MEMO DECISION & ORDER

INDEX No. 954/11

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: 4/13/17
SUBMIT DATE: 5/5/17
Mot. Seq. # 002 - Mot D
Pre-Trial Conference: 6/9/17
CDISP Y____ N X

----------X

CHASE HOME FINANCE, LLC,

Plaintiff,

-against-

STEPHANIE SPIEGEL f/k/a STEPHANIE KANTROWITZ, STRATHMORE EAST HOMEOWNER'S ASSOCIATION, "JOHN DOES" and "JANE DOES" said names being fictitious, parties intended being possible tenants or occupants of premises, and corporations, other entities or persons who claim, or may claim, a lien against the premises,

Defendants.

----------X

ROSICKI, ROSICKI & ASSOC., PC
Attys. For Plaintiff
26 Harvester Ave.
Batavia, NY 14020

MICHAEL G. McAULIFFE, ESQ.
Atty. For Defendant Spiegel
68 Sol Service Rd. - Ste. 100
Melville, NY 11747

Upon the following papers numbered 1 to 7 read on this motion for summary judgment, among other relief ; Notice of Motion/Order to Show Cause and supporting papers 1 - 3 ; Notice of Cross Motion and supporting papers ; Answering papers 4-5 ; Reply papers 6-7 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#002) by the plaintiff for an order awarding it summary judgment against the answering defendant and default judgments against the other defendants served with process, a substitution of the named plaintiff by a successor-in-interest together with the deletion of the unknown defendants and a caption amendment to reflect these changes and the appointment of a referee to compute is considered under CPLR 3212, 3215, 1024, 1003 and RPAPL

§ 1321 and is granted only to the limited extent that all affirmative defenses asserted in the answer of defendant Spiegel, except for the Second affirmative defense challenging the plaintiff's standing, are dismissed pursuant to CPLR 3212(b); and it is further

ORDERED that a pre-trial conference shall be held on **June 9, 2017**, 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 in February of 2011 to foreclose the lien of September 22, 2008 mortgage given by defendant Spiegel to Capital One Home Loans, LLC to secure a note likewise given on that date in the principal amount of $196,000.00. According to the complaint, the loan went into default in September of 2010 and it remained uncured prior to filing. In response to the plaintiff's service of the summons, complaint and other initiatory papers, only defendant Spiegel appeared herein by answer. Therein, defendant Spiegel asserted seven affirmative defenses including, legal insufficiency, lack of standing, improper acceleration of sums due under the note, failure to join necessary parties, culpable conduct and the failure to mitigate damages.

By the instant motion (#002), the plaintiff seeks an award of summary judgment dismissing the affirmative defenses asserted in the answer served by defendant Spiegel and summary judgment on its complaint against said defendant. The plaintiff also seeks an order substituting a successor-in-interest of the named plaintiff for said plaintiff and the deletion of the unknown defendants with a caption amendment to reflect these changes. Also demanded is an adjudication of the defaults in answering of the remaining defendants served with process and the appointment of a referee to compute amounts due under the subject mortgage. The motion is opposed by defendant Spiegel who raises only her pleaded standing defense and advances challenges to the nature of the plaintiff's proof as grounds for denial of the plaintiff's motion. For the reasons stated, the motion is denied except to the limited extent set forth herein.

It is well settled that a foreclosing plaintiff establishes its prima facie entitlement to judgment as a matter of law by producing the mortgage and the unpaid note, and evidence of the default (*see* ***HSBC Mtge. Servs., Inc. v Royal***, 142 AD3d 952, 37 NYS3d 321 [2d Dept 2016]; ***Wells Fargo Bank, N.A. v Erobobo***, 127 AD3d 1176, 9 NYS2d 312 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v DeSouza***, 126 AD3d 965, 3 NYS2d 619 [2d Dept 2015]; ***OneWest Bank, FSB v DiPilato***, 124 AD3d 735, 998 NYS2d 668 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v Ali***, 122 AD3d 726, 995 NYS2d 735 [2d Dept 2014]). Where the plaintiff's standing has been placed in issue by the defendant's answer, the plaintiff also must establish its standing as part of its prima facie showing (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, 12 NYS3d 612 [2015]; ***U.S. Bank Natl. Ass'n v Cruz***, 147 AD3d 1103, 47 NYS3d 459 [2d Dept 2017]; ***HSBC Bank USA, N.A. v Baptiste***,

128 AD3d 77, 10 NYS3d 255 [2d Dept 2015]). Moreover, where the answer served contains affirmative defenses and/or counterclaims that affect the plaintiff's right to recovery, the moving plaintiff seeking summary judgment should establish that none of such counterclaims nor any of the the affirmative defenses asserted in the answer have merit (*see* ***Bank of New York Mellon v Vytalingam***, 144 AD3d 1070, 42 NYS3d 274 [2d Dept 2016]; ***Prompt Mtge. Providers of North America, LLC v Singh***, 132 AD3d 833, 18 NYS3d 668 [2d Dept 2015]; ***Citimortgage, Inc. v Chow Ming Tung***, 126 AD3d 841, 7 NYS3d 147 [2d Dept 2015]; ***Jessabell Realty Corp. v Gonzales***, 117 AD3d 908, 909, 985 NYS2d 897 [2d Dept 2014]).

Here, the moving papers established, prima facie, that all of the affirmative defenses asserted in the answer served by defendant Spiegel are without merit, except the asserted standing defense. It is now clear that the standing of a foreclosing plaintiff is measured at the time of the commencement of the action (*see* ***Wells Fargo Bank Minn., N.A. v Mastropaolo***, 42 AD3d 239, 242, 837 NYS2d 247 [2d Dept 2007]). It is equally clear that there are several ways in which a foreclosing plaintiff may establish its standing to prosecute its claim for foreclosure and sale and any one will suffice so as to render the others irrelevant and immaterial to the establishment of standing. Relevant to this action are four of the several ways in which a foreclosing plaintiff may establish its standing.

The standing of a mortgage foreclosing plaintiff may be derived from that it was the assignee of the underlying note at the time the action is commenced (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, 361, *supra*; ***Wells Fargo Bank, N.A. v Archibald***, ___ AD3D ___, 2017 WL 1902211 [2D Dept 2017]; ***Deutsche Bank Natl. Trust Co. v Romano***, 147 AD3d 1021, 48 NYS3d 237 [2d Dept 2017]; ***U.S. Bank Natl. Ass'n. v Akande***, 136 AD3d 887, 26 NYS3d 164 [2d Dept 2016]; ***Emigrant Bank v Larizza***, 129 AD3d 904, 13 NYS3d 129 [2d Dept 2015]; ***Peak Fin. Partners, Inc., v Brook***, 119 AD3d 539, 987 NYS2d 916 [2d Dept 2014]; ***Chase Home Fin., LLC v Miciotta***, 101 AD3d 1307, 956 NYS2d 271 [3d Dept 2012]). Nevertheless, a written assignment of the note that is executed by a nominee of the original lender will not effect a valid transfer of said note unless there is proof that said nominee was authorized to assign the note or was either the assignee or holder of such note at the time the written assignment was executed (*see* ***Filan v Dellaria***, 144 AD3d 967, 43 NYS3d 353 [2d Dept 2016]; ***Citibank, N.A. v Herman***, 125 AD3d 587, 588–589, 3 NYS3d 379 [2d 2015]; ***Deutsche Bank Natl. Trust Co. v Haller***, 100 AD3d 680, 683, 954 NYS2d 551 [2d Dept 2012]; *see also* ***JP Morgan Chase Bank, Natl. Ass'n v Venture***, 148 AD3d 1269, 48 NYS3d 824 [3d Dept 2017]). Here, there is no evidence that the January 26, 2011 assignment of the note and mortgage by Mortgage Electronic Registration Systems [MERS], as nominee of the original lender, in favor of the named plaintiff effectively transferred the note, as there is no evidence of the authority

of MERS to assign the note on behalf of the original lender or that MERS was in possession of said note as its assignee, the holder thereof.

A foreclosing plaintiff may also establish its standing by demonstrating that it is the holder of the mortgage note within the contemplation of the Uniform Commercial Code at the time of the commencement of the action. Holder status is established where the plaintiff possesses a note that, on its face or by allonge, contains an endorsement in blank or bears a special endorsement payable to the order of the plaintiff (*see* UCC 1–201; 3–202; 3–204; ***Hartford Acc. & Indem. Co. v American Express Co.***, 74 NY2d 153, 159 [1989]). Notably, the holder of an instrument, whether or not it is the owner, may enforce payment in his own name (*see* UCC 3–301; ***Well Fargo Bank, N.A. v Ostiguy***, 127 AD3d 1375, 8 NYS3d 669 [3d Dept 2015]).

A "holder" is "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession" (UCC 1–201[b][21]; *see* ***U.S. Bank Nat. Ass'n v Cruz***, 147 AD3d 1103, *supra*]; ***US Bank, N.A. v Zwisler***, 46AD3d 213, 2017 WL 422317 [2d Dept 2017]; ***Pennymac Corp. v Chavez***, 144 AD3d 1006, 42 NYS3d 239 [2d Dept 2016]). " 'Bearer' means ... a person in possession of a negotiable instrument" (UCC 1–201[b][5]), and where the note is endorsed in blank, it may be negotiated by delivery alone (*see* UCC 3–202[1], 3–204[2]). "An endorsement in blank specifies no particular endorsee and may consist of a mere signature" and "[a]n instrument payable to order and endorsed in blank becomes payable to bearer and may be negotiated by delivery alone until specially endorsed (UCC 3–204[2])" (***JPMorgan Chase Bank, Natl. Assn. v Weinberger***, 142 AD3d 643, 37 NYS3d 286 [2d Dept 2016]). A special endorsement, which may appear on the face of the note or by allonge attached thereto, is considered a written assignment of the note (*see* ***Deutsche Bank Trust Co. Americas v Garrison***, 46 AD3d 185, 2017 WL 424740 [2d Dept 2017]).

Under this statutory framework, it is clear that to establish its standing as the holder of a duly endorsed note in blank or specially endorsed in its favor, a plaintiff is only required to demonstrate that it had physical possession of the note prior to commencement of the action (*see* ***Deutsche Bank Natl. Trust Co. v Logan***, 146 AD3d 861, 45 NYS3d 189 [2d Dept 2016]; ***JPMorgan Chase Bank, Natl. Assn. v Weinberger***, 142 AD3d 643, 645, *supra*). Where the note is endorsed in blank, "it is unnecessary to give factual details of the delivery in order to establish that possession was obtained prior to a particular date because such a note is payable to the bearer thereof. A plaintiff in possession of a blank endorsed note is thus without obligation to establish how it came into possession of the instrument in order to enforce it" (*see* UCC 3–204[2]; ***Deutsche Bank Natl. Trust Co. v Logan***, 146 AD3d 86, *supra*; ***Pennymac Corp. v Chavez***, 144 AD3d 1006, *supra, quoting*

JPMorgan Chase Bank, Natl. Assn. v Weinberger, 142 AD3d 643, 645, *supra*). In addition, because "a signature on a negotiable instrument 'is presumed to be genuine or authorized'" (*see* UCC 3–307[1][b]), the plaintiff is not required to submit proof that the person who endorsed the subject note, in blank or especially in favor of the plaintiff, was authorized to do so (*see* ***CitiMortgage, Inc. v McKinney***, 144 AD3d 1073, 42 NYS3d 302 [2d Dept 2016]).

Alternatively, due proof of the physical delivery of the note to the plaintiff or its custodial agent prior to commencement of a foreclosure action is also sufficient to transfer the mortgage obligation and create standing to foreclose (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, *supra*; ***US Bank Natl. Ass'n v Ehrenfeld***, 144 AD3d 893, 41 NYS3d 269 [2d Dept 2016], *supra*; ***JPMorgan Chase Bank, Natl. Ass'n v Weinberger***, 142 AD3d 643, *supra*; ***Citimortgage, Inc. v Klein***, 140 AD3d 913, 33 NYS3d 432 [2d Dept 2016]; ***U.S. Bank v Askew***, 138 AD3d 402, 27 NYS3d 856 [1st Dept 2016]; ***U.S. Bank Natl. Ass'n v Godwin***, 137 AD3d 1260, 28 NYS3d 450 [2d Dept 2016]; ***Wells Fargo Bank, N.A. v Joseph***, 137 AD3d 896, 26 NYS3d [2d Dept 2016]; ***Emigrant Bank v Larizza***, 129 AD3d 904, *supra*; ***Bank of N.Y. Mellon Trust Co. NA v Sachar***, 95 AD3d 695, 943 NYS2d 893 [1st Dept 2012]). Indeed, the establishment of the plaintiff's actual possession of the mortgage note or its constructive possession through a custodial agent on a date prior to the commencement of the action is so conclusive that it renders, unavailing, all claims of defects in allonges (*see* ***U.S. Bank v Askew***, 138 AD3d 402, *supra*). It further renders unavailing, all claims of defects in the chain of mortgage assignments (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, *supra*; ***CitiMortgage, Inc. v McKinney*** 144 AD3d 1073, 42 NYS3d 302 [2d Dept 2016]; ***JPMorgan Chase Bank, Natl. Ass'n v Weinberger***, 142 AD3d 643, *supra*; ***Deutsche Flagstar Bank, FSB v Mendoza***, 139 AD3d 898, 32 NYS3d 278 [2d Dept 2016]; ***US Bank Natl. Trust v Naughton***, 137 AD3d 1199, 28 NYS3d 444 [2d Dept 2016]; ***Deutsche Bank Natl. Trust v Whalen***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]).

Standing may also be established by demonstrating that through one or a succession of several mergers, the plaintiff gained actual or constructive possession of the note on the effective date of the merger which was prior to the commencement of the foreclosure action (*see* Banking Law § 602; ***TD Bank, N.A. v Mandia***, 133 AD3d 590, 20 NYS3d 83 [2d Dept 2015]; ***PNC Bank, Natl. Ass'n v Klein***, 125 AD3d 953, 5 NYS3d 439 [2d Dept 2015]; ***JP Morgan Chase Bank, Natl. Ass'n v Russo***, 121 AD3d 1048, 996 NYS2d 68 [2d Dept 2014]; ***JP Morgan Chase Bank, Natl. Ass'n v Shapiro***, 104 AD3d 411, 959 NYS2d 918 [1st Dept 2013]; ***Capital One, N.A. v Brooklyn Flatiron, LLC***, 85 AD3d 837, 925 NYS2d 350 [2011]; ***Ladino v Bank of America***, 52 AD3d 571, 861 NYS2d 683 [2d Dept 2008]; *see also* ***Wells Fargo Bank, N.A. v Moore***, 599 Fed. Appex 600 [7th Circ. 2015 "*The surviving entity in a corporate merger acquires all of its predecessors' rights (and obligations) as a matter of law; there is no need for document-by-document assignments*"]).

Here, the record contains evidence that the original lender, by an allonge attached to the note, specially endorsed the note in favor of JPMorgan Chase Bank, N.A., who endorsed it in blank. Yet the affidavit of note possession submitted by the plaintiff that was executed by an employee of JPMorgan Chase Bank, N.A. and is attached to the moving papers as Exhibit B, indicates that JPMorgan Chase Bank, N.A., is the *custodian* of the collateral documents for the *subject loan.* The affiant further avers that the recordsof JPMorgan Chase Bank, along with those of its subsidiary, JPMorgan Chase Custody Services, Inc., indicate that the custodian, JPMorgan Chase Bank, N.A., took physical possession of the note on October 8, 2008, some three weeks after the loan's origination. Since the note possession affiant fails to identify for whom JPMorgan Chase, N.A. serves as custodian, none of the factual averments demonstrate that the plaintiff, Chase Home Finance, LLC, who commenced this action in February of 2011, was in possession of the note at the time of such commencement actually, or constructively through a custodian.

Moreover, although there is some evidence that the plaintiff, Chase Home Finance LLC, merged into JPMorgan Chase Bank National Association under a Delaware merger agreement effective as of May 1, 2011 (*see* Certificate of Merger attached as part of Exhibit C to the moving papers), the occurrence of that merger post-dates the October 8, 2008 delivery of the note to the special endorsee, custodian, Wells Fargo Bank, N.A., as testified to by the plaintiff's "note possession" affiant. Accordingly, said affidavit does not establish that the named plaintiff, Chase Home Finance, LLC, had possession of the note duly endorsed by the special endorsee, and thereafter endorsed in blank by said entity, on the date of the commencement of this action. The plaintiff thus failed to demonstrate any entitlement to a dismissal of the pleaded standing defense or to the accelerated judgments against the defendants and other relief demanded on its motion (#002).

In view of the foregoing, the instant motion (#002) for summary judgment and the other relief outlined above is granted only to the extent that all affirmative defenses asserted in the answer of defendant Spiegel except for the Second affirmative defense challenging the plaintiff's standing are dismissed pursuant to CPLR 3212(b).

DATED: 5/16/17

THOMAS F. WHELAN, J.S.C.