SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 10

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BANK OF NEW YORK MELLON FKA,
NEW YORK MELLON FKA THE BANK OF NEW YORK,
AS TRUSTEE (CWALT 2007-J1)

Index 850194/2015
Motion Seq. 001

DECISION & ORDER

Plaintiffs,

-against-

VIOLET JAMES FELIX A/K/A VIOLET FELIX, HORACE FELIX, *et al.*,

Defendants

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GEORGE J. SILVER, J.S.C.:

This action is brought to foreclose a mortgage held by plaintiff the Bank of New York Mellon FKA The Bank of New York as trustee for the Certificate Holder of CWALT, Inc., Alternative Loan Trust 2007-J1 ("plaintiff") on a premises located at 139 West 122nd Street, New York, NY 10027. On or about September 24, 2004, defendant Horace Felix executed and delivered to WMC Mortgage Corp., a note bearing that date, whereby defendant Horace Felix agreed to pay the sum of $477,000.00. As a collateral security for the payment of that debt, defendants Violet and Horace Felix ("defendants") executed, acknowledged and delivered to Mortgage Electronic Registration Systems, Inc., as Nominee for WMC Mortgage Corp., its successors and/or assigns, a mortgage dated September 24, 2004 and recorded in the County of New York on November 18, 2004 in CRFN 2004000718121. Thereafter, the mortgage was assigned to Mortgage Electronic Registration Systems, Inc., as nominee for America's Wholesale Lender, its successors and/or assigns by assignment of mortgage dated April 8, 2014 and recorded on October 10, 2014 in CRFN 2014000339364. Thereafter, on or about December 18, 2006, defendant Horace Felix executed and

delivered to America's Wholesale Lender, a note bearing that date, whereby defendant Horace Felix agreed to pay the sum of $178,769.01.

As collateral security for the payment of that debt, defendants also executed, acknowledged and delivered to Mortgage Electronic Registration Systems, Inc., as nominee for America's Wholesale Lender, its successors and assigns, a mortgage dated December 18, 2006 and recorded in the County of New York on March 19, 2007 in CRFN 2007000146006. The aforesaid instruments were thereafter consolidated by agreement dated December 18, 2006, and recorded in the County of New York on March 19, 2007 in CRFN 2007000146007, creating a single lien of $644,000.00. Thereafter, the mortgage was assigned to plaintiff by assignment of mortgage dated November 25, 2011 and recorded on January 11, 2012 in CRFN 2012000010675.

Plaintiff contends that defendants breached their obligation by failing to timely tender the installment which became due and payable on December 1, 2010 and by failing to timely tender subsequent installments. By this default, plaintiff elected to accelerate the mortgage debt and declared all sums secured thereby to be due and payable. Plaintiff sent the required default notice and the required notice pursuant to RPAPL § 1304.

Plaintiff states that the present amount due is $643,088.78, together with interest from November 1, 2010. Plaintiff further contends that plaintiff is entitled to recover reimbursement for all advances made, with interest as provided in said documents, as well as reasonable attorney's fees. The summons, complaint, notice of pendency, and certificate of merit were filed in the office of the Clerk of the County of New York, on June 9, 2015.

All defendants were duly served with the summons and complaint along with required notice pursuant to RPAPL § 1303. The original affidavits of service were filed with the New York County Clerk's office.

Defendants served an answer. All other parties that failed to answer either defaulted or waived notice of this motion. Plaintiff and defendants appeared for and participated in a court mandated and mediated settlement conference pursuant to CPLR § 3408 from September 9, 2015 until April 20, 2016.

DISCUSSION

Plaintiff moves for summary judgment, arguing that plaintiff has made out a *prima facie* case, and that the answer interposed by defendants fails to set forth the existence of either a triable issue of fact or a meritorious defense.

CPLR § 3212 (b) provides, in relevant part:

> A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.

Thus, a party moving for summary judgment must first establish its *prima facie* entitlement to judgment as a matter of law by demonstrating the absence of material issues of fact (*see Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). It is only after the burden of proof is met that the opposing party must then show "facts and conditions from which...liability may be reasonably inferred" (*Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 [1st Dept. 1995]; *see also First Nationwide Bank FSB v. Goodman*, 272 AD2d 433 [2d Dept. 2000]; *Charter One Bank v. Houston*, 300 AD2d 429 [2d Dept. 2002]). The plaintiff cannot, however, rely on conjecture or speculation (*see Roimesher v Colgate Scaffolding & Equip.*

Corp., 77 AD3d 425, 426 [1st Dept. 2010]). Conclusory allegations are insufficient to defeat a motion for summary judgment (*Freedman v. Chemical Construction Corp.*, 43 NY2d 260 [1997]).

Plaintiff has established *prima facie* proof of an entitlement to summary judgment based on the record before the court. Indeed, defendant Horace Felix signed the notes referenced in plaintiff's motion, and defendants collectively signed the mortgages and consolidation agreement. Moreover, as set forth in the affidavit of merit of Dora Foye, defendants failed to pay the installments as provided for in the note and mortgage.

Having established a *prima facie* case, the burden shifts to defendants to furnish documentary evidence establishing a triable issue of fact. Defendants argue that the chain of assignments in this action do not establish that plaintiff is the rightful holder of the mortgage and note. As such, defendants argue that plaintiff lacks standing to pursue this foreclosure action, as plaintiff has provided no evidence that plaintiff was given ownership of the loan. In light of this, defendants aver that there is clearly a question of fact as to who actually has ownership over the loan. Defendants further contend that the affidavits furnished by plaintiff should be discounted by this court on account of the affiants lack of personal knowledge.

To commence a mortgage foreclosure action, the plaintiff must have either a legal or equitable interest in the mortgage (*see Countrywide Home Loans, Inc, v. Gress*, 68 AD3d 709 [2d Dept. 2009]). A plaintiff has standing where it the holder or assignee of the note and the mortgage at the time the action is commenced (*see CitiMortgage. Inc, v. Rosenthal*, 88 AD3d 759 [2nd Dept. 2011]). 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 (*see US Bank National Assoc, v. Cange*, 96 AD3d 825 [2nd Dept. 2012]).

Here, plaintiff's production of the note constitutes *prima facie* evidence of its delivery to plaintiff. Moreover, plaintiff's physical possession of the note, which is indorsed in blank, establishes the deliverance of the note as well as plaintiff's ownership of the note (*see Nationstar Mtge.. LLC v. Catizone*, 127 AD3d 1151, 1152 [2nd Dept. 2015]["[T]he plaintiff established its standing as the holder of the note and mortgage by demonstrating that the note was in its possession and the mortgage had been assigned to it prior to the commencement of the action, as evidenced by its attachment of the indorsed note, the mortgage, and the mortgage assignment to the summons and complaint at the time the action was commenced."]). Based on the record before this court, which included a copy of the original endorsed notes, the recorded mortgages and consolidation agreement with the recorded assignments of mortgage, plaintiff has satisfactorily established standing as holder of the note and mortgages as a matter of law. Defendants have failed to provide any admissible evidence to challenge plaintiff's standing.

As to plaintiff's affidavits, the Court of Appeals has held that "a witness who is familiar with the practices of a company that produced the records at issue, and who generally relies upon such records, may have the requisite knowledge to meet the CPLR requirement for the admission of a business record, provided that the witness can also attest that (1) the record was made in the regular course of business; (2) it was the regular course of business to make such record; and (3) the record was made contemporaneously with the relevant event, thereby assuring its reliability" (*People v. Brown*, 13 NY3d [2009]). Moreover, the affidavit of a bank official in support of a motion for summary judgment is sufficient if based upon documentary evidence, even if they did not participate in the loan negotiations and had no personal knowledge of the facts (*see HSBC Bank USA, NA, v. Scwartz*, 88 A.D.3d 961 [2nd Dept. 2011]).

As plaintiff's point out, Dara Foye, Keli Smith, and Tina M. Tuo are employees of Bayview Loan Servicing, LLC, servicer for plaintiff, as Document Coordinators and/or Pre-foreclosure

Coordinator and clearly state that they are attesting to the records kept and maintained by Bayview, and that they have personal knowledge of Bayview's procedures for creating and maintaining those records. As such, it is axiomatic that the affiants in this case are attesting to the business records of Bayview and that the affiants have personal knowledge of Bayview's practices insofar as they know how those records are kept and maintained. As such, defendants have failed to provide any admissible evidence or demonstrate any basis for this court to reject the testimony of plaintiff's affiants.

As defendants have failed to proffer and additional arguments or evidence sufficient to raise a triable issue of fact, it is the view of this court that plaintiff has demonstrated an unpersuasively rebutted entitlement to summary judgment in plaintiff's favor.

Accordingly, it is hereby,

ORDERED, that the motion for summary judgment is granted and the answer of Violet James Felix A/K/A Violet Felix and Horace Felix is stricken; and it is further

ORDERED, that the answer interposed by defendants Violet James Felix A/K/A Violet Felix and Horace Felix be and hereby is deemed the usual appearance and waiver in foreclosure, requiring service of only Notice of Sale, Notice of Proceedings for Surplus Monies, and Notice of Discontinuance of Action upon said Defendants; and it is further

ORDERED, that a default judgment be granted against all non-appearing and non-answering defendants; and it is further

ORDERED, that this action be and the same hereby is referred to Robert Finkelstein, Esq.,with an address of 99 Hudson Street Floor 5, New York, NY 10013 (212) 964-8700 who is hereby appointed Referee to ascertain and compute the amount due except for attorney's fees upon the bond/note and mortgage being foreclosed in this action, and to determine whether the mortgaged premises can be sold in parcels and the Referee to report to the Court with all convenient speed; and it is further

ORDERED, that, if required, said Referee take testimony pursuant to RPAPL § 1321; and it is further

ORDERED, that by accepting this appointment the Referee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCCR Part 36) including, but not limited to Section 36.2(c) (" Disqualification from Appointment") and Section 36.2(d) (" Limitations on Appointments Based on Compensation"); and it is further

ORDERED, that pursuant to CPLR § 8003(a)(the statutory fee of $50.00)(in the discretion of the Court, a fee of $250.00), shall be paid to the Referee for the computation stage and upon the filing of his report; and it is further

ORDERED, that the Referee is prohibited from accepting or retaining any funds for him/herself or paying funds to him without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED, that the caption be amended by substituting Sonia Doe (Last Name Refused) in place of the Defendants sued herein as "John Does" and "Jane Does"; all without prejudice to the proceedings heretofore had herein; and it is further

ORDERED, that the caption as amended shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS TRUSTEE (CWALT 2007-J1),

Index No. 850194/2015

Plaintiff,

-against-

VIOLET JAMES, FELIZ A/K/A VIOLET FELIX; HORACE FELIX; NEW YORK CITY PARKING VIOLATIONS BUREAU NEW YORK CITY TRANSIT ADJUDICATION BUREAU; S.J. FUEL CO.; HIRAM JOHNSON; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; SONIA DOE,

Defendants.

and it is further,

ORDERED, that a copy of this Order with Notice of Entry shall be served upon the owner of the equity redemption, any tenants named in this action and any other party entitled to notice.

This constitutes the decision and order of the court.

March 23 2018

George J. Silver

HON. GEORGE J. SILVER
J.S.C.