

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

	x	Index
FREMONT INVESTMENT & LOAN,		Number <u>10776</u> 2007
Plaintiff,		Motion
-against-		Date <u>June 4,</u> 2008
REGINALD LAROC; ELAINE NASTA;		Motion
CHRISTINA PLOUMIS; DIMITRIOS		Cal. Number <u>8</u>
PLOUMIS; DENISE PLOUMIS;		Motion Seq. No. <u>2</u>
Defendants.		
	x	

The following papers numbered 1 to 13 read on this motion by defendants Reginald Laroc and Elaine Nasta to stay the foreclosure sale and all proceedings to enforce the judgment, and vacate the judgment and action.

	<u>Papers Numbered</u>
Order to Show Cause - Affidavits - Exhibits.....	1-6
Answering Affidavits - Exhibits.....	7-9
Reply Affidavits.....	10-13

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff commenced this foreclosure action alleging it is the holder, pursuant to an assignment, of a mortgage dated October 13, 2006, executed, acknowledged and delivered by defendants Laroc and Nasta, the fee owners of the premises known as 57-29 160th Street, Fresh Meadows, to Fremont Investment & Loan, to secure repayment of a note, evidencing a loan in the principal amount of \$585,000.00, with interest. Plaintiff alleged that defendants Laroc and Nasta defaulted under the terms of the mortgage and note by failing to make the monthly installment payment of interest due and owing on December 1, 2006, and that as a consequence, it elected to accelerate the entire mortgage debt.

Plaintiff obtained a judgment of foreclosure and sale dated January 15, 2008 against defendants Laroc and Nasta based upon their default in answering the complaint. Defendants Laroc and Nasta seek to stay the foreclosure sale, vacate the judgment of foreclosure and sale, and for leave to serve a late answer. They assert that their default in answering the complaint is excusable and that they have meritorious defenses based upon fraud, coercion, lack of standing, and violations of Banking Law § 6-1 and General Obligations Law § 349.

Plaintiff opposes this motion.

To the extent defendants Laroc and Nasta seek to vacate the judgment of foreclosure and sale, the affidavits of service presented by plaintiff constitute prima facie evidence of proper service upon defendants Laroc and Nasta in accordance with CPLR 308(2) and CPLR 308(1), respectively (see Skyline Agency, Inc. v Ambrose Coppotelli, Inc., 117 AD2d 135, 139 [1986]). In addition, defendants Laroc and Nasta appeared in the action, insofar as their former counsel served and filed a notice of appearance on their behalf, and the notice of appearance did not contest jurisdiction. Generally, "[a]n appearance by a defendant in an action is deemed to be the equivalent of personal service of a summons upon him [or her], and therefore confers personal jurisdiction over him or [her], unless he [or she] asserts an objection to jurisdiction either by way of motion or in his [or her] answer By statute, a party may appear in an action by attorney (CPLR 321), and such an appearance constitutes an appearance by the party for purposes of conferring jurisdiction" (Skyline Agency v Ambrose Coppotelli, Inc., 117 AD2d at 140) (see National Loan Investors, L.P. v Piscitello, 21 AD3d 537 [2005]). Defendants Laroc and Nasta claim that they relied upon their attorney to represent them in defense of the action, and were unaware that the attorney did not assert any defenses on their behalf. However, they do not contest that plaintiff properly effected service of process upon them. Thus, that branch of the motion by defendants Laroc and Nasta to vacate the judgment of foreclosure and sale pursuant to CPLR 5015(a)(4) is denied.

Defendants Laroc and Nasta make no claim that they did not personally receive notice of the summons in time to defend (see CPLR 317). That branch of the motion by defendants Laroc and Nasta to vacate the judgment of foreclosure and sale pursuant to CPLR 317 is denied.

With respect to that branch of the motion by defendants Laroc and Nasta to vacate the judgment based upon CPLR 5015(a)(1), a defendant seeking to vacate a default in answering a complaint must

demonstrate a justifiable excuse for the default and a meritorious defense to the action (see CPLR 5015[a][1]; White v Daimler Chrysler Corp., 44 AD3d 651 [2007]; Fekete v Camp Skwere, 16 AD3d 544 [2005]; Caputo v Peton, 13 AD3d 474 [2004]; Glibbery v Cosenza & Assoc., 4 AD3d 393 [2004]). Defendants Laroc and Nasta state that their former attorney merely attempted to negotiate with plaintiff's assignee for permission to sell the premises with a short payoff of the mortgage loan. They further assert that they have learned from their present attorney, that they are the victims of fraudulent and predatory lending practices committed by plaintiff and its agents, in violation of Banking Law § 6-1 and General Business Law § 349, and that plaintiff lacked standing to bring this suit.

Although a court has the discretion to accept law office failure as a reasonable excuse (see CPLR 2005), a conclusory, undetailed, and uncorroborated claim of law office failure does not amount to a reasonable excuse (see Matter of ELRAC v Holder, 31 AD3d 636 [2006]; McClaren v Bell Atl., 30 AD3d 569 [2006]; Solomon v Ramlall, 18 AD3d 461 [2005]). Here, the uncorroborated and inadequately-explained excuse for failing to answer by defendants Laroc and Nasta does not constitute a reasonable excuse. In fact, the record supports the conclusion that defendants Laroc and Nasta purposely embarked upon a course of "willful default and neglect" (Santiago v New York City Health & Hosps. Corp., 10 AD3d 393, 394 [2004]; Kolajo v City of New York, 248 AD2d 512 [1998]). Defendants Laroc and Nasta were in default in answering before they retained their former attorney. Moreover, they make no claim that their former attorney failed to advise them properly regarding their potential defenses, and have presented no proof that such attorney failed to serve an answer as an oversight or under a misapprehension that negotiations with plaintiff's alleged assignee extended the time to answer.

In addition, defendants Laroc and Nasta have failed to demonstrate a meritorious defense to the action.

To the extent defendants Laroc and Nasta raise lack of standing, "[s]tanding to sue requires 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" (Carper v Nussbaum, 36 AD3d 176, 181 [2006]). A plaintiff seeking to foreclose upon a mortgage must establish that it has legal or equitable interest in the mortgage and underlying debt (see Katz v East-Ville Realty Co., 249 AD2d 243 [1998]; Kluge v Fugazy, 145 AD2d 537 [1988]; see also First Trust Nat. Assn. v Meisels, 234 AD2d 414 [1996]). Thus, it is self-evident that if the plaintiff establishes it is the lawful holder of the mortgage and

note when the action was commenced, it has standing to sue for foreclosure (see Mortgage Electronic Registration Systems, Inc. v Coakley, 41 AD3d 674 [2007]; Federal Natl. Mtge. Assn. v Youkelsone, 303 AD2d 546 [2003]).

Defendants Laroc and Nasta claim that plaintiff did not have any interest in the subject mortgage and underlying note at the time of the commencement of this action.

The subject mortgage names Fremont Investment & Loan as the lender, and Mortgage Electronic Registration Systems, Inc. (MERS) as the nominee for the lender and the lender's successors and assigns, and as the mortgagee of record. The note was executed in favor of Fremont Investment & Loan, as the lender which advanced the mortgage loan proceeds to defendants Laroc and Nasta. The subject mortgage and note permit transference by the lender as of right, without permission of the borrower. Cynthia Can Patten, a vice-president on behalf of MERS, acting as nominee for Fremont Investment & Loan, executed the assignment of mortgage on May 24, 2007, purporting to assign the subject mortgage, together with the underlying obligation, from MERS to plaintiff. The assignment states that it is "[e]ffective as of March 20, 2007."

A mortgage may be assigned by the delivery of the note and mortgage by the assignor to the assignee with the intention that all ownership interest be thereby transferred (see Levy v Louvre Realty Co., 222 NY 14, 20 [1917]; Curtis v Moore, 152 NY 159 [1897]; Fryer v Rockefeller, 63 NY 268 [1875]; Flyer v Sullivan, 284 AD 697 [1954]; see also Becker v Wells, 297 NY 275 [1948]), or by a written instrument of assignment (see generally Deutsche Bank Trust Co. Americas v Peabody, 2008 WL 2548733, 2008 NY Misc LEXIS 3690). One court has taken the position that a written assignment of a mortgage and underlying note to a plaintiff seeking foreclosure, which is dated after the commencement date, is ineffective to establish standing, even where the assignment recited an effective date earlier than the commencement date (see e.g. Countrywide Home Loans, Inc. v Taylor, 17 Misc 3d 595 [2007]; Countrywide Home Loans, Inc. v Hovanec, 15 Misc 3d 1115(A) [2007]; see generally Deutsche Bank Trust Co. Americas v Peabody, 2008 WL 2548733, 2008 NY Misc LEXIS 3690, supra). This court, however, is of the opinion that a written assignment may convey a legal interest, and also may serve to acknowledge an equitable interest which was transferred at earlier time by reciting that the assignment took effect at date prior to the date of its execution (see e.g. Penske Truck Leasing Co., L.P. v Home Ins. Co., 251 AD2d 478 [1998]; Tenzer, Greenblatt, Fallon & Kaplan v Abbruzzese, 57 Misc 2d 783 [1968]). Such earlier transference of the equitable interest, if accomplished by physical delivery of the

note and mortgage to a plaintiff, prior to initiation of the action (see Bankers Trust Co. v Hoovis, 263 AD2d 937 [1999]; see also Deutsche Bank Trust Co. Americas v Peabody, 2008 WL 2548733, 2008 NY Misc LEXIS 3690, supra), can provide the requisite standing for bringing foreclosure (see Katz v East-Ville Realty Co., 249 AD2d 243 [1998], supra; Kluge v Fugazy, 145 AD2d 537 [1988], supra; see also First Trust Nat. Assn. v Meisels, 234 AD2d 414 [1996], supra).

In this instance, it is undisputed that Fremont Investment & Loan was the holder of the mortgage and note from the outset and that the mortgage confers no right to the note to MERS. Therefore, the assignment from Fremont Investment & Loan to itself, by means of the assignment by MERS, was an effort by plaintiff, as a matter of caution, to avoid any objection to the standing of MERS as a nominee for the lender to bring a foreclosure action (see generally MERSCORP, Inc. v Romaine, 8 NY3d 90 [2006] [county clerk had duty to record and index mortgages that named MERS as the lender's nominee]; see also Mortgage Electronic Registration Systems, Inc. v Coakley, 41 AD3d 674 [2007], supra).

To the extent defendants Laroc and Nasta assert that the subject mortgage loan was a high-cost home loan, they have failed to show that the mortgage loan constituted a "high cost home loan" as that term was defined in Banking Law § 6-1, as of the date of the making of the subject loan (see Banking Law § 6-1[1][d]; former Banking Law § 6-1[e][I] [L 2002, c 626, § 1]).¹

Defendants Laroc and Nasta assert that plaintiff engaged in fraud and coercion, and predatory lending practices, to induce them into accepting a loan beyond their means to repay, and with the intention that the property be sold at foreclosure. They claim that plaintiff failed to consider their repayment ability and provided them with a truth-in-lending statement which contained a false statement as to the amount of the monthly payment. In addition, they claim that plaintiff utilized a false appraisal, to justify the loan amount, and aided and abetted the mortgage broker in improperly charging them \$23,241.00 in fees in relation to the refinancing of mortgage. According to defendants Laroc and Nasta, plaintiff violated General Business Law § 349.

General Business Law § 349 prohibits deceptive business practices and acts. An affirmative defense or a cause of action

1

Under former Banking Law § 6-1(e)(i), mortgage loans in principal amounts exceeding \$300,000.00 were not covered by the statute.

for deceptive business practices under General Business Law § 349 must include an allegation of a consumer-oriented act or practice that is misleading in a material way which causes injury to the party seeking relief (see Stutman v Chemical Bank, 95 NY2d 24, 29 [2000]). An act is deceptive if it is likely to mislead a reasonable consumer acting reasonably under the circumstances (see Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, 85 NY2d 20, 26 [1995]). The act need not constitute common-law fraud to be actionable (see Stutman v Chemical Bank, 95 NY2d 24, 29 [2000], supra).

Although an individual mortgagor who has been the victim of misleading practices by a mortgagee has been held to have a remedy under General Business Law § 349 (see e.g. Popular Financial Services, LLC v Williams, 50 AD3d 660 [2008]; Delta Funding Corp. v Murdaugh, 6 AD3d 571 [2004]), in this instance, defendants Laroc and Nasta played a role in inducing plaintiff to make the loan because they submitted a mortgage application with an incorrect and exaggerated total monthly income figure of \$11,100.00. They aver that they never reported to any entity that they made a total monthly income of \$11,100.00, and blame the mortgage broker for inserting such figure in the application. However, they make no claim that plaintiff was aware of their true income, and do not provide a sworn denial that they signed the loan application or initialed the application page wherein the inflated figure is recited. Defendant Nasta merely states that "we cannot even tell whether the initials on the bottom of that page are our initials." As a general rule, the signer of a written agreement is deemed to be conclusively bound by its terms, in the absence of a showing of fraud, duress or some other wrongful act on the part of a party to the contract (see Pimpinello v Swift & Co., 253 NY 159 [1930]; Columbus Trust Co. v Campolo, 110 AD2d 616 [1985], affd 66 NY2d 701 [1985]). To the extent defendants Laroc and Nasta signed the application, without reviewing it or knowing its contents, they risked that plaintiff would be induced to give them a loan they could not afford.

With respect to the claims by defendants Laroc and Nasta that plaintiff was guilty of coercion and overreaching in fraudulently inducing them to enter into the refinance transaction, they have presented no evidence indicating an absence of meaningful choice on their part (see King v Fox, 7 NY3d 181 [2006]; Gillman v Chase Manhattan Bank, N.A., 73 NY2d 1 [1988]). Again, to the extent defendants Laroc and Nasta permitted the mortgage broker to exaggerate their income on their mortgage application, to induce the granting of the loan, they cannot be heard to complain of the consequences. Defendants Laroc and Nasta, furthermore, have failed to demonstrate that the appraisal was fraudulent at the time of the

report's issuance, or that it was intended for their benefit, and they justifiably relied upon the representations therein when deciding to enter into the transaction.

To the extent defendants Laroc and Nasta assert that they were not given a proper settlement statement in relation to the closing of the mortgage loan, the Real Estate Settlement Procedures Act (RESPA) (12 USC § 2601 et seq.), requires mortgage lenders, which offer "federally related mortgage loans" (see 12 USC § 2605), and mortgage brokers (to the extent they are not the lender's exclusive agent), to disclose the costs associated with real estate transactions which involve federally-related mortgage loans (12 USC § 2603; 24 CFR 3500.7). Defendants Laroc and Nasta have failed, however, to prove that the subject loan was a federally-related mortgage loan.

In addition, a RESPA violation does not adversely affect the validity or enforceability of a federally-related mortgage loan (see 12 USC § 2615; see also G.E. Capital Mortgage Services, Inc. v Baker, No. CV 980167089S, 1999 WL 511156, 1999 Conn Super LEXIS 1791 [Conn Super Ct, July 7, 1999] [applying section 2615]; Security Pacific Natl. Bank v Robertson, No. CV 920124622S, 1997 WL 561235, 1997 Conn Super LEXIS 2306 [Conn Super Ct, August 28, 1997]; cf. Bibler v Arcata Investments 2, LLC, No. 263024, 2005 WL 3304127 [Mich Ct App, December 6, 2005]). Thus, a disclosure violation of RESPA does not constitute a valid defense to mortgage foreclosure (see Webster Bank v Linsley, 2001 WL 1042581 [Conn Super Ct, August 14, 2001]).

To the extent defendants Laroc and Nasta object to the mortgage broker fee, which they paid in connection with the loan, they have failed to offer proof that the mortgage broker violated any law or committed any fraud in charging such fee. Nor have they established that plaintiff owed them a duty to monitor and control the mortgage broker. Therefore, defendants Laroc and Nasta have failed to show the manner in which plaintiff aided and abetted the mortgage broker to defraud them.

To the extent defendants Laroc and Nasta assert plaintiff is guilty of "reverse redlining," i.e. "a lending scheme that targets low-income minorities, offering them exorbitantly high interest rate loans in large amounts, even though they do not have the ability to repay, thereby approving a loan designed to fail, and resulting in loss of the home through foreclosure" (Equicredit Corp. of N.Y. v Turcios, 300 AD2d 344, 346 [2002]), they improperly asserted such defense for the first time in their reply papers (see CPLR 2214; Keitel v Kurtz, 54 AD3d 387 [2008]; Tobias v Manginelli, 266 AD2d 532 [1999]). Plaintiff, therefore,

has been denied any opportunity to submit evidence to oppose such newly-raised defense.

That branch of the motion by defendants Laroc and Nasta to vacate the judgment based upon CPLR 5015(a)(1) is denied.

Lastly, defendants Laroc and Nasta assert plaintiff no longer has an interest in the property, having assigned its interest in the mortgage and note to GMAC. Where a mortgagee commences an action to foreclose and then assigns its interest in the mortgage, the assignee has the right to continue the action in the name of the original mortgagee even in the absence of formal substitution (see CPLR 1018; Central Fed. Sav. v 405 W. 45th St., 242 AD2d 512 [1997]; Judson v Three Building Corp., 18 AD2d 232 [1963]). Defendants Laroc and Nasta do not challenge the substantive validity of the alleged assignment of the subject mortgage to GMAC. Therefore, defendants Laroc and Nasta have failed to show the judgment of foreclosure and sale is defective.

That branch of the motion by defendants Laroc and Nasta to stay the foreclosure sale is denied. Defendants Laroc and Nasta have failed to demonstrate that plaintiff is contractually obligated to consent to any stay or forbearance agreement, or to reinstate the mortgage, or that they tendered funds sufficient to satisfy the mortgage debt.

Dated: October 8, 2008

J.S.C.