| **Green Tree Servicing LLC v Milani** |
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| 2018 NY Slip Op 31499(U) |
| June 25, 2018 |
| Supreme Court, Suffolk County |
| Docket Number: 000846/2014 |
| Judge: James Hudson |
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[* 1]

SHORT FORM ORDER **COPY** INDEX NO. 000846/2014

# SUPREME COURT - STATE OF NEW YORK
## IAS PART 40 - SUFFOLK COUNTY

PRESENT: HON. JAMES HUDSON
Acting Supreme Court Justice

x

GREEN TREE SERVICING LLC,

Plaintiff,

-against-

DONNA MILANI, NATIONAL CITY BANK,

"JOHN DOE#1" through "JOHN DOE #12," the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises, described in the complaint,

Defendants.

x

MOTION DATE: 1-17-17
ADJ. DATE: 2-8-17
MOT. SEQ. # 001 - MG

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

***ORDERED*** that this motion (001) by the plaintiff for, inter alia, an order: (1) pursuant to CPLR 3212, awarding summary judgment in its favor and against the answering defendant Donna Milani, striking her answer and dismissing the affirmative defenses set forth therein; (2) striking the names "JOHN DOE #1" through "JOHN DOE #12," and to amend the caption accordingly; (3) pursuant to CPLR 3215, fixing the defaults of the non-answering defendants; and (4) pursuant to RPAPL §1321, appointing a referee to (a) compute amounts due under the subject mortgage; and (b) examine and report whether the subject premises should be sold in one parcel or multiple parcels is granted; and it is further

***ORDERED*** that the plaintiff is directed to serve a copy of this order amending the caption upon the Calendar Clerk of this Court; and it is further

***ORDERED*** that the plaintiff is directed to serve a copy of this order with notice of entry upon all parties who have appeared herein and not waived further notice pursuant to CPLR 2103(b)(1), (2) or (3) within thirty (30) days of the date herein, and to promptly file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on real property situate in Suffolk County, New York, commenced on January 13, 2014. On November 10, 2005, defendant Donna Milani executed a note in favor of America's Wholesale Lender ("AWL") in the amount of $385,000.00. To secure said note, on the same date, defendant gave a mortgage on the subject property to Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for AWL. On December 1, 2011, MERS, as nominee for AWL, executed an Assignment of Mortgage in favor of Bank of America, N.A., successor by merger to BAC Home Loans Servicing f/k/a Countrywide Home Loans Servicing, LP ("BANA"). On June 6, 2013, BANA executed an Assignment of Mortgage in favor of plaintiff. The subject note is indorsed by Countrywide Home Loans, Inc. d/b/a AWL in blank, though this indorsement is undated. By its complaint, plaintiff alleges that defendant defaulted on her payments on the note. By her answer, defendant generally denies the material allegations as set forth in the complaint, and she asserts 12 affirmative defenses, including lack of standing, champerty, and failure to comply with the notice requirements prescribed by Real Property Actions and Proceedings Law (RPAPL) §§1303, 1304, and 1306. No other defendants have answered the complaint or otherwise appeared in this action.

Plaintiff now moves for summary judgment. In support of its motion, plaintiff submits, among other things, copies of the note and mortgage, several duly executed affidavits of service, an affidavit of Kindra Denny, plaintiff's Assistant Vice President, and an affidavit of Karen Keehn, plaintiff's employee. Defendant opposes the motion, arguing, inter alia, that plaintiff failed to comply with RPAPL §§1303, 1304, 1306, and that the doctrine of champerty bars plaintiff's recovery on its cause of action. Further, defendant abandons her remaining affirmative defenses. In opposition, defendant submits an affirmation of her attorney and her own affidavit.

Here, as defendant served an answer that included the affirmative defense of standing, plaintiff must prove its standing so as to be entitled to relief (*see* ***Bank of N.Y. Mellon v Visconti***, 136 AD3d 950, 25 NYS3d 630 [2d Dept 2016]; ***CitiMortgage, Inc. v Rosenthal***, 88 AD3d 759, 931 NYS2d 638 [2d Dept 2011]; ***Bank of N.Y. v Silverberg***, 86 AD3d 274, 926 NYS2d 532 [2d Dept 2011]). Plaintiff established its standing as the holder of the note by attaching the indorsed note to the summons and complaint, demonstrating that the note was in its possession prior to the commencement of the action, and that the subject mortgage passed to plaintiff with the note as an inseparable incident (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, 362, 12 NYS3d 612, 614 [2015]; ***U.S. Bank, N.A. v Saravanan***, 146 AD3d 1010, 45 NYS3d 547 [2d Dept 2017]; ***Nationstar Mtge., LLC v Catizone***, 127 AD3d 1151, 1152, 9 NYS3d 315 [2d Dept 2015]; ***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]). As plaintiff established standing via physical delivery of the note, the validity of the subsequent assignments of the subject mortgage is irrelevant (*see* ***Aurora Loan Servs., LLC v Taylor***, *supra*; ***Wells Fargo Bank, N.A. v Charlaff***, 134 AD3d 1099, 24 NYS3d 317 [2d Dept 2015]; ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]).

Plaintiff's submissions also establish its prima facie entitlement to summary judgment on its mortgage foreclosure action by producing the indorsed note, the mortgage, and evidence of nonpayment (*see* ***Pennymac Holdings, LLC v Tomanelli***, 139 AD3d 688, 32 NYS3d 181 [2d Dept 2016]; ***Wachovia Bank, N.A. v Carcano***, 106 AD3d 724, 965 NYS2d 516 [2d Dept 2013]; ***Capital One, N.A. v Knollwood Props. II, LLC***, 98 AD3d 707, 950 NYS2d 482 [2d Dept 2012]). By her affidavit of merit,

Ms. Denny attests that, based on her review of records kept during the regular course of plaintiff's business, defendant failed to make a payment on the note scheduled for February 1, 2010, and that she failed to make subsequent payments to bring the loan current (*see* CPLR 4518[a]; ***American Airlines Fed. Credit Union v Mohamed***, 117 AD3d 974, 986 NYS2d 530 [2d Dept 2014]; ***Bank of Smithtown v 219 Sagg Main, LLC***, 107 AD3d 654, 968 NYS2d 95 [2d Dept 2013]). In addition, plaintiff's submissions, namely a duly executed affidavit of service dated February 4, 2014, constitutes prima facie evidence of proper service of the notice required by RPAPL §1303 (*see* ***First Nat. Bank of Chicago v Silver***, 73 AD3d 162, 166, 899 NYS2d 256 [2d Dept 2010]; *see also* ***Deutsche Bank Nat. Trust Co. v Quinones***, 114 AD3d 719, 981 NYS2d 107 [2d Dept 2014]; ***U.S. Bank, N.A. v Tate***, 102 AD3d 859, 958 NYS2d 722 [2d Dept 2013]). Further, plaintiff has supplied the Court with adequate evidentiary proof of its compliance with RPAPL §1304, as Ms. Keehn attests to personally mailing the required notices to defendant on September 9, 2013 via first-class and certified mail by her affidavit of service (*see* ***Aurora Loan Servs., LLC v Weisblum***, *supra*, at 103; *cf.* ***M&T Bank v Joseph***, 152 AD3d 579, 58 NYS3d 150 [2d Dept 2017]; ***Deutsche Bank Nat. Trust Co. v Spanos***, 102 AD3d 909, 961 NYS2d 200 [2d Dept 2013]). Moreover, plaintiff's submissions, namely Ms. Denny's affidavit and a copy of a New York State Department of Financial Services proof of filing statement, demonstrate, prima facie, its compliance with RPAPL §1306 (*cf.* ***Hudson City Savings Bank v Seminario***, 149 AD3d 706, 51 NYS3d 159 [2d Dept 2017]; ***TD Bank, N.A v Oz Leroy***, 121 AD3d 1256, 1260, 995 NYS2d 625, 629 [3d Dept 2014]).

As to defendant's affirmative defense of champerty, this doctrine was developed to "prevent or curtail the commercialization of or trading in litigation" (***Bluebird Partners v First Fid. Bank***, 94 NY2d 726, 729, 709 NYS2d 865, 867 [2000]), and it forbids the acquisition of a claim or debt for the primary purpose of commencing a lawsuit (*see* Judiciary Law §489; ***Trust for Certificate Holders of Merrill Lynch Mtge. Invs., Inc. Mtge. Pass-Through Certificates, Series 1999-C1 v Love Funding Corp.***, 13 NY3d 190, 200, 890 NYS2d 377, 382 [2009]; ***SB Schwartz & Co., Inc. v Levine***, 82 AD3d 742, 918 NYS2d 171 [2d Dept 2011]). However, willingness to resort to litigation will not render a transaction champertous if the primary purpose of the transaction is to enforce a legitimate claim (*see* ***Trust for Certificate Holders of Merrill Lynch Mtge. Invs., Inc. Mtge. Pass-Through Certificates, Series 1999-C1 v Love Funding Corp.***, *supra*, at 201; ***Fairchild Hiller Corp. v McDonnell Douglas Corp.***, 28 NY2d 325, 330, 321 NYS2d 857, 860 [1971]; ***SB Schwartz & Co., Inc. v Levine***, *supra*). A party acquiring a debt instrument for the purpose of enforcing it is not champerty simply because said party intends to do so by litigation (*see* ***Trust for Certificate Holders of Merrill Lynch Mtge. Invs., Inc. Mtge. Pass-Through Certificates, Series 1999–C1 v Love Funding Corp.***, *supra*, at 200). Here, plaintiff acquired the subject loan for the purpose of enforcing a legitimate claim, namely to obtain a judgment of foreclosure on a defaulted mortgage, and as such, defendant's affirmative defense of champerty is without merit (*see* CPLR 3211[e]; ***Trust for Certificate Holders of Merrill Lynch Mtge. Invs., Inc. Mtge. Pass-Through Certificates, Series 1999–C1 v Love Funding Corp.***, *supra*; ***71 Clinton St. Apts. LLC v 71 Clinton Inc.***, 114 AD3d 583, 982 NYS2d 6 [1st Dept 2014]; *cf.* ***SB Schwartz & Co., Inc. v Levine***, *supra*).

Plaintiff having met its initial burden on the motion, the burden shifted to defendant to assert any defenses which could properly raise a triable issue of fact (*see* ***Bank of Smithtown v 219 Sagg Main,***

***LLC***, *supra*; ***Valley Natl. Bank v Deutsch***, 88 AD3d 691, 930 NYS2d 477 [2d Dept 2011]; ***Wells Fargo Bank v Cohen***, 80 AD3d 753, 915 NYS2d 569 [2d Dept 2011]; ***Grogg v South Rd. Assoc., L.P.***, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]). In opposition, defendant submits an affirmation of her attorney, arguing, among other things, that plaintiff purchased the subject mortgage for the sole purpose of engaging in litigation, in violation of the champerty statute. However, the affirmation from an attorney having no personal knowledge of the facts is without evidentiary value and, thus, is insufficient to raise a triable issue of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Nevertheless, the Court finds this affirmative defense to be without merit (*see* CPLR 3211[e]; ***Trust for Certificate Holders of Merrill Lynch Mtge. Invs., Inc. Mtge. Pass-Through Certificates, Series 1999-C1 v Love Funding Corp.***, *supra*; ***Fairchild Hiller Corp. v McDonnell Douglas Corp.***, *supra*; ***71 Clinton St. Apts. LLC v 71 Clinton Inc.***, *supra*).

Also in opposition, defendant submits her own affidavit, alleging, among other things, that plaintiff failed to strictly comply with RPAPL §§1303, 1304, and 1306, and that plaintiff failed to comply with her discovery demands. First, defendant contends that the title of the RPAPL §1303 notice served upon her, along with the summons and complaint, was smaller than 20-point type, which does not comport with the statute. However, as defendant does not submit a copy of the notice she actually received, only a copy of a purportedly proper notice, she fails tender evidence, in admissible form, that raises a triable issue of fact as to whether plaintiff strictly complied with RPAPL §1303 (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, *supra*).

Next, defendant attests that she did not receive the RPAPL §1304 notice allegedly sent to her, but nevertheless, said notice failed to strictly comply with the statute, as it contained a housing counseling agency located in Jackson Heights, which is not local to her home in St. James. However, a simple denial of receipt is insufficient to rebut the presumption of proper mailing (*see* ***Flagstar Bank, FSB v Mendoza***, 139 AD3d 898, 32 NYS3d 278 [2d Dept 2016]; ***Emigrant Mtge. Co., Inc. v Persad***, 117 AD3d 676, 985 NYS2d 608 [2d Dept 2014]; ***Grogg v South Rd. Assoc., L.P.***, *supra*). Further, RPAPL §1304(2) states, in relevant part, that "the notices required by this section shall contain a current list of at least five housing counseling agencies *serving the county where the property is located* from the most recent listing available from department of financial services" (emphasis added). Here, defendant proffers no evidence, in admissible form, that the Jackson Heights agency, located in Queens County, does not serve Suffolk County, where the subject property is located, and thus, she fails to raise a triable issue of fact as to whether plaintiff strictly complied with the statute (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*).

In addition, defendant alleges that plaintiff not complete the "step two" filing within the three-day time period prescribed by RPAPL §1306. In support of her contention, defendant submits copies of the filing statements submitted by plaintiff in support of its motion, which show that plaintiff completed the "step two" mailing on January 13, 2014, and that it completed filing of same on February 7, 2014. However, the statute mandates that a lender file the RPAPL §1304 notice it sent to a borrower with the Department of Financial Services within three business days of mailing same, and it is silent as to when the "step two" mailing and filing must be made (*see* RPAPL §1306[1]). As statutory interpretation begins with the plain language of the statute, and the clearest indicator of legislative intent is the

statutory text, "the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof" (***Majewski v Broadalbin-Perth Cent. School Dist.***, 91 NY2d 577, 583, 673 NYS2d 966, [1998]; *see also* ***Estate of Marin v Bell***, 137 AD3d 783, 27 NYS3d 56 [2d Dept 2016]; ***Balsam v Fioriglio***, 123 AD3d 750, 751, 999 NYS2d 425, 426 [2d Dept 2014]). Here, the plain language of RPAPL §1306 is devoid of any instructions as to the "step two" mailing and filing, and the Court declines to apply defendant's interpretation of the statute (see ***Majewski v Broadalbin-Perth Cent. School Dist.***, *supra*; *cf.* ***Hudson City Savings Bank v Seminario***, *supra*; ***TD Bank, N.A v Oz Leroy***, *supra*).

Moreover, a mere hope that further discovery may yield evidence sufficient to raise a triable issue of fact is not a basis to deny summary judgment (*see* ***Dyer Trust 2012-1 v Global World Realty, Inc.***, 140 AD3d 827, 33 NYS3d 414 [2d Dept 2016]; ***Jannetti v Whelan***, 131 AD3d 1209, 17 NYS3d 455 [2d Dept 2015]; ***Suero-Sosa v Cardona***, 112 AD3d 706, 977 NYS2d 61 [2d Dept 2013]).

In light of the foregoing, plaintiff's motion for summary judgment is granted, and the proposed order of reference, as modified by the Court, has been signed concurrently herewith.

Dated: June 25th, 2018

A.S.C.J.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**