

Citimortgage Inc. v Thompson
2014 NY Slip Op 33671(U)
June 4, 2014
Supreme Court, New York County
Docket Number: 117112/2009
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. JOAN A. MADDEN

J.S.C.

PRESENT: _____
Justice

PART 11

Index Number : 117112/2009
CITIMORTGAGE, INC.
VS.
THOMPSON, AL
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is *granted in accordance with the annexed decision and order. The court is signing the proposed order of reference submitted with plaintiff's motion papers.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

JUN 13 2014

COUNTY CLERK'S OFFICE
NEW YORK

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NYS SUPREME COURT - CIVIL

Dated: June 4, 2014

_____, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
CITIMORTGAGE INC.,

Plaintiff,

INDEX NO. 117112/09

-against-

AL THOMPSON; NATIONAL CITY BANK; NEW YORK CITY PARKING VIOLATIONS BUREAU; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; UNITED STATES OF AMERICA (EASTERN DISTRICT); NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; CITIBANK (SOUTH DAKOTA); CRIMINAL COURT OF THE CITY OF NEW YORK (QUEENS); COMMISSIONER DEPARTMENT OF SOCIAL SERVICES NYC; BOARD OF MANAGERS OF THE LENOX CONDOMINIUM; "JOHN DOE #1" through "JOHN DOE #10" inclusive, the names of the ten last name Defendants being fictitious, real names unknown to the Plaintiff, the parties intended being persons or corporations having an interest in, or tenant or persons in possession of, portions of the mortgaged premises described in the Complaint,

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JUN 13 2014

Defendants.

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NEW YORK

-----X
JOAN A. MADDEN, J.:

In this mortgage foreclosure action, plaintiff moves for an order pursuant to RPAPL § 1321, CPLR 3215 and CPLR 3212 granting summary judgment in its favor, striking the answer of defendant Al Thompson, amending the caption, granting a default judgment against the non-appearing defendants, and appointing a referee to compute the amount due to plaintiff.

Defendant mortgagor, Al Thompson, opposes the motion and cross-moves for summary judgment dismissing the complaint on the ground that plaintiff lacks standing to maintain this action.

In moving for summary judgment in a mortgage foreclosure action, plaintiff establishes a prima facie right to foreclose by producing the mortgage, the assignment, if any, the unpaid note and evidence of default. See CitiFinancial Co. (DE) v. McKinney, 27 AD3d 224 (1st Dept 2006); LPP Mortgage, Ltd v. Card Corp, 17 AD3d 103 (1st Dept), lv app den, 6 NY3d 702 (2005); Bank of America, N.A. v. Tatham, 305 AD2d 183 (1st Dept 2003). Once plaintiff satisfies that burden, it is incumbent on the party opposing foreclosure to come forward with evidence sufficient to raise a triable issue of fact as to a bona fide defense such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of plaintiff. See Nassau Trust Co v. Montrose Concrete Products Corp., 56 NY2d 175, reargmt den 57 NY2d 674 (1982); CitiFinancial Co (DE) v. McKinney, *supra*; Mahopac National Bank v. Baisley, 244 AD2d 466 (2nd Dept 1997), lv app disp 91 NY2d 1003 (1998).

Plaintiff has established its prima facie entitlement to judgment as a matter of law by producing the note, the mortgage, the assignment and evidence of the mortgagor's default. See CitiFinancial Co. (DE) v. McKinney, *supra*; LPP Mortgage, Ltd v. Card Corp, *supra*; Bank of America, N.A. v. Tatham, *supra*. Plaintiff's Vice President, Document Control, Lesa Duddey, submits an affidavit based on personal knowledge and review of business records, stating that the mortgagor, defendant Thompson, defaulted on his mortgage obligations by failing to make the payment due on January 1, 2009 and each payment due thereafter.

In opposing plaintiff's motion and in support of his cross-motion for summary judgment dismissing the complaint, defendant Thompson does not deny that money is owed, or that he defaulted on the mortgage. Rather, he objects that plaintiff lacks standing to maintain this action, asserting that neither the mortgage nor the note was assigned to plaintiff prior to the

commencement of this action. The court notes defendant Thompson's standing defense remains viable, as his answer includes a Fourth Affirmative Defense asserting that plaintiff "is not the owner and holder of the mortgage loan referred to in the Complaint by reason of having assigned the said mortgage loan to a third party," and as a result plaintiff "lacks standing to maintain the present action."

Where, as here, defendant raises an issue as to plaintiff's standing, it is incumbent on plaintiff to prove its standing to be entitled to relief. See Emigrant Mortgage Co, Inc v. Persad, ___ AD3d ___, 2014 WL 1797607 (2nd Dept 2014); Aurora Loan Services, LLC v. Taylor, 114 AD3d 627 (2nd Dept 2014). In a mortgage foreclosure action, a plaintiff has standing where it is the holder or assignee of both the subject mortgage and the underlying note at the time the action is commenced. See Emigrant Mortgage Co, Inc v. Persad, *supra*; Onewest Bank FSB v. Carey, 104 AD3d 444 (1st Dept 2013); HSBC Bank USA v. Hernandez, 92 AD3d 843 (2nd Dept 2012). While an assignment of a mortgage without the effective assignment of the underlying note is a nullity, see U.S. Bank, N.A. v. Collymore, 68 AD3d 752, 754 (2nd Dept 2009), since a mortgage is "merely security for a debt or other obligation and cannot exist independently of the debt or obligation," when a note is transferred or assigned, "the mortgage securing the debt passes as an incident to the note." Deutsche Bank National Trust Co v. Spanos, 102 AD3d 909, 911 (2nd Dept), lv app dism, 21 NY3d 1068 (2013) (internal citations omitted). Thus, "[e]ither a written assignment of the underlying note or 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." U.S. Bank, N.A. v. Collymore, *supra* at 754; accord Aurora Loan Services, LLC v. Taylor, *supra*.

Plaintiff has made a sufficient showing that it was the holder of the note and mortgage when it commenced the instant action on December 7, 2009, by submitting a copy of the assignment dated June 26, 2009, by which MERS as nominee for CitiMortgage, Inc., assigned both the mortgage and the note to plaintiff CitiMortgage, Inc. Defendant argues that the June 26, 2009 assignment did not transfer or assign the mortgage to plaintiff, since the assignment incorrectly identified the date of the mortgage as March 1, 2006, rather than the correct date of March 1, 2007. Defendant's argument is not persuasive. Notwithstanding the error in listing the year as 2006, the assignment includes sufficient information to identify the mortgage, specifically the correct date the mortgage was recorded, March 21, 2007, and the correct CRFN or City Register File Number for the mortgage.

While defendant also objects that plaintiff's motion papers recite an incorrect CFRN number and incorrectly state that the assignment was recorded on January 1, 2010 (as opposed to January 12, 2010), those errors have no effect on plaintiff's standing.¹

Defendant further argues that plaintiff "acknowledges" the "invalidity of the alleged assignment," because plaintiff and MERS executed a second assignment dated December 3, 2012, which was after the commencement of this action. While plaintiff offers no explanation for executing the second assignment, defendant's cites no legal authority for concluding that the December 2012 assignment invalidated or superceded the June 2009 assignment. Thus, since the court has already determined that the June 26, 2009 assignment properly assigned both the mortgage and the note to plaintiff, the December 3, 2012 assignment is at best superfluous.

¹Even if the court were to agree with defendant that plaintiff's motions papers are "sloppy" and "careless," that is not a reason to deny plaintiff's motion.

Finally, defendant argues that plaintiff has failed to show that the note was "physically delivered" to plaintiff prior to the commencement of this action. Defendant's argument is without merit, in light of the June 26, 2009 assignment which assigned both the note and mortgage. As stated above, either a written assignment of the underlying note or physical delivery of the note prior to the commencement of the action is sufficient to transfer the obligation. See U.S. Bank, N.A. v. Collymore, supra at 754; Aurora Loan Services, LLC v. Taylor, supra.

Based on the foregoing, defendant fails to raise an issue of material fact as to plaintiff's standing. Plaintiff's motion is, therefore, granted in its entirety, and defendant's cross-motion is denied in its entirety. The court is signing the proposed order submitted with plaintiff's motion papers.

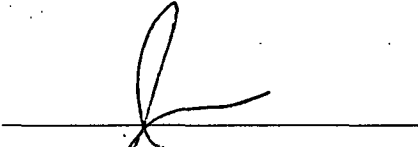
Accordingly, it is

ORDERED that plaintiff's motion is granted in its entirety, and the court is signing the proposed submitted with plaintiff's motion papers; and it is further

ORDERED that defendant's cross-motion is denied in its entirety.

DATED: June 4, 2014

ENTER:



FILED J.S.C.

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