

<b>Mortgage Elec. Registration Sys., Inc. v Bukowski</b>
2016 NY Slip Op 30365(U)
March 1, 2016
Supreme Court, Suffolk County
Docket Number: 13395/15
Judge: Thomas F. Whelan
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**COPY**

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 33 - SUFFOLK COUNTY

**PRESENT:**

Hon. THOMAS F. WHELAN  
Justice of the Supreme Court

MOTION DATE 12/11/15  
SUBMIT DATE: 1/29/16  
Mot. Seq. # 001- MD  
Conference date: 4/15/16  
CDISP: No

-----X  
MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC., as nominee for Wells Fargo  
Bank, NA,

Plaintiff,

-against-

KEVIN M. BUKOWSKI and MARY ANN  
BUKOWSKI,

Defendants.  
-----X

BUTLER, FITZGERALD, FIVESON  
Attys. For Plaintiff  
9 East 45<sup>th</sup> St.  
New York, NY 10017

KEVIN & MARY ANN BUKOWSKI  
Defendants  
131 Southaven Ave.  
Medford, NY 11763

Upon the following papers numbered 1 to 3 read on this Motion for a default judgment  
\_\_\_\_\_; Notice of motion/Order to Show Cause and supporting papers 1 - 3; Notice of Cross  
Motion & Supporting papers \_\_\_\_\_; Opposing papers; None; Reply papers \_\_\_\_\_; Other \_\_\_\_\_; (and after  
hearing the parties in support of and in opposition to the motion) it is,

**ORDERED** that this motion (#001) by the plaintiff for a default judgment on its complaint  
against the defendants is considered under CPLR 3215 and RPAPL Article 15 and is denied; and it is  
further

**ORDERED** that plaintiff's counsel is hereby directed to appear at a conference on **April 15,**  
**2016,** at 9:30 a.m., in Part 33, at the courthouse located at 1 Court Street - Annex, Riverhead, New York.

The plaintiff commenced this action for a judgment declaring that the plaintiff, Mortgage  
Electronic Registration Systems, Inc., as a purported nominee of Wells Fargo Bank, N.A., is the owner  
and "holder" of a first mortgage on residential real property in Medford, from the date of April 5, 2013,  
and that the defendants and all other claiming through or under them be forever barred from asserting  
all claims or interests adverse to the first mortgage rights of the plaintiff as so declared. The plaintiff  
further demands a judgment that it be "authorized" to record a copy of the mortgage with the Suffolk  
County Clerk. Alternatively, the plaintiff seeks a judgment declaring the plaintiff and its non-party

Mortgage Electronic Registration Systems Inc. v Bukowski  
Index No. 13395/2015  
Page 2

principal, Wells Fargo Bank, N.A., to be the holders of a first equitable mortgage lien against the subject premises in the amount of \$225,000.00 as of April 5, 2013.

Underlying the foregoing demands for relief are the following allegations of fact asserted by counsel for the plaintiff in the unverified complaint filed in this action which is described therein to be

one to quiet title to real property under RPAPL § 1515 of the Real Property Actions and Proceedings Law [RPAPL]. On April 5, 2013, the defendants are alleged to have been granted a mortgage loan by Residential Home Funding Corp. [Residential] in the amount of \$225,000.00 that was evidenced by a mortgage note of the same date given by defendant, Kevin M. Bukowski. The note was secured by a mortgage executed by both defendants in favor the plaintiff, Mortgage Electronic Registration Systems Inc., as nominee of the lender, Residential. The plaintiff alleges that the mortgage was not recorded and is believed to have been lost. Residential allegedly indorsed the note in favor of the plaintiff's purported nominee, Wells Fargo Bank, N.A., who remains the holder of such note. The plaintiff goes on to allege that all persons having an interest in the premises and affected by the judgment have been named as parties to this action and that none suffer from any of the legal disabilities set forth in RPAPL § 1515.

By the instant motion, the plaintiff seeks a default judgment on its complaint against the defendants. The motion is supported by affidavits of service of the summons and complaint upon the defendants and counsel's affirmation regarding their default in responding by answer or otherwise. The motion is further supported by an affidavit of merit by Justin Lawson, a Vice President of Loan Documentation of Wells Fargo Bank, N.A., the holder of the mortgage note and copies of the note, containing two indorsements, a copy of the mortgage and a 2005 deed in favor of the defendants. In his affidavit, Mr. Lawson avers that Wells Fargo acquired the loan on April 23, 2013 and remains the holder of the note and that it serves as the servicer of the loan. Mr Lawson further avers that "upon information and belief, the original mortgage was lost and never recorded" (*see* Affidavit of Justin Lawson dated November 12, 2015).

For the reasons stated below, the motion is denied.

Entitlement to a default judgment rests upon the plaintiff's submission of proof of service of summons and complaint, proof of the facts constituting the claim and proof of the defaulting party's default in answering or appearing (*see* CPLR 3215[f]; *U.S. Bank Natl. Ass'n v Alba* 130 AD3d 715, 11 NYS2d 864 [2d Dept 2015]; *HSBC Bank USA, N.A. v Alexander*, 124 AD3d 838, 4 NYS2d 47 [2d Dept 2015]; *Interboro Ins. Co. v Johnson*, 123 AD3d 667, 1 NYS3d 111 [2d Dept 2014]; *Todd v Green*, 122 AD3d 831, 997 NYS2d 155 [2d Dept 2014]; *Oak Hollow Nursing Ctr. v Stumbo*, 117 AD3d 698, 985 NY2d 269 [2d Dept 2014]; *U.S. Bank, Natl. Ass'n v Razon*, 115 AD3d 739, 981 NYS2d 571 [2d Dept 2014]; *Dela Cruz v Keter Residence, LLC*, 115 AD3d 700, 981 NYS2d 607 [2d Dept 2014]; *Kolonkowski v Daily News, L.P.*, 94 AD3d 704, 941 NYS2d 663 [2d Dept 2012]; *Triangle Prop. #2, LLC v Narang* 73 AD3d 1030, 903 NYS2d 424 [2d Dept 2010]). While the quantum of proof necessary to support an application for a default judgment is not as exacting as the proof required on a motion for summary judgment, some firsthand confirmation of the facts forming the basis for the claim must be presented (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 760 NYS2d 727 [2003]; *Feffer v Malpeso*, 210 AD2d 60, 619 NYS2d 46 [2d Dept 1994]). Accordingly, the plaintiff must

advance facts from which the court may discern the plaintiff's possession of one or more viable claims for relief against the defaulting defendant in an affidavit or verified complaint by a party or other person possessed of knowledge of the facts alleged (*see DLJ Mtge. Capital, Inc. v United Gen. Title Ins. Co.*, 128 AD3d 760, 9 NYS3d 335 [2d Dept 2015]; *Williams v North Shore LIJ Health Sys.*, 119 AD3d 937, 989 NYS2d 887 [2d Dept 2014]; *CPS Group, Inc. v Gastro Enter. Corp.*, 54 AD3d 800, 863 NYS2d 764 [2d Dept 2008]; *Resnick v Lebovitz*, 28 AD3d 533, 813 NYS2d 480 [2d Dept 2006]; *Beaton v Transit Fac. Corp.*, 14 AD3d 637, 789 NYS2d 314 [2d Dept 2005]), together with proof of the amount due, if sufficiently certain (*see* CPLR 3215[f]). Where these elements are established, a motion for entry of a default judgment should be granted (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 760 NYS2d 727 [2003]; *Csaszar v County of Dutchess*, 95 AD3d 1009, 943 NYS2d 610 [2d Dept 2012]; *King v King*, 99AD3d 672, 951 NYS2d 565 [2d Dept 2012]; *Tarrytown Professional Ctr., Inc. v Family Medicine of Tarrytown*, 93 AD3d 712, 939 NYS2d 868 [2d Dept 2012]). Where they are not, the motion should be denied (*see DLJ Mtge. Capital, Inc. v United Gen. Title Ins. Co.*, 128 AD3d 760, *supra*).

To be entitled to equitable declaratory relief under common law principles of lost instruments, the grantee under a lost deed or the owner or holder of a mortgage that was not recorded due to its loss or destruction must predicate its claims for relief upon allegations and proof of the due execution of the lost instrument, the terms of its contents by proof of a certified copy or other clear and convincing proof of the contents thereof and of its loss or destruction and the continuing viability of the obligations and rights of the parties thereunder (*see Argent Mtge. Co., LLC v 35 Plank Rd. Realty Corp.*, 131 AD3d 909, 15 NYS3d 473 [2d Dept 2015]; *O'Brien v Town of Huntington*, 66 AD3d 160, 166, 884 NYS2d 446 [2d Dept 2009]; *La Capria v Bonazza*, 153 AD2d 551, 552-553, 544 NYS2d 848 [2d Dept 1989]; *Edwards v Noyes*, 65 NY 125, 127 [1875]). Where the lost instrument is a mortgage and the plaintiff is not the original lender listed in the mortgage indenture, proof of the plaintiff's ownership interest in the mortgage is also required, as such interest is not established by the mortgage indenture itself. Rather, ownership or holder status of the mortgage note dictates ownership of the mortgage (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361-362, 12 NYS2d 612 [2015]). To be entitled to an order compelling the Clerk who serves as the registrar of conveyances to record a lost instrument, the plaintiff must plead and prove that the mortgage is valid on its face (*see JP Morgan Chase Bank, N.A. v Mbanefo*, 123 AD3d 669, 671, 998 NYS3d 669 [2d Dept 2015]).

Moreover, because a mortgage loses its priority to a subsequent mortgage where the subsequent mortgagee is a good-faith lender for value who recorded its mortgage first without actual or constructive knowledge of the prior mortgage (*see* Real Property Law § 291; *Rite Capital Group, LLC v LMAG, LLC*, 91 AD3d 741, 743, 936 NYS2d 280 [2d Dept 2012]), the record owners of all subsequently recorded deeds and mortgages and others having recorded interests in the premises subsequent to the date of the mortgage are necessary parties to an equitable action to declare the validity of a lost or destroyed mortgage and to compel its recording by the Clerk serving as the registrar of conveyances. Accordingly, where relief requested in the form of a nunc pro tunc recording of the lost mortgage, as is the case here, such relief is not available to the plaintiff absent due proof that no persons or entities who have recorded interests subsequent to the date on which the lost mortgage would be effectively recorded would be adversely affected thereby (*see Wells Fargo Bank, N.A. v Perry*, 23 Misc 827 875 NYS2d 853 [Sup. Ct. Suffolk County 2009]; *cf.*, RPL § 293).

Here, the moving papers failed to demonstrate that the plaintiff, who is not the assignee or holder of the April 5, 2013 mortgage note, has cognizable claims for the relief sought on this motion. There are no allegations, let alone proof, of the defendants' execution of the mortgage, or the continuing viability of its terms thereof from the contents thereof. The moving papers contained no duly certified copy by one qualified to make such certification or testimonial proof by one with knowledge as contemplated by RPL § 305. In addition, the allegations of loss or destruction are premised upon information and belief and are thus insufficient to establish the plaintiff's entitlement to the equitable declaratory relief demanded and its entitlement to a recording of the mortgage by the Clerk of the Suffolk County, who has not been joined as party defendant to this action (see *JP Morgan Chase Bank, N.A. v Mbanefo*, 123 AD3d 669, 671, *supra*).

The plaintiff failed to establish an entitlement to relief in the form of a judgment quieting its title or interest in the subject premises pursuant to RPAPL Article 15. The object of quiet title claims is the removal of clouds on property which serve as an apparent title such as a deed or instrument that is actually invalid (see *Acocella v Bank of New York Mellon*, 127 AD3d 891, 9 NYS2d 67 [2d Dept 2015]). In addition, a quiet title claim will lie where the plaintiff seeks recovery of ownership or possession of real property free of competing claims of others (see *JP Morgan Chase Bank, N.A. v Mbanefo*, 123 AD3d 669, 671, *supra*). An Article 15 claim to quiet title must include allegations concerning: (1) the plaintiff's interest in the real property, and the particular nature of the interest; (2) that the defendant claims an interest in the property adverse to that of the plaintiff, and the particular nature of the interest; (3) whether any defendant is known or unknown, or incompetent, etc.; and (4) whether all interested parties are named (see RPAPL § 1515). Defendants are persons who make claims adverse to the claims of the plaintiff's or persons who appear from public records might make such claims (see RPAPL 1501[1]; *Wellington v Financial Freedom Acquisition, LLC*, 132 AD3d 506, 18 NYS3d 33 [2d Dept 2015]). The final judgment in the action shall declare the validity of any claim to any estate or interest established by any party to the action. The judgment shall also declare that any party whose claim to an estate or interest in the property has been adjudged invalid, and every person claiming under him, by title accruing after the filing of the judgment-roll, or of the notice of the pendency of the action, as prescribed by law, be forever barred from asserting such claim to an estate or interest, the invalidity of which is established in the action, and may direct that any instrument purporting to create any such estate or interest be delivered up or cancelled of record or be reformed of record as the facts may require. Judgment may also be given awarding possession of real property to any party together with his damages for the withholding of such property and two or more of such forms of judgment may be awarded in the same action (see RPL § 1521).

Here, the plaintiff seeks to record a purportedly lost mortgage, nunc pro tunc, to the date of its execution and a declaration that the subject mortgage is a first mortgage on the premises. The complaint does not identify the plaintiff's interest in the premises or any person or named party as having an interest in the premises adverse to that of the plaintiff. Instead, it appears that Wells Fargo, the plaintiff's nominee, is the holder of the subject mortgage which mortgage "is wholly personal property" (*Stickler v Ryan*, 270 AD 962, 61 NYS2d 708 [3d Dept 1946]) since a mortgagee under New York's lien theory of mortgages acquires "no legal or equitable interest in the subject premises" (*Smith v Bank of America, N.A.*, 103 AD3d 21, 957 NYS3d 705 [2d Dept 2012]; see *Johnson v Augsbury Org., Inc.*, 167 AD2d 783, 563 NYS2d 339 [3d Dept 1990]). The action is thus not one to quiet title since neither

Mortgage Electronic Registration Systems Inc. v Bukowski  
Index No. 13395/2015  
Page 5

the removal of a cloud on title nor the recovery of ownership or possession of the mortgaged premises is demanded (see *JP Morgan Chase Bank, N.A. v Mbanefo*, 123 AD3d 669, 671, *supra*).

Nor did the moving papers establish the plaintiff's possession of a viable claim for the imposition of an equitable mortgage. Equitable liens may arise only upon proof that money was expended for the improvement of the premises by a person in a confidential relationship to the owner or upon proof of an agreement that the premises would be held as security for the obligation (see *Petrukevich v Maksimovich*, 1 AD2d 786, 147 NYS2d 869 [1<sup>st</sup> Dept 1956]; *DiNiscia v Olsey*, 162 AD 154, 147 NYS2d 198 [4<sup>th</sup> Dept 1914]). "To make such a lien binding upon a third party, it is necessary that its existence as a lien be fully proven" (*Penn Oil P.R. Co. v Willrock Producing Co.*, 434—435, 196 N.E. 385 [1935]). Neither the complaint nor supporting affidavit established the elements of a claim for an equitable lien. Nor are the elements of claim for a constructive trust discernable from the complaint or the moving papers (see *Manufacturers and Traders Trust Co. v Berthole*, 130 AD3d 881, 15 NYS2d 82 [2d Dept 2015]).

In view of the foregoing, the instant motion (#001) by the plaintiff for a default judgment is denied.

DATED: 3/1/16



THOMAS F. WHELAN, J.S.C.