are markedly different, with marketable title being title that is *"...reasonably free from any doubt which would interfere with its market value."* *Voorheesville Rod & Gun Club Inc. v. E. W. Tompkins Co. 82 NY 2d 564 (1993)*. For title to be insurable, it need only be that which a title insurer would insure, a far lower standard and one which seems elusive at best. It logically follows then that if the REMIC, as real party in interest, did not take title to the note and mortgage in accordance with the express terms and conditions of the trust, then the party Plaintiffs in these actions, as purported successors in interest thereto would be without any authority to enforce the same, their assertions to the contrary notwithstanding. This, in turn, leads inexorably to invocation of the ancient maxim of *"Nemo dat quod non habet"* ("You cannot give what you do not have"). The question, to be directed to both Plaintiffs, "What do they have?" cannot be answered to the satisfaction of the Courtat this point in time.

It has long been the public policy of New York that matters be resolved on their merits rather than by default wherever it is possible. That having been said, it is the custom and practice of the courts that leave to be amend be freely given, provided that it does not impose either surprise or prejudice upon the adverse party, *Balport Construction Co. v. New York Telephone Co. 134 AD 2d 309 (2nd Dept. 1987)*, *Ozen v. Yilmaz 181 AD 2d 666 (2nd Dept. 1992)*. No actual prejudice or surprise has been advanced by either Plaintiff which could be said to be of sufficient magnitude to warrant preclusion of the relief sought by Defendants. Moreover, since an action to foreclose a mortgage is a suit in equity, *Jamaica Savings Bank v. M.S. Investment Co. 274 NY 215 (1937)*, equity mandates that the Court do that which is right and fair, that which ought to be done.

It is, therefore,

ORDERED that Defendants' Application (seq. 002), made pursuant to CPLR § 602(a) and CPLR § 3025(b) shall be and the same is hereby granted in its entirety; and it is further

ORDERED that Plaintiff's application (seq. 003) seeking dismissal of this action shall be and the same is hereby denied in its entirety; and it is further

ORDERED that Defendants shall serve and file their Second Amended Answer within twenty one (21) days from the date of this Order; and it is further

ORDERED that this action and the one pending under Suffolk County Index No. 2013-61675 shall be joined and consolidated, for all purposes, under Suffolk County Index No. 2009-22839; and it is further

ORDERED that the caption of this action shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK
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AURORA LOAN SERVICES LLC and NATIONSTAR MORTGAGE LLC,
Plaintiffs

-vs.-

MANFRED SCHELLER, CHERYL MENDENHALL, et. al.,
Defendants

Index No. 2009-22839
(Consolidated)

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and it is further

ORDERED that any relief not expressly granted herein shall be and the same is hereby denied; and it is further

ORDERED that counsel for Defendants shall serve a copy of this Order with Notice of Entry upon all parties as well as Plaintiff in the second action within twenty one days from the date hereof.

Dated: May 22, 2014
Riverhead, New York

HON. JEFFREY ARLEN SPINNER
J.S.C.

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