

**Aurora Loan Servs, LLC v Thomas**

2010 NY Slip Op 33023(U)

October 14, 2010

Supreme Court, Suffolk County

Docket Number: 06-19176

Judge: Peter H. Mayer

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 17 - SUFFOLK COUNTY

**PRESENT:**

Hon. PETER H. MAYER  
Justice of the Supreme Court

MOTION DATE 3-5-10 (#004)  
MOTION DATE 4-9-10 (#005)  
ADJ. DATE 8-3-10  
Mot. Seq. # 004 - MD  
# 005 - MotD

-----X		
AURORA LOAN SERVICES, LLC,	:	ROSICKI, ROSICKI & ASSOCIATES, P.C.
	:	Attorney for Plaintiff
	:	51 E. Bethpage Road
Plaintiff,	:	Plainview, New York 11803
- against -	:	
	:	
TERENCE THOMAS, GREENPOINT	:	JUDITH REARDON, P.C.
MORTGAGE FUNDING, INC., "JOHN DOES"	:	Attorney for Defendant Terence Thomas
and "JANE DOES", said names being fictitious,	:	20 Woodsbridge Road
parties intended being possible tenants or occupants	:	Katonah, New York 10536
of premises, and corporations, other entities or	:	
persons who claim, or may claim, a lien against the	:	
premises,	:	
	:	
Defendants.	:	
-----X		

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause (#004) for summary judgment by Aurora Loan Service dated February 8, 2010 and supporting papers numbered 1-26 ; (2) Notice of Cross Motion (#005) by Terrence Thomas dated March 29, 2010 and supporting papers 27-56 and (3) Affirmation in Opposition numbered 57-68; (4) Reply Affirmations numbered 69-74; (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

**ORDERED** that this motion (004) by the plaintiff pursuant to CPLR 3212 for an order granting summary judgment striking the answer and affirmative defenses and counterclaims interposed by Terence Thomas and deem it an appearance and waiver in foreclosure; and further order appointing a referee to compute the total sums due and owing to plaintiff; for further order to amend the caption to strike "JOHN DOES" and "JANE DOE;" or in the alternative, for an order requiring defendant Thomas to give an undertaking in the amount of \$30,000 as security for the payment of property-related taxes and insurance that have accrued to date and are expected to accrue pending the trial of this action has been rendered academic by dismissal of the complaint of this action and is hereby denied as moot; and it is further

**ORDERED** that this motion (005) by the defendant, Terence Thomas, for an order pursuant to CPLR 3211(a)(3) dismissing the complaint on the basis that the plaintiff lacks standing to bring this action is hereby

granted as a matter of law and the complaint is dismissed and defendant Thomas' counterclaims set forth in the amended answer are severed and continued; and for further order for summary judgment on the defendant's counterclaim premised upon alleged violations of General Business Law §394, and for legal fees and costs is denied; and it is further

**ORDERED** that the Notice of Pendency filed with the Clerk of the County of Suffolk on July 13, 2006 is hereby cancelled and the defendant is directed to serve a copy of this order with Notice of Entry upon all parties and the Clerk of the County of Suffolk within thirty days of the date of this order, and said Clerk is directed to cancel, said Notice of Pendency against the subject property.

This is an action of record wherein the plaintiff, Aurora Loan Services, LLC, seeks to foreclose on a mortgage for the premises located at 413 Broadway, Huntington, New York. The complaint in this action alleges that on or about November 2, 2005, Terence Thomas (Thomas) executed and delivered to Greenpoint Mortgage Funding, Inc. a note on a mortgage whereby Thomas covenanted and agreed to pay the sum of \$344,000.00 with interest on the unpaid balance thereof at the rate of 7.125% per annum by monthly payments of \$2,042.50 commencing on January 1, 2006 until final payment on December 1, 2035. As collateral security, Thomas also executed and delivered to Greenpoint Mortgage Funding a mortgage dated November 2, 2005, recorded in the County of Suffolk, New York on November 17, 2005. It is claimed that the defendant stopped making payments on the mortgage on April 1, 2006 and ongoing, and that the balance due and owing upon the note and mortgage as of the date of default is \$344,000.00 plus interest from March 1, 2006.

A Notice of Pendency was filed on July 13, 2006 with the Clerk of the County of Suffolk for the foreclosure of the mortgage dated November 2, 2005 for the subject premises.

The defendant, Terence Thomas, served an answer asserting various affirmative defenses, including failure to accelerate the mortgage pursuant to paragraph 22 of the mortgage document as a condition precedent to commencing the action; bad faith; predatory lending practices in violation of Federal and State statutes; and conspiracy to commit fraud in violation of General Business Law §349. For a first counterclaim, the defendant asserts that the law firm of Caputo and Quail represented the seller, the buyer and the lender at the closing; submitted false information on the application for the mortgage; indicated that it was holding \$12,900.00 in escrow when no such asset existed; used inflated appraisals; concealed the purchase of the property by the seller one month prior; misrepresented the documents to be signed by the defendant; and induced the defendant to purchase the property on false representations upon which the defendant relied. Thomas further claims he was the victim of predatory lending schemes and that the plaintiff, in underwriting his application, reviewed the application and should have been aware that the seller of the property was not in title of the property when the loan was approved and that there was a tenant in the premises. The defendant asserts that he was defrauded by the plaintiff as the underwriter and end lender who knew or should have known that the defendant lacked the financial ability to repay the mortgage executed at the closing on November 2, 2005 and that the plaintiff and plaintiff's assignor failed to conduct due diligence regarding the veracity of the financial information, and submitted false documents at closing, including a HUD Settlement Statement.

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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the

sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2<sup>nd</sup> Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2<sup>nd</sup> Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [2<sup>nd</sup> Dept 1979]).

In motion (004), the plaintiff seeks summary judgment striking the answer and affirmative defenses and counterclaims interposed by Terence Thoms and deem it an appearance and waiver in foreclosure; and further order appointing a referee to compute the total sums due and owing to plaintiff; for further order to amend the caption to strike “JOHN DOES” and “JANE DOE;” or in the alternative, for an order requiring defendant Thomas to give an undertaking in the amount of \$30,000 as security for the payment of property-related taxes and insurance that have accrued to date and are expected to accrue pending the trial of this action. In support of this motion, the plaintiff has submitted, inter alia, an attorney’s affirmation; a copy of a Contract of Sale between Jocelyn Jean and Terence Thomas dated October 7, 2005; copy of a loan application; copy of a Fixed Rate Note dated November 2, 2005; copy of a recorded assignment from Green Point to Mortgage Electronic Registration Systems, Inc. for the Terence Thomas mortgage in the County of Suffolk on November 17, 2005; copy of the recording of the deed for the sale of the subject property from Jocelyn Jean to Terence Thomas on November 17, 2005; copy of a U.S. Housing Settlement Statement; partial, unsigned transcript of the examination before trial of Zachary Trump dated May 16, 2008; affidavit of Zachary Trump notarized in the State of Nebraska, County of Scotts Bluff; affidavit of Patrick Bauman notarized in the State of Colorado, County of Douglas; a copy of the summons and complaint with affidavit of service, answer with affirmative defenses and counterclaims and reply to counterclaims, amended answer with affirmative defenses and counterclaims, reply to amended counterclaims; copy of the order dated March 27, 2007 (Mayer, J.) denying summary judgment and the appointment of a referee to compute; copy of the transcript dated March 3, 2009 for the oral argument before J. Mayer; copy of the Note of Issue and Certificate of Readiness dated October 9, 2009; copy of a letter dated May 19, 2006 to Terence Thomas from Aurora Loan Services; Good Faith Estimate by Orion Funding Corp. dated October 7, 2005; Uniform Residential Appraisal Report dated October 6, 2005; copy of Indenture dated October 5, 2005 for the subject premises from Martha Velasquez to Jocelyn Jean without recording.

It is noted that the transcript of the examination before trial of Zachary Trump is unsigned and is not in admissible form. The out-of-state affidavits of Zachary Trump and Patrick Bauman are not in admissible form pursuant to CPLR 2106 and 2309(c), and lack a certificate of conformity as required by N.Y. Real. Prop. Law. § 299-a(1) (see, *Ford Motor Credit Company v Prestige Gown Cleaning Service*, 193 Misc2d 262, 748 NYS2d 235 [Civ Ct Queens County 2002], wherein it was provided that “[a]n oath or affirmation taken without the state shall be treated as if taken within the state if it is accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state to be recorded within the state if such deed had been acknowledged before the officer who administered the oath or affirmation”). Based upon the foregoing, it is determined that the motion for summary judgment fails to comport with the requirements of CPLR 3212 which requires affidavits by a persons with knowledge in admissible form. Here, the partial deposition transcript is unsigned and the affidavits do not comport with CPLR 3212. However, in that it is determined that the plaintiff

lacks standing to maintain this action, the plaintiff's application has been rendered academic and is denied as moot.

In motion (005), the defendant seeks dismissal of the action pursuant to CPLR 3211(a)(3) based upon the plaintiff not having standing, and further seeks summary judgment on the counterclaim for violations of General Business Law §394. In support of the instant application, the defendant has submitted, inter alia, an attorney's affirmation; copy of the order dated February 23, 2010 of the Appellate Division 2<sup>nd</sup> Department; a copy of a redacted letter/contract dated November 30, 2005 to Greenpoint Mortgage from Lehman Brothers Bank, FSB; copy of the amended verified answer with affirmative defenses and counterclaims; Copy of Assignment and Conveyance dated December 29, 2005 from Greenpoint Mortgage to Lehman Brothers Bank, FSB with Exhibits A and B; copy of the Flow Mortgage Loan Purchase and Warranties Agreement between Lehman Brothers Bank FSB, purchaser, and Greenpoint Mortgage Funding, Inc., seller, for Conventional Fixed and Adjustable Rate Residential Mortgage Loans, dated December 12, 2001; unsigned excerpts from a deposition transcript; copy of the Assignment of Mortgage dated July 28, 2006 from Assignor Mortgage Electronic Registration Systems, Inc. as nominee for Greenpoint Mortgage Funding, Inc. to Assignee Aurora Loan Services, LLC for the mortgage executed by Terence Thomas on November 2, 2005, recorded in Suffolk County on November 17, 2005 for the property at 413 Broadway, Huntington, New York, with the assignment effective on or before June 1, 2006; report dated December 28, 2005, Clayton Services, Inc.; partial and unsigned transcript of the deposition of non-party witness, James J. Quail dated February 20, 2008; partial and unsigned transcript of the deposition of non-party witness Robert Caputo dated May 2, 2008; partial and unsigned transcript of the deposition of non-party witness, Konstantinos Volakos dated May 5, 2008; and a partial and unsigned transcript of the deposition of non-party witness, Steven Barnes.

It is determined that part of the defendant's motion (005) for summary judgment on the counterclaim for violations of General Business Law §394 fails to comport with the requirements of CPLR 3212 as it is unsupported by an affidavit of a person with knowledge or copies of deposition transcripts in admissible form and thus summary judgment on the counterclaim is denied.

Turning to that part of the defendant's motion pursuant to CPLR 3211(a)(3) for dismissal of the complaint on the basis that the plaintiff lacks standing to commence this action, it is determined as a matter of law that the defendant lacks standing.

Standing requires an inquiry into whether the litigant has an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request. Where standing is put into issue by a defendant's answer, a plaintiff must prove its standing if it is to be entitled to relief. Standing is an aspect of justiciability which, when challenged, must be considered at the outset of any litigation (see, *Wells Fargo Bank Minnesota National Association*, 4 AD3d 239, 837 NYS2d 247 [2<sup>nd</sup> Dept 2007]). "Standing to sue is critical to the proper functioning of the judicial system. It is a threshold issue. If standing is denied, the pathway to the courthouse is blocked. The plaintiff who has standing, however, may cross the threshold and seek judicial redress.... If a plaintiff lacks standing to sue, the plaintiff may not proceed in the action" (*Deutsche Bank National Trust Company, et al v Campbell et al*, 21 Misc3d 1145A, 875 NYS2d 819 [Supreme Court of New York, Kings County 2008]). It is noted that the order dated February 23, 2010 of the Appellate Division 2<sup>nd</sup> Department, provided, inter alia, a determination that contrary to the plaintiff's contention, the defendant Terence Thomas did not waive the affirmative defenses of lack of standing and lack of capacity to sue (cf. *Wells Fargo Bank Minn. N.A. v Mastropaolo*, 42 AD3d 239), and further determined that the Supreme Court properly granted those portions of Thomas' motion which were for leave to amend his answer to assert the defenses of lack of standing and lack of capacity to sue (see, *Aurora Loan Services, LLC v*

*Terence Thomas et al*, 70 AD3d 986, 897 NYS2d 140 [2<sup>nd</sup> Dept 2010]).

A plaintiff seeking foreclosure must establish that it was the owner or holder of the note and mortgage at the time that it commenced the foreclosure action (*see, Mortgage Elec. Registration Sys. v Coakley*, 41 AD3d 674, 838 NYS2d 622 [2<sup>nd</sup> Dept 2007]; *Federal Natl. Mtge. Assn. v Youkelsone*, 303 AD2d 546, 755 NYS2d 730 [2<sup>nd</sup> Dept 2003]; *see also, Wells Fargo Bank, N.A. v Marchione*, 69 AD3d 204, 887 NYS2d 615 [2<sup>nd</sup> Dept 2009]). A plaintiff may do so by demonstrating that it was the assignee of the mortgage and the underlying note or the assignee of the mortgage and by indorsement the holder of the note at the time that the action was commenced (*see, Federal Natl. Mtge. Assn. v Youkelsone, supra; First Trust Natl. Assn v Meisels*, 234 AD2d 414, 651 NYS2d 121[2<sup>nd</sup> Dept 1996]; *Slutsky v Blooming Grove Inn, Inc.*, 147 AD2d 208, 542 NYS2d 721[2<sup>nd</sup> Dept 1989]).

The Corporate Assignment of Mortgage reveals that on July 28, 2006, the Assignor-Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for Greenpoint Mortgage Funding, Inc, assigned to Aurora Loan Services, LLC-Assignor, the mortgage dated November 2, 2005 executed by Terence Thomas and recorded November 17, 2005 in the County of Suffolk. The assignment further indicates that the assignment is effective on or before June 1, 2006. The address of the subject property of the mortgage is 413 Broadway, Huntington, New York. The assignment of the mortgage to Aurora Loan Services, LLC was recorded with the Clerk of the County of Suffolk, New York on August 16, 2006.

Here, the defendant has demonstrated that the plaintiff lacks standing as the lawful holder or assignee of the subject note (*see, U.S. Bank, N.A. v Adrian Collymore, supra*). Although the plaintiff asserts that it obtained ownership interest in the subject note and mortgage from MERS as the purported nominee of Greenpoint Mortgage Funding, Inc., the effectiveness of the subject assignment on June 1, 2006 is ineffective where the instrument is dated July 28, 2006 and there is no evidence to demonstrate to this court that Aurora Loan Services, LLC owned the mortgage on July 14, 2006 when the instant action was commenced. If an assignment is in writing, the execution date is generally controlling and a written assignment claiming an earlier effective date is deficient unless it is accompanied by proof that the physical delivery of the note and mortgage was, in fact, previously effectuated (*see, Wells Fargo Bank, N.A. v Marchione, et al, supra*). In the instant action, the same has not been demonstrated.

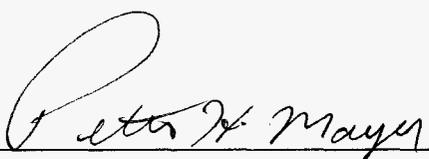
While recognizing that in some circumstances parties to an agreement may bind themselves retroactively, the fiction of retroactivity should not be applied to affect adversely the rights of third persons, and a retroactive assignment cannot be used to confer standing upon the assignee in a foreclosure action commenced prior to the execution of the assignment (*Wells Fargo Bank, N.A. v Marchione, et al, supra*). Foreclosure of a mortgage may not be brought by one who has no title to it, and an assignee of such a mortgage does not have standing unless the assignment is complete at the time the action is commenced (*see, JP Morgan Chase Bank, N.A. et al v George et al*, 27 Misc3d 1217A, 2010 NY Slip Op 50786U [Supreme Court of New York, Kings County 2010]). There is no evidence to demonstrate that Greenpoint ever directly assigned the note or mortgage to MERS or expressly gave MERS the authority, such as by power of attorney, to act as its authorized agent to assign the subject note to the plaintiff (*see, In re Stralem*, 303 AD2d 120, 758 NYS2d 345 [2<sup>nd</sup> Dept 2003]; *Teitz v Goettler*, 191 AD 924, 181 NYS 956 [2<sup>nd</sup> Dept 1920]). Without an effective transfer of Greenpoint's interest in the note to MERS, or express authorization from Greenpoint for MERS to assign the note on its behalf, the assignment of the mortgage is a nullity (*see, Kluge v Fugazy*, 145 AD2d 537, 536 NYS2d 92 [2<sup>nd</sup> Dept 1988]).

Aurora v Thomas et al  
Index No. 06-19176  
Page No. 6

On December 29, 2005, Greenpoint Mortgage Funding, Inc. assigned and conveyed its ownership interest in the Terence Thomas mortgage to Lehman Brothers Bank, FSB pursuant to the purchase agreement dated December 12, 2001. Pursuant to that Agreement, the purchaser, Lehman Brothers Bank, FSB, assumed all servicing responsibilities related in, and the seller ceased all servicing responsibilities, on the date of transfer. There are no evidentiary submissions to establish that Lehman Brothers Bank, FSB conveyed the mortgage to Lehman Brothers Holding, or to Fannie Mae, back to Lehman Brothers Bank, FSB or Lehman Brothers Holding and back to Greenpoint Funding, or to Aurora Services, LLC., or to any other party, as the plaintiff asserts in an unsupported and conclusory manner. It has not been demonstrated who owned the mortgage at the time this action was commenced. Therefore, it has not been demonstrated that Aurora Loan Servicers, LLC owned the mortgage at the time the action was commenced and therefore standing to commence this action has not been demonstrated as a matter of law. Accordingly, the complaint is dismissed and the counterclaim is severed from the action and continued.

Settle Order

Dated: 10/14/10

  
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PETER H. MAYER, J.S.C.