

<b>Bank of New York Mellon v Olivero</b>
2014 NY Slip Op 33483(U)
December 9, 2014
Supreme Court, Suffolk County
Docket Number: 29189/12
Judge: Arthur G. Pitts
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**Supreme Court of the State of New York  
IAS Part 43 - County of Suffolk**

**FILED**

**PRESENT: Hon. ARTHUR G. PITTS**

**THE BANK OF NEW YORK MELLON  
FKA THE BANK OF NEW YORK AS  
TRUSTEE FOR THE CERTIFICATE  
HOLDERS OF THE CWABS INC.,  
ASSET-BACKED CERTIFICATES,  
SERIES 2005-17,**

**Plaintiff,**

**- against-**

**VICTOR R. OLIVERO, ANGELA M.  
OLIVERO, GE MONEY BANK, LVNV  
FUNDING LLC A/P/O CAPITAL ONE,  
AND "JOHN DOW #1" THROUGH  
"JOHN DOE #10", the last ten names  
being fictitious and unknown to the  
plaintiff, the person or parties intended  
being the persons or parties, if any,  
having or claiming an interest in or lien  
upon the Mortgaged premises described  
in the Complaint,**

**Defendants.**

**ORIG. RETURN DATE: 9-18-14**

**ADJOURNED DATE: 10-2-14**

**MOTION SEQ. NO.:001-MG**

**PLTF'S/PET'S ATTY:**

**BRYAN CAVE LLP  
1290 AVENUE OF THE AMERICAS  
NEW YORK, NY 10104**

**DEFT'S/RESP'S ATTY:**

**DeLISA LAW GROUP, PLLC  
475 MONTAUK HIGHWAY  
WEST ISLIP, NY 11795  
Atty for Deft., Angela Olivero**

Upon the following papers numbered 1 to 39 read on this motion summary judgment  
Notice of Motion and supporting papers 1-35 Notice of Cross-Motion and supporting papers \_\_\_\_\_  
Affirmation/affidavit in opposition and supporting papers 36-39 Affirmation/affidavit in reply and supporting papers \_\_\_\_ Other \_\_\_\_;  
(and after hearing counsel in support of and opposed to the motion) it is,

ORDERED that plaintiff The Bank of New York Mellon FKA The Bank of New York as Trustee for The Certificate Holders of the CWABS Inc., Asset-Backed Certificates, Series 2005-17's motion for summary judgment and an order of reference is granted under the circumstances presented herein. It is further

ORDERED that simultaneously with the execution of the within decision and order, the proposed order of reference is signed and entered.

The matter at bar is one sounding in foreclosure which was commenced by the filing of a summons and complaint on or about September 19, 2012. Issue was joined on or about October 24, 2012 by service of defendant Angela M. Olivero's verified answer with affirmative defenses and counterclaims. By way of its verified complaint, the plaintiff alleges that defendants defaulted on the loan by failing to make the monthly payment and interest due on December 1, 2008 and any payments due thereafter. They were further advised by letter dated March 24, 2011 of their default and on or about June 4, 2012, a 90 -Day Notice was mailed to the defendants via certified mail and regular mail. On April 9, 2013 this matter was placed on the foreclosure settlement conference calendar and then scheduled for an additional appearance on July 9, 2013. The defendant failed to submit an application for a loan modification and the conference was marked "held." A preliminary conference has not been held although the plaintiff has responded to the some of the defendant's discovery demands and objected to others. The plaintiff now moves for summary judgment and an order of reference.

The following salient facts are not in dispute: On or about November 22, 2005 defendants Victor R. Olivero and Angela M. Olivero obtained a loan in the amount of \$266,900.00 and executed a note in the plaintiff's predecessor in interest, America's Wholesale Lender ("AWL") favor. At the same time the defendants executed a mortgage encumbering the premises located at 46 Malba Drive, Shirley, Suffolk County, New York to Mortgage Electronic Registration Systems, Inc ("MERS") as nominee for AWL. The mortgage was recorded in the Office of the Suffolk County Clerk on or about December 12, 2005. The plaintiff avers that the note was endorsed in blank by AWL prior to the commencement of this action and further submits that it has been the owner and holder of the note and mortgage since on or about December 8, 2005. On that same date the mortgage was assigned by MERS to the plaintiff, which is evidenced by a written assignment dated September 13, 2011, that was recorded on October 5, 2011.

It is well settled that once a mortgagee establishes a prima facie case for foreclosure by proffering documentary evidence of the mortgage, the mortgage note and the mortgagor's default in payment, the burden shifts to the mortgagor to come forward with admissible evidence to warrant denial of judgment. ( see *Greater New York Savings Bank v. 2120 Realty*, 202 A.D.2d 248, 608 N.Y.S.2d 463 [1<sup>st</sup> Dept. 1994]) Herein, the plaintiff has met its burden and has established its entitlement to judgment as a matter of law. In opposition thereto, defendant Angela Olivero alleges that plaintiff lacks standing to commence the instant action.

“In a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action was commenced’ ( *Bank of N.Y. v. Silverberg*, 86 A.D.3d 274, 279, 926 N.Y.S.2d 532, see *US Bank N.A. v. Cange*, 96 A.D.3d 825, 826, 947 N.Y.S.2d 522; *U.S. Bank, N.A. v. Collymore*, 68 A.D.3d 752, 753-754, 890 N.Y.S.2d 578; *Countrywide Home Loans, Inc., v. Gress*, 68 A.D.3d 709, 888 N.Y.S.2d 914) ‘Either

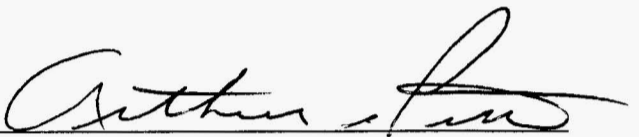

a written assignment of the underlying note of the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident.’ ( see *HSBC Bank USA v. Hernandez*, 92 A.D.3d 843, 939 N.Y.S.2d 120 )” ( *Homecomings Financial, LLC v. Guldi*, 108 A.D.3d 506, 507-508, 969 N.Y.S.2d 470 [2<sup>nd</sup> Dept 2013])

Notwithstanding the defendant’s objections, the plaintiff has proffered evidence which establishes that the subject mortgage had been assigned to it, that it was the owner of the note and mortgage prior to the commencement of the action. As such, it had standing and there is no basis to deny the plaintiff’s motion for summary judgment. Accordingly, pursuant to the foregoing and under the circumstances presented herein, the plaintiff’s motion for summary judgment is granted and an order of reference is simultaneously executed.

This shall constitute the decision and order of the Court.

So ordered.

**Dated: Riverhead, New York  
December 9, 2014**

  
\_\_\_\_\_  
J.S.C. 

CHECK ONE:    \_\_\_ FINAL DISPOSITION    XX NON-FINAL DISPOSITION

**Supreme Court of the State of New York**  
**IAS Part 43 - County of Suffolk**

PRESENT: Hon. ARTHUR G. PITTS

CITICORP TRUST BANK, FSB,

Plaintiff,

- against-

LAWRENCE A. KOCH, LEAH KOCH,  
 CITICORP TRUST BANK, FSB,  
 BROOKWOOD CORAM I, LLC,  
 SUFFOLK ANESTHESIOLOGY  
 ASSOC. P.C., COMMISSIONER OF  
 TAXATION & FINANCE CIVIL  
 ENFORCEMENT CO ATC AND  
 STATE OF NEW YORK MORTGAGE  
 AGENCY and "John Doe" and/or "Jane  
 Doe" #1-10 inclusive, the last ten names  
 being fictitious and unknown to plaintiff,  
 the persons or parties intended being the  
 tenants, occupants, persons or  
 corporations, if any, having or claiming  
 an interest in or lien upon the premises  
 described in the complaint,

Defendants.

ORIG. RETURN DATE: 10-2-14

ADJOURNED DATE: 10-9-14

MOTION SEQ. NO.:001-MG

**PUBLISH**

PLTF'S/PET'S ATTY:

SWEENEY, GALLO, REICH & BOLZ, LLP  
 95-25 QUEENS BOULEVARD, 11th FLOOR  
 REGO PARK, NY 11374

DEFT'S/RESP'S ATTY:

LAWRENCE A. KOCH & LEAH KOCH-PRO SE  
 7 HEDGE LANE  
 CENTEREACH, NY 11720

CITICORP TRUST BANK, FSB-PRO SE  
 4500 LINDEN HILL DRIVE  
 WILMINGTON, DE 19808

BROOKWOOD CORAM I, LLC-PRO SE  
 c/o Secretary of State of the State of New York

SUFFOLK ANESTHESIOLOGY ASSOC. P.C.-PRO SE  
 c/o Secretary of State of the State of New York

COMM. OF TAXATION & FINANCE  
 CIVIL ENFORCEMENT CO ATC-PRO SE  
 400 OAK STREET  
 GARDEN CITY, NY 11530

STATE OF NY MORTGAGE AGENCY-PRO SE  
 641 LEXINGTON AVENUE  
 NEW YORK, NY 10022

Upon the following papers numbered 1 to 21 read on this motion strike answer  
 Notice of Motion and supporting papers 1-17 Notice of Cross-Motion and supporting papers \_\_\_\_\_  
 Affirmation/affidavit in opposition and supporting papers 18-19 Affirmation/affidavit in reply and supporting papers 20-21  
 Other \_\_\_\_\_; (and after hearing counsel in support of and opposed to the motion) it is,

ORDERED that plaintiff Citicorp Trust Bank, FSB's motion for an order striking defendants Lawrence A. Koch and Leah Koch's answer and affirmative defenses as well as for summary judgment, is granted under the circumstances presented herein. ( CPLR 3211 (b); 3212 ) It is further

ORDERED that simultaneously with the execution of the within decision and order, the proposed order of reference is signed and entered.

The matter at bar is one sounding in foreclosure where the plaintiff herein, Citicorp Trust Bank FSB, seeks to foreclose on a mortgage encumbering the property known as 7 Hedge Lane, Centereach, Suffolk County, New York. The instant matter was commenced by the filing of the summons and complaint and notice of pendency on or about March 28, 2012. Defendants Lawrence A. Koch and Leah Koch interposed an answer on April 20, 2012 which contained four affirmative defenses and a counterclaim.

The following salient facts are undisputed: On August 31, 2005 the defendants executed and delivered a note and mortgage to the plaintiff in the amount of \$243,069.95. Said mortgage was recorded in the Office of the Suffolk County Clerk on November 23, 2005. The defendants failed to make their monthly payment of principal and interest due in June, 2011 and all subsequent monthly payments due thereafter and on July 28, 2011 they were notified that they were in default. It is well settled that once a mortgagee establishes a prima facie case for foreclosure by proffering documentary evidence of the mortgage, the mortgage note and the mortgagor's default in payment, the burden shifts to the mortgagor to come forward with admissible evidence to warrant denial of judgment. (see *Greater New York Savings Bank v. 2120 Realty*, 202 A.D.2d 248, 608 N.Y.S.2d 463 [1<sup>st</sup> Dept. 1994])


A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. ( *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851,853, 487 N.Y.S.2d 316; *Zuckerman v. City of New York*, 49 N.Y.2d 557,562). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue ( *State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action. ( *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 [1986] ).

In opposition the defendants aver that their income has increased and they have sought modification of their mortgage on two occasions without response from the plaintiff. However, notwithstanding such assertion, it has consistently been held that a mortgagee has no duty to modify or forbear a note and as such, it is not a defense to a motion for summary judgment. ( *Wells Fargo Bank, N.A. v. Van Dyke*, 101 A.D.3d 638, 958 N.Y.S.2d 331 [2<sup>nd</sup> Dept. 2012] ) The Court further notes that the defendants' have pled a counterclaim that the mortgage and note have been satisfied, yet have failed to proffer any documentary evidence indicating same. Accordingly, the defendants having not raised issues of fact which would warrant the denial of the plaintiff's motion and under the circumstances presented herein, the motion is granted.

This shall constitute the decision and order of the Court.

So ordered.

**Dated: Riverhead, New York  
 December 9, 2014**

  
 \_\_\_\_\_  
 J.S.C.

CHECK ONE:     FINAL DISPOSITION     NON-FINAL DISPOSITION