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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IA Part 14
Justice

ONEWEST BANK, FSB,

Plaintiff,

-against-

YVONNE G. DEWER, ET AL.,

Defendants.

Index No. 23000 2010

Motion Date October 9, 2013

Motion Seq. No. 1

Motion Cal. No. 92

The following numbered papers 1 to 13 read on this motion by plaintiff for an order granting it summary judgment against defendants Yvonne G. Dewer, Brian K. Dewer and Elizabeth Dewer (defendants Dewer), striking their answer and counterclaims, amending the caption by deleting reference to defendants "John Doe" and "Jane Doe," and appointing a referee to ascertain and compute the amounts due and owing plaintiff.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-7
Answering Affidavits - Exhibits	8-11
Reply Affidavits	12-13

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff commenced this action on September 10, 2010 to reform and foreclose a mortgage encumbering the real property known as 119-22 Inwood Street, Jamaica, New York given by defendants Dewer as security for the payment of a note, evidencing an obligation in the principal amount of $403,750.00 plus interest. The mortgage names IndyMac Bank, F.S.B. (IndyMac), as the lender and Mortgage Electronic Registration Systems, Inc. (MERS), as the nominee for the lender and the lender's successors and assigns, and as the mortgagee of record for the purpose of recording the mortgage. Plaintiff alleged in its complaint that

it is the holder of the note and subject mortgage, and that defendants Dewer defaulted under the terms of the mortgage and note, and as a consequence, it elected to accelerate the entire mortgage debt. It also alleged that, due to a clerical error, the mortgage was recorded without a legal description included, and the legal description corresponding to the address of the property should be incorporated into the mortgage *nunc pro tunc*.

Defendants Dewer served a combined answer, asserting various affirmative defenses, including lack of standing, and interposing counterclaims. Plaintiff served a reply to the counterclaims. Plaintiff did not cause defendants "John Doe" and "Jane Doe" to be served with process because plaintiff determined that they are unnecessary party defendants.

That branch of the motion by plaintiff for leave to amend the caption deleting reference to defendants "John Doe" and "Jane Doe" is granted.

It is ORDERED that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY

ONEWEST BANK, FSB, Index No. 23000 2010
Plaintiff,

-against-

YVONNE G. DEWER, BRIAN K. DEWER, and
ELIZABETH DEWER,
Defendants.

It is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). To establish a prima facie case in an action to foreclose a mortgage, the plaintiff must produce the mortgage, the unpaid note, bond or obligation and evidence of default (*see Baron Assoc., LLC v Garcia Group Enters., Inc.*, 96 AD3d 793 [2d Dept 2012]; *Citibank, N.A. v Van Brunt Props., LLC*, 95 AD3d 1158 [2d Dept 2012]). Where standing is put into issue by the defendant, the plaintiff must prove its standing in order to be entitled to relief (*see Deutsche Bank Nat. Trust Co. v Haller*, 100 AD3d 680 [2d Dept 2012]; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 753 [2d Dept 2009]; *Wells Fargo Bank*

Minn., N.A. v Mastropaolo, 42 AD3d 239, 242 [2d Dept 2007]). A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that 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 is commenced (*see Deutsche Bank Natl. Trust Co. v Rivas*, 95 AD3d 1061, 1061-1062 [2d Dept 2012]; *Bank of N.Y. v Silverberg*, 86 AD3d 274, 279 [2d Dept 2011]; *see Homecomings Fin., LLC v Guldi*, 108 AD3d 506 [2d Dept 2013]; *US Bank N.A. v Cange*, 96 AD3d 825, 826 [2d Dept 2012]; *U.S. Bank, N.A. v Collymore*, 68 AD3d at 753-754; *Countrywide Home Loans, Inc. v Gress*, 68 AD3d 709 [2d Dept 2009]). "Either 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*, 68 AD3d at 754; *see HSBC Bank USA v Hernandez*, 92 AD3d 843 [2d Dept 2012]; *see Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 108 [2d Dept 2011]).

In support of that branch of the motion for summary judgment, plaintiff offers, among other things, a copy of the pleadings, affidavits of service upon defendants Dewer, an affirmation of regularity by its counsel, a copy of the subject mortgage, underlying note, an assignment dated August 26, 2010, and the bill of sale providing for the sale of certain assets of IndyMac by the Federal Deposit Insurance Company (FDIC), as the receiver for IndyMac to plaintiff, and an affidavit dated June 21, 2013 of Charles Boyle, an officer of plaintiff. In his affidavit, Mr. Boyle states plaintiff is the holder and in possession of the original note, and that plaintiff is the assignee of the "security instrument" for the loan, and defendants Dewer defaulted in paying the monthly mortgage installment due under the mortgage on June 1, 2009 and thereafter. The copy of the note presented includes an undated endorsement in blank, without recourse, by Vincent Dombrowski, as the vice president of IndyMac.

Defendants Dewer oppose the motion, asserting that plaintiff has failed to make a prima facie showing of standing to commence this action.

To the extent plaintiff contends it is the assignee of the mortgage and note by virtue of an assignment executed by MERS, plaintiff has failed to show MERS had been the holder of the note and mortgage, or that MERS had been given an interest in the underlying note by the lender or specifically authorized to assign the subject note (*see Bank of N.Y. v Silverberg*, 86 AD3d at 283). In addition, although Mr. Boyle makes reference to the possession of the note by plaintiff, his affidavit does not give any factual details of a physical delivery of the note and when the note was endorsed in blank (*see Homecomings Fin., LLC v Guldi*, 108 AD3d 506 [2d Dept 2013]; *HSBC Bank USA v Hernandez*, 92 AD3d 843). The affirmation of plaintiff's counsel dated July 10, 2013, furthermore, does not indicate it is based upon personal knowledge and lacks detail as to when the note was endorsed and physically came into possession by plaintiff. That a copy of the note with the endorsement

was annexed as an exhibit to the complaint filed with the summons does not, without more, establish that the original note with the endorsement was in physical possession of plaintiff or its counsel at the time of the institution of the action. To the extent plaintiff additionally relies upon the bill of sale to demonstrate it had standing to bring this action, the court declines its invitation to search the internet to verify that the subject mortgage was part of the assets sold by the FDIC to plaintiff.[1] More importantly, the copy of the bill of sale does not itself establish that plaintiff was the holder or assignee of the subject mortgage and note or had physical possession of the note endorsed in blank at the time of the transfer of the assets by the FDIC to plaintiff or the time of the commencement of this action (*cf. JP Morgan Chase Bank Nat. Assn. v Miodownik*, 91 AD3d 546 [1st Dept 2012], *lv to appeal dismissed* 19 NY3d 1017 [2012]; *JP Morgan Chase Bank, N.A. v Shapiro*, 104 AD3d 411, 412 [1st Dept 2013]). Under such circumstances, plaintiff has failed to show how or when it became the lawful holder of the note either by delivery or valid assignment of the note to it (*see Citimortgage, Inc. v Stosel*, 89 AD3d 887, 888 [2d Dept 2011]; *Bank of N.Y. v Silverberg*, 86 AD3d at 283). As such, that branch of the motion by plaintiff for summary judgment against defendants Dewer is denied.

With respect to that branch of the motion by plaintiff to strike the affirmative defenses asserted by defendants Dewer in their answer, plaintiff bears the burden of demonstrating that the defenses are without merit as a matter of law (*see Butler v Catinella*, 58 AD3d 145, 157-148 [2d Dept 2008]*; Vita v New York Waste Servs.*, LLC, 34 AD3d 559, 559 [2d Dept 2006]).

With respect to the first affirmative defense and the first counterclaim asserted by defendants Dewer in their answer, defendants Dewer assert they are entitled to rescind the loan agreement pursuant the Federal Truth in Lending Act (15 USC § 1601 *et seq.*) (TILA), and the TILA implementing regulations (found in Federal Reserve Board Regulation Z [Regulation Z] at 12 CFR 226), and seek to recover actual and statutory damages for violations of TILA, in addition to rescission. Defendants Dewer also seek as a second and third counterclaim a judgment declaring the subject mortgage to be void. Plaintiff offers evidence that the subject loan transaction was exempt from the requirements of TILA at the time of the making of the loan because the non-exempt total points and fees charged in relation to the loan did not exceed 8% of the entire principal loan amount (*see* former 15 USC § 1602 [aa] [1] [B]; *see also* 15 USC § 1605 [e]; 12 CFR 226.4). In addition, plaintiff offers evidence that it provided the required material disclosures to defendants Dewer in compliance with TILA at the closing and, therefore, any right to rescind was not extended to three years after the date of the consummation of the transaction

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1. It is noted that the bill of sale refers to the sale of Assets as defined in a certain Agreement dated March 19, 2009, said agreement not having been provided.

(*see* 15 USC § 1635 [f]). Defendants Dewer have failed to come forward with any proof to show TILA was applicable to the subject loan at the time of its making, or that any material written representations or disclosures made to them were in conflict with the terms of the subject mortgage and note. Under such circumstances, that branch of the motion by plaintiff to dismiss the first affirmative defense and the counterclaims asserted by defendants Dewer is granted.

That branch of the motion by plaintiff to dismiss the second affirmative defense asserted by defendants Dewer in their answer based upon failure to state a cause of action is granted. On its face, the complaint states causes of action for foreclosure and reformation of the mortgage.

That branch of the motion by plaintiff to dismiss the third, fourth, fifth, twelfth, thirteenth, nineteenth, and twentieth affirmative defenses based upon unjust enrichment, estoppel, "condonation and ratification," the doctrine of unclean hands, waiver, "consent to Defendants' conduct," and participation in wrongdoing, respectively, is granted. They have failed to allege or prove any facts supporting these conclusions of law (see *Moran Enterprises, Inc. v Hurst*, 96 AD3d 914 [2d Dept 2012]; *Glenesk v Guidance Realty Corp.*, 36 AD2d 852 [2d Dept 1971], *abrogated on other grounds by Butler v Catinella*, 58 AD3d 145; *MacIver v George Braziller, Inc.*, 32 Misc 2d 477 [Sup Ct, NY County 1961]; CPLR 3018 [b]).

That branch of the motion by plaintiff to dismiss the seventh, eighth, ninth and eighteenth affirmative defenses of defendants Dewer based upon negligence and assumption of risk, culpable conduct of third parties and plaintiff, and lack of proximate cause, respectively, is granted. The concepts of negligence, assumption of risk, culpable conduct and proximate cause are related to tort. The claims asserted by plaintiff herein relate to a default under the mortgage and reformation of the mortgage, as opposed to tortious conduct and thus, any affirmative defense based upon a notion of culpable or tortious conduct is unavailable herein (*see* CPLR 1401; *Pilweski v Solymosy*, 266 AD2d 83 [1st Dept 1999]; *Nastro Contracting Inc. v Agusta*, 217 AD2d 874 [3d Dept 1995]; *Schmidt's Wholesale, Inc. v Miller & Lehman Const., Inc.*, 173 AD2d 1004 [3d Dept 1991]; *Castleton Holding Corp. v Forde*, 15 Misc 3d 1111[A] [Sup Ct, Kings County 2007]).

The branch of the motion by plaintiff to dismiss the sixth, fifteenth, sixteenth and seventeenth affirmative defenses asserted by defendants Dewer is granted. These defenses are based upon allegations that plaintiff failed to exercise good business judgment, unjustifiably relied on representations and misrepresentations, and failed to perform due diligence and make proper inquiry. Such allegations, without more, do not constitute a defense to a foreclosure action. The legal relationship between a borrower and a lending

bank is normally one of debtor and creditor (*see Trustco Bank, Nat. Assn. v Cannon Bldg. of Troy Assocs.*, 246 AD2d 797 [3d Dept 1998]), and defendants Dewer have failed to allege any facts which would demonstrate that a duty of care was owed to them by the lender in the origination of the loan.

That branch of the motion by plaintiff to dismiss the tenth and fourteenth affirmative defenses asserted by defendants Dewer based upon failure to mitigate damages and lack of damages is granted. Mitigation of damages is not an affirmative defense to an action to foreclose a mortgage. Any dispute as to the exact amount owed plaintiff pursuant to the mortgage and note, may be resolved after a reference pursuant to RPAPL § 1321 (*see Crest/Good Mfg. Co, v Baumann*, 160 AD2d 831 [2d Dept 1990]).

Defendants Dewer assert as an eleventh affirmative defense that plaintiff is guilty of laches in bringing this action. Laches is not a defense to a mortgage foreclosure proceeding where, as here, the action was commenced within the statute of limitations (CPLR 213 [4]; *see New York State Mtge. Loan Enforcement & Admin. Corp. v North Town Phase II Houses, Inc.*, 191 AD2d 151 [1st Dept 1993]; *Schmidt's Wholesale, Inc. v Miller & Lehman Const., Inc.*, 173 AD2d 1004 [3d Dept 1991]). Even if the defense was available here, defendants Dewer have not shown that they changed their position, or failed to take some action to their prejudice as a result of the alleged delay.

The allegation that plaintiff suffered no damage because it was insolvent does not constitute an affirmative defense to a foreclosure action. That branch of the motion by plaintiff to dismiss the twenty-first affirmative defense asserted by defendants Dewer is granted.

That branch of the motion by plaintiff to dismiss the twenty-second affirmative defense asserted by defendants Dewer based upon lack of standing is denied (*supra* at 3-4).

Accordingly, the branch of plaintiff's motion for an order amending the caption is granted, as ordered, *supra*. The branch of the motion for an order granting plaintiff summary judgment is denied. Those branches of the motion for an order dismissing the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, and twenty-first affirmative defenses, and all counterclaims are granted.

Dated: February 6, 2014

J.S.C.