

Citibank, N.A. v Lin

2007 NY Slip Op 31428(U)

May 24, 2007

Supreme Court, New York County

Docket Number: 0101699/2007

Judge: Judith J. Gische

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

PRESENT: GISCHE
Justice

PART 10

CITIBANK, N.A.
- v -
EUGENE LIM, ETAL.

INDEX NO. 101699/07
MOTION DATE _____
MOTION SEQ. NO. 01
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
JUN 04 2007
NEW YORK
COUNTY CLERK'S OFFICE

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 5/29/07

JUDITH J. GISCHE, J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

Supreme Court of the State of New York
County of New York: Part 10

CITIBANK, N.A.,

Plaintiff,

-against-

EUGENE LIN, ILAN CHACHAMI, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, BOARD OF MANAGERS OF THE TOWER 53 CONCOMINIUM, and "JOHN DOE" and/or "JANE DOE" #1-10 inclusive, the last ten 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.

Decision/Order

Index No. 101699/07

Mot. No. 001

Present:

Hon. Judith J. Gische

J.S.C.

Pursuant to CPLR 2219(a) the court considered the following numbered papers on this motion:

PAPERS	NUMBERED
Pltf's OSC, affirm JR, affid (CC), exhs	1

Upon the foregoing papers the decision and order of the court is as follows:

Plaintiff/mortgagee commenced this foreclosure action seeking to recover on a Note allegedly executed by defendant Eugene Lin ("Lin") and secured by a mortgage purportedly executed by Lin and Ilan Chachami ("Chachami"). An ex parte application has been brought by Citibank, N.A. (plaintiff or "Citibank") which seeks an order appointing a Referee to ascertain and compute the amount due to plaintiff for principal, interest and other disbursements advanced as provided for in a purported mortgage

note ("Note") and Mortgage upon which this action was brought and report whether the mortgaged premises can be sold in one parcel. For at least, but not limited to the following reasons, the instant application must be denied at this time, without prejudice to renew.

The Mortgage allegedly entered into by Lin and Chachami was given to plaintiff on property known as and located at 149 West 53rd Street, 17G in Manhattan (the "Property"). Plaintiff has failed to comply with RPAPL 1303 in that the affidavits of service for the Summons, Verified Complaint and Notice of Pendency on Chachami do not indicate that he was served with the RPAPL 1303 Notice as required in a foreclosure action.

A mortgagee's *prima facie* foreclosure case is made out by presentation of the note and mortgage and unasailable proof of nonpayment. Chemical Bank v. Broadway 55-56th St. Assocs., 220 A.D.2d 308 (1st Dept. 1995); Naismith v. Scoville, 169 A.D.2d 898 (3rd Dept. 1991). The actual Note has not been provided to the court because, according to plaintiff, it is unable to locate the Note.

Where a party is unable to provide an instrument upon which they seek recovery, that party must submit due proof of: (1) ownership of the instrument; (2) the facts which prevent production of the instrument; and (3) the terms of the instrument. UCC 3-804. Marrazzo v. Piccolo, 163 A.D.2d 369 (2nd Dept. 1990).

Plaintiff has provided the affidavit of Cindy Constantino ("Constantino"), an officer of plaintiff. Constantino contends that Lin executed the Note on March 15, 2006. As to the circumstances upon which the Note was lost, Constantino merely states that "[p]laintiff and its servicing agent is now unable to locate the aforementioned Second

Note." For its terms, Constantino states that Lin agreed to pay plaintiff or its transferees \$119,000, "plus increases in principal, if any, with interest thereon, installments of principal and interest to be paid monthly, in substantially equal payments on the same date of each month until maturity, *all as provided in the Note.*"

Constantino's affidavit relies only "upon personal knowledge, based on books and records of Citibank." She clearly does not have personal knowledge of the transaction and does not indicate what books or records she relies on to support of her conclusion that defendant Lin executed the Note. Further, plaintiff has not offered any facts surrounding the circumstances upon which it claims the Note was lost. Accordingly, plaintiff has failed to establish its *prima facie* case for entitlement to foreclosure.

There are other discrepancies and deficiencies in the instant application. Plaintiff contends that the Note is a first Note and the Mortgage is a first Mortgage. Constantino contradicts plaintiff by referring to the Note as the "Second Note" and the Mortgage as the "Second Mortgage" in her affidavit. Plaintiff must unequivocally establish the correct status of the Note and Mortgage in order to foreclose.

Plaintiff also contends that \$119,000, plus interest thereon, is currently due and owing under the Note. However, the mortgage refers to a Home Equity Credit Line as the credit secured by the Property. While the maximum amount that may be loaned under the Mortgage to Lin and Chachami is \$119,000, it is not necessarily the amount plaintiff delivered under the purported Note. It is also unclear whether Lin made any payments under such a Note. Plaintiff has not provided a statement of account showing what amount, if any, was delivered to Lin and Chachami and whether Lin

made any payments thereon. Accordingly, plaintiff has failed to provide proof of non-payment, or the amount of any debt currently due and owing.

Plaintiff also states that it "elected to exercise its option to demand immediate payment in full of the amount outstanding under the Note and Mortgage and has notified the Defendants of its decision to demand immediate payment." Such demand for immediate payment would suggest that a writing was delivered to plaintiff, although such a writing has not been provided to the court. Plaintiff must indicate how the demand for payment was made and provide proof of such demand.


Accordingly, plaintiff's motion is denied, without prejudice to renew within ninety days, upon a proper showing that the following defects have been remedied. Failure to renew within the time herein provided shall be deemed an abandonment of this action and the action shall be dismissed, accordingly.

Any requested relief not otherwise expressly granted herein is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
May 24, 2007

SO ORDERED:



J.G. J.S.C.

FILED
JUN 04 2007
NEW YORK
COUNTY CLERK'S OFFICE